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Law Reform Commission of Victoria

Report No. 7

RAPE AND ALLIED OFFENCES:

Substantive Aspects

7

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June 1987

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LAW REFORM COMMISSION OF VICTORIA

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To The Hon J H Kennan MLC
Attorney-General
Parliament House
MELBOURNE VIC 3000

Dear Attorney-General

In accordance with the provisions of Section 6 (1) (*a*) of the *Law Reform Commission Act* 1984, I submit the Commission's Report on Rape and Allied Offences: Substantive Aspects.

Yours sincerely

D ST L KELLY
Chairperson

June 1987

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1. EXECUTIVE SUMMARY

General Considerations

1. This report arises out of a reference from the Attorney-General, the Hon J.H. Kennan, MLC. That reference requires the Commission to review the law relating to sexual offences. Particular emphasis was placed on the impact of the amendments to the law made by the Crimes (Sexual Offences) Act 1980.

2. This report deals only with rape and allied offences in the Crimes Act as they apply to adult victims. It is also limited to the substantive law. Separate reports will cover child victims, adult victims with impaired mental functioning, and the general procedural and evidentiary issues.

3. There are four considerations relevant to reform in this area. First, the law should offer as much protection as possible to the sexual autonomy and integrity of all members of the community. Secondly, the interests and concerns of women must be given special recognition as they are the vast majority of adult victims of sexual offences. Thirdly, the established fundamental principles of the criminal justice system, including the presumption of innocence, should be maintained. Finally, the law should be as clear and simple as possible.

Specific Recommendations

Threshold Questions

4. One threshold question is whether sexual offences should continue to be a separate category of offences against the person. The law would certainly be clearer to state and to administer if sexual offences were simply included in more general offences such as causing serious injury or causing injury. However, the type of violation of personal integrity which is involved in sexual offences is of particular concern to the community over and above the use of force or the causing of harm.

> *The law should continue to treat sexual offences as a separate category from other offences against the person* (para 30).

5. Another threshold question is whether the law relating to sexual offences should continue to distinguish between penetrative and non-penetrative conduct. The law would be simpler if the distinction were not made. However, penetrative conduct is generally regarded more seriously than non-penetrative conduct.

> *The law should continue to distinguish between penetrative and non-penetrative conduct* (para 31).

Rape

6. Amendments to the Crimes Act in 1980 extended the definition of rape from penetration of the vagina by the penis to include anal and oral rape. Penetration by parts of the body other than the penis remain indecent assaults. To achieve a

more consistent approach to penetrative—non-penetrative conduct, rape should cover penetration by parts of the body other than the penis. To resolve doubt, penetration of a surgically constructed vagina should also be included.

> *Non-consensual penetration by the penis of the vagina, anus or mouth, and non-consensual penetration by a part of the body or an object of the vagina or the anus should constitute rape. "Vagina" should include a surgically constructed vagina* (para 39).

7. Rape is not restricted to cases where the victim submits as a result of force or threats of it. It extends to all cases where there is a lack of consent to the penetration. Lack of consent should continue to be given its ordinary and natural meaning. Suggestions have been made that rape should be limited to cases involving violence or the threat of it. Such a restriction would not be warranted.

> *Rape should not be restricted to cases where submission is induced by force or threats of it, but should extend to all cases where consent is lacking* (para 44).

8. Suggestions were made to the Commission that lack of consent should cease to be an element of the offence of rape. One suggestion was that rape should be defined not by reference to 'lack of consent' but by reference to 'coercive circumstances'. However, adoption of this suggestion would not reduce the evidence given at trials. It could lead to greater complexity in directions to the jury. It might also lead to an increased reliance on evidence of violence. Consent is, in any event, the accepted basis for distinguishing between lawful and unlawful activity.

> *Lack of consent should remain a central element of the offence of rape* (para 50).

'Lack of consent' covers certain cases where penetration takes place as a result of fraud. The types of fraud covered could be expanded. However, the cases now covered are cases where consent is lacking to an act of penetration or to the act of penetration with a particular person. In other cases of fraud, consent is not lacking. To include these cases within rape would be inconsistent with the underlying concept.

> *The categories of fraud which fall within the offence of rape should not be extended* (para 57).

The mental element in rape is an intention to penetrate accompanied by knowledge either that the person is not consenting or that the person may not be consenting. A person who honestly believes that the other person is consenting is not guilty of rape. Suggestions were made that an honest belief should not be enough. It should also have to be a reasonable belief. However, the reasonableness of an alleged belief is already relevant to the question whether the belief actually existed. Moreover, it is a general principle of criminal law that only a person who acts intentionally or recklessly should be guilty of serious criminal offences.

> *The present mental element in rape should be retained* (para 60, dissent para 102).

9. Concerns about the reasonableness of the accused's belief might be met by creating a lesser offence for cases where the accused's belief is unreasonable. However, the creation of such an offence would cause difficulties in the trial process.

> *A lesser offence, covering cases where the accused's belief as to consent is unreasonable, should not be created* (para 61).

10. Some doubt exists about when the offence of rape is complete. Juries are commonly instructed that rape is "sexual intercourse" without consent. However, the Crimes Act definition of "rape", which builds upon the common law

definition, appears to be confined to the introduction of the penis or object. If so, to continue penetration after becoming aware that the person is not consenting constitutes indecent assault rather than rape. That would be contrary to the distinction drawn between penetrative and non-penetrative conduct.

> *The offence of rape should cover cases where the accused continues to penetrate after becoming aware that there is no consent* (para 64).

11. In some jurisdictions the term "rape" is no longer used to refer to penetrative offences. Most submissions to the Commission favoured retention of the word "rape". Even in its extended sense, the term is well understood and it effectively labels a most serious offence.

> *The term 'rape' should be retained* (para 66).

Indecent Assault

12. For an assault to be indecent, the circumstances of the assault must themselves be indecent. In some other jurisdictions, indecent circumstances are not essential. A sexual motive is sufficient to convert an assault to an indecent assault. However, this involves imposing special criminal liability on the basis of admitted motive rather than for observable conduct.

> *Indecent assault should continue to be limited to cases where the circumstances are indecent* (para 70).

13. Like rape, indecent assault requires a lack of consent. However, it is not clear that the concept of lack of consent is the same in both offences. This doubt should be resolved.

> *The concept of 'lack of consent' should be the same for indecent assault as for rape* (para 71).

14. 'Sexual assault' would be a better description than the term 'indecent assault'. However, there is no point in re-naming the offence unless it is intended to change the substance of the offence. There is no reason to change the substance of the offence.

> *The term 'indecent assault' should be retained* (para 72, dissent para 103).

Aggravating Circumstances Offences

15. In 1980, the maximum penalty for the offence of rape was reduced from 20 years to 10 years imprisonment. This was complemented by the introduction of two new offences: rape with aggravating circumstances and indecent assault with aggravating circumstances. The maximum penalty for rape with aggravating circumstances was then set at 20 years imprisonment. While this gave greater direction to judges in sentencing, it has led to unacceptable complexity in the conduct of trials.

> *The aggravating circumstances offences introduced by the 1980 amendments to the Crimes Act should be repealed* (para 75).

16. Section 54 of the Crimes Act makes it an offence to procure sexual penetration by threat or intimidation or by fraudulent means. The section is unsatisfactory because it overlaps the offence of rape, is limited to sexual

penetration outside marriage, and requires corroboration as a matter of law. However, agreement could not be reached on whether to narrow or widen the section.

The substance of section 54 should be retained but the limitation of the offence to penetration outside marriage and the requirement for corroboration should be abolished (para 85).

Other Offences

17. Section 55 of the Crimes Act makes it an offence to administer drugs or other substances with an intention to lower the resistance of another person in order to effect penetration. The behaviour covered by this section is adequately dealt with by general offences.

Section 55 of the Crimes Act should be repealed (para 86).

18. Section 56 of the Crimes Act makes it an offence to unlawfully abduct or detain a person for the purposes of sexual penetration or marriage. This type of behaviour is also adequately dealt with by general offences.

Section 56 of the Crimes Act should be repealed (para 87).

19. Some Crimes Act provisions deal specifically with attempted offences. The Crimes Act also contains references to the common law offence of assault with intent to rape. In each case, the conduct is adequately dealt with by other provisions.

Crimes Act provisions referring to attempts to commit sexual offences and assault with intent to commit rape should be repealed and the offence of assault with intent to commit rape abolished (para 88).

Alternative Verdicts

20. Section 421 of the Crimes Act deals generally with alternative verdicts. However, section 425 deals specifically with alternative verdicts in rape and other sexual offence cases. The relevant sub-sections are not necessary.

The alternative verdict provisions contained in section 425 (1) and (2) of the Crimes Act should be repealed in relation to adult victims (para 91).

21. In light of the Commission's recommendation that the aggravating circumstances offences be repealed, new penalties must be set for rape and indecent assault.

The maximum penalties should be twenty years imprisonment for rape, and ten years for indecent assault. The present maximum penalty for section 54, five years imprisonment, should be retained (para 94).

22. The present law on sexual offences is partly stated in the Crimes Act and partly left to the common law. There is a need for a clear and concise statement of the law, with detailed definitions where there is a departure from the present law.

There should be a clear and consise legislative statement of the elements of the offences (para 98, dissent paras 99-101).

RAPE AND ALLIED OFFENCES: SUBSTANTIVE ASPECTS

1. INTRODUCTION

Terms of Reference

1. On 21 October 1985, the Law Reform Commission received from the Attorney-General, the Hon J.H. Kennan, MLC, a reference dealing with the law relating to sexual offences in Victoria. The Terms of Reference direct the Commission:

- to review the law relating to sexual offences in Victoria, in particular the adequacy of the operation in practice of the amendments to the law made by the Crimes (Sexual Offences) Act 1980; and
- to recommend what, if any, reforms should be made.

Background To The Reference

2. Four recent developments lie behind concern over the present law with respect to sexual offences. The first development is the passing of major sexual law reform legislation by a number of overseas and Australian jurisdictions. Within recent years, Canada, New Zealand, New South Wales, Western Australia, the Australian Capital Territory and the Northern Territory have all conducted major reviews of their sexual offence laws. A number of these reviews have led to restructured laws, involving abolition of the common law crime of rape and its replacement with new forms of sexual assault offences.

3. The second was the recognition by the Shorter Trials Committee of the Victorian Bar and the Australian Institute of Judicial Administration of inefficiencies in the conduct of criminal trials. Criminal proceedings, especially trials in the higher courts, are expensive. In its *Report on Criminal Trials*,[1] the Shorter Trials Committee suggested that the substantive criminal law often contributes to unnecessarily long trials, and singled out serious sexual offences for special mention. One particular aspect which has been causing difficulty is the large number of alternative verdicts which became available as a result of amendments to the relevant provisions of the Crimes Act in 1980.[2]

4. The third is an increase in the awareness of the extent of sexual abuse of children. Major reports have been produced recently in New South Wales, South Australia and Queensland on aspects of this problem.[3] In 1986, a similar inquiry was established in Western Australia. In Victoria, a discussion paper on *Child*

1. Shorter Trials Committee, *Report on Criminal Trials*, Victorian Bar and the Australian Institute of Judicial Administration, Melbourne, 1985.

2. See s 425 Crimes Act 1958.

3. *Report of the New South Wales Child Sexual Assault Task Force* Premier's Department, New South Wales, 1985; *South Australian Government Task Force on Child Sexual Abuse*, Ministry of Health, South Australia, 1985; *An Inquiry into Sexual Offences Involving Children and Related Matters* by D.G. Sturgess QC Director of Prosecutions, Queensland, 1985.

Sexual Assault was released by the Department of Premier and Cabinet early in 1986.[4]

5. The fourth development is the finding by the *Inquiry into Prostitution*[5] of a number of anomalies and other difficulties in relation to the sexual offence provisions of the Crimes Act 1958. In particular, the Inquiry drew attention to the need for examination of the provisions of the Act dealing with the age of consent in relation to sexual activity, and the provisions dealing with sexual activity where one party is a young person and the other a considerably older person.

Scope And Organisation Of The Reference

6. In dealing with the reference, the Commission decided to concentrate on the sexual offence provisions of the Crimes Act.[6] These are numerous and complex. They deal with offences such as rape, rape with aggravating circumstances, indecent assault, indecent assault with aggravating circumstances, a variety of sexual penetration offences involving young people and mentally and intellectually disabled people, gross indecency, incest, and procuring, abducting and administering drugs for sexual purposes.

7. Work on the reference has been divided into four parts:

- ⋆ the substantive law relating to general sexual offences.[7]
- ⋆ the procedural and evidentiary law relating to general sexual offences.[8]
- ⋆ the substantive, procedural and evidentiary law relating to sexual offences against children.
- ⋆ the substantive, procedural and evidentiary law relating to sexual offence victims with impaired mental functioning.

This report deals only with the substantive law relating to the general sexual offences involving non-disabled adult victims.

Consultation And Community Participation

8. At the beginning of its work on the reference, the Commission invited observations from a wide selection of individuals and interested bodies. These included judges, Prosecutors for the Queen, barristers, solicitors, academic lawyers, magistrates, law reform bodies, women's groups, civil liberties organisations, the police, government departments, institutes of criminology and victim support groups. Many of these responded to the Commission's invitation and their views have been of great assistance in the preparation of this report. In addition, a diverse and experienced group of honorary consultants

4. L. Hewitt, April 1986.
5. *Inquiry into Prostitution* M. Neave, Inquirer, Victorian Government, 1985.
6. Ss 44-61.
7. Discussion Paper No 2—*Rape and Allied Offences: Substantive Aspects* 1986.
8. Discussion Paper No 5—*Rape and Allied Offences: Procedure and Evidence* 1987.

was appointed to assist the Commission in its work on the reference. Their advice has been most valuable. However, the report represents the views of the Commission and may not accord with the views held by individual consultants.

9. In August 1986, the Commission published a discussion paper on the substantive law of rape and allied offences. That paper discussed the background to the present law, outlined its terms, examined the need for change, indicated options for reform, and made a number of provisional recommendations. It was widely distributed in Victoria and elsewhere to a broad range of individuals, bodies and community groups. Members of the Commission responded to all invitations to address interested groups and two information sessions were conducted by the Commission for representatives of a wide range of women's interest groups. Submissions were received from such bodies as the Victorian Bar, the Law Institute, the Legal Aid Commission, the Victims of Crime Assistance League, the Victoria Police, the Office of Corrections, Women's Electoral Lobby, the Women's Information and Referral Exchange, the Peninsula Women's Refuge Group and the Geelong Rape Crisis Centre. Submissions were also received from judges, magistrates, Prosecutors for the Queen, politicians, social workers and academic and practising lawyers. Many of these submissions are referred to in the body of the report.

Relevant Considerations

(1) The Law Should Protect Sexual Autonomy

10. A fundamental principle is that the law should offer as much protection as possible to the sexual integrity and personal autonomy of all members of the community, and particularly women, who are the victims in the great majority of sexual offences. Offences should be designed to maximise protection from sexual assault. As the Law Reform Commission of Canada said in 1978:

> The integrity of the human person should not be violated. Consequently, no individual should be forced to submit to a sexual act to which he or she has not consented. In sexual relations, therefore, consent must be of the essence. Sexual activity must be consensual and not procured by force or trickery; otherwise it constitutes a direct violation of the integrity of the human person.[9]

11. It is, of course, important to remember that no reform of the criminal law can eradicate criminal conduct.[10] The criminal law is an imperfect device for controlling behaviour. The imperfections are more pronounced in relation to sexual crime than they are in relation to other areas. As was noted in a recent New Zealand paper on rape:

> We should . . . be wary about expecting any reform of law and procedure to have any significant impact upon the incidence and control of rape in the community.[11]

9. Law Reform Commission of Canada, *Report on Sexual Offences*, Canada, 1978, 7.

10. See, for example, *The Effectiveness of Sentencing*, Home Office Research Study No 35, HMSO, London, 1975.

11. Rape Study, Volume 1, *A Discussion of Law and Practice*, Department of Justice and the Institute of Criminology, New Zealand, 1983, 25.

12. Despite the limits on the effectiveness of the law in preventing crime, the criminal justice system performs the important function of punishing wrongdoers on a retributive basis, that is, because they deserve it. Even if the community cannot rely on the law to eradicate or substantially to reduce sexual offending, it can at least rely on it to do justice when accused persons are convicted. Moreover, the criminal law has an important symbolic and educative function. A significant role of the criminal law is to define unacceptable conduct. In declaring certain types of sexual behaviour to be criminal, the law plays a crucial part in the development and maintenance of community attitudes and expectations.

(2) The Law Should Be Clear And Precise

13. The second principle is that the criminal law should be as precise, simple and clear as possible. Those who are responsible for administering the criminal law believe that the present array of sexual offences is not entirely consistent with this principle. A major aim of the Commission is to identify changes which would clarify and simplify the law. People are entitled to know what conduct is forbidden. Clarity and simplicity in the law lower the risk of injustice. Moreover, they lead to greater efficiency and reduce the cost of running the criminal justice system. Cases can come to trial more quickly and take less time to try, which may result in less trauma for the victims.

(3) The Social Reality Of Sexual Assault Should Be Recognised

14. In addition to these principles, the social reality of sexual assault must be borne in mind. Women are the victims in the vast majority of cases. During the 1960's and 1970's women's groups were at the forefront of sexual law reform movements on a world-wide scale. The fact that so many changes were made to rape and other sexual offence laws is in large measure directly attributable to the efforts of women. Despite these changes, women's groups are still concerned about the state of sexual offence laws. They are concerned that the reporting rates of these offences are low, that too few alleged offenders are charged, tried and convicted, and that victims are often humiliated by the trial process and frequently feel that they, rather than the accused, are on trial. They are keen that guilty plea rates be increased so that victims are spared the ordeal of giving evidence and being cross-examined. No law reform project dealing with sexual offences can proceed without specific and special recognition being given to the interests of women and without placing their concerns high on the agenda of items to be considered.

(4) Legal Principles Should Be Observed

15. Reform of the law of rape and allied offences cannot proceed in a legal vacuum. Reforms should be consistent with system-wide principles. These principles include the presumption of innocence and the requirement that the prosecution must prove all the elements of its case beyond reasonable doubt. The Commission's examination of the present law has led it to the conclusion that a more satisfactory balance between the interests of victims and accused

persons can be achieved, more particularly in the procedural and evidentiary area, without prejudicing these crucial principles.

Plan Of Report

16. The next section of the report sets out the present law and its background. Particular emphasis is placed upon the changes introduced by the Crimes (Sexual Offences) Act 1980. That is followed by a discussion of the problems with the present law and strategies for reform.

2. THE PRESENT LAW

17. Non-consensual sexual behaviour is covered by the offence of rape and a loose coalition of allied offences aimed at protecting the sexual integrity of individuals from the unwanted advances of others. From a practical point of view, the most important of the allied offences is indecent assault. Rape and indecent assault are the most commonly prosecuted offences involving non-consensual sexual behaviour. The remaining offences considered in this report are 'back-up' or gap-filling provisions. In the following paragraphs, the offences will be described in turn.

The Law Of Rape

18. The present law of rape consists of a curious combination of common law and statute law. Until the changes introduced by the Crimes (Sexual Offences) Act 1980, the law of rape had remained very much the same for centuries. The traditional, common law crime of rape was the slightest insertion by a man[12] of his penis into the vagina of a woman[13] without her consent, under circumstances where the man knew the woman was not consenting, or believed there was a possibility that she was not consenting and went ahead regardless. The common law crime of rape therefore consists of three major elements: the physical act, the absence of consent by the victim and the intention of the offender. The 1980 legislation extended the definition of the first of these elements, and created a new offence of rape with aggravating circumstances.

(1) The Physical Act

19. The 1980 legislation extended the class of acts covered by the offence of rape to include penetration by the penis of the anus or mouth of another person, and penetration by an object (other than a part of the body) of the vagina or anus of another person. The rationale underlying the changes was to afford equal protection to both men and women against sexual violation, and to reflect the judgement that certain other kinds of sexual penetration are as serious as the act traditionally covered by rape.[14]

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12. At common law, males under 14 years of age were conclusively presumed to be impotent. The 1980 Act removed this 'immunity' from prosecution for rape (s 62 (1)).

13. Provided the woman was not his wife. The effect of a number of decisions, particularly in England, that a husband could only be guilty of rape if he and his wife were living apart and then only if there was evidence indicating separation, or some formal steps preparatory to divorce. In Victoria, the Crimes (Amendment) Act 1985 provides: The existence of a marriage does not constitute, or raise any presumption of, consent by a person to an act of sexual penetration with another person or to an indecent assault (with or without aggravating circumstances) by another person.

14. The offence is not entirely gender neutral. Unlike the definition of an act of sexual penetration, which focuses upon both parties, the definition of rape requires the offender to physically effect penetration (s 2A Crimes Act).

(2) Lack Of Consent

20. The 1980 legislation did not alter the requirement that penetration take place without the victim's consent. Under early common law, the penetration had to be 'against the will' of the victim. This concept proved inadequate to deal with cases where victims did not physically resist sexual penetration. Where the victim was unaware that penetration was taking place, as for example where she was asleep or unconscious as a result of having been drugged, it could not be said with confidence that penetration had occurred 'against her will'. But it could be said with complete confidence that it had occurred despite her lack of consent. If the victim's consent to penetration is induced by fraud as to the nature of the act or the identity of the person committing the act, the penetration is regarded as being without consent.[15]

(3) The Mental Element

21. The accused must intend to sexually penetrate the victim while being aware that the victim is not consenting or might not be consenting. The accused is entitled to assert that he or she honestly believed the other person was consenting. This belief does not have to be reasonable provided that it is honestly held.[16] There is no statutory definition of the mental element in rape. It is a matter of common law.

Rape With Aggravating Circumstances

22. Penetration constituting rape also constitutes the separate offence of rape with aggravating circumstances if:

(*a*) immediately before or during or immediately after the commission of the offence, and at or in the vicinity of the place where the offence was committed, the offender inflicts serious personal violence upon the victim or another person;

(*b*) the offender has with him an offensive weapon;

(*c*) immediately before or during or immediately after the commission of the offence the offender does an act which is likely seriously and substantially to degrade or humiliate the victim; or

(*d*) the offender is aided or abetted by another person who is present immediately before or during or immediately after the commission of the offence at or in the vicinity of the place where the offence is or was committed.[17]

15. *Papadimitropoulos v R* (1957) 98 CLR 249.

16. *R v Saragozza* [1984] VR 187.

17. s 46 (4).

When a verdict of guilty has been returned and the trial judge is satisfied the offender has previously been convicted of a specified sexual offence,[18] the original verdict is changed to guilty of rape with aggravating circumstances. This procedure is followed to protect the accused from possible prejudice as a result of the jury being informed of a conviction prior to returning a verdict.

Indecent Assault

23. The most commonly prosecuted offence other than rape is the common law offence of indecent assault. As with rape its major elements are the acts which constitute the offence, lack of consent and the mental element. An indecent assault is an assault accompanied by circumstances of indecency.[19] An assault is an act by which the offender intentionally or recklessly causes the victim to apprehend or to sustain, unlawful personal violence.[20] An assault can be either a battery, or contact, or the causing of fear without physical contact. If there is contact, it is not necessary to prove the victim was aware of the assault or the circumstances of indecency. If there is no contact, the victim must be aware of both the assault and the circumstances of the indecency.[21] Until 1980, the offence of indecent assault had a much wider field of operation because rape was limited to cases of penetration of the vagina by the penis. Many indecent assaults became rape in 1980 with the expanded definition of penetration. However, to use a part of the body other than the penis to penetrate the vagina or anus still constitutes only indecent assault.

24. Indecency has not been exhaustively defined by law. The Shorter Oxford Dictionary gives synonyms of 'unbecoming, highly unsuitable, offending against recognised standards of decency'. One commentator has referred to 'indecent' as 'overtly sexual'.[22] In *R v Court* the Court of Appeal said that 'the offence is concerned with the contravention of standards of decent behaviour in regard to sexual modesty or privacy'.[23] Prosecution and conviction therefore depend upon prevailing views of unacceptable sexual behaviour. The test for indecency is an objective one. In *R v George*[24] the accused assaulted a female by attempting to remove her shoe because this gave him sexual satisfaction. His appeal against conviction for indecent assault was successful because his motive did not make the act indecent.

25. The prosecution must prove lack of consent.[25] It is not entirely clear whether consent obtained by fraud constitutes lack of consent as it does in the law of

18. (*a*) rape (with or without aggravating circumstances);
(*b*) rape with mitigating circumstances;
(*c*) an attempt to rape (with or without aggravating circumstances);
(*d*) assault with intent to rape (with or without aggravating circumstances); or
(*e*) indecent assault (with or without aggravating circumstances):
s 46 (3) Crimes Act.
19. *Beal v Kelley* [1951] 1 All ER 763.
20. *R v Venna* [1975] 3 All ER 788.
21. *R v Court* [1987] 1 All ER 120,122.
22. G. Williams, *Textbook of Criminal Law*, Stevens, London, 1983, 231.
23. [1987] 1 All ER 120, 124.
24. [1986] 3 WLR 1029, 1034.
25. *R v May* [1912] 2 KB 572.

rape.[26] The mental element of the offence is an intention to assault the other person knowing there is no consent or being reckless as to whether the person is consenting or not[27] and with knowledge of the indecent circumstances or being reckless as to the existence of them.[28]

Indecent Assault With Aggravating Circumstances

26. The 1980 legislation created a new offence of indecent assault with aggravating circumstances. The factors which constitute aggravating circumstances are the same as those which apply to rape with aggravating circumstances, that is, inflicting violence, committing humiliating or degrading acts, being armed, or in company, or having a prior conviction for a similar sexual offence. The aggravating factor of acts of degradation or humiliation must be additional to the behaviour which constitutes the assault or the indecency if the more serious offence is to be committed.

'Procuration' Offences

27. There are three offences which are directed at a range of unacceptable ways of procuring sexual penetration. Some reorganisation and rationalisation of these provisions was undertaken in the 1980 amendments, including the extension of their application to male as well as female victims. However, the bulk of the previous law was preserved. Section 54 of the Crimes Act is directed at persons who use threats, intimidation, false pretences, false representations or other fraudulent means to procure or attempt to procure another person to take part in an act of sexual penetration outside marriage. There is an obvious overlap between the section 54 offence and the offence of rape involving threats or fraud. Unlike the offence of rape, no person may be convicted of a section 54 offence on the unsupported evidence of one witness. Section 55 of the Act makes it an offence to administer or cause to be taken by another person 'any drug, matter or thing' for the purpose of overcoming any resistance to sexual penetration outside marriage. As with section 54, no person may be convicted without corroboration or independent evidence supporting a single witness. Section 56 deals with abduction or detention for the purposes of marriage or sexual penetration. The abduction must be by force or the detention against the will of the victim.

26. *R v Bennett* (1866) 4 F&F 1105; *R v Sinclair* (1867) 13 Cox 28; *cf* *R v Clarence* (1888) 22 QBD 23.
27. *R v Kimber* (1983) 77 Cr App R 225.
28. *R v Court* [1987] 1 All ER 120, 124.

3. REFORM: PRELIMINARY ISSUES

28. There are two preliminary issues relevant to a review of the law relating to sexual offences. The first is whether or not it is appropriate to maintain a separate category of sexual offences. If a separate category is required, the second issue arises. That is whether a distinction should be made between penetrative and non-penetrative conduct.

Should There Be A Separate Category Of Sexual Offences?

29. It has been suggested recently that it is inappropriate and counter-productive for legal systems to persist with separate categories of sexual offences. The gist of the argument is that non-consensual sexual behaviour constitutes an assault and should be dealt with as such. Many of the problems experienced in the reporting, prosecution and trial of sexual offences are said to be caused by the explicit labelling of the offences as sexual and by a range of community attitudes and myths about sexuality and sexual offending which accompany that labelling process. In England, the Sexual Law Reform Society[29] and the Howard League[30] have both supported the abolition of sexual offences as a discrete category. As the latter stated:

> Because the term 'sexual' amplifies the emotive content of the offence, and therefore the harm suffered, we believe it would be better for the law to deal with non-consensual sexual activities in exactly the same way as it already deals with any other acts of violence, fraud or undue influence.

The Howard League's approach was based on the view that the label 'sexual' may place stigma on the victim. Others argue that retaining a separate category of sexual offences perpetuates notions of sexuality that may not accord with contemporary thinking. The basis of this argument is that sexual behaviour is simply regarded as one aspect of human behaviour and should not be singled out.

30. There have undoubtedly been substantial changes in community attitudes towards sexual matters. However, many in the community regard non-consensual sex as so distinctively a humiliating experience as to merit separate treatment by the criminal law. The existence of the present offences reflects the view that there is something distinctive about a sexual attack. Sexual assault has not been equated with non-sexual injury or physical harm. Nor would it be appropriate for the law to do so in the absence of some clearly observable benefit, such as a reduction in the stigma for victims. However, it is doubtful whether criminal proceedings would be significantly less traumatic and humiliating for the victim merely because the sexual label had been removed from the offence. A trial would still have to take place. The issues in the trial would broadly be the same. There would be similar public and media interest because of the sexual nature of the charge.

> *The law should continue to treat sexual offences as a separate category from other offences against the person.*

29. See generally, A. Grey 'Sexual Law Reform Society Working Party Report' [1975] *Criminal Law Review*, 323—335.

30. Report of the Howard League Working Party, *Unlawful Sex*, Waterlow, London, 1985, 123.

Should A Distinction Be Made Between Penetrative And Non-Penetrative Conduct?

31. It would be possible to define a single offence to cover all types of sexual assaults, from the merest touching to penetration accompanied by extreme violence. While this would dramatically simplify the present law, there are two main arguments against such an approach. First, the issue of penalty is a very important aspect of the criminal law. A single, all-embracing offence would reduce legislative guidance for judges in relation to sentencing. Secondly, it would be wrong in principle for the legislature not to distinguish one type of sexual interference from another. The existence of the separate offence of rape represents a tradition of treating sexual penetration as a special phenomenon. That tradition is also reflected in the statutory offences created by sections 54, 55 and 56 of the Crimes Act, each of which is directed at procuring penetration. The 1980 amendments strengthened the tradition by extending the class of acts of penetration covered by the offence of rape. While some acts of sexual penetration are still not included in rape, these are not central to it. The submissions received by the Commission indicate there is strong support for the view that the structure of sexual offences should continue to reflect a distinction between activity which involves penetration and that which does not.

> *The law should continue to distinguish between penetrative and non-penetrative conduct.*

4. ISSUES CONCERNING THE PRESENT OFFENCES

Rape

What Forms Of Penetration Should Constitute Rape?

32. At common law, rape covered only penetration of the vagina by the penis. Under the 1980 legislation, other forms of penetration are covered, including penetration of the mouth or anus by the penis and penetration of the vagina or anus by an object. Some believe that the 1980 legislation was misconceived and that rape should once again be confined to penetration of the vagina by the penis. Others believe that the 1980 legislation did not go far enough, and that the rape offence should extend to penetration of the vagina or anus by parts of the body other than the penis.

33. The traditional common law definition of penetration has been retained in England. In 1975, the Heilbron Committee said:

> . . . we think the concept of rape as a distinct form of criminal misconduct is well established in popular thought, and corresponds to a distinctive form of wrongdoing. The law in our view, should, so far as possible, reflect contemporary ideas and categorisations.[31]

A similar view was taken by the Criminal Law Revision Committee in its 1984 report on *Sexual Offences*.[32]

> We consider it likely to be harmful to the administration of justice if the definition of a serious offence becomes out of step with the understanding of a large section of the public. We appreciate that other forms of penetration are serious, degrading and can lead to pain and injury, but we take the view that they are distinct from rape.[33]

34. The approach of the Heilbron and Criminal Law Revision Committees has been criticised by a number of commentators. The authors of a recent New Zealand paper on rape observed of the English approach:

> . . . we cannot be certain that the majority of the public do subscribe to the definition of 'rape' imposed by law: 'homosexual rape', after all, is a common enough term. Nor can we be sure that they would wish the ambit of the law of rape to be confined to penetration of the vagina by the penis. In any case, the objection raised may be an argument for abandoning the word 'rape' if the definition of intercourse were expanded, but it can scarcely provide a reason in itself for retaining the present legal distinction between one form of penetration and another.[34]

35. The Commission agrees with the Heilbron and Criminal Law Revision Committees that the substance of the penetrative offences should reflect contemporary thinking. However, it believes that the expansion of the class of acts constituting rape which occurred in Victoria in 1980 reflected current attitudes to the seriousness of the relevant conduct. South Australia produced

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31. *Advisory Group Report*, HMSO, London, 1975, 14.

32. Criminal Law Revision Committee, Fifteenth Report, *Sexual Offences*, HMSO, London, 1984.

33. n32, 16.

34. New Zealand *Discussion Paper*, 1983, 115. See also J. Temkin 'Towards a Modern Law of Rape' (1982) 45 *Modern Law Review*, 399 at 411.

an expanded version of the physical ingredients of rape[35] in 1976, and all Australian jurisdictions except Queensland and Tasmania[36] have now done the same. There seems to have been little, if any, public opposition to these reforms of rape laws. The modern emphasis is not upon the protection of virginity, the risk of pregnancy or disease, or the defilement of another man's wife or daughter, but rather upon providing the appropriate level of protection for the sexual autonomy of women and men. On that basis, there is no justification for drawing the distinctions which were involved in the common law offence of rape. Oral rape and anal rape are common events. The laws and concepts are well understood. Oral and anal rape may be as traumatic for victims as vaginal rape. The Commission's view is that rape should not be restricted to penetration of the vagina by the penis.

36. In its discussion paper, the Commission suggested that the rape offence should be extended to cover penetration of the vagina or anus by body parts other than the penis. It also suggested that the offence should cover cunnilingus, whether or not penetration was effected. Most submissions supported these proposals. The Victorian Bar, however, took a different view:

> It is the experience of Counsel that most cases involve the use of fingers or tongue followed by penile penetration . The use of these bodily parts is usually charged as an indecent assault leading up to intercourse. The acts of their nature are preliminary to intercourse and, in that sense at least, of less significance. Furthermore, the inherent nature of the activity is such that it will often lead to disputes as to whether penetration has occurred or not.

The Bar submission acknowledged that conduct involving penetration by parts of the body other than the penis may involve 'humiliation, degradation and violence such as to require a condign sentence'. However, it argued that behaviour of that type can be adequately punished under the heading of indecent assault.

37. While it may be true that penetration other than by the penis is usually followed by penetration by the penis that is not always so. In any event, the important consideration is the nature of the act itself. Victims are frightened, humiliated and degraded by sexual penetration whatever its precise form. They do not make the same distinctions as the present law. It may also be true that some cases of digital penetration are less significant than penetration by the penis. But there are other cases of digital penetration which are too serious to be left to the law relating to indecent assault. The fact that the digital penetration is less of a violation in one case than it is in another is a matter which can be taken into account in sentencing.

38. To include cunnilingus within rape irrespective of whether penetration took place would be quite inconsistent with the basis which has been proposed for distinguishing between sexual offences. The Commission's suggestion that it be generally included was based, in part, on the obvious difficulty of proving that penetration took place. However, the same difficulty can arise in the case of other forms of penetration. The Commission believes that cunnilingus should be covered by the offence of rape only if penetration takes place. This will follow if the Commission's recommendation that rape include penetration by any part

35. S 3 Criminal Law Consolidation Act Amendment Act 1976.

36. The Tasmanian Criminal Code Amendment (Sexual Offences) Bill 1987 contains a definition of "intercourse" which includes penetration of the vagina, anus or mouth.

of the body is adopted. Other cases of oral-genital contact, such as non-penetrative cunnilingus and fellatio of a male victim,[37] should be left as indecent assault.

39. Some doubt has been expressed as to whether a surgically constructed vagina is a vagina within the meaning of section 2A of the Crimes Act. This doubt should be removed.

> *Non-consensual penetration by the penis of the vagina, anus or mouth, and non-consensual penetration by a part of the body or an object of the vagina or the anus should constitute rape. "Vagina" should include a surgically constructed vagina.*

Should Rape Be Restricted To Cases Where Submission Is Induced By Force Or Fear Of It?

40. Lack of consent is not confined to cases where the victim strongly resists an attack. Nor is it limited to cases where the victim's submission is brought about by force or fear of force. In *R v Olugboja*,[38] the offender had been convicted of rape. On appeal, he argued that although submission does not necessarily involve consent, submission is only compatible with a lack of consent if it results from violence or a fear of it. Moral or economic pressure or even blackmail causing a woman to submit could never be enough to found a charge of rape. Such cases were covered instead by the statutory offence of procuring unlawful intercourse by threat or intimidation.[39] The Court of Criminal Appeal rejected this view:

> In so far as the *actus reus* [the physical act or acts] is concerned, the question now is simply: at the time of the sexual intercourse did the woman consent to it? It is not necessary for the prosecution to prove that what might otherwise appear to be consent was in reality merely submission induced by force, fear or fraud, although one or more of these factors will no doubt be present in the majority of cases of rape.[40]

41. According to the Court, consent was to be given its ordinary meaning. Nonetheless, the directions to the jury should vary with the circumstances of each case. Cases involving allegations of force or the fear of it require comparatively simple directions. Those involving allegation of threats not involving force or the fear of it require fuller directions:

> In the less common type of case where intercourse takes place after threats not involving violence or the fear of it . . . an appropriate direction to the jury will have to be fuller. [The jury] should be directed to concentrate on the state of mind of the victim immediately before the act of 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.[41]

This appears to be consistent with the present law in Victoria. The submission from the Bar Council stated:

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37. Defined as an act of sexual penetration but not included in the definition of rape (s 2A Crimes Act).

38. [1981] 3 All ER 443.

39. The equivalent Victorian offence is contained in s 54 Crimes Act.

40. [1981] 3 All ER 443, 448.

41. p 449.

> At present, juries are instructed that consent must be a free and voluntary consent and, [in appropriate cases], that submission brought about by [fraud], violence or threats of violence is not consent . . .

42. There are those who argue that the concept of lack of consent should be confined to cases involving force or the threat of it:

> The problem is. . . whether any threat other than bodily harm ... can be admitted as sufficiently serious to negative consent. The most likely situation would be a form of blackmail, the threat being either to publish some unpleasant fact about V [the victim], or about someone whose welfare matters to her, or else to bring down some economic loss upon her such as the foreclosure of a mortgage. The chief objection to admitting threats of this kind is that the difficulties delineating what is a sufficiently improper pressure from what is not would make the law too vague.[42]

In 1984, the Criminal Law Revision Committee in Britain endorsed this approach:

> . . . the offence of rape should arise where consent to sexual intercourse is obtained by threats of force, explicit or implicit, against the woman or another person, for example, her child; but that it should not be rape if, taking a reasonable view, the threats were not capable of being carried out immediately.[43]

43. A variation of this view is that a lesser offence should be used for cases not involving force or threats of it as suggested by the Criminal Law Revision Committee.[44] It should be based on the limiting, rather than the denial, of sexual choice:

> Rape, it is submitted, should be confined to cases where the victim's sexual choice is eliminated. The defendant who threatens his victim with violence denies her the choice of whether to have intercourse with him or not. He means to have intercourse with her in any event. Her choice lies between intercourse with violence or intercourse without it. In the unlikely event of a defendant inviting his victim to opt either for sexual intercourse with him or alternatively for a violent beating, her choice is similarly eliminated since there is no way she can be sure that the violent assault will not be accompanied by forced sexual intercourse. On the other hand, where the threat is to terminate a woman's employment, she is left with a choice, albeit an unpalatable one, as to whether to have intercourse with the defendant or not. In cases such as this where sexual choice remains but is unacceptably limited or confined, liability for an offence which is less serious than rape is appropriate.[45]

44. The Commission disagrees. It sees no reason to differentiate between the cases where submission has resulted from threats of force and those where it has resulted from other threats. It is the effect the threat has, and is intended to have, on the mind of the victim which is critical, not the form of the harm threatened.

> *Rape should not be restricted to cases where submission is induced by force or threats of it, but should extend to all cases where consent is lacking.*

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42. C. Howard *Criminal Law*, Law Book Co, Sydney, 1982, 160.
43. Criminal Law Revision Committee, Report, 1984, n32, 11.
44. eg s 2, Sexual Offences Act 1956.
45. Temkin, n34, 466–7.

Should Lack Of Consent Continue To Be An Element Of The Offence?

45. There is general agreement that it is the presence or absence of consent which distinguishes lawful and unlawful sexual behaviour. However, there is considerable disagreement about the part which it should play in the definition and prosecution of the offence of rape.

46. At present the concept of lack of consent constitutes an element of the offence, which means that it must be proven by the prosecution beyond reasonable doubt. In submissions to the Commission, a number of women's groups argued that the prosecution should have to prove a different element, generally described as 'coercive circumstances', from which lack of consent can be presumed. It would then be up to the accused to prove that the presumption is incorrect, that consent was actually present. The benefits believed to flow from changing the elements in this way are that it would make prosecution easier and, therefore, reduce the trauma for complainants during trials. A joint submission from a number of women's groups stated:

> The absence of consent must be removed as an element of the crime. At present the assumption is that if penetration has occurred, the woman has consented. If the prosecution was required to establish only that penetration with intent to penetrate took place in coercive circumstances, the assumption could be made that the woman was not consenting. It would still be open to the defence to plead that he believed that she was consenting, and this would not infringe the rights of the accused as the physical and coercive elements would still be required to be proved beyond reasonable doubt. It is our belief that this proposal would alter the present emphasis on the woman's state of mind. It would limit examination of the victim/survivor's state of mind as to whether or not she felt she was being coerced.[46]

47. The Women's Legal Resources Group put forward a similar argument:

> We believe that the crime as it is presently defined does not reflect the reality of women's experience of rape. This contributes to the difficulties in conducting a successful prosecution and to a justifiable lack of confidence by women in the ability of the courts to dispense justice. . . . The crime should be redefined so that the prosecution has to prove beyond reasonable doubt that the accused intended to have sexual relations in a context of intimidation, threats, coercion, harassment or violence. The prosecution should not also have to prove beyond reasonable doubt that the complainant did not consent to sexual relations in such a context.
>
> It is our view that women do not experience rape as simply 'unwilling sexual intercourse' or as a situation where she did not 'consent'. During a rape most women feel that the rapist is singularly uninterested in her views as to whether she wished to have sexual relations. Rather, rape occurs in circumstances of intimidation, coercion, harassment, threats or violence (although most frequently violence does not result in visible injury).

48. The Women's Information and Referral Exchange argued that:

> If sexual relations take place in a coercive situation, then such coercion should be perceived to negative consent. The removal of consent as an element of the crime should mean that the prosecution had only to prove beyond all reasonable doubt that sexual penetration had occurred in a coercive

46. Women's Information and Referral Exchange, Women Against Rape, Women's Resources Group, the Geelong Rape Crisis Centre and Christine Haag, Honourary Consultant.

situation. It would then be up to the defence to demonstrate on the balance of probabilities that in a coercive situation consent was *freely given.*[47]

49. Legislation along the lines proposed in these submissions has been passed in Michigan. There the offence of forcible rape was replaced by a scheme of sexual assault which removed lack of consent as an element of the offences. Instead, the consent of the victim became a defence available to the accused. The legislation provides that a person is guilty of criminal sexual conduct if he or she uses coercion to engage in sexual penetration, and a list of coercive circumstances is provided.

50. The Commission has considered the alternative views concerning the elements of the offence of rape. It has concluded that they do not provide a desirable substitute for the present element of lack of consent. It is unlikely the benefits hoped for by the proponents of change would result.

Lack of consent should remain a central element of the offence of rape.

51. It does so for four reasons. First, there is unlikely to be any substantial difference between the evidence that would be required to demonstrate that a person felt coerced, and the evidence to prove that the person did not consent. The victims would be exposed to the same investigation in court of their state of mind. As Naffin observed recently:

> Except where rape is brutal, its only distinguishing feature—that which makes it different from lawful sexual intercourse—is the lack of willingness of the victim. This can be described in a number of ways, but whatever it is called, the facts of the crime, the key issues in the court-room and therefore the experience of the victim, remain the same. Both the prosecution and defence remain interested in determining whether the victim wanted to engage in sexual intercourse. The sort of evidence which will tend to prove that the accused 'forced' (or 'coerced') the victim to engage in intercourse, essentially will be the same as the evidence indicating whether or not the victim consented. Court-room tactics, and therefore the experience of the victim, are unlikely to vary with semantic changes to the law.[48]

Naffin's observation is supported by evidence from Michigan. The authors of the leading empirical study of the Michigan law have confirmed that the new structure has not avoided an emphasis upon consent in trials.[49]

52. Secondly, a concept of coercive circumstances would require further additional directions to be given to the jury concerning the shift in the burden of proof. This would create considerable problems for both judge and jury. The jury would have to be instructed that, if they were not satisfied beyond reasonable doubt that coercive circumstances existed, then they had to be satisfied beyond reasonable doubt that there was a lack of consent. If, on the other hand, they were satisfied beyond reasonable doubt that coercive circumstances did exist, then the accused could establish a defence by proving, on the balance of probabilities, that the victim had consented to the penetration. There is a substantial probability that juries would not be able to readily understand and

47. The Victims of Crime Assistance League proposed a variation on this approach. Their suggestion was that the prosecution should be required to establish a basic case of non-consent and the burden of proving consent would then shift to the accused.

48. N. Naffin, *An Inquiry into the Substantive Law of Rape*, Department of Premier and Cabinet, South Australia, 1984, 26.

49. See generally J.C. Marsh, A. Geist and N. Caplan *Rape and the Limits of Law Reform*, Auburn, Boston, 1982.

apply the distinctions involved in such a direction. The trial process would become even more complex. Justice would be put at risk.[50]

53. Thirdly, a large number of rape cases do not involve the causing of related physical injuries.[51] The concept of coercion has strong connotations of violence and physical compulsion. Courts and juries might interpret it in terms of forcible rape. As noted earlier, the Commission supports the open and flexible definition which the concept of lack of consent has been given, taking it well beyond force and the threat of force. The Commission would not like to see this jeopardised by the introduction of a concept such as 'coercive circumstances' which is far less settled.

54. Fourthly, consent is the element which is accepted by everyone as the factor distinguishing lawful from unlawful behaviour. It is because the victim was not consenting that the act deserves punishment. It is therefore appropriate that lack of consent should constitute an element of the offence which the prosecution must prove. The surrounding circumstances are relevant only as evidence from which lack of consent may be inferred. The evidentiary role of these circumstances should not be changed to a central concept.

What Cases Of Fraud Are Covered By Rape?

55. Consent is not necessarily lacking merely because the victim is induced to agree to the penetration as a result of fraud or deception. In *Papadimitropoulos v R*,[52] the appellant had pretended to a migrant woman who did not understand English that the lodging of a notice of intended marriage at a Melbourne Registry Office was in fact the ceremony of marriage. The woman believed she was married and consented to have intercourse with the man. He was subsequently convicted of rape. The High Court of Australia quashed the conviction. The victim knew who the man was and understood the nature of sexual intercourse:

> . . . once the consent is comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape.[53]

However, consent is lacking if the fraud goes to the identity of the other party or to the nature of the act in question. It is not that the fraud 'vitiates' or invalidates consent, but that the 'consent' which is given is not a real consent to the relevant act, or is not given to the act with that person. As the High Court said in *Papadimitropoulos*, the essential enquiry is:

50. For an example of the danger of formulating rules of law which juries are unlikely to understand, see *R v Podola* [1959] 3 WLR 718.

51. See for example, D.J. West 'Sexual Assaults: The Reality Behind the Statistics' (1980) 12 *Australian Journal of Forensic Sciences* 30-39. Recently, the New South Wales Bureau of Crime Statistics and Research, as part of a large-scale study to evaluate the New South Wales sex offence laws, has reported that about half of the complainants suffered negligible injuries or none at all. Of the remainder, approximately one third recorded only bruises, scratches or abrasions not requiring medical attention (see Bureau of Crime Statistics and Research, *Crimes (Sexual Assault) Amendment Act 1981 Monitoring and Evaluation: An Interim Report on the Characteristics of the Complainant, the Defendant and the Offence*, Sydney, 1985). See also W.D. Loh 'The Impact of the Common Law and Reform Rape Statutes on Prosecution: An Empirical Study' (1980) 33 *Washington Law Review* 543-625.

52. (1957) 98 CLR 249.

53. p 261.

> . . . whether the consent is no consent because it is not directed to the nature and character of the act. The identity of the man and the character of the physical act that is done or proposed seem now clearly to be regarded as forming part of the nature and character of the act to which the woman's consent is directed.[54]

Should Fraud Be Excluded From Rape?

56. There are those who argue that there is a substantial, qualitative difference between obtaining sex by coercive means and obtaining it by fraudulent ones. In the former case, the victim may submit but does not consent; in the latter case, the victim consents but only because of fraud. This distinction is regarded as important because of the difference in the trauma likely to be suffered in the two cases. This was the basis for the tentative proposal of the English Criminal Law Revision Committee in 1980 for abolition of 'fraudulent rape':

> We consider that the distress which the victim of such frauds may suffer is, though a serious matter, not really comparable with the fear and shock that often accompanies true rape.[55]

This approach was subject to strong criticism.[56] When the English Criminal Law Revision Committee made its final recommendation in 1984, it resiled from its original view:

> Where fraud vitiates consent the essence of rape is present and the offender deserves to be labelled and punished accordingly. In reaching this conclusion we have in mind that to define rape so as to exclude all cases of sexual intercourse obtained by fraud might be perceived as a narrowing of the definition of the offence and might possibly create uncertainty among persons not conversant with the finer details of the legislation as to the precise ambit of the offence in cases involving issues other than fraud.[57]

On the basis of the High Court's analysis in *Papadimitropoulos*, the exclusion of all cases of fraud from rape would create the anomaly that some non-consensual acts would be covered, but others would not. This would represent a return to a 'forcible' rape or 'against the will' perspective. The Commission believes there is no justification for adopting this approach.

Should Rape Be Extended To Cover Additional Kinds Of Fraud?

57. At present, rape covers cases of fraud only where the fraud concerns the nature of the act or the identity of the other party. Deceptions such as false representations as to marital or social status are not covered by the offence. In its discussion paper, the Commission indicated that it was attracted to recent Western Australian legislation that defines lack of consent as including cases where the consent is obtained by 'deception or fraudulent means'. This suggestion

54. p 260.

55. Criminal Law Revision Committee, *Working Paper on Sexual Offences*, HMSO, London, 1980, 10.

56. eg Temkin 403, n 36.

57. Criminal Law Revision Committee Report, 1984, n32, 10.

met with strong criticism. One submission pointed to the fundamental nature of the change which acceptance of the suggestion would bring about:

> I am concerned at the extent to which the proposed definition of consent involves an extension of the law so as to cover *dishonest* conduct. It is as if a conceptual scheme which governs offences against property has begun to colonise an area of criminal conduct which is still, in many respects, significantly different. If rape is an offence of *taking* sex, the proposed reforms involve an extension to cases of 'obtaining' as well.[58]

The Commission now believes that to extend the offence of rape to cases of fraud other than fraud as to the nature of the act or the identity of the person would be inappropriate. Appreciation of the nature of the act and of the identity of the other partner are central to consent to sexual penetration. While other forms of deception are also morally reprehensible, they are not generally regarded as being equally serious. Whether they should be dealt with as a separate offence is examined later in this report.[59]

> *The categories of fraud which fall within the offence of rape should not be extended.*

What Should The Mental Element Be?

58. The mental element in rape is the intention to penetrate knowing the other person is not consenting or being aware that that person may not be consenting but proceeding with penetration anyway. A major issue has arisen concerning the nature of the accused's belief. At present, the accused is not guilty of the offence if the jury accepts the assertion that he or she honestly believed that the victim was consenting, if this amounts to a reasonable doubt in terms of the prosecution's proof of the mental element. The accused's belief does not have to be based upon reasonable grounds. This rule was reaffirmed by the House of Lords in *Morgan v DPP*.[60] Although the convictions of all four accused were confirmed in that case, there was considerable public debate about the ruling on the mental element of rape. It was proclaimed in some circles as 'a green light for rapists' and as a 'rapist's charter'. As a result, the Home Secretary established an Advisory Group under the chairmanship of Justice Heilbron to consider the law of rape. The Heilbron Committee agreed with the decision in *Morgan* but concluded that there was a need for legislation to declare the law clearly, and to make it clear that the reasonableness of the accused's alleged belief was nonetheless relevant to the question of whether he held it:

> While there is no requirement of law that such a belief must be based on reasonable grounds, the presence or absence of such grounds is a relevant consideration to which the jury should have regard, in conjunction with all other evidence, in considering whether the accused genuinely had such a belief.[61]

These recommendations were enacted in the Sexual Offences (Amendment) Act 1976.

58. I. Leader-Elliott, Faculty of Law, The University of Adelaide.

59. Paras 76-85.

60. [1976] AC 182.

61. *Report of the Advisory Group on the Law of Rape*, HMSO, London, 1975.

59. The *Morgan* approach has been accepted as correct in Victoria. There were observations in some earlier cases which might have appeared to suggest that the accused's belief in the victim's consent was to be judged objectively. This possibility was rejected by the Full Court in *Saragozza*:[62]

> This court should now remove any doubts that may result from passing observations in its own earlier decisions by making it clear that *Morgan's Case* is to be followed in Victoria. A mistaken belief in consent need not be reasonable: the reasonableness of the belief bears only on its existence.[63]

The Full Court clearly stated that the belief of the accused was only relevant to the prosecution's proof of the mental element:

> Once it is accepted that it is an element of the crime that the accused either was aware that the woman was not consenting, or else realised that she might not be and determined to have intercourse whether she was consenting or not, the conclusion is inescapable that a man who believes the woman is consenting cannot be guilty of the offence; for the existence of this belief is inconsistent with the presence of the mental element of the crime. Logic then insists that the reasonableness of the belief bears only on whether the accused in fact held it.

60. There are those who maintain that an accused whose belief in the victim's consent is not a reasonable one should be guilty of rape. Part of a joint submission from the Women's Information and Referral Exchange, Women Against Rape, the Women's Legal Resources Group and the Geelong Rape Crisis Centre reflected this view:

> The appropriate test for the accused is to establish on the balance of the probabilities that it was reasonable in all of the circumstances of the accused for him to believe she was consenting. Such a contest focuses on both parties' states of mind, leaves a realistic burden and onus of proof on the prosecution, gives jurisprudential protection to accused persons, yet recognises that men have a duty to enquire into the views of potential sexual partners. Men need to take responsibility for their sexual behaviour—women are not the keepers of morality.

Recasting the belief of an accused as an affirmative defence is only one way of introducing the concept of reasonableness into the law of rape.[64] However, the Commission will not canvass the various options because it believes, as a matter of general principle, that the introduction of a concept of reasonableness into the law of rape is undesirable. It agrees with the reasoning of the Heilbron Committee:

> The law recognises that man is susceptible to error and does not demand that he may never be mistaken in his mental appreciation or perception of the actual circumstances surrounding his actions. . . . A mistaken, though erroneous, belief is inconsistent with and negatives the requisite mental element i.e. either an intent to have sexual intercourse with the complainant knowing she does not consent, or recklessly, not caring whether she was a consenting party or not. Conversely if the jury were to find that the accused did have sexual intercourse either with such intent or recklessly, this should have the effect of negativing the existence of any mistake, for if he intended to have non-consensual sexual intercourse, there could be no question of

62. *R v Saragozza* [1984] VR 187.

63. p 196.

64. A number of options, varying in terms of subjective and objective components, and evidential and persuasive burdens, were canvassed by Naffin, 1984, 45-47, n 50.

> mistake, and if he did not care whether she was consenting or not, he could hardly be said to have held any genuine belief, one way or the other.[65]

Further, it does not believe a person should be guilty of an extremely serious crime because his or her genuine belief falls outside what is considered to be reasonable. As Goode has stated, in another context, the concept of reasonableness:

> . . . involves the punishment of the accused for what he or she ought reasonably to be, and not what he or she is; this is at best an abuse of language, at worst unjustifiable and unjust. It has no place in the law relating to rape. There is here no basis for the reform of the present law.[66]

The Commission does not believe a person should be convicted of rape because of what he or she should have thought or believed according to some standard of reasonableness.

The present mental element in rape should be retained.

61. However, that does not exclude the possibility of creating a less serious offence for those whose belief as to consent is unreasonable. As Wells has stated:

> The definition of rape requires that the woman was not consenting. If there is sufficient evidence to satisfy a jury that consent was absent, can it not be argued that this is sufficient to distinguish, in terms of culpability, the mistaken defendant from those men who have never had sexual intercourse with a woman who was not consenting? If the defendant is so out of touch with the reality of the situation, is there not a suggestion that he should take more care to ensure that his sexual partner is willing? Social protection might be better served by the punishment of a defendant who failed to acquaint himself with this (seemingly) elementary fact.[67]

Wells goes on to suggest that, even if the mistaken 'rapist' is culpable, he may not be as culpable as the deliberate rapist and it could be argued that a lesser offence than rape may be appropriate, such as 'negligent sexual invasion'.[68] There are difficulties with such an approach. First, as Wells acknowledges, there is a risk that a jury might find a deliberate rapist guilty of the lesser offence for reasons other than the merits of the case. Wells sees this possibility as due to the 'double standards' of juries. The Commission is aware of anecdotal evidence that juries are sometimes reluctant to convict of very serious offences where a less harsh alternative is readily available. Secondly, an alternative offence would add to the complexity of the law. Juries might become confused by the issue of reasonableness, which itself is a difficult standard to apply. Thirdly, it would be extremely difficult to define the offence with the required precision. Finally, indictable (triable by jury) offences involving negligence are confined to manslaughter and causing grievous bodily harm. In terms of gravity, non-consensual penetrative conduct could be equated with the latter. However, the concept of consent has no relevance to manslaughter or causing grievous bodily harm. Criminal liability should normally only be imposed for intentional or reckless conduct. The Commission recommends that the present mental element in rape be retained.

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65. *Report of the Advisory Group on the Law of Rape*, HMSO, London, 1975, 9.

66. M. Goode 'The Mental Element of Rape, the Naffin Report and Other Questions: A Defence of the Common Law' [1985] *Criminal Law Journal* 17, 39.

67. C. Wells 'Swatting the Subjectivist Bug' [1982] *Criminal Law Review* 209-220, 213.

68. n67, 213.

A lesser offence, covering cases where the accused's belief as to consent is unreasonable, should not be created.

What If The Offender Becomes Aware Of Lack Of Consent After Penetration?

62. It is a general requirement of the criminal law that all of the elements of an offence be present at the same time. If the offence of rape is considered to be complete at the moment of penetration,[69] two situations would not be covered. The first is where there was consent to the original penetration, the consent is clearly withdrawn, but the penetrative act continues. The second is where there was no consent to the original penetration. The accused believed at the time of penetration that there was consent. The fact that there was no consent becomes apparent, but the penetrative act continues. In each case, the offence is not rape, but indecent assault.[70]

63. This result has been avoided in jurisdictions which do not confine the offence to the act of penetration. The New South Wales legislation refers to 'continuation of intercourse'.[71] The Tasmanian Bill defines 'sexual intercourse' as including 'the continuation of such penetration'.[72] In England a man commits rape if 'he *has* unlawful sexual intercourse . . . '[73] Sections 126 and 127 of the New Zealand Crimes Act 1961 provide that 'rape is the act of a male person *having* sexual intercourse . . . ' and that intercourse is complete upon penetration. In *Kaitamaki v R* the Privy Council held that intercourse was only 'complete' upon withdrawal.[74]

64. If a person's sexual autonomy is to be adequately protected, the law must treat the right to terminate sexual activity as equal to the right to agree to initiate it. If, after penetration, it becomes obvious to an accused that the person is not or may not be consenting, to continue the penetrative act is as blameworthy as to penetrate, knowing there is no consent. If, after penetration, consent is withdrawn continuation should be an offence.

The offence of rape should cover cases where the accused continues to penetrate after becoming aware that there is no consent.

Should The Word 'Rape' Be Retained?

65. In its discussion paper, the Commission proposed the abandonment of the term 'rape' and its replacement by the term 'sexual assault category 1'. Three reasons were given. First, the combined effect of the 1980 changes and the adoption of the Commission's tentative recommendations for an extension to

69. Doubt surrounds this particular point as rape has been stated to be unlawful carnal knowledge which is 'the physical fact of penetration' (*Papadimitropoulos v R* (1957) 98 CLR 249, 261). In England carnal knowledge has been legislatively replaced with 'sexual intercourse'. Juries in Victoria are commonly instructed that rape involves sexual intercourse.

70. *R v Salmon* [1969] SASR 76; *Richardson v R* (1978) Supreme Court of Tasmania 50/1978 (unreported).

71. s 61A(1) (*d*) Crimes Act 1900.

72. Criminal Code Amendment (Sexual Offences) Act.

73. S 1 Sexual Offences (Amendment) Act 1976.

74. [1984] 3 WLR 137.

the circumstances covered by rape would produce an offence drastically different from the traditional offence of rape. Secondly, the term 'rape' is regarded by some people as having connotations which are inappropriate in contemporary society. Thirdly, while retention of the word 'rape' may facilitate expression of the community's disapproval of the relevant act, use of the label may increase trauma and stigma experienced by the victim.

66. Most submissions which dealt with the issue favoured retention of the word 'rape'. These include submissions from the Bar, the Law Institute, the Legal Aid Commission, the Geelong Rape Crisis Centre, the Peninsula Women's Refuge Group, the Women's Information and Referral Exchange, and a number of individual practising and academic lawyers. The majority of those wanting to retain the word simply expressed preference for that term without giving reasons. A number of submissions recognised that it was a difficult issue but indicated that, on balance, 'rape' was the preferable label. The Bar Council emphasised the lack of a satisfactory alternative term to 'rape':

> It is important that the traditional label should not be replaced unless there is another succinct expression capable of conveying to the layman generally the type of conduct involved. 'Rape' clearly connotes penetration and lack of consent. The general use of the term 'homosexual rape' tends to indicate that the community has understood and accepted the gender neutralising of rape laws in 1980. It may be that it is not generally known that penetration with inanimate objects is included. But no other expression so far suggested comes close to the word 'rape' in conveying the essential elements of the conduct involved.

No submission strongly argued a case for abandoning it. However, the Victims of Crime Assistance League submitted that, on balance, it would be better to drop the term 'rape', making the offence one of 'sexual assault':

> Whilst on the one hand . . . the description 'rape' carries with it a stigma which should apply to the offender, it was also recognised that this often works against the victim and that the victim feels in some way degraded and therefore has a loss of self esteem when associated with the crime of 'rape'. It was also felt that by using the word 'rape' it might somehow encourage the concept amongst some offenders that this is an offence which has some chauvinistic redeeming features, unlike other forms of assault.

However, the Geelong Rape Crisis Centre objected to renaming the offence as a form of 'assault':

> In our view, the only viable substitute for 'rape' would be 'sexual violation' as is now used in New Zealand. If the Commission is concerned with finding a definition of the offence which is both accurate and readily understood, then 'violation' is a far more appropriate choice than 'assault'. Community understanding of the term 'assault' can bear little relation to the actuality of rape.

The Commission agrees that 'assault' would represent an inadequate alternative to the present term. It also believes that the term 'sexual violation' is not sufficiently definitive or descriptive of the range of behaviours involved in the offence. 'Rape' is a well understood and accepted word. It is no longer limited to vaginal rape. 'Oral rape' and 'homosexual rape' are well understood concepts. To substitute another term would be to risk trivialising the relevant behaviour, not only in the minds of victims and convicted persons, but also in the mind of the community at large. The value of the term by way of denunciation of abhorrent conduct is considerable.

The term 'rape' should be retained.

What Should The Offence Of Indecent Assault Be?

67. Indecent assault is a common law offence. It covers both penetrative and non-penetrative conduct. If rape is extended to cover most forms of penetration, indecent assault would, as a matter of practice, become limited almost entirely to non-penetrative conduct. The scope of conduct covered by indecent assault is variable as it depends upon the prevailing views of magistrates and juries as to what are circumstances of indecency. The English Court of Criminal Appeal recently stated:

> . . . the offence is concerned with the contravention of standards of decent behaviour in regard to sexual modesty or privacy.[75]

The word 'indecent' is given an ordinary and popular meaning.[76] Indecency is judged in the light of time, place and circumstance.[77]

68. The law relating to indecent assault could be made more precise. However, it would be difficult to make an exhaustive list of the circumstances to be covered by the offence. To compile such a list might place undue limitations upon changing attitudes towards sexual behaviour. Neither the Commission's research nor submissions made to it have revealed any major problem in relation to the scope of indecent assault.

69. However, there is one aspect of the offence which deserves consideration. An assault which is not overtly sexual does not become an indecent assault merely because the accused has a sexual motive. The circumstances must themselves be indecent. In *R v Culgan*,[78] the Supreme Court of New South Wales held that an act of trying to force a person to another location, with a view to intercourse, was not an indecent assault. On the other hand, it was held in *R v Chong*[79] that contact with the victim, accompanied by an offer of money for a sexual act, was an indecent assault. *Chong* was approved in *R v Quinton* by the Supreme Court of Canada:

> His spoken words which were part of his conduct evidenced the intention of the accused and determined the criminal quality of his act.[80]

70. The Tasmanian Criminal Code Amendment Bill 1986 adopts a different approach from that of the common law. It includes a reference to both the character of the act and the motive of the offender:

> 'Sexual acts' includes—
>
> (*a*) an assault; and
>
> (*b*) the causing by the perpetrator of an act to be performed upon the perpetrator or any other person where the act has, or can be construed as having, a sexual character,

75. *R v Court* [1986] 3 WLR 1029, 1034.
76. *Stokes v Bragg* [1955] SASR 311.
77. *R v Dunn* [1973] 2 NZLR 481.
78. (1898) 19 NSW 160.
79. (1914) 32 OLR 66; 23 CCC 250.
80. (1947) SCR 234; 88 CCC 231.

> where the assault or act is intended or can reasonably be construed as being intended, for the sexual arousal of the perpetrator or for the sexual gratification of the perpetrator.[81]

The 'sexual purpose,' 'sexual arousal' or 'sexual gratification' approach raises a major difficulty. An accused would be guilty of an offence if, for example, he or she touched someone's arm or a foot with a sexual motive. The offender's liability would be dependent upon his or her sexual proclivities irrespective of the harm or impact upon the victim. In *R v Court*, the issue was considered in the context of penetrative medical examinations:

> So long as the examination is carried out for genuine medical purposes in a manner and in circumstances consistent with those purposes, then in our view the fact that the doctor or midwife happens to have some secret indecent motive, or happens to obtain some secret sexual gratification known only to himself from carrying out his legitimate work, cannot in our view render the circumstances indecent.[82]

The motive of the offender should only be relevant to his or her criminal intent. It should not be regarded as altering the nature of the act itself.

> *Indecent assault should continue to be limited to cases where the circumstances are indecent.*

71. As is the case with rape, indecent assault is committed only if the act in question is done without the victim's consent. Similarly, the offence is committed only if the accused knows that the victim was not, or might not be, consenting to the relevant act. It is not absolutely clear whether the concept of lack of consent as defined in relation to rape is equally applicable to indecent assault. This doubt should be removed as there is no reason why the element should differ between the offences.

> *The concept of 'lack of consent' should be the same for indecent assault as for rape.*

Should The Term 'Indecent Assault' Be Retained?

72. In its discussion paper, the Commission suggested that the offence of indecent assault should be renamed in much the same way as the offence of rape. As a consequence of the proposed renaming of rape, it favoured the term 'sexual assault category 2'. The reasons for recommending retention of the term 'rape' have already been explained. If rape is retained the arguments in favour of substituting a new term for 'indecent assault' are much weaker. Indecent assault is a common law offence. There is little point in re-naming an offence unless the new description more accurately reflects the substance of the offence. The Commission considers the term 'sexual assault' to be a more appropriate label than 'indecent assault'. 'Indecency' is an outmoded term whereas 'sexual' is commonly accepted. However, it would become necessary to define 'sexual'. This could be done by reference to current perceptions of sexual behaviour but these perceptions vary among the community. Further, legislative definition could be either descriptive or exhaustive. The former would allow for reference back to common law interpretations of indecency and nothing would be gained.

81. Clause 185 (1).

82. [1986] 3 WLR 1029, 1035.

The latter would bind the courts unnecessarily. The ability of the common law to respond to changed and changing perceptions would be lost. Therefore, despite the view that 'sexual' is more descriptive than 'indecent', the Commission recommends that the term 'indecent assault' be retained.

The term 'indecent assault' should be retained.

Are Aggravating Circumstances Offences Necessary?

73. The separate offences of rape with aggravating circumstances and indecent assault with aggravating circumstances were introduced by the 1980 amendments. The aggravating circumstances are themselves diverse—inflicting serious violence, seriously degrading or humiliating the victim, being armed with an offensive weapon or being aided and abetted by a person near the scene of the crime. The amendments also conferred on trial judges a power to record a conviction for rape or indecent assault with aggravating circumstances against a person who has been convicted by a jury of rape or indecent assault and who has a prior conviction for one of a specified list of sexual offences.[83] Before returning its verdict, the jury is not told of the prior convictions because of the prejudicial effect it may have.

74. The 1980 provisions were intended to distinguish between different levels of seriousness of the relevant offences in order to assist judges in sentencing. Unfortunately, they have had other effects and have introduced needless complexity into the law. They have increased the verdicts on which directions must be given to the jury. Directions are often required to be long and complex and thereby become particularly difficult for juries to follow.[84] This is costly and inefficient. It may also result in injustice. Accused persons may be convicted without proper analysis and assessment by the jury according to the relevant law. Equally, accused persons may be acquitted simply because juries find the law too complicated. Either result is unacceptable.

75. The existence of the separate offences causes difficulties in the framing of presentments and in proof in court. It results in longer trials and greater trauma for victims. These points have been made strongly by County Court judges and by members of the legal profession. A number of submissions referred to the undesirable nature of the provision under which, in the case of previous sexual offenders, the judge determines the nature of the offence. It is better to leave to the jury the decision concerning the offence of which an offender is guilty. The objective of the aggravating circumstances provisions can be achieved in other ways. In sentencing, a judge could take account of the aggravating circumstances without their being identified as separate offences. If the circumstances were treated as matters relevant to sentence, rather than as ingredients of separate, substantive offences, one source of unnecessary complexity would be removed from the law.

The aggravating circumstances offences introduced by the 1980 amendments to the Crimes Act should be repealed.

83. S 46 (4).

84. Mr Justice Roden 'Lawyers' "Law" is not for Jurors' paper presented at the Melbourne Criminal Justice Symposium 21 March 1987.

What Should Be Done With Section 54?

76. Section 54 makes it an offence to procure, or attempt to procure, a person to take part in an act of sexual penetration outside marriage by threats or intimidation, or by way of false pretence, false representation or other fraudulent means. Two main options for dealing with section 54 were considered. The first was to substantially restrict its scope; the second was to expand it.

77. The first option is based on the view that section 54 is too broad in two respects: it overlaps with other offences; and it covers behaviour which should not be regarded as criminal. The most significant problem is that section 54 overlaps the offence of rape. Penetration effected as a result of threats or intimidation, or certain types of fraud, is clearly within the scope of rape. Such acts should be prosecuted as rape and not as a lesser statutory offence. Other types of cases to which section 54 applies either constitute other offences, or should not be offences at all.

78. The first type of case is where a person procures or attempts to procure the victim to have sex with that person, but where no penetration results. A procurer is already guilty of a general offence if the mode of procuration is itself unlawful. For example, a threat or intimidation amounting to an assault with intent to commit an indictable offence constitutes an offence under section 31 of the Crimes Act. If the method of procuration does not amount to a general offence and penetration does not occur, it is doubtful whether the activity should amount to criminal conduct.

79. Another type of case covered by section 54 is that involving procuration by one person with penetration to be effected by another. Under section 323 of the Crimes Act, it is already an offence to procure a person for the purposes of the commission of an indictable offence. However, the section does not apply where the person effecting penetration is unaware of the unlawful behaviour of the procurer. In that case, the penetration itself is not unlawful and the first person commits no offence. Nonetheless, the procurer may well have committed an offence of rape because of the application of the 'innocent agent' principle which was well illustrated in the case of *R v Cogan and Leak*.[85]

80. In *R v Cogan and Leak*, Cogan was charged with rape and Leak, the victim's husband, was charged with aiding and abetting Cogan. Mrs. Leak was unwilling to have intercourse with Cogan but was frightened of her husband who had previously assaulted her. Cogan's conviction for rape was subsequently quashed on appeal because he believed Mrs. Leak was consenting. The English Court of Criminal Appeal dismissed Leak's appeal on the basis that:

> The fact that Cogan was innocent of rape because he believed she was consenting does not affect the position that she was raped.
> Her ravishment had come about because Leak had wanted it to happen and had taken action to see that it did by persuading Cogan to use his body as the instrument for the necessary physical act. In the language of the law the act of sexual intercourse without the wife's consent was the *actus reus*: it had been procured by Leak who had the appropriate *mens rea* [mental element], namely, his intention that Cogan should have sexual intercourse with her without her consent. In our judgment it is evident that the man whom Leak had procured to do the physical act himself did not intend to have sexual

85. [1976] 1 QB 217

intercourse with the wife without her consent. Leak was using him as a means to procure a criminal purpose.[86]

81. Procuration by fraud is more of a problem. In the view of those wanting to restrict section 54, the present offence is most unsatisfactory as the phrase 'any false pretence, false representation or other fraudulent means' covers a diversity of conduct much of which should not, in their opinion, be dealt with by the criminal law. If a person is deceived into having sexual intercourse by being given an expectation of material gain, there is no significant public interest in ensuring that, if that expectation is not met, the offender should be criminally liable. However, some situations covered by the relevant phrase may require a criminal sanction. The first is where a person consents to penetration as a result of a fraudulent representation that he or she is validly married to the other party. Some cases of that type could be prosecuted as bigamy. There seems no difference between the trauma suffered by a person in the *Papadimitropoulos* situation and the discovery by the 'duped' spouse of a bigamous marriage that he or she is unmarried. However, a deception as to marriage is regarded by many as so serious that it should be a separate offence.

82. The second situation is where a person conceals the existence or suspicion of a sexually transmitted disease in the knowledge that the other person would otherwise not agree to penetration. It is questionable whether section 54 is an appropriate means for dealing with this problem. First, many cases may not involve a positive representation, but only concealment or a failure to disclose the condition. Secondly, it would be anomalous to treat one possible consequence of penetration differently from others, including the possibility of pregnancy. Thirdly, it is doubtful whether a deception of this type should be dealt with as a sexual offence. The Health Department has published a discussion paper dealing with the transmission of infectious diseases.[87] It would be better for the question of deception in relation to sexually transmitted diseases to be considered in that context.

83. The second option was to expand section 54: first, to include non-penetrative sexual conduct; and secondly, to cover situations where it could not be said that the activity took place 'without consent' but the offender had used unacceptable means to induce the victim to consent to the activity. Those who preferred this option feel that it is appropriate for the criminal law to be concerned with a wide range of conduct which might be seen as unfairly inducing people to engage in sexual activity, and that it should not be arbitrarily restricted to situations where penetration is involved. The kind of conduct which is envisaged is the exploitation of a position of status or power over another person, where the explicit coercion traditionally involved in rape and indecent assault is not present.

84. The difficulty with the option is that it cannot readily be expressed in terms which clearly distinguish its coverage from that of other offences. Without a precise definition of the modes of procuration constituting the offence, the overlap with rape, for example, would be substantial and this would cause confusion. If non-penetrative behaviour were to be covered, the offence would have to be cast in terms of assault. This would be inconsistent with the established rule that consent is a defence to an assault.

86. p 223.

87. Review of Health Legislation Discussion Paper No 2: *Infectious Diseases*, Health Department, Victoria, 1986.

85. After consideration of the contrasting views about section 54, the Commission has agreed that no compelling argument for either of the proposed changes has been made out. The Commission has received no information to suggest that the existence of section 54 has created any difficulty. However, the concepts contained in the section could be expressed more clearly. Additional amendment is also desirable. Section 54 (2) provides that no person may be convicted of an offence under section 54 on the evidence of one witness unless the witness is corroborated in a material particular by evidence implicating the accused. This is inconsistent with the removal of the need for corroboration in rape cases. Further, the limitation of the offence to penetration outside marriage is inconsistent with the 1985 abolition of marital immunity from conviction for rape.

The substance of section 54 should be retained but the limitation of the offence to penetration outside marriage and the requirement for corroboration should be abolished.

Is Section 55 Necessary?

86. Section 55 makes it unlawful for a person to administer a drug or other substance to another person with the intention of rendering the other person incapable of resisting sexual penetration outside marriage. The need for this offence is doubtful. If penetration occurs, the person administering the drug may have committed rape as well as the offence under section 55. If penetration does not occur, the behaviour may constitute attempted rape. Section 55 overlaps with other provisions in the Crimes Act. Section 18 contains an offence of causing injury intentionally or recklessly. 'Injury' is defined as including unconsciousness, hysteria, pain and any substantial impairment of bodily function. The administration of drugs for sexual purposes may cause 'injury' within the meaning of this definition. The Crimes Act also contains a provision making it an offence to administer certain substances which are capable of interfering substantially with the bodily functions of another person.[88] In the light of all these general offences, there is no need for section 55.

Section 55 of the Crimes Act should be repealed.

Is Section 56 Necessary?

87. Section 56 makes it an offence to remove a person by force or detain a person against his or her will with the intention that the person should marry or take part in an act of sexual penetration. Like section 55, this offence appears to be unnecessary. Cases may be covered by the common law offences of false imprisonment[89] or kidnapping, or the statutory offence of kidnapping.[90] Like section 55, section 56 creates an offence of a non-sexual act done with a sexual

88. S 19 Crimes Act 1958.

89. The total and unlawful restraint of the personal liberty of another.

90. S 63A. The statutory offence requires proof of an intention on the part of the offender to demand a ransom or some other gain; there is no such requirement in relation to common law offences.

motive. Given the existence of general offences, the separate offence of abduction or detention for a marital or sexual purpose is unnecessary.

Section 56 of the Crimes Act should be repealed.

Are Provisions Dealing With Attempted Offences And Assault With Intent To Commit Rape Necessary?

88. Assault with intent to commit rape is a common law offence. An attempt to commit a common law offence is also a common law offence. The Crimes Act includes references to attempts to commit sexual offences. The Commission believes separate reference to attempted offences is unnecessary. Section 421 (3) of the Crimes Act states that the allegation of an offence shall be taken as including an allegation of an attempt to commit that offence. The offence of assault with intent to commit rape is also redundant. Section 31 of the Crimes Act declares that an assault with intent to commit an indictable offence is an offence. Therefore, the relevant conduct is adequately covered by general offences.

Crimes Act provisions referring to attempts to commit sexual offences and assault with intent to rape should be repealed and the offence of assault with intent to rape abolished.

5. GENERAL ISSUES

Are Special Alternative Verdict Provisions Necessary?

89. The rationale for making provision for alternative verdicts is succinctly put by Heath and Hassett:

> In order to determine the nature of the counts to be contained in a presentment it is necessary to know what alternative verdicts may be returned in relation to any particular count. If a serious offence is charged and there is any possibility of the jury failing to be satisfied of the elements of that offence but perhaps being satisfied of the elements of a less serious charge, the latter must be specifically pleaded unless it is open to the jury on the more serious charge to return a verdict of guilty of the latter charge. If it is not so open to the jury, and if the lesser charge is not included in the presentment, the jury would be required to simply acquit.[91]

90. Some provision must be made for alternative verdicts. However, a balance must be achieved between the need to provide a sufficiently large net in which to catch offenders and the need to minimise the complexity of trials. Section 421 (2) of the Crimes Act deals with alternative verdicts in the case of trials other than trials for murder and treason. It provides that:

> Where, on a person's trial on indictment or presentment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged therein, but the allegations in the indictment or presentment amount to or include (expressly or by necessary implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence.

However, this section would appear not to be applicable to sexual offences because of the existence of section 425 which deals with alternative verdicts for sexual offences:

> (1) Where on the trial of a person charged with rape the jury are not satisfied that he is guilty of rape or of an attempt to commit rape but are satisfied that he is guilty of—
>
> (*a*) assault with intent to commit rape
> (*b*) indecent assault
> (*c*) assault of a child under the age of ten years with intent to take part in an act of sexual penetration
> (*d*) assault of a person who is of or above the age of ten years but under the age of sixteeen years and to whom the accused is not married with intent to take part in an act of sexual penetration
> (*e*) assault occasioning actual bodily harm
> or
> (*f*) common assault.
>
> the jury may acquit the accused of rape and find him guilty of whichever of those offences they are satisfied he is guilty and he shall be liable to punishment accordingly.
>
> (2) Where on the trial of a person charged with rape with aggravating circumstances the jury are not satisfied that he is guilty of rape with aggravating circumstances or of an attempt to commit rape with aggravating circumstances but are satisfied that he is guilty of—

91. I.W. Heath and J.T. Hassett *Indictable Offences in Victoria*, VGPS, Melbourne, 1986, 17.

(*a*) assault with intent to commit rape with aggravating circumstances
(*b*) indecent assault with aggravating circumstances or
(*c*) any offence of which he may be found guilty on a charge of rape

the jury may acquit the accused of rape with aggravating circumstances and find him guilty of whichever of those offences they are satisfied he is guilty and he shall be liable to punishment accordingly.

91. The complexity of these provisions indicates the type of difficulty which may be encountered in some rape trials, especially those involving a number of accused persons and a number of charges. On occasion, the case becomes so complicated that it becomes necessary for the trial judge to assist the jury with an elaborate flow chart to guide the jury in attempting to find its way through a veritable mass of legal and evidentiary detail. The repeal of section 425 (2) would follow from the abolition of the offence of rape with aggravating circumstances. Section 425 (1), as it relates to adult victims,[92] should be repealed leaving section 421 (2) to provide alternative verdicts from offences known to the law. A reduction in the number of sexual offences would then result in a lesser number of alternative verdicts.

The alternative verdict provisions contained in section 425 (1) and (2) of the Crimes Act should be repealed in relation to adult victims.

What Is The Appropriate Sentencing Structure?

92. The present offence structure consists of four central offences—rape with aggravating circumstances, rape, indecent assault with aggravating circumstances and indecent assault. The respective maximum terms of imprisonment are: twenty, ten, ten and five years. In order to simplify and clarify the law, the Commission recommends that the aggravating circumstances provisions be repealed. This would reduce the main general offences to two—rape and indecent assault. A question arises concerning the appropriate sentencing structure for the proposed offences.

93. In the discussion paper, the Commission suggested that the maximum penalty for 'sexual assault category 1' should be twenty years imprisonment and ten years imprisonment for 'sexual assault category 2'. The question of sentencing occupied very little space in the submissions received. However, two submissions took issue with the Commission's provisional proposal. The Office of Corrections and Mr David Biles, Deputy Director of the Australian Institute of Criminology, both suggested that the Commission's proposed penalties were twice as high as they should be. Both said that the maximum penalty for rape should be ten years imprisonment and for sexual assault five years.

94. An appropriate penalty structure must be capable of dealing with the worst cases of rape and assault. The repeal of the offences with aggravating circumstances will not affect the number of very serious rapes and indecent assaults. In the Commission's view, there are cases of rape where the circumstances merit a sentence of up to twenty years imprisonment and cases of indecent assault which deserve a penalty of up to ten years.

92. S 425 (1) contains references to offences which can only be committed against victims under 16 years of age. The relevance of these verdicts will be considered in the work on child sexual assault.

The maximum penalties should be twenty years imprisonment for rape, and ten years imprisonment for indecent assault. The present maximum penalty for section 54, five years imprisonment, should be retained.

Common Law Or Legislation?

95. The present sexual offences vary in the extent to which they are contained in the common law or defined in legislation. The physical acts which constitute rape are largely defined in legislation, whereas the elements of lack of consent and the knowledge or belief of the offender are not. Indecent assault is entirely a common law offence, whereas the allied offences are statutory creations.

96. Adoption of the Commission's recommendations in this report would require further legislative amendments, but the Crimes Act would continue to contain an incomplete statement of the law. That would be unsatisfactory. The Commission believes that, as a matter of principle, citizens should be readily able to find a statement of the laws which bind them. It is unreasonable to expect people to search the law reports for judicial statements, or to consult legal texts, having no legally authoritative status. As a minimum, a statement of the elements of the offences should be set out in the Crimes Act.

97. The further question is how much detail should be contained in the relevant provisions. It would be one thing to state, for example, that rape is 'unlawful[93] penetration without consent'. It would be quite another thing to define consent. The extent of the detail which the legislation can and should provide is ultimately a matter of opinion. In its discussion paper, the Commission tentatively proposed the enactment of a statutory provision which would attempt to enshrine the common law on consent. It has subsequently become convinced that such a provision might cause more harm than good. To do the job properly it would have to be comprehensive and detailed. Judges would be required to produce complicated directions to juries, resulting in jury confusion. It would be left to the courts, not the legislature, to work out the precise meaning of the provisions. This could take a considerable period of time. A number of jurisdictions which have attempted to define consent have been forced to do so in an illustrative rather than exhaustive fashion. This is an acknowledgement of the difficulties involved in arriving at a comprehensive, clear-cut statutory definition of consent. The same considerations apply to a concept such as 'indecency'. Detailed definition is not as amenable to dynamic interpretation as a general concept. The Commission believes that it is preferable to retain the flexibility of the common law rather than proceed with complex statutory provisions of uncertain scope and meaning.

There should be a clear and concise legislative statement of the elements of the offences.

93. Some form of non-consensual penetration, such as body searches, are permitted under the law.

6. DISSENTING VIEW

Ms Susan McCulloch

Dr Linda Hancock

98. Wide differences of opinion exist within the community with regard to the law on sexual offences. While agreeing with most of the Commission's recommendations there are some which in our opinion reflect views different from ours. Key issues on which we dissent from the recommendations as stated in the body of the Report are:

(1) the need for more detailed statutory provisions on the law of rape

(2) the definition of consent

(3) the definition of the mental element

(4) the use of the term 'sexual assault' rather than 'indecent assault'.

Statutory Provisions

99. The law should play an educative role and should be easily accessible to the public. A legislative statement will not achieve these aims unless all the elements of the offences are not only stated, but defined. We believe that recommendation 22 should provide for definition of the elements of the offence of rape in legislation, including consent and the mental element.

Consent

100. The concept of consent has been the subject of much discussion, and guidelines as to its meaning would help clarify its meaning. Section 324G of the Western Australian Criminal Code provides an appropriate model:

> (1) . . . 'consent' means a consent freely and voluntarily given and, without in any way affecting or limiting the meaning otherwise attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deception or fraudulent means.
> (2) A failure to offer physical resistance to a sexual assault does not of itself constitute consent to a sexual assault.

Further clarification could be obtained by including in the legislation examples of situations intended to be covered by the terms. For example, that threats include not only threats to inflict force but threats of financial loss and loss of employment. This would assist the successful prosecution of sexual offences where consent was not given freely, and where there is no explicit violence or threat of violence.

101. A detailed definition of what constitutes the offence of rape is also necessary if section 54 is retained as this Report recommends. Otherwise, there will be no guidance as to the distinction between classes of threat, intimidation and fraud which are rape and those which are offences under section 54 of the Crimes Act.

Mental Element

102. At present the law permits a defendant to be acquitted where he or she had a belief that the person consented, even if the circumstances were such that a reasonable person would not have held this belief. We believe this is unfair to victims of such behaviour. The mental element should be changed so that the offence of rape is committed even where the accused believed the victim consented if this belief was not based on reasonable grounds.

'Sexual Assault' rather than 'Indecent Assault'

103. We believe that the term 'sexual assault' should be used rather than 'indecent assault'. The latter term is ill-defined and anachronistic. Consistent with our general emphasis on the need for clear and concise statutory definitions, the term sexual assault should also be defined rather than left to the prevailing view of courts and juries. These definitions can be illustrative and non-exhaustive.

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