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COMMUNITY LEGAL CENTRE

Sexual Offences

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INTRODUCTION

In Queensland, the *Criminal Code Act 1899* (Qld) (Criminal Code) deals with the main sexual offences while the *Evidence Act 1977* (Qld) (Evidence Act) sets out the special rules for dealing with the evidence of victims of sexual offences.

RAPE AND ATTEMPTED RAPE

Sections 349 and 350 of the Criminal Code deal with rape and attempted rape.

Rape is broadly defined to be all forms of penetration of the vagina, anus or mouth. In theory, no one form of penetration is any more serious than the other. The offence is gender neutral, which means that any gender may commit rape or be victims of it.

A person rapes another if the person:

- engages in penile intercourse with another without their consent or
- penetrates the vulva, vagina or anus of another to any extent with an object (e.g. a bottle) or any body part other than the penis (e.g. a finger) without their consent or
- penetrates the mouth of another to any extent with their penis without the persons consent.

The legal definitions of vagina, vulva, penis and genitalia include surgically constructed genitalia so as to recognise post-operative transgender persons.

The law has now expressly acknowledged 'stealthing' as a circumstance of non-consent and rape. 'Stealthing' is the non-consensual removal of a condom or tampering with a condom before or during consensual sexual activity.

The offence of rape is punishable by life imprisonment.

Sexual assault is an alternative verdict to rape (i.e. if charged with rape, an accused may be convicted of sexual assault). Unlawful sodomy and incest are also available as alternative verdicts to rape.

Penile Intercourse

Penile intercourse is defined in s 6 of the Criminal Code to mean the penetration, to any extent, of the vagina, vulva or anus of a person by the penis of another person.

A person engages in penile intercourse with another person if:

- the person penetrates, to any extent, the vagina, vulva or anus of another person with the person's penis

- the person's vagina, vulva or anus is penetrated, to any extent, by the penis of another person.

Consent

At a trial, the prosecution must prove lack of consent beyond reasonable doubt. Under the affirmative model of consent, consent to sexual activity must be mutually agreed, all participants have to say or do something to seek consent, and consent must be communicated back to the asking participant.

In the Criminal Code, ss 348 and 348AA consider the definition of consent in detail.

Consent means free and voluntary agreement.

A person may withdraw consent to an act at any time.

A person does not consent to an act just because they consented to another act with the same person, or the same act with that same person but at a different time, or the same act with a different person, or a different act with a different person.

Participants must also have the cognitive capacity to freely give consent.

The term 'cognitive capacity' recognises that a person must have the ability to understand the nature and effect of giving consent, though it does not equate to legal capacity. Some factors that impact upon a person's cognitive capacity to consent include youth, intellectual impairment or intoxication.

Consent may not be obtained by force, threat, intimidation, fear of bodily harm, exercise of authority (e.g. where the accused is in a position of trust or authority) or fraud. The fact that an accused person is married to the complainant does not prevent them from being prosecuted for any sexual offence.

Other circumstances where the law states there is no consent include where the person is asleep or unconscious, or where there was consent for the use of a condom, but then the condom is removed or breaks and the person continues the act.

There is also no consent where a sex worker agrees to an act for a payment or reward but the customer is being fraudulent and agreeing with no intent or means.

A child under the age of 12 years is incapable of giving consent (s 349(3) Criminal Code).

Attempted rape

It is an offence to attempt to rape a person. The maximum penalty is 14 years imprisonment. 'Attempt' is defined in s 4 of the Criminal Code to mean where a person intends to commit the offence, but does not actually complete the commission of the offence.

SEXUAL ASSAULT

Section 352 of the Criminal Code deals with sexual assault.

The offence of sexual assault occurs where a person:

- unlawfully and indecently assaults another
- procures another person without their consent to:
 - commit an act of gross indecency
 - witness an act of gross indecency.

The maximum penalty is 10 years imprisonment, or 14 years if there is a circumstance of aggravation.

A circumstance of aggravation is if the indecent assault or act of gross indecency includes bringing into contact any part of the genitalia or the anus of a person with any part of the mouth of a person.

The offence of sexual assault can include conduct involving penetration, as well as other sexual touching or indecent conduct not involving penetration.

The penalty can be life imprisonment if the offender:

- is or pretends to be armed with a dangerous or offensive weapon (before, during or after the offence) or is in company of another person
- penetrates the vagina, vulva or anus with a part of the body other than a penis
- procures the person.

Indecent assault

'Indecent' is not specifically defined in the legislation. The case law indicates that what constitutes indecency is to be judged by prevailing community standards.

Gross indecency

The Criminal Code does not define the meaning of 'gross', but it has been held to have its ordinary dictionary meaning of plain, evident or obvious.

Assault with intent to commit rape

It is an offence to assault a person with intent to commit rape (s 351 Criminal Code). This offence is punishable by a maximum term of 14 years imprisonment.

An assault is any touching without consent. The assault does not have to be of a sexual nature.

INDECENT ACTS

Section 227 of the Criminal Code deals with indecent acts.

It is an offence to wilfully do an indecent act in public or to wilfully do so in any place with intent to insult or offend any person. The maximum penalty for this offence is imprisonment for two years.

The Queensland Court of Appeal has held that there should be some bodily act that is indecent, judged by prevailing community standards. It is a defence to show that the indecent act was not done wilfully, or in a public place, or with the requisite intent to insult or offend.

PROCURING SEXUAL ACTS BY COERCION

Section 218 of the Criminal Code deals with procuring sexual acts by coercion including procuring a person to provide or continue to provide commercial sexual services.

Procuring sexual acts by:

- threats or intimidation
- a false pretence
- administering to a person, or causing them to take, a drug or some other thing intending to stupefy or overpower them to enable a sexual act to be engaged in
- assaulting a person or damaging property of a person

is an offence that is punishable by up to 14 years imprisonment. Section 218(4) of the Criminal Code defines 'procure' as to knowingly entice or recruit for the purposes of sexual exploitation.

A person engages in a sexual act if the person:

- allows a sexual act to be done to the person's body
- does a sexual act to the person's own body or the body of another person
- otherwise engages in an act of an indecent nature with another person.

It is not limited to sexual intercourse or acts involving physical contact.

FEMALE GENITAL MUTILATION

Section 323A of the Criminal Code deals with female genital mutilation.

It is an offence punishable by up to 14 years imprisonment to perform female genital mutilation on another person. Consent by the person being mutilated is not a defence. Sexual reassignment procedures and medical procedures for genuine therapeutic purposes are not caught by the provision. Body piercing is not intended to be caught by this section.

Section 323B of the Criminal Code makes it an offence to take or to arrange to take a child under 18 years of age from Queensland with the intention of having female genital mutilation performed on the child. The maximum punishment for this offence is 14 years imprisonment.

SEXUAL OFFENCES AGAINST CHILDREN AND PERSONS WITH AN IMPAIRMENT OF THE MIND

Special categories of complainants to sexual offences include children and persons with an impairment of the mind.

For offences of rape and sexual assault, the absence of consent is a crucial element of the offence. Where the victim is a child or person with an impairment of the mind, the law deems that that person is not capable of giving consent.

Offences where consent is not an element

Offences under the Criminal Code where the absence of consent is not an element include:

- indecent treatment of children of or above 12 years (punishable by 14 years imprisonment (s 210))
- indecent treatment of children under 12 years or if the child has an impairment of the mind (punishable by 20 years imprisonment)
- engaging in unlawful penile intercourse with a child under 16 and of or above the age of 12 (punishable by 14 years imprisonment)
- engaging in unlawful penile intercourse with a child under 12 or if the child has an impairment of the mind (punishable by life imprisonment (s 215))
- using electronic communication (e.g. email, internet chat rooms, SMS messages) to procure children under 16 years to engage in a sexual act, or to expose children under 16 to any indecent matter (the latter as defined in s 1)

(punishable by 10 years imprisonment (s 218A)); grooming children under 16 (punishable by five years imprisonment (s 218B))

- incest (punishable by life imprisonment (s 222))
- repeated sexual conduct with a child under 16 (or under 18 in the case of sodomy) (punishable by life imprisonment (s 229B)).

If the child is over the age of 12, it is a defence for the accused to prove that they honestly believed on reasonable grounds that the child was of or above the age of 16 years.

For most of these offences, the offence is aggravated (more serious) and the accused is liable to a harsher penalty if the child is under 12 years of age, is a lineal descendant of the accused or is under the accused's guardianship or care.

Similarly, circumstances of aggravation exist in relation to offences involving persons with an impairment of mind.

For those offences involving a person with an impairment of mind, it is an excuse for accused persons to prove that they honestly believed on reasonable grounds that the person did not have an impairment of mind, or that the behaviour constituting the offence did not in the circumstances constitute sexual exploitation of the person with an impairment of mind.

Repeated sexual conduct with a child

Sections 229B of the Criminal Code sets out the law regarding this offence.

This is the only sexual offence that cannot be charged by police, but is indictable by the Crown (Director of Public Prosecutions) in the District Court if the Crown considers the evidence supports this offence.

The offence is unique in that it requires evidence of more than one unlawful sexual act over a period of time. The prosecution is not required to prove each individual unlawful sexual act.

To prove the offence, it does not matter whether the offending took place over a brief period or was sustained over several years.

Repeated sexual conduct with a child is considered one of the most serious offences of a sexual nature.

The offence seriousness is reflected both in the maximum penalty of life imprisonment, and in the offence being the most common to be declared a 'serious violent offence'.

PORNOGRAPHY AND OTHER PROHIBITED VISUAL MATERIAL

Child pornography offences

Sections 228A to 228D of the Criminal Code set out child pornography offences including the making of child exploitation material, and distributing and possessing such material.

‘Child exploitation material’ is defined in s 207A (Criminal Code) to mean material that, in a way likely to cause offence to a reasonable adult, describes or depicts a person, or a representation of a person, who is (or apparently is) a child under 16 years:

- in a sexual context (e.g. engaging in a sexual activity)
- in an offensive or demeaning context
- being subjected to abuse, cruelty or torture.

For the purposes of sentencing, s 9 of the *Penalties and Sentencing Act 1992* (Qld) states that an offender convicted of a ‘child images offence’ must serve a sentence of actual custody unless exceptional circumstances exist.

Section 9 also covers what the court may and must have regard to when considering whether there are exceptional circumstances, what to have regard to when sentencing an offender (and what not to have regard to), and how to treat any evidence of good character put forward by the offender.

There are also offences of administering and encouraging use of child exploitation material websites (ss 228DA, 228DB). The maximum penalty increases in both circumstances from 14 to 20 years if a hidden network or anonymising service is employed by the offender.

Observations and recordings in breach of privacy

Section 227A of the Criminal Code makes it an offence to observe or make a visual recording (moving or still image) of another person without their consent when they are:

- in a private place (e.g. a toilet, bathroom, communal change room or bedroom)
- engaging in a private act (e.g. using a toilet, showering, undressing or engaging in an intimate sexual activity not usually done in public).

It is also an offence under this provision to engage in covert up-skirt filming. This has been introduced in response to the widespread availability of mobile phone

cameras, video cameras, digital cameras and the internet, and due to heightened privacy concerns. The maximum penalty for these offences is three years imprisonment.

Distributing prohibited visual recordings

It is an offence under s 227B of the Criminal Code to distribute a visual recording without the consent of the person visually recorded that was made in circumstances described above. ‘Distribute’ includes communicate, send, supply, transmit, make available and attempt to distribute. It is punishable by a maximum penalty of three years imprisonment.

MEDICAL EXAMINATION AFTER A SEXUAL OFFENCE

Whether or not a complainant makes a formal police complaint, it is important that the complainant be medically examined as soon as possible after the assault so as to:

- detect and treat any physical injuries, especially internal injuries that may not be readily apparent
- test for sexually transmitted diseases and/or pregnancy
- collect forensic medical evidence for the purposes of a possible prosecution.

A timely forensic medical examination is often a key item of evidence for police and prosecutors. The examination may involve an internal examination, DNA testing and the recording of any injuries. The kinds of specimens that may be taken include combings of pubic hair, vaginal or anal swabs to test for presence of semen, scrapings from under the fingernails and saliva.

Proof of physical injury

It is not necessary for the Crown to prove that physical injuries were caused to the complainant, though any evidence of physical injury could be considered to be corroborative (supportive) of the Crown’s case.

The law still allows the defence to comment on a lack of physical injury, which may be relevant to the circumstances of the case. For example, the statement given by the complainant might indicate that injuries would be expected and, in that case, the absence of injury might be a cause for comment by the defence.

MAKING A STATEMENT AFTER A SEXUAL OFFENCE

If the complainant decides to make a formal complaint to police, they will be asked to make a detailed statement about the alleged assault. The statement will later be provided to the defendant as part of the process of prosecution

disclosure. If the matter proceeds to trial, the defendant is entitled to cross-examine the complainant about the contents of their statement.

The complainant may have different forms of support such as a support person, a partition when giving evidence, the possibility to give evidence from another room or to join the court via a television screen in real time, or to have their evidence pre-recorded subject to an application under s 21A of the Evidence Act to the court.

It is the complainant's choice whether to proceed with a formal complaint or not. A complainant may report an alleged sexual offence and then decide that they do not wish to continue with it. While the decision to prosecute any offence (i.e. to proceed to take the matter to court) is always ultimately up to police and the Crown, it is most unlikely that a complaint would be proceeded with in circumstances where the complainant has indicated they do not wish to take the matter further, and the prosecution is satisfied the complainant is making the decision of their own free will and there is no pressure from another party. If a person wishes to withdraw a sexual complaint made to police, they should speak to a solicitor first and get advice about the possible consequences arising from that.

THE PROSECUTION TO A SEXUAL OFFENCE

The Crown on behalf of the state conducts prosecutions for rape and contested sexual assault. This means that complainants at a trial do not have their own legal representation and their interests are pursued by police or the Crown Prosecutor or another lawyer from, or on the behalf of, the Office of the Director of Public Prosecutions.

The prosecution must prove the guilt of the accused to the criminal standard of beyond reasonable doubt.

The prosecution has an obligation to disclose to the defence all of the evidence (including the complainant's statement and the results of any forensic or medical examination) that they rely on to prove the charge.

DEFENCES TO A SEXUAL OFFENCE

The most common defences to a sexual offence are:

- consent—the accused argues that the complainant consented to the sexual act or that the accused honestly and reasonably believed that the complainant consented
- identity—the accused denies being the person who allegedly assaulted the complainant.

Section 24 of the Criminal Code provides the accused with the possible excuse from criminal responsibility that they held an honest and reasonable but mistaken belief that the complainant was consenting. It extends further in s 348A of the Criminal Code, in relation to mistake of fact specifically in relation to consent. There are provisions in the legislation for circumstances where the defendant may have a cognitive impairment or mental health impairment (ss 348B, 348C).

In relation to attempted rape, it is sufficient that the accused's belief is only honestly held (i.e. it need not also be reasonable) as s 4 of the Criminal Code requires that the accused has the intention to commit the offence. An honest belief in consent (even if not reasonable) is inconsistent with an intention to commit rape.

EVIDENCE IN SEXUAL OFFENCE PROCEEDINGS

Evidence of complainants

Special rules of evidence apply in relation to complainants (including children) to a sexual offence.

The court may disallow or excuse witnesses from answering any improper questions the court considers to be misleading, confusing, annoying, harassing, intimidating, offensive, oppressive, repetitive or phrased in inappropriate language.

In deciding whether to disallow a question, the court must take into account particular characteristics of the individual witness (i.e. any mental, intellectual or physical impairment the witness has and any other relevant matter including age, education, level of understanding, cultural background or relationship to any party to the proceedings) (s 21 Evidence Act).

Special provisions apply to children who are witnesses in certain proceedings (including for sexual offences (see pt 2 div 4A of the Evidence Act)).

Adult complainants to sexual offences are declared special witnesses. Children under 16 are automatically declared to be a special witness. Also, a person to whom domestic violence has been or is alleged to have been committed by another person is a special witness.

If a witness is a special witness, the court may make any of the following orders:

- that the accused be excluded from the court or obscured (e.g. by a screen) while the witness is giving evidence or while the witness is otherwise required to be present
- that all persons other than those specified by the court be excluded while the witness is giving evidence

- that a person approved by the court be present to give emotional support to the witness while giving evidence or while they are otherwise required to be in court
- that the witness give evidence in a room other than the room in which they are sitting and from which all persons other than those specified by the court are excluded
- that the witness give videotaped evidence or evidence via a closed-circuit television link
- any other orders the court considers appropriate including rest breaks for the witness or a direction that questions for the witness be kept simple, be limited by time generally or by number on a particular issue.

Intermediaries

The intermediary scheme is an additional special provision for vulnerable witnesses.

Vulnerable witnesses may be unable to give clear and accurate evidence due to their communication needs arising from a range of reasons including but not limited to:

- very young or very old age
- cognitive issues
- trauma
- learning disabilities
- mental illness
- ADHD and autism.

The Evidence Act has introduced that an intermediary (selected from a panel (s 21AZV Evidence Act) can be appointed for complainants by application to the court. Their function can include informing the court of the communication needs of the witness and making recommendations on the most effective way to communicate with the witness (pt 2 div 4C Evidence Act).

Sexual offence expert evidence panel

Queensland courts is piloting a sexual offence expert evidence panel (the Panel) in Brisbane and Townsville to allow experts to give relevant evidence in sexual violence proceedings (pt 6B div 4 Evidence Act). The Panel is a two-year program.

The Panel has two streams of experts to service referrals for matters in specified courts at pilot locations in Brisbane and Townsville.

- Stream 1 will allow an expert to give relevant evidence about the defendant in a proceeding for a relevant offence. Specifically, as to whether the defendant's cognitive and/or mental health impairment at the time of the alleged offence was a substantial cause of the person not saying or doing anything to ascertain whether the other person consented to the sexual act.
- Stream 2 will allow experts to give counterintuitive evidence about the nature of sexual offences and the social, psychological and cultural factors that may affect the behaviour of a person who has been, or alleges to be, the victim of a relevant sexual offence as requested by the prosecution, defence or court.

Preliminary complaint evidence

A preliminary complaint is any complaint made to a witness by the complainant prior to the complainant's statement to police. Examples include to a friend, a parent, a teacher or to a guidance officer.

Generally, evidence of a statement made to another person is not admissible. One exception to this rule is evidence of a recent (or fresh) complaint in trials for sexual offences. Section 94A of the Evidence Act outlines the admissibility of preliminary complaint in sexual offences and domestic violence offences.

Evidence of how and when any preliminary complaint was made by the complainant is admissible regardless of when the complaint was made. There are directions a judge must give to a jury when a matter is at trial that give a jury direction on how to use such evidence (e.g. reliability).

The court can exclude the evidence if it is satisfied that it would be unfair to the defendant to admit it (s 94A (3) Evidence Act).

Evidence of sexual experience

The circumstances in which a complainant may be asked during trials for sexual offences about their sexual experience with the accused and other persons, as well as their general sexual reputation, is very limited. Questions and comments about the complainant's sexual reputation are prohibited entirely (ss 103ZG-103ZN Evidence Act). Questions of the complainant regarding their prior sexual history with either the accused or any other person may only be asked with the leave (permission) of the court.

Cross-examination by the accused in person

An unrepresented accused is prohibited from cross-examining in person any children under 16 years of age, persons with an impairment of the mind and

victims of sexual offences or violent crimes (s 21N Evidence Act). These persons are called protected witnesses (s 21M Evidence Act). A grant of Legal Aid will be given to an accused to allow cross-examination of these witnesses by a lawyer (s 21P Evidence Act), unless the accused arranges for their own legal representation instead for that purpose or the accused does not wish to cross-examine any protected witness (see generally ss 21L-21S Evidence Act).

Proceedings in private

Proceedings for sexual offences can occur in a closed court if an application is made and the court so orders as it is not the whole trial or proceeding that is in private generally.

Section 21AAA of the Evidence Act states that the court may on its own initiative or on an application made by a party, order that all persons other than those specified by the court be excluded from the room while evidence is being presented by a special witness. The accused cannot be excluded (s 21AAA(3) Evidence Act).

Publication of the complainant's identity is also prohibited (s 103ZZN Evidence Act).

CONFIDENTIAL COUNSELLING RECORDS OF SEXUAL OFFENCE VICTIMS

Persons who are victims of sexual offences often seek counselling or other assistance as part of their recovery process. Counsellors generally keep notes or records of these counselling sessions. In a number of instances, defence lawyers seek to obtain access to a complainant's counselling records by way of subpoena with a view to using them as a further source of information upon which to base questions to the complainant at the trial (e.g. in an effort to damage the complainant's credibility by disclosing evidence of drug taking, mental health issues, inconsistent statements or the quality of the complainant's memory of the offence).

In Queensland, legislation and court Practice Directions have been introduced to protect the confidentiality of counselling records where the material may be irrelevant to the court proceedings.

Admissibility is determined case by case through the Protected Counselling Communications (PCC) procedure, which is a two-stage process. A counselled person (complainant) can waive privilege (i.e. consent) to their sexual assault counselling documents being produced. However, they must seek legal advice before doing so (s 14J Evidence Act).

The Supreme Court of Queensland Practice Direction 16 of 24 outlines the application (pt 2 div 2A Evidence Act) and the court process, which essentially requires any party seeking material that could possibly or inadvertently contain counselling records to apply to the court to be given consent to issue subpoenas, or the court can order it themselves to receive material (s 14H(2A) Evidence Act).

A protected counselling communication can be any oral or written communication made in confidence.

The court process involves a law firm and barrister being appointed as lawyers for the counselled person (complainant). They have an important role in the process.

The process is an attempt to balance the rights of individuals to privacy against the accused person's right to a fair hearing.

Victim impact statements

Under ss 15(1) to 15(9) of the *Victims of Crime Assistance Act 2009* (Qld), at the time of sentencing an accused for any sexual offence, the prosecutor may inform the court of the harm that has been caused to a victim of the crime (see also the chapter on Assisting Victims of Crime).

The usual way in which this is done is by the tendering of a Victim Impact Statement (VIS). A VIS is a written statement that is signed and dated, and contains particulars of the harm caused to the victim of the offence. Medical reports, drawings, photographs and other images may be attached to the statement. A VIS may be prepared by the victim or another person (depending on the victim's age and capacity). It is not mandatory for a victim to prepare a VIS. A lack of a VIS does not lead to the inference that the offence caused little or no harm to the victim.

LEGAL NOTICES

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