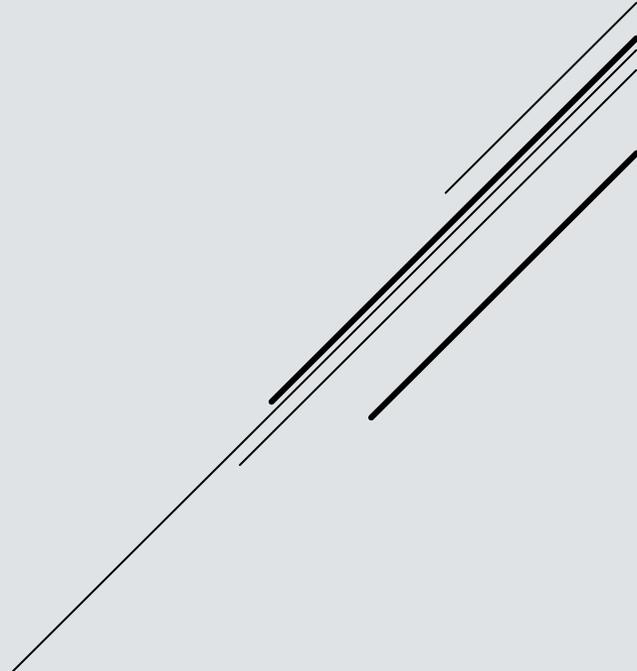
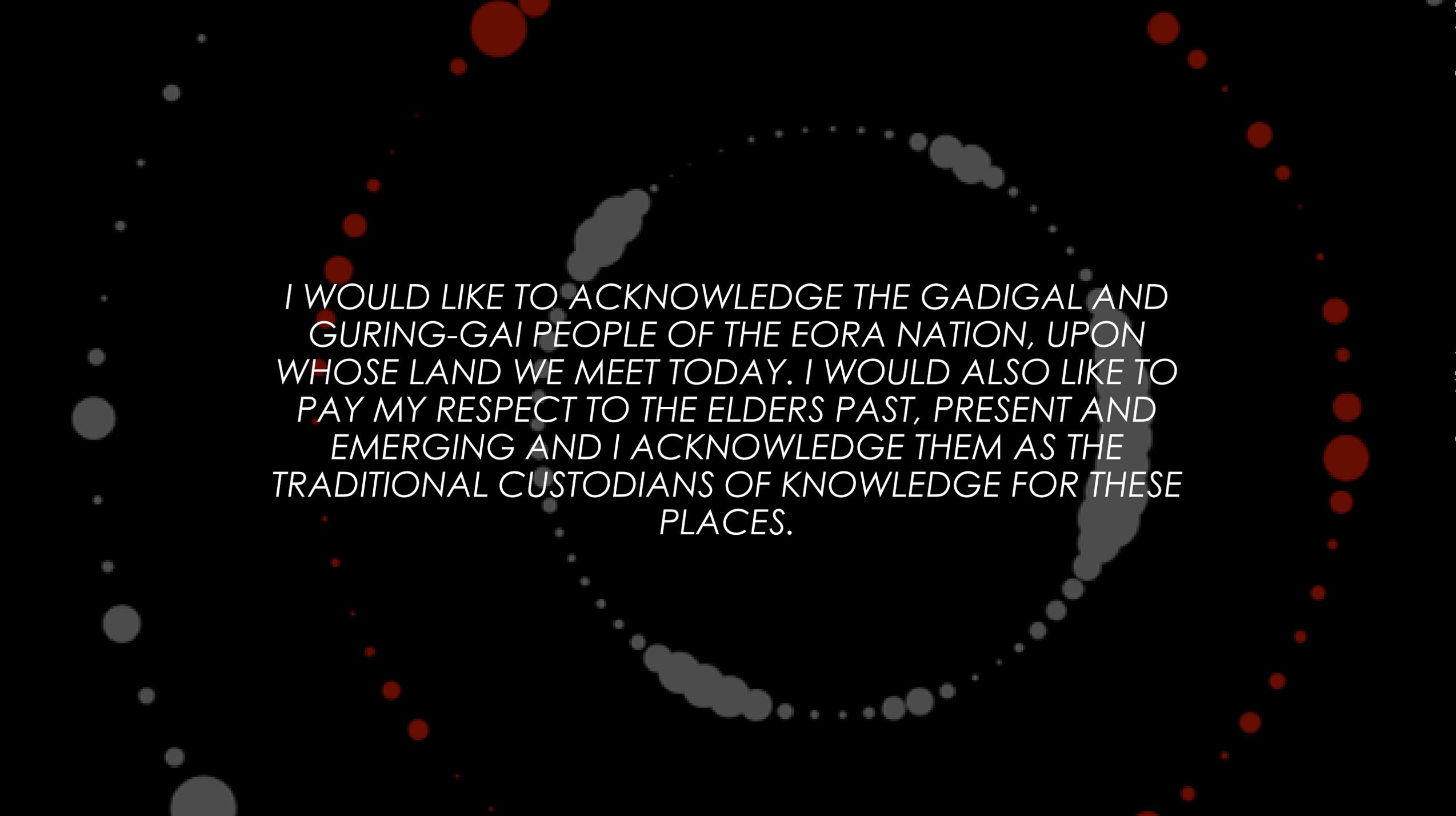


SEXUAL CONSENT IN THE AGE OF PART 3, DIVISION 10 OF THE *CRIMES ACT 1900* (NSW)

NSW PUBLIC DEFENDERS' ANNUAL CONFERENCE
SYDNEY 11 – 12 MARCH 2023

JUDGE SARAH HUGGETT





I WOULD LIKE TO ACKNOWLEDGE THE GADIGAL AND
GURING-GAI PEOPLE OF THE EORA NATION, UPON
WHOSE LAND WE MEET TODAY. I WOULD ALSO LIKE TO
PAY MY RESPECT TO THE ELDERS PAST, PRESENT AND
EMERGING AND I ACKNOWLEDGE THEM AS THE
TRADITIONAL CUSTODIANS OF KNOWLEDGE FOR THESE
PLACES.

In June 2022 significant changes were made to both the *Crimes Act 1900* and the *Criminal Procedure Act 1986* by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021*.

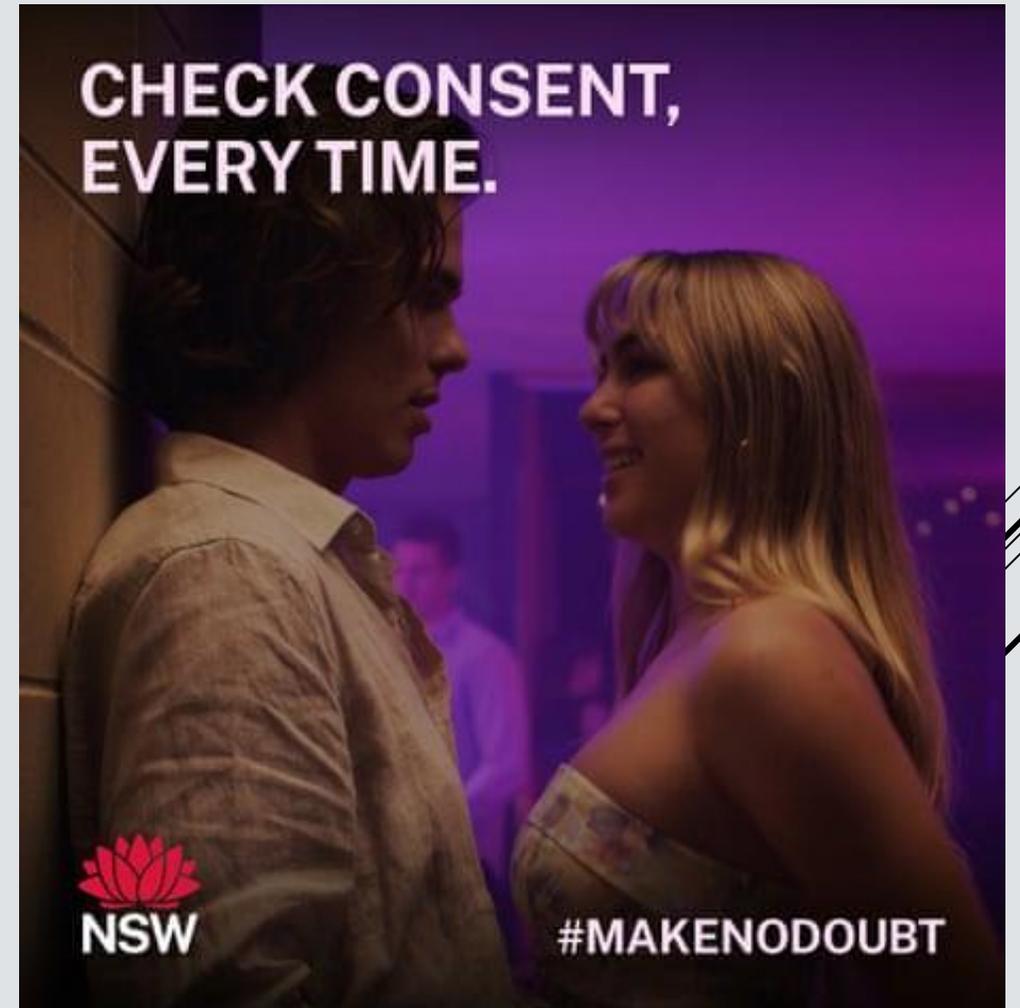
These include:

- amendments to the definition of consent;
- changes to when consent is given;
- changes to when an accused person is taken to know that the other person does not consent;
- the introduction of consent directions.

The expectation was that the amendments would give effect to a more modern understanding of crimes of sexual violence.

In summary ...

- A person is not considered as having given consent unless they say or do something to indicate their consent has been given.
- An accused's belief in consent will not be reasonable unless the accused says or does something to ascertain whether the other person consents to the particular sexual activity at the time of that activity - and not for example by relying on something that occurred beforehand.



THE BACKGROUND TO THE AMENDMENTS ...

THE HISTORY OF 'RAPE' AS A CRIMINAL OFFENCE

Palaeolithic societies recognised rape as a **legitimate means of securing a bride** and treated it as a crime against the **property of men**.

Ancient Greek society recognised forcible sexual intercourse against men and women but saw it as a **civil wrong** rather than a criminal wrong and the gravity of the wrong was the **dishonour** occasioned to the victim's family.

Ancient Rome recognised ravishment but only against women of **high status** by a person and **not the woman's husband**.

In **1275** King Edward I of England enacted a law prohibiting bride abduction and ravishment of a woman against her will. This appears to be the **first codification of a notion that a woman was entitled to refuse sex** - although it did **not** include refusing **her husband**.

In 17th century England the common law came to define rape as '*the **carnal knowledge** of any woman above the age of 10 years against her will and of a woman-child under the age of 10 years with or against her will*'.

In **1861** rape was made a **felony** in England and was punishable by death.

THE STATUTORY POSITION IN NSW

The statutory offence of rape was created in s 63 of the *Crimes Act* and was punishable by penal servitude for life.

The provision stated that “*the consent of a woman, if obtained by threats or terror, shall be no defence*”.

Consent was not defined.

The common law provided the mens rea for the offence. *Either* that the accused was aware that the complainant had not consented or realised that the complainant might not be consenting and was determined to have sexual intercourse whether with whether there was consent or not.

1981

In **1981** significant changes were made to the law relating to sexual violence. These included the **abolition of the offence of rape** and the introduction of a suite of sexual offences which divided offences into 4 categories depending upon the nature and seriousness of the act.

The act that constituted '*sexual intercourse*' was defined in s 61A and greatly expanded the old offence of rape. Sexual intercourse was defined to include a sexual connection of the vagina or anus by any part of the body or an object, fellatio, cunnilingus or the continuation of these forms of connection. Gender was removed meaning that males could also be the victim of a sexual offence.

Section 61D created the offence of **Sexual Intercourse without Consent**. Consent was not defined but what was not consent was articulated. The common law requirement that a victim '*raise a hue and cry*' if it was to be accepted that there had been no consent was abolished.

SECTION 61D: SEXUAL INTERCOURSE CATEGORY 3 – SEXUAL INTERCOURSE WITHOUT CONSENT

- 1) Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse shall be liable to penal servitude for 7 years or, if the person is under the age of 16 years, to penal servitude for 10 years.
- 2) For the purposes of subsection (1), a person who has sexual intercourse with another person without the consent of the other person and who is **reckless** as to whether the other person consents to the sexual intercourse shall be deemed to know that the other person does not consent to the sexual intercourse.
- 3) For the purpose of subsection (1) and without limiting the grounds upon which it may be established that consent to sexual intercourse is vitiated:
 - a) a person who consents to sexual intercourse with another person:
 - i. under a **mistaken belief as to the identity** of the other person, or
 - ii. under a **mistaken belief that the other person is married to the person**,shall be deemed not to consent to the sexual intercourse,
 - b) a person who knows that another person consents to sexual intercourse under a mistaken belief referred to in paragraph (a) shall be deemed to know that the other person does not consent to the sexual intercourse.
 - c) a person who **submits to sexual intercourse with another person as a result of threats or terror**, whether the threats are against, or the terror is instilled in, the person who submits to the sexual intercourse or any other person, **shall be regarded as not consenting** to the sexual intercourse, and
 - d) a person **who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting** to the sexual intercourse.

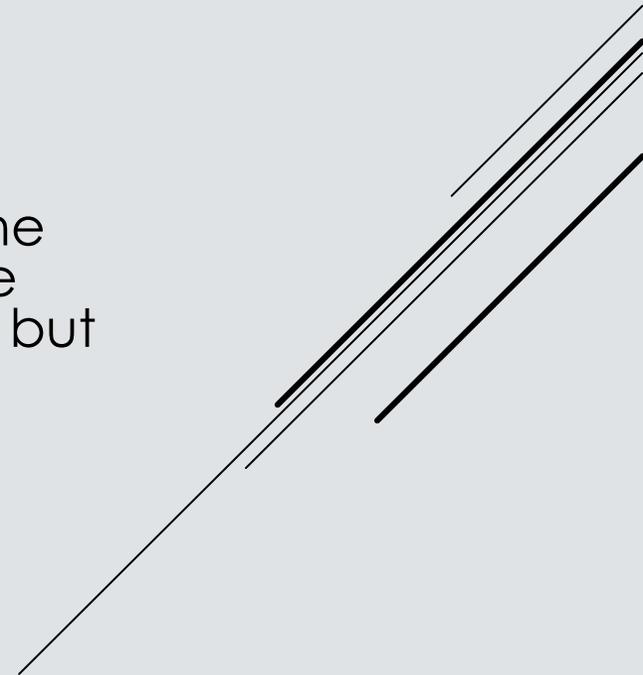
10 YEARS LATER ...

In **1991** further changes were made to sexual assault offences.

A 'basic' offence of Sexual Intercourse without Consent was created and an aggravated form of the basic offence.

The definition of '*sexual intercourse*' remained the same and the new provision in relation to consent (**s 61R**) was substantially the same as the previous section. Again, consent was not defined but what it was not was articulated.

Recognition was given in s 61T that non-consensual sexual intercourse could take place within a marriage.



SECTION 61R: CONSENT

- 1) For the purposes of sections 61I and 61J, a person who has sexual intercourse with another person without the consent of the other person and who is reckless as to whether the other person consents to the sexual intercourse is to be taken to know that the other person does not consent to the sexual intercourse.
- 2) For the purposes of sections 61I and 61J and without limiting the grounds on which it may be established that consent to sexual intercourse is vitiated:
 - a) a person who consents to sexual intercourse with another person:
 - i. under a mistaken belief as to the identity of the other person, or
 - ii. under a mistaken belief that the other person is married to the person,is to be taken not to consent to the sexual intercourse, and
 - b) a person who knows that another person consents to sexual intercourse under a mistaken belief referred to in paragraph (a) is to be taken to know that the other person does not consent to the sexual intercourse, and
 - c) a person who submits to sexual intercourse with another person as a result of threats or terror, whether the threats are against, or the terror is instilled in, the person who submits to the sexual intercourse or any other person, is to be regarded as not consenting to the sexual intercourse, and
 - d) a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse.

2004 - 2008

In **2004** the NSW Criminal Justice Sexual Offences Taskforce was established to advise on **ways to improve the responsiveness of the criminal justice system to victims of sexual assault, whilst ensuring that an accused person receives a fair trial.**

The Taskforce's report, ***Responding to Sexual Assault: The Way Forward*** was published in **2005**. It contained some 70 recommendations for reform including the **repeal of the consent provision** (in s 61R) and its replacement with a statutory definition of consent '*partially based on the UK definition; ie. a person consents if he or she **freely and voluntarily** agrees to the sexual act and has the **capacity to make that choice***' (at iv).

The report led to the ***Crimes Amendment (Consent – Sexual Assault Offences) Act (2007)***. As the title suggests, **the focus of the amendment was consent**. The former consent provision in s 61R was repealed and replaced by a reformed consent provision in **s 61HA**.

The amendments, which commenced on 1 January 2008, were **significant**.

SECTION 61HA: CONSENT IN RELATION TO SEXUAL ASSAULT OFFENCES

- 1) Offences to which section applies: This section applies for the purposes of the offences under sections 61I, 61J and 61JA.
- 2) **Meaning of consent:** A person consents to sexual intercourse if the person **freely and voluntarily** agrees to the sexual intercourse.
- 3) **Knowledge about consent:** A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if:
 - a) the person knows that the other person does not consent to the sexual intercourse, or
 - b) the person is reckless as to whether the other person consents to the sexual intercourse, or
 - c) **the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.**

For the purpose of making any such finding, the trier of fact **must** have regard to all the circumstances of the case:

- c) including **any steps taken** by the person to ascertain whether the other person consents to the sexual intercourse, but
 - d) not including any self-induced intoxication of the person.
- 4) **Negation of consent:** A person does **not** consent to sexual intercourse:
 - a) if the person **does not have the capacity** to consent to the sexual intercourse, including because of age or cognitive incapacity, or
 - b) if the person **does not have the opportunity** to consent to the sexual intercourse because the person is unconscious or asleep, or
 - c) if the person consents to the sexual intercourse because of **threats of force or terror** (whether the threats are against, or the terror is instilled in, that person or any other person), or
 - d) if the person consents to the sexual intercourse because the person is **unlawfully detained**.

(cont')

- 5) A person who consents to sexual intercourse with another person:
- a) under a mistaken belief as to the identity of the other person, or
 - b) under a mistaken belief that the other person is married to the person, or
 - c) under a mistaken belief that the sexual intercourse is for medical or hygienic purposes (or under any other mistaken belief about the nature of the act induced by fraudulent means),

does not consent to the sexual intercourse.

For the purposes of subsection (3), the other person knows that the person does not consent to sexual intercourse if the other person knows the person consents to sexual intercourse under such a mistaken belief.

- 6) The grounds on which it **may** be established that a person does **not** consent to sexual intercourse include:
- a) if the person has sexual intercourse while **substantially intoxicated** by alcohol or any drug, or
 - b) if the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force, or
 - c) if the person has sexual intercourse because of the **abuse of a position of authority or trust**.
- 7) A person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse.
- 8) This section does not limit the grounds on which it may be established that a person does not consent to sexual intercourse.

10 YEARS LATER ...

On 1 December 2018 **significant amendments** were again made to the sexual assault laws.

Separate definitional sections for '*sexual intercourse*', '*sexual touching*', '*sexual act*' and '*cognitive impairment*' were introduced and new offences using the new terminology were created in s 61KC to s 61KF. The offences all related to intentional acts to or towards another person without their consent.

The **consent** provision (s 61HA) was substantially re-enacted as **s 61HE**.



SECTION 61HE: CONSENT IN RELATION TO SEXUAL OFFENCES

- 1) Offences to which section applies: This section applies for the purposes of the offences, or attempts to commit the offences, under sections 61I, 61J, 61JA, 61KC, 61KD, 61KE and 61KF.
- 2) Meaning of “consent”: A person consents to a sexual activity if the person freely and voluntarily agrees to the sexual activity.
- 3) Knowledge about consent: A person who without the consent of another 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
 - c) The person has no reasonable grounds for believing that the alleged victim consents to the sexual activity.
- 4) For the purposes 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.

(cont')

- 5) Negation of consent: A person does not consent to a sexual activity:
 - a) if the person does not have the capacity to consent to the sexual activity, including because of age or cognitive incapacity, or
 - b) if the person does not have the opportunity to consent to the sexual activity because the person is unconscious or asleep, or
 - c) if the person consents to the sexual activity because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or
 - d) if the person consents to the sexual activity because the person is unlawfully detained.
- 6) A person who consents to a sexual activity with or from another person under any of the following mistaken beliefs does not consent to the sexual activity:
 - a) a mistaken belief as to the identity of the other person,
 - b) a mistaken belief that the other person is married to the person,
 - c) a mistaken belief that the sexual activity is for health or hygienic purposes,
 - d) any other mistaken belief about the nature of the activity induced by fraudulent means.
- 7) For the purpose of subsection (3), the other person knows that the person does not consent to the sexual activity of the other person knows the person consents to the sexual activity under such a mistaken belief.
- 8) The grounds on which it may be established that a person does not consent to a sexual activity include:
 - a) if the person consents to the sexual activity while substantially intoxicated by alcohol or any drug, or
 - b) if the person consents to the sexual activity because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force, or
 - c) if the person consents to the sexual activity because of the abuse of a position of authority or trust.
- 9) A person who does not offer actual physical resistance to a sexual activity is not, by reason only of that fact, to be regarded as consenting to the sexual activity.
- 10) This section does not limit the grounds on which it may be established that a person does not consent to sexual activity.
- 11) In this section sexual activity means sexual intercourse, sexual touching or a sexual act.

Despite the reforms made to sexual assault laws in NSW over 4 decades or so, advocates contended that the laws did not adequately protect victims of sexual offences (the majority of whom are women).

This apparent community discontent coupled with the *#MeToo* movement and the Lazarus case were catalysts to the 2022 amendments.



Sexual & gender-based violence abroad

is a
Threat to

THE #METOO MOVEMENT

TARANA BURKE IS AN AMERICAN ACTIVIST AND BUSINESS EXECUTIVE.

IN 2006 SHE FOUNDED THE #METOO MOVEMENT, WHICH SOUGHT TO ASSIST SURVIVORS OF SEXUAL VIOLENCE AND HARASSMENT, ESPECIALLY WOMEN OF COLOUR. SHE ALSO DIRECTED A NUMBER OF PROGRAMS PROMOTING SOCIAL EQUITY.

public *safely* everywhere

me too.

- The #MeToo movement put a powerful spotlight on the sexual abuse and harassment women have been suffering under for ages (Shay Maunz & Paige Meltzer).
- In many ways, the original purpose of the #MeToo movement was achieved. A message was sent that survivors of sexual assault and harassment are not alone and that their experiences were neither anomalies, nor cases of individual bad luck, nor the result of some misbehaviour or mistake on their part (Caitlin Logan).
- As a result of the movement, more people began talking about sexual assault and wondering how they could address it in their workplace beyond a mere policy on the books (Kristin Toussaint).

... the movement became a global force.



THE LUKE LAZARUS TRIALS AND APPEALS

- Luke Lazarus was found *Guilty* at his first (jury) trial.
- That verdict was overturned on appeal and a retrial was ordered.
- He was then found *Not Guilty* in a (judge alone) retrial, the trial judge finding he had a 'genuine belief' the complainant, Saxon Mullins, had consented.
- That verdict was overturned however the CCA did not order a third trial.
 - *Lazarus v R* [2016] NSWCCA 52.
 - *R v Lazarus*, 4 May 2017, unreported judgment of the District Court of NSW.
 - *R v Lazarus* [2017] NSWCCA 279.



12
6-7
MON-FRI

Kings Cross

STREET

North

Langlo

Canberra

WATCH FOR
BICYCLE

LETTER DISTRIBUTOR
Wellington
Canberra

ROAD WORK
AHEAD

TAXI

Coca-Cola

NO
RIGHT
TURN

A woman's face is centered in the foreground, looking directly at the camera with a neutral expression. The background is a blurred city street at night, featuring a prominent red Coca-Cola sign with the word 'Enjoy' above it. The street is filled with light trails from cars and various traffic signs, including one for 'Kings Cross' and another for 'NO RIGHT TURN'. The overall scene is dimly lit, with the primary light source being the streetlights and the Coca-Cola sign.

'I AM THAT GIRL'

She was at the centre of one of NSW's most controversial SEXUAL ASSAULT TRIALS IN RECENT TIMES.

Image credit: Australian Broadcasting Corporation

SAXON MULLINS

- Saxon Mullins went public after the criminal proceedings against Luke Lazarus came to an end as part of an ABC Four Corners program that highlighted the consent laws in NSW through a focus on the Lazarus case.
- She is now the Director of Advocacy at Rape and Sexual Assault Research and Advocacy - or RASARA – which describes itself as an independent not-for-profit charitable organisation established to develop an evidence base for addressing sexual violence and to advocate for best practice community and legal responses to sexual assault.
- After the program aired, in May 2018 the NSW Attorney General, Mark Speakman, asked the NSW Law Reform Commission **to review sexual consent laws and to report on whether amendments were needed to better protect victims.**

NSWLRC, REPORT 148, CONSENT IN RELATION TO SEXUAL OFFENCES

- The Commission consulted widely over 3 years and received extensive feedback including around 200 written submissions and over 3,850 survey responses from lawyers, sexual assault victim support groups, individual sexual assault complainants and many other groups and persons.
- The Commission's Report was published in September 2020 and tabled in Parliament on 18 November 2020. 44 recommendations were made including 40 recommendations for immediate statutory amendments to the *Crimes Act* and *Criminal Procedure Act* and 4 recommendations in relation to research and review.
- The NSW Government supported all 44 recommendations. The government's reforms however went further than the LRC's recommendations in one significant respect - by providing that **any belief in consent that an accused person had (or may have) at the time of sexual activity will not be reasonable in the circumstances if the accused did not say or do anything to ascertain consent.** (There is an exception to this requirement for an accused person with a significant mental health or cognitive impairment.)

WHILE THE FOCUS OF REPORT 148 WAS SECTION 61HE, THE RECOMMENDATIONS WENT BEYOND REFORM OF THE STATUTORY CONSENT PROVISION.

THE KEY RECOMMENDATIONS AIMED TO ...

Simplify and modernise the language used in relation to sexual offences and make offences **gender-neutral**.

Clarify consent provisions including that consent is **free and voluntary agreement** and **should not be presumed**.

Address identified misconceptions about consent.

Clarify that consent involves **ongoing and mutual communication** and can be **withdrawn** and consent to one activity is not consent to another activity.

Educate judges, lawyers, police and the community about the changes to the law of consent.

Improve **victim experience** of the justice system and **juror understanding** of the complexities of sexual offending and reporting by the introduction of **new jury directions**.

The legislation which implemented the consent reforms commenced on 1 June 2022.

The *Crimes Act* was amended by the insertion of a new subdivision '**Consent and Knowledge of Consent**' which contains ss 61HF – 61HK. The changes to the *Crimes Act* apply to offences committed on and from 1 June 2022.

The *Criminal Procedure Act* was amended by the introduction of **5 directions** that may be given to a jury (at any time and repeated) designed to address the potential impact upon their deliberations of common misconceptions identified in Report 148 about consent and to ensure a complainant's evidence is assessed fairly and impartially by the jury. The changes to the *Criminal Procedure Act* apply to hearings which commence on and from 1 June 2022 irrespective of when the offence was committed.

In the Second Reading Speech the Attorney General said...

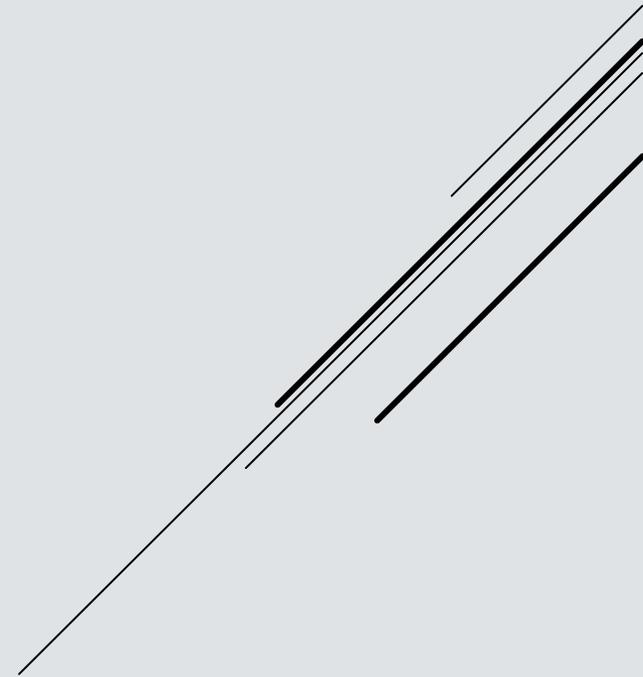
- These common sense reforms will make consent law easier to follow and ensure more effective prosecutions.
- The bill reinforces the basic principle of common decency that consent is a free and voluntary choice at the time of sexual activity, involving mutual and ongoing communication.
- Consent cannot be presumed. No-one should assume someone is saying 'yes' just because they do not say 'no' or do not resist physically.
- The changes are consistent with the notion of sexual autonomy that underpins the communicative model of consent and reflect community standards of respectful sexual relations.

Second Reading Speech, Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021, NSW Legislative Assembly, Debates, 20 October 2021 at p. 51 and p. 52.

SECTION 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 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 as 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 as 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**.

Of s 61HJ(1)(a), which is sometimes referred to as the 'freeze' provision, the Attorney General said ...

Silence does not mean consent, nor should consent be inferred when a person remains unresponsive. Consent is something which must be actively communicated. This lies at the core of the communicative model of consent embodied in the Crimes Act and, in particular, in the definition of 'consent' as a free and voluntary agreement to participate in a sexual activity.

Consent is not an abstract concept in the mind of one person. It is an agreement between two people, and there can be no agreement without communication. This is why a person who does not communicate their consent by saying or doing something cannot be taken to consent.

Second Reading Speech, Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021, NSW Legislative Assembly, Debates, 20 October 2021 at p. 53.

SECTION 61HK: KNOWLEDGE ABOUT CONSENT

- 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
 - 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 the 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.
- 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
 - b) 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.
- 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.

- Sections 61HK(1)(c) and 61HK(2) are the changes of substance and reflect the 'positive consent' model (with an exception for an accused who is affected by a cognitive or mental health impairment).
- The 'no reasonable belief' test in s 61HK(1)(c) has been described as a **hybrid subjective/objective test**. It requires the fact finder to consider whether the accused's belief was **objectively reasonable** in the circumstances and the **subjective belief** must be whether consent (meaning free and voluntary agreement) existed at the time of the sexual activity.
- A further requirement relevant to s 61HK(1)(c) is imposed by s 61HK(2) which reinforces that consent cannot be assumed. It imposes a **positive obligation on the accused to have formed a reasonable belief**, through doing or saying something ("Are you okay with this?") to ascertain that the other person consents to the sexual activity.
- There is no change to the onus of proof. Where the third limb is engaged (ie. honest belief), the Crown must prove beyond reasonable doubt that the accused **did not have reasonable grounds for believing that the person consented**.

SECTION 292: DIRECTIONS IN RELATION TO CONSENT

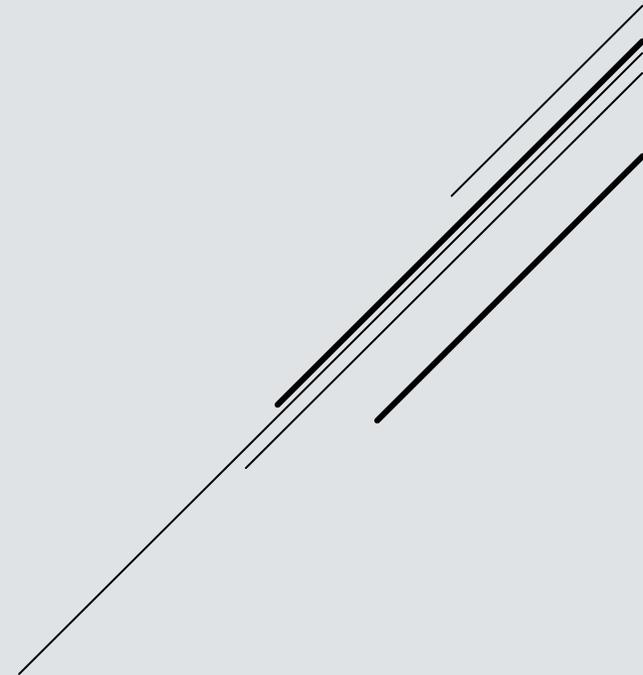
1. This Subdivision applies to a trial of a person for an offence, or attempt to commit an offence, against the Crimes Act 1900, section 61I, 61J, 61JA, 61KC, 61KD, 61KE or 61KF.
 2. In a trial to which this Subdivision applies, the judge **must** give any 1 or more of the directions set out in sections 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 one occasion** during a trial.
- 

SECTION 292A: CIRCUMSTANCES IN WHICH NON-CONSENSUAL SEXUAL ACTIVITY OCCURS

Direction —

Non-consensual sexual activity can occur—

- (a) in many different circumstances, and
- (b) between different kinds of people including—
 - (i) people who know one another, or
 - (ii) people who are married to one another, or
 - (iii) people who are in an established relationship with one another.



SECTION 292B: RESPONSES TO NON-CONSENSUAL SEXUAL ACTIVITY

Direction —

There is no typical or normal response to non-consensual sexual activity.

People may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything.

The jury must avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity.

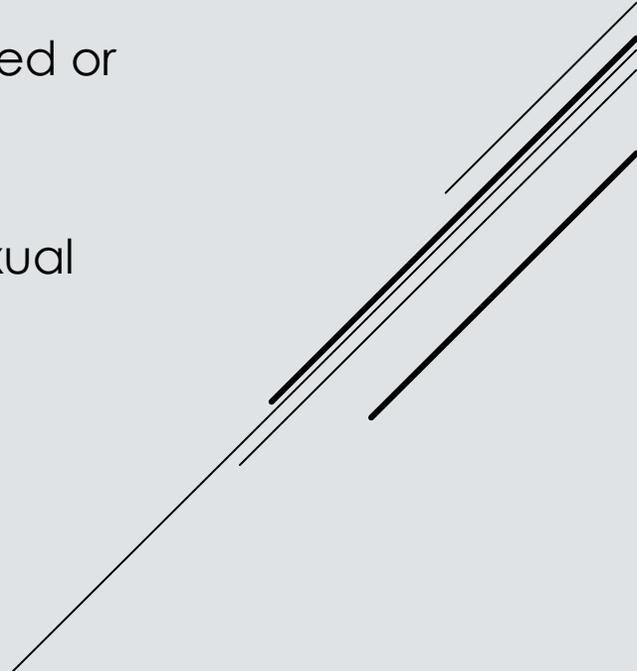


SECTION 292C: LACK OF PHYSICAL INJURY, VIOLENCE OR THREATS

Direction —

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.

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.

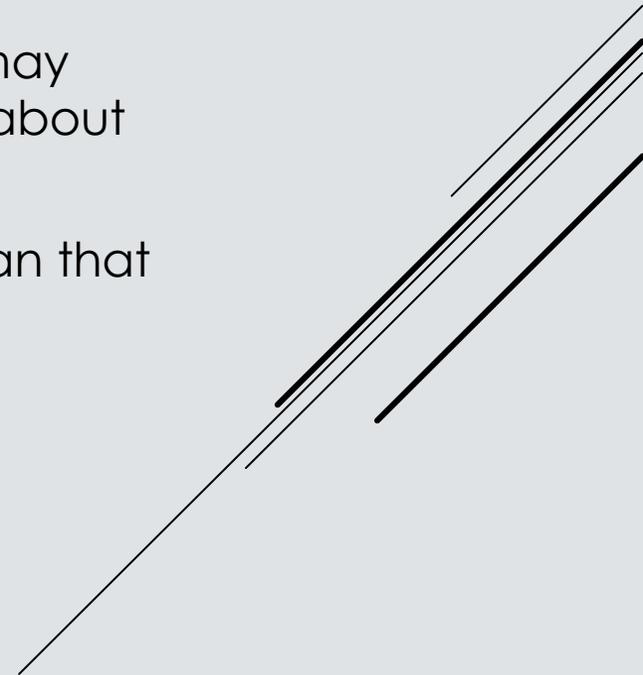


SECTION 292D: RESPONSES TO GIVING EVIDENCE

Direction —

Trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence, but others may not.

The presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth about an alleged sexual offence.

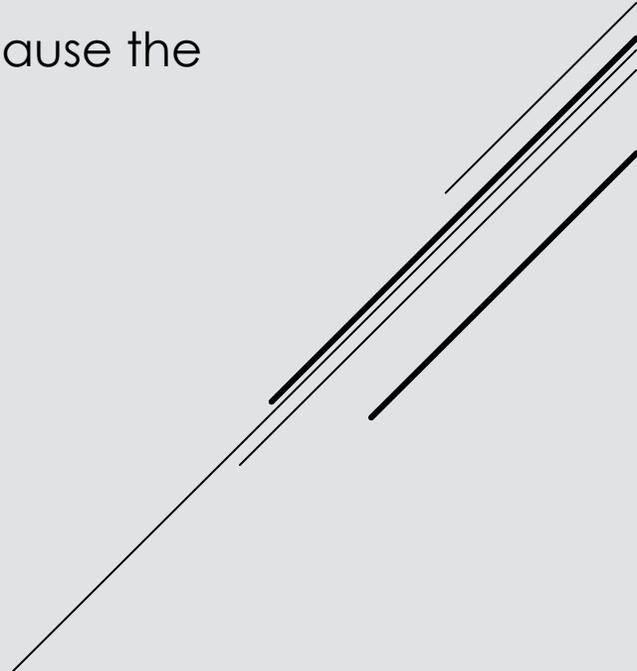


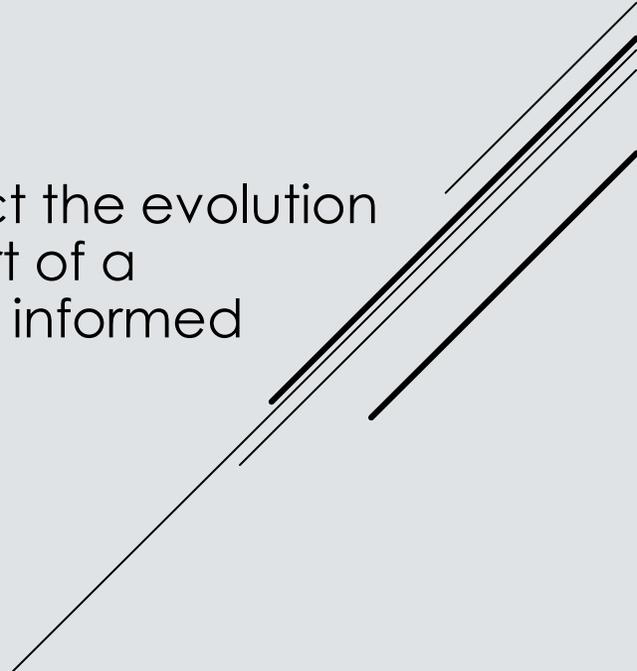
SECTION 292E: BEHAVIOUR AND APPEARANCE OF COMPLAINANT

Direction —

It should not be assumed that a person consented to a sexual activity because the person—

- a) wore particular clothing or had a particular appearance, or
- b) consumed alcohol or another drug, or
- c) was present in a particular location.



- In addition to the 5 consent directions in 292A to 292E, changes have been made to ss 293A (warning in relation to differences in complainant's account), 294 (warning about absence of complaint and delay) and 294AA (complainants not being a class of witnesses who are unreliable or that it would be dangerous to convict). These changes involve replacing the word 'warning' with 'direction or direct'.
 - These amendments coupled with the consent amendments reflect the evolution of the understanding of a possible range of behaviours on the part of a complainant both during and after a sexual assault and a trauma informed approach which is increasingly being taken to their evidence.
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SOME PRACTICAL CONSIDERATIONS ARISING FROM THE AMENDMENTS ...

- Where 61HK(1)(c)(no reasonable belief) arises, identify as early as possible what it is said that the accused said or did, within a reasonable time before or at the time of this sexual activity' to find out whether the person consented to the sexual activity' and ensure the jury is directed that the onus of proof beyond reasonable doubt that the accused did not have a reasonable belief as to consent remains on the Crown.
- Consider which consent directions are appropriate and when they should be given – recognising that they are not a basis to undermine the onus of proof or the jury's obligation to assess all of the evidence.
- If the accused is convicted, consider what findings should be made on sentence regarding which limb of s 61 HK(1) was proved beyond reasonable doubt. All things being equal, arguably actual knowledge would be objectively more serious than where the accused subjectively believed the other person consented but that belief was not reasonable.