

The law on sex and consent in NSW

Sexual assault is taken seriously in Australia. In an emergency, please call 000.

If you need to talk to someone, please get in touch with the Student Legal Service on (02) 9685 4788 or email the completed SLS [request for help form](#) to studentlegalservices@westernsydney.edu.au.

Free, confidential and professional counselling is available for all students through the student [Counselling Service](#) on counselling@westernsydney.edu.au or 1300 668 370 (option 4 then option 1), Monday to Friday 9am – 4.30pm.

The below information is an informative guide for the benefit of all students on the law on sex and consent in NSW. This has been produced in collaboration between the WSU Student Legal Service and Criminal Defence Lawyers Australia (**CDLA**), a team of experienced [criminal lawyers Sydney](#) based.

CONSENT

What is “consent”?

For sexual activity to be lawful, there must be “consent”, which is when a person freely and voluntarily agrees to the sexual activity.

Consent involves a conscious and voluntary agreement to engage in sexual activity. It can be given verbally or expressed by actions. This also means that the absence of consent does not have to be in words; it can be communicated in other ways such as offering resistance although even where there is no physical resistance there may still be no consent.

Even though “consent” is legally defined, there is still some legal and social ambiguity on the current consent laws in NSW. We will try to simplify it for you here.

When is it considered NOT to be “consent”?

If ‘person A’ and ‘person B’ have sex or engage in sexual activity, person B will be considered NOT to have consented to the sexual activity if:

- person B does not have the capacity to consent due to cognitive incapacity or age; or
- person B does not have the opportunity to consent due to being asleep or unconscious; or
- person B consents because of threats of force or terror. This includes threats that are against, or the terror is instilled in, person B or any other person; or
- person B consents because of being unlawfully detained.

Other circumstances in which it is considered NOT to be consent:

- person B consents under a mistaken belief as to the identity of person A; or
- person B consents under a mistaken belief that they are married to person A; or

- person B consents under a mistaken belief that it was for health or hygienic reasons or because of other fraudulent means.

Circumstances in which a person who gives consent is NOT regarded as giving consent under the law, include where:

- person B was substantially intoxicated by alcohol or drugs; or
- person B was intimidated or threatened or coerced without the use of threat of force; or
- person A held a position of authority or trust over person B, and person A abused that position.

Proving lack of consent

To be guilty of a sexual offence, generally, there are two important criteria on consent that must EACH be proven beyond reasonable doubt by the prosecution, namely:

1. Person B did not consent; and
2. Person A knew that person B did not consent. This can be proven in any one of the following ways:
 - a. Person A knew that person B did not consent.
 - b. Person A is reckless as to whether person B consented. This is where:
 - i. Person A **failed to even consider** whether person B was consenting, yet continued with the sexual activity in circumstances where it would have been obvious to any other person who turned their mind to it that there was no consent; or
 - ii. Person A **realised the possibility** that person B was not consenting yet continued with the sexual activity, ignoring the issue of consent.
 - c. If person A runs the defence of an honest but mistaken belief that person B was consenting, person A can only be guilty, if:
 - i. Person A's **belief was not honestly held** (a subjective test); or
 - ii. There were **no reasonable grounds for person A to have held that belief** (an objective test). In determining this objective test, common sense and current community standards are considered.

In determining whether person A knew or was reckless as to whether person B consented, the circumstances are to be considered, including any steps taken by person A to find out whether person B consented. When examining person A's state of mind to determine this issue, any effects of intoxication are to be ignored.

If person B does not physically resist person A's sexual activity, person B should not necessarily be regarded as consenting. However, the absence of any physical resistance combined with other factors may in some cases be considered consent under the law.

What is the legal age to have sex?

It is a crime to engage in sexual activity with a person who is under the age of 16 under section 66 C of the *Crimes Act 1900* (NSW)(the **Crimes Act**).

Anyone under the age of 16 is considered incapable of providing informed consent for sexual activity.

The maximum punishment for this offence depends on the age of the victim and varies from 10-years to life imprisonment.

SEXUAL ASSAULT

What is sexual assault?

Sexual assault encompasses a range of illegal sexual behaviour including:

1. non-consensual sexual intercourse
2. sexual touching
3. sexual acts
4. revenge porn
5. sending unsolicited nudes to someone else
6. filming a person in a private act
7. voyeurism
8. up-skirting
9. incitement to commit a sexual offence, and
10. sexual harassment.

The law on this is outlined in Part 3, Division 10, 10B, 15B, 15C of the [Crimes Act 1900 \(NSW\)](#)(the **Crimes Act**).

1. Sexual intercourse without consent

It is a crime to have sexual intercourse with a person if it is done without the other person's consent, knowing that that person did not consent.

What is "Sexual Intercourse"?

"Sexual intercourse" includes:

- where the victim's genitalia is sexually penetrated. i.e. penetrating the anus or vagina.
- the offender introducing his penis into the victim's mouth.
- oral stimulation of the victim's genitalia (penis or vagina).
- penetrating the lips or licking or sucking the genitalia.
- using any object to penetrate the genitalia.

What is the penalty?

This offence carries up to 14-years' imprisonment.

It also carries a standard non-parole period of 7-years imprisonment. This is the minimum time required to be spent behind bars before being eligible for release on parole.

This offence is prescribed in section 61I of the Crimes Act.

The same punishment applies to anyone who attempts to commit this offence.

Can the past sexual experience of the alleged complainant (person B) be used as evidence?

Normally, the alleged victim's (person B's) past sexual history is NOT allowed to be used against them in court.

However, it can be used as evidence if:

- person A and person B were in a relationship either at the time or recent to the time of the alleged date of offence; or
- person A denies ever having sexual intercourse with person B; or
- The sexual experience or activity occurred close to or at the time of the date of the alleged sexual intercourse. This only applies to a limited extent.

2. Sexual touching

Non-consensual sexual touching is a crime. It is when person A intentionally touches person B, in a situation where person B does not consent and person A knows there is no consent, and in circumstances a reasonable person would consider the touching to be "sexual".

Sexual touching was formerly called "indecent assault".

What is "sexual touching"?

Sexual touching is when a reasonable person would assess the touching between people to be sexual. Relevant factors in making this assessment include the circumstances of the touching, whether it was for sexual pleasure, the part of the body touched and the body part used to do the touching.

What is the penalty?

This offence carries a maximum penalty of 5-years' imprisonment in the District Court, and up to 2-years' imprisonment in the Local Court. It is commonly dealt with in the local court. This is prescribed in section 61KC of the Crimes Act.

3. Sexual act

Non-consensual sexual act(s) are a crime. It occurs if person A intentionally commits an act with or towards person B in a situation where person B does not consent and person A knows there is no consent, and where a reasonable person would consider the act as "sexual".

This was formerly known as an “act of indecency” offence.

What is the penalty?

This offence carries up to 18-months’ imprisonment or a \$5,500 fine, or both. This is prescribed in section 61KE of the Crimes Act.

4. Revenge porn

Revenge porn is considered a serious crime. It occurs when person A intentionally records or distributes an intimate image of person B without consent, knowing that person B does not consent or person A is reckless as to whether person B consents. It is equally a crime to even threaten to do this to someone.

What is revenge porn?

This is the recording or distributing of intimate images of someone else on to the internet without consent. It is usually done as an act of revenge to humiliate or punish a person.

What is an “intimate image”?

This includes private body part images, or images depicting someone engaging in a private act where a reasonable person would reasonably expect privacy.

What is the penalty?

Recording or distributing an intimate image without consent carries up to 3-years’ imprisonment or an \$11,000 fine, or both, under sections 91P and 91Q of the Crimes Act.

The same maximum penalties apply to anyone who even threatens to commit this kind of offence.

The court can order anyone found guilty of this offence to remove or destroy the intimate image(s). A failure to then comply with this order carries up to 2-years’ imprisonment or \$5,500, or both.

5. Sending unsolicited nudes or sexting or using a carriage service to harass, offend or menace

This is a type of revenge porn crime.

It is a crime to intentionally use a carriage service (such as your mobile phone or computer) or use social media, email or other form through the internet, to send a text or picture or video clip that any reasonable person would consider to be harassing, offensive or menacing. It must be private sexual material that is transmitted, made available, publicised, distributed, advertised or promoted.

What is “private sexual material”?

This means material that depicts a person who is, or appears to be, at least 18-years-of-age engaged in or appearing to be engaged in a sexual pose/activity and in circumstances a reasonable person would regard it as giving rise to an expectation of privacy.

It also includes material the dominant feature of which is to depict a sexual organ or anal region or a person who is, or appears to be, at least 18-years; or the breasts of a female who is, or appears to be, at least 18-years, and where the depiction is in circumstances that a reasonable person would consider as giving rise to an expectation of privacy.

What is the penalty?

The penalty for committing this crime is a maximum of 5-years' imprisonment, prescribed under section 474.17A of the *Criminal Code Act 1995* (Cth)(the **Criminal Code**).

6. Filming a person in a private act

It is a crime to film a person in a "private act" if it is done without consent, knowing that the person does not consent, and if:

- the act being filmed is not normally done in public; and
- it is in such circumstances that the filmed person would ordinarily expect privacy; and
- the person filming it does so for sexual pleasure, or to enable someone else to gain sexual pleasure.

What is a "private act"?

Filming a person in a "private act" includes filming a person in an undressed state, a person using a toilet, showering, engaging in a sexual act not normally done in public, or bathing where the filmed person would ordinarily expect privacy.

What is the penalty?

This offence carries up to 2-years' imprisonment or an \$11,000 fine, or both, pursuant to section 91K(1) Crimes Act.

7. Voyeurism

It is a crime to observe or watch a person engage in a private act without their consent, in circumstances you know there is no consent, for your sexual gratification.

A "private act" is outlined above and includes being undressed, using a toilet, bathing, showering or engaging in a sexual act of a kind not ordinarily done in public or any other similar activity where the person would ordinarily expect privacy.

What is the Penalty?

The maximum penalty for this offence is up to 2-years' imprisonment or an \$11,000 fine, or both, pursuant to section 91J of the Crimes Act.

8. Up-skirting or filming a person's private parts

It is a crime to film a person's private parts, in circumstances where a reasonable person would reasonably expect the person's private parts could not be filmed without consent, and:

- knowing that there was no consent; and
- if it was done to obtain or allow someone else to obtain sexual pleasure.

What is up-skirting?

This is when a person films another person's private parts. This includes the offence of filming up a person's skirt, known as "up-skirting".

What is the penalty?

This crime carries a maximum penalty of up to 2-years' imprisonment or an \$11,000 fine, or both, which is outlined in section 91L of the Crimes Act.

9. Incitement to commit a sexual offence

It is a crime to intentionally incite other(s) to commit a sexual offence. This includes urging or encouraging someone to commit criminal sexual conduct.

It is still a crime to do this even if it is not possible for the offence to be committed; it equally applies regardless of whether the offence is committed.

This type of offence includes a person sexually inciting children by sexting.

What is the penalty?

The maximum penalty for this offence depends on the type of sexual offence incited. The penalty will be the same maximum penalty as that of the offence being incited. For example, if the incitement was to commit sexual intercourse without consent, the maximum penalty is 14-years imprisonment; If the incited sexual offence is filming a person without consent in a private act, the maximum penalty will be 2-years imprisonment and/or \$11,000 fine.

Incitement to commit sexual offences is contained in section 80G of the Crimes Act.

10. Sexual harassment

Sexual harassment is unwelcomed sexual conduct where a reasonable person would expect the other person to feel offended, humiliated or intimidated.

Sexual harassment includes making unwelcome sexual advances, or unwelcome requests for sexual favours.

A sexual harassment complaint may be made against individuals and their employers. Organisations or employers are generally not liable for their employees' sexual harassment conduct but may be if they fail to take all reasonable steps to minimise the risk of sexual harassment in the workplace.

It is prohibited under the *Sex Discrimination Act 1984* (Cth) and the *Anti-Discrimination Act 1977* (NSW).

What are “reasonable steps”?

Simply having policies and procedures to stop sexual harassment in the workplace is not sufficient: employers should have a “lively and real interest” in disciplining for it (*Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82). It is also important for employees to be aware of this type of conduct being illegal in the workplace, which should involve the employer disclosing the relevant federal and state laws to all employees.

What is the penalty?

Other than the penalties for sexual assault outlined earlier, sexual harassment can result in civil damages.

Is it a crime to attempt to sexually assault a person?

Yes it is. The same maximum penalty applies where a person attempts the sexual assault as though the sexual assault occurred, even if it did not occur. This is outlined in section 344A of the Crimes Act.

What are some defences to sexual assault?

1. Person A held reasonable grounds for believing that person B consented at the time, even if person B did not in fact consent at the time. This defence is commonly run on the basis that even if person B did not consent, person A honestly believed that consent was present at the time, and that it was reasonable in the circumstances for person A to have held that belief. The test here is whether person A’s belief was reasonably held in the circumstances (subjective test), not that of the hypothetical reasonable person’s belief (objective test).
2. Person B consented and did not withdraw that consent at any stage of the sexual activity. This can be inferred from the circumstances of the case.
3. No alleged sexual activity took place. This can also be inferred from the circumstances of the case.
4. The alleged conduct was done for genuine medical purpose(s).
5. Necessity or Duress.

Consequences of being convicted of a child sex offence

Being convicted of a child sex offence has severe consequences, including being punished in court and criminally convicted. In addition to these and social consequences, it also means:

- You will not be allowed to have a child-related job. A conviction results in being classified as a 'disqualified person' which will prohibit you from obtaining a working with children check clearance.
- You will become a "registerable person". Your name, charge details and court outcome may be recorded on the child protection register. You may also be required to report to police for a period of time.

Consequences of being convicted of a non-child related sex offence

Being convicted of any other sex offence can mean:

- The conviction will never be "spent" for sex offences. It will stay on your record for your entire life as a criminal conviction. This means that you will always have to disclose it when asked about it. Most other non-sexual offences are "spent" after 10-years, provided certain pre-conditions are met. A conviction being "spent" means that you can say that you do not have a criminal record. Your conviction is removed from your criminal record and you no longer have to disclose it.
- The Children's Guardian can refuse you a children's check clearance.

WSU Reporting Procedures on Sexual Harassment

Western Sydney University (**WSU**) has zero tolerance for sexual harassment and sexual assault. WSU strives to provide a safe, supportive and caring learning and working environment that is free from both harassment and assault as outlined under state and federal law.

WSU supports the Respect.Now.Always. campaign which ensures universities are a place of safety and respect. For further details, including where to find [support](#) and how to [report](#), see [here](#).

WSU Sexual Harassment Prevention Policy

WSU's [Sexual Harassment Prevention Policy \(SHPP\)](#) applies to all members of the WSU community, including staff, students, contractors, visitors or individuals:

- attending campus
- attending a WSU event, function or activity
- using WSU equipment
- participating in any activity as a representative or student of WSU and / or
- carrying out functions in connection with WSU.

Managers and supervisors have a duty to prevent sexual harassment in the work and learning environment.

Staff and students have a responsibility to comply with WSU policies, report incidents of sexual harassment, offer support to those affected, and maintain confidentiality.

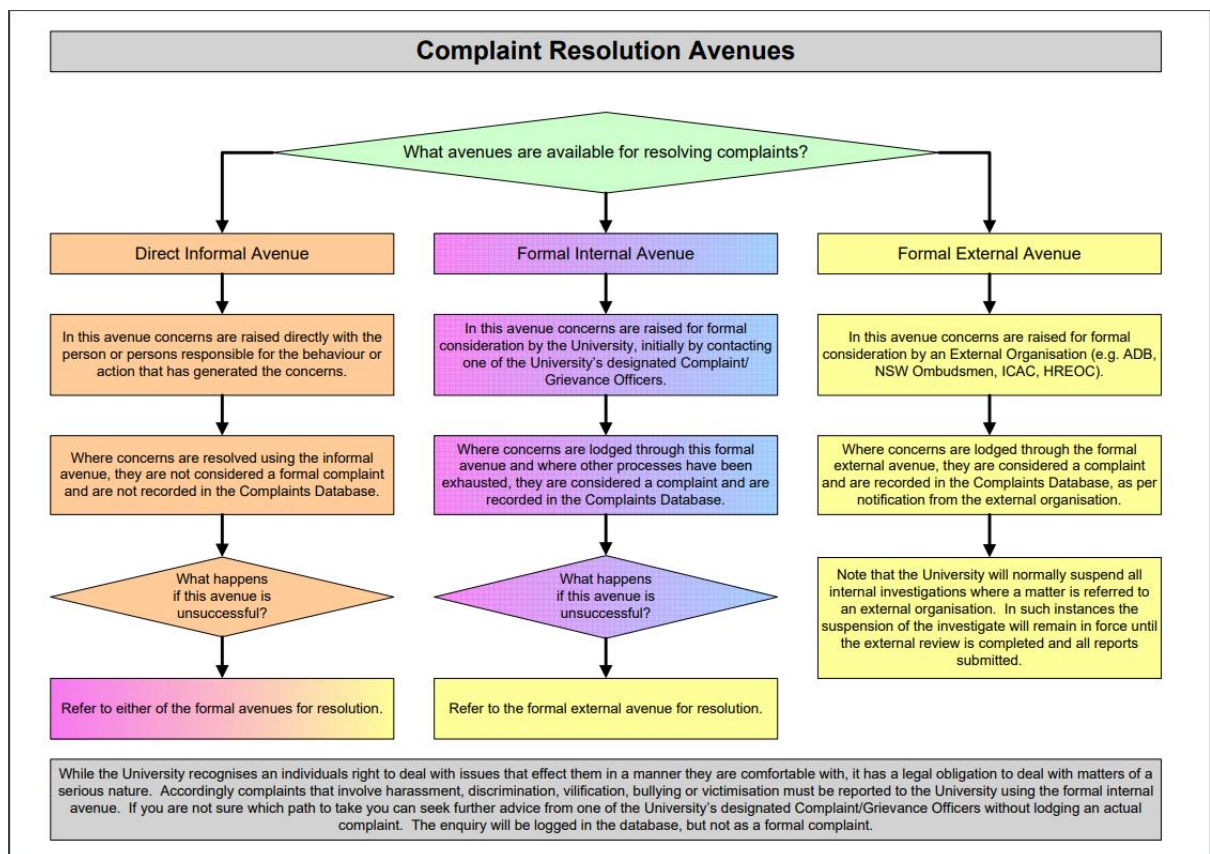
A person who has been, or thinks they are being, sexually harassed is advised to:

- speak or write directly to the harasser;
- seek advice (e.g. from a supervisor or manager, or the Equity and Diversity Unit ([here](#)) or the Office of Human Resources ([here](#));
- keep confidential records about the harassment; and
- keep a record of or a diary of incidents, including what happened, when and where it happened, and the names of witnesses.

More information on what to do at WSU if you have been sexually harassed can be found [here](#).

WSU Sexual Harassment Complaints Avenues

There are three (3) complaint resolution avenues available at WSU, demonstrated in the flowchart [here](#) and below.



As sexual harassment is defined as a “serious matter” by WSU, there are two (2) complaint resolution avenues available if the direct informal avenue is not considered appropriate:

- a. Formal Internal Avenue

b. Formal External Avenue

The Formal Internal Avenue

Internal complaints about sexual harassment may be made using WSU's [Complaints Handling and Resolution Policy \(Complaints Policy\)](#). These complaints of sexual harassment will be treated seriously, investigated promptly, impartially and confidentially. If sexual harassment is found to have occurred, action will be taken to stop the behaviour and appropriate disciplinary action will be taken against the offender under student or staff misconduct provisions.

The procedure in the Complaints Policy under the Formal Internal Avenue states that complaints:

- must be lodged with a WSU designated Complaint/Grievance Officer (**Officer**) as soon as possible or no later than six (6) months after the last incident occurred (although there are provisions for late lodgement);
- may be lodged by phone (02 9678 7900), in person, in writing (complaints@westernsydney.edu.au) or via a complaints form ([here](#)) to the Complaints Resolution Unit (**CRU**)([here](#));
- the Officer will undertake a preliminary assessment;
- the Officer will record the complaint on the Complaint Handling System and refer to a Case Manager for further investigation where appropriate;
- the Case Manager will investigate as quickly as possible and either refer the matter on for further investigation or request that the matter be closed;
- there are avenues for appeal.

The Formal Internal Avenue checklist is available [here](#). Further information about the complaints process at WSU is available [here](#).

The Formal External Avenue

External complaints about sexual harassment can be made to external organisations where they may be investigated. These complaints can be made with the external organisation at any time (subject to the procedures of the organisation). Complainants are not required to complain internally first.

A complainant may seek advice from the WSU's [Complaints Resolution Unit](#) about which external organisation to complain to and should know that the external organisation will normally notify WSU when they receive a complaint. WSU will then record that complaint in the WSU Complaint Handling System.

If the Complaint is Substantiated

WSU states that disciplinary action may be taken against students or staff who are found to have sexually harassed other students or staff. Breaches of the policy will be considered misconduct or serious misconduct in the case of employees, and "non-academic

misconduct” in the case of students. The most serious cases may result in permanent expulsion (for students) or dismissal (for staff).

Note: this does not include any external remedies available to a complainant at law.

For a free confidential chat about the law on sex and consent in NSW, CDLA have experienced [Specialist sex offence lawyers](#) available 24/7 for guidance and advice.

I've been sexually harassed in the workplace or at Uni: what are my options?

1. Make a file note of what happened with as much detail about time, place, location, who did it and what happened/what was said. You should also include if anyone was a witness. This will assist you later by forming a contemporaneous piece of evidence.
2. You can try approaching the harasser by letting them know that you did not like their conduct, it made you feel humiliated, intimidated, hurt, offensive etc. This can help prevent it from recurring.
3. You may lodge a complaint to the [Anti-Discrimination Board NSW](#) (within 12-months of the date of the harassment) or the [Australian Human Rights Commission](#) in writing who may instigate an investigation. This could lead to a conciliation conference. If unsuccessful there, you may choose to take the complaint to the [NSW Civil and Administrative Tribunal](#) for an order to be made. In addition, you may lodge a complaint to the [Fair Work Ombudsman](#).
4. You may also report the incident to police. This will also cause an investigation before police decide whether or not to charge the other person(s).
5. Your organisation will likely have a policy and procedure for sexual harassment complaints. You can lodge a complaint within the organisation.

WSU's Sexual Offences Response Policy and Procedures

WSU's [Sexual Offences Response Policy and Procedures](#) (**Sexual Offences Policy**) stipulates the obligations of WSU when a person reports a sexual offence, as distinct from reports of sexual harassment.

Reporting and Support Options

- **External reporting:** in an emergency, call 000 (24 hours per day, 7 days per week) or 131 444 (non-emergency police assistance line).
- **Internal reporting:**
 - Campus Safety and Security (available [here](#)) or 1300 737 003 (24 hours per day, 7 days per week)
 - Complaints Resolution Unit (available [here](#)) or 02 9678 7900 (Monday to Friday 9am – 4.30pm)
 - Sexual Offences Reporting Portal (online reporting portal, available [here](#))

- **External support:**
 - 1800 RESPECT (available [here](#)) or 1800 737 732 (24 hours per day, 7 days per week)
 - NSW Rape Crisis 24/7 (available [here](#)) or 1800 424 017
- **Internal support:**
 - Students – University Counselling Service web page (available [here](#)) or 1300 668 370 (Monday to Friday 9am – 4pm)
 - Staff – Employee Assistance Program web page (available [here](#)) or 1800 81 87 28 (24 hours per day, 7 days per week)

A sexual offences response flowchart is available [here](#).

Existing staff and student FAQs on reporting and complaint procedures are available [here](#).

Other Legal advice and Support Services

- WSU [First Responder Network](#) are trained in supporting and referring survivors of sexual harassment and sexual assault
- WSU [Student Legal Service](#) for referral advice
- [1800 RESPECT](#) or 1800 737 732
- [Western Sydney Community Legal Centre](#)
- [Youth Law Australia](#)

Are campus security safety personnel available?

- [WSU Campus Safety & Security](#) are available on **1300 737 003** or extension **2300** from any fixed internal phone on campus
- A complete list of security contacts at each campus is available [here](#).
- [Emergency contact points](#) provide a 24 hour direct link to a Campus Safety and Security Officer when activated, and are strategically located on each campus.
- Other personal safety and security options on campus are listed in detail [here](#) and include:
 - Downloading the WSU mobile app [here](#) with campus maps;
 - Asking a security officer to escort a person to a car if it's late or there are concerns;
 - Catching WSU branded shuttle buses where available.
- In an emergency, call **000**. For non-emergency police assistance, call **131 444**.

Who can a student go to for a confidential discussion?

Free, confidential and professional counselling is available for all students through the student [Counselling Service](#) on counselling@westernsydney.edu.au or 1300 668 370 (option 4 then option 1), Monday to Friday 9am – 4.30pm.

Students overseas can contact Customer Care on 61 2 8907 5686 (24/7).

eCounselling is also available ([here](#)) and via email at ecounselling@westernsydney.edu.au.

External support is available through 1800 RESPECT (available [here](#)) or 1800 737 732 (24 hours per day, 7 days per week).

For immediate crisis intervention, students should call emergency services on 000.

A detailed list of support services at WSU and in the community is available [here](#).