

CRIMINAL LAW GUIDEBOOK: QUEENSLAND AND WESTERN AUSTRALIA

ANDREW HEMMING

ASSESSMENT PREPARATION

CHAPTER 5

ACTIVE LEARNING QUESTIONS

1. What are the elements of rape and sexual penetration?

Queensland and Western Australia use different terminology to describe sexual intercourse without consent. Queensland uses the term 'rape' and defines the offence of rape in s 349 of the *Criminal Code 1899* (Qld). Western Australia uses the term sexual penetration without consent and the offence is found in s 325 of the *Criminal Code 1913* (WA).

Queensland

The act or physical element of the offence of rape is the penetration. As can be seen from the definition of sexual penetration in s 6 and s 349(2) of the *Criminal Code* (Qld), penetration has a broad meaning. The essence of the offence of rape is lack of consent. However, the legislation is silent on a mental element, such as whether the person was reckless as to whether the other person was consenting. This then leaves the circumstances under which the penetration occurred, in order to establish lack of consent.

Western Australia

Western Australia uses the term 'sexual penetration without consent' as opposed to rape. The offence is defined in s 325 of the *Criminal Code* (WA) as: 'A person who sexually penetrates another person without the consent of that person is guilty of a crime.' Thus, as in Queensland, the act is the sexual penetration and there is no mental element prescribed in the offence. Whether the other person was consenting is determined by whether consent was freely and voluntarily given.

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Arturo Cuomo



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