

4 | Sexual Assault

s61H – “sexual intercourse” (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.

s61HA – “Consent” 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,
- (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 (automatically negated)

- (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](#):** (automatically negated)

- (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.

S61I 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.

THE ELEMENTS

Actus Reas:

1. an act of sexual intercourse
2. without consent – this is about what is in the mind of the victim at the time of the sexual intercourse.

Mens rea:

1. accused must *intend* to engage in the conduct (sexual intercourse)
2. must have the *knowledge* as to the circumstances of non-consent of the victim– see section 61HA(3) for a definition of ‘knowing’ (subjective test)

Circumstances that Automatically Negate Consent (s61HA(4))

R v Clark

The victim was a prison inmate. He was told by a fellow inmate (Clark) that other inmates were going to do him harm. Clark said he would protect the victim in return for anal sex. Clark said that the victim had consented. He was charged and convicted of sexual assault.

Held by Simpson J that consent [under the then provision 61R which did not contain a reference to consent being freely and voluntarily given which is in 61HA(1)] that there was evidence that the jury could base its verdict that the consent was not freely and voluntarily given.

So, even without those words in the Act, it was essential that the consent be genuine. Consent induced by fear or threats is not consent.

We will look at the fault element and consent further at our next lecture.

That is s 61HA(3) deems that the following states amount to ‘knowledge’ for sexual assault (s 61I), the aggravated forms (ss 61I, s 61J and s 61JA) of the offence and attempts to commit such offences:

- the accused **had actual knowledge that the victim was not consenting**
- the accused **was aware of the possibility that the victim was not consenting, but went ahead regardless** (i.e. advertent recklessness: **Banditt**).
- the accused **failed to consider whether the victim was consenting, and went ahead with the act of sexual intercourse, even though the risk that the victim was not consenting would have been obvious to someone with the accused’s mental capacity if they had turned their mind to it** (i.e. inadvertent recklessness – **Tolmie**)
- the accused **had an honest belief that the victim was consenting but no reasonable grounds for the belief** (s 61HA(3)(c)).

Circumstances which negate consent

s 61HA (4) – that consent is negated if the person does not have the capacity...

- the words “threats of terror” – **Aitken 2005** considered the meaning terror = ‘sharp, overpowering fear’ or ‘feeling, occasion or cause of great fear’.

Sexual Assault recklessness as to Consent

In relation to ‘knowledge’, recklessness is not defined. But court have ruled that there are 2 types:

- **Advertent Recklessness** - accused was aware of the possibility that the complainant was not consenting – see **Hemsley (1988)**
- **Inadvertent Recklessness** - the accused failed to consider whether the complainant was consenting, in circumstances where a reasonable person in their shoes WOULD have turned their mind to the issue of consent). See **Kitchener (1993)** and affirmation in **Tolmie (1995)**.

Kitchener (1993)

The court held that failure to advert at all to the possibility that the complainant is not consenting, necessarily means that the accused is reckless as to whether the other person consents. This type of behaviour (not even considering the possibility at all, despite it being obvious) is usually termed **inadvertent recklessness**.

Tolmie (1995)

- Facts: The complainant and the appellant were among a group of people who had been drinking, as they walked down a path the appellant asked the complainant to come to him at the back of the group and propositioned her. She repeatedly told him to stop and they ended up on the ground where he sexually assaulted her.
- Held: recklessness can be shown where the accused adverts to the possibility of consent but ignores it and also where the accused is so bent on gratification and indifferent to the rights of the victim as to completely ignore consent.

Indecent Assault (s61L)

An indecent assault is the combination of a normal assault and an act of indecency (indecent act). The principles of an indecent assault are described in **Fitzgerald v Kennard**

- The 'deeming' provision in respect of knowledge of consent (**s 61HA(3)**) DOES NOT APPLY to indecent assault.
- The common law is applicable, and indicates that the offence must be committed either:
 - (1) with knowledge of 'non-consent' OR
 - (2) while being reckless as to whether the complainant consented

Fitzgerald v Kennard

- Facts: the accused was a visiting electrician who rubbed the householder's legs and attempted to touch her breasts.
- Held:
 - Actus reus: either of the actus reus' of assault (physical contact without consent or lawful excuse /act causing apprehension etc)+ an indecent act.
 - These acts do not have to be separate - the indecent act can also constitute the act of assault.
 - Mens rea: the mens rea for the relevant act of assault (recklessness/intention to physical contact the accused/cause apprehension) + knowledge as to a lack of consent.
 - Knowledge as to lack of consent extends to recklessness about consent (including inadvertent recklessness).

What constitutes an indecent act was discussed in Harkin:

- Indecency "simply means contrary to the ordinary standards of morality of respectable people within the community".
- However, it must have a **sexual connotation**.

Act of indecency (the offence)

The offence of committing "an act of indecency with or towards a person" was developed to cover situations where contact did not amount to assault, such as where the victim was a child who voluntarily touched the accused.

- In **Barrass**, it was held that an act of indecency does not require immediate physical presence and thus masturbation in a car adjacent to a school bus was sufficient.

Summary

Important reforms to laws applying to consent were enacted in 2007. Before 2007, consent was not positively defined in the *Crimes Act*, s 61HA:

- (2) Meaning of consent (**relevant to actus reus**): a person consents to sexual intercourse only if the person **freely and voluntarily** agrees to the sexual intercourse.
- (3) Knowledge of consent (**relevant to mens rea**): the mens rea standard of 'knowledge' is expanded for the purposes of a lack of consent. Knowing about a lack of consent is defined as follows:
 - Actual knowledge that there is no consent.
 - Recklessness as to whether the person consents.
 - Lack of reasonable grounds for believing there is consent.

Note: steps taken by the accused to ascertain consent are to be considered. Self-induced intoxication is not taken into account.

Recklessness as to consent

(when the accused considered that the victim might not consent yet continued anyway) constitutes sufficient mens rea according to the new s 61HA (3)(b). This is a recognition of previous common law principles in **Hemsely** and **DPP v Morgan**

In **Kitchener** the court held that failure to advert at all to the possibility that the complainant is not consenting, necessarily means that the accused is reckless as to whether the other person consents. This type of behaviour is usually termed **inadvertent recklessness**.

Banditt - where the accused broke into the victim's house and commenced intercourse with her while she was asleep, the court held that "he was reckless in the sense that he did not even consider whether she was going to consent or not, or at least he recognised that there was a possibility that she may not consent but he went ahead anyway."