

BETWEEN:

MICHAEL ALAN GILLARD
Appellant

and

THE QUEEN
Respondent



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APPELLANT'S SUBMISSIONS

Part I:

1 This submission is in a form suitable for publication on the internet.

20 **Part II: Concise statement of the issue the appeal presents**

2 Section 54 of the *Crimes Act* 1900 (ACT) provides that a person is guilty of the offence of sexual intercourse without consent if they engage in sexual intercourse with another person without the consent of that person and with knowledge that the other person does not consent or if they are reckless as to whether the other person consents.¹ Section 60 sets out a similar offence in respect of an act of indecency.²

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3 Section 67(1) sets out factors that negate the consent of a person to, *inter alia*, sexual intercourse or an act of indecency.³ Of those factors, s 67(1)(h) provides that a person's consent is negated if it is caused by the abuse by the other person of his or her position of authority over, or professional or other trust in relation to, that person. Section 67(3) provides that if a person knows the consent of another person has been caused by one of the s 67(1) factors, they are deemed to know that the other person does not consent.

4 The issue that arises on the appeal is, when s 67(1)(h) is relied upon to establish absence of consent for the purpose of the physical element of the offence, may the mental element of the offence be established through recklessness as to the circumstances under s 67(1)(h), or is knowledge of those circumstances required by operation of s 67(3)?

40 **Part III: *Judiciary Act* 1903 (Cth)**

5 The appellant considers that notices under s 78B are not required.

¹ At the relevant time the section was numbered 92D. It has been amended in the interim but the amendments do not, in the appellant's view, relevantly affect the operation of the section. These submissions adopt the current numbering, as that course was adopted by the Court of Appeal. The original provisions, interim amendments, and the current provisions are annexure A to these submissions.

² At the relevant time the section was numbered s 92J.

³ At the relevant time the section was numbered 92P.

Part IV: Citations

6 The citation of the reasons for judgment of the intermediate Court is *Gillard v R* [2013] ACTCA 17; (2013) 275 FLR 416. The summing up and remarks on sentence of the primary judge are unreported, and are reproduced in the appeal book.

Part V: Narrative statement of relevant facts

7 The appellant stood trial before Chief Justice Higgins and a jury in the Supreme Court of the Australian Capital Territory in September 2011 in respect of 19 counts of offences contrary to Part 3 of the *Crimes Act* 1900 (ACT) ("*Crimes Act*"). Two counts were withdrawn during the course of the trial. On 22 September 2011 the jury returned verdicts of guilty on three counts of act of indecency (person under 16) (contrary to s 61(2) *Crimes Act*), three counts of sexual intercourse without consent (contrary to s 54(1)), one count of act of indecency without consent (contrary to s 60(1)) and one count of possess child pornography (contrary to s 65). This appeal is brought in respect of the convictions on which consent was in issue, namely counts 13, 14, 16, and 18 of the indictment.

Evidence relevant to counts 13, 14, 16 and 18

8 The complainants (DD and JL) are sisters. Between December 1996 and January 2000 they often stayed with the appellant, a family friend, for a week during the Christmas school holidays (CA at [8], [23]). They stayed in order to visit their brother who lived in a permanent care facility in Canberra (T78.6-15). At these times they were said to be under the appellant's care, and they said they referred to him as "uncle" (T76, T354).

9 All of the counts in respect of a person under 16 years (counts 1-12) were alleged to have occurred at the appellant's Canberra home during these periods and involved DD prior to her 16th birthday in May 1997 (CA [42]).

10 DD gave evidence of another (uncharged) incident alleged to have occurred in Wodonga, Victoria, after she turned 16 but prior to the alleged incidents subject of counts 13-18. This evidence was admitted, *inter alia*, to establish the context of DD's acquiescence in respect of count 13 (T37.34-45). She gave evidence that the appellant told her "If you don't love me anymore, then I'll start loving [JL]" (T103.24) and then caused DD to touch his penis and put her mouth over it (T109.6-24). DD gave evidence that she acquiesced to the appellant's requests to protect her sister JL (T103.10-104.5).

11 The incident the subject of counts 13 and 14 occurred in January 1999 at the appellant's home when DD was 17 years old. DD gave evidence that she engaged in intercourse with the appellant in front of JL at the appellant's instruction (T101.43-102.13, 103.5). The complainants and the appellant were in the lounge room (T101.43). JL was using a computer in the room with her back to the area where DD and the appellant were sitting (T210.44-211.4, 216.30). DD gave evidence that the appellant told JL that he and DD (T101.44-102.9):

"had a relationship and that he could get me to do whatever he wanted me to do. I told him to stop because I didn't want – I didn't want him talking about it. I didn't want him to tell my sister, because it was the first time he'd ever brought my sister into it. He then said to [JL] that he'd show – he'd prove that he could get me to do whatever he wanted, and he told me to give him a head job, which I didn't want to do."

12 DD said the appellant then stood up and guided her down, grabbing the back of her head and pushing her mouth over his penis and maintaining his grip. She said she then gave him "a head job" (T102.9).

13 JL gave a different account of the same incident. She said the appellant asked her "Do you want to know why [DD] and I have a special bond?" and she replied "Yes". The appellant said "Whatever [DD] tells me to do, I do. Whatever I tell [DD] to do, she does", and said to DD "Come... On your knees. You know what to do" (T210.5-10 210.9). She said that he stood there, with his hands beside his legs (T212.26), and that DD put her mouth on his penis (T211.21). She gave evidence that the appellant did not ask if she was okay about he and DD performing a sexual act in her presence (T212.33).

14 The appellant admitted the act of intercourse the subject of count 13, but denied that DD was not consenting and gave a different version of the incident. He said generally that he and DD had a strong bond and that he was closer to her than to the other kids (T399.20). In relation to the incident, the appellant said that after breakfast, JL started 20 playing on the computer while he and DD stayed at the dinning room table talking. They started kissing and kissed for a while, and then DD started to undress (T367.28-.34). He said they continued touching and kissing each other and that the appellant said words to the effect "it would be nice if you went down" (T458.7). He said he did not direct her or tell her what to do or hold her head (T459.12-.25). He said DD moved her mouth up and down over his penis for 15-30 seconds, and then they both stopped and he pushed her back and nodded no (T459.23-.44).

15 Count 14 related to JL witnessing that act. The appellant accepted that JL was in the room, but denied that JL witnessed the act (T461.33-44). He gave evidence that as far 30 as he was aware JL's back remained to him during the act of sexual intercourse (T368.10).

16 DD gave evidence in respect of counts 16 and 18 said to have occurred the following year. She said the appellant pushed her down on a bed and inserted two fingers in her vagina (count 16), and then engaged in cunnilingus (count 18), and that she protested and physical resisted (T114-115). The appellant denied the acts of intercourse (T466.1-15).

17 Count 19 was in respect of possession of three photographs of DD naked taken when she was over 16 but under the age of 18. 40

Crown case

18 In respect of the *mens rea* of count 13 (an offence contrary to s 54 (1) of the *Crimes Act*) the Crown case statement (not before the jury) said:

50 "the accused did not attempt to ascertain whether [DD] consented, and further the prosecution will rely on the negation of consent provisions in section 67(1)(h) of the Crimes Act. The prosecution case is that the consent of the complainant to sexual intercourse with the accused, is negated because that consent was caused by the abuse by the accused of his or her position of authority over, or other trust in relation to, [DD]" (Crown Case Statement p 10).

19 In respect of the *mens rea* of count 14 (an offence contrary to s 60(1) of the *Crimes Act*) the Crown case statement said:

“the accused did not ascertain [JL’s] consent to have an act of indecency performed in her presence. The prosecution case is that any apparent consent of [JL] to an act of indecency committed in her presence by the accused is negated because that consent was caused by the abuse by the accused of his or her position of authority over, or other trust in relation to, her” (Crown Case Statement p 10-11).

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20 In respect of counts 16 and 18 (offences contrary to s 54 (1) of the *Crimes Act*) the Crown case statement in respect of *mens rea* said:

“the accused did not attempt to ascertain whether [DD] consented, and further the prosecution will rely on the negation of consent provisions in section 67(1)(h) of the *Crimes Act*. The prosecution case is that the consent of the complainant to sexual intercourse with the accused, is negated because that consent was caused by the abuse by the accused of his or her position of authority over, or other trust in relation to, [DD].” (Crown Case Statement p 12).

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21 At issue in the trial was the mental element to be proved where consent was said to be negated by the appellant’s abuse of his position over the complainants.

22 Section 67 of the *Crimes Act* relevantly provides:

(1) For sections 54, 55 (3) (b), 60 and 61 (3) (b) and without limiting the grounds on which it may be established that consent is negated, the consent of a person to sexual intercourse with another person, or to the committing of an act of indecency by or with another person, is negated if that consent is caused—

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...
(h) by the abuse by the other person of his or her position of authority over, or professional or other trust in relation to, the person; or
...

(2) A person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse.

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(3) If it is established that a person who knows the consent of another person to sexual intercourse or the committing of an act of indecency has been caused by any of the means set out in subsection (1) (a) to (j), the person shall be deemed to know that the other person does not consent to the sexual intercourse or the act of indecency, as the case may be.

23 In opening the case to the jury, the Crown said (T63.9):

“... The law says that if it’s established that a person in the position of the accused who knows that consent has been caused by them abusing their position of trust or by abusing their position of authority then that person, the accused, is deemed to

know that there is no consent and so that addresses the state of the accused's knowledge."

24 The Crown later misstated the effect of s 67(3) to the jury (T64.42, emphasis added):

10 "Then the next step is, if she apparently consented, was that consent caused by the accused abusing his position of authority over her or his position in trust [sic] in relation to her or, indeed, both those positions, in which case her consent is negated, it has no effect. *In such a case, he is then deemed to know she is not consenting.*"

25 In her closing statement to the jury, the Crown puts recklessness as an available mental element in respect of s 67(1)(h) (T491.13):

"There is also recklessness. That is sufficient, that the accused may have been reckless as to the cause of any apparent consent on the part of [DD], if he was reckless to the fact that that's why she was consenting because of that position of authority.

20 ... I suggest to you that there is evidence before you on the basis of [DD]'s evidence that she was not, in fact, consenting and that the accused would have known. But if you're not of that view, that any apparent consent was caused by the nature of their relationship and to the extent – and to that extent it was not consent at all and the accused was either aware of this or reckless as to that."

Summing up

26 The judge initially explained consent to the jury without reference to negated consent (T527.42):

30 "Now, I mentioned the accused knowledge [sic] and the accused is guilty of a crime where consent is absent if and only if the accused, first of all, knows that there is no consent. So it must be either knowledge of consent – of lack of consent, I'm sorry. If there is knowledge of lack of consent then there being no consent that becomes a crime. There is however another alternative and that is that the accused might be reckless as to whether there is consent or not and that may be constituted in one of two ways."

His Honour then set out advertent and inadvertent recklessness.

40 27 After discussions with counsel, in which counsel for the appellant sought a redirection on consent to account for the operation of s 67(3) (T531.23), the trial judge directed the jury as to the mental element required where consent is said to be negated by abuse of position (CA [81], T532.2-532.33, emphasis added):

"... it was mentioned to you that the accused *should* know that there was no consent. If so then the accused knows that and whatever apparent consent there is, is of no consequence or no signs. That is to say no overt signs of consent would be relevant.

However, if the accused does not know or you're not satisfied that he did know that there was no consent you would have to, by virtue of the directions I gave you concerning the onus of proof, proceed on the basis that the accused *did not know there was consent* because you're not satisfied beyond reasonable doubt that he did know that there was no consent. I'd say the next question's recklessness and *you might be satisfied the accused was reckless* or you might be satisfied that the accused knew that the apparent consent which he perceived was a result of a breach of trust or a breach of his position of authority if there was one.

10 Now, he must, in that consequence, in that circumstance, know that the apparent consent is so procured. In other words if you take the example, Mr Archer gave of the errant doctor, while there's a breach of medical ethics for a doctor to have intercourse with a patient it's not of itself a crime. But if the doctor said, first of all, overtly said to the patient I won't treat you anymore unless you consent, that would be abuse of a position of authority but he would have to know *it was an abuse of that position of authority*. You might well think, well, of course he knows it and that might well be the answer.

20 But if it was the patient who thought to herself, well, if I don't consent to this suggestion that I have sex he might not treat me anymore and agrees to the sexual act because of that then, it would be a crime if and only if the doctor was aware that that was the reason for the apparent consent.

So there are several steps to take in respect of that."

28 His Honour then gave directions in respect of other aspects of the jury's task and began summarising the evidence given in respect of each count in the order of the counts on the indictment. On reaching count 13, his Honour said (T539.37-43):

30 "Now, the next occasion she referred to was after her learner's permit and that's definitely after she's aged 16. You've seen the learner's permit dated '98 and clearly she was over 16 at the time. And it was January '99 that the next visit happens. That would indicate that she was then over the age of 16 so that if anything happened consent is an issue. This is the occasion when she and [JL] were there and here there is some agreement from the accused that something happened".

29 The judge then misstated the evidence given by DD in respect of count 13. After summarizing her account of the act, his Honour said (T540.4, emphasis added):

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"She said he said he [sic] was his girl. 'I loved him and he loved me. If didn't love him he'd love [JL] [sic]. *That was before [JL] came into the room,*' she said. *This was in advance of that act occurring.*

And again that's put forward as a reason why she apparently agreed that she didn't want to have his attentions directed towards her younger sister. Now, if that's the case, of course, that would tend to *vitiating* consent because that is a threat and a threat would vitiate consent. And if a person making a threat does [sic] for the purpose of achieving compliance you might well think they know full well that that

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is the reason why the consent is being given."

DD only gave evidence of the appellant making statements to that effect in Wodonga and at other unspecified times in Canberra, not at the time of the act alleged in count 13.

30 After summarising the evidence in respect of count 16, and immediately prior to summarising the evidence in respect of count 18 (being two separately charged acts occurring during the same incident), his Honour said (at T541.5):

10 “And I just remind you it has to be without consent, the accused knowing it was without consent or at least be reckless as to whether there is consent. And in considering apparent consent you also consider whether any coercion of the kind I’ve mentioned was used and is breach of position of authority [sic]. It was suggested – I’ll talk about that a bit later – but certainly threats would be qualified as vitiating consent if there were any.”

31 Immediately after summarising the evidence in respect of count 18 his Honour said (T541.23):

20 “If that occurred then the same issues arise as to whether there was consent or not to that and I don’t think there’s much alternative in respect to that. It either happened or it didn’t. That is to say you’re either satisfied beyond reasonable doubt that it did or you are not so satisfied.”

32 His Honour then set out the remaining evidence in respect of the counts, and the evidence of the appellant. He then said (T546.34, emphasis added):

30 “Now the addresses of counsel I don’t think I need to reiterate for you. Ms Jones of course pointed out some matters of law that *I think you’ll probably find I’ve virtually agreed with.*”

33 His Honour then summarised the counts, in which he said, in respect of counts 13 and 14 (T547.30, emphasis added):

“The issue that arises there is whether the other elements are made out. That is knowledge of lack of consent or recklessness as to whether there was consent and *even if it was acquiescence whether it was genuine consent.* If there was no consent, you’re satisfied about that, of course that’s a matter for you.”

34 In summary, it was put variously to the jury that they could find the appellant guilty:

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- If he was reckless or knew that consent was caused by his abuse of his position of trust (Crown opening at T63.9, Summing up T532.15),
- If consent was caused by his abuse, in which case no requisite mental element applied because he would be “deemed to know she is not consenting” (Crown opening at T65.1),
- If he was reckless as to the cause of consent (Crown closing at T491.13),
- If he “should know” there was no consent (Summing up at T532.2),
- If he knew that he was abusing his position of authority (Summing up at T532.24),

- If he was “aware” that consent was caused by abuse of his position (T532.31),
- If he knew that consent was caused by a threat (T540.10), and
- If he was reckless as to whether consent was genuine (Summing up T547.30).

35 The jury retired to consider its verdict at 1.19pm on 21 September 2011. The jury delivered verdict at 11.00am on 22 September 2011 convicting the appellant on counts 2-4, 13, 14, 16, 18 and 19.

10 36 On 2 December 2011 the appellant was sentenced to a total period of imprisonment of 9 years and 9 months, with a non-parole period of 5 years and 3 months. His total non-concurrent imprisonment attributable to convictions on counts 13, 14, 16 and 18 was 8 years.

Appeal

37 The appellant appealed against his conviction and sentence; ground (c) of the conviction appeal was that the trial judge misdirected the jury in respect of the issue of consent. The ground was put on three bases, the third of which was that (*Gillard v R* [2013] ACTCA 17; (2013) 275 FLR 416 (“CA”) [83(c)]):

20 “even if it could be shown that DD’s will had been overborne by the abuse of the appellant’s position of trust or authority, it also had to be shown that the appellant knew that DD’s ‘consent’ has been obtained because of the overbearing of her will by that abuse (recklessness as to consent would not be sufficient).”

38 The appeal was heard on 31 July 2012. On 18 April 2013, Refshauge, Penfold and North JJ dismissed the appeal. The Court held that (CA [99]-[100]):

30 “If s 67 only applies to cases involving knowledge and not to those involving recklessness, then the failure of the trial judge to instruct the jury that the possibility of apparent, rather than genuine, consent was only relevant to determining whether the appellant knew there was no consent, could be said to have deprived the appellant of a chance of acquittal on the six charges where consent was theoretically in issue. In those circumstances, and in contrast to her Honour’s position in *R v Schippiani* [set out below], we do need to reach a conclusion about the scope of s 67.

Our conclusion is that ss 67(1) and (2) are applicable to determining whether there was consent, not only where **knowledge** of absence of consent is alleged but also where the allegation is **recklessness** as to consent.”

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Part VI: Appellant’s argument

Errors of the Court of Appeal

39 The Court of Appeal erred by misconstruing the effect of s 67.

40 The Court held that s 67(3) was not intended to “limit” the operation of s 67 to circumstances in which a person knows that consent is the result of one of the (a)-(j) causes (CA [98]). It held that s 67(1) and (2) are applicable to determining whether there was consent not only where knowledge of absence of consent is alleged but also
50 where the allegation is recklessness as to consent (CA [100]-[109]).

41 The Court of Appeal's judgment was based in part upon an acceptance of the *obiter dicta* of Penfold J in *R v Shipanni* [2012] ACTSC 108; (2012) 265 FLR 197 at [81]-[89] (CA [101]). In that case her Honour observed that:

10 “[82] One intended effect of s 67(1) seems to be that an ostensible consent to the relevant sexual activity is not a real consent if the giving of that ostensible consent is caused by any of the actions or circumstances described in paras 67(1)(a) to (j). 67(1) thus enables the requirement of an absence of consent to be established, despite an ostensible consent, in appropriate cases.

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20 [84] The question that was raised in this trial, however, was whether s 67(3) confines the operation of s 67(1) to cases in which the accused can be shown to have known that the ostensible consent was caused by one of the actions or circumstances described in paras 67(1)(a) to (j) (and is therefore deemed to know that the complainant did not consent), or whether s 67(1) also applies where an accused person may have been reckless about consent. That is, does s 67(1) apply where any ostensible or actual consent would have been negated under that provision (thus establishing the objective absence of consent) but where the accused's state of mind cannot be shown to have involved knowledge so as to invoke the operation of s 67(3). If s 67(1) still applies in such a case, this would leave the question of the accused's state of mind (specifically, whether he or she was reckless about consent) to be addressed by other evidence, rather than by a legislative presumption such as is provided by s 67(3) in relation to knowledge. Otherwise, s 67 only protects a complainant whose “consent” has resulted from one of the circumstances described in that subsection if the accused knows that this was the origin of the consent, but not if the accused was reckless about the origin of the consent.

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40 [87] ... since the accused's trial, in *Jones v Chief of Navy* [2012] ADFDAT 2, the Defence Force Discipline Appeal Tribunal (Tracey J, White JA and Mildren J) considered the applicability of s 67 in a proceeding under the *Defence Force Discipline Act* 1982 (Cth) [An appeal from that decision on other grounds was dismissed by a bench of five judges: *Jones v Chief of Navy* [2012] FCAFC 125 at [128]-[132].] The Tribunal commented on the operation of s 67(3) as such, saying (at [73]):

50 As to s 67 (3), in our opinion it does not create a statutory fiction. As a matter of logic and common sense, knowledge of circumstances which negate consent means that not only was there no consent at all, but the accused knew there was no consent. Section 67 (3) is merely a provision for the removal of any doubt on that subject: see *Macquarie Bank Ltd v Fociri Pty Ltd* (1992) 27 NSWLR 203 at 207 (per Gleeson CJ). This subsection also makes clear that honest and reasonable mistake of fact is not available as a defence in the circumstances to which s 67 (3) applies, (although as a matter of logic, if the fault element is knowledge, it is difficult to see how

one could be mistaken about something when it was proved that the accused had the relevant knowledge).

[88] The Tribunal did not apparently need to consider the question raised in this case, namely whether the existence of s 67(3) excluded the operation of s 67(1) in a case where the charge relied on recklessness rather than knowledge as to consent, but the description of s 67(3) as “merely a provision for the removal of any doubt” does not suggest that the Tribunal saw the provision as confining the operation of s 67(1).”

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42 The Court of Appeal in the present case also reasoned that ss 67(1) and (2) relate directly to the question (at [102], [108]):

“whether there was in fact consent by the complainant (the genuine consent required by law) to the sexual activity. Those provisions have nothing to say about the state of mind of the accused. They could sensibly stand alone even if there were no provisions along the lines of s 67(3), and the question of whether there was in fact consent is equally relevant whether the offence charged is said to involve knowledge of absence of consent or recklessness about consent.

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As is apparent from the transcript of the appellant’s trial, discussions in court about the operation of s 67 tend to focus on the problem caused by the concept of ‘negating’ consent, and are commonly resolved by participants reading the s 67 references to consent being negated as references to ‘apparent’ or ‘ostensible’ consent not being real or genuine consent if ‘given in one of the circumstances mentioned in the section. It seems to us that the aim of s 67(3) is simply to ensure that an accused cannot defeat a charge by establish that, although he or she knew that the consent given had been caused by any of the circumstances set out in s 67(1), he or she did not know that at law that ‘consent’ was not a real consent.”

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43 It is submitted that the above interpretation misconstrues the effect of s 67(1), conflates circumstances of acquiescence not being actual consent with cases of actual consent that is deemed to be negated, extends liability in disregard of the clear words of the section and renders s 67(3) otiose.

Operation of s 67

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44 Section 54 of the *Crimes Act* makes a person criminally liable if he or she has intercourse with another person “without the consent of that other person” and if he or she is “reckless as to whether the other person consents”. Recklessness is defined to include actual knowledge that a person is not consenting (s 54(3)).⁴ Section 60 operates to similar effect with respect to an act of indecency.

45 A person who does not offer physical or verbal resistance may nevertheless not be consenting within the meaning of consent in ss 54(1) and 60(1). For example, a person

⁴ At the time of the offences the provision provided that the person would commit an offence if they did so with knowledge that the other person did not consent or if they were reckless as to whether the other person consented.

who is sleeping or unconscious is not, in fact, consenting. In such circumstances, there is no consent, and the physical elements of the offences in ss 54 and 60 would be satisfied without having to look outside the provisions for this element.

46 The effect of s 67 is to broaden the category of offences created by ss 54 and 60 to include cases in which consent *is actually given* by the other person but is deemed to be negated by the circumstances there identified. Subsection 67(1) negates consent if it is caused:

- 10 (a) by the infliction of violence or force on the person, or on a third person who is present or nearby; or
- (b) by a threat to inflict violence or force on the person, or on a third person who is present or nearby; or
- (c) by a threat to inflict violence or force on, or to use extortion against, the person or another person; or
- (d) by a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person; or
- (e) by the effect of intoxicating liquor, a drug or an anaesthetic; or
- (f) by a mistaken belief as to the identity of that other person; or
- 20 (g) by a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person; or
- (h) by the abuse by the other person of his or her position of authority over, or professional or other trust in relation to, the person; or
- (i) by the person's physical helplessness or mental incapacity to understand the nature of the act in relation to which the consent is given; or
- (j) by the unlawful detention of the person.

30 47 On first reading, s 67(1) appears to conflate circumstances in which acquiescence is not real consent with those in which consent is real but vitiated. This evident conflation was noted by the ACT Law Reform Commission in its 2001 *Report on the Laws Relating to Sexual Assault*, no 18 at [184]. That report also criticised s 67 (then s 92P) on other grounds, including the lack of clarity as to whether liability dependent upon s 67 required actual knowledge of the circumstances negating consent by virtue of s 67(3) (at [191]). The section remains relevantly unamended. However on examination it is clear s 67 only applies where consent is actually given.

40 48 For some of the situations envisaged by the s 67(1)(g) factors, such as (g) and (h), it is readily apparent that acquiescence may be real consent, such that lack of consent for the purpose of s 54(1) will not be made out without relying upon s 67(1). For others, such as the situations envisaged in (a) and (b) it is less readily apparent, and in many instances there will be no real consent where a person submits because of violence or a threat of violence. In such cases, lack of consent will be made out for the purposes of s

54(1), and no reliance upon s 67(1) is necessary. However, there can be instances in which a person's real consent is caused by violence or the threat of violence, in which case there will be no lack of consent for the purposes of s 54(1), unless s 67(1) operates to negate that consent.

49 Take, for example, a relationship that is marred by domestic violence. There may be instances in which there is actual consent that is negated by the threat of violence or by recent violence, and there may be other instances where there is no actual consent because of violence being actively inflicted.

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50 Where there is actual consent, the necessary element in s 54(1), "without the consent of that other person", cannot apply because the person is, in fact, consenting. It is necessary therefore to rely on the operation of s 67(1)(a), to deem that the actual consent is "negated", in order to criminalise the act. However once s 67(1) becomes necessary to criminalise the act, the mental element provided in s 54(1) ceases to be effective. A person cannot have knowledge that another person is not consenting where that other person is, in fact, consenting. Nor is it clear how they could be reckless as to whether the other person is consenting where, to outward appearances, the other person is consenting and moreover is, in fact, consenting. Subsection 67(1)(3) is therefore necessary to establish the requisite mental element, which in the present example requires that the person know that the other person is only consenting because the other person feels threatened by future violence.

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51 Where the person submits because they are being hit or immediately threatened with violence, on the other hand, there may be no actual consent, and the other person will be guilty if he or she knows or is reckless as to whether the first person is not consenting.

52 A further possible example in which the threat of violence may negate actual consent is a situation in which a sex worker or his or her family is threatened by a brothel keeper. Brothel patrons may have no basis for knowing or suspecting that the sex worker's consent to sexual intercourse is not a result of the patron's payment, but a result of the threat of violence to themselves or their families. On the Court of Appeal's construction of the Act, if a patron of the brothel does not turn his or her mind to whether the sex worker is only consenting because they have been threatened by the brothel keeper, the patron will be guilty of an offence of sexual intercourse without consent.

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53 In order to criminalise sexual intercourse with or an act of indecency on a person without that person's consent in circumstances in which the other person is in fact consenting, therefore, it is necessary to deem both the physical element, by negating actual consent, and the requisite mental element in respect of the negation of the other person's actual consent. This is the effect of s 67(3), which provides:

40

"If it is established that a person who knows the consent of another person to sexual intercourse or the committing of an act of indecency has been caused by any of the means set out in subsection (1) (a) to (j), the person shall be deemed to know that the other person does not consent to the sexual intercourse or the act of indecency, as the case may be."

50

54 The purpose of s 67(3) is to provide a workable mental element for the relevant offences where the physical elements of the offence have been altered by a statutory deeming provision.

55 Thus by deeming that instances of actual consent are “negated” by the circumstances set out in (a)-(j), s 67 broadens the circumstances in which a person may be liable for the relevant offences of sexual intercourse or an act of indecency without consent. It is in this context that s 67(3) specifies that the required mental element where consent is given but is deemed negated by s 67(1), is knowledge.

10

Actual consent

56 Section 67 can be contrasted with the approach to consent adopted in the legislation of each of the Australian States, which incorporate factors capable of influencing consent such as mistake, unconsciousness, and fear of force, into the definition of consent such that there is no real consent in those circumstances. Where such factors are present they do not negate *actual* consent, but may establish that the person “does not consent” (*Crimes Act* 1900 (NSW) s 61HA(6)) or has otherwise not “freely agreed” (or words to that effect) and so cannot be said to have consented within the defined meaning of “consent”: *Crimes Act* 1958 (Vic) s 36, *Criminal Code* (QLD) s 348, *Criminal Law Consolidation Act* 1935 (SA) s 46(2), *Criminal Code Act* 1924 (TAS) s2A, *Criminal Code* (WA) s 319(2)(a)). Section 67 of the ACT *Crimes Act* appears in this respect unique in Australia, in that it distinguishes between instances of lack of real consent, and actual consent deemed to be negated.

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57 The reasoning of the Court of Appeal that s 67(1) relates to “the question *whether* there was *in fact* consent by the complainant” (at [102] emphasis added), and should be read as though references to consent being negated are “references to ‘apparent’ or ‘ostensible’ consent not being real or genuine” (at [108]), treats ss 67(1) and (3) as though they operate in the same way as the other Australian Acts, when *prima facie* they do not. Section 67 does not operate as a definition provision, and it cannot be interpreted, as the Court of Appeal suggests, by reading “references to consent being negated as references to ‘apparent’ or ‘ostensible’ consent not being real or genuine consent if ‘given’ in one of the circumstances mentioned in the section” (CA [108]).

30

58 Subsection 67(1) refers to the “consent of a person” being “negated” if that “consent” is caused by one of the (a)-(j) factors. Subsection 67(3) refers to a person knowing that consent “has been caused by any of the means set out in subsection (1) (a) to (j)”. The underlying premise must be that there is actual consent; it cannot be “negated” if it does not exist, nor can there be knowledge of a state of affairs that does not exist.

40

59 By contrast, subsection (2) provides that a person who does not offer actual physical resistance shall not, by reason only of that fact, be regarded as consenting. Unlike subsections (1) and (3), subsection (2) is not limited to cases of actual consent. Subsections (1) and (3) could have been framed in similar terms:

A person will not be regarded as consenting merely because they submit or acquiesce where that submission or acquiescence is caused by any of the means set out in subsection (1)(a) to (j).

60 There would then be no need to specify a separate requisite mental element, because the person would not, in fact, be consenting and the mental element set out in s 54 would operate. However, that is not how the provision is framed.

Extending liability

61 The effect of ss 67(1) and (3) is to extend the circumstances in which a person will be guilty of the offences, in this case, under ss 54 and 60, to those where the other person in fact consents but that consent is negated, provided that the accused had knowledge that the actual consent of the other person is caused by any of the (1)(a)-(j) means. The interpretation of the Court of Appeal extends the circumstances in which a person will be guilty beyond that contemplated in the legislation to cases in which the other person is actually consenting, and the accused does not turn his or her mind to why that person is actually consenting.

62 The effect of extending the scope of the provision in this way may be considered by applying it to a case under s 67(1)(e) where a person is consenting by reason of the fact that he or she is intoxicated. This could feasibly apply to both parties in a given situation, who consent only because they are intoxicated and do not turn their minds to why the other person is consenting. It may be asked (rhetorically) how recklessness would apply to that circumstance. On the Court of Appeal's construction, both parties would be guilty of an offence under s 54.

63 The Court of Appeal's construction is contrary to ordinary principles of statutory construction which require clear words to extend criminal liability for identified conduct, particularly in the context of serious criminal conduct: see eg *CTM v R* [2008] HCA 25; (2008) 236 CLR 440 at [7]. Moreover, a court should not disregard clear words in order to extend the scope of criminal liability to include conduct of a kind that stands outside the language of the section, even if it thinks the legislature has only failed to deal with a matter by inadvertence: *Krakouer v R* [1998] HCA 43; [1998] 194 CLR 202 per McHugh J at [62], citing *Ex parte Fitzgerald*; *RE Gordon* (1945) 45 SR (NSW) 182 per Jordan CJ at 186. See also *Plaintiff M47/2012 v Director-General of Security* [2012] HCA 46; (2012) 292 ALR 243 at [528]-[529] per Bell J.

Giving meaning to s 67

64 Finally, the Court of Appeal's construction gives ss 67(1) and (3) no work to do.

65 If s 67(1) merely enumerates circumstances in which there is no real consent, it is superfluous. If there is no real consent s 54(1) is satisfied in any event, and reliance on s 67(1) is unnecessary.

66 The Court of Appeal held that "the aim of s 67(3) is simply to ensure that an accused cannot defeat a charge by establishing that, although he or she knew that the consent given had been caused by any of the circumstances set out in s 67(1), he or she did not know that at law that 'consent' was not real consent": at [108]. It is unnecessary to include a provision to clarify that ignorance of the law is no defence: *Ostrowski v Palmer* [2004] HCA 30; (2004) 218 CLR 493 at [1]. Even if it were necessary it would apply *a fortiori* to recklessness; further begging the question why recklessness is not expressly referred to. The Court of Appeal's construction leaves s 67(3) no work to do.

67 The Court of Appeal's construction thus impermissibly expands criminal liability beyond the express scope of the penal provision, and in so doing renders part of that provision otiose. The appellant's construction adopts the approach to construction affirmed in *Project Blue Sky Inc v ABA* [1998] HCA 28; (1998) 194 CLR 355 at [71] by giving meaning to s 67, without altering the operation of ss 54 and 60. Knowledge or recklessness may still be proved under those sections where they operate without reliance on s 67(1).

10 68 Critically, s 67(3) deems knowledge of lack of consent where a person has knowledge that the actual consent of the other person is caused by one of the factors in (a)-(j). To read s 67 as extending liability to circumstances in which a person is reckless as to whether actual consent is negated by s 67(1) is to import words into the section. This reading extends the range of circumstances to which ss 54 and 60 apply to situations unlikely to have been in the contemplation of Parliament, without evident parliamentary intention, and contrary to the interests of the persons against whom those sections operate.

Relevance to the charges in this case

20 69 Negation of consent was plainly in issue in respect of count 13.

70 It was also in issue in respect of counts 14, 16 and 18. On all accounts, including the evidence of DD, JL and the appellant, the appellant asserted that he and DD had a "special bond" or "relationship" of some kind. DD gave evidence that the appellant told JL that he and DD had "a relationship", and that she told him to stop because she didn't want him to tell JL (T101.44). JL said the appellant referred to his relationship with DD as "a special bond" (T210.5). The appellant gave evidence that they had a "strong bond" and that he was closer to her than to the others (T399.20). JL also gave evidence in respect of the incident the subject of counts 13 and 14 suggesting that DD did not protest or make outward signs of lack of consent (T210-212).

30 71 In these circumstances, it was open to the jury to infer that, even though the appellant denied the incident the subject of counts 16 and 18, it did in fact occur, and that the complainant consented because of this "special relationship". The Crown characterised this relationship as an abuse of position or trust, which it relied upon to negate the resulting consent of DD.

40 72 Recklessness as to why the complainants were consenting was expressly left to the jury by the trial judge on all "post-16" counts (T532.12, 539.37, 547.30), and individually in respect of counts 13 and 14 (T547.30) and counts 16 and 18 (T541.5).

Part VII:

74 The applicable legislation is attached in annexure A. Some amendments have been made since the time of the offence, and all versions of the legislation from that time to the present have been included. However, the amendments do not relevantly affect the operation of the provisions.

Part VIII:

- 50 (1) Appeal allowed.
(2) Convictions on counts 13, 14, 16 and 18 on the indictment quashed.
(3) New trial ordered in respect of counts 13, 14, 16 and 18.

Part IX:

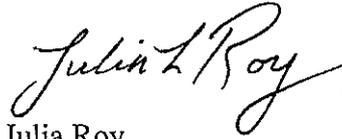
The appellant estimates that the presentation of the oral argument will require around 2 hours.

Dated: 13 December 2013



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IN THE HIGH COURT OF AUSTRALIA
CANBERA REGISTRY

No. C20 of 2013

B E T W E E N:

MICHAEL ALAN GILLARD
Applicant

-and-

THE QUEEN
Respondent

ANNEXURE A

No.	Description of Document	Date	Page
1	<i>Crimes Act</i> 1900 (ACT) ss 92D, 92E, 92J, 92K and 92P	1.6.1998- 6.1.2002	
2	<i>Crimes Act</i> 1900 (ACT) ss 54, 55, 60, 61, 67 (renumbered to current sections in Republication No 9, 7.1.2002)	7.1.2002- 26.8.2008	
3	<i>Crimes Act</i> 1900 (ACT) s 54 (amended 27.8.2008)	27.8.2008- 16.3.2011	
4	<i>Crimes Act</i> 1900 (ACT) s 60 (amended 16.3.2011)	17.3.2011- 6.7.2011	
5	<i>Crimes Act 1900</i> (ACT) ss 54, 55, 60, 61, 67 (s 60 amended 7 July 2011)	7.7.2011 - present	

**1 June 1998 - 6 January 2002
(provisions at time of offences)**

Crimes Act 1900

(2) A person who, acting in company with any other person, inflicts, or assists in inflicting, actual bodily harm upon a third person with the intent that the first-mentioned person, or any person with whom he or she is in company, should engage in sexual intercourse with that third person, or with any other person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 17 years.

92C. Sexual assault in the third degree

(1) A person who unlawfully assaults, or threatens to inflict grievous or actual bodily harm upon, another person with intent to engage in sexual intercourse with that other person, or with a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 12 years.

(2) A person who, acting in company with any other person, unlawfully assaults, or threatens to inflict grievous or actual bodily harm upon, a third person with the intent that the first-mentioned person, or any person with whom he or she is in company, should engage in sexual intercourse with that third person, or with any other person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 14 years.

92D. Sexual intercourse without consent

(1) A person who engages in sexual intercourse with another person without the consent of that other person and who knows that that other person does not consent, or who is reckless as to whether that other person consents, to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 12 years.

(2) A person who, acting in company with any other person, engages in sexual intercourse with another person without the consent of that other person and who knows that that other person does not consent, or who is reckless as to whether that other person consents, to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 14 years.

92E. Sexual intercourse with a young person

(1) A person who engages in sexual intercourse with another person who is under the age of 10 years is guilty of an offence punishable, on conviction, by imprisonment for 17 years.

Crimes Act 1900

(2) A person who engages in sexual intercourse with another person who is under the age of 16 years is guilty of an offence punishable, on conviction, by imprisonment for 14 years.

(3) It is a defence to a prosecution for an offence under subsection (2) if the defendant establishes that:

- (a) he or she believed on reasonable grounds that the person upon whom the offence is alleged to have been committed was of or above the age of 16 years; or
- (b) at the time of the alleged offence—
 - (i) the person on whom the offence is alleged to have been committed was of or above the age of 10 years; and
 - (ii) the defendant was not more than 2 years older;

and that that person consented to the sexual intercourse.

92EA. Maintaining a sexual relationship with a young person

(1) In this section—

“adult” means a person who has attained the age of 18 years;

“sexual act” means an act that constitutes an offence under this Part but does not include an act referred to in subsection 92E (2) or 92K (2) if the person who committed the act establishes the matters referred to in subsection 92E (3) or 92K (3), as the case may be, that would be a defence if the person had been charged with an offence against subsection 92E (2) or 92K (2), as the case may be;

“young person” means a person who is under the age of 16 years.

(2) A person who, being an adult, maintains a sexual relationship with a young person is guilty of an offence.

(3) For the purposes of subsection (2), an adult shall be taken to have maintained a sexual relationship with a young person if the adult has engaged in a sexual act in relation to the young person on 3 or more occasions.

(4) In proceedings for an offence under subsection (2), evidence of a sexual act is not inadmissible by reason only that it does not disclose the date or the exact circumstances in which the act occurred.

92H. Act of indecency in the third degree

A person who unlawfully assaults, or threatens to inflict grievous or actual bodily harm upon, another person with intent to commit an act of indecency upon, or in the presence of, that other person, or a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 10 years.

92J. Act of indecency without consent

(1) A person who commits an act of indecency upon, or in the presence of, another person without the consent of that person and who knows that that other person does not consent, or who is reckless as to whether that other person consents, to the committing of the act of indecency is guilty of an offence punishable, on conviction, by imprisonment for 5 years.

(2) A person who, acting in company with any other person, commits an act of indecency upon, or in the presence of, another person without the consent of that other person and who knows that that other person does not consent, or who is reckless as to whether that other person consents, to the committing of the act of indecency is guilty of an offence punishable, on conviction, by imprisonment for 7 years.

92K. Acts of indecency with young persons

(1) A person who commits an act of indecency upon, or in the presence of, another person who is under the age of 10 years is guilty of an offence punishable, on conviction, by imprisonment for 12 years.

(2) A person who commits an act of indecency upon, or in the presence of, another person who is under the age of 16 years is guilty of an offence punishable, on conviction, by imprisonment for 10 years.

(3) It is a defence to a prosecution for an offence under subsection (2) if the defendant establishes that:

- (a) he or she believed on reasonable grounds that the person upon whom the offence is alleged to have been committed was of or above the age of 16 years; or
- (b) at the time of the alleged offence—
 - (i) the person on whom the offence is alleged to have been committed was of or above the age of 10 years; and
 - (ii) the defendant was not more than 2 years older;

and that that person consented to the committing of the act of indecency.

92NA. Employment of young persons for pornographic purposes

(1) A person who employs or permits the employment, whether for reward or not, of a person who is under the age of 16 years (in this section referred to as the “young person”):

- (a) to engage in an act of a sexual nature, or to be in the presence of another person who is engaged in an act of a sexual nature, being an act that would, in the circumstances, offend a reasonable adult person; or
- (b) for the purpose of depicting or otherwise representing, by means of a film, photograph, drawing, audio tape, video tape or any other means, the young person as being engaged in, or as being in the presence of another person engaged in, an act of a sexual nature where the depiction or other representation of the young person in those circumstances would offend a reasonable adult person;

is guilty of an offence punishable, on conviction, by imprisonment for 10 years.

(2) In subsection (1), “an act of a sexual nature” means sexual intercourse or an act of indecency.

92NB. Possession of child pornography

(1) A person who knowingly has in his or her possession a film, photograph, drawing, audio tape, video tape or any other thing depicting or otherwise representing a young person engaged in, or in the presence of another person engaged in, an act of a sexual nature, being a depiction or representation that would offend a reasonable adult person, is guilty of an offence punishable, on conviction, by imprisonment for 5 years.

(2) It is a defence to a prosecution for an offence against subsection (1) that the defendant reasonably believed that the person depicted or otherwise represented as a young person was not under the age of 16 years.

(3) In this section—
“young person” means a person who is under the age of 16 years.

92P. Consent

(1) For the purposes of section 92D, paragraph 92E (3) (b), section 92J and paragraph 92K (3) (b) and without limiting the grounds upon which it may be established that consent is negated, the consent of a person to

Crimes Act 1900

sexual intercourse with another person, or to the committing of an act of indecency by or with another person, is negated if that consent is caused:

- (a) by the infliction of violence or force on the person, or on a third person who is present or nearby;
- (b) by a threat to inflict violence or force on the person, or on a third person who is present or nearby;
- (c) by a threat to inflict violence or force on, or to use extortion against, the person or another person;
- (d) by a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person;
- (e) by the effect of intoxicating liquor, a drug or an anaesthetic;
- (f) by a mistaken belief as to the identity of that other person;
- (g) by a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person;
- (h) by the abuse by the other person of his or her position of authority over, or professional or other trust in relation to, the person;
- (i) by the person's physical helplessness or mental incapacity to understand the nature of the act in relation to which the consent is given; or
- (j) by the unlawful detention of the person.

(2) A person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse.

(3) Where it is established that a person who knows the consent of another person to sexual intercourse or the committing of an act of indecency has been caused by any of the means set out in paragraphs (1) (a) to (j) (inclusive), the person shall be deemed to know that the other person does not consent to the sexual intercourse or the act of indecency, as the case may be.

92Q. Sexual intercourse—persons not to be presumed incapable by reason of age

(1) For the purposes of this Part, a person shall not, by reason only of his or her age, be presumed to be incapable of engaging in sexual intercourse with another person.

7 January 2002 - 26 August 2008 (sections renumbered)

Part 3 Sexual offences

Section 52

is guilty of an offence punishable, on conviction, by imprisonment for 20 years.

52 Sexual assault in the second degree

- (1) A person who inflicts actual bodily harm upon another person with intent to engage in sexual intercourse with that other person, or with a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 14 years.
- (2) A person who, acting in company with any other person, inflicts, or assists in inflicting, actual bodily harm upon a third person with the intent that the firstmentioned person, or any person with whom he or she is in company, should engage in sexual intercourse with that third person, or with any other person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 17 years.

53 Sexual assault in the third degree

- (1) A person who unlawfully assaults, or threatens to inflict grievous or actual bodily harm upon, another person with intent to engage in sexual intercourse with that other person, or with a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 12 years.
- (2) A person who, acting in company with any other person, unlawfully assaults, or threatens to inflict grievous or actual bodily harm upon, a third person with the intent that the firstmentioned person, or any person with whom he or she is in company, should engage in sexual intercourse with that third person, or with any other person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 14 years.

54 Sexual intercourse without consent

- (1) A person who engages in sexual intercourse with another person without the consent of that other person and who knows that that

other person does not consent, or who is reckless as to whether that other person consents, to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 12 years.

- (2) A person who, acting in company with any other person, engages in sexual intercourse with another person without the consent of that other person and who knows that that other person does not consent, or who is reckless as to whether that other person consents, to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 14 years.

55 Sexual intercourse with a young person

- (1) A person who engages in sexual intercourse with another person who is under the age of 10 years is guilty of an offence punishable, on conviction, by imprisonment for 17 years.
- (2) A person who engages in sexual intercourse with another person who is under the age of 16 years is guilty of an offence punishable, on conviction, by imprisonment for 14 years.
- (3) It is a defence to a prosecution for an offence against subsection (2) if the defendant establishes that—
- (a) he or she believed on reasonable grounds that the person upon whom the offence is alleged to have been committed was of or above the age of 16 years; or
- (b) at the time of the alleged offence—
- (i) the person on whom the offence is alleged to have been committed was of or above the age of 10 years; and
- (ii) the defendant was not more than 2 years older;
- and that that person consented to the sexual intercourse.

56 Maintaining a sexual relationship with a young person

- (1) In this section:

60 Act of indecency without consent

- (1) A person who commits an act of indecency upon, or in the presence of, another person without the consent of that person and who knows that that other person does not consent, or who is reckless as to whether that other person consents, to the committing of the act of indecency is guilty of an offence punishable, on conviction, by imprisonment for 5 years.
- (2) A person who, acting in company with any other person, commits an act of indecency upon, or in the presence of, another person without the consent of that other person and who knows that that other person does not consent, or who is reckless as to whether that other person consents, to the committing of the act of indecency is guilty of an offence punishable, on conviction, by imprisonment for 7 years.

61 Acts of indecency with young persons

- (1) A person who commits an act of indecency upon, or in the presence of, another person who is under the age of 10 years is guilty of an offence punishable, on conviction, by imprisonment for 12 years.
- (2) A person who commits an act of indecency upon, or in the presence of, another person who is under the age of 16 years is guilty of an offence punishable, on conviction, by imprisonment for 10 years.
- (3) It is a defence to a prosecution for an offence against subsection (2) if the defendant establishes that—
 - (a) he or she believed on reasonable grounds that the person upon whom the offence is alleged to have been committed was of or above the age of 16 years; or
 - (b) at the time of the alleged offence—
 - (i) the person on whom the offence is alleged to have been committed was of or above the age of 10 years; and
 - (ii) the defendant was not more than 2 years older;

and that that person consented to the committing of the act of indecency.

62 Incest and similar offences

- (1) A person who engages in sexual intercourse with another person, being a person who is under the age of 10 years and who is, to the knowledge of the firstmentioned person, his or her lineal descendant, sister, half-sister, brother, half-brother or stepchild, is guilty of an offence punishable, on conviction, by imprisonment for 20 years.
- (2) A person who engages in sexual intercourse with another person, being a person who is under the age of 16 years and who is, to the knowledge of the firstmentioned person, his or her lineal descendant, sister, half-sister, brother, half-brother or stepchild, is guilty of an offence punishable, on conviction, by imprisonment for 15 years.
- (3) A person who engages in sexual intercourse with another person, being a person who is of or above the age of 16 years and who is, to the knowledge of the firstmentioned person, his or her lineal ancestor, lineal descendant, sister, half-sister, brother or half-brother, is guilty of an offence punishable, on conviction, by imprisonment for 10 years.
- (4) A person shall not be convicted of an offence against subsection (2) or (3) if there is evidence that he or she engaged in the act alleged to constitute the offence under the coercion of the person with whom the offence is alleged to have been committed unless that evidence is rebutted by the Crown.
- (5) A person charged with an offence against this section shall, unless there is evidence to the contrary, be presumed to have known at the time of the alleged offence that he or she and the person with whom the offence is alleged to have been committed were related in the manner charged.

- (3) It is a defence to a prosecution for an offence against subsection (2) if the defendant—
- (a) is an Internet service provider; and
 - (b) had no knowledge that the defendant's facilities were used to commit the offence.
- (4) It is not a defence to a prosecution for an offence against this section that the young person had consented to—
- (a) the suggestion being made; or
 - (b) the material being sent or made available.
- (5) However, it is a defence to a prosecution for an offence against this section if the defendant proves that the defendant believed on reasonable grounds that the young person to whom the suggestion was made, or the material was sent or made available, was at least 16 years old.
- (6) In this section:
- act of a sexual nature* means sexual intercourse or an act of indecency.
- classified*—see the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995*.
- pornographic material* means material that has been, or is likely to be, classified RC, X or R.
- using electronic means* means using email, Internet chat rooms, SMS messages and real time audio/video.
- young person* means a person under 16 years old.

67 Consent

- (1) For the purposes of sections 54, 55 (3) (b), 60 and 61 (3) (b) and without limiting the grounds upon which it may be established that consent is negated, the consent of a person to sexual intercourse

with another person, or to the committing of an act of indecency by or with another person, is negated if that consent is caused—

- (a) by the infliction of violence or force on the person, or on a third person who is present or nearby; or
 - (b) by a threat to inflict violence or force on the person, or on a third person who is present or nearby; or
 - (c) by a threat to inflict violence or force on, or to use extortion against, the person or another person; or
 - (d) by a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person; or
 - (e) by the effect of intoxicating liquor, a drug or an anaesthetic; or
 - (f) by a mistaken belief as to the identity of that other person; or
 - (g) by a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person; or
 - (h) by the abuse by the other person of his or her position of authority over, or professional or other trust in relation to, the person; or
 - (i) by the person's physical helplessness or mental incapacity to understand the nature of the act in relation to which the consent is given; or
 - (j) by the unlawful detention of the person.
- (2) A person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse.
- (3) Where it is established that a person who knows the consent of another person to sexual intercourse or the committing of an act of indecency has been caused by any of the means set out in subsection (1) (a) to (j), the person shall be deemed to know that the

**27 August 2008 - 16 March 2011
(s 54 amended)**

Sexual offences

Part 3

Section 52

guilty of an offence punishable, on conviction, by imprisonment for 20 years.

52 Sexual assault in the second degree

- (1) A person who inflicts actual bodily harm on another person with intent to engage in sexual intercourse with that other person, or with a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 14 years.
- (2) A person who, acting in company with any other person, inflicts, or assists in inflicting, actual bodily harm on a third person with the intent that the firstmentioned person, or any person with whom he or she is in company, should engage in sexual intercourse with that third person, or with any other person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 17 years.

53 Sexual assault in the third degree

- (1) A person who unlawfully assaults, or threatens to inflict grievous or actual bodily harm on, another person with intent to engage in sexual intercourse with that other person, or with a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 12 years.
- (2) A person who, acting in company with any other person, unlawfully assaults, or threatens to inflict grievous or actual bodily harm on, a third person with the intent that the firstmentioned person, or any person with whom he or she is in company, should engage in sexual intercourse with that third person, or with any other person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 14 years.

54 Sexual intercourse without consent

- (1) A person who engages in sexual intercourse with another person without the consent of that other person and who is reckless as to

whether that other person consents to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 12 years.

- (2) A person who, acting in company with any other person, engages in sexual intercourse with another person without the consent of that other person and who is reckless as to whether that other person consents to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 14 years.
- (3) For this section, proof of knowledge or recklessness is sufficient to establish the element of recklessness.

55 Sexual intercourse with young person

- (1) A person who engages in sexual intercourse with another person who is under the age of 10 years is guilty of an offence punishable, on conviction, by imprisonment for 17 years.
- (2) A person who engages in sexual intercourse with another person who is under the age of 16 years is guilty of an offence punishable, on conviction, by imprisonment for 14 years.
- (3) It is a defence to a prosecution for an offence against subsection (2) if the defendant establishes that—
 - (a) he or she believed on reasonable grounds that the person on whom the offence is alleged to have been committed was of or above the age of 16 years; or
 - (b) at the time of the alleged offence—
 - (i) the person on whom the offence is alleged to have been committed was of or above the age of 10 years; and
 - (ii) the defendant was not more than 2 years older;and that that person consented to the sexual intercourse.

**17 March 2011 - 6 July 2011
(s 60 amended)**

Sexual offences

Part 3

Section 58

58 Act of indecency in the second degree

A person who inflicts actual bodily harm on another person with intent to commit an act of indecency on, or in the presence of, that other person, or a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 12 years.

59 Act of indecency in the third degree

A person who unlawfully assaults, or threatens to inflict grievous or actual bodily harm on, another person with intent to commit an act of indecency on, or in the presence of, that other person, or a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 10 years.

60 Act of indecency without consent

- (1) A person who commits an act of indecency on, or in the presence of, another person without the consent of that person and who is reckless as to whether that other person consents to the committing of the act of indecency is guilty of an offence punishable, on conviction, by imprisonment for 5 years.
- (2) A person who, acting in company with any other person, commits an act of indecency on, or in the presence of, another person without the consent of that other person and who is reckless as to whether that other person consents to the committing of the act of indecency is guilty of an offence punishable, on conviction, by imprisonment for 7 years.
- (3) For this section, proof of knowledge or recklessness is sufficient to establish the element of recklessness.

61 Acts of indecency with young people

- (1) A person who commits an act of indecency on, or in the presence of, another person who is under the age of 10 years is guilty of an offence punishable, on conviction, by imprisonment for 12 years.

**7 July 2011 - Present
(maximum penalties increased)**

Sexual offences

Part 3

Section 54

- (2) A person who, acting in company with any other person, unlawfully assaults, or threatens to inflict grievous or actual bodily harm on, a third person with the intent that the firstmentioned person, or any person with whom he or she is in company, should engage in sexual intercourse with that third person, or with any other person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 14 years.

54 Sexual intercourse without consent

- (1) A person who engages in sexual intercourse with another person without the consent of that other person and who is reckless as to whether that other person consents to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 12 years.
- (2) A person who, acting in company with any other person, engages in sexual intercourse with another person without the consent of that other person and who is reckless as to whether that other person consents to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 14 years.
- (3) For this section, proof of knowledge or recklessness is sufficient to establish the element of recklessness.

55 Sexual intercourse with young person

- (1) A person who engages in sexual intercourse with another person who is under the age of 10 years is guilty of an offence punishable, on conviction, by imprisonment for 17 years.
- (2) A person who engages in sexual intercourse with another person who is under the age of 16 years is guilty of an offence punishable, on conviction, by imprisonment for 14 years.

- (3) It is a defence to a prosecution for an offence against subsection (2) if the defendant establishes that—
- (a) he or she believed on reasonable grounds that the person on whom the offence is alleged to have been committed was of or above the age of 16 years; or
 - (b) at the time of the alleged offence—
 - (i) the person on whom the offence is alleged to have been committed was of or above the age of 10 years; and
 - (ii) the defendant was not more than 2 years older;
- and that that person consented to the sexual intercourse.

55A Sexual intercourse with young person under special care

- (1) A person commits an offence if—
- (a) the person engages in sexual intercourse with a young person; and
 - (b) the young person is under the person's special care.

Maximum penalty: imprisonment for 10 years.

Note A reference to an offence includes a reference to a related ancillary offence, eg attempt (see Legislation Act, s 189).

- (2) Without limiting subsection (1), a young person is under a person's special care if—
- (a) the person is a teacher at a school, or a person with responsibility for students at a school, and the young person is a student at the school; or
 - (b) the person is a step-parent, foster carer or legal guardian of the young person; or
 - (c) the person provides religious instruction to the young person; or

- (9) A prosecution for an offence against subsection (2) shall not be commenced except by, or with the consent of, the director of public prosecutions.

57 Act of indecency in the first degree

A person who inflicts grievous bodily harm on another person with intent to commit an act of indecency on, or in the presence of, that other person, or a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 15 years.

58 Act of indecency in the second degree

A person who inflicts actual bodily harm on another person with intent to commit an act of indecency on, or in the presence of, that other person, or a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 12 years.

59 Act of indecency in the third degree

A person who unlawfully assaults, or threatens to inflict grievous or actual bodily harm on, another person with intent to commit an act of indecency on, or in the presence of, that other person, or a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 10 years.

60 Act of indecency without consent

- (1) A person who commits an act of indecency on, or in the presence of, another person without the consent of that person and who is reckless as to whether that other person consents to the committing of the act of indecency is guilty of an offence punishable, on conviction, by imprisonment for 7 years.
- (2) A person who, acting in company with any other person, commits an act of indecency on, or in the presence of, another person without the consent of that other person and who is reckless as to whether that other person consents to the committing of the act of indecency

is guilty of an offence punishable, on conviction, by imprisonment for 9 years.

- (3) For this section, proof of knowledge or recklessness is sufficient to establish the element of recklessness.

61 Acts of indecency with young people

- (1) A person who commits an act of indecency on, or in the presence of, another person who is under the age of 10 years is guilty of an offence punishable, on conviction, by imprisonment for 12 years.
- (2) A person who commits an act of indecency on, or in the presence of, another person who is under the age of 16 years is guilty of an offence punishable, on conviction, by imprisonment for 10 years.
- (3) It is a defence to a prosecution for an offence against subsection (2) if the defendant establishes that—
- (a) he or she believed on reasonable grounds that the person on whom the offence is alleged to have been committed was of or above the age of 16 years; or
- (b) at the time of the alleged offence—
- (i) the person on whom the offence is alleged to have been committed was of or above the age of 10 years; and
- (ii) the defendant was not more than 2 years older;

and that that person consented to the committing of the act of indecency.

61A Act of indecency with young person under special care

- (1) A person commits an offence if—
- (a) the person commits an act of indecency on, or in the presence of, a young person; and
- (b) the young person is under the person's special care.

classified—see the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995*, dictionary.

pornographic material means—

- (a) material of a sexual nature that has been, or is likely to be, classified R 18+, RC, category 1 restricted or category 2 restricted; or
- (b) material that has been, or is likely to be, classified X 18+.

using electronic means means using email, Internet chat rooms, SMS messages and real time audio/video.

young person means a person under 16 years old.

67 Consent

- (1) For sections 54, 55 (3) (b), 60 and 61 (3) (b) and without limiting the grounds on which it may be established that consent is negated, the consent of a person to sexual intercourse with another person, or to the committing of an act of indecency by or with another person, is negated if that consent is caused—
 - (a) by the infliction of violence or force on the person, or on a third person who is present or nearby; or
 - (b) by a threat to inflict violence or force on the person, or on a third person who is present or nearby; or
 - (c) by a threat to inflict violence or force on, or to use extortion against, the person or another person; or
 - (d) by a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person; or
 - (e) by the effect of intoxicating liquor, a drug or an anaesthetic; or
 - (f) by a mistaken belief as to the identity of that other person; or

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- (g) by a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person; or
 - (h) by the abuse by the other person of his or her position of authority over, or professional or other trust in relation to, the person; or
 - (i) by the person's physical helplessness or mental incapacity to understand the nature of the act in relation to which the consent is given; or
 - (j) by the unlawful detention of the person.
- (2) A person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse.
- (3) If it is established that a person who knows the consent of another person to sexual intercourse or the committing of an act of indecency has been caused by any of the means set out in subsection (1) (a) to (j), the person shall be deemed to know that the other person does not consent to the sexual intercourse or the act of indecency, as the case may be.

68 Sexual intercourse—people not to be presumed incapable by reason of age

- (1) For this part, a person shall not, by reason only of his or her age, be presumed to be incapable of engaging in sexual intercourse with another person.
- (2) Subsection (1) shall not be construed so as to affect the operation of any law relating to the age when a child can be found guilty of an offence.