

## NEW SEXUAL CONSENT LAWS IN NSW.

*This factsheet provides an overview of the changes in relation to Affirmative Consent, that were passed on 1<sup>st</sup> June 2022. It accompanies an Ask Lois webinar broadcast on 6<sup>th</sup> June 2022 and an additional resources document, listed at the end of the factsheet.*

### **Amendments to the Crimes Act 1900 (NSW) and Criminal Procedure Act 1986 (NSW)**

On 1 June 2022, the Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021 (NSW) commenced, making significant changes to the definition of consent in NSW in relation to sexual activity and knowledge about consent within the Crimes Act 1900 (NSW) and to jury directions with respect to sexual offences within the Criminal Procedure Act 1986 (NSW).

The amendments to the Crimes Act apply only in relation to offences committed on or after the commencement of the amendments on 1 June 2022.

The amendments to the jury directions apply to proceedings which commence from 1 June 2022, regardless of when the offence was committed.

### **What has led to the changes to the law on consent in relation to sexual offences?**

#### **THE LAZARUS TRIALS**

In May 2018, following Saxon Mullins sharing her lived experience in a Four Corners episode: "I am that girl", the Hon. Mark Speakman SC MP asked the NSW Law Reform Commission (NSWLRC) to conduct a review into consent in relation to sexual offences.

Saxon Mullins shared her story as the victim survivor in the NSW District Court and NSW Court of Criminal Appeal cases in 2015, 2016 and 2017,<sup>1</sup> which highlighted the need for reform on the question of consent. These decisions demonstrated a lack of understanding of the 'freeze' response to trauma leaving a person unable to communicate that they do not consent to sexual activity.

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<sup>1</sup> Lazarus v R [2016] NSWCCA 52; R v Lazarus (Unreported, District Court of New South Wales, Judge Tupman, 4 May 2017; R v Lazarus [2017] NSWCCA 279.



In November 2020, the NSW Law Reform Commission Report was tabled in Parliament and made 44 recommendations. The NSW Government responded in May 2021, expressing support or support in principle for all of the recommendations.

The Government also went a step further than the NSWLRC recommendations, introducing 'affirmative consent.'

## The New Law

### **AFFIRMATIVE CONSENT (SECTION 61HI CRIMES ACT 1900)**

Consent is defined as 'free and voluntary agreement' to sexual activity.

'Free and voluntary agreement' is based on affirmative consent, requiring 'ongoing and mutual communication and 'is not to be presumed'.<sup>2</sup>

The new law makes clear that:

- A person may by words or conduct withdraw consent to sexual activity at any time, and that sexual activity that occurs after consent has been withdrawn occurs without consent;<sup>3</sup>
- A person who does not offer physical or verbal resistance to sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity;<sup>4</sup>
- consent to a particular sexual activity, is not taken to be consent to any other sexual activity;<sup>5</sup> and
- a person who consents to a sexual activity with a person on one occasion is not consenting to a sexual activity with:
  - that person on another occasion, or
  - another person on that or another occasion.<sup>6</sup>

### **THE KNOWLEDGE ELEMENT (SECTION 61HK CRIMES ACT 1900)**

An accused person is taken to know that the other person does not consent if:

- a. They actually know that the person does not consent to the sexual activity; or
- b. They are reckless as to whether the other person consents to the sexual activity; or
- c. their belief as to consent is not reasonable in the circumstances.<sup>7</sup>

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.<sup>8</sup>

<sup>2</sup> Section 61HF *Crimes Act 1900 (NSW)*

<sup>3</sup> Section 61HI(2), (3) *Crimes Act 1900 (NSW)*

<sup>4</sup> Section 61HI(4) *Crimes Act 1900 (NSW)*

<sup>5</sup> Section 61HI(5) *Crimes Act 1900 (NSW)*

<sup>6</sup> Section 61HI(6) *Crimes Act 1900 (NSW)*

<sup>7</sup> Sections 61HK(1)(a), (b) and (c) *Crimes Act 1900 (NSW)*

<sup>8</sup> Section 61HK(2) *Crimes Act 1900 (NSW)*

This does not apply where the accused can show at the time of the sexual activity that they had a cognitive or mental health impairment, and that the impairment was a substantial cause for them not saying or doing anything to find out whether the other person consents.<sup>9</sup>

### **CIRCUMSTANCES IN WHICH THERE IS NO CONSENT (SECTION 61HJ CRIMES ACT 1900)**

The amendments introduced a single list of non-exhaustive circumstances in which there is no consent.

A person does not consent to sexual activity if they:

- do not say or do anything to communicate consent,<sup>10</sup> reflecting the common experience of ‘freezing’ in response to non-consensual sexual activity, or
- do not have the capacity to consent,<sup>11</sup> or
- are so affected by alcohol or another drug as to be incapable of consenting to the sexual activity<sup>12</sup> (*This is a change to earlier law which provided that consent may be negated if the complainant is ‘substantially intoxicated’*) or
- are unconscious or asleep,<sup>13</sup> or
- participate in the sexual activity because they are unlawfully detained,<sup>14</sup> or
- participate in the sexual activity:
  - because of force, fear of force or fear of serious harm of any kind, including harm or fear of harm to animals or property and applies regardless of when the force or the conduct giving rise to the fear occurs or whether it occurs as a single instance or as part of an ongoing pattern,<sup>15</sup> or
  - because of coercion, blackmail or intimidation regardless of whether the coercion, blackmail or intimidation occurs or whether it occurs as a single instance or part of an ongoing pattern,<sup>16</sup> or
  - because the person is overborne by the abuse of a relationship of authority, trust or dependence.<sup>17</sup> The inclusion of ‘dependence’ is intended to better capture non-consensual activity in circumstances such as, for example, where a person with a disability or an elderly person dependent on a formal or informal carer for day-to-day needs participates in non-consensual sexual activity with the carer because they are fearful of withdrawal of such support.

*(These provisions are intended to better recognise sexual violence within the context of coercive control and domestic and family violence and abuse).*

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<sup>9</sup> Section 61HK(3) *Crimes Act 1900 (NSW)*

<sup>10</sup> Section 61HJ(1)(a) *Crimes Act 1900 (NSW)*

<sup>11</sup> Section 62HJ(1)(b) *Crimes Act 1900 (NSW)*

<sup>12</sup> Section 61HJ(1)(c) *Crimes Act 1900 (NSW)*

<sup>13</sup> Section 61HJ(1)(d) *Crimes Act 1900 (NSW)*

<sup>14</sup> Section 61HJ(1)(g) *Crimes Act 1900 (NSW)*

<sup>15</sup> Section 61HJ(1)(e) *Crimes Act 1900 (NSW)*

<sup>16</sup> Section 61HJ(1)(f) *Crimes Act 1900 (NSW)*

<sup>17</sup> Section 61HJ(1)(h) *Crimes Act 1900 (NSW)*

- participate in sexual activity because of fraudulent inducement.<sup>18</sup> (*This provision may cover for instance, situations where a sex worker engages in sexual activity on the condition that they receive payment for their services and after the activity, payment is withheld*)<sup>19</sup>
- participate in the sexual activity because the person is mistaken about the nature of the sexual activity or the purpose of the sexual activity, including about whether the sexual activity is for health, hygienic or cosmetic purposes,<sup>20</sup> or
- participate in the sexual activity because the person is mistaken about the identity of the other person or that they are married to the other person.<sup>21</sup>

## JURY DIRECTIONS <sup>22</sup>

The new laws are accompanied by new jury directions which respond to ‘rape myths’. The jury directions can be made at any time during the trial and given on more than one occasion. No particular form of words is required when giving the directions.

These directions include:

- Non-consensual sexual activity can occur in many different circumstances including between people who know each other, are married, or are in a relationship with each other.
- There is no typical or normal response to non-consensual sexual activity, some people may respond by freezing and warns against relying on ‘preconceived ideas’.
- A person who has not consented to sexual activity may have no physical injury or may not have been threatened with physical injury or violence.
- Trauma affects people differently and so some people may show ‘obvious signs of emotion or distress’ when giving evidence and others may not.
- It should not be presumed that a person consented to sexual activity because the person wore particular clothing or had a particular appearance or consumed alcohol or another drug or was present in a particular location.

## THE WAY FORWARD

These reforms signify an important shift in the understanding of consent to sexual activity, the prosecution of sexual offences and judicial process. To ensure their effectiveness, the new law includes the requirement for regular reviews of the consent provisions and jury directions.<sup>23</sup> A report about training on consent is required to be tabled in Parliament before each review.

<sup>18</sup> Section 61HJ(1)(k) *Crimes Act 1900 (NSW)*

<sup>19</sup> See, New South Wales, *Parliamentary Debates, Legislative Council Hansard*, 20 October 2021 (Mr Mark Speakman, Attorney General); See also, New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences*, (Report No 148 September 2020), [6.117].

<sup>20</sup> Section 61HJ(1)(i) *Crimes Act 1900 (NSW)*

<sup>21</sup> Section 61HJ(1)(j) *Crimes Act 1900 (NSW)*

<sup>22</sup> See sections 292A, 292B, 292C, 292D, 292E *Criminal Procedure Act 1986 (NSW)*

<sup>23</sup> See s 583 of the *Crimes Act 1900 (NSW)* and s 368 of the *Criminal Procedure Act 1986 (NSW)*

## **Additional Resources**

### **MORE ABOUT THE LAWS**

[‘Make No Doubt’ campaign](#)

NSW Government, June 2022

[Affirmative consent: What the ‘common sense’ NSW law reforms mean](#)

*Law Society of NSW Journal*, 31 January 2022

[Second Reading Speech](#) Mark Speakman, Attorney-General.

*Parliamentary Debates, Legislative Council*, 20 October 2021

[Consent in Relation to Sexual Offences.](#)

*New South Wales Law Reform Commission*, Report No 148, September 2020

### **WEBINAR RECORDINGS**

[The new affirmative consent laws – what do they really mean?](#)

*Ask Lois – WLS NSW*, 6 June 2022

[Reporting a Sexual Assault – what is NSW health and police best practice?](#)

*WLS NSW and Redfern CLC*, 17 June 2021

[Protecting young people from sexual exploitation](#)

*Ask Lois – WLS NSW*, 14 October 2020

### **SUPPORT SERVICES**

[Full Stop Australia](#) NSW Sexual Violence Helpline (24/7): 1800 424 017

NSW Health [Sexual Assault Services](#)

[1800 RESPECT](#): 1800 737 732

NSW DCJ [Domestic Violence Line](#): 1800 65 64 63