IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C20 of 2013

BETWEEN:

MICHAEL ALAN GILLARD
Appellant

and

THE QUEEN
Respondent



# RESPONDENT'S SUBMISSIONS

## Part I: Certification

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

## Part II: Issues

2. Section 54[1] of the *Crimes Act 1900* (ACT) ("the *Crimes Act*"), creates an offence of sexual intercourse without consent. Section 60 of the *Crimes Act* creates an offence of committing an act of indecency upon or in the presence of another person without the consent of that other person. Section 67(1) provides for a number of circumstances in which the complainant's consent (a physical element of the offence) is "negated". This appeal is concerned with the mental element applicable to those offences where s 67(1) is relied upon by the prosecution. Section 67(3) provides that, where it is established an accused "knows the consent [of the complainant] has been caused by any of the means set out in [s 67(1)], the person shall be deemed to know that [the complainant] does not consent to the sexual intercourse or the act of indecency, as the case may be".

3. The respondent submits that the Court of Appeal did not err in deciding that in a case where s 67(1) is relied on by the prosecution, the mental element of the offence may be satisfied by proving:

   i. the accused knew the complainant was not consenting; or
   ii. the accused was reckless as to whether the complainant was consenting.

4. Matter (i) above may be proved by proving either that the accused knew the complainant was not consenting (in the sense that he or she believed the complainant

[1] To maintain consistency with the appellant submissions (AWS) the current section numbers are referred to. The sections were differently numbered at the time of trial. It should also be noted that the current sections are not identical to those in force at the time of the alleged offences. The differences are referred to below.

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was not consenting) or, relying on s 67(3), by proving that the accused knew that the complainant's (apparent) consent was caused by one of the matters set out in s 67(1). In this latter case, any belief on the part of the accused as to the complainant's consent will not assist the accused. This issue is raised by ground 3 in the notice of appeal.[2]

5. The appellant's notice of appeal (in ground 2) also raises a question as to whether the Court of Appeal erred in finding that the trial judge did not err in directing the jury that, to paraphrase, the appellant could be convicted if the jury was satisfied that any consent on the part of the complainant was the result of a s 67(1) matter (here the abuse by the appellant of his position of authority over the complainant) and the appellant was reckless as to that circumstance. The respondent submits the Court of Appeal did not make such a finding (and was not called upon to make any such finding). Nor did the trial judge's directions give rise to such an issue.

6. A issue is also raised (in ground 4) as to whether consent was in issue only in relation to count 13 on the indictment. This issue only arises in the event the appellant is successful on ground 2 or 3 and consequently, in the respondent's submission does not arise. In the event that it does arise, the respondent submits the Court of Appeal was correct to decide the issue of consent arose only in relation to count 13 on the indictment.

**Part III: Notice**

7. The respondent considers that notices under s 78B of the *Judiciary Act 1903* (Cth) are not required.

**Part IV: Material facts that are contested**

**The evidence at the trial**

8. The respondent generally accepts the material facts as outlined in the appellant's submissions. However, it is necessary to set out some additional facts.

Counts and 13 and 14

9. There was no dispute at the trial that the sexual act the subject of counts 13 and 14 took place: the appellant admitted the act in interviews with the police and in his evidence at trial. The issue at trial, in count 13, was whether the intercourse was consensual, and, if not, the appellant's state of mind with respect to consent. The issue in count 14 (which involved the same act but charged an act of indecency committed in the presence of JL), was proof of an intention to commit an act of indecency "in the presence of" JL.[3] The context in which the sexual act took place is relevant to the issues in the appeal.

10. The Crown case was that the appellant was in a position of authority with respect to the complainant. The appellant was a close family friend of DD and JL's father

[2] The ground is numbered "3" but is the second of the actual grounds.
[3] The appellant's case was that he believed that JL did not see the act.

("GM"). The two men met in Brisbane while serving in the armed forces.[4] They had a brother-like relationship and the appellant was a "*de facto uncle*" to DD and JL.[5] In a police interview tendered at trial the appellant described himself as their "*unofficial godfather*".[6]

11. In 1988 DD and JL's brother C suffered a severe asthma attack which left him severely disabled and requiring full time care.[7] In 1990 the family moved to Canberra and in June 1992 the family moved to Wodonga following GM's posting there.[8] C remained in Canberra at a home for the disabled.[9]

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12. The incidents were alleged to have occurred in the appellant's home in the Canberra suburb of Monash. As both GM and his wife ("JM") were working,[10] DD, JL, and sometimes their older sister DM, stayed with the appellant in Canberra for a week during summer school holidays in order to visit their brother. This continued until January 2000 when C passed away. The appellant undertook responsibility for DD and JL (and their older sister when she was with them) and as such was acting *in loco parentis*.

13. DD gave evidence of a number of sexual acts committed upon her by the appellant
20 before she was 16 and after she turned 16. DD's evidence was that the appellant committed sexual acts upon her in both Canberra and in Wodonga, and that every time she visited Canberra he would commit sexual acts upon her.[11] The appellant's evidence was that the only sexual contact between himself and DD was that which was the subject of count 13.[12]

14. One of the issues at the trial, particularly with respect to the counts that required proof that DD was under the age of 16, was the years in which DD and JL stayed with the appellant. The evidence at trial was that the appellant was first posted to Canberra in mid-January 1995 and the appellant's evidence was that he moved into the premises in
30 which the offences occurred in February or March 1995.[13] This meant the first possible visit to the particular premises was January 1996. In relation to the counts requiring proof of age (counts 1 to 12), count 1 was withdrawn, verdicts of guilty were returned on counts 2 to 4 these acts of indecency that occurred on three separate occasions during one of the weeks that DD and JL were staying with the appellant and verdicts of not guilty were returned on counts 5 to 12. It would appear that, in relation to counts 5 to 12 the jury was not satisfied the complainant was under the age of 16 at the time the incidents occurred.[14]

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[4] T222.22-24.
[5] T223.32.
[6] Exhibit 4, T280, at A96.
[7] T224.1-28. C died on 6 January 2000.
[8] T225.11.
[9] T225.36.
[10] T227.9-17.
[11] T154.10-18.
[12] T368.18-21.
[13] T359.35-36.
[14] No complaint as to inconsistent verdicts was raised in the Court of Appeal. The logical basis for reconciling the verdicts on counts 2 to 4 (and those on later counts) with those with respect to counts 5 to 12 is lack of satisfaction as to the complainant's age. (Counts 5 to 12 were all said to have occurred in the course of the same visit to Canberra.) Note also the Court of Appeal's observation in this regard: *Gillard v The Queen* [2013] ACTCA 17; (2013) 275 FLR 416 at [43].

15. The timing of counts 13 and 14 was more certain as the complainant was able to relate the event to the obtaining of her drivers' licence, placing the event in January 1999. At that time the appellant was aged 45, DD was 17 and JL was 16. Further, the appellant had previously sexually abused the complainant, at least to the extent alleged in counts 2 to 4 (and, accepting the basis for reconciling the verdicts, noted above, on significantly more occasions).

16. The appellant asserts (AWS [29]) that the trial judge misstated evidence given by DD in respect of count 13. The respondent submits the evidence was not misstated. The evidence of DD was that the appellant told her that he would "*love*" her sister if she did not "*love*" him and that this occurred prior to, but in the context of, the specific sexual act the subject of count 13. The evidence is set out below: [15]

> Okay. Before you gave him a head job what was the conversation or what did he say and what did you say?---*He just said that I was his girl and we were in a relationship and that he loved me and if I loved him, that I would give him a head job. If I didn't love him, that he would love JL.*
>
> So did that conversation take place there? In the incident you've just described where you gave him a head job and JL was there, did that conversation take place there?---*The - the conversation about him saying that he loved me and if I loved him I'd give him a head job, and if I didn't love him he'd go to JL, that happened when JL wasn't with us. Then the conversation where he said to JL, "DD and I are in a relationship. I can get her to do whatever I want," that was in front of JL.*

17. DD's evidence of the conversation in which the appellant said he would "love" JL was, while not in the presence of JL, clearly related to the event the subject of count 13.

18. DD also gave evidence that a conversation along these lines (where the appellant mentioned JL) occurred in Canberra "*a couple of times*" and in Wodonga once. DD gave evidence of an incident in Wodonga that occurred in the previous year. This was led after a ruling of the trial judge at the commencement of the trial. DD gave evidence that during this incident in Wodonga she told the appellant she loved him, but said this only because she wanted to protect JL.[16]

19. The appellant's submissions refer to the three different versions of the act the subject of counts 13 and 14 given by DD, JL, and the appellant. Insofar as the appellant asserts (at AWS [11]) that DD gave evidence that she engaged in sexual intercourse with the appellant in front of JL "*at the appellant's instruction*" it is to be noted that DD's evidence (the effect of which is noted at AWS [12]), was that after the appellant said he wanted her to give him a head job, he "*guided me down*" then "*grabbed the back of my head and pushed it towards his penis, which was erect at the time, and pushed my mouth over to the top of his penis and maintained the grip on the back of my head so I couldn't pull it away*".[17] She gave evidence that when she tried to pull

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[15] T102.37-45.
[16] T103.43- 104.5.
[17] T102.5-9.

her head away he "*gripped harder and just held it there firmly*".[18] Thus her evidence went beyond compliance on the basis of instructions issued by the appellant.

20. The appellant accurately sets out the evidence of JL but omits mention of JL's evidence that (contrary to the appellant's evidence), DD was clothed at the time.[19] It was not suggested to JL that she had not seen the incident. JL gave evidence that she was shocked at what she saw and that the appellant did not ask if she consented to having this act performed in front of her.[20] She left the room crying.

21. Two records of interview between police and the appellant were tendered in the Crown's case and played at trial.[21] In both of these interviews the appellant told police that he and DD had kissed and DD had undressed herself before performing oral sex on him.[22] At trial the appellant gave evidence that he had requested DD fellate him. He denied telling DD to get on her knees, putting his hand on her head or holding her mouth on his penis. The appellant gave evidence the oral sex had lasted approximately 15-30 seconds and that he stopped it because he felt it was "*wrong*".[23]

22. In relation to the assertion by the appellant in evidence at the trial that JL did not witness the act of sexual intercourse the subject of counts 13 and 14 as her back was turned (referred to in AWS at [15]), the appellant gave evidence that while engaged in sexual intercourse he "*occasionally*" glanced over to JL.[24] In the police interviews, the appellant said he was aware that JL was in the room at the time. He said he had forgotten about her being there[25] but that he believed JL had not noticed what was happening.[26]

23. DD gave evidence that after the incident, she told her sister JL not to tell anyone what she had seen, as did the appellant. DD's evidence was that she did this as their brother C was still alive and she did not want to jeopardise being able to see him.[27]

Counts 16 and 18

24. DD gave evidence that these acts were not consensual and, as noted in the appellant's submissions (AWS [16]) DD protested physically and verbally. The appellant denied the acts.

**The Crown case**

25. The appellant's submissions refer to the prosecution case statement and the Crown opening (at AWS [18]). The Crown case statement was not before the jury and is not

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[18] T102.11-13.
[19] T212.11-12.
[20] T212.31-34.
[21] Recording (and transcript) of conversation between appellant and police during the execution of search warrant on 13 February 2009 ("TRSW"), exhibit 4, T280. Recording and transcript of interview between appellant and police on 13 February 2009 ("TROI"), exhibit 5, T283.
[22] TROI, A125.
[23] T459.27-28.
[24] T460.19-20.
[25] TROI, A117.
[26] TRSW, A152-155; TROI A106-152, A318.
[27] T161.8-25.

relevant to this appeal. The prosecution case statement is not a summary of the prosecution opening. It is not a pleading and has no formal status.[28]

26. In relation to count 13 the Crown opened on alternative bases, that is either that DD was (demonstrably) not consenting or, alternatively, that any apparent consent was negated as it was obtained by the appellant's abuse of his position of authority.[29]

27. It is respectfully submitted that no issue arises in relation to the Crown opening. This appeal is not concerned with any issue with respect to particulars or any change in the way the Crown put its case. As such, and, in the light of the issues raised, it is submitted the appropriate focus is on the directions given by the trial judge. In this regard, anything said by the parties is relevant only to the extent that it was endorsed by the trial judge.

28. While the Crown in its opening address did misstate the effect of s 67(3) (as noted by the appellant at AWS [24]) and in its closing address did put recklessness as an available mental element in respect of s 67(1)(h) (as put by the appellant at AWS [25]), the jury was, ultimately, properly instructed by the trial judge (and, in fact, in relation to this last aspect, an example that had been used by the appellant's counsel was put to the jury).[30]

**The trial judge's directions**

29. The appellant discusses the trial judge's directions at AWS [26]. It is not accepted that the trial judge initially explained consent to the jury without reference to negated consent (cf AWS [26]). In this regard the following direction was given:[31]

> After a person turns 16 they may lawfully consent to an act that's of a sexual nature and the act of a sexual nature is not a crime unless there is no consent and there are other conditions too. There's knowledge of consent but I'll come to that in just a moment. But consent has its ordinary meaning and a state of mind that agrees with acquiescence in the act in question. That's what consent is.
>
> Now, there is a qualification to that of course. That is whether there is apparent consent or acquiescence. It may be no real consent because of some vitiating circumstances. One obvious one would be a force or a threat of force. Even if the person's so threatened apparently without demure concurs with the demand then made you wouldn't say that was consent. You wouldn't say it because the apparent consent is vitiated by that consideration.
>
> I say the one relied upon here is not that of course. There is a question of what is said to be a position of authority or trust occupied by the accused in respect of DD. Now, whether there was such a position is a matter for you. When the evidence is reviewed, that matter may become clear or less clear as the case may be but that is the accusation there. So, for example, if a person who had authority such as, I suppose, a commanding officer, commanded a subordinate to submit to something it may be that that would be an abuse of the position of authority and it may be that the apparent consent would be vitiated.

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[28] *R v Goodwin* [2009] ACTSC 111; (2009) 233 FLR 473 at [31]-[33].
[29] T62.22-31.
[30] T532.17-30.
[31] T527.10-41.

> Now, the mere fact that there is no overt indication of lack of consent, no resistance, no physical assault or that there had been prior consent to other things does not of itself mean there is consent. A person is entitled to consent on one occasion and not on another. So even if there has been consent to sexual acts in the past, for example, it doesn't mean that therefore should be concluded to be for that reason consent on another occasion.

30. The trial judge then directed the jury on the *mens rea* required in relation to the post-16 offences (as extracted at AWS [26]).

31. During a break in the trial judge's summing up, in the absence of the jury, the appellant's counsel said:[32]

> The only other observation I make, your Honour, is 67(3) in relation to the extent of consent, "It must be established the person knows the consent of the other person of sexual intercourse committing an act of indecency has been caused by any of the means set out in subsection (8) [*sic – should be (1)*]." So that's the additional thing that applies in relation to extended consent provision.

32. The trial judge then directed the jury as extracted at AWS [27], including the example of the doctor used by defence counsel in his closing address.

33. With respect to count 14 the trial judge directed the jury on the basis of JL's evidence that she did not consent. There was no need for a direction relating any such lack of consent to s67(1) and no such direction was given.[33]

34. On counts 16 and 18 the real issue was whether or not the incidents occurred.[34] The trial judge referred to "*vitiating consent*"[35] but ultimately the case was left to the jury as one where the evidence was that DD was not consenting and the real issue for the jury to determine was whether the acts occurred or did not occur.[36]

**The Court of Appeal decision**

35. The appellant appealed to the Court of Appeal. The only ground relevant to this appeal is ground (c):[37]

> In respect of counts 13, 14, 16, 17 and 18 His Honour misdirected the jury in respect of the issue of consent.

36. The Court of Appeal addressed this ground at [79]-[111]. Three separate arguments were put under this general ground, as set out by the Court of Appeal at [83]. Of these, (as noted at AWS [37]), the only argument relevant to this appeal is that stated at [83](c). The Court of Appeal dealt with this argument at [94]ff. Their Honours, at [94], described the issue in the following terms:

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[32] T531.22-26.
[33] See at T542.43-T543.19.
[34] T540.40-T451.26.
[35] T541.5-10.
[36] T541.24-26.
[37] Court of Appeal at [31].

> The basic submission was that if s 67 is the ground for saying that any apparent consent was not real consent, then the prosecution must particularise the charge in relation to the accused's state of mind as that the accused knew that the complainant did not consent, and cannot charge that the accused was reckless as to consent.

37. The Court of Appeal, correctly it is respectfully submitted, decided (as set out by the appellant at AWS [38]), that where the prosecution relies on s 67(1) to prove the complainant was not consenting, it is not obliged to prove that the accused knew that the complainant's "consent" had only been obtained as a result of the operation of the s 67(1) factor relied on but can alternatively establish the mental element against the accused by proving that the accused was reckless as to consent.

38. As noted above, the Court of Appeal did not decide (and was not asked to decide), that the prosecution could establish the requisite mental element by proving the appellant was reckless as to whether any consent was obtained only as a result of one of the matters in s 67(1).

## Part V: Legislative Provisions

39. The appellant's statement of applicable legislation is accepted.

## Part VI: Argument

### The relevant statutory provisions

40. Counts 13, 16 and 18 were charged against 92D(1) of the *Crimes Act* (now s 54(1)). At the time of the offences that section then read:[38]

> A person who engages in sexual intercourse with another person without the consent of that other person and who knows that that 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.

41. Count 14 was charged contrary to s 92J(1) (now s 60(1)). At the time of the offences that section read:[39]

> 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, for 5 years.

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[38] The section was renumbered effective from 7 January 2002. It was subsequently amended effective from 27 August 2008 to refer to only to recklessness as to the other persons consent as the relevant mental state to be proved. At that time s 54D(3) was added to provide that proof of knowledge or recklessness is sufficient to establish the element of recklessness. It should also be noted the common law concept of recklessness in sexual offences applies. The *Criminal Code 2002* (ACT) definition of recklessness (s 20) is not an applied provision as defined in s 10 of the *Code* and thus has no application to the particular provisions under consideration

[39] The section was amended effective from 17 March 2011 to refer only to recklessness as the mental element, bringing it into line with s 54.

42. At the time of the offences s 92P (now s 67), relevantly provided:

> (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 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— ...
>
> (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;
> ...
>
> (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.

43. The disposition of this appeal depends on the proper construction of s 67 and its interaction with s 54, and whether the directions given by the trial judge reflected that construction and interaction. The appellant's argument is essentially that when the Crown relies on a s 67(1) factor to prove the physical element of lack of consent, the only available *mens rea* is provided by s 67(3) and the fault element of recklessness in s 54 no longer has any part to play. This, it is respectfully submitted, misconstrues the effect of s 67(1) and s 67 (3).

44. In summary, the respondent's argument is that both on the plain reading of s 67 and in light of the context and purpose of the provision the construction urged by the appellant is not correct. The mental state to be proved against an accused remains knowledge or recklessness, as provided by the offence provisions, whether s 67(1) is relied upon or not. Section 67(3) simply makes clear a particular state of mind is within the rubric of knowledge in s 54 (and s 60), but has nothing to say about recklessness.

**Consent**

45. This Court has repeatedly stated that the proper construction of a statute begins with the text itself, that the clear meaning of the text cannot be displaced by extrinsic materials or history, and that the text should be given a meaning consistent with the context and purpose of the legislation as a whole.[40] Understanding the context in which the provisions were enacted, however, throws light on the construction of the

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[40] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 per Hayne, Heydon, Crennan and Kiefel JJ at [47]; *Weiss v The Queen* [2005] HCA 81; (2005) 224 CLR 300 per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ at [9]-[10] ("*Weiss*"); *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 per McHugh, Gummow, Kirby and Hayne JJ at 381. See also: *Legislation Act 2001* (ACT) s 139.

statute.[41] The meaning of "consent" for the purposes of the offences under consideration is not defined in the *Crimes Act*. In order to understand the context in which s 67 operates, it is necessary to have regard to the common law in relation to consent. At common law, consent must be real consent, that is, free and voluntary consent.[42] All consent involves submission but submission alone is not sufficient to indicate consent.[43]

46. Consent was considered in the light of s 1 of the *Sexual Offences Act 1956* (UK) by the Court of Appeal for England and Wales in *R v Olugboja*.[44] That section provided a statutory offence of rape in similar terms to s 54 of the *Crimes Act*.[45] The legislation did not define (or otherwise refine) the word "consent". Dunn LJ, delivering the judgment of the Court, said:[46]

> Although "consent" is an equally common word it covers a wide range of states of mind in the context of intercourse between a man and a woman, ranging from actual desire on the one hand to reluctant acquiescence on the other. We do not think that the issue of consent should be left to a jury without some further direction. What this should be will depend on the circumstances of each case. The jury will have been reminded of the burden and standard of proof required to establish each ingredient, including lack of consent, of the offence. They should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent: *per* Coleridge J. in *Reg.* v. *Day*, 9 C. & P. 722, 724. ... They should be directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse, having regard to all the relevant circumstances; and in particular, the events leading up to the act and her reaction to them showing their impact on her mind. Apparent acquiescence after penetration does not necessarily involve consent, which must have occurred before the act takes place. In addition to the general direction about consent which we have outlined, the jury will probably be helped in such cases by being reminded that in this context consent does comprehend the wide spectrum of states of mind to which we earlier referred, and that the dividing line in such circumstances between real consent on the one hand and mere submission on the other may not be easy to draw. Where it is to be drawn in a given case is for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of that case.

47. In *R v Clark*[47] the New South Wales Court of Criminal Appeal considered an appeal from a conviction of an offence of sexual intercourse without consent. The appellant and complainant were sharing a gaol cell. On the complainant's version sexual intercourse was forced. On the appellant's version the appellant had offered to protect the complainant from other inmates if he would "do the right thing" by him. Following a question from the jury the trial judge directed them that "consent is free choice, consent is not submission due to some pressure". The Court ordered a retrial

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[41] *Weiss* [2005] HCA 81; (2005) 224 CLR 300 per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ at [11]. See also: *Legislation Act 2001* (ACT) s 142.

[42] *R v Clark*, unreported, NSW Court of Criminal Appeal, 17 April 1998, per Simpson J at 11 ("*Clark*"); *Question of Law (No 1 of 1993)* (1993) 59 SASR 214, per King CJ at 220, Perry J at 233 and Duggan J at 237; *R v Ewanchuk* [1999] 1 SCR 330.

[43] *R v Olugboja* [1981] EWCA 2; [1982] QB 320 at 321-322 ("*Olugboja*").

[44] [1981] EWCA 2; [1982] QB 320.

[45] See at 326A

[46] [1981] EWCA 2; [1982] 1 QB 320 at 331H-332E.

[47] Unreported, NSW Court of Criminal Appeal, 17 April 1998.

on the basis that the direction was inadequate. Section 61R(2) of the *Crimes Act 1900* (NSW) listed grounds on which it might be established that consent to sexual intercourse was vitiated, including where a person submitted to sexual intercourse as a result of threats or terror. It had nothing to say about the knowledge required of those circumstances. There was no definition in the Act defining consent otherwise. Simpson J was of the view that, in the particular circumstances, the jury should have been given the following directions (*emphasis added*):[48]

> On the appellant's account, he, knowing of the complainant's fear of others in the prison, took advantage of that fear to secure the complainant's consent to intercourse with him. The jury should, in my view, have been given a three stranded direction in relation to this evidence. Firstly, they should have been directed that the offence was committed if the Crown had proved, to the requisite standard, that the complainant did not consent to intercourse (see *R v Olugboja* [1981] EWCA Crim 2; [1982] 1 QB 320). *Secondly, they should have been directed that consent is not consent unless freely and voluntarily given.* Thirdly, they should have been directed that, if the complainant, to the knowledge of the appellant, submitted to sexual intercourse with the appellant as the result of threats or terror, even if those threats or terror emanated from persons other than the appellant, then the complainant was to be regarded as not consenting to the sexual intercourse.

48. In *R v Sutton*[49] the Queensland Court of Appeal applied the House of Lords reasoning in *Olugboja.* The appellant appealed a conviction for indecent assault. The appellant was a masseur. The complainant, who was 16 years old at the time, was receiving a massage. The appellant masturbated the complainant for 15 to 20 minutes. The complainant did not tell the appellant to stop nor resist in any other way. The complaint on appeal was that the trial judge had misdirected the jury by failing to direct that passive acquiescence was consent. In dismissing the appeal Keane JA (as his Honour then was, and with whom Fraser JA and Fryberg J agreed) set out the passage in *Olugboja* referred to above and said:[50]

> [39] In my respectful opinion, the learned trial judge's directions to the jury were appropriate to focus the jury upon what was relevant to the Crown's attempt to negative consent on the part of the complainant for the purposes of count 1. The jury were told that the question for their determination turned upon their assessment of whether the complainant consciously decided in his mind to agree to the appellant's initial touching of his penis or found himself being touched in a way he had not made a decision to permit. That question fell to be resolved in the light of the evidence of an intimate touching of a youth by an older man in circumstances where the touching was both uninvited and inappropriate to the occasion on which it occurred. The resolution of that question was then a task for the common sense of the jury. That task was unlikely to have been more accurately focused by further explanation by his Honour. His Honour's reference to consent as actual agreement to what was being done as something different from "passive acquiescence to something that might overwhelm him" was, I think, sufficient to convey to the jury the true nature of the issue for their determination.

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[48] *Clark*, unreported, NSW Court of Criminal Appeal, 17 April 1998 per Simpson J at 10-11. Emphasis added.
[49] [2008] QCA 249; (2008) 187 A Crim R 231.
[50] [2008] QCA 249; (2008) 187 A Crim R 231.

**Section 67(1) and consent**

49. Section 67(1) provides a number of circumstances in which consent is "negated". The list is not exhaustive ("... without limiting the grounds on which it may be established that consent is negated ...").

50. The appellant's argument stems from the premise that where "consent" is "negated" there is actual consent (albeit negatived) (AWS [47]). This argument places heavy reliance on the word "negated" in s 67(1) and seeks to distinguish the provision in this regard from provisions in the various Australian States which provide that a person does not consent in certain circumstances. The appellant contends that in those jurisdictions, because the person is stated not to consent in the particular circumstance, there is, unlike in the present context, no consent to be "negatived".

51. The word "negated", particularly when used in the context of a concept like "consent", does not, of itself, suggest that s 67(1) requires that, in certain circumstances, "real" consent to be treated as non-consent, as opposed to providing that there is, in such a situation, simply no consent.

52. In *Jones v Chief of Navy*[51] a similar argument was, it is respectfully submitted, correctly rejected. There, the Full Court of the Federal Court said:[52]

> [77] On the applicant's behalf it was argued that the Judge Advocate's directions to the Panel were insufficient in that they failed to alert the Panel to what was said to be a fundamental inconsistency between a charge of which the absence of consent is an element and a charge which depends on the negation of consent. In truth, there was no such inconsistency. The absence of consent is an element of the offence created by s 60(1) of the *Crimes Act*. Section 67(1)(h) of the *Crimes Act* provides that "For section ... 60 [of the *Crimes Act*] and without limiting the grounds on which it may be established that consent is negated, the consent of [the complainant] ... is negated if that consent is caused by the abuse by the other person of his ... position of authority over ... [the complainant]". The text of ss 60 and 67 could have been included in one section. Section 67 is not different from, or inconsistent with, s 60: it serves to ensure that submission to an act of indecency resulting from, inter alia, the abuse of a position of authority is not regarded as consent.

53. The Macquarie Dictionary[53] defines negate as "to deny; nullify". Similarly, the first meaning given to "negate" in the *Australian Concise Oxford Dictionary*[54] is "1. nullify, make ineffective, invalidate, destroy".

54. Such a meaning is consistent with the notion that any apparent consent obtained by one of the means set out in s 67(1), is not real consent. It does not require the consent to be regarded as "real" but "negated" as submitted by the appellant. Indeed this Court used the language of "negativing 'free agreement'" in a similar context in *The Queen v Getachew*[55] to describe the effect of a provision which defined "consent" and provided a list of circumstances in which there was no consent.[56]

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[51] [2012] FCAFC 125; (2012) 205 FCR 458
[52] At 477; [77]
[53] Macquarie Dictionary Publishers, 6th ed, 2013, at p983.
[54] Oxford University Press, 5th ed, 2012, at p 950.
[55] [2012] HCA 10; (2012) 248 CLR 22 at [14].
[56] Similarly the language of the Court of Appeal in *R v Olugboja* at 331D and that in *R v Sutton* at [39], set out above at [48].

55. Textual indicators also suggest that "negatived" should not be construed in the manner submitted by the appellant. Section 67(1) provides that "without limiting the grounds upon which it may be established that consent is negated" before setting out various circumstances in which consent will be "negated". The inclusive, non-definitional, nature of the provision makes clear that there will be circumstances in which any apparent consent cannot be regarded as real consent. On the appellant's construction there could never be a situation of what the appellant describes as "real but negated" consent outside the stipulated categories in s 67(1), (and the appellant thereby ignores the inclusive nature of the provision).

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56. Further, as is conceded by the appellant (at AWS [46]), a number of circumstances clearly within s 67(1) cannot be regarded as instances of real consent which is then negatived – most obviously s 67(1)(a) and (b). In the appellant's submission, these are not instances of consent which is negatived, but despite the words of the section are somehow to be regarded as outside the section altogether (see AWS [48]).

57. Further, the use of "consent" and "negatived" consent is not unique to s 67 of the *Crimes Act* (contrary to the appellant's argument at AWS [56]). Section s 61HA(4) of the *Crimes Act 1900* (NSW) begins with the words "Negation of consent" before
20 setting out various circumstances in which a person "does not consent to sexual intercourse". Further, s 61HA(5) provides that "a person who consents to sexual intercourse ..." in certain circumstances "does not consent to the sexual intercourse". It is plain that it is not unique to the present legislation to speak of "consent" in two separate senses, being either "real consent" or "apparent consent".

58. The legislative history and extrinsic materials also support the respondent's construction. Sections 54, 60 and 67 were introduced by the *Crimes (Amendment) Ordinance (No 5) 1985* (ACT).[57] The history of these provisions has been considered in *Director of Public Prosecutions v Walker*.[58] This Court in *Banditt v The Queen*[59]
30 had occasion to consider similar provisions in the New South Wales *Crimes Act*. As noted in *Banditt*, the New South Wales provisions reflected the influence of developments in England including *R v Morgan*[60] and the enactment of s 1 of the *Sexual Offences (Amendment) Act 1976* (UK) which followed the Helibron Committee report in 1975.[61] The Helibron Committee noted that the most important aspect of *Morgan* was that for the first time it had been clearly stated that recklessness as to the complainant's consent was sufficient *mens rea* for a conviction.[62] The consequent UK provision was recommended as declaratory legislation in effect confirming the position in *Morgan* in relation to the requisite *mens rea*.[63]

40 59. The Explanatory Statement on the introduction of s 92P (now s 67) states that "Section 92P deals with the question of 'consent' in cases where the consent of the alleged victim is relevant to the offence or where an honest belief as to such consent

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[57] These provisions were inserted into the *Crimes Act 1900* (NSW) as amended in its application to the Australian Capital Territory by Ordinances of the Territory. By s 34(4) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) the *Crimes Act 1900* (NSW) became an Act of the Territory.
[58] [2011] ACTCA 1; (2011) 246 FLR 413 at [33]-[43].
[59] [2005] HCA 80; (2005) 224 CLR 262 per Gummow, Hayne and Heydon JJ at [17]-[39] ("*Banditt*").
[60] [1976] AC 182 ("*Morgan*").
[61] *Banditt* [2005] HCA 80; (2005) 224 CLR 262 per Gummow, Hayne and Heydon JJ at [30] and [33].
[62] *Banditt* [2005] HCA 80; (2005) 224 CLR 262 per Gummow, Hayne and Heydon JJ at [24].
[63] *Banditt* [2005] HCA 80; (2005) 224 CLR 262 per Gummow, Hayne and Heydon JJ at [26].

held by an accused would entitle him to an acquittal".[64] Nothing in the Explanatory Statement provides support for the appellant's construction, and, indeed, the use of inverted commas around the word "consent" (on more than one occasion) strongly supports the notion that any consent within s 67(1) is, contrary to the appellant's argument, not real consent. The Explanatory Statement also supports the respondent's position with respect to s 67(3), discussed further below.

60. The introduction of the provisions followed recommendations of the Law Reform Commission of Tasmania in their *Report and recommendations on rape and sexual offences*.[65] That report recommended the adoption of provisions as to circumstances in which "a consent procured thereby should not be full and free".[66] These provisions were based on a Northern Territory draft Bill. The Northern Territory draft Bill listed a number of factors by which the "consent of a person to sexual intercourse or the performance of a sexual act is not full and free if it is brought about [by any of those factors]".[67] In supporting its recommendation the Tasmanian Law Reform Commission noted:[68]

> An extensive but not exhaustive list of *non-consensual* situations avoids the problems of a vague generalised definition of consent. Such definitions have caused much confusion and resentment because it is felt that they can be interpreted to exonerate the accused in situations which many women would regard as nonconsensual ... The provision recommended would remove doubts in the area of force and threats of violence ... where the law is vague and extended in the area of fraud ... threats of public humiliation and extortion ... and exploitation of authority or position where it has not gone far enough. The issue of consent is not ousted. It is rather a matter of changed emphasis."

61. With reference to the examples postulated by the appellant (at AWS [49]-[52]), there is, with respect, no difficulty in regarding a person who, outwardly appears to consent, but does so only because of the violence of the accused, as not giving consent to sexual intercourse. Indeed, it is respectfully submitted, the contrary position is untenable. Nor is there any difficulty in regarding a sex worker as not consenting when threatened by the brothel keeper. That the client of the sex worker might be ignorant of circumstances, says nothing about the nature of the consent given (and in fact illustrates the point made by the Court of Appeal to the effect that ss 67(1) and 67(2) could, quite sensibly, stand alone). Further, and contrary to the appellant's submissions, the Court of Appeal decision does not mean a client in this situation who does not turn his or her mind to the possibility that any "consent" is the result of the threat of future violence would be guilty of an offence on this basis. However, if the client, in the same circumstances, had intercourse not caring if the worker was consenting or not he or she would be guilty of an offence.

62. It follows from the text of s 67(1)(h) that, where it is established that any apparent consent is the result of an abuse of authority, the common law requirement, picked up

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[64] Explanatory Statement, *Australian Capital Territory Seat of Government (Administration) Act 1910*; Crimes (Amendment) Ordinance (No 5) 1985; No 62, 1985 at p7 (available at http://www.legislation.act.gov.au/es/db_37105/19851128-42652/pdf/db_37105.pdf).
[65] Explanatory Statement, Crimes (Amendment) Ordinance (No 5) (1985) at p 7.
[66] Law Reform Commission of Tasmania, *Report and recommendations on rape and sexual offences*, Report No 31 (1982), [40] ("Report No 31").
[67] Law Reform Commission of Tasmania, Report No 31, [40].
[68] Law Reform Commission of Tasmania, Report No 31, [44]-[45]. *Emphasis added.*

by the Act, that consent be freely and voluntarily given, is not satisfied. Although s 67 will be raised where there is evidence of apparent consent, the effect of proving s67(1)(h) – or another s 67(1) circumstance – is that there never was consent. Contrary to the appellant's submissions (at AWS [53]), s 67(1) does not result in any "deeming" of the physical element of the offences created by, inter alia, ss 54 and 60.

**The proper construction of s 67(3)**

63. Contextually, ss 67(1) and 67(3) are split by s 67(2). Where a person offers no physical resistance s 67(2) will operate in relation to all relevant offence provisions, irrespective of the operation of ss 67(1) and 67(3). The independence of s 67(2) provides further support for the independent operation of s 67(1). That is, s 67(1) is capable of operating independently of s 67(3), such that, in a case in which reliance is placed on s 67(1), the prosecution is entitled to prove, within the terms of the offence provision, knowledge or recklessness. There is nothing in the text of ss 67(1) or 67(2) to suggest they are dependent on s 67(3).

64. There is, it is submitted, nothing surprising or untoward in this result. To the contrary, such a construction is consistent with the purposes of the legislation. To take the appellant's example of sexual intercourse in the context of a relationship affected by domestic violence. On the appellant's construction, an accused who does not positively know, (or against whom it cannot later be proved that he knew), that that the complainant's submission is based only on the history of violence, will escape liability even if that be the fact and the accused determines to have sexual intercourse with the complainant not caring if she consents or not (that is, recklessly).

65. Section 67(3) is activated if a certain state of affairs is proved. That is, that the accused knew consent was caused by, relevantly, an abuse of a relationship of authority. Where that knowledge is proven the accused is deemed to know that there is no consent. The knowledge there is no consent exists as an incident of the knowledge of an abuse of authority. This meaning is apparent from the text of s 67(3). In other words:[69]

> As to s 67(3), 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 that the accused knew there was no consent.

66. This construction of s 67(3) operating as a deeming provision without modifying the elements of ss 54 and 60, is supported by the Explanatory Statement to the amending legislation that introduced these sections:[70]

> The effect of [s 67] is to retain existing defences in relation to offences involving sexual intercourse but to extend them to offences involving acts of indecency. In other words the defences available as enunciated in D.P.P. v Morgan (1976) A.C. 182, remain available. On the other hand if the Crown can prove beyond a reasonable doubt that the accused was aware that the 'consent' was caused by any of the objective factors set out in sub-section (1) then the accused must be convicted. This also follows from the decision in D.P.P. v

[69] *Jones v Chief of Navy* [2012] FCAFC 125; (2012) 205 FCR 458 at [125].
[70] Explanatory Statement, Crimes (Amendment) Ordinance (No 5) 1985 (ACT) at p 7.

> Morgan which requires that any belief as to the consent of the victim must be honestly held. ...
>
> Sub-section (3) provides that where the Crown has proven that the person charged knew at the relevant time that the consent of the victim was caused by any of the means set out in sub-section (1) then the first-mentioned person cannot be held to have an honest belief in the consent of the victim to the act of sexual intercourse or act of indecency.

67. The effect of *Morgan* is that where a person had an honest belief in the consent of the other they would not be criminally liable.[71] This is whether or not the belief was reasonable. The purpose of s 67(3) is to prevent an accused from relying on an honest belief in consent in circumstances where the jury is satisfied the accused knew that the apparent consent was caused by a factor listed in s 67(1).

68. The Court of Appeal was correct to say:

> [102] ... The elements of a relevant offence include both an absence of consent by the complainant as a matter of fact *and,* on the part of the accused, either knowledge of that absence of consent, or recklessness about whether there is consent. Sections 67(1) and (2) relate directly to the question 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 provision 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.
>
> [103] There is therefore no reason to assume, without any explicit statement or even implicit hint to that effect, that s 67(3) not only has its explicit substantive effect but is also intended to exclude the application of the rest of s 67 to cases not covered by s 67(3).
>
> [104] We also consider that a statement such as is made in s 67(3), which can sensibly be made in relation to a requirement of knowledge on the part of an accused, is, on proper analysis, irrelevant in relation to the concept of recklessness.

69. The appellant contends that, on the Court of Appeal (and the respondent's) construction, s 67(3) would not be necessary. It is not clear that this is so.[72] Even if this is so, reading the provisions as a whole, (particularly noting that much of s 67(1) might be regarded as unnecessary), this tool of statutory construction does not assist the appellant. Section 67(3), at the least, removes any doubt on the issue.[73] As noted in the Court of Appeal,[74] and in the Explanatory Statement, the provision heads off any argument by an accused that he or she did honestly believe the complainant was consenting. In a contest where the subjective state of mind of the accused is to be proved s 67(3) makes plain the need to direct the jury that a belief on the part of an accused that the complainant was "consenting" should not result in an acquittal, if the accused knew that the reason for any (apparent) consent was one of the matters referred to in s 67(1).

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[71] *DPP v Morgan* [1976] AC 182 per Cross LJ at 203E, per Fraser LJ at 237F.
[72] cf. s 37AA of the *Crimes Act 1958* (Vic) as discussed by this Court in *The Queen v Getachew* [2012] HCA 10; (2012) 248 CLR 22 particularly at [28] ("*Getachew*");
[73] See *Jones v Chief of Navy* [2012] ADFDAT 2 at [73] (Tracey J, White JA and Mildren J), referred to by Penfold J in *R v Schippani* [2012] ACTSC 108 at [87], in turn referred to in the Court of Appeal at [95].
[74] Court of Appeal at [108].

70. Thus understood, s 67 operates to complement the offence creating provisions. In other words, where an offence is charged the *mens rea* of those offences, recklessness or knowledge, remain. Section 67 operates in addition to the ordinary operation of the offence provisions, whenever the relevant state of affairs is proved.

**The trial judge's directions**

71. The trial judge's directions were "moulded in the light of the proper construction" of s 67 and "having regard to the real issues in the trial".[75]

72. The jury was sufficiently instructed on the real issues in the trial – for counts 13 and 14 whether there was consent and the appellant's state of mind in relation to consent, and, for counts 16 and 18 whether they had occurred. The jury was given sufficient detail of the relevant law and how it applied to the case to decide those issues.[76]

73. The jury was properly instructed as to the meaning of consent in the light of s67(1) of the *Crimes Act*. In relation to count 13, it was open to the jury to convict the appellant based on DD's evidence that there was, demonstrably, no consent, on JL's evidence, that there was submission without consent and, additionally, if necessary, any apparent consent had been negated because the appellant was abusing his authority over DD. Individual jurors were "not obliged to follow the same evidential path to arrive at a unanimous decision".[77]

**The jury's path**

74. The facts in this case highlight the above point. In relation to count 13, DD gave evidence that she was physically held down to perform fellatio on the appellant. On DD's evidence there was demonstrably no consent. JL's evidence suggested submission on the part of DD. In the circumstances that were before the jury, that is the history of sexual abuse of DD by the appellant, the fact she was away from her parents, the authority the appellant had over her, the fact that in DD's mind the appellant was a means to see her brother, and the conversations both immediately prior to the act and in Wodonga where the appellant intimated he would turn to JL if DD did not comply, members of the jury might have considered that DD's consent was not consent fully and freely given. This could be so without relying on s 67. This was indeed noted by the trial judge after the jury retired to consider their verdict:[78]

> I don't think we are actually talking here about section 67 so much is the ordinary meaning of the term consent, which can be taken to mean acquiescence, of course. And if there is acquiescence, then you do ask the further question, well, why is acquiescence?

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[75] *Getachew* [2012] HCA 10; (2012) 248 CLR 22 at [29]; *HML v The Queen* [2008] HCA 16; (2008) 235 CLR 334 per Hayne J at [121] (see footnotes 111 and 112).
[76] *Getachew* [2012] HCA 10; (2012) 248 CLR 22 at [29] (see footnote 35).
[77] *WGC v The Queen* [2007] HCA 58; (2007) 233 CLR 66 per Kirby J at [75]-[76], per Hayne and Heydon JJ at [138], per Crennan J at [172].
[78] T549.26-30.

**Ground of appeal 1 – misdirection on recklessness as to circumstance**

75. The appellant's first ground of appeal is that the Court of Appeal erred in holding that the trial judge did not err in directing that the jury could find the appellant guilty in respect of the counts 13, 14, 16 and 18 if it were satisfied the complainant's consent was caused by the abuse of the appellant of his position of authority over the complainant and the appellant was reckless as to that circumstance. The trial judge did not direct the jury in this way.

76. The appellant relies on the trial judges directions at T532.15 in support of this argument. It is necessary, however, to look at those directions in their proper context. The trial judge directed the jury in relation to the concept of consent[79] before moving on to address the appellant's mental state. This, he directed the jury, must be either knowledge of lack of consent or recklessness as to the lack of consent. The trial judge explained to the jury inadvertent and advertent recklessness.[80] There was then a short adjournment during which counsel for the appellant requested a direction in terms of s 67(3), and, submitted to the trial judge that knowledge of the circumstances causing consent must be established.

77. Upon recommencing his charge to the jury, the trial judge reiterated his earlier directions on the requisite mental element, referring again to the relevant mental element being knowledge that there was no consent, or recklessness as to lack of consent.[81] The trial judge then directed the jury, in accordance with a request by the appellant's counsel, on the effect of s 67(3) as follows:[82]

> ... 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. Now, he must, in that consequence, in that circumstance, know that the apparent consent is so procured.

78. His Honour then followed this immediately with an example, as given by the appellant's counsel in his closing address, of a doctor requesting a patient engage in a sexual act with him, distinguishing between the situation where the doctor overtly uses his position to obtain consent and the situation where the patient consents because she is of the belief that he will not continue to treat her if she did not consent. His Honour directed the jury that "*it would be a crime if and only if the doctor was aware that that was the reason for the apparent consent*".[83]

79. The trial judge did not direct the jury that recklessness as to the circumstances negating consent was sufficient. His Honour's directions, including defence counsel's example, made clear to the jury that, if they were to rely on the appellant's state of mind with respect to the manner in which any apparent consent had been procured (that is by the abuse of the position of trust), it was necessary that the prosecution prove knowledge as to this matter.

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[79] T527.
[80] T527.43-528.18.
[81] T532.2-13.
[82] T532.13-15.
[83] T532.29-30.

**Ground of appeal 3 – the court of appeal erred in holding consent was only in issue in respect of count 13**

*Count 14*

80. As discussed above, consent was not an issue in relation to count 14. The Crown was required to prove that the appellant intentionally engaged in an act, that act was an act of indecency, it was engaged in the presence of JL, it was without the consent of JL, and the appellant knew or was reckless as to that consent. In the trial there was no issue in relation to the issue of whether the act was an act of indecency. There was no issue that it was committed in the presence of JL.[84] JL gave clear evidence of lack of consent. There was no suggestion that the appellant had attempted to ascertain if she would consent prior to the act taking place. Ultimately there was no evidence suggesting that the appellant had put his mind to the issue of consent. The lack of consent on the part of JL was not dependent on s 67(1). The issues in grounds 2 and 3 of the appellant's notice of appeal do not arise with respect to this count.

*Counts 16 and 18*

81. The appellant's argument in relation to these counts is dependent on establishing error in relation to the directions on consent and the appellant's mental state with respect to consent. For the reasons above, there was no error in this regard. If this submission is not accepted it is submitted that the Court of Appeal was correct to decide the issue of consent (and the appellant's state of mind in this regard) arose only in the context of count 13.[85] In relation to counts 16 and 18 the evidence of the complainant was that she physically and verbally protested. For the physical element in these counts it was not necessary for the jury to consider the negated consent provisions. The appellant's case was a denial. The appellant's counsel addressed on the basis that the events simply did not occur.[86] Indeed, defence counsel sought to take tactical advantage from the passing reference by the Crown prosecutor to the possible issue of a breach of a position of trust in relation to these counts.[87] The jury was adequately instructed in relation to these counts and the issues arising in grounds 2 and 3 of the appellant's grounds of appeal do not arise.

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[84] It does not require any participatory conduct, cf where equivalent statutes use the word "with": *Crampton v R* [2000] HCA 60; (2000) 206 CLR 161. It is noted that in *R v AWL* [2003] SASC 416 at [12], cited with apparent approval in *SLJ v The Queen* [2013] VSCA 193 at [14], it was held in relation to similar provisions, there is no requirement that that the person be aware of the act - it is "sufficient to constitute the offence if the child is present", suggesting that there was, on the facts, no defence to count 14.

[85] Court of Appeal [79].

[86] T517.41-520.28

[87] See Crown address at T492.31. The tactical advantage sought to be made was a submission to the effect that the Crown's reference to the nature of the relationship was a concession it was not as "clear-cut" as the complainant's evidence of explicitly stated non-consent suggested, the submission being then that the jury should have a doubt about the complainant's evidence that the event occurred at all. It was never submitted that the complainant was consenting or that that the appellant did not know and was not reckless as to the lack of consent (or that the jury ought to have a doubt about either of these things).

**Part VIII: Estimated time**

82. The respondent estimates that the presentation of the oral argument will require two hours.

Dated: 17 January 2014

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