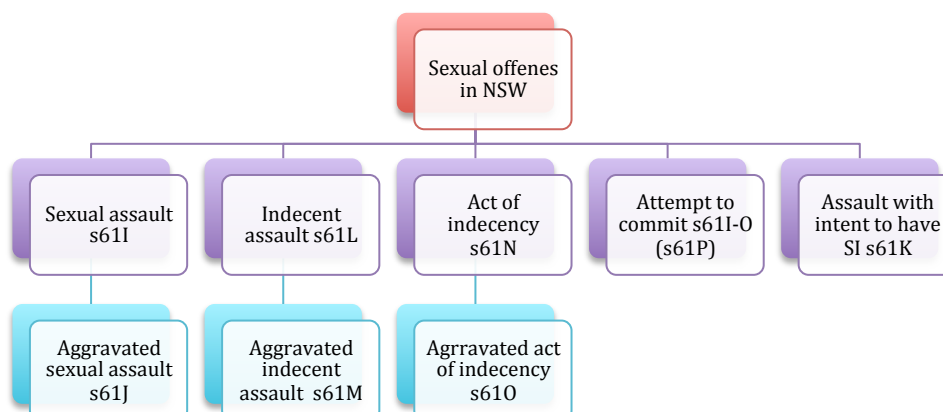


6. Sexual Assault and other Sexual Offences

Sexual offences in NSW



Sexual assault

Sexual Assault (s61I)

Conduct element/actus reus	Mental element/mens rea
Sexual intercourse (conduct) AND	Knowledge of non-consent s61HA (3) OR
Without consent (circumstances)	Reckless as whether is consent OR
	No reasonable grounds for believing that the other person consents
AR and MR coincide	

Aggravated Sexual Assault s61J

Conduct element/actus reus	Mental element/mens rea
Sexual intercourse AND	Knowledge that the other person does not consent OR
Without consent AND	Reckless as whether is consent OR
Deprived victim of liberty before or after commission of offence (i) OR	No reasonable grounds for believing that the other person consents
Inflicts ABH on alleged victim or any other person nearby (a) OR	Intention OR recklessness
In the company of another person/persons (c) OR	
Alleged victim under 16 (d), serious physical disability (f), cognitive impairment (g) OR	
Breaks and enters into any dwelling-house or other building (h) OR	Intention of committing the offence or any other serious indictable offence
AR and MR coincide	

-Being in company: presence is not enough. There must be some kind of encouragement or assistance (*Griffin*)

-*RJS (1993) 31 NSWLR 649*: Aggravated sexual assault under s61J (2)(b)-threat with an offensive weapon or instrument-not necessary for the Crown to prove that the accused brought the knife to the scene intending to use it in an offensive manner. It was sufficient to prove that accused was using the object in an offensive manner at the time of the commission of the offence.

Aggravated Sexual Assault in company s61JA

Conduct element/actus reus	Mental element/mens rea
Sexual intercourse AND	Knowledge that the other person does not consent OR
Without consent AND	Reckless as whether is consent OR
	No reasonable grounds for believing that the other person consents
Is in the company of another person/persons AND	
Inflicts ABH on the alleged victim or any other person who is present or nearby, OR	Intentionally or recklessly
Threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument, OR	
Deprives the alleged victim of his or her liberty for a period	

- No disincentive to then kill them (s1-imprisonment for life)

Assault with intent to have sexual intercourse s61K

Conduct element/actus reus	Mental element/mens rea
	Intent to have sexual intercourse with another person AND
Inflicts ABH on the other person or a third person who is present or nearby, OR	Intention or recklessness re the assault and degree of harm (ABH)
Threatens to inflict ABH on the other person or a third person who is present or nearby by means of an offensive weapon or instrument,	
<i>Hogan (2008) NSWCCA</i> : causal connection between intent to have SI and the infliction/threat of ABH	
AR and MR coincide	

Issues in Sexual Assault

Sexual assault: Actus reus

-Previously under common law, rape applied only to the penetration of the vagina by a penis. The definition (61H) has been broadened today.

Consent

-s61HA of Crimes Act 1990

Sexual assault: Mens rea

-Mental element of common law rape found in *DPP v Morgan [1976] AC 182*

Knowledge

-Legislative amendments in NSW preserved the Morgan requirement of subjective knowledge of consent. However, the stipulation that the accused knows the other person does not consent if they have 'no reasonable grounds for believing that the other person consents' (s61HA (3)(c)) is a significant change in the NSW law, which overturns Morgan (as long as there is true belief, does not have to be reasonable).

-s61HA (3)(b)

Advertent recklessness- Subjective

Hemsley (1988) A Crim R 334

-Facts: Victim dragged from car into barn house and gang-raped. Accused denies intercourse in the car and claimed that the victim had consented in the barnhouse.

-Held: Foresight of the possibility that the victim is not consenting satisfies the mens rea for sexual assault.

HOWEVER,

R v Banditt

-Facts: Victim had several non-friendly encounters with the accused. He was staying at her house; he then tried to hit on her, she said no and kicked him out. One night he knew the kids were not going to be home, she fell asleep and he had sex with her while she was sleeping. She woke up to realise it was him.

-Held:

(1) In order for an accused person to be liable on the basis of advertent recklessness the possibility that the plaintiff is not consenting, of which the accused is aware must be more than merely or a bare possibility.

(2) If it were possible that the accused believed that the complainant was consenting, the accused would have to be acquitted, whether or not there were any reasonable grounds for such a belief - applying DPP v Morgan

(3) The trial judge would be entitled to tell the jury that, in determining whether the fact that the appellant believed or might possibly have believed that the complainant was consenting, the jury could determine whether there would have been grounds for such belief.

Non-advertent recklessness-Objective

-*Kitchener (1993) 29 NSWLR 696 (NSW Court of Criminal Appeal)*

- Facts: 16 yr old with her boyfriend outside a disco where bf sold hotdogs. Couple approached Kitchener (president of motor cycle club) to ask if she could have a ride. He accepts, takes her to a dirt track 20km outside town where alleged sexual assault took place. She claimed that the accused forced her to have sex with him.
- Principle: Held that recklessness in the context of sexual assault offences does not necessarily involve actual advertence, but covers situations where D is 'so bent on gratification and indifferent to the rights of the victim as to ignore completely the requirement of consent'. Failure to avert to whether consent was present or not may be sufficient for recklessness.

-*Tolmie (1995)*

- Facts: Complainant and appellant drinking in a club after footy presentation. Seen kissing and fondling. Established that complainant may have been intoxicated at later stages of the evening, while appellant denied being drunk (intoxication not raised w.r.t. him). After they left club he told her "you turn me on" she replied "I am with my fiancée". They ended up on the ground with the complainant straddled on her back, her hair being grabbed and her head pushed to the ground. Told "you are going to get it anyway" and had her stockings forcibly removed, then intercourse. She ran off to nearest house leaving garments behind and called friend
- Decision: Argued for the accused that if Kitchener incorporated inadvertence or negligence into mens rea for SA it would be inconsistent with central tenet of crim law, b/c accused would be convicted of actions, which were not proved that he intended. Tried to argue that if he thought about it, he wouldn't have done it. Court confirmed Kitchener, and said that whether he would have done it if he turned his mind to the risk is not relevant.

Indecent assault

Indecent assault s61L

Conduct element/actus reus	Mental element/mens rea
Assault AND	Intention OR
Commits act of indecency (on or in the presence of the other person) -at the same time/ immediately before/after	Recklessness to commit assault (Includes reckless inadvertence (F v K))
NB assault and act of indecency could be the same conduct (<i>Fitzgerald v Kennard (1995)</i>)	
AR and MR must coincide	

Aggravated indecent assault s61M

Conduct element/actus reus	Mental element/mens rea
Assault	Intention OR
(In circumstances of aggravation)	Recklessness to commit assault (Includes reckless inadvertence (F v K))
Commits an act of indecency on or in the presence of the other person,	
AR and MR must coincide	

-Higher penalty if the other person is <16 (2)

-"circumstances of aggravation" means circumstances in which:

- (a) the alleged offender is in the company of another person or persons (has to be some kind of encouragement or coercive effect-*Griffin*), OR
- (c) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender (*teacher/student, employee/employer, parent/child*), OR
- (d) the alleged victim has a serious physical disability, OR
- (e) the alleged victim has a cognitive impairment.

Issues in Indecent Assault

Actus reus

- The physical element for an indecent assault is an assault coupled with an act of indecency, which may be the assault itself (*Sorlie*).
- It is established that assault ingredient in any indecent assault charge may involve either physical contact (e.g. battery) or a threat to the victim involving a reasonable apprehension of immediate and unlawful personal violence (*Fitzgerald v Kennard* (1995) 38 NSWLR 184)

Mens rea

R v Bonora (1994) 35 NSWLR 74: Crown must not only prove the act of indecency, but also the absence of consent in that either the accused *knew* the victim was not consenting, or was *reckless* with regard to consent.

Fitzgerald v Kennard (1995) 38 NSWLR 184

- Facts: Kennard is an electrician who visits the victim's home (17yr old female) to install some power outlets. D proceeds to rub the victim's arm, gives her a hug, rubs her back etc... meanwhile the victim is getting freaked out...she froze...he subsequently gives her another hug and rubs her butt and legs...He said he gave no thought to whether or not the victim was consenting. He ends up getting charged with indecent assault and convicted.
- Held: Test of recklessness is the same test in Tolmie. It was held that necessary intention for indecent assault extended to inadvertent recklessness.

Act of indecency

Act of indecency s61N

Conduct element/actus reus	Mental element/mens rea
Act of indecency OR	Intention to do the act or incite the act of indecency OR
Incites a person to an act of indecency with or towards that or another person AND	Recklessness? (<i>Barrass (2005)</i>)
Person <16 (2 years) or >16 (18 months)	
AR and MR must coincide	

- >16 lesser penalties

Aggravated act of indecency s61O

Conduct element/actus reus	Mental element/mens rea
Act of indecency OR	Intention to do the act or incite the act of indecency OR
Incites a person to an act of indecency with or towards that or another person (<16 or >16) AND	Recklessness? (<i>Barrass (2005)</i>)
(in aggravated circumstances) OR	
Towards or with person <10	
IF <16 AND the act of indecency is being filmed for the purposes of the production of child abuse material	Knowledge

- "circumstances of aggravation" means circumstances in which:

(a) the alleged offender is in the company of another person or persons, or

- (b) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender, or
- (c) the alleged victim has a serious physical disability, or
- (d) the alleged victim has a cognitive impairment.

Issues in Act of indecency

'Indecency' according to whom?

-Definition of "indecency" - **R v Harkin (1989)** per Lee J - "contrary to the ordinary standards of morality of respectable people in the community". However, indecency must have a sexual connotation (area of body of victim or accused would give rise to sexual connotation-genitals of males or females, anus males or females, breasts of females)

Acts of indecency towards another person

-**R v Barrass [2005]** - discussion of whether an act of indecency required for s61N and 61O must be *committed in the immediate presence of the complainant*. No. Masturbation in a car adjacent to a bus containing school children could constitute an act of indecency towards another person.

-**Chonka [2000] NSWCCA 466** -an act of indecency 'with' another requires two participants in the indecent act, while an act of indecency 'towards' another is committed by a person who acts indecently towards a non-participant.

Marital immunity?

-Classic common law statement of spousal immunity rule (Hale's Pleas of the Crown): 'But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.

-61T Offender married to victim

The fact that a person is married to a person:

- (a) upon whom an offence under section 61I, 61J, 61JA or 61K is alleged to have been committed is no bar to the firstmentioned person being convicted of the offence, or
- (b) upon whom an offence under any of those sections is alleged to have been attempted is no bar to the firstmentioned person being convicted of the attempt.

Children

66A Sexual intercourse—child under 10

66B Attempting, or assaulting with intent, to have sexual intercourse with child under 10

66C Sexual intercourse—child between 10 and 16

66D Attempting, or assaulting with intent, to have sexual intercourse with child between 10 and 16

66E Alternative verdicts

66EA Persistent sexual abuse of a child

77 Consent no defence in certain cases

Defenses?

-Honest and reasonable mistake of fact (CTM case-s66C): Strict liability. Defense is available in relation to the fact if, given that if the fact was true will make the accused not guilty (re age). Accused person has evidential burden (reasonable possibility). In this case there was no sworn evidence, statement given to police etc. to support his belief.

Statutory reforms (CPA and Evidence Act)

1. Delay in complaint

-The common law assumption that delay in complaint is relevant to the accuracy of the complainant does not sit easily with the victim survey findings that only approximately 25% of sexual assaults are reported to the police.

-Hence, **s294 of CPA** requires statutory warnings/information to jury that there may be good reasons for the delay in complaint.

2. Abolition of the corroboration warning

-s164 of Evidence Act 1994

(1) *It is not necessary that evidence on which a party relies be corroborated.*

(2) Subsection (1) does not affect the operation of a rule of law that requires corroboration with respect to the offence of perjury or a similar or related offence.

(3) Despite any rule, whether of law or practice, to the contrary, but subject to the other provisions of this Act, if there is a jury, *it is not necessary that the judge:*

(a) Warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect, or

(b) Give a direction relating to the absence of corroboration.

3. Admissibility of evidence relating to sexual experience and reputation

-s293 Admissibility of evidence relating to sexual experience

(1) This section applies to proceedings in respect of a prescribed sexual offence.

(2) *Evidence relating to the sexual reputation of the complainant is inadmissible.*

(3) Evidence that discloses or implies:

(a) that the complainant has or may have had sexual experience or a lack of sexual experience, or

(b) has or may have taken part or not taken part in any sexual activity,

is inadmissible.

4. Sexual Assault communications privilege

-s297 of CPA creates an absolute privilege at bail proceedings and committal proceedings against the defence access to records of the complainant's counseling treatment.

-s298 The Court can set aside the privilege for the production of documents and the adducing of evidence at trial.

5. Cross examination by an unrepresented accused

-s294A of Criminal Procedure Amendment (Sexual Offence Evidence) Act 2003: the complainant cannot be cross-examined or re-examined by the accused person but may be examined by a person appointed by the court.

6. Alternative arrangement for the complainant's evidence

- s294B of Criminal Procedure Amendment (Sexual Offence Evidence) Act 2004: entitles complainants to give evidence from a place other than a court room by means of closed circuit tv or other technology.

7. The complainant's evidence on a retrial

- The Criminal Procedure Amendment (Evidence) Act 2005: permit the record of evidence given by the complainant in a sexual assault trial to be admitted as the evidence in any new trial ordered following an appeal.

Theoretical issues

Societal attitudes to sexual assault: Australia

-National Survey on Community Attitudes towards Violence Against Women. *Changing Cultures, Changing Attitudes-Preventing Violence Against Women (2009)*: 10,000 interviews

34% believed that rape results from men not being able to control their need for sex

13% believed that women often say no when they mean yes

16% believed that women partly responsible for rape if intoxicated

26% disagreed that women rarely make false claims of being raped

5% believed that women who are raped ask for it

7% disagreed that forced sex in an intimate relationship is a crime

Judicial/juror attitudes to sexual assault

-‘Women who say no do not always mean no...If she doesn’t want it she only has to keep her legs shut and she would not get it without force and then there would be the marks of force being used’ Judge Wild, direction to jury in rape trial, England, 1982

-Justice Jupp (1990) passed a suspended sentence on a man who twice raped his ex-wife, explaining that this was a rare sort of rape, within the family, and does not impinge on the public.

-Taylor, ‘Juror Attitudes and Biases in SA Cases’ (2007) AIC Trends & Issues in Crime and Criminal justice No 344

- Less favorable attitudes towards victims if SA if juror is male, lower income, and politically conservative
- More favorable attitudes towards victims of SA if juror is educated...

Essay: Subjective or Objective?

Introduction (p.656)

-Fault element for CL offence of rape is satisfied by an ‘intention to have sexual intercourse without consent’-*DPP v Morgan*.

-The HOL clarified that this intent will be satisfied by either:

- Knowledge that victim is not consenting
- Recklessness as to consent

The CL Approach

-The CL demonstrates a high degree of fidelity to the primacy of subjective mental states.

-*DPP v Morgan*

- Facts: Morgan invited three colleagues home to have sex with his wife. On her evidence, she was restrained and forced to have sex with each of the men. The three men were charged with rape and Morgan was charged with aiding and abetting these rapes. The men claimed that Morgan had urged them to ignore any protests or resistance, saying his wife was ‘kinky’ and that these protests were merely simulations designed to increase sexual pleasure.
- Held: HOL held that jury should have been directed that a man is not guilty of rape where he had sex in the mistaken belief, however unreasonable, that the woman was consenting
- Reason: Since rape required the accused to either know or be reckless to whether the woman was consenting, as a matter of ‘inexorable logic’, a mistaken belief in consent (however unreasonable_ must negate liability for rape.

-This ruling was widely criticized. However, affirmed as a correct statement of CL in NSW (*R v McEwan*)

Legislative changes

-In NSW, s61HA (3) of the Crimes Act 1900 MSW) broadened the definition of knowledge to include recklessness and absence of reasonable belief in consent

(3) A person who has SI 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 SI
- (b) the person is reckless as to whether the other person consents to the SI
- (c) The person has no reasonable grounds for believing that the other person consents to the SI

The case for SUBJECTIVE mens rea

1. Having subjective fault element accords with the fundamental principles of criminal responsibility- a person should not be convicted of a serious criminal offence unless he or she intended to do the forbidden act or was aware of the circumstances which made the act criminal.
 - An objective test would mean that punishment would be imposed not for what an accused actually believed but for what he or she should have thought or believed, according to some standard of reasonableness.
 - The requirement that prosecution prove 'mens rea' emphasizes the importance of individual responsibility. It also recognizes that the criminal law is designed to punish the vicious, not the stupid or the credulous (Law Reform Commission of Victoria, rape: Reform of Law and Procedure, Report No 43)
 - Justice Brennan: 'humane protection for persons who unwittingly engage in prohibited conduct
2. Serious crime, such as rape should not be made an offence of strict liability or negligence, as it would be an exception to the general principle of Cl that serious offences require proof of intention or recklessness.
 - However, this argument is persuasive only if idea of 'true fault' in criminal law is conceived in purely subjective terms. That is not the case. Subjective fault in criminal law has never been the only basis for criminal responsibility. There are signs that judges and law reformers are prepared to adopt an objective fault standard based on culpable inadvertence (where accused has failed to advert to the question of consent completely)
3. Jocelyn Scutt doubts whether the introduction of a reasonableness test would advance the situation for women at all, for the reason that 'what a woman actually believes is reasonable, and what the law has traditionally regarded as reasonable are quite different'.

The case for OBJECTIVE mens rea

1. The present law (only subjective) does not adequately protect victims of sexual assault
 - ...when the offender has genuine but distorted views about appropriate sexual conduct. The subjective test is outdated and reflects archaic views about sexual activity. It fails to ensure a reasonable standard of care is taken to ascertain whether a person is consenting before embarking on a potentially damaging behavior. An objective test is required to ensure the jury applies its common sense regarding current community standards (NSW Attorney-General *The Hon John Hatzistergos MLC-when justifying the move to objective fault element*)
2. An accused person should not be able to avoid culpability if he has not considered the issue of consent
 - *R v Kitchener*: 'where consent to intercourse is withheld, failure by the accused to avert at all to the possibility that the complainant was not consenting, necessarily means that the accused is 'reckless as to whether the other person consents'...which is sufficient to satisfy the mens rea of the offence in NSW

- The act of penetration is an act which cannot be done accidentally. If an accused is physically capable of penetration and mentally capable of forming the intent to penetrate, then it should be expected that he is also able to turn his mind whether or not the other person is consenting.
- 3. Also, accused should not be allowed to escape conviction simply by asserting an honest belief that there was consent
 - It will sometimes be difficult for prosecution to refute such an assertion, regardless of how unreasonable that belief is.
 - Note: Since evidence of mistaken belief is adduced, it is incumbent upon prosecution to disprove it BRD. Rape convictions are therefore made more difficult to obtain due to the onerous task of disproving a wholly subjective fault element.
- 4. Objective element is needed to protect women from those men who hold distorted views about sexual behavior
 - The subjective model reinforces male constructions of sexual relations which assumed women derive erotic pleasure from having their will overcome by a masterful male.
 - Allows accused to rely on notions such as 'no' means 'yes' or that women enjoy being ravished (*DPP v Morgan*)
- 5. Education function of the law
 - Help to educate men, in particular, about the need to exercise more care in their conduct of sexual relations.
 - It serves as a signal to the community that a belief is not acceptable for men to cling on outdated myths about seduction, sexual conquest and female sexuality.

Legislation

61I 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.

61H Definition of "sexual intercourse" and other terms

(1) "*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).

(1A) For the purposes of this Division, a person has a "cognitive impairment" if the person has:

- (a) an intellectual disability, or
- (b) a developmental disorder (including an autistic spectrum disorder), or
- (c) a neurological disorder, or
- (d) dementia, or
- (e) a severe mental illness, or
- (f) a brain injury,