

# Consent reforms in NSW

Amendments to the *Crimes Act 1900* (NSW) will apply to sexual act, sexual touch and sexual assault offences contrary to sections 61I, 61J, 61JA, 61KC, 61KD, 61KE and 61KF allegedly committed after the commencement of the legislation on 1 June 2022.



# Overview of the key aspects of the reforms

1. Definitions have been clarified and simplified
2. A new subdivision has been introduced that has three parts
3. A new affirmative model of consent has been introduced
4. A suite of new jury directions about consent have been incorporated into the *Criminal Procedure Act 1986 (NSW)*



# An affirmative model of consent

What is it?

- Extends the communicative model of consent by adding a requirement that an accused person obtain the clearly expressed consent of a complainant before engaging in sexual activity
- The affirmative model has two parts:
  - A complainant must communicate consent through words and/or actions (a physical element of a sexual offence)
  - An accused must find out through words and/or actions that their partner (the complainant) consents to the sexual activity (mental element of a sexual offence)



# Subdivision 1A Consent and knowledge of consent

## 61HF Objective

An objective of this Subdivision is to recognise the following—

- (a) every person has a right to choose whether or not to participate in a sexual activity,
- (b) consent to a sexual activity is not to be presumed,
- (c) consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.



## Section 61HI Consent generally

- (1) A person consents to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.
- (2) A person may, by words or conduct, withdraw consent to a sexual activity at any time.
- (3) Sexual activity that occurs after consent has been withdrawn occurs without consent.
- (4) A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.
- (5) A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity. Example— A person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.
- (6) A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with—
  - a) that person on another occasion, or
  - b) another person on that or another occasion.



# Section 61HJ Circumstances in which there is no consent

- (1) A person does not consent to a sexual activity if—
  - a) **the person does not say or do anything to communicate consent, or**
  - b) the person does not have the capacity to consent to the sexual activity, or
  - c) the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity, or
  - d) the person is unconscious or asleep, or
  - e) the person participates in the sexual activity because of force, fear of force or fear of serious harm of any kind to the person, another person, an animal or property, regardless of—
    - i. when the force or the conduct giving rise to the fear occurs, or
    - ii. whether it occurs in a single instance or as part of an ongoing pattern, or
  - f) the person participates in the sexual activity because of coercion, blackmail or intimidation, regardless of—
    - i. when the coercion, blackmail or intimidation occurs, or
    - ii. whether it occurs in a single instance or as part of an ongoing pattern, or
  - g) the person participates in the sexual activity because the person or another person is unlawfully detained, or
  - h) the person participates in the sexual activity because the person is overborne by the abuse of a relationship of authority, trust or dependence, or
  - i) the person participates in the sexual activity because the person is mistaken about—
    - i. the nature of the sexual activity, or
    - ii. the purpose of the sexual activity, including about whether the sexual activity is for health, hygienic or cosmetic purposes, or
  - j) the person participates in the sexual activity with another person because the person is mistaken—
    - i. about the identity of the other person, or
    - ii. that the person is married to the other person, or
  - k) the person participates in the sexual activity because of a fraudulent inducement.
- (2) This section does not limit the grounds on which it may be established that a person does not consent to a sexual activity.
- (3) In this section—

***fraudulent inducement*** does not include a misrepresentation about a person's income, wealth or feelings.



# Knowledge about consent

How can the prosecution prove that an accused *had knowledge* that a complainant did not consent to a sexual activity?



# Knowledge about consent

## The old s 61HE(3) compared to the new s 61HK

### Section 61HE (old)

#### (3) Knowledge about consent

A person who without the consent of the other person (the “alleged victim”) engages in a sexual activity with or towards the alleged victim, incites the alleged victim to engage in a sexual activity or incites a third person to engage in a sexual activity with or towards the alleged victim, **knows that the alleged victim does not consent to the sexual activity if—**

- (a) the person **knows** that the alleged victim does not consent to the sexual activity, or
- (b) the person is **reckless** as to whether the alleged victim consents to the sexual activity, or ...

### Section 61HK (new)

- (1) A person (the **accused person**) is taken to **know** that another person does not consent to a sexual activity if—
  - (a) the accused person actually **knows** the other person does not consent to the sexual activity, or
  - (b) the accused person is **reckless** as to whether the other person consents to the sexual activity, or...





# Knowledge about consent

## The old s 61HE(3) compared to the new s 61HK

### Section 61HE(3) (*old*)

...

(c) the person has no reasonable grounds for believing that the alleged victim consents to the sexual activity.

(4) For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case—

(a) including **any steps taken by the person to ascertain whether the alleged victim consents to the sexual activity**, but

(b) not including any self-induced intoxication of the person.

### Section 61HK(1) (*new*)

A person (the *accused person*) is **taken to know** that another person does not consent to a sexual activity if—

...

(c) any belief that the accused person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.

(2) Without limiting subsection (1)(c), a belief that the other person consents to sexual activity is **not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity.**

...

(5) For the purposes of making any finding under this section, the trier of fact—

(a) must **consider all the circumstances** of the case, including what, if anything, the **accused person said or did**, and

(b) must not consider any self-induced intoxication of the accused person.



# Knowledge about consent The old s 61HE(3) compared to the new s 61HK

## Section 61HE(3) (*old*)

N/A

## Section 61HK(1) (*new*)

(3) Subsection (2) does not apply if the accused person shows that—

- (a) the accused person had at the time of the sexual activity—
  - (i) a **cognitive impairment** within the meaning of section 23A(8) and (9), or
  - (ii) a **mental health impairment**, and
- (i) the impairment was a **substantial cause** of the accused person not saying or doing anything.

(4) The **onus** of establishing a matter referred to in subsection (3) lies with the accused person on the balance of probabilities.



Knowledge about consent  
The new process pursuant to s 61HK(1)(c)

*(Putting actual knowledge and recklessness to one side)*

**STEPS:**

1. **Creating criminal liability** – Accused is *deemed to know* there is no consent when he/she has no reasonable belief that the complainant consented;
2. **Providing a “defence”** – Accused reasonably believed that the complainant consented;
3. **Disallowing the “defence”** – Failure to say or do anything to find out whether the other person consented.



# Knowledge about consent

## The new process pursuant to s 61HK(1)(c)

The main considerations where reasonable belief in consent is in issue:

1. What did the **complainant say or do to communicate** consent?
2. What did the **accused say or do to find out** that the complainant was consenting?
3. What are all the **relevant circumstances** of the case?  
(That is, how does each of these circumstances logically support an inference that consent was more likely to have been present at the time of the alleged offence?)



# Knowledge about consent

## How do the amendments affect the onus of proof?

- Practically speaking, there is an evidentiary burden on the accused to raise that he or she had a reasonable belief that the complainant consented.
- It will be necessary to show (through calling the accused, cross-examination and/or other evidence) that the accused *said or did* something within a reasonable time before or at the time of the sexual activity to find out whether the complainant consented.
- Where reasonable belief is raised, the prosecution must negative it beyond reasonable doubt. This requires proving BRD *either* that a) the accused did not hold the subjective belief *or* b) it was not objectively reasonable in the circumstances. (Note: s61HK(3) *re cognitive/mental impairments*)



# Knowledge about consent

## Factual battlegrounds and criticism thus far:

- “[These reforms will] effectively require everyone engaging in sexual activity to ask – by words or some comparable form of communication – for consent for each and every sexual act. How reasonable is that expectation? Will a raised eyebrow be enough? A quizzical look? ...

Even if the complainant has given every appearance of consent, or has plainly consented to one form of sexual activity, a jury will be required to convict because the accused did not actually ask for consent *for another form of sexual activity.*”

*(Odgers, S., 30 May 2022. Tread carefully on sexual consent - some of these ‘reforms’ are dangerous. Sydney Morning Herald)*

(NB: s 61HI(5): “A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity”)

- How early is too early to say or do something to obtain consent for a later sexual act?
- Does the new “affirmative consent” approach to knowledge resolve the ambiguity surrounding consent?



# Amendments to *Criminal Procedure Act 1986*

*Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (commenced on 1 June 2022)

Amendments to CPA apply to *all proceedings after commencement irrespective of when the offence was committed* (Sch 2, cl [20]):

‘An amendment made to this Act by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* extends to proceedings for an offence committed, or alleged to have been committed, before the commencement of the amendment but not if the hearing of the proceedings began before the commencement of the amendment.’

See also P Mizzi and R Beach-Jones, ‘The law on consent in sexual assault is changing’ 34(1) *Judicial Officers’ Bulletin* 1



# CPA amendments include a number of new directions – designed to ‘myth bust’

5 new directions incorporated into Ch 6, Part 5, Division 1, Subdivision 3:

**292A Circumstances in which non-consensual sexual activity occurs**

**292B Responses to non-consensual sexual activity**

**292C Lack of physical injury, violence or threats**

**292D Responses to giving evidence**

**292E Behaviour and appearance of complainant**





# When should the direction be given?

## 292 Directions in relation to consent

...

(2) In a trial to which this Subdivision applies, **the judge must give** any 1 or more of the directions set out in sections 292A–292E (a **consent direction**)—

(a) if there is a **good reason to give** the consent direction, or

(b) **if requested to give** the consent direction by a party to the proceedings, unless there is a good reason not to give the direction.

(3) A judge is not required to use a particular form of words in giving a consent direction.

(4) A judge may, as the judge sees fit—

(a) give a consent direction **at any time during a trial**, and

(b) give the same consent direction **on more than 1 occasion during a trial**

- Many judges are highly proactive re ‘mid-trial’ directions about the rights of the accused such as :

- use of tendency evidence
- not to draw adverse inferences about an accused’s refusal to participate in police interview or right to silence;
- not to draw adverse inferences to the accused person or give the evidence any greater/lesser weight because evidence given in a particular way (ie remotely, recorded)

- **Logic** ‘For my part, I believe it is highly preferable that a trial judge gives such information and warnings ... either immediately before or immediately after the giving of that evidence rather than to wait to fulfil that obligation during the course of the summing up. Generally speaking, [the warning] would have considerably more impact upon the jury if given at a time proximate to the evidence.’ (*R v DBG* [2002] NSWCCA 328 Howie J (Meagher JA & Simpson J agreeing) at [23])

-> Same logic should apply to directions designed to correct ‘rape myths’



# Direction on responses to non-consensual sexual activity

## 292B Responses to non-consensual sexual activity

Direction—

- (a) there is no typical or normal response to non-consensual sexual activity, and
- (b) people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything, and
- (c) the jury must avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity.

Note: read alongside

## 61HJ Circumstances in which there is no consent

- (1) A person does not consent to a sexual activity if— (a) the person does not say or do anything to communicate consent, or (Crimes Act 1900 s 61HJ(1)(a))

*DEFENCE COUNSEL: What I suggest is... you didn't say anything to him to indicate you weren't consenting, did you?*

*COMPLAINANT: No.*

*DEFENCE COUNSEL: I'm sorry?*

*COMPLAINANT: No.*

...

*DEFENCE COUNSEL: Now, Ms [COMPLAINANT], I'm suggesting that when the young man started touching you in your groin area on the outside of your underwear, **you didn't move away, or say, or do anything to suggest you weren't happy about him touching you there?***

*COMPLAINANT: I don't remember that happening.*

...

### **Accused: Examination-in-chief**

*DEFENCE COUNSEL: When you were having sex with [the complainant] in the room, did she say no to you at any point?*

*ACCUSED: No, she didn't.*

*DEFENCE COUNSEL: Did she tell you at any point that she didn't want to have sex with you?*

*ACCUSED: No. At no - not at one point did she ever say that, like anything like that.*

*DEFENCE COUNSEL: Did she push you away at any point?*

*ACCUSED: No.*



# 292C Lack of physical injury, violence or threats

## 292C Direction—

(a) people who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence, and

(b) the absence of injury or violence, or threats of injury or violence, does not necessarily mean that a person is not telling the truth about an alleged sexual offence

Note: read alongside s 61HI(4) 'A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.'

*DEFENCE COUNSEL: You didn't scream out, stop?*

*COMPLAINANT: I did say stop but I didn't scream it.*

*DEFENCE COUNSEL: You didn't kick him?*

*COMPLAINANT: No.*

*DEFENCE COUNSEL: **Could have bitten him, could have scratched him, did none of that?***

*COMPLAINANT: No, I was in shock*

....

*DEFENCE COUNSEL: ... He's not made any verbal threats to you at any of these times, has he?*

*COMPLAINANT: No.*

*DEFENCE COUNSEL: So you're not in fear of anything he might've threatened to do to you?*

*COMPLAINANT: No.*

...

*DEFENCE COUNSEL: Now, before the break I was putting some things to you. And what I also need to put to you is **that at no stage that evening did you do anything to resist engaging in sexual activity with [the accused]?***

*COMPLAINANT: Yes I did. ...*

*DEFENCE COUNSEL: Is it not true that **if you had used all your strength you could have pushed him off you?***

*COMPLAINANT: Um, not in that moment.*

