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The law on consent in sexual assault is changing

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Legislation to change the law of consent is expected to commence in early June 2022. This article summarises the changes that the *Crimes Legislation Amendment (Sexual Consent Reforms) Act* 2021 will introduce as well as the legislated jury directions added to the *Criminal Procedure Act* 1986. The directions address perceived misconceptions about the conduct of a sexual assault complainant and the possible manner of such complainants giving evidence.

Introduction

The *Crimes Legislation Amendment (Sexual Consent Reforms) Act* 2021 ("the Act") passed both Houses of Parliament in November 2021.[1] It is anticipated the Act will commence in early June 2022. The Act makes three significant changes.

First, the Act amends the definition of consent in the *Crimes Act* 1900.

Second, it alters the circumstances in which knowledge of the absence of consent is demonstrated by specifying that the 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.

Third, it introduces into the *Criminal Procedure Act* 1986 (CPA) five directions about consent to address the potential impact on a jury of misconceptions about the way complainants conduct themselves in the context of an alleged sexual assault.

The Act also includes amendments to the *Crimes Act* intended to clarify aspects of the definitions of sexual intercourse, sexual touching and sexual act and consequential amendments to the *Criminal Procedure Act*. The amendments made to the definitions of sexual intercourse and sexual touching update the language used to ensure they apply irrespective of a person's gender and so that sexual activities are described in language appropriate to sexual assault.[2]

The changes to the *Crimes Act*, including to the definition of consent, commence on proclamation and apply to offences committed on and from commencement.[3]

The new jury consent directions apply to hearings which commence on the proclamation date regardless of when the offence was committed.[4]

FEATURES

REGULARS

The Act follows a review of the law of consent that the NSW Law Reform Commission (NSWLRC) conducted as a result of the two Court of Criminal Appeal (NSWCCA) decisions in 2016 and 2017 in the *Lazarus* case.[5] When introducing the Bill, the Attorney General described the Act as a "significant reform to strengthen the law in relation to sexual offending and to ensure that these serious crimes are prosecuted fairly and effectively".[6] In outlining the background to, and rationale for, the various changes, this article will refer to both the NSWLRC's Report and the Attorney General's Second Reading Speech. In doing so, it is not intended to suggest that they can necessarily be relied on to resolve any controversies that may arise as to the interpretation of any particular provision of the Act.[7]

Background

While the impetus for these reforms arose initially from community concern following the *Lazarus* case, the NSWLRC's review occurred at a time when public discourse about sexual assault and harassment, both in Australia and overseas, had become increasingly prominent.

Consent in relation to sexual offences is addressed in the current s 61HE of the *Crimes Act*. Section 61HE(3) sets out three ways in which knowledge about lack of consent can be established: (a) the person knows the other person does not consent, (b) the person is reckless as to whether the other person consents, or (c) the person has no reasonable grounds for believing the other person consents.

In the *Lazarus* case, the complainant[8] (Saxon Mullins) alleged she was sexually assaulted in an alley behind a Kings Cross nightclub. The issue at the ensuing trials was whether Mr Lazarus knew Ms Mullins did not consent to the sexual intercourse which it was conceded had occurred. Following each of the two trials, the NSWCCA concluded that incorrect directions were given about the third way that lack of consent could be established, that is, the person had no reasonable grounds to believe the other person had consented.

As part of its review of the law of consent, the NSWLRC also considered whether juries in sexual assault trials should be given specific directions about what were described as certain misconceptions about the ways sexual assault complainants may conduct themselves both around the time of, and following, an assault.[9]

Consent changes

The Act inserts into the *Crimes Act* a new subdivision "Consent and knowledge of consent" comprising ss 61HF–61HK.[10] This replaces the current definition of consent in s 61HE of the *Crimes Act*. These provisions apply to the basic and aggravated offences of sexual assault (*Crimes Act*, ss 61I, 61J, 61JA), sexual touching (ss 61KC, 61KD) and carrying out a sexual act (ss 61KE, 61KF): s 61HG. They apply to offences committed on and from the commencement date.[11]

Central to these amendments is the significance of communication about consent, by either words or actions, before sexual activity occurs between two people.

The Attorney General said in the Second Reading Speech that 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".[12] This is given statutory effect in s 61HF which states that an objective of this part of the Act is to recognise that:

(a) every person has a right to choose whether or not to participate in a sexual activity[13]

(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.

The Attorney General stated that these are not new concepts but said stating them expressly in the legislation enhanced the communicative model of consent embodied in the criminal law, would guide the application of the law and aid the understanding of consent in the general community.[14]

Consent defined — s 61HI

The definition of consent in s 61HI provides that:

(1) A person ***consents*** to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to it.

(2) A person may, by words or conduct, withdraw consent to a sexual activity at any time.

(3) Sexual activity occurring after consent has been withdrawn occurs without consent.

(4) A person who does not physically or verbally resist 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. [An example of this is provided: a person who consents to a sexual activity with a condom is not to be taken to consent to a sexual activity without using one.]

(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 61HI(1) is in broadly similar terms to the current s 61HE(2).[15] The core aspect of the definition of "free and voluntary" agreement remains unchanged, but the section makes clear that consent operates "at the time of the sexual activity". This reflects the position at common law.[16] In the Second Reading Speech, the Attorney General described consent as a "continuum" where a person can consent to and maintain consent to multiple

forms of sexual activity and said a "common sense" and not "an unduly narrow" approach should be taken as to what would constitute a different sexual activity.[17]

Circumstances in which a person does not consent — s 61HJ

A non-exhaustive list of circumstances in s 61HJ(1) provides that a person does not consent to a sexual activity if:

(a) they do not say or do anything to communicate consent
(b) they do not have the capacity to consent to the sexual activity
(c) they are so affected by alcohol or another drug as to be incapable of consenting to the sexual activity
(d) they are unconscious or asleep
(e) they participated 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
(f) they participate 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
(g) they participate in the sexual activity because they or another person is unlawfully detained
(h) they participate in the sexual activity because they are overborne by the abuse of a relationship of authority, trust or dependence
(i) they participate in the sexual activity because they are mistaken about:
    (i) the nature of the sexual activity, or
    (ii) the purpose of the sexual activity, including about whether it is for health, hygienic or cosmetic purposes
(j) they participate in the sexual activity with another person because they are mistaken about:
    (i) the other person's identity, or
    (ii) that they are married to the other person
(k) they participate in the sexual activity because of a fraudulent inducement.

The NSWLRC described the function of a list of circumstances as partly educative — to elaborate on the actual meaning of consent by identifying the circumstances where consent cannot exist and to send a clear message about situations which are non-consensual.[18]

While s 61HJ(1) largely replicates the current ss 61HE(5) and 61HE(6), there are a number of significant additions. Section 61HJ(1)(a) has been introduced to address the "freeze" response where a person may not physically or verbally resist an assault. It is also intended to reinforce the communicative model of consent.[19] Section 61HJ(1)(d) makes clear that a person who is asleep or unconscious cannot consent to sexual activity. Presently s 61HE(5)(b) provides that a person does not consent "if the person does not have the opportunity to consent to the sexual activity because the person is unconscious or asleep". The Act removes the phrase "does not have the opportunity to consent". The NSWLRC described the common law as having left open the possibility that a person in such a state *may* be taken to have had an opportunity to consent,[20] or that they could be treated as having consented on the basis of something they might have said or done in the past. The NSWLRC's recommendation that the law should treat *all* sexual activity involving a sleeping or unconscious person as occurring without consent was adopted.[21] The Attorney General said people in such a state are particularly vulnerable and should be protected by the law, observing that consent "can only be present if the person is awake and conscious" at the relevant time.[22]

Sections 61HJ(1)(e) and 61HJ(1)(f) address the absence of consent in circumstances which may be broadly described as instances of abusive conduct — be it physical or emotional. It is not dependent on the conduct occurring at the same time as the relevant sexual activity: a single instance of the relevant conduct, or conduct which is part of an ongoing pattern, is enough to satisfy the requirements of each section. The Attorney General described s 61HJ(1)(f) as being "intended to capture conduct which may amount to coercive control, especially in the context of domestic and family violence as this type of conduct can be just as oppressive as physical violence or serious threats."[23] However, conduct of the kind described in s 61HJ(1)(e) may also arise in a domestic context.[24]

Section 61HJ(1)(e), which provides that there is no consent if the person participates because of force, fear of force or fear of serious harm, addresses similar conduct to that in the current s 61HE(5)(c) but is broader in scope. The provision now also extends to force, fear of force or fear of serious harm to an animal or property — previously it was limited to the person or another person consenting due to threats of force or terror. "Force" has been added to the list of circumstances and the adjective "serious" was added to avoid overreach.[25] In terms of the conduct caught by the provision, the Attorney General said:[26]

> Ultimately, the scope of conduct captured will depend on the circumstances and whether the person has consented "because of" that fear … it must be proven that the accused's behaviour was a substantial cause of the victim submitting to the sexual act. There must be some force or conduct engaged in by the accused that gives rise to the "fear or harm"; this latter requirement is implicit in the use of the term "force or conduct giving rise to the fear". … The fear is not engaged by reason only of a passive fear existing in the mind of the complainant.

Section 61HJ(1)(f) concerns an absence of consent when a person participates in sexual activity because of coercion, blackmail or intimidation. This is more extensive than the current s 61HE(8)(b) which provides that "it may be established" that a person does not consent to a sexual activity because of "intimidatory or coercive conduct". Each of coercion, blackmail or intimidation were said by the NSWLRC to be broad enough to cover a range of behaviours such as verbal aggression, begging and nagging, physical persistence, social pressuring and emotional manipulation.[27] Of this aspect of the Commission's Report, the Attorney General said:[28]

> for the purposes of this Bill the New South Wales Government does not intend that, for example, mere begging and nagging, given the ordinary meaning of those words, would reach the threshold of coercion, blackmail or intimidation, without more. It is not the intent of the provision to criminalise conduct that does not amount to a serious impingement on a person's right to freely and voluntarily agree, or not agree, to participate in sexual activity.

A new circumstance where there will be no consent is found in s 61HJ(1)(h) — abuse of a relationship of authority, trust or dependence. Currently, this is a circumstance in which it "may be established" that a person does not consent to sexual activity.[29] However, the NSWLRC concluded these should be treated as circumstances where a person does not consent because abuse of such relationships removes a person's ability to make a free and voluntary decision about sexual activity.[30] Note that s 61HJ(1)(h) only applies if the person participates in the relevant sexual activity because they are "overborne" by the relevant relationship. This is not a requirement of the current s 61HE(8)(c).

Section 61HJ(1)(j) concerns the absence of consent to sexual activity based on a mistake about the identity of, or being married to, the other person. The Attorney General said this was "not intended to criminalise conduct based on a person's representations about their gender or sexual characteristics, but … address circumstances where a person agrees to participate in sexual activity under a misapprehension as to who they are engaging in those sexual activities with, or mistakenly believing that the other person is their spouse."[31]

In s 61HJ(1)(k) the term "fraudulent inducement" has been used to address the limitations the NSWLRC identified with the current s 61HE(6)(d) which provides that a person does not consent to sexual activity if they consent under a "mistaken belief about the nature of the activity induced by fraudulent means". Section 61HJ(3) states that "fraudulent inducement" does not include a misrepresentation about a person's income, wealth or feelings. The type of conduct that may amount to fraud is not limited by the legislation. In summary, the Attorney General said that s 61HJ(1)(k):

- was not intended "to criminalise conduct that is not sufficiently serious or closely connected to the complainant's consent as to warrant attributing criminal responsibility … [o]nly very serious deceit is intended to fall within the scope of this section" — lies about wealth, physical strength or marital status were not included
- required more than silence or non-disclosure on the accused's part — there must be a positive act or spoken words which the accused knows to be false and, by making the representation, the accused intends to obtain the complainant's participation in the sexual activity
- requires a direct causal relationship between the fraudulent inducement and the complainant's agreement to participate in the sexual act.[32]

Proving knowledge of the absence of consent — s 61HK

Section 61HK, which addresses knowledge about consent, and which the Attorney General describes as a "cornerstone"[33] of the Act, provides that:

1. A person (the accused) is taken to know another person does not consent to a sexual activity if—
   (a) the accused actually knows the other person does not consent to the sexual activity, or
   (b) the accused is reckless as to whether the other person consents to the sexual activity, or
   (c) any belief the accused 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 the other person consents to a sexual activity is not reasonable if the accused 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 shows that—
   (a) the accused 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 not saying or doing anything.
4. The onus of establishing a matter referred to in subsection (3) lies with the accused 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 said or did, and
   (b) must not consider any self-induced intoxication of the accused.

Dealing first with making findings about knowledge of consent, s 61HK(5), consistently with the current law,[34] requires the tribunal of fact to consider all the circumstances, including anything said or done by the accused. Any self-induced intoxication of the accused cannot be taken into account.

As is the case with the current s 61HE(3), s 61HK(1) retains three bases for establishing knowledge of the absence of consent. The first two, actual knowledge and recklessness (in ss 61HK(1)(a) and (b)), remain unchanged. While the third, in s 61HK(1)(c), retains what is described as a "hybrid subjective/objective test",[35] the current test of "no reasonable grounds" [36] is replaced with a "no reasonable belief" test.

In his Second Reading Speech, the Attorney General said that s 61HK(1)(c) focused on:[37]

> the reasonableness of any belief an accused has, or may have, in light of all relevant circumstances, rather than on the narrow question of whether there existed any single ground or grounds on which the accused may have held that belief. It is not intended that personal characteristics of an accused in the form of misogynistic beliefs would generally or typically be taken into account in determining whether their belief as to consent is "reasonable in the circumstances" under section 61HK(1)(c).

The section requires a fact finder to consider whether the accused's belief was objectively reasonable in the circumstances and the relevant subjective belief must be whether consent, in the form of free and voluntary agreement, existed at the time of the particular sexual act.[38]

Limits on the reasonableness of an accused's belief for the purposes of s 61HK(1)(c) are contained in what the Attorney General describes as the "affirmative consent requirement" introduced in s 61HK(2). The NSWLRC considered, but rejected, such an approach partly because of concerns about the potential effect of a such a requirement on the rights of an accused, but also because the existing requirement to consider "all" the circumstances surrounding a particular incident of sexual activity, including an accused's failure to take steps, appropriately directed attention to all aspects of the accused's behaviour.[39]

However, the Attorney General said that s 61HK(2) "reinforces the important principle that consent can never be assumed".[40] The section imposes a positive obligation on the accused to have said or done something so as to have a reasonable belief that the other person consented to the relevant sexual activity. As to whether such a provision may be read as imposing an onus on an accused, the Attorney General said:[41]

> The onus remains on the Crown to prove each element of the sexual offence beyond reasonable doubt … [A]ffirmative consent does not reverse this onus or abrogate an accused's right to silence. When a belief in consent is raised as a fact in issue, the reasonable belief test will be engaged, and the Crown must prove beyond reasonable doubt that the accused had no reasonable belief in consent. This may include evidence that the accused did not say or do anything to find out if the other person was consenting. It may also require the jury to assess whether any actions taken by the accused were sufficient so as to constitute a reasonable belief in consent in all the circumstances.

Section 61HK(3) provides an exception to s 61HK(2) for an accused with a mental health or cognitive impairment which was a "substantial cause" of the accused not saying or doing anything to ascertain consent. The onus in this respect lies on the accused on the balance of probabilities: s 61HK(4).

The new subdiv 1A does not expressly address the interrelationship between the expanded circumstances set out in s 61HJ(1) as to when a person does not consent to sexual activity and an accused's knowledge of the absence of consent in s 61HK. For example, the current s 61HE(6) provides that a person who consents to a sexual activity with or from another person is to be taken as not consenting to the sexual activity if they were under a mistaken belief as to their identity, or that the other person is married to them, or that the sexual activity is for health or hygienic purposes or as to the nature of the activity induced by fraudulent means. Current s 61HE(7) provides that if the accused knows the person consents under such a mistaken belief then they are to be taken as "know[ing] that the person does not consent to the sexual activity". There is no equivalent provision in the new subdiv 1A.

The NSWLRC addressed this in its report. It considered that a provision such as s 61HE(7) was unnecessary because "there is a direct relationship between the definition of consent and the circumstances listed in s 61HJ(1) in which a person does not consent."[42] According to the NSWLRC, this meant that if any of the circumstances in s 61HJ(1) is proven to exist "the complainant does not consent" and if the "accused person 'knows' that the sexual activity occurred under any of these circumstances, by definition the accused person knows that the complainant did not consent to the activity".[43] This approach treats the "actually knows the other person does not consent" in s 61HK(1)(a) as encompassing all of the circumstances in s 61HJ(1), some of which have a causal component ("because") and some of which do not (see for example s 61HJ(1)(b)).

Mandatory directions concerning consent — new ss 292 – 292E, Criminal Procedure Act

The Act inserts new ss 292–292E into the *Criminal Procedure Act.* These provisions empower and in some respects oblige trial judges to give the jury directions about consensual and non-consensual sexual activity (a consent direction).[44] The Attorney General said the purpose of these provisions was to "address common misconceptions about consent and to ensure a complainant's evidence is assessed fairly and impartially

by the tribunal of fact".[45] The NSWLRC recommended these directions to discourage jurors from relying on misconceptions and assumptions about consensual and non-consensual sexual activity when making decisions in sexual assault trials.[46] The extent to which actual juries rely on such misconceptions is unknown because most of the research in this area involves mock juries.[47]

The NSWCCA has made various statements about the dangers of drawing unwarranted assumptions based on a complainant's behaviour in the context of an individual case and of the necessity to avoid outmoded ways of reasoning about the ways sexual assault complainants may behave.[48] For example, in *Maughan v R*,[49] RA Hulme J observed:

> It is futile to assess the behaviour of sexual assault complainants by reference to stereotypical expectations. The criminal law has moved past the era in which this was often prominent in a defence to a sexual assault allegation. Jurors applying a sensible and mature understanding of human behaviour are far less likely now to be persuaded by such propositions.

Sections 292–292E apply to offences whenever they were committed "but *not if the hearing* of the proceedings began before the commencement of the amendment" [emphasis added].[50] A similar phrase was considered by the NSWCCA in *GG v R*[51] where Beazley JA accepted that a reference in these terms is to the hearing of the particular proceeding such as the trial itself.[52] The position in relation to the commencement of a hearing in the Local Court is less clear, but an analogy might be drawn with the reasoning of the NSWCCA in *GG v R*, with the effect that a hearing in that court commences on the day a matter is listed for hearing, not on one of the preceding mentions of the matters in its early stages.

The consent directions apply to the basic and aggravated offences of sexual assault (*Crimes Act* 1900, ss 61I, 61J, 61JA), sexual touching (ss 61KC, 61KD) and carrying out a sexual act (ss 61KE, 61KF): s 292(1). They complement existing directions in the Act concerning the following:

- delay in, or lack of, complaint[53]
- uncorroborated evidence of a complainant,[54] and
- differences of account a complainant may give of an alleged sexual assault.[55]

There are five consent directions set out in ss 292A to 292E. Section 292A enables a direction to be given that non-consensual sexual activity can occur in many different circumstances and between different kinds of people including those known to one another, married to one another, or in an established relationship with one another.[56]

Sections 292B addresses the circumstance of non-typical responses to non-consensual sexual activity and requires a judge to direct a jury to avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity. It directs attention to the fact there is no typical or normal response to non-consensual sexual activity and that people may respond differently including by freezing and not saying, or doing, anything.[57]

The absence of physical injury, violence or threats is the subject of the direction in s 292C. It enables a direction to be given that 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. Further, the absence of these does not necessarily mean that a person is not telling the truth about an alleged sexual offence.[58]

Misperceptions of the manner in which evidence may be given about an alleged sexual offence are addressed in s 292D which provides for a direction that trauma may affect people differently, with some showing obvious signs of emotion or distress when giving evidence about an alleged sexual offence while others may not, and that the presence or absence of either does not necessarily mean a person is not telling the truth about it.[59]

Section 292E addresses a complainant's behaviour and appearance and provides for a direction that it should not be assumed that a person consented to a sexual activity because they wore particular clothing or had a particular appearance, had consumed alcohol or another drug, or were present in a particular location.[60]

There is no mandatory requirement to give a consent direction but in a trial to which these provisions apply, s 292(2) of the Act states that the trial judge "must give any 1 or more" of the consent directions if:

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

(b) if requested by one of the parties to do so *unless* there is a good reason *not* to give the direction.[61]

A consent direction may be given at any time during a trial and may be given more than once: s 292(4). There is no requirement to use a particular form of words in giving any consent direction: s 292(3).

The wording of each of the consent directions in ss 292A–292E is sufficiently general to be adapted to the circumstances of an individual case and the point during the trial when the direction is being given. Suggested directions are being prepared for the *Criminal Trial Courts Bench Book* but, as is the case with any suggested direction, it will be necessary for the trial judge to adapt these to suit the circumstances of the case at hand. The authority to give these directions at any point during the trial suggests that either at the beginning of the trial, or at least before the complainant is called to give evidence, it may be good practice for the trial judge to raise the issue of what directions may be required with the parties. For example, if consent and knowledge of the lack of consent are the real issues in the trial, it may be that one or more of these directions should be given to the jury at the outset along with a reminder of the onus of proof and the usual admonitions about assessing evidence and considering all the evidence in the trial.

Other changes

In addition to the directions in ss 292A–292E, consequential changes have been made to ss 293A, 294, and 294AA of the *Criminal Procedure Act* which concern other aspects of the evidence given by a complainant in a sexual assault trial. This involves replacing the word "warning" in the section headings and within the section itself with "direction" or "direct".[62] This is an important albeit subtle shift. A warning may defined as "something said or written to tell people of a possible danger, problem, or other unpleasant thing that might happen".[63] Historically, aspects of a complainant's evidence in cases such as these were regarded as unreliable and a jury was warned about relying on the evidence unless certain pre-conditions were met.[64] This was intended as a safeguard to ensure an accused received a fair trial. However, provisions such as ss 293A, 294, and 294AA reflect the evolution in understanding of a complainant's possible ranges of behaviour, both during and following a sexual assault, and the trauma-informed approach which is increasingly taken to their evidence.

A review of certain of the new provisions relating to consent is provided for in s 583 of the *Crimes Act* and s 368 of the *Criminal Procedure Act* respectively. The review is to commence "within 6 months after the period of 3 years"[65] following commencement. A report tabled in Parliament following a s 583 review must detail the type of training provided in relation to communicative consent, the number and kinds of persons to whom that training has been provided (including whether it is has been provided to, inter alia, judicial officers) and how effective the training has been.[66] For a review pursuant to s 368, the Minister must consider the transcripts of trials conducted during the review period in which one of the consent directions in ss 292A–292E was given or requested by a party to the proceedings.[67]

The Judicial Commission will be offering education programs associated with both aspects of the reforms — both before and after commencement of the Act. Programs of this kind are recorded in the Commission's Annual Report.

Conclusion

Although the Act contains more guidance than is usual in relation to jury directions, there are particular challenges in drafting the directions to give effect to the intention of the legislature, given the range of offences and conduct to which they apply, and the desire to deal with "misperceptions" of jurors about aspects of a complainant's behaviour. This legislation requires a reworking of the existing directions in the *Criminal Trial Courts Bench Book* for many of the sexual assault offences, and the addition of new directions. It is anticipated these will be available to coincide with the commencement of this legislation.

However, even in the absence of suggested directions, a few conclusions can still be drawn at this point about the practical effect on trial judges of the changes made by the Act to the meaning of consent and the circumstances in which knowledge of the absence of consent can be proved. First, it will be necessary to clearly identify whether the case raises any circumstance that may fall within s 61HJ and determine how that affects proof of knowledge of absence of consent. This should be done by consulting the parties at the beginning of the trial if possible.

Second, in any case where s 61HK(1)(c) arises, it will be necessary to identify, as early as possible, what it is said the accused had said or done, within a reasonable time before or at the time of the sexual activity, "to find out whether the other person consent[ed] to the sexual activity".[68] Moreover, in such cases it will be especially important to explain to the jury that the onus of proof beyond reasonable doubt that the accused did not have a reasonable belief as to consent is still on the prosecution.

Third, in the event that a conviction ensues, it is important for trial judges to at least consider whether, in light of the jury's verdict, findings should be made on sentence as to which limb of s 61HK(1) the Crown had proved beyond reasonable doubt. All other matters being equal, the objective seriousness of an offence where the accused actually knew the other person did not consent to sexual activity is potentially much greater than, say, the objective serious of an offence where the accused subjectively believed the other person consented but that belief was not reasonable principally because the accused did not say or do anything to find out whether they consented.

Similarly, in relation to those parts of the Act that empower trial judges to give the directions referred to in s 292 of the CPA, three points can be noted. First, trial judges need to be cognisant that these provisions appear to apply to hearings that start immediately after the Act commences, as opposed to only applying to persons who are charged after the Act commences. Second, as noted above, the potential for these directions to be engaged should be ascertained at the earliest possible time in the trial so that consideration can be given to whether such a direction should be made well before the summing up. Third, the content and context of the direction will need to be considered carefully, especially in light of what is known about the defence case. They are not a basis for a general undermining of either the onus of proof or the jury's obligation to properly assess all the evidence of a witness.

Endnotes

1 Assented 8/12/2021, GG No 649, 17/12/2021, n2021-2831.
2 *Crimes Legislation Amendment (Sexual Consent Reforms) Act* 2021 (the Act), Sch 1 [1]–[5].
3 The Act, Sch 1 [25].
4 The Act, Sch 2 [20].
5 *Lazarus v R* [2016] NSWCCA 52 and *R v Lazarus* [2017] NSWCCA 279.
6 Second Reading Speech, Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021, NSW, Legislative Assembly, *Debates*, 20 October 2021 at p 51.
7 See *Interpretation Act* 1987, s 34 — in particular, s 34(2)(b).

8 Ms Mullins identified herself as the complainant in the *Lazarus* case in "I am that girl", *Four Corners*, ABC Television, 7 May 2018. See also *Crimes Act* 1900, s 578A(4)(b).
9 NSW Law Reform Commission (NSWLRC), *Consent in relation to sexual offences*, Report No 148, 2020, Ch 8.
10 *Crimes Act*, Pt 3, Div 10, Subdiv 1A: *Crimes Legislation Amendment (Sexual Consent Reforms) Act* 2021 (the Act), Sch 1[9].
11 The Act, Sch 1 [25].
12 Second Reading Speech, above n 6 at p 51.
13 "Sexual activity" is defined in s 61HH of the Act as sexual intercourse, sexual touching or a sexual act.
14 Second Reading Speech, above n 6 at p 53.
15 Section 61HE(2) *Crimes Act* states: "A person ***consents*** to a sexual activity if the person freely and voluntarily agrees to the sexual activity."
16 NSWLRC, above n 9 at 5.22–5.29.
17 Second Reading Speech, above n 6 at p 52.
18 NSWLRC , above n 9 at 6.191.
19 Second Reading Speech, above n 6 at p 53. See also NSWLRC Report, above n 9 at 6.25–6.59.
20 See for example *WO v DPP(NSW)* [2009] NSWCCA 275 at [71].
21 NSWLRC, above n 9 at 6.89–6.99.
22 Second Reading Speech, above n 6 at p 53.
23 ibid at p 54.
24 NSWLRC, above n 9 at 6.100 – 6.108.
25 Second Reading Speech, above n 6 at p 53.
26 ibid at pp 53-54.
27 NSWLRC, above n 9 at 6.108.
28 Second Reading Speech, above n 6 at p 54.
29 *Crimes Act*, s 61HE(8)(c).
30 NSWLRC, above n 9 at 6.126.
31 Second Reading Speech, above n 6 at p 54. See also NSWLRC, above n 9 at 6.134–6.164.
32 Second Reading Speech, above n 6 at pp 54–55.
33 ibid at p 55.
34 *Crimes Act*, s 61HE(4).
35 Second Reading Speech, above n 6 at p 55.
36 See *Lazarus v R* [2016] NSWCCA 52 at [156]. See also NSWLRC, above n 9 at 7.43–7.46; 7.54–7.62.
37 Second Reading Speech, above n 6 at p 56. See also *Lazarus v R*, ibid at [156] and the discussion of this aspect of that case in NSWLRC, above n 9 at 7.68–7.71.
38 Second Reading Speech, above n 6 at p 56.
39 NSWLRC, above n 9 at 7.107–7.121.
40 Second Reading Speech, above n 6 at p 56.
41 ibid.
42 NSWLRC, above n 9 at 7.189.
43 ibid at 7.190.
44 The Act, Sch 2 [3].
45 Second Reading Speech, above n 6 at p 58. See also NSWLRC, above n 9 at 8.45; 8.151.
46 NSWLRC, above n 9 at 8.45; 8.151.
47 ibid at 8.31–8.38 and, in particular, the research referred to in the footnotes to 8.32 and 8.33. See also C Thomas, "The 21st century jury: contempt, bias and the impact of jury service" (2020) 11 *Crim Law Review* 987.
48 See, for example, *Khamis v R* [2018] NSWCCA 131 at [56]–[58] (Gleeson JA); at [533] (Button J); *Rao v R* [2019] NSWCCA 290 at [98]; *Xu v R* [2019] NSWCCA 178 at [92]; *Maughan v R* [2020] NSWCCA 51 at [2] (RA Hulme J); at [13] (Adamson J); at [99] (Ierace J).
49 [2020] NSWCCA 51 at [2].
50 The Act, Sch 2 [20].
51 (2010) 79 NSWLR 194 at [101]–[103].
52 ibid at [101]; see also *R v Janceski* (2005) 64 NSWLR 10 at [218]–[220].
53 *Criminal Procedure Act* 1986 (CPA), s 294(1).
54 CPA, s 294AA(2).
55 CPA, s 293A.
56 The rationale for this direction is explained in NSWLRC, above n 9 at 8.91–8.97.
57 The rationale for this direction is explained in NSWLRC, ibid at 8.98–8.103.
58 ibid at 8.104–8.110 explains the rational for this direction.
59 This is discussed in NSWLRC, ibid at 8.111–8.119.
60 Discussed in NSWLRC, ibid at 8.120–8.132.
61 Discussed in NSWLRC, ibid at 8.67–8.72.
62 The Act, Sch 2 [5]–[16].
63 Collins Dictionary on-line at www.collinsdictionary.com/dictionary/english/adequate-warning, accessed 31/1/2022.
64 Delay in complaint is an example.
65 *Crimes Act*, s 583(3); CPA, s 368(3).
66 *Crimes Act*, s 583(6).
67 CPA, s 368(2).
68 The Act, s 61HK(2).

District Court of NSW Walama List is launched

As foreshadowed in the December 2021 *Judicial Officers Bulletin*,[1] the District Court of NSW commenced the Walama List Pilot on 31 January 2022. The Walama List is an alternative sentencing procedure for eligible Aboriginal and Torres Strait Islander offenders who appear for sentence and aims to reduce re-offending. Congratulations to all involved in making this possible. Further information can be found in the **District Court Criminal Practice Note 26 Walama List Sentencing Procedure Recent Law item** and in the **Walama List factsheet**.

1 D Yehia, "Introducing the Walama List Pilot at the District Court of NSW" (2021) *JOB* 114.