

# LAW162 - Summary Notes

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## Sexual Offences

### - Section 61I *Crimes Act 1900* (NSW):

- Sexual Assault:
  - Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years.

## 1. Physical Elements

### - **The accused has sexual intercourse with another person** (an act)

- 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).
- Must be intentional (not accidental): *R v AJS* (2005) 12 VR 563

AND

### - **It is without the consent of the other person** (a circumstance)

- Section 61HE
    - (2) A person **consents** to sexual activity if the person freely and voluntarily agrees to the sexual activity.
  - circumstances where a person cannot consent to sexual intercourse
    - S 61HE(5): Includes lack of capacity; where complainant is asleep or unconscious
    - S 61HE(6): mistaken beliefs (identity of the person, activity is for health or hygiene purposes, etc)
    - S 61HE(8): substantially intoxicated, intimidatory or coercive conduct; abuse of a position of authority or trust
    - S 61HE(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.
  - *R v Aiken* (2005) 63 NSWLR 719: a person consented to sexual activity because of coercive conduct or other threat not involving force
  - *McGrath v R* (2010) 199 A Crim R 527: a person did not have capacity to consent to sexual activity because of age
  - *R v Clark* Unreported, NSWCCA, 17 April 1998: a person consented to sexual intercourse because of threats of force or terror
- The issue of the victim’s consent arises in two ways:
- Crown must prove BRD that the victim did not consent
  - At this stage, accused is entitled to raise issue of consent to argue that there was in fact consent

- Once the jury are satisfied BRD that there was no consent, the question of the accused's knowledge becomes relevant
  - The accused can argue they believed, albeit wrongly, that the complainant was consenting and therefore fault element not present
- Silence or absence of positive resistance to an unwanted sexual advance is not to be taken as consent, or as communication of consent
  - *R v Mueller* (2005) 62 NSWLR 476
- Consent must be 'freely and voluntarily given'
  - *R v Clark*
- Mere submission in consequence of force or threats is not consent
- The relevant time for consent is the time when sexual intercourse occurs
- Consent previously given may be withdrawn, thereby rendering the act non-consensual
  - *Question of Law (No 1 of 1993)* (1993) 59 SASR 214
  - *Kitchener*
- Where consent to sexual intercourse is withheld, a failure by the offender to advert at all to the possibility that the complainant was not consenting, necessarily means the offender is 'reckless as to whether the complainant was consenting for the purpose of s 61D(2) of the Crimes Act

## **2. Fault element**

### **- Knowledge of non-consent**

- Actual knowledge
  - Section 61HE
    - (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.
  - an accused will "know" the complainant does not consent if:
    - He/she was reckless as to consent
    - He/she had no reasonable grounds for believing the complainant consented
    - The complainant consented only as a result of threats or force
  - 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 (s 61HE(4))

OR

### **- Was reckless with regard to consent**

- Non-advertent recklessness (*Tolmie*)

- prosecution may prove either that the accused knew the victim was not consenting or that the accused simply failed to consider whether or not the complainant was consenting
- Did the accused even consider whether the person was consenting? (subjective)
  - If no, had someone with the accused's mental capacity turned their mind to it, would it have been obvious that the person wasn't consenting?
  - If yes, then the accused was reckless
    - *R v Tolmie* (1995) 37 NSWLR 660 (Kirby P)
- Advertent recklessness (*Banditt*)
  - '[I]f an accused person is aware of a real possibility that the complainant does not consent to sexual intercourse, he acts recklessly if, having that knowledge, he decides to proceed to have sexual intercourse, even if he considers it probable... that the complainant does consent to sexual intercourse.'
  - Must be more than 'merely a bare possibility' that the person is not consenting
    - *R v Banditt* (2004) 151 A Crim R 215 (James J)

OR

- **May have held an honest belief that the victim consented** (a subjective test), **but that belief was unreasonable** (an objective test)
  - the accused must have reasonable grounds to believe that the person was consenting
  - Did the accused believe that the person was consenting (subjective) AND were there reasonable grounds to support that belief? (objective)
    - *Lazarus v R* [2016] NSWCCA 52
- **Aggravated sexual assault**
  - S 61J
    - Aggravating factors include
      - ABH, wounding or GBH
      - Age of the victim
      - Cognitive impairment
      - Serious physical disability
      - Deprivation of liberty
- **Sexual touching (s61KC)**
  - Requires touching without consent
    - Any person (the **alleged offender**) who without the consent of another person (the **alleged victim**) and knowing that the alleged victim does not consent intentionally
      - 
      - (a) sexually touches the alleged victim, or
      - (b) incites the alleged victim to sexually touch the alleged offender, or
      - (c) incites a third person to sexually touch the alleged victim, or
      - (d) incites the alleged victim to sexually touch a third person,
    - is guilty of an offence.
    - Maximum penalty—Imprisonment for 5 years.
- **Sexual act - s 61KE**
  - Carried out with or towards the alleged victim
  - Physical element:
    - Touching without consent (an assault)
    - Coupled with a sexual act (which may be the touching itself)
      - *R v Bonora* (1994) 35 NSWLR 74