

REPORT NO. 43

RAPE: REFORM  
OF LAW  
AND  
PROCEDURE

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Law Reform Commission  
of Victoria

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RAPE: REFORM OF LAW  
AND PROCEDURE

September 1991



LAW REFORM  
COMMISSION  
VICTORIA

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In the course of its work on this reference, the Commission has consulted as widely as possible with all interested parties. It is grateful to its honorary consultants for the large amount of time and effort they put into advising the Commission and discussing the many issues raised by the reference, and to many other people for providing information and advice on a less formal basis. It is particularly grateful to the Centres Against Sexual Assault and the Real Rape Law Coalition for their thoughtful submissions and advice and to Acting Inspector Gordon Charteris of the Community Policing Squad for the work which he and his officers have put into developing a police Code of Practice in the area of sexual assault. The Commission has been particularly encouraged by the willingness of those involved in the consultation process to cooperate with each other in the search for solutions.





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## 1. INTRODUCTION

- 1 In July 1991 the Commission sent the Attorney-General an interim report on its reference on rape, together with a separate volume of appendixes recording the Commission's research findings.<sup>1</sup> The *interim report* was tabled in Parliament on 29 August 1991.
- 2 The Commission decided to present an *interim report* because it was aware that there was keen community and media interest in its progress on the reference. The Commission was also concerned that implementation of its proposals for reducing victim trauma would otherwise be delayed simply because it was not in a position to make final recommendations in relation to all the issues being considered.
- 3 This report deals with a number of issues of substantive law and some procedural matters. However, there are other matters which still require further investigation and consultation. These will be dealt with in a supplementary report.

### Plan of the report

- 4 This report is structured as follows:
  - Part 2: Reforms to substantive law
  - Part 3: Other matters relating to substantive law
  - Part 4: Procedural reforms
  - Part 5: Conclusion

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<sup>1</sup> Interim report No. 42 *Rape: Reform of Law and procedure* (hereinafter called '*interim report*').

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5 A draft Bill containing the Commission's main recommendations relating to the substantive law of rape and indecent assault, and consequential amendments, are included as an appendix to this report.

6 The issues dealt with are:

*Reform of substantive law —*

- should there be a legislative statement of the elements of rape and indecent assault?
- how should 'lack of consent' be defined?
- what should be the mental element required to convict a person of rape or indecent assault?
- should juries be directed to consider the reasonableness of an accused's alleged belief in consent?
- should an offence of 'negligent sexual penetration' be created?
- should the aggravating circumstances provisions be repealed?
- should common law rape be abolished?

*Other substantive law issues —*

- should there be a legislative statement of general principles?
- should juries in sexual assault trials be given a written summary of relevant legal principles?
- should juries in sexual assault trials be required to give reasons for verdicts?

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*Procedural issues* —

- should complainants in sexual assault trials be able to give their evidence by alternative means, such as closed circuit television?

**Forthcoming report**

7 The issues to be addressed in a forthcoming supplementary report will include:

- cross-examination and advocacy practices
- crimes compensation in relation to sexual assault victims
- implementation of recommendations made in the interim report
- any further issues identified by the Commission's research and consultations.

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## 2. REFORMS TO SUBSTANTIVE LAW

8 The Commission's main recommendations in relation to the substantive law of rape and indecent assault are contained in the draft Bill reproduced in the Appendix of this report. This Bill, which amends the *Crimes Act* 1958:

- sets out the elements of the offences of rape and indecent assault
- defines 'lack of consent' and requires judges to give certain directions to juries in cases where consent is an issue
- retains the present mental element in rape and indecent assault
- abolishes the separate offences of rape with aggravating circumstances and indecent assault with aggravating circumstances and increases the maximum penalties for rape and indecent assault to 20 years and 10 years imprisonment respectively
- abolishes the common law offence of rape.

This part of the report examines these proposed changes.

### Should there be a legislative statement of the elements of rape and indecent assault?

9 The Commission believes that the *Crimes Act* 1958 should contain a clear and concise statement of the elements of the offences of rape and indecent assault. This will help to make the law more accessible to the general community. In particular, it will make clear what the mental element is for each offence.

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- 10 The definitions that the Commission considers should be adopted are:

*Rape*

A person commits rape if:

- (1) he or she intentionally sexually penetrates another person without that person's consent while being aware that the person is not consenting or might not be consenting; or
- (2) after sexual penetration he or she does not withdraw from a person who is not consenting on realising that the person is not consenting or might not be consenting.

*Indecent assault*

A person commits indecent assault if he or she assaults another person in indecent circumstances while being aware that the person is not consenting or might not be consenting.

**How should 'lack of consent' be defined?**

- 11 In its *interim report*, the Commission concluded that 'lack of consent' should be retained as an element of the offences of rape and indecent assault. The arguments in support of this recommendation were set out at some length.<sup>2</sup> In brief, the Commission rejected the suggestion that rape and indecent assault be defined in terms of 'coercive circumstances', rather than 'lack of consent'. This was because the concept of 'coercive circumstances':

- would not reduce the emphasis on the consent issue in most sexual assault trials
- would tend to suggest that sexual penetration without consent only amounts to rape where force is involved
- would not make the law in this area any less complex.

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2 *Interim report*, 5-8.

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- 12 Although the Commission considered that 'lack of consent' should be retained as an element of rape and indecent assault, the *interim report* acknowledged that there was confusion about what this concept entailed, and considerable concern about how it was being applied in specific cases. The report therefore proposed that 'lack of consent' should be legislatively defined.
- 13 Since the completion of the *interim report*, the Commission has devoted considerable time to developing an acceptable definition of the consent element. It has examined the definitions of consent used in a number of other jurisdictions.<sup>3</sup> During August, draft provisions relating to consent were prepared and circulated to consultants for comment. A special meeting of consultants was also held to discuss the draft and several modifications were made as a result of this discussion. No major objections were made to the Commission's proposals during this consultation process.
- 14 The final version of the proposed consent provisions is contained in the draft Bill. There are three key features.
- 15 Firstly, the Bill contains a definition of 'without consent'. It states that:

a sexual act takes place with another person without that person's consent if she or he does not freely agree to it.

The use of the phrase 'does not freely agree' is intended to make it absolutely clear that consent involves *free agreement*, not merely submission on the part of the other person.

- 16 Secondly, the draft Bill provides that a person is *not* to be regarded as freely agreeing in any of the following circumstances:
- the person submits because of force or the fear of force to that person or someone else
  - the person submits because of the fear of harm of any type to that person or someone else

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3 See *interim report*, Appendix 1, 21-30.

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- the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing
  - the person is mistaken about the sexual nature of the act or the identity of the person
  - the person mistakenly believes, because of a false representation, that the act is for medical or hygienic purposes
  - the person is incapable of understanding the sexual nature of the act
  - the person submits because she or he is unlawfully detained.

17 The list of 'vitiating circumstances' is broadly the same as that recognised by the common law or existing legislation.<sup>4</sup> However, the following points should be noted:

- The list of factors is not intended to be exhaustive.
- 'Harm' is intended to include non-physical harms - such as blackmail or substantial economic harm.
- In determining whether a person submitted because of the fear of force or some other harm, it is the situation *as it was perceived by that person* which is the crucial issue. There is no requirement to show that a reasonable person would have reacted similarly in similar circumstances.
- Consistent with present law, a fraud as to marital status does not vitiate consent for the purposes of rape. Such cases will continue to come under section 57 of the *Crimes Act* ('procuring sexual penetration by threats or fraud').

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4 The case where a person submits to a sexual act as a result of a false representation that the sexual act is necessary for medical or hygienic purposes is dealt with under section 36A of the *Crimes Act* 1958, as amended by the *Crimes (Sexual Offences) Act* 1991. The other circumstances which vitiate consent are recognised by the common law.



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- 18 Thirdly, under the proposed legislation judges will be required to direct juries, in a relevant case, that a person is not to be regarded as having freely agreed to a sexual act just because:
- she or he did not protest or physically resist, or
  - she or he did not sustain physical injury, or
  - on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person.<sup>5</sup>
- 19 Judges will also be required to direct juries that where there is clear evidence that the victim did not say or do anything to indicate free agreement, this will normally be enough to establish that there was no consent.
- 20 The use of the phrase 'in a relevant case' recognises that there will be cases where the matter covered by the proposed directions will not be in issue. For example, there would be little to be gained from directing a jury about the meaning of consent when the only issue in the trial is whether the accused was present at the time of the alleged rape. It clearly also would not be appropriate to direct juries about the weight to be given to sexual history evidence if no such evidence had been led in the first place.
- 21 Directions similar to those proposed are already given in many rape trials. This provision is intended to formalise good practice to ensure that a consistent approach is taken to the issue of consent. Another benefit of expressing these directions in legislative form is that the community in general will be made aware of what type of evidence is, or is not, sufficient to prove a lack of consent.

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5 This direction is intended to supplement the sexual history provisions of section 37A of the *Evidence Act*. Section 37A relates to the circumstances in which cross-examination about sexual history is permissible, whereas this direction concerns the weight which juries should attach to such evidence.

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**Should the mental element of rape and indecent assault be changed?**

22 The mental element, or 'mens rea', of rape is that the accused:

- was aware that the other person was not consenting to being sexually penetrated; or
- was aware that the other person might not be consenting and intended to engage in the sexual act regardless of whether that person was consenting or not.

23 Under the common law, an accused is not guilty of rape if he honestly but mistakenly believes that the other person was consenting, even if a reasonable person would not have made the same mistake.

24 In written submissions, the Real Rape Law Coalition and the Feminist Lawyers group argued that it was inappropriate to define rape in these terms, and that an objective, rather than subjective, standard should be used to determine the accused's guilt. According to these proposals, the prosecution should have to prove only that a reasonable person would have been aware that the other person was or might not be consenting. This change, if adopted, would mean that an accused who makes an honest but unreasonable mistake about consent would be guilty of rape.

25 After careful consideration, the Commission has decided that there should be no change in the mental element of rape or indecent assault. However, the definition of the mental element of these offences will be affected indirectly by the proposed consent provisions. 'Belief in consent' means belief in consent as that term is defined by legislation. 'Mens rea' will therefore be proved if it can be shown that the accused was aware that the other person might not have been freely agreeing, or may have been submitting only because one or more of the 'vitiating circumstances' listed in the draft Bill were present.

26 The Commission has decided the mental element of the offences should be retained for three main reasons:

- a requirement that the accused's belief in consent must be 'reasonable' would involve a significant departure from established principles of the criminal law
- the policy reasons for treating rape differently from other serious criminal offences are not persuasive
- the meaning of 'reasonableness' is difficult to interpret in the context of sexual assault.

27 The following discussion elaborates on each of these reasons.

*The general principle and its application to rape*

28 It is one of the most important general principles of the criminal law that a person should not be convicted of a serious criminal offence unless he or she intended to do the forbidden act, or was aware of the circumstances which made the act criminal. Murder, theft, rape, robbery, assault and drug offences are all defined that way. The most important exceptions to this general rule are the common law offence of negligent manslaughter and the statutory offence of 'negligently causing serious injury',<sup>6</sup> which are known as 'lesser included offences'. For these offences, it is enough to show that the accused breached, to a gross degree, the standard of care which a reasonable person would have observed in the circumstances. The maximum penalties for these offences are well below those which apply for the equivalent acts done intentionally ('murder' and 'intentionally causing serious injury') This is a recognition by the law that the person who negligently causes harm is less morally blameworthy than the person who means to cause the harm, or knows that harm is likely to result from his or her actions.<sup>7</sup>

29 This approach to culpability for serious offences has been strongly advocated by the High Court, the drafters of the modern criminal

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6 Section 24, *Crimes Act 1958*.

7 Manslaughter currently carries a maximum penalty of 15 years, compared to a maximum of life imprisonment for murder. The offence of 'negligently causing serious injury' carries a maximum penalty of 3 years, compared to 15 years for 'intentionally causing serious injury'.

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codes, and by the major commentators.<sup>8</sup> The courts have stressed the need to base culpability on the actual state of the defendant's mind (the 'subjective test') as opposed to attributing a mental state to the defendant by reference to what a reasonable person in the circumstances would have thought (the 'objective test').

- 30 The Commission believes strongly that the emphasis which the criminal law has traditionally placed on 'mens rea' is correct. The requirement that the prosecution prove 'mens rea' emphasises the importance of individual responsibility. It also recognises that 'the criminal law is designed to punish the vicious, not the stupid or the credulous'.<sup>9</sup> In the words of Justice Brennan of the High Court, it is 'a humane protection for persons who unwittingly engage in prohibited conduct'.<sup>10</sup>
- 31 None of the submissions to the Commission argued that, as a general rule, it was wrong for the criminal law to require proof of 'mens rea' in serious criminal offences. In fact, the Feminist Lawyers group, in their submission, stated quite explicitly that:

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8 In the High Court, see particularly the strong statements of Chief Justice Dixon in *Parker* (1962-3) 111 CLR 610, esp 623ff and his criticisms of the English decision in *Smith* (1961) AC 290. The importance of taking a subjective approach was again strongly stated by the High Court in *He Kaw Teh* (1985) 157 CLR 523. For the modern codes, see ss3F, 3G and 3M of the draft *Crimes (Amendment) Act* included in the report of the Gibbs Committee in its review of the Commonwealth Criminal Law, *Principles of Criminal Responsibility and Other Matters* (1990). In Chapter 7, concerning mistakes which negate mens rea, the Gibbs Committee said:

'The Review Committee considers that it cannot now be disputed that the fact that an accused person held a mistaken belief in facts, or was ignorant of the true facts, is a matter relevant to be considered in deciding whether the accused had the knowledge or intention necessary to constitute the offence charged and may negate the existence of that knowledge or intention, even though it was unreasonable to hold that belief or to be ignorant of the facts and even though, if the facts were as the accused believed them to be, he or she would be guilty of another and lesser criminal offence or some moral wrongdoing. None of the submissions received disagreed with this view, though none thought it necessary to express the principle in the proposed consolidation.'

The same point about unreasonable mistakes is made by the English Law Commission in the commentary on its *Criminal Code for England and Wales*, 1989 (Law Comm. No 177), para 8.32.

9 Bray, C J in *R v Brown* [1975] 10 SASR 139, 148.

10 *He Kaw Teh* (1985) 157 CLR 523, 568.

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As lawyers we recognise that criminal liability should not be imposed in the absence of the appropriate 'mens rea' in serious criminal offences. We would generally oppose the notion that culpability for a serious criminal offence should derive solely from the harm caused (as in strict liability cases).<sup>11</sup>

- 32 However, the Feminist Lawyers group also suggested that the mental element of rape had been mis-specified and that an objective standard could be adopted without violating the 'mens rea' principle. According to their submission, the appropriate 'mens rea' in rape should be an intention to penetrate the complainant in circumstances where a reasonable person would have been aware that consent might be lacking.<sup>12</sup>
- 33 This restatement of the 'mens rea' requirement of rape is clearly not consistent with established principles. As noted, there is wide agreement that 'mens rea' requires some intention to do the forbidden act, or at least a knowledge of the circumstances which make the act criminal. Where rape is concerned, the forbidden act is obviously not sexual penetration itself, but sexual penetration without the other person's consent. For a person to have the requisite criminal intent, he or she must not only have intended to sexually penetrate the other person, but must also have had at least some awareness that the person was not consenting. That is, after all, the only circumstance which makes the physical act unlawful. A person whose belief in consent is genuine, even if unreasonable, lacks that type of awareness.

### *Policy arguments*

- 34 It follows from this analysis that use of an objective standard in the case of rape can only be justified if it can be shown that there are

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11 Feminist Lawyers' submission, 2.

12 In support of this interpretation, Feminist Lawyers relied heavily on a comment made by Brennan J in *He Kaw Teh* (1985) 157 CLR 527, a case relating to the interpretation of drug offences in the Commonwealth *Customs Act*. However, the Commission considers this to be a misreading of the case. Brennan J, and the two other judges who made up the majority, strongly emphasised that it is the subjective appreciation of the circumstances which makes an act criminal - in this case, that the defendant knew that the substance in his possession was a drug.

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strong policy grounds for treating rape differently from other serious criminal offences. Two arguments in particular need to be considered in this regard. These are:

- convictions in rape trials are too hard to obtain, because of the problem of proving the mental element of the offence
- rape is a serious social problem and there is an urgent need to educate the community, and men in particular, to take more care in the conduct of their sexual relations.

35 For the reasons given below, the Commission has not been persuaded that either of these arguments warrants adoption of an objective test.

#### *Conviction rates*

36 It is true that rape can be a difficult offence to prove, especially if the accused did not make any admissions to the police and the complainant did not sustain any physical injuries.<sup>13</sup> However, this is not because the mental element in particular is difficult to prove. The basic problem is that, in the typical rape trial, the jury usually has to choose between two quite different accounts of what took place between the accused and the complainant.

37 The Commission's research confirmed that it is rare for the accused's state of mind to be the major focus.<sup>14</sup> Commission researchers examined Director of Public Prosecutions (DPP) case files for 53 accused who stood trial in the County Court for rape in 1989 or 1990.<sup>15</sup> Of these 53 accused, only three (6%) relied on 'belief in consent' as their primary line of defence, with another nine (17%)

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13 *Interim report*, Appendix 3, 92-7.

14 There has been a good deal of confusion over this issue. For example, late in 1990, the Real Rape Law Coalition circulated a document describing six cases in which an accused person was able successfully to argue 'belief in consent'. With the assistance of staff from the Office of the Director of Public Prosecutions, Commission researchers were able to locate files relating to three of these cases. In each case it was clear from the file, and from discussions with those involved in the prosecution, that the dominant issue was the complainant's actual consent, not the accused's belief in consent.

15 See *interim report*, Appendix 3, for details of this study.

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using a mix of 'consent' and 'belief in consent' defences.<sup>16</sup> By contrast, 27 (51%) based their defences primarily on the issue of the complainant's actual consent.<sup>17</sup>

- 38 It is not surprising that the mental element is rarely the main issue in rape trials. Contrary to claims made by some critics of existing rape laws, 'mistaken belief in consent' is normally not a very attractive line of defence to run. This is because it involves a major concession by the defence, namely that the complainant may not, in fact, have been consenting. In the great majority of cases where a person is charged with rape, the complainant has alleged that the accused used or threatened physical force and that she responded by resisting verbally or physically.<sup>18</sup> Confronted with these allegations, an accused is unlikely to be acquitted unless, through cross examination or by his own evidence, he can cast doubt on the complainant's account of events. This generally involves focusing on the issue of consent. Few juries are likely to believe an accused who claims to have thought that the complainant was consenting - or that he was not aware that she might not have been consenting - if there is uncontradicted evidence that force or threats had been used, or that the complainant had resisted verbally or physically.<sup>19</sup>

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16 The criteria for distinguishing between 'belief', 'consent' and 'mixed belief and consent' defences are discussed in Appendix 3 of the *interim report*, 82-4, 85-8. In brief, 'belief' cases were classified as those in which it was conceded that there was a real possibility of a mistake on the part of the accused. In 'consent' cases, on the other hand, there was a clear disagreement between the accused and the complainant about what had taken place. Logically, the accused in these cases were also asserting a belief in consent, but the claim was that the belief was well grounded, rather than the result of a possible mistake. 'Mixed' cases were those in which the line of defence shifted during the course of the trial, or evidence was presented which could be seen as relevant to either issue.

17 *Interim report*, Appendix 3, 78-9. Another 11% of accused denied any contact with the complainant and 11% admitted that there was contact but denied that there had been a sexual encounter. In two cases, the line of defence adopted by the accused was unclear.

18 *Interim report*, Appendix 3, 69-70.

19 There was only one accused in the DPP study who claimed to have interpreted the complainant's verbal and physical resistance as evidence of consent. Not surprisingly, the jury did not believe this story and the accused was convicted on all counts. In the other two cases in which 'belief in consent' was the primary issue, it was accepted that penetration had been effected without any resistance on the complainant's part. In one case, the complainant was drunk and said that she had mistaken the accused for her husband. In the second case, the complainant said that she was asleep at the time she was first penetrated. In the first of these cases, there was a

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- 39 Of those accused who do argue 'belief in consent', a substantial proportion are already convicted under the present law. For example, of the 12 accused in the DPP study who based their trial defence partly or primarily on a claim of 'belief in consent', six (50%) were convicted of rape. This means that there were only six cases (11% of all accused standing trial) in which use of an objective standard might conceivably have made a difference to the outcome. Even in these cases, it cannot be assumed that the jury would necessarily have decided any differently had it been directed to apply an objective standard. There is simply no way of telling.
- 40 One response to this evidence is that adoption of an objective standard might in the longer run encourage the prosecution of more 'belief in consent' cases. However, this argument assumes that there is a reluctance to prosecute these types of cases at present. There is no evidence to support that proposition. On the contrary, 'belief' cases are relatively strong from a prosecutorial view because they involve less focus on the complainant's credibility and behaviour.
- 41 The Commission is not suggesting, of course, that adoption of an objective standard would have no effect on trial outcomes. As a matter of logic, if one of the elements of an offence is made easier to prove, there is always a chance that there could be a different outcome in specific cases. What the evidence does show, however, is that the impact on the overall conviction rate would only be slight.
- 42 Even if introduction of a 'reasonableness' requirement did lead to a substantial increase in conviction rates, that would not of itself justify changing the law. Change would only be justified if it could also be established that those accused who might be convicted as a result of a shift to an objective test deserve to be convicted of rape.
- 43 Arguably, two groups of accused could have their chances of conviction increased if an objective test were adopted:

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directed acquittal on the charge of rape, although the accused was convicted of an indecent assault. In the second case, the accused was acquitted on all charges. See Appendix 3 of the *interim report*, 87-88.



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- those who falsely claim that they believed the complainant was consenting, and
  - those who genuinely but unreasonably believed that the complainant was consenting.

44 Those in the first category clearly deserve to be convicted of rape. However, as argued, there is little evidence that the current state of the law prevents conviction of those in this group. It is the second group who are more likely to be affected by the proposed change. Experience in other areas of the criminal law shows that this group will include people who, for a variety of reasons beyond their control (for example, intellectual disability), have failed to live up to 'reasonable' standards of behaviour. In the Commission's view, these are not people who, according to normal standards of criminal responsibility, ought to be punished as rapists. (The issue of whether those in this category should be convicted on a lesser offence of 'negligent sexual penetration' is considered below.)

#### *The educational function of the law*

45 The other main argument for adopting a 'reasonableness' requirement is that this may help to educate men, in particular, about the need to exercise more care in their conduct of sexual relations. From this perspective, it does not matter that a change in the law would have only a limited impact on trial outcomes. Rather, the most important reason for requiring that a belief in consent be reasonable is to signal to the community that it is not acceptable for men to cling to outdated myths about seduction, sexual conquest and female sexuality.

46 The Commission accepts that the criminal law has an important educational role to play in this area. However, the law of rape can perform its educational function quite effectively without abandoning the 'mens rea' requirement. The Commission's proposed amending legislation makes it quite clear, in case there was any doubt, that a person should not be assumed to have consented to sex unless that person has given her or his free agreement. It says, among other things, that a person may have the necessary 'mens rea' if he or she is aware that the other person might be asleep or unconscious, or so

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affected by drugs or alcohol as to be incapable of freely agreeing to the sexual act; or that the other person might have 'agreed' to sex because of a fear of physical or other harm, or because she or he was being unlawfully detained. Furthermore, the legislation states that an accused can normally expect to be convicted of rape once it is established that nothing was said or done by the complainant to indicate her free agreement to the sexual act in question. This surely is enough to get the message across to most people about what the law regards as unacceptable behaviour.

- 47 A broader issue of principle is also involved. Except where it operates at a purely symbolic level, one of the ways in which the criminal law educates is by making an example of those individuals who contravene the law. In the Commission's view, it is only ever appropriate to use individuals as 'examples' for this purpose if they deserve to be convicted of the offence concerned. To reiterate, this requires proving that they had the necessary 'mens rea'. The alternative view is that the criminal law should regard those 'stupid or credulous' individuals who make unreasonable but honest mistakes as expendable in the interests of wider social and political objectives. This approach is not acceptable. Stupidity should not lead to conviction for a crime as serious as rape.

*Applying an objective standard*

- 48 It was also not at all clear from the submissions made to the Commission how the proposed concept of 'reasonableness' would be applied in particular cases. A basic problem lies in the fact that there are different ways of formulating an objective standard.<sup>20</sup> For example, should the test be whether the accused's mistaken belief in consent was reasonable for someone of the same ethnic group, social class, education and mental capacity as the accused? Should the jurors be instructed to consider what they would have done in the same situation? Or should the standard be that of the quintessential

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20 This same problem has arisen in other areas of criminal law such as provocation in murder. The response of the law in this area has been to move towards a more subjective test. Where the defence of provocation is raised, juries are now directed to consider whether an ordinary person with characteristics similar to those of the accused could have been provoked to act similarly in the same circumstances. See, for example, *Moffa* (1977) 138 CLR 601.

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reasonable person who possesses reasonable foresight and knowledge? If the first approach is taken, the stated objective of educating men throughout society that certain behaviour is unacceptable is largely undermined. On the other hand, if no account is taken of the accused's education, background and so on, the law runs the risk of punishing people for failing to comply with standards which they could not fairly be expected to have met.

- 49    Whichever approach is taken, difficulties arise, as the Heilbron Committee report on British rape law acknowledged in 1975:

[T]he approach to, and the circumstances surrounding, sexual relationships are imprecise and varied. There are many diverse situations and the boundary lines are often unclear. By the very nature of such relationships, they involve differing degrees and types of persuasion, encouragement and many other imponderables.<sup>21</sup>

**Should juries be directed to consider the reasonableness of an accused's alleged belief in consent?**

- 50    Although the Commission considers that the present mental element should be retained, it believes that it would be useful for juries to be directed that, in deciding on the accused's actual state of mind, they should take into account whether his alleged belief in consent was reasonable in all the relevant circumstances. These circumstances could include such matters as what was said and done by the complainant and the general context in which the sexual encounter took place. This direction recognises that the more unreasonable the accused's alleged mistake, the less likely it will be accepted by the jury. However, it also acknowledges that if the jury does decide that the accused may have made a genuine even though unreasonable mistake, he should be acquitted.

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21    *Report of the Advisory Committee on the Law of Rape*, HMSO, London, 1975, 9. This committee, chaired by Mrs Justice Rose Heilbron, was established following the decision of the House of Lords in *DPP v Morgan* (1976) AC 182.

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- 51 Although judges sometimes direct juries along the lines proposed, this does not occur as a matter of course. In the Commission's view, such a direction should be standard practice. A similar provision was adopted in Britain following the Heilbron Committee report in 1975 and does not seem to have caused any difficulties. As the Heilbron Committee stated at the time, such a provision is nothing more than a codification of the existing position at common law.

**Should an offence of 'negligent sexual penetration' be created?**

- 52 The creation of a lesser offence, defined in terms of criminal negligence (a gross failure to take reasonable care), might be another way of dealing with the accused who has a genuine but unreasonable belief in consent. A person who negligently causes death or serious injury to another is recognised by the criminal law as deserving of some punishment, albeit substantially less than a person who does the same act deliberately or recklessly. As it is undoubtedly a serious harm to sexually penetrate someone without their consent, there is arguably no reason in principle why the same approach could not be taken in the area of sexual assault. Using the offence of 'negligently causing serious injury' as a guide, such an offence could attract a maximum penalty of, say, three years.
- 53 The Commission has given this option serious consideration, but has concluded that the possible advantages of defining a separate negligence offence are outweighed by the practical problems that it would create. The Commission has also been influenced by the fact that none of the oral or written submissions received by the Commission advocated this option.
- 54 As the Commission pointed out in its 1987 report on the substantive law of rape,<sup>22</sup> there is considerable anecdotal evidence that juries are sometimes reluctant to convict of very serious offences where a less harsh alternative is available. There is a danger that the creation of a lesser offence would lead to fewer rather than more convictions for rape. This might be avoided if the jury were not allowed to return an alternative verdict of 'negligent sexual penetration' where

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22 Report No. 7, *Rape and Allied Offences: Substantive Aspects*, June 1987, 26.

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the accused was presented for trial on a rape charge. But that would mean that some accused who deserved to be convicted of the lesser offence might then escape punishment altogether, whereas those initially presented on the lesser charge would be convicted. This rule could also lead to overly conservative prosecution practices on the part of the prosecuting authorities.

- 55 Another concern is that an alternative offence would add to the complexity of the law, particularly given that, as argued above, the meaning of 'reasonableness' in this context is far from clear. Similar problems were foreseen by the Heilbron Committee:

The judge would have to direct the jury not only on intention and recklessness and the requirements of rape, but also on the requirement of the new offence. This would not only make the task of the jury more difficult, but ... we are extremely doubtful whether any satisfactory account of the behaviour of the reasonable man could be formulated to cover personal sexual relations.<sup>23</sup>

#### **Should the separate 'aggravating circumstances' offences be abolished?**

- 56 As stated in its 1987 report, the Commission believes that the separate 'aggravating circumstances' offences<sup>24</sup> should be abolished. These separate offences cause difficulties in the framing of presentments and in proof in court. They often require judges to give long and complex directions which can be particularly difficult for juries to follow. They also lead to longer trials, which may result in greater trauma for victims. According to data obtained from the DPP study, trials of accused charged with rape with aggravating circumstances lasted an average of 8.6 days, compared to 4.5 days for those accused charged with 'basic' rape. In part, this was because the 'aggravated' rapes included some trials where two accused had been jointly presented. However, even where only one accused was involved, the average trial length was still 6.7 days - well above that for 'basic' rapes. Moreover, cross-examination of the complainant

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23 Report, 13.

24 See ss41 and 43, *Crimes Act 1958*. The meaning of 'aggravating circumstances' is given in s38.

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took 50 per cent longer, on average, in those cases where aggravating circumstances were alleged.

- 57 It is sometimes argued that aggravating circumstances provisions facilitate plea bargaining and, in doing so, help save complainants the trauma of a trial. However, there is little indication that the provisions are currently being used for this purpose. Of the 40 accused in the DPP study who were committed to stand trial on a charge of rape with aggravating circumstances, only four subsequently entered a plea of guilty to 'basic' rape. In only two of these cases was there any indication that the charge had been reduced as a result of negotiations between the DPP and the defence. This evidence strongly suggests that abolition of separate 'aggravating circumstances' provisions would have only a minimal impact on the overall guilty plea rate for rape offences.
- 58 The Commission considers that the offences of 'rape with aggravating circumstances' and 'indecent assault with aggravating circumstances' should be abolished and the maximum penalties for rape and indecent assault should be increased to 20 years and 10 years respectively. In advocating the abolition of the 'aggravating circumstances' provisions and an increase in the penalty for the 'basic' offence, the Commission's concern is to simplify the conduct of trials; not to alter judicial sentencing practices. The Commission expects that judges will continue to give aggravating circumstances much the same weight in sentencing as they do at present and that there will be no overall increase in the sentences imposed for sexual assaults in which there are no aggravating circumstances.

### **What should be done with the common law offence of rape?**

- 59 The proposed statement of the elements of rape, in conjunction with the provisions defining consent and the physical circumstances of rape, now provide a comprehensive definition of this offence.<sup>25</sup> Consequently, there is no need to retain a separate common law offence of rape.

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25 The offence of indecent assault has been created by statute and therefore does not require abolition at common law.

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### 3. OTHER MATTERS RELATING TO THE SUBSTANTIVE LAW

Should the legislation contain a statement of general principles?

- 60 In its submission to the Commission, the Real Rape Law Coalition argued strongly for the insertion of a statement of general principles, or 'interpretation clause', at the beginning of the sexual assault provisions of the *Crimes Act*. In its *interim report*, the Commission agreed that such a statement could be of value. However, the report also noted that a separate statement might not be needed if sufficiently comprehensive provisions on consent were adopted.
- 61 In the Commission's view, virtually all the matters which the Real Rape Law Coalition wished to have included in the statement of principles are now dealt with by the consent provisions of the draft Bill, or by existing *Crimes Act* provisions.<sup>26</sup> A separate statement of principles would add little to the law and could complicate the interpretation of more specific legislative provisions. The most basic principle - the right not to engage in sexual activity - is stated in any event, in the objects clause of the draft Bill.

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26 For example, the Coalition proposed that the 'interpretation clause' should contain a statement that 'any lapse in time between an act complained of and the time of the complaint must be recognised as potentially due to the sensitivity of the issue and the effect of the assault on the victim/survivor.' This bears a close resemblance to the current section 61(1)(b) of the *Crimes Act*. This section provides that in circumstances where a delay in complaint is at issue, a judge must warn the jury that delay in complaining does not necessarily indicate that the allegation is false, and there may be good reasons why a victim of sexual assault may hesitate in complaining about it.

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**Should juries be provided with a written summary of relevant legal principles?**

- 62 At present, judges in criminal trials rely almost exclusively on oral directions to inform jurors about the law. It was suggested to the Commission that this was an outdated practice and that, as far as sexual assault trials were concerned, jurors would be better able to apply the law correctly if they could also take a written summary of relevant legal principles with them into the jury room.
- 63 The Commission agrees with this proposal.<sup>27</sup> It is hard at the best of times for people to remember everything that they are told orally. It is even harder when the concepts are unfamiliar and the relevant information is contained in a final address from a judge which may last for several hours. A recent study undertaken in Michigan in the United States concluded that the provision of written instructions to jurors increased comprehension levels significantly.<sup>28</sup> Another positive effect noted in a similar study was that written instructions helped to resolve disputes among jurors over the meaning of the law.<sup>29</sup>
- 64 Where an accused has been charged with rape, judges already use a fairly standard form of words when directing juries on the various elements which make up the offence. It should not be too difficult to come up with an acceptable written formulation. Of course, allowance would need to be made for the different fact situations of particular cases. For example, it would make little sense to elaborate on the meaning of consent in a case in which the accused denied any contact with the complainant. However, this problem could be overcome by developing tailored written directions for different types

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27 There is clearly no reason in principle why written summaries could not also be used in other areas of the criminal law. However, consistent with the Commission's terms of reference, this discussion looks only at the use of this material in sexual assault trials.

28 G P Kramer and D M Koenig, 'Do jurors understand criminal jury instructions? Analysing the results of the Michigan juror comprehension project', *Journal of Law Reform*, University of Michigan, 1990, 428.

29 L Heuer and S D Penrod, 'Instructing Jurors: A field experiment with written and preliminary instructions', 13 *Law and Human Behaviour*, 1989, 409.



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of cases, or by highlighting the sections of the written summary which were relevant to the particular case.<sup>30</sup>

- 65 The Commission intends to prepare a 'plain English' summary of relevant legal principles for distribution to juries in sexual assault trials. This summary will be developed in consultation with members of the County Court and representatives of the legal profession. Once an acceptable statement of principles has been devised, it will be made available to the County Court for use where appropriate. No legislation is required to enable written material to be given to juries.

### Should juries be required to give reasons for verdicts?

- 66 It has long been the practice in Victoria and other jurisdictions that juries in criminal cases are not asked to explain their verdicts. The Feminist Lawyers group argued that this practice should be modified in the case of sexual assault trials. According to their proposal, the jury should be required to indicate in appropriate cases whether the accused was acquitted because:

- 'lack of consent' had not been proved; or
- lack of consent had been proved, but the jury was not satisfied that the accused had the necessary 'mens rea'.

- 67 In support of their proposal, Feminist Lawyers argued that the trauma experienced by a victim following an acquittal would be reduced considerably if she knew that the jury accepted that she had not consented. It was also suggested that such a provision would enable more accurate monitoring of the frequency with which accused in sexual assault trials are able successfully to argue a mistaken belief in consent.

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30 In future, the use of computers should make it easier to tailor directions to specific cases. If instructions were on file, any necessary modifications could be readily incorporated and printed off for distribution to jurors.

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- 68 One problem with this proposal is that it assumes that juries usually agree on why an accused should be acquitted. In reality, collective decisions to acquit may be made for a variety of reasons. For example, in cases where both 'consent' and 'belief in consent' are relevant issues, some jury members may think that the consent element has not been proved. Others may focus more on the mental element, and still others may not distinguish between the two issues. It is unclear how the reasons for the verdict should be reported in these circumstances. The Feminist Lawyers' proposal is also silent on the difficult question of what should be done in cases where there is a 'hung' jury.
- 69 A more important consideration is that the proposal may not be in the interests of the majority of complainants. As has been shown, a large proportion of rape trials are straightforward disputes about whether the complainant consented. Complainants in these trials could well experience more trauma if the jury had to give reasons for acquitting the accused, because they would then be told quite directly that their account of events had not been accepted. In the Commission's view, a more useful way to lessen the distress which many victims experience upon an acquittal is to ensure that they are properly 'debriefed' by prosecuting counsel at the conclusion of the trial.<sup>31</sup>
- 70 The Commission accepts that the proposal to require reasons could provide some useful information about why juries decide as they do. However, 'research convenience' is not a sufficient justification for interfering with jury decision-making processes.

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31 See *interim report*, 37.

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## 4. PROCEDURAL REFORMS

71 The Commission's draft Bill amends the *Evidence Act*, 1958 to:

- allow some adult complainants to give their evidence by alternative means (eg, closed-circuit television) where the accused has been charged with a sexual offence, or some other serious offence against the person
- extend section 37a (which restricts the introduction of sexual history evidence) to apply to evidence about the complainant's prior sexual relations with the accused.

**Should complainants be able to give their evidence by alternative means?**

72 In its *interim report* the Commission raised the issue of complainants giving their evidence by closed-circuit television in committal hearings and trials. As noted in that report, a number of the victims who spoke to the Commission during its consultation process reported that the presence of the accused in the courtroom caused them severe distress and affected their ability to give evidence clearly and accurately. This trauma was exacerbated by the layout of courtrooms, some of which allowed a direct line of sight from the dock to the witness box.

73 The *Evidence Act* 1958, as amended by the *Crimes (Sexual Offences) Act* 1991, permits alternative arrangements, including closed-circuit television, to be used in sexual assault or assault cases involving a complainant who has impaired mental functioning or is under the age of 18 years.<sup>32</sup> Where such arrangements are made, the judge is required to warn the jury not to draw any adverse inferences or to

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32 *Evidence Act*, s37C.

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give the evidence any greater or lesser weight because of these arrangements. Proclamation of these provisions has been delayed until the relevant technology is in place in the courts.

- 74 In the Commission's view, if it is acceptable to make these arrangements in cases involving children and the mentally impaired, it should also be possible for them to be used in appropriate cases involving adults. The primary objection to allowing evidence to be given by means of alternative arrangements is that this practice would disadvantage the accused, because it might lead jurors to believe that the accused is dangerous, and therefore guilty of the offence. However, that risk can be minimised if the jury is directed appropriately by the trial judge. Objections to using such arrangements carry even less weight in the case of committal hearings, because no jury is present and the purpose of the hearing is simply to determine if there is enough evidence to require an accused person to stand trial.
- 75 The Commission is aware that, given current resource constraints, it would be impractical to allow every adult complainant in an assault or sexual assault trial to give his or her evidence by means of closed-circuit television or some other special arrangement. However, this problem can be overcome by requiring that the court be satisfied that there are 'special reasons' which justify the use of these arrangements in the particular case.
- 76 Provisions to this effect are already in force in Queensland. The Queensland *Evidence Act*, as amended in 1989, gives the court a discretion to order the use of alternative arrangements for the giving of evidence by children under 12 and by other 'special witnesses'. A 'special witness' is defined as:

a person who, in the court's opinion —

- (i) would, as a result of intellectual impairment or cultural differences, be likely to be disadvantaged as a witness;
- (ii) would be likely to suffer severe emotional trauma; or

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- (iii) would be likely to be so intimidated as to be disadvantaged as a witness,

if required to give evidence in accordance with the usual rules and practice of the court.<sup>33</sup>

- 77 Discussions with the Office of the Queensland Director of Prosecutions indicate that although these provisions are used mostly in relation to child witnesses, applications in respect of adult victims have also been successful.
- 78 In its report, *Evidence of Children and Other Vulnerable Witnesses*, the Western Australia Law Reform Commission made a similar proposal.<sup>34</sup>

A court should be able to declare any witness a 'special witness' if, taking into account —

- (1) a person's age, cultural background, or relationship to any party to the proceedings,
- (2) in a criminal case, the nature of the offence, or,
- (3) any other relevant factor,

the court is satisfied that the person

- (a) would be likely to suffer severe emotional trauma, or
- (b) would be likely to be so intimidated or stressed as to be unable to give evidence,

if required to give evidence in accordance with the traditional rules and practice of the court.

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33 Section 21A(1)(b), *Evidence Act 1971*.

34 Project No. 87, April 1991.

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- 79 A Bill to implement the above recommendations is currently being drafted for the Western Australian Parliament.
- 80 Consistent with the approach taken in these other jurisdictions, the Commission recommends that the *Evidence Act* be amended to provide for the use of alternative arrangements where a court is satisfied that a complainant will otherwise suffer severe emotional trauma or be seriously disadvantaged as a witness. This option should be available in cases of sexual and non-sexual assault alike. The Commission undertakes to monitor the operation of this provision once it is in force.

### **Sexual history**

- 81 The proposed amendment of section 37A of the *Evidence Act* implements a recommendation contained in the *interim report*.<sup>35</sup> The effect of this amendment will be to require the prior approval of the court before a complainant can be cross-examined or evidence led concerning her prior sexual relations with the accused.

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35 See 40-41.

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## 5. CONCLUSION

82 The primary focus of this report has been on the substantive law of rape and indecent assault. The Commission has proposed that the *Crimes Act 1958* be amended to:

- define the elements of the offences of 'rape' and 'indecent assault'
- define 'lack of consent'
- require that, in cases where consent is a relevant issue, juries be directed about the weight they should give certain evidence.

83 If adopted, these amendments will, for the first time in Victoria, provide a clear and comprehensive legislative statement of what the criminal law regards as unacceptable sexual conduct. They will also resolve a number of uncertainties which have arisen in relation to the present law.

84 The report has also recommended further ways of reducing the trauma experienced by victims in sexual assault court proceedings. These involve:

- allowing the use of alternative arrangements for giving evidence (such as closed-circuit television) where a court is satisfied that a complainant would suffer severe trauma if she or he had to give evidence by normal means
- abolishing the separate 'aggravating circumstances' offences and thereby substantially reducing trial length and the time taken to cross-examine complainants.

85 These measures, in conjunction with the large number of recommendations contained in the Commission's *interim report*, should

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significantly improve the treatment of sexual assault victims by the criminal justice system.

- 86 Not everyone will be satisfied with all of the Commission's recommendations. Some will say that it should have gone further. But the Commission has the responsibility of making sure that its proposals do not put at risk basic principles of criminal justice - such as the presumption of innocence. To do otherwise would be contrary to the long-term interests of the community. Moreover, it would not address the basic problems which are faced by victims of sexual assault. The Commission believes that the draft legislation attached to this report should be enacted and carefully monitored over a substantial period before any further changes are contemplated to the law relating to rape and indecent assault.



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## **APPENDIX**

### **DRAFT CRIMES (RAPE) BILL**

The Parliament of Victoria enacts as follows:

#### **1. Purpose**

The purpose of this Act is to reform the law relating to rape and indecent assault in order to:

- clarify the concept of consent
- reaffirm the fundamental right of a person not to engage in sexual activity
- give greater protection to complainants in court proceedings.

#### **2. Rape and Indecent Assault**

Substitute the following Subdivisions for Subdivisions (8) and (8A) of Division 1 of Part I of the *Crimes Act* 1958:

##### **"(8) Sexual Offences (definitions)**

##### **36. Definitions**

(1) In Subdivisions (8A) to (8G) —

‘De facto spouse’ means a person who is living with a person of the opposite sex as if they were married although they are not.

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**'Sexual penetration' means —**

- (a) the introduction (to any extent) by a person of a penis into the vagina, anus or mouth of another person; or
- (b) the introduction (to any extent) by a person of an object or a part of the body (other than the penis) into the vagina or anus of another person, other than in the course of a medical or hygienic procedure carried out in good faith.

**'Vagina' includes a surgically constructed vagina.**

- (2) Both the person who sexually penetrates another person and that other person are, for the purposes of Subdivisions (8B) to (8E), taking part in an act of sexual penetration.

### **(8A) Rape and Indecent Assault**

#### **37. Meaning of sexual act**

In this Subdivision 'sexual act' means —

- (a) a physical act which, if the other elements of the offence are proved, constitutes rape;
- (b) a physical act which, if the other elements of the offence are proved, constitutes indecent assault.

#### **38. Rape**

- (1) A person must not commit rape.

Penalty: Level 2 imprisonment.

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(2) A person commits rape if —

- (a) he or she intentionally sexually penetrates another person without that person's consent while being aware that the person is not consenting or might not be consenting;  
or
- (b) after sexual penetration he or she does not withdraw from a person who is not consenting on becoming aware that the person is not consenting or might not be consenting.

**39. Indecent assault**

(1) A person must not commit indecent assault.

Penalty: Level 5 imprisonment.

(2) A person commits indecent assault if he or she assaults another person in indecent circumstances while being aware that the person is not consenting or might not be consenting.

**40. Meaning of consent**

A sexual act with another person takes place without that person's consent if she or he does not freely agree to it. Circumstances in which a person does not freely agree include the following:

- (a) the person submits because of force or the fear of force to that person or someone else;
- (b) the person submits because of the fear of harm of any type to that person or someone else;

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- (c) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;
  - (d) the person is mistaken about the sexual nature of the act or the identity of the person;
  - (e) the person mistakenly believes, because of a false representation, that the act is for medical or hygienic purposes;
  - (f) the person is incapable of understanding the sexual nature of the act;
  - (g) the person submits because she or he is unlawfully detained.

**41. Jury directions on consent**

In a relevant case the judge must direct the jury that —

- (a) the fact that the person did not say or do anything to indicate free agreement to a sexual act is normally enough to show that the act took place without that person's free agreement;
- (b) a person is not to be regarded as having freely agreed to a sexual act just because
  - (i) she or he did not protest or physically resist; or
  - (ii) she or he did not sustain physical injury; or
  - (iii) on that or an earlier occasion, she or he freely agreed to engage in another

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sexual act (whether or not of the same type) with that person, or a sexual act with another person;

- (c) in considering whether the accused was aware that the other person was consenting to the sexual act, it should take into account whether the accused's alleged belief was reasonable in all the relevant circumstances."

### **3. Rules of evidence**

In section 37A(1) of the *Evidence Act 1958* [which deals with sexual history evidence] —

- (a) in Rule (2)(a) omit "other than with the accused";
- (b) in Rule (2)(b) omit "other than with the accused";
- (c) in Rule (4) omit "other than with the accused".

### **4. Alternative arrangements for giving evidence**

In section 37C of the *Evidence Act 1958*, for sub-section (2) substitute —

"(2) The court may, of its own motion or on the application of a party to the proceeding, direct that alternative arrangements be made for the giving of evidence by a witness if the court is satisfied —

- (a) that the witness is a person with impaired mental functioning or under the age of 18; or
- (b) that, without alternative arrangements being made, the witness is likely in giving evidence

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- (i) to suffer severe emotional trauma; or
  - (ii) to be so intimidated or stressed as to be severely disadvantaged as a witness."

## **5. Abolition of common law rape**

The common law offence of rape is abolished.

## **6. Transitional provisions**

- (1) The abolition of the common law offence of rape (section 5) does not apply to an offence that is alleged to have taken place before the commencement of this Act.
- (2) The amendment of sections 40 and 41 of the *Crimes Act 1958* by section 2 of this Act, and all the amendments made by section 3 of this Act, apply to proceedings that occur after the commencement of this Act regardless of when the alleged offence occurred.
- (3) The other amendments of the *Crimes Act 1958* made by section 2 of this Act apply only to offences alleged to have been committed after the commencement of this Act.
- (4) If the offence is alleged to have occurred between two dates and the Act commences on a date between those two dates, the offence is alleged to have been committed before the commencement date.

## **7. Consequential amendments**

The Acts listed in the Schedule are amended as set out in the Schedule.

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## **8. Commencement**

This Act comes into operation on a day to be proclaimed.

## **SCHEDULE**

### **Consequential Amendments**

#### **1. *Crimes Act 1958***

1.1 In section 359A(1)(a), for '40, 41, 42 (if the complainant was under the age of 16 at the time of the alleged offence), 43' substitute '38, 39'.

1.2 In section 425(1)(b) for '42' substitute '39'.

1.3 Section 425(2) is repealed.

#### **2. *Magistrates' Court Act 1989***

2.1 In item 8 of Schedule 4, for '42' substitute '39'.

2.2 In clause 15(8) of Schedule 5, for '40, 41, 42 (if the complainant was under the age of 16 at the time of the alleged offence), 43' substitute '38, 39'.

#### **3. *Sentencing Act 1991***

3.1 Items 1, 1A, 2 and 3 in Schedule 3 are repealed.