



NEW JERSEY LAW REVISION COMMISSION

Revised Tentative Report

Relating to

Title 2C—Sexual Offenses

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S.* 1:12A-8.

This Tentative Report is distributed to advise interested persons of the Commission's tentative recommendations and the opportunity to submit comments. Comments should be submitted no later than **December 16, 2013**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this tentative report or direct any related inquiries, to:

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Title 2C – Sexual Offenses

I. Introduction

The Commission has approved a project to revise the provisions of Title 2C that pertain to sexual offenses, *N.J.S.* § 2C:14-1 – 2C:14-12, in response to case law. This memorandum suggests revisions to two different areas of the law: First, it suggests revisions to reflect the concept of force as established by *State in Interest of M.T.S.*, 129 N.J. 422 (1992) and *State v. Triestman*, 416 N.J. Super. 195 (App. Div. 2010), as well as some additional changes that reflect the Court’s recent decision in *State v. Rangel*, 213 N.J. 500 (2013). Second, the memorandum suggests revisions to the statute based on the Court’s decision in *State v. Olivio*, 123 N.J. 550 (1991), relating to sexual offenses against those with intellectual and developmental disabilities. Staff has therefore incorporated changes to the statutory language addressing issues arising from each of these cases.

Beginning with the *M.T.S.* case in 1992, courts in New Jersey have grappled with the conflict between long-standing statutory language governing crimes of rape and sexual assault and the developments in societal understanding of the nature and harms involved in these crimes. Historically, rape was defined as “unlawful carnal knowledge of a woman by force and against her will.” Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 Berkeley Women's L.J. 72, 74 (2001).¹ Prosecutors were required to prove that “the victim ‘resisted to the utmost.’” *Id.* at 74. The crime of rape was historically therefore made up of two key elements – the lack of the woman’s consent, as indicated by her resistance, and force sufficient to overpower her. See, e.g., George E. Burns, Jr., *Rape, Consent & Force: Legal Mystery—Modern Problem*, 34 Apr. Md. B.J. 44 (2001). Moreover, force and resistance were typically the main focus in rape prosecutions, as women’s statements regarding their own consent were not typically believed and women who made allegations of rape were typically viewed with suspicion and distrust. Richard Klein, *An Analysis of Thirty-five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 Akron L. Rev. 981, 982-84 (2008). Further, the victim’s sexual and moral history were considered relevant and admissible to determine her credibility, so juries were confronted with all evidence of a woman’s past sexual conduct as they were determining whether in this particular case she had given consent. See *id.* at 984-85. Given that most juries were not willing to believe that a woman who had consented in the past would fail to give consent in any other situation, rape prosecutions hinged primarily on whether the woman had struggled sufficiently to show that she had not consented to intercourse. *Id.* at 987. Societal mores, and most courts, expected women to resist to the fullest extent of her capabilities. *Ibid.* Essentially, rape laws put the victim on trial. Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 Geo. Wash. L. Rev. 51, 54 (2002). In the absence of evidence of a struggle, including physical injury to the woman, rape prosecutions were rarely successful. Klein, *supra*, at 982.

Rape laws began to be reformed in the 1970s, as part of a wave of criminal law reform and as a result of successful lobbying on the part of sexual violence and women’s rights groups.

¹ Notably, there was no such crime as rape within marriage because consent to marriage was viewed as consent to all sexual intercourse from that point on. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Cal. L. Rev. 1373, 1373 (2000).

Futter & Walter R. Mebane, Jr., *supra*, at 72. Rape law reform took on many aspects of the criminal law of rape, including the violent nature of the crime, the relevant evidence that could be presented at trial about both the victim and the accused, the age of consent, and the appropriate penalties. *Ibid.* Most relevant to this Project, reformers took on both the issue of consent and the issue of resistance. *Id.* at 74. The overarching goal was to eliminate the presumption that a victim must forcefully resist an attack in order to show lack of consent and to focus instead on the assaultive nature of the crime. *Ibid.* Reformers sought to ensure that rape was viewed as a violent crime, like other violent crimes, with the focus on the perpetrator's actions rather than the victim's. Ronald J. Berger, Patricia Searles, W. Lawrence Neuman, *The Dimensions of Rape Reform Legislation*, 22 *Law & Soc'y Rev.* 329, 331 (1988).² Over the last thirty years, every state has considered some reforms to the state law on rape or sexual assault and there continue to be developments as societal understanding and expectations relating to gender, violence and sexuality have shifted. Futter & Walter R. Mebane, Jr., *supra*, at 79.

II. New Jersey Statutory Background

N.J.S. §§ 2C:14-1 to -11 addresses criminal sexual offenses. N.J.S. § 2C:14-2, enacted in 1978, governs the crimes of sexual assault and aggravated sexual assault, which are defined as “an act of sexual penetration” under circumstances in which the victim either does not consent or the victim is statutorily incapable of consent. The crime of sexual assault against a person capable of consent has two elements: both that the victim did not consent and that there was “physical force or coercion” involved in the crime. *See* N.J.S. § 2C:14-2(a)(6) & (c)(1). The 1978 amendment to the rape law resulted from a state-based law reform process that included input from many law reform bodies as well as a number of feminist groups working on the issue. *See State in the Interest of M.T.S.*, 129 N.J. 422, 440 (1992). The general intent of the drafters was to “remove all features found to be contrary to the interest of rape victims” and to focus instead on the “forceful or assaultive conduct of the defendant.” *Ibid.* Apparently as a result, the legislative language incorporates the terms “physical force” and “coercion” but does not define “force.” *Ibid.*

Although not the primary focus of the law reform efforts aimed at rape laws in the 1970s and 80s, more recent attempts to address sexual assault laws have tried to take into account the emerging social awareness of discrimination against individuals with intellectual and physical disabilities. The original 1978 statute made it a second degree offense to “commit the act of sexual penetration with another person” if the victim “is one whom the actor knew or should have known was physically helpless, mentally defective or mentally incapacitated.” Law of 1978, ch. 95, § 2C:14-2, eff. Sept. 1, 1979 (amended seven times between 1979 and 2011). “Mentally defective” was originally defined as “that condition in which a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of understanding the nature of his conduct, including, but not limited to, being incapable of

² Other goals of reform included broadening rape to include oral and anal penetration and making the crime gender neutral. Ronald J. Berger, Patricia Searles, W. Lawrence Neuman, *The Dimensions of Rape Reform Legislation*, 22 *Law & Soc'y Rev.* 329, 331-32 (1988). Evidentiary reform included removing resistance requirements and creating rape shield laws to limit evidence of victims' sexual history. *Id.* at 332. Statutory reform removed mistake of age defenses and created graded offenses for rape of particular ages. *Id.* Penalty reform created minimum sentences and graded penalties based on the seriousness of the crime. *Id.*

providing consent.” *See Olivio*, 123 N.J. at 556. In 1997, the statute was amended and this offense was upgraded to a first degree offense.

Over the next dozen years, social standards around intellectual disabilities changed and law reforms have been enacted to address the discrimination against individuals with intellectual and developmental disabilities in various parts of the New Jersey statutes.³ Among other amendments, in 2011, the Legislature enacted a law intended to eliminate the terms “mentally defective” from the statutes. *See* Act of March 17, 2012, ch. 232, §4, 2010 N.J. Leg. Session, P.L. 2011. As a result, the current law now reads: An actor

commits an act of sexual penetration with another person [if] . . .
The victim is one whom the actor knew or should have known was physically helpless, mentally incapacitated, or had a mental disease or defect which rendered the victim temporarily or permanently incapable of understanding the nature of his conduct, including, but not limited to, being incapable of providing consent.

[N.J.S. 2C:14-2(a)(7).]

A committee statement accompanying the original version of the 2011 bill noted that the Assembly “committee’s understanding [was] that the bill would not make any substantive change to the legal meaning of the affected statutes and should not be deemed to change or overrule any precedential judicial interpretation as to that meaning.” N.J. Assembly, Judiciary Committee, Statement Regarding Changes to AB 4403, Dec. 12, 2011, 2010 Legislative Session, available at http://www.njleg.state.nj.us/2010/Bills/A4500/4403_S1.PDF. As is described in detail below, the meaning of the terms “mentally defective,” “mental disease” and “mental defect” are governed by the New Jersey Supreme Court’s decision in *State v. Olivio*, 123 N.J. 550 (1991).

III. New Jersey Interpretive Case Law

A. The Issue of “Force” in the Crime of Sexual Assault

In 1992, the New Jersey Supreme Court interpreted the requirement that the crime of sexual assault include “physical force or coercion.” *See M.T.S.*, 129 N.J. 422. The key issue confronting the Court in *M.T.S.* was whether by including the words “physical force” in the statute, the Legislature had intended to require that force “in addition to that entailed in an act of involuntary or unwanted sexual penetration” be proven in order to convict a defendant for the crime of sexual assault. *Id.* at 443. The Court examined the history of the law reform efforts related to sexual assault and found that although the language had been drafted in an effort to

³ In 2008, New Jersey adopted an amendment to its Constitution removing the words “idiot and insane” from the voting rights provision, changing the standards so that only those who were adjudicated incompetent could be prevented from voting. Two separate statutes have since been enacted to remove additional pejorative terms relating to mental health from the New Jersey statutes. *See* Law of 2010, ch. 50, effective August 16, 2010 (amending multiple sections of N.J. statutes to take out pejorative terms and replace them with “person first” language); Law of 2013, ch. 103, effective August 7, 2013 (amending other sections of N.J. statutes to take out additional pejorative terms and replace them with “person first” language).

eliminate the reliance on the idea of “resistance,” in practice the need to prove the element of “physical force” implicitly reintroduced the need to show resistance in order to be able to prove that forced had been used. *Id.* at 443. The Court found that in order to prove the element of force, prosecutors relied on the amount of resistance offered, so the victim needed to resist enough to show that the perpetrator used “more force than was necessary for penetration.” *Id.* at 435. This often required visible signs of resistance like torn clothing. *Ibid.*

However, the Court also found that by eliminating the idea of “resistance” from the definition of sexual assault and by ensuring that the victim would not be “put on trial” in sexual assault cases, the Legislature had the clear “purpose [of] eliminate[ing] any consideration of whether the victim resisted or expressed non-consent.” *Id.* at 443. Moreover, the Court noted that the word “force” was ambiguous in this context—the legislature had not defined it and had relied on concepts like the law of criminal battery, which criminalizes any “unauthorized touching” without reference to the level of force used or resistance displayed. *Id.* at 442. The Court ultimately concluded that it would be “fundamentally inconsistent” with that purpose to interpret the statute to require additional physical force beyond that “entailed in an act of involuntary or unwanted sexual penetration.” *Id.* Thus, the Court redefined rape as a violation of autonomy, privacy and bodily control. *Id.* at 446.

In order to read the statutory language as consistent with the statutory intent, the Court held that the only requirement for conviction under the sexual assault statute is proof “beyond a reasonable doubt that there was sexual penetration and that it was accomplished without the affirmative and freely-given permission of the alleged victim.” *Id.* at 449. “[J]ust as any unauthorized touching is a crime under traditional laws of assault and battery, . . . so is any unauthorized sexual penetration a crime under the reformed law of sexual assault.” *Id.* at 443. Essentially, the Court read the “physical force” requirement simply to “define and explain the acts that are offensive, unauthorized and unlawful,” namely the penetration itself, but not to add an additional requirement of harm beyond the penetration. *Id.* at 445. As a result, although the “force” requirement has remained in the statute, physical force in addition to the act of penetration is not necessary for a conviction under § 2C:14-2, if penetration occurred without the permission of the victim.⁴

⁴ The Supreme Court also addressed the phrase “physical force” in the sexual assault context in a case related to the No Early Release Act (NERA), 2C:43-7.2, a statute that exposes defendants to longer sentences for some serious crimes. *State v. Thomas*, 166 N.J. 560 (2001). In *Thomas*, in which the defendant was convicted for second-degree sexual assault based on sexual contact with a child under the age of thirteen, the Court was asked to determine whether the state was required to prove an additional level of “physical force” in order to expose the defendant to a more severe NERA sentence. 166 N.J. at 567. The Court ultimately concluded that under the then-existing language in NERA, when “physical force” had not been an element of the underlying offense, as in the case of a conviction for sexual contact with a child under thirteen, the prosecutor must prove “physical force” as an added element in order subject the defendant to the more severe sentence associated with NERA. *Id.* at 563-64. The Court’s holding did not disturb its earlier decision in *M.T.S.* as to the meaning of the words “physical force” or regarding the determination of consent rather than force as the key element in the crime of sexual assault. *See id.* at 571. In response to this case and several others, the legislature then amended NERA to clarify that sexual assault based on non-consent is clearly with the set of offenses that qualifies for more severe sentencing under the law, regardless of whether “physical force” was involved. *See* Law of 2001, ch. 129, § 2C:43-7.2, eff. June 29, 2001 (amending

After *M.T.S.*, prosecutors who bring and courts that consider sexual assault cases have had to use both the statute and the court decision to determine the elements necessary for conviction. Under *M.T.S.*, “any act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault.” *Id.* at 444. The Court determined that a reasonable person standard to determine what constitutes affirmative and freely-given consent should apply, holding that “[p]ermission may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances. *Id.* at 444-45. Such permission “may be physical actions rather than words.” *Id.* at 445. The fact finder must decide “whether the defendant’s belief that the alleged victim had freely given affirmative permission was reasonable.” *Id.* at 448. The victim’s state of mind or reasonableness of her actions is not relevant, and the victim may only be questioned about the circumstances of the act to determine whether the defendant was reasonable in believing the victim consented. *Ibid.*

In 2010, the Appellate Division extended the *M.T.S.* ruling to the crime of sexual contact, *N.J.S.* 2C:14-3(b). Sexual contact is defined as “an intentional touching by the victim or actor, either directly or through clothing, of the victim’s or actor’s intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present.” 2C:14-1. The elements of the crime of sexual contact are linked to the elements of the crime of sexual assault, and thus sexual contact includes an element of “physical force” in situations where the victim has capacity to give consent. *State v. Triestman*, 416 *N.J. Super.* 195 (App. Div. 2010); *see* *N.J.S.* 2C:14-3(b) (“An actor is guilty of criminal sexual contact if he commits an act of sexual contact with the victim under any of the circumstances set forth in section 2C:14-2c. (1) through (4).”). Because the two statutes are so linked, the Court held that, under the logic of *M.T.S.*, unauthorized sexual contact without additional force is sufficient to uphold a conviction of criminal sexual contact. *Id.* at 220.

In *Triestman*, the defendant, a manager at a furniture store in Newark, was accused of unauthorized sexual contact with an employee. *Triestman*, *supra*, 416 *N.J. Super.* at 198. The defendant asked the victim to prepare a bed so he could take pictures of it and sell it online. *Ibid.* As the victim changed the bedding, the defendant told her it would look better with her naked, and moved closer, “plac[ing] his left hand on her shoulder⁵, put[ting] his right hand on her breast over her clothes, and tr[ying] to kiss her.” *Ibid.* The victim immediately left and contacted help. *Ibid.* As in *M.T.S.*, the Court was asked to determine whether the “physical force” element of the crime required force beyond that involved in the sexual contact itself.⁶

NERA). Neither the Court’s holding in *Thomas* nor the legislature’s amendment to the NERA statute conflict with the Court’s holding in *M.T.S.*, nor are they contrary to the recommendations in this report.

⁵ The court, in dicta, mentioned that the force of the actor placing his hand on the victim’s shoulder could have amounted to a level of physical force beyond that of the sexual contact itself; nonetheless, the court held that sexual contact without additional force could satisfy the elements of criminal sexual contact. *See State v. Triestman*, *supra*, 416 *N.J. Super.* at 221.

⁶ Neither court addressed the element of “coercion” in the statutes, as neither case involved coercion. *See id.* at 210; *see generally M.T.S.*, 129 *N.J.* at 445-50.

The *Triestman* court reviewed the legislative history of the sexual contact crime and found that “the only distinguishing feature between criminal sexual assault and criminal sexual contact is the presence or absence of penetration.” *Id.* at 213. The court also noted that in *M.T.S.*, the Supreme Court had already found that “[t]he characteristics that make a sexual contact unlawful are the same as those that make a sexual penetration unlawful. . . . That the Legislature would have wanted to decriminalize unauthorized sexual intrusions on the bodily integrity of the victim by requiring a showing of force in addition to that entailed in the sexual contact itself is hardly possible.” *Id.* at 217 (quoting *M.T.S.*, 129 A.2d at 444). The court concluded that the *M.T.S.* decision governed both sexual assault and sexual contact crimes and that there was no need to provide force beyond that which was necessary to accomplish the sexual contact. *Id.* at 219. The *Triestman* court also reiterated the standard established in the *M.T.S.* decision—whether “a reasonable person would have believed the act unauthorized and offensive to the victim.” *Id.* The court distinguished *State v. Thomas*, noting that the decision related only sentence enhancements and to situations where the defendant was charged with an offense that did not include a NERA element. *Id.* at 220.

B. Incapacity in Sexual Assault Cases

New Jersey’s sexual offenses statutes have always included sections relating to sexual assaults against persons with intellectual or developmental disabilities, although the language therein has changed slightly over time to remove pejorative terms. *State v. Olivio* was the first significant case to interpret these terms and the Court’s interpretation of the statute guides its application today. In *Olivio*, the defendant was charged with sexual assault of a mentally defective woman after having sexual intercourse with a sixteen year old woman who was considered “educable mentally retarded.” 123 N.J. at 553. The defendant admitted that sexual intercourse had occurred, but argued that the young woman was not mentally defective. *Ibid.* The Court was thus asked to determine “when a person who engages in such sexual conduct is mentally defective under the criminal code.” *Ibid.* The Court recognized that its conclusion would have “implications for both mentally-defective persons who are vulnerable and need the special protection of our laws from the sexual intrusions of others and persons whose mental deficiencies need not be an impediment to the enjoyment of a reasonably normal life, including consensual sexual relations.” *Ibid.* This critical balance led to the Court’s conclusion that “a person is mentally defective within the meaning of N.J.S. 2C:14-2c(2) if, at the time of the sexual activity, he or she is unable to comprehend the distinctly sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in such conduct with another.” *Ibid.* This conclusion has been the guiding standard for sexual assault cases relating to individuals with intellectual and developmental disabilities since that point.

C. The Object of the Crime in Sexual Assault Cases

In 2013, the New Jersey Supreme Court decided a case tangentially related to the issues set forth in this memo. In *State v. Rangel*, 213 N.J. 500 (2013), the Court was asked to interpret the following section of N.J.S. 2C:14-2(a)(3):

An actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person under any one of the

following circumstances [] . . . (3) The act is committed during the commission, or attempted commission, . . . of . . . aggravated assault on another[;] . . . (6) The actor uses physical force or coercion and severe personal injury is sustained by the victim[.]

[N.J.S. 2C:14-2(a)(3).]

In this case, the defendant was alleged to have physically and sexually assaulted the victim and the prosecutor had charged the defendant with aggravated sexual assault not because of the victim had sustained “severe personal injury” but on the basis that the defendant had committed “aggravated assault” against the victim in addition to the sexual assault. The Court was asked to determine whether the statute’s language “aggravated assault on another” intended to include the victim as a potential “another,” or whether that language was intended to include only situations where the defendant had assaulted a person in addition to the victim, such as a watching loved one, in the course of committing the sexual assault. *Rangel*, 213 N.J. at 503. The trial court had held that “on another” could include the victim and that the phrase was intended to act as an “‘enhancement feature’ that responded to the ‘additional threat of physical harm to the victim that’s over and above the act of penetration or the violent act.’” *Id.* However, the Appellate Division reversed the trial court’s decision, holding that “the aggravated assault must be on a third person, committed for the purpose of compelling the submission of the sexual assault victim.” *Id.* at 505. The Supreme Court agreed with the Appellate Division, determining that the key question was whether the word “another” was intended to refer to the victim or to someone other than the victim and concluding that the legislature must have intended it to refer to someone other than the victim. *Id.* at 506-16. The Court reached that conclusion for several reasons, including that since “aggravated sexual assault” covers situations where the victim has sustained “severe personal injury,” it seemed clear that “the ‘severe personal injury’ provision . . . is intended to punish the enhanced violence committed *against the victim*, whereas the ‘aggravated assault on another’ provision . . . is intended to punish the accompanying violence *against a third person*.” *Id.* at 512. The Court also noted the legislature generally used the word “victim” when referring to the victim and did not use the word “another” in any other context where it was clear that they were referring to the primary victim of the crime. *Ibid.* For example, the statute considers a sexual assault that is committed “during the commission . . . of robbery” to be aggravated sexual assault without the qualifier “of another,” and the Court noted that it was reasonable to assume that “if a sexual assault victim were also the target of a . . . robbery” the intent would have been to elevate that to a first-degree crime. *Id.* at 513. The Court held that “the most plausible explanation is that, having addressed an aggravated assault on the victim in” the words “severe personal injury,” “the Legislature intended to refer to a third party as “another” in (a)(3).” *Id.*

IV. Issue and Purpose of Project

As a result of several important developments in case law, most notably *M.T.S.* and its progeny and *Olivio*, New Jersey’s sexual offense statutes no longer reflect the current state of the law. Staff has drafted proposed changes to Title 2C:14 in an effort to conform the statutes to the current practice under governing case law. First, *N.J.S.* § 2C:14-2, sexual assault offenses, is modified by: 1) removing the ambiguous term “force” from the section; 2) codifying the *M.T.S.*

decision so that the central issue related to consent is whether “a reasonable person would not have believed the act of sexual penetration authorized by the victim”; 3) clarifying which types of sexual assault offenses are based on the lack of consent and which are offenses regardless of consent ; and 4) updating pronoun usage to render the statute gender neutral and reinforce its application to both males and females. In relation to sexual assault against persons with intellectual and developmental disabilities, *N.J.S.* § 2C:14-2(a)(7) is removed and a new § 2C:14-2(a)(3) provides a newly drafted offense that more closely tracks the standard dictated by the Court in *Olivio*.

In addition, *N.J.S.* § 2C:14-3, sexual contact offenses is modified to update the statutory references to § 2C:14-2, which has been modified to incorporate the changes dictated by *M.T.S.* and *Triestman*.

This report has been revised since its previous issuance and language new to the report is found in *italics*, both in the statutory text and the comments.

DRAFT

2C:14-2. Sexual assault

a. An actor is guilty of aggravated sexual assault if the actor commits an act of sexual penetration with *another person* ~~another person under any one of the following circumstances:~~

(1) ~~Another person~~ under any one of the following circumstances regardless of whether the victim consented to the act:

(A) ~~(1)~~ The victim is less than 13 years old;

(B) ~~(2)~~ The victim is at least 13 but less than 16 years old; and

(i) ~~(A)~~ The actor is related to the victim by blood or affinity to the third degree, or

(ii) ~~(B)~~ The actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional, or occupational status, or

(iii) ~~(C)~~ The actor is a resource family parent, a guardian, or stands in loco parentis within the household;

(2) ~~Another person~~, if a reasonable person would not have believed the act *freely and affirmatively permitted* ~~authorized~~ by the victim, under any one of the following circumstances:

(A) ~~(3)~~ The act is committed during the commission, or attempted commission, whether alone or with one or more other persons, of robbery, kidnapping, homicide, aggravated assault ~~on another~~ on or of a person other than the victim, burglary, arson or criminal escape;

- (B) ~~(4)~~ The actor is armed with a weapon or any object fashioned in such a manner as to lead the victim to reasonably believe it to be a weapon and threatens by word or gesture to use the weapon or object;
 - (C) ~~(5)~~ The actor is aided or abetted by one or more other persons ~~and the actor uses physical force or coercion;~~
 - (D) ~~(6)~~ The actor uses physical force or coercion and Severe personal injury is sustained by the victim;
- ~~(7) The victim is one whom the actor knew or should have known was physically helpless, mentally incapacitated, or had a mental disease or defect which rendered the victim temporarily or permanently incapable of understanding his nature of the conduct, including, but not limited to, being incapable of providing consent.~~

(3) A person if, at the time of the sexual penetration, the actor knew or should have known that the victim, either temporarily or permanently, was physically helpless or mentally incapacitated or had an intellectual or developmental disability that rendered the victim:

- (A) Incapable of understanding the right to refuse, or of exercising the right to refuse, to engage in the sexual conduct he act, including the ability to resist and exercise the right to refuse; or
- (B) Incapable of understanding the nature of the sexual conduct.; or
- (C) Incapable of the exercising the capacity to consent when the sexual conduct occurred.

This provision shall not be interpreted to deprive a person with an intellectual or developmental disability from engaging in consensual sexual activity.

Aggravated sexual assault is a crime of the first degree.

b. An actor is guilty of sexual assault if he

(1) the actor commits an act of ~~(1)~~ sexual contact with a victim who is less than 13 years old and the actor is at least four years older than the victim regardless of whether the victim consented to the act.

(2) e. An actor is guilty of sexual assault if he the actor commits an act of sexual penetration with another person under any one of the following circumstances regardless of whether the victim consented to the act:

~~(1) The actor uses physical force or coercion, but the victim does not sustain severe personal injury;~~

(A) ~~(2)~~ The victim is on probation or parole, or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional or occupational status;

(B) ~~(3)~~ The victim is at least 16 but less than 18 years old and:

i. ~~(a)~~ The actor is related to the victim by blood or affinity to the third degree; or

- ii. ~~(b)~~ The actor has supervisory or disciplinary power of any nature or in any capacity over the victim; or
 - iii. ~~(e)~~ The actor is a resource family parent, a guardian, or stands in loco parentis within the household;
- (C) ~~(4)~~ The victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim.

~~(3) (2) An actor is guilty of sexual assault if the actor commits an act of sexual penetration and if a reasonable person would not have believed the act freely and affirmatively permitted authorized by the victim. even if the victim does not sustain severe personal injury.~~

Sexual assault is a crime of the second degree.

COMMENT

This section has been revised in light of the Court’s interpretation of the elements of the crime of sexual assault in *State in Interest of M.T.S.*, 129 N.J. 422 (1992). The Court’s holdings have been incorporated into the section and the section has been reorganized to better reflect the distinction between sexual assault crimes that hinge on consent and those that hinge on the status of the victim to which consent is not a defense. When the act involves a statutorily-determined prohibited age or power gap between the two parties, such that the law has determined the victim is not capable of providing consent, or where the victim is incapable of providing consent due to temporary or permanent physical helplessness or mental incapacitation as previously defined in the statute, or intellectual or developmental disabilities, the issue of consent is irrelevant. However, for crimes in which consent rather than resistance is at issue, this section clarifies its focus. While careful not to change the intent of the 1978 Amendment, which focused on the assaultive nature of the crime, rather than the consent of the victim, this section removes the ambiguous term “force” from the statute. In its place, this section codifies the interpretation of the *M.T.S.* Court that “any act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault.” *M.T.S.*, *supra*, 129 N.J. at 444.

The concept of force, a requirement of the crimes of sexual assault and aggravated sexual assault under subsections b. e. and f., is derived from the following passage from the *M.T.S.* decision:

[J]ust as any unauthorized touching is a crime under traditional laws of assault and battery, so is any unauthorized sexual contact a crime under the reformed law of criminal sexual contact, and so is any unauthorized sexual penetration a crime under the reformed law of sexual assault. . . . The definition of “physical force” is satisfied under N.J.S. 2C:14-2c(1) if the defendant applies any amount of force against another person in the absence of what a reasonable person would believe to be affirmative and freely-given permission to the act of sexual penetration. Under the reformed statute, permission to engage in sexual penetration must be affirmative and it must be given freely, but that permission may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances. . . . Persons need not, of course, expressly announce their consent to engage in intercourse for there to be affirmative permission. Permission to engage in an act of sexual penetration can be and indeed often is indicated through physical actions rather than words. Permission is demonstrated when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act. . . . Hence, as a description of the method of achieving “sexual penetration,” the term “physical force” serves to define and explain the acts that are offensive, unauthorized, and unlawful.
[*Id.* at 443-45.]

Based on the *M.T.S.* Court’s interpretation of “force” and the Court’s conclusion about the legislative intent behind the statutory language, this section has been revised so that the crimes of sexual assault and aggravated assault now hinge on the issue of consent, with the relevant standard set forth as whether a reasonable person would have believed the act of sexual penetration was *freely and affirmatively permitted* by the victim. *This version of the*

report has incorporated the concept of “free and affirmative” permission rather than the term “authorize,” as this phrase appears to better reflect the Court’s holding in M.T.S., addresses both the ideas of consent and coercion that were present in the original statute, and hews more closely to existing legislative language. See N.J.S. 2C:14-7 (New Jersey’s Rape Shield law, regarding evidence that can be proffered by a defendant to show that he or she reasonably believed that the victim had given consent, states: “Evidence of the victim’s previous sexual conduct with the defendant shall be considered relevant if it is probative of whether a reasonable person, knowing what the defendant knew at the time of the alleged offense, would have believed that the alleged victim freely and affirmatively permitted the sexual behavior complained of.”).

The section was also restructured to incorporate the Court’s interpretation in *State v. Olivio*, 123 N.J. 550 (1991) of the mental capacity issues involved in what was previously termed “mentally defective” and was revised by the Legislature in 2011 to be referred to as “mental disease or defect.” In *Olivio*, the defendant admitted having intercourse with the victim, but denied that she was mentally disabled under the criminal statute. The Court elaborated on the Code’s definition of “mentally defective,” holding that a person is mentally defective “if, at the time of sexual activity, the mental defect rendered him or her unable to comprehend the distinctively sexual nature of the conduct, or incapable of understanding or exercising the right to refuse to engage in such conduct with another.” See *Olivio*, *supra*, 123 N.J. at 553. In 2011, when the Legislature eliminated the term “mentally defective” and replaced it with “mental disease or defect,” the Legislature also eliminated statutory definition of “mentally defective” but without including a new definition. This indicates that the Legislature intended to continue using the Court’s interpretation and standard set forth in *Olivio*. Over the last several years, New Jersey’s statutes have also been amended to incorporate “person first” language and to remove pejorative terms relating to mental health from the statutes. Although the amendments to the statutes have not touched the criminal code, this section now incorporates the terms “intellectual or developmental disability” in place of “mental disease or defect,” consistent with both the purpose of the “person first” amendments and with the holding in *Olivio*. *Note that the section has been revised since the earlier draft of April 2013 to re-incorporate several key parts of the existing statute, including that an actor commits a sexual assault when the actor commits sexual penetration with a victim who is physically helpless or mentally incapacitated as defined in N.J.S. 2C:14-1, and also that this applies whether the helplessness, incapacity or disability were permanent or temporary.*

The draft statutory language in section (a)(3) reflects the inclusion, and subsequent removal, of a single sentence originally included to clarify that the ability of persons with intellectual and developmental disabilities to engage in consensual sexual activity would not be limited by statutory language. Ultimately, the sentence proved to be a cause for concern among knowledgeable commenters who suggested that it might cause additional problems, confusion or prosecutorial difficulties. It was removed as a result. *In this revision, this sentence is still excluded. The standard created by the Court in State v. Olivio, and incorporated into this Project, already takes into account the need to balance the need for “special protections of our laws” from those who are intellectually or developmentally disabled with the right of those “persons with mental deficiencies [to] the enjoyment of a reasonably normal life, including consensual sexual relations.” State v. Olivio, 123 N.J. 550, 552 (1991). By adopting a standard that considers in each individual circumstance whether, at the time of the sexual activity, the victim was capable of understanding the nature of the sexual activity, understanding that he or she could refuse to consent and whether the victim had the ability to exercise that refusal, this statutory language should strike the same balance as the Court strove to create in Olivio. Properly applied, this standard should criminalize only situations wherein those with intellectual or developmental disabilities are unable to refuse, do not understand that they have the right to refuse, or do not understand the nature of the sexual contact, and should exclude any situation where such persons understand their behavior and are willingly engaging in sexual behavior. See State v. Scherzer et al., 301 N.J. Super. 363 (App. Div. 1997) (striking down defendants’ conviction for sexual assault under N.J.S.A 2C:14-2(a)(5)(a) because evidence had shown that teenager with intellectual disabilities was not coerced into sexual activity, nor was it done without her consent, but upholding defendants’ conviction for sexual assault because they “as reasonable young persons were shown under the circumstances presented to have known that [the victim] did not understand that she could say no to a request.”). This revision also incorporated the language “at the time of the sexual activity” to further ensure that the analysis is based solely on whether the person with the intellectual or developmental disability was capable at that very moment of understanding, refusing or consenting, and leaves open the potential that if the person was not capable in that moment, in another situation, the person could be capable of engaging in those assessments.*

Additionally, non-substantive changes were made to pronoun usage in an attempt to make the language gender neutral and reinforce this section’s application to both males and females.

2C:14-3. Criminal sexual contact

a. An actor is guilty of aggravated criminal sexual contact if ~~he~~ the actor commits an act of ~~sexual contact~~ unauthorized and offensive sexual contact touching with the ~~on~~ a victim under any of the ~~circumstances set forth in 2C:14-2a. (2) through (7)~~ circumstances set forth in 2C:14-2(a)(1)(B), (a)(2), and (a)(3);

~~(1) The victim is at least 13 but less than 16 years old and the actor is related to the victim by blood or affinity to the third degree; or the actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional, or occupational status; or the actor is a resource family parent, a guardian, or stands in loco parentis within the household;~~

~~(2) The act is committed during the commission, or attempted commission, whether alone or with one or more other persons, of robbery, kidnapping, homicide, aggravated assault on another, burglary, arson, or criminal escape;~~

~~(3) The actor is armed with a weapon or any object fashioned in such a manner as to lead the victim to reasonably believe it to be a weapon and threatens by word or gesture to use the weapon or object;~~

~~(4) The actor is aided or abetted by one or more other persons; or~~

~~(5) Severe personal injury is sustained by the victim.~~

Aggravated criminal sexual contact is a crime of the third degree.

b. An actor is guilty of criminal sexual contact if ~~he~~ the actor commits an act of ~~sexual contact~~ unauthorized and offensive sexual contact touching with the ~~on~~ a victim under any of the ~~circumstances set forth in 2C:14-2(b)(2) and (b)(3)~~ circumstances set forth in 2C:14-2e (1) through (4) following circumstances;

~~(1) The victim is on probation or parole, or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional, or occupational status;~~

~~(2) The victim is at least 16 but less than 18 years old and the actor is related to the victim by blood or affinity to the third degree; or the actor has supervisory or disciplinary power of any nature or in any capacity over the victim; or the actor is a resource family parent, a guardian, or stands in loco parentis within the household;~~

~~(3) The victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim; or~~

~~(4) If a reasonable person would not have believed the act was authorized by the victim even if the victim does not sustain severe personal injury.~~

Criminal sexual contact is a crime of the fourth degree.

COMMENT

This section incorporates by reference the Court's interpretation of the sexual assault statute in *M.T.S.* as extended to the sexual contact law by the Appellate Division in *State v. Triestman*, 416 N.J. Super. 195 (App. Div. 2010). In *Triestman*, the court concluded that the Supreme Court's reading of the terms "physical force" to essentially add no further requirement than the force necessary to accomplish the sexual penetration should equally

apply to crimes of sexual contact. *Id.* at 220. The Appellate Division relied on *M.T.S.*, holding that the Court’s decision dictated that “any unauthorized sexual contact is a crime under the law of criminal sexual contact,” and that no additional “‘physical force’ extrinsic from and additional to the sexual contact is required for sexual contact to be criminal.” *Triestman, supra*, 416 *N.J. Super.* at 220 (quoting *M.T.S., supra*, 129 *N.J.* at 443). This section of the statute already cross-referenced and paralleled the sexual assault statute, so it has merely been amended to ensure that the appropriate new subsections relating to sexual assault are referenced. *Note that this section has been restructured since the Draft Tentative Report issued in April 2013 to more closely parallel the sections for sexual assault. Current law is structured in this manner and this helps ensure that the legislative intent to link the two sections is maintained in this revision.*

2C:43-7.2. Eligibility for parole; persons convicted of certain violent crimes

a. A court imposing a sentence of incarceration for a crime of the first or second degree enumerated in subsection d. of this section shall fix a minimum term of 85% of the sentence imposed, during which the defendant shall not be eligible for parole.

b. The minimum term required by subsection a. of this section shall be fixed as a part of every sentence of incarceration imposed upon every conviction of a crime enumerated in subsection d. of this section, whether the sentence of incarceration is determined pursuant to N.J.S.2C:43-6, N.J.S. 2C:43-7, N.J.S.2C:11-3 or any other provision of law, and shall be calculated based upon the sentence of incarceration actually imposed. The provisions of subsection a. of this section shall not be construed or applied to reduce the time that must be served before eligibility for parole by an inmate sentenced to a mandatory minimum period of incarceration. Solely for the purpose of calculating the minimum term of parole ineligibility pursuant to subsection a. of this section, a sentence of life imprisonment shall be deemed to be 75 years.

c. Notwithstanding any other provision of law to the contrary and in addition to any other sentence imposed, a court imposing a minimum period of parole ineligibility of 85 percent of the sentence pursuant to this section shall also impose a five-year term of parole supervision if the defendant is being sentenced for a crime of the first degree, or a three-year term of parole supervision if the defendant is being sentenced for a crime of the second degree. The term of parole supervision shall commence upon the completion of the sentence of incarceration imposed by the court pursuant to subsection a. of this section unless the defendant is serving a sentence of incarceration for another crime at the time he completes the sentence of incarceration imposed pursuant to subsection a., in which case the term of parole supervision shall commence immediately upon the defendant's release from incarceration. During the term of parole supervision the defendant shall remain in release status in the community in the legal custody of the Commissioner of the Department of Corrections and shall be supervised by the State Parole Board as if on parole and shall be subject to the provisions and conditions of section 3 of P.L.1997, c. 117 (C.30:4-123.51b).

d. The court shall impose sentence pursuant to subsection a. of this section upon conviction of the following crimes or an attempt or conspiracy to commit any of these crimes:

- (1) N.J.S.2C:11-3, murder;
- (2) N.J.S.2C:11-4, aggravated manslaughter or manslaughter;
- (3) N.J.S.2C:11-5, vehicular homicide;
- (4) subsection b. of N.J.S.2C:12-1, aggravated assault;

- (5) subsection b. of section 1 of P.L. 1996, c. 14 (2C:12-11), disarming a law enforcement officer;
 - (6) N.J.S.2C:13-1, kidnapping;
 - (7) subsection a. of N.J.S.2C:14-2, aggravated sexual assault;
 - (8) subsection b. of N.J.S.2C:14-2 and paragraph (3) of subsection b.~~paragraph (1) of subsection e.~~ of N.J.S.2C:14-2, sexual assault;
 - (9) N.J.S.2C:15-1, robbery;
 - (10) section 1 of P.L.1993, c. 221 (C.2C:15-2), carjacking;
 - (11) paragraph (1) of subsection a. of N.J.S.2C:17-1, aggravated arson;
 - (12) N.J.S.2C:18-2, burglary;
 - (13) subsection a. of N.J.S.2C:20-5, extortion;
 - (14) subsection b. of section 1 of P.L.1997, c. 185 (C.2C:35-4.1), booby traps in manufacturing or distribution facilities;
 - (15) N.J.S.2C:35-9, strict liability for drug induced deaths ;
 - (16) section 2 of P.L.2002, c. 26 (C.2C:38-2), terrorism;
 - (17) section 3 of P.L.2002, c. 26 (C.2C:38-3), producing or possessing chemical weapons, biological agents or nuclear or radiological devices; or
 - (18) N.J.S.2C:41-2, racketeering, when it is a crime of the first degree.
- e. (Deleted by amendment, P.L.2001, c. 129).

COMMENT

This section addresses the No Early Release Act's reference to the crimes of aggravated sexual assault and sexual assault. As a result of the restructuring of 2C:14-2, the link between NERA and these sexual offenses would otherwise be incomplete without this adjustment.