



Legal Studies State Conference 2022

Consent Legislation in NSW

Nicholas Cowdery AO QC
Former Director of Public Prosecutions, NSW

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INTRODUCTION

The topic of this paper refers, of course, to the laws that surround the effective giving of consent to sexual conduct that would otherwise be criminal. I am not undertaking a survey of the law regulating consent in other areas – and there are many in both criminal and civil law where some kind of consent to some kind of action or proposition may be indicated.

This may be something that may intrude upon your duties as high school teachers when dealing with students and their personal issues. I note also that on International Women’s Day (8 March 2022) Labor pledged \$77m to train teachers how to talk to students about sexual consent and respectful relationships in an age-appropriate way, which I understand has been included in recent changes to the national school curriculum. The government has pledged \$32m to run a campaign targeting young people and their parents. But it is also something of which all responsible citizens, of all ages, should be aware because it imports legislated community standards into personal interactions and conduct. Ultimately it will be for magistrates, judges and juries in individual cases to apply those standards in accordance with the law.

It is a matter that comes to the fore whenever the media get hold of a controversial case in which it appears community standards may not have been met and it is then flogged to death from all angles. Eventually the politicians decide to act and that is exactly what has occurred here. You may recall the case of Saxon Mullins and Luke Lazarus in 2015-17. The common law at that time enabled a defence based on honest belief on reasonable grounds that consent had been given.

NSW LAW REFORM COMMISSION [LRC]

¹ BA, LLB *Sydney*, Hon DLaws *W’gong*, FAAL, Hon FACBS; Life Member of the Legal Studies Association; Former President of the International Association of Prosecutors; Inaugural Co-Chair of the Human Rights Institute of the International Bar Association; Former Barrister; Former Acting Judge; Consultant; Adjunct Professor of Law and Visiting Professorial Fellow; Campaign Champion, JustReinvest NSW; a director of Justice Reform Initiative; tyro teacher...and more.

FOOTNOTE: I am privileged to be a Life Member of the Legal Studies Association and the only non-teacher to be so. This is the 18th conference I have addressed in 20 years, having been overseas in 2010 and having provided a handout in 2020. I am heartened by the dedication you show to the education of our students in matters that will help them to understand and work to support the legal institutions, principles and processes that help to make ours a good – and a safe – community.

So it was on 3 May 2018 when the NSW LRC received a reference from the Attorney General “to review and report on consent and knowledge of consent in relation to sexual assault offences, as dealt with in s 61HA of the Crimes Act 1900 (NSW)”.

At the time of the reference (but not now – see below) Section 61HA provided:

61HA Consent in relation to sexual assault 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 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:

- (d) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but
- (e) 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.

(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 health 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.

The specific offences involved here were confined to sections 61I, 61J and 61JA. If consent were to become an issue in other offences it would be governed by the common law (case law) where the test is similar to subsection (2) highlighted above and a defence may be made out on the basis of honest and reasonable belief in consent.

The NSW LRC Terms of Reference provided that:

In undertaking this review, the Commission should have regard to:

1. Whether s 61HA should be amended, including how the section could be simplified or modernised;
2. All relevant issues relating to the practical application of s 61HA, including the experiences of sexual assault survivors in the criminal justice system;
3. Sexual assault research and expert opinion;
4. The impact or potential impact of relevant case law and developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia, and internationally, on the content and application of s 61HA; and

5. Any other matters that the NSW Law Reform Commission considers relevant.

(This was not going to be an easy task and it became a complicated procedure.)

The final **Report 148 Consent in relation to sexual offences**

(<https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report%20148.pdf>)

was delivered on 21 September 2020 and tabled in Parliament on 18 November 2020. On 15 November 2021 the Bureau of Crime Statistics and Research (BOCSAR) notified the LRC of some incorrect data that it had supplied. On 6 December 2021 the LRC published a comparison of the two sets of data.

The LRC report is 251 pages long and contains 10 recommendations, many of them divided into up to 10 sub-recommendations. You may read those for yourselves.

On 25 May 2021 the Attorney General announced consent law reform and issued a Media Release and Factsheet:

(<https://inbrief.nswbar.asn.au/posts/08b347d11316f1372f3414b4c466afe4/attachment/AG%20media%20release.pdf>). On 20 October 2021 he announced the introduction of a Bill to effect reform, the *Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021* and information about the reforms was published. On 23 November 2021 the reforms were passed by Parliament and announced by the Attorney General.

As amended, the old section 61HA has been split into two, with s61HA now dealing with sexual intercourse and s61HE dealing with consent. The new section 61HE shares a good deal of the old section 61HA, but the differences are important.

Section 61HA now provides:

61HA Meaning of “sexual intercourse”

For the purposes of this Division, *sexual intercourse* means—

(a) sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person by—

(i) any part of the body of another person, or

(ii) any object manipulated by another person,

except where the penetration is carried out for proper medical purposes, or

(b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or

(c) cunnilingus, or

(d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

Section 61HE now provides:

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 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
- (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.

(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 purposes of subsection (3), the other person knows that the person does not consent to the sexual activity if 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 a sexual activity.

(11) In this section—
sexual activity means sexual intercourse, sexual touching or a sexual act.

To recite the events above gives an impression of a smooth flow of actions (apart from the BOCSAR glitch); but it was far from that. In the consultation phase before the amending legislation, vigorous debate was carried out by a large number of concerned agencies and individuals about just what should be included in the law.

There had been a lengthy controversy about whether or not there should be an **affirmative, communicative model of consent** – that is, a model in which consent only occurred if something was done by the relevant potential complainant party to the conduct to positively communicate consent before the conduct occurred. Such a model had been adopted in other Australian jurisdictions, notably Tasmania and Victoria, and elsewhere (eg Canada) – but I do not canvass those developments. It was decided that it would be adopted in NSW.

It was emphasised by many that people must be able to know, in advance, whether or not their conduct might attract criminal liability. For that to happen the law must be readily knowable, available, certain and clear – complying with principles of the rule of law.

Issue was taken with some specific provisions, for example:

- 61HA(a) refers to “proper medical purposes”. It was suggested (unsuccessfully) that it should be “proper medical or hygienic purpose” (to cover, just to take one example, application of cream to an incontinent person or infant). But it did sneak into section 61HE(6) in relation to mistaken beliefs.
- In 61HE it was argued that there should be a provision to cover the continuum of consent that arises where consent is maintained to a sexual activity and not withdrawn, including consent to a range of activities that has been freely and voluntarily given – should there be fresh consent required to every step of foreplay, for instance?
- 61HE(5)(b) includes absence of consent where the person is unconscious or asleep. It was submitted (unsuccessfully) that after “asleep” should be added “unless consent has been given at an earlier time and not withdrawn prior to the time of the sexual activity”.

QUEENSLAND

There are 9 legal jurisdictions in Australia requiring consent laws and in Queensland on 2 September 2019 (16 months after the NSW LRC reference) the Queensland Law Reform Commission received Terms of Reference for an inquiry. Its **Report 78 Review of consent laws and the excuse of mistake of fact** was published in June 2020, three months before the NSW report was delivered:

https://www qlrc.qld.gov.au/_data/assets/pdf_file/0010/654958/qlrc-report-78-final-web.pdf .

I shall refrain from complicating the picture further by analysing that report (the title of this paper refers specifically to NSW).

It is over 250 pages long and contains a mere 5 recommendations.

The legislative actions taken in Queensland after the report are described here:

<https://www.justice.qld.gov.au/about-us/services/women-violence-prevention/violence-prevention/sexual-violence-prevention/review-consent-rape-sexual-assault>

UNITED KINGDOM

In England the Criminal Law Reform Now Network (CLRNN, supported by the Universities of Birmingham and Cambridge and the Arts and Humanities Research Council published in December 2021 a consultation paper on **Reforming the Relationship Between Sexual Consent, Deception and Mistake**. It remains open to submissions until 1 April 2022 (tomorrow). See:

<file:///C:/Users/Nick/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/YQZAJFGC/CLRNN%20Deception%20Consultation%20Paper.pdf>

A glance at the titles of the papers collected there will give you some further insights into the complexity of all this.

The paper makes ten reform proposals for English law, one in each of the papers published, which are themselves composed of many aspects. I don't need to go there, either.

STATE OF THE LAW OF CONSENT IN NSW

I think it is appropriate, before we disappear down the academic rabbit hole of law reform, that I end by trying to summarise just what all this means in practical terms now for the citizens of NSW.

To keep it simple (otherwise we will need to be here for several days), I will frame what I say in the context of a young adult man (call him A) trying to get a young adult woman (call her B) into an intimate connection of some kind (partly because that is the context that most often arises in the criminal courts) for sexual intercourse (see section 61HA above), sexual touching or a sexual act (see "sexual activity" in section 61HE(11) above).

The overarching principle is that B must freely and voluntarily consent to any sexual activity, otherwise A is open to being charged criminally.

A is taken to know that B does not consent if he:

- in fact, knows that;
- is reckless as to whether B in fact consents; or
- has no reasonable grounds for believing that B consents.

Recklessness requires exploration of A's mind at the time of the event. If he failed to consider at all whether B was consenting and went ahead anyway, even though the risk that B was not consenting would have been obvious to someone with A's mental capacity if he had considered it, then that is recklessness. In addition, if A realised that it was possible that B was not consenting but went ahead anyway, that is also recklessness.

Reasonable grounds for belief requires an honest belief by A that was based on reasonable grounds (reasonable in the circumstances of the case) – but again, A's mind at the time would need to be explored.

A court must have regard to any steps taken by A to ascertain whether B consents; so positive action by A to discover that would serve him well.

B must have the capacity to consent; she must have the opportunity to consent; must not be consenting because of any threats of force or terror; and must not be consenting because she is unlawfully detained.

B does not consent if she has a mistaken belief as to: the identity of A; that A is her husband; that the activity is for health or hygienic purposes; the nature of the activity induced by fraud.

IT MAY be established that B is not consenting if she consents: while substantially intoxicated by alcohol or a drug; because of intimidatory or coercive conduct or any threat short of violence; because of the abuse of a position of authority or trust.

The absence of physical resistance by B does not, of itself, demonstrate consent.

Other grounds, not listed in section 61HE, may establish an absence of consent.

I think it may be argued that while the notion of affirmative consent is built into the scheme now provided, even indirectly, there is some falling short in establishing a communicative foundation. Nowhere is it specifically provided that for A to be in the clear, B must communicate consent in some prescribed manner. Perhaps that was a bridge too far. It may be included by implication in the application of sub-section 61HE(4) – the court must take into account any steps taken by A to ascertain whether B consented, so any actions or responses by B would be examined.

The reforms do address the “freeze” response sometimes encountered – where B freezes and submits passively and A can argue belief in consent.

JURY DIRECTIONS

Finally I note that, as the Attorney General's Factsheet stated, some additional directions to juries by judges became available (not mandatory) to address some common misconceptions about consent and to ensure a victim's evidence is assessed fairly and impartially. This is an attempt to provide background education for the jury for when it comes to consider its verdict and not all directions may be appropriate to the facts of all cases. But they are probably some points we all need to remember. The directions are:

- Sexual assault can occur in many different situations, including between acquaintances or people who are married or in a relationship.
- Sexual offences are not always accompanied by violence, threats or physical injuries.
- There is no "normal" or "typical" response to being sexually assaulted and juries must not rely upon preconceived ideas about how people respond to a sexual assault.
- Trauma may affect people differently, meaning some people may show signs of emotional distress when giving evidence and some may not.
- It cannot be assumed that the way a person is dressed or the fact that they have consumed alcohol or drugs indicates their consent.