

Chapter 8: Domestic violence and sexual assault

Victims of domestic violence may have also experienced sexual assault. This chapter helps you to assist and advise your clients who have experienced sexual assault.

Types of offences

The *Crimes Act 1900* (NSW) (Crimes Act) lists a range of sexual offences, including but not limited to:

- ▶ sexual assault;
- ▶ aggravated sexual assault;
- ▶ sexual assault by forced self-manipulation.

Police may charge a person with a sexual assault offence and apply for an AVO for the protection of the victim.

Sexual assault

Section 61I of the Crimes Act states that sexual assault occurs when a person has sexual intercourse with another person without that person's consent, knowing that the other person is not consenting. The maximum penalty for this offence is 14 years' imprisonment.

Section 61H of the Crimes Act defines sexual intercourse as:

- ▶ penetration of a person's genitalia (including surgically constructed genitalia) or anus by any part of the body of another person, or by an object manipulated by another person;
- ▶ placing the penis into the mouth of another person; or
- ▶ cunnilingus.

Consent means the 'person freely and voluntarily agrees to the sexual intercourse', according to section 61HA(2). A sexual offence is committed if:

1. a person knows that the other person is not consenting;
2. is reckless as to whether the other person is consenting; or

3. has no reasonable grounds for believing that the other person consents to the sexual intercourse.

In determining whether the defendant committed an offence, the court is directed by section 61HA(3) to look at the circumstances of the case including what steps the defendant took to find out whether the other person was consenting.

According to section 61HA the grounds under which a person is taken to have not consented include:

- ▶ that they did not have the capacity to consent, including because of age or cognitive incapacity; or
- ▶ that they did not have the opportunity to consent because they were unconscious or asleep; or
- ▶ that they or another person were subject to threats of force or terror; or
- ▶ that consent was obtained because the person was unlawfully detained; or
- ▶ that consent was obtained through mistake as to identity, mistake as to marriage or mistake as to purpose (such as the purpose of medical examination).

The grounds on which it may be established that a person does not consent to sexual intercourse include:

- ▶ if the person has sexual intercourse while substantially intoxicated by alcohol or other drugs; or
- ▶ because of intimidatory or coercive conduct, or another threat that does not involve a threat of force, or because of an abuse of a position of authority or trust.

Section 61HA does not limit the grounds on which it may be established that a person does not consent to sexual intercourse.

Consent cannot be inferred from the absence of physical resistance (s 61HA(7)).

Being married to the victim is not a defence to sexual assault (s 61T).

Consent to sexual intercourse can be given and then withdrawn. If sexual intercourse is continued after permission has been withdrawn, the offence of sexual assault is committed.

Aggravated sexual assault

Section 61J states that aggravated sexual assault occurs when a person has sexual intercourse with another person in 'aggravating circumstances' and without the other person's consent. The maximum penalty is 20 years' imprisonment.

Circumstances of aggravation exist where:

- a) the offender, at the time of, or immediately before or after the offence, intentionally or recklessly inflicts actual bodily harm on the victim or someone else present;
- b) the offender, at the time of, or immediately before or after the offence, threatens to inflict actual bodily harm on the victim or another person who is present by means of an offensive instrument;
- c) the offender is in the company of another or others;
- d) the offender breaks into any house or building with the intent of committing the offence;
- e) the offender deprives the victim of his or her liberty before or after committing the offence;
- f) the victim is under 16;
- g) the victim is under the authority of the offender; or
- h) the victim has a serious physical disability or cognitive impairment.

Sexual assault by forced self-manipulation

Section 80A states this offence occurs when someone forces another person (by threats) to engage in self-manipulation, that is the penetration of a vagina or anus by an object manipulated by that person. The maximum penalty is 14 years' imprisonment or 20 years' imprisonment in circumstances of aggravation, which are the same as above.

Reporting sexual assault

There is no limitation period for reporting a sexual assault. Victims of sexual assault may find it very difficult to report the sexual assault to the police. You could refer them to one of the services listed in **Chapter 14: Referrals and Contacts** for support reporting.

A victim of sexual assault will be referred to as the 'complainant' by police and in any subsequent criminal proceedings.

Medical and forensic examinations

Whether the victim wishes to make a formal complaint to police or not, they will be offered a general medical examination and a forensic examination at a sexual assault service. A medical examination is carried out to make sure that any physical injuries are treated and that other medical concerns arising from the assault, such as sexually transmitted infections or the possibility of pregnancy, can be addressed.

The standardised Sexual Assault Investigation Kit (SAIK) is used for the forensic examination. The examination involves taking a detailed history and laboratory specimens, including anal, oral, vaginal or penile swabs, sperm samples from the person's body or clothes, and a blood sample from the victim (where appropriate). The critical period in which to collect forensic evidence is up to 72 hours after the assault, and anyone who presents to a sexual assault service in this period is usually seen immediately, although there may be physical evidence up to seven days later. A forensic examination immediately after a sexual assault may provide important corroborative evidence for any subsequent trial.

If the person is unsure about reporting the assault to police, the SAIK specimens are generally stored for three months in case they change their mind. If the person has made a report to police, police will request the SAIK examination as a part of their investigation.

Making a statement

A person who decides to report a sexual assault to police is asked to give a full and detailed statement. This statement forms the basis of the prosecution, and is relied on to settle the charges.

Your client should take care to ensure that the statement is comprehensive and accurate and should check it carefully before signing it. If an error or omission is discovered later on, the police should be contacted as soon as possible so that the statement can be rectified.

Withdrawing a complaint

It is not uncommon for someone who has made a statement to police to decide, at any time up to the trial, that they do not wish to continue. This may occur for a variety of reasons, including fear of the legal process, threats by the accused, family pressures, shame and exhaustion.

If the complainant indicates that no sexual assault in fact took place and retracts the allegations, the investigation or prosecution may be terminated. The complainant may also be charged with a range of criminal offences, including making a false accusation under section 314 of the Crimes Act. While the decision is ultimately up to the police and the Director of Public Prosecutions (DPP), the views of the complainant are considered in making the decision in accordance with Guideline 19 of the DPP *Prosecution Guidelines*. See also page 32 in **Chapter 3** for further information about the offences of public mischief and perjury.

Sexual Assault Reporting Option (SARO)

For victims who are reluctant to formally report to police, an option is to complete a SARO questionnaire developed by police. Information is confidential and is entered into a secure and restricted database with police. The questions can be answered anonymously or personal details can be provided.

Completing the questionnaire will not result in a police investigation. It is not taken as a formal complaint for investigation and prosecution purposes. The information is used by the police to gather information on sexual offences and offending. A formal complaint can be made at any time if the victim changes their mind about making a formal report.

If a victim completing the questionnaire has had a forensic examination, they can consent to the release of the SAIK and analysis of the samples, which may help the police to identify an offender.

Prosecution

Witness Assistance Service (WAS)

The DPP has a Witness Assistance Service (WAS) that is staffed by people who are experienced in assisting victims of crime, including dedicated Indigenous officers. The WAS is available to assist complainants and other witnesses with:

- ▶ information about the prosecution process;
- ▶ court preparation;
- ▶ referral to appropriate support and counselling services; and
- ▶ information about the progress of their matter and the court process in general.

There are WAS officers at all offices of the DPP.

Cross-examination in committal hearings

Section 93 of the *Criminal Procedure Act 1986* (NSW) (CPA) provides that Magistrates can direct the attendance of a sexual assault complainant to give oral evidence only if the defendant has shown 'special reasons' why, in the interests of justice, the complainant should do so. The magistrate will consider submissions from both the defence and the prosecution before making a decision as to whether a complainant will be called to give evidence at committal. Some special reasons for which magistrates have allowed cross-examination of complainants are:

- ▶ issues with identification of the accused person;
- ▶ inconsistency about details of the offence on the part of the complainant; and
- ▶ a real possibility that, if the complainant were cross-examined, the accused person would not be committed for trial.

Once a complainant has been directed to attend to give oral evidence, cross-examination can also be limited to those issues that formed the basis of the application.

Sexual Assault Communications Privilege (SACP)

Sexual Assault Communications Privilege (SACP) is a statutory right under Part 5, Division 2 of the CPA that recognises there is a public interest in preserving the confidentiality of counselling records and the integrity of the counselling relationship; protecting sexual assault victims from further harm that may be caused if their records are revealed and used by the defence; and promoting the reporting of sexual assault.

Practitioner tip

SACP does not apply in all areas of law.

The privilege applies in all criminal and AVO cases in NSW and in very limited circumstances, to civil cases such as personal injury or sexual harassment cases, but only where SACP has been upheld in a criminal proceeding and the civil case is about the same or similar acts. SACP does not apply in family law and it generally does not apply in child protection cases.

SACP is activated when a party to a criminal case (defence, prosecution or police) wants to access or use written or oral communications that have been

made in confidential, therapeutic settings (referred to as 'protected confidences'). For example, the defence might seek to access the victim's mental health records, or the prosecution seeks to rely on evidence that the victim told their GP about a sexual assault immediately after it happened, many years before it was reported to the police.

Protected confidence

Section 296(1) of the CPA defines a 'protected confidence' as 'a counselling communication that is made by, or about a victim or alleged victim of a sexual assault offence'. The privilege does not just apply to counselling records of the complainant in relation to the sexual assault, but to any counselling to a client that has been sexually assaulted, or counselling that may have occurred prior to the sexual assault.

Practitioner tip

The privilege relates to records even if they were made before the sexual assault and to records that do not refer to the sexual assault or are not, or do not appear to be, directly related to the assault.

Counselling communication

Section 296(5) of the CPA defines a person who 'counsels' as someone who has 'some skill, gained through training, study or experience, in treating a person who has suffered harm'. They may be either paid or unpaid for that role.

The leave test

If a party seeks to subpoena a protected confidence they must be granted the court's leave to do so. However, it is up to the person seeking to issue the subpoena (who has not seen the requested documents) to identify whether or not the requested documents will disclose protected confidences. Section 299D(1) of the CPA sets out the tests for the granting of leave to produce or adduce a protected confidence:

- ▶ the document or evidence will have substantial probative value; and
- ▶ other documents or evidence concerning the matters are not available; and
- ▶ the public interest in preserving the confidentiality of protected confidences and protecting the victim from harm is substantially outweighed by the public interest in admitting

into evidence information or the contents of a document of substantial probative value.

In deciding the public interest test, the court must take into account:

- ▶ the need to encourage victims of sexual offences to seek counselling;
- ▶ that the effectiveness of counselling is likely to be dependent on protecting the confidentiality of the counselling relationship;
- ▶ the public interest in ensuring that victims of sexual offences receive effective counselling;
- ▶ that the disclosure of the protected confidence is likely to damage or undermine the relationship between the counsellor and the counselled person;
- ▶ whether disclosure of the protected confidence is sought on the basis of a discriminatory belief or bias; and
- ▶ that the adducing of the evidence is likely to infringe a reasonable expectation of privacy (s 299D(2)).

Claiming privilege / objecting to the issue of a subpoena

A victim of sexual assault who wants to claim the privilege can obtain advice and representation from the SACP Service at Legal Aid NSW. At the time of writing, no means or merits test is applied.

The service also provides free advice and information to workers and services in the health and welfare sector who have received a subpoena for client records.

Measures to minimise harm

If the court makes an order to produce a protected confidence, section 302 of the CPA allows the court to make orders to minimise harm that may be caused by disclosure of a counselling communication or witness identity information at the production stage. The following ancillary orders may be made by the court:

- ▶ delete any information in the notes that would disclose the address or telephone number of the victim or counsellor;
- ▶ the parties are only allowed to read the notes instead of being provided with copies;
- ▶ if the other parties are allowed a copy, then only one copy of the notes be provided;

- ▶ only those sections of the notes the court considers to be relevant are to be made available;
- ▶ only the defence lawyer and not the defendant is to handle the documents;
- ▶ the contents of the documents are not to be revealed to the defendant except to obtain specific instructions;
- ▶ all copies of notes are to be returned within 7 days of the completion of the trial;
- ▶ if oral evidence is to be given by a counsellor in court, all or any of the evidence is heard in camera (in a closed court); and
- ▶ the suppression of publication of any of the information in the notes if this is necessary to protect the safety of either the complainant or the counsellor.

If records are not covered by the privilege but may still be considered 'sensitive' in nature the court may also make orders like those listed above for the protection of documents.

Practitioner tip

Check that the subpoena has been validly issued. If it is invalid, an objection can be filed.

More information about SACP, including the Subpoena Survival Guide, can be found on the Legal Aid website.²⁴

Consent to release information

A victim of sexual assault can consent to the release of protected confidences ('waive privilege') during a court case. The consent must be in writing, make specific reference to the information being released and state that the victim understands their SACP rights.

Measures to assist complainants giving evidence at trial

When a complainant gives evidence, the proceedings are to be held in camera (s 291 CPA). A complainant is also entitled to give evidence from a private room using closed circuit television facilities if they choose to (s 291(2) CPA).

Section 294B of the CPA allows alternative arrangements to be made for victims of prescribed sexual offences to give evidence. If the defendant has been charged with committing a prescribed sexual of-

fence against the protected person, section 294B(3) provides for the protected person to elect:

(a) to give that evidence from a place other than the courtroom by means of closed-circuit television facilities or other technology that enables communication between that place and the courtroom, or

(b) to give that evidence by use of alternative arrangements made to restrict contact (including visual contact) between the complainant and the accused person or any other person or persons in the courtroom, including the following:

(i) use of screens,

(ii) planned seating arrangements for people who have an interest in the proceedings (including the level at which they are seated and the people in the complainant's line of vision).

Section 294C CPA allows the complainant to request to have a support person present and near them while giving their evidence, provided that person is not a witness in the case.

Section 294A CPA prohibits the direct examining or cross examining of the complainant by the accused person (charged with a prescribed sexual offence) where the accused is not represented by a legal practitioner.

24 www.legalaid.nsw.gov.au/publications/factsheets-and-resources/subpoena-survival-guide/sexual-assault-communications-privilege-sacp