

*The Shopfront*  
YOUTH LEGAL CENTRE

**Consent:**  
what does it mean and  
why does it matter?  
November 2018





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**Who we are**


- A free legal service for homeless and disadvantaged young people
- A joint project of Herbert Smith Freehills, Mission Australia and The Salvation Army
- Established in 1993
- Based in inner-city Sydney



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**Our clients**

- Aged approx 12–25 years
- Mainly from the city and suburbs of Sydney
- Diverse cultural backgrounds, including indigenous
- Most are homeless or at risk of homelessness
- Most have experienced severe trauma
- Many have complex needs



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**Our services**

- **Court representation**, mostly for young people charged with criminal offences
- **Legal advice and assistance** about issues including criminal law, family law, fines, debts, housing, employment, police misconduct
- **Help for victims of crime**, including compensation claims
- **Social work support**
- **Referrals** to other legal and social services



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**Legal education**

- Workshops for young people at schools, refuges and youth centres
- Training for youth workers, health professionals and others who work with young people
- Legal fact sheets and other publications for young people and youth workers
- Education for lawyers



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**Consent**

- Legal definition of consent
- Sexual intercourse without consent
- Age of consent
- Law reform
- Issues for health workers around under-age sex
- Reporting sexual assault and abuse

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## Sexual intercourse without consent

*Crimes Act 1900 (NSW):*

- section 61I – sexual assault – max penalty 14 years imprisonment
- section 61J – aggravated sexual assault – max penalty 20 years imprisonment
- section 61JA – aggravated sexual assault in company – max penalty life imprisonment

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## Consent – legal definition

- *Crimes Act 1900 (NSW)* section 61HA
- Applies to sexual assault offences
- “A person consents to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse”

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## Consent – legal definition

Cannot consent if:

- lacks capacity due to age or cognitive incapacity
- does not have opportunity to consent because unconscious or asleep
- “consents” because of threats or force or unlawful detention
- “consents” due to mistaken belief

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## Knowledge of lack of consent

Guilty of sexual intercourse without consent if:

- knows the victim does not consent; or
- is reckless as to whether the victim consents; or
- has no reasonable grounds for believing that the victim consents

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## Knowledge of lack of consent

- Court must look at all the circumstances of the case
- This includes any steps taken by alleged offender to ascertain whether the victim was consenting
- Offender’s self-induced intoxication is irrelevant

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## Possible law reform re consent

NSW Law Reform Commission

[https://www.lawreform.justice.nsw.gov.au/Page/s/lrc/lrc\\_current\\_projects/Consent/Consent.aspx](https://www.lawreform.justice.nsw.gov.au/Page/s/lrc/lrc_current_projects/Consent/Consent.aspx)

Submissions close 1 February 2019

### Age of consent

- It is an offence to have sex with a person who is below the age of consent
- It doesn't matter whether they consent or not
- Age of consent in NSW = 16
- Age of consent is same for both males and females, heterosexual and same-sex activity

### Age of consent

Examples of offences under NSW *Crimes Act*:

- Sexual intercourse with child aged 14-15 (section 66C(3)-(4)) – *max penalty 10 years (12 years in "circumstances of aggravation")*
- Indecent assault of child aged under 16 (section 61M) – *max penalty 10 years*
- Act of indecency with or towards child aged under 16 (section 61N) – *max penalty 2 years*

### Age of consent

- It is *not* an offence for a person under 16 to have sex (unless partner is also under 16)
- Where both partners are under 16, who is the victim and who is the offender?
- Honest and reasonable mistake of fact defence
- Similar age defence – being introduced

### Special care offences

- Even if child is over the age of consent
- Offence to have sex with a 16- or 17-yr-old under "special care"
- Examples: step-parents, guardians, carers, custodial officers, health professionals, teachers, coaches, religious leaders
- Definition is very broad: could include genuine age-appropriate consensual relationships
- Similar age defence – being introduced

### Consequences of being found guilty of child sex offences

- Will not always receive prison sentence, but:
- Convictions for sex offences can never be spent
- Deemed a "conviction" even if no conviction recorded (eg. Children's Court, or section 10)
- Child Protection Register
- Working With Children Check

### Similar age defence

- Amendments passed by NSW Parliament 20 June 2018, but not yet in force
- Will apply to sexual intercourse, indecent assault/act of indecency, special care offences
- Will apply if:
  - alleged victim is 14 or over; and
  - less than 2 year age difference between alleged victim and alleged offender

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## Issues for youth/health workers

- Sexual health care/information/education – generally *not* aiding and abetting a crime
- When to report to FaCS?
- When to report to police?

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## Reporting under-age sex to FaCS

- Mandatory reporting (*Children and Young Persons (Care and Protection) Act* section 27)
- Child under 16 “at risk of significant harm”
- Under-age sex doesn’t necessarily mean child is at risk of significant harm
- Inter-agency guidelines  
<https://www.facs.nsw.gov.au/providers/children-families/interagency-guidelines>

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## Reporting to police

- *Crimes Act* s316 – concealing a serious offence
- **NEW** *Crimes Act* s316A – concealing a child abuse offence
- Reasonable excuse
- Limits on prosecuting professionals

