

SEXUAL HARASSMENT AND SEXUAL ASSAULT; THE LAW AND WHY EVERYONE IS TALKING ABOUT IT

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Sexual harassment and sexual assault often go unreported due to the sensitive nature of the offence, and the difficulty victims have in speaking about their experiences. Nonetheless, it is better to be aware of the issues surrounding sexual misconduct, particularly around sexual harassment and sexual assault.

This article will discuss the elements of both sexual harassment and sexual assault.



A. SEXUAL HARASSMENT

Sexual harassment is defined in section 28A of the Sex Discrimination Act 1984 (Cth) as any unwanted or unwelcome sexual behaviour from one person to another which may offend, intimidate or embarrass that person.

Some examples include:

- Unwanted sexual advances, such as touching or romantic/sexual propositioning; and
- Unwanted sexual behaviour, such as communicating inappropriate sexual jokes or images, staring or making sexual comments.

Sexual harassment is a kind of sex discrimination and is therefore unlawful in certain situations. This is addressed in Division 3 of the Sex Discrimination Act, whereby sexual harassment is deemed unlawful in the workplace, educational institutions, clubs and other specific circumstances.

The Australian Human Rights Commission's (AHRC) 2018 national survey on sexual harassment found that 85% of women and 56% of men have been sexually harassed at some point in their life. This primarily involved making offensive sexually suggestive comments or inappropriate physical contact.

If the behaviour escalates to an indecent act, meaning an act of a sexual kind that a reasonable person would deem indecent, the offender may be liable to imprisonment for up to two years.

An important factor of sexual harassment is that the behaviour is unwanted.

However, in some circumstances it may be difficult to tell whether sexual advances and flirtatious behaviour is unwanted. If there is any doubt about a person's consent, it should be assumed that consent has not been given.

NOTE: The next page will discuss sexual assault.



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MAKING A COMPLAINT

If the situation cannot be resolved between the parties, or the harassed person feels uncomfortable discussing the matter with their harasser, a complaint can be made to the Australian Human Rights Commission (AHRC). This can be done through post, fax or lodged online.

A complaint to the AHRC must outline the events that have occurred and provide sufficient detail of the allegations, including who was involved and where it occurred. The AHRC would then investigate the complaint and attempt to resolve it through conciliation (where both parties or their representatives discuss the issues in the presence of a third party conciliator).

If the complaint cannot be resolved in this informal manner, the matter can be taken to court.

B. SEXUAL ASSAULT

Sexual assault is a more serious violation of a person's liberty and comfort than sexual harassment.

Sexual assault, formerly known as rape, is a serious crime in NSW.

It is defined in the Crimes Act 1900 (NSW), under section 61I and a person found guilty of sexual assault is liable to imprisonment for 14 years.

The crime of sexual assault has two main parts:

The offender has sexual intercourse, or attempts to have sexual intercourse, with another person who does not consent to the intercourse; and

The offender knows the other person is not consenting.

In 2014, the NSW Government amended the Crimes Act to make the definition of consent irrefutably clear.

Section 61HA outlines consent to be when a person **"freely and voluntarily agrees to the sexual intercourse"**.

A person is liable for sexual assault if they had, or attempted to have, sexual intercourse and:

- Were aware that the other person was not consenting;
- Were reckless as to whether the other person was consenting; or
- Had no reasonable grounds to believe the other person was consenting.

It is stated in the law that any self-induced intoxication of the alleged offender, by either drugs or alcohol, is irrelevant and cannot be used as a defence.

There are a number of circumstances where a person is automatically deemed unable to consent.

These include:

- If they have no capacity to consent because they are a child;
- If they have no capacity to consent because they have a cognitive impairment;
- If they are unconscious or asleep;
- If they are threatened with force (either against them or someone else); or
- If they are unlawfully detained, e.g. held captive.

Other situations where a person may be unable to consent include:

- If they are substantially impaired due to drugs or alcohol;
- If they were intimidated or coerced into the intercourse; and
- If the offender abused a position of trust or authority.

A person who does not put up a physical resistance to the sexual intercourse is not automatically understood to be consenting.



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A sexual assault offence can be considered aggravated in certain circumstances, leading to a longer maximum imprisonment period of 20 years. Under section 61J of the Crimes Act, aggravated sexual assault occurs where:

- The offender also inflicts bodily harm on the victim;
- The offender is in the company of another person;
- The victim is under 16 years of age;
- The victim is under the authority of the offender;
- The victim has a serious disability or cognitive impairment;
- The offender breaks into a home or other building to commit the offence; or
- The offender deprives the victim of their liberty before or after the offence takes place.

WHAT TO DO IF A SEXUAL ASSAULT HAS OCCURRED?

As sexual assault is a criminal offence, victims can formally report incidences of sexual assault to the police, after which the police would investigate the matter and charge and arrest the offender where appropriate.

At first instance, victims will be recommended a NSW Health sexual assault counsellor for free and confidential counselling, and assistance in coping with their experience. Victims may alternatively be referred to the Rape Crisis Service, which also provides private counselling.

Reports of sexual assault can be made at any time when the victim feels comfortable, whether it be immediately after the offence occurs or years afterwards.

Despite this, sexual assault is largely under-reported to the police.

This is due to a number of factors, such as victims' apprehension to relive their experiences in giving a statement to the police, stigma and a low conviction rate.

However, reporting has increased over the last few years due to social movements such as the #MeToo Campaign and the End Rape on Campus Campaign. Other campaigns such as the Ask for Angela Campaign, would help to reduce the cases of sexual assault and harassment in entertainment areas, such as bars and clubs.

If you or someone you know has been affected by these issues, professional help should be sought and the correct authorities alerted.

Useful organisations:

[1800RESPECT](https://1800respect.org.au) – free 24/7 counselling.
1800respect.org.au, Tel: 1800 737 732

[NSW Rape Crisis Helpline](https://nswrapecrisis.com.au)
[Nswrapecrisis.com.au](https://nswrapecrisis.com.au), Tel: (02) 9819 6565

[NSW Health Sexual Assault Services](https://health.nsw.gov.au)
health.nsw.gov.au

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