

PART VIII – SEXUAL OFFENCES

I Introduction

A History and Structure

1 Anachronisms of the common law

Prior to 1991, legal prohibitions relating to sexual offences in Victoria were governed by the common law. However, this legal framework was widely agreed to be unsatisfactory, embodying several questionable presumptions about the nature of sexual misconduct:

- It was impossible for a spouse to be raped by her husband at common law, because marriage was seen as a continuing and 'permanent' form of consent
- No child under the age of 14 years could commit common law rape
- There existed a presumption that the victim consented (if consent is an element of the offence, the prosecution bears the onus of proving every element to the required standard)
- Traditionally, the enquiry's focus was the state of mind of the accused (cf current regime, where the victim's mental state is also important)
- The original actus reus was simply penetration without consent (cf current regime, which imports an additional standard of recklessness as to the possibility of consent)

Various evidentiary rules also governed the prosecution of offenders:

- The victim's sexual history was frequently used to discredit their claim that they did not consent to the accused's penetration

2 Recent legislative changes

Since 1991, sexual offences have been legislatively defined by Subdivision 8 of the *Crimes Act 1958* (Vic). The previous common law definitions of rape and indecent assault have been abolished and replaced with statutory offences, which separated rape from indecent assault and reformulated their legal definition:

- Sexual penetration without consent now forms the basis for the offence of rape
- Performance of non-penetrative sexual acts without consent now forms the basis for the offence of indecent assault
- Sexual relationships with persons of a particular status, regardless of consent, forms the basis of the various status offences

This division defines several sexual offences:

- Rape
- Indecent assault
- Sexual offences against children and people with impaired mental functioning
- Miscellaneous definitions (eg, bestiality, female genital mutilation, etc)
- Regulatory offences (eg, prostitution)

B *Evaluative Criteria*

The commission of these offences (and the seriousness of the resulting penalty) is determined by reference to a relatively small number of criteria:

- Sexual conduct
 - An objective determinant of liability
 - Said to fall within three classes of sexual relation
 - Sexual penetration
 - Indecency
 - Sexual relationship
 - Relates to the sexual conduct of the accused
 - (Evidentially, the sexuality of the victim is often on trial)
- Mental state
 - Primarily that of the accused (ie, mens rea)
 - However, exceptionally, the definitions of the sexual offences also require legal examination of the victim's mental state (via consent)
- Standard of consent
 - Reflective of the current approach generally
 - Address both the victim's lack of consent and the accused's knowledge of it
 - Can arise as a positive requirement (lack of consent), a refutable presumption (that consent was given) and excluded as irrelevant (in status offences)
- Status
 - Mainly relates to the status of the victim (eg, age or marital status)
 - May occasionally refer to the accused (eg, where they are in a supervisory or familial relation with the victim)

C *Relevant Offences*

- **Rape:** penetrative sexual acts without consent
 - In NSW, called 'sexual assault'
 - In ACT and NT called 'sexual intercourse without consent'
- **Indecent assault:** still based on a sexual act performed without consent, but does not involve actual *penetration*
- **Status offences:** sexual offences defined solely by the commission of sexual acts with persons of particular status – children and the intellectually impaired

II **Rape**

A *Basic Definition*

In order for the accused to be found guilty in Victoria of the crime of rape, the prosecution must prove beyond reasonable doubt that:

- The accused *sexually penetrated* the victim; and

- The victim did *not consent* to the sexual penetration; and
- Either:
 - The accused *knew* that the victim *was not* consenting; or
 - The accused *knew* that the victim *might not be* consenting.

s 38(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.

Penalty: 25 years maximum.

Such a definition makes available to an accused the following lines of defence:

- Denial of contact with the victim
 - Eg, mistaken identity: 'I wasn't at the scene of the crime'
 - This line of defence has become harder with the increasing admissibility of DNA evidence
- Admission of some contact but denial of sexual penetration
 - Could be a denial of any sexual contact at all or merely a denial of sexual penetration
 - If the accused admits some sexual contact but not sexual penetration, then the admission often results in a charge of indecent assault
- Admission of sexual penetration but argument that the victim was consenting
 - Eg, by casting doubt on victim's claims: 'she is making it up, or, worse, lying'
 - Often relies on the incorrect assumption that it is easy to make allegations of rape (statistics refute the factual accuracy of this assumption)
- Admission of sexual penetration and that the victim was not consenting but argument that, *at the time of penetration*, the accused honestly but mistakenly believed that the victim was consenting
 - Eg, by adducing evidence of intoxication or incapacity so as to render the resulting belief more believable: 'I thought she was consenting'
 - Need not be reasonable, but must be *actually* held

Since its introduction in November 2000, the *Crimes Act* also defines 'male rape' as follows:

s 38:

(3) A person (the offender) also commits rape if he or she compels a *male* person –

- (a) to *sexually penetrate* the offender or another person with his penis, irrespective of

<p>whether the person being sexually penetrated consents to the act; or</p> <p>(b) who has sexually penetrated the offender or another person with his penis, not to withdraw his penis from the offender or that other person, irrespective of whether the person who has been sexually penetrated consents to the act.</p> <p>(4) For the purposes of sub-section (3), a person compels a male person (the victim) to engage in a sexual act if the person compels the victim (by force or otherwise) to engage in that act –</p> <p>(a) without the victim's <i>consent</i>; <u>and</u></p> <p>(b) while being aware that the victim <i>is not consenting or might not be consenting</i>.</p>
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(For example, in *R v Portias*, a male masseur performed fellatio on a [male] client. He was subsequently convicted of rape.)

Sub-sections (3) and (4) embody a concern with the use of force (both physical and otherwise).

The prototypical case involves three people: the accused, a person who is compelled to penetrate, and a person who is penetrated. This may be contrasted with the s 38(2) definition of rape, which involves only two people (the perpetrator and the person penetrated).

B Elements

Section 38(2) defines and prohibits the crime of rape. It draws upon collateral definitions in ss 35 (defining sexual penetration), 36 (defining consent) and 37 (jury directions). The practical operation of these sections is also determined by a the various evidentiary rules regulating the relevance and admissibility of evidence in sexual assault trials.

Many commentators have remarked that, in addition to the explicit elements of the crime of rape, further, implicit, elements operate to 'filter out' accusations of rape 'at every stage of the criminal justice system'. The extent to which this occurs is said to be far greater than in any other crime.

Thus, the legal meanings of s 38's definitional and evidential rules are determined by cultural and structural practices quite apart from the legislative scheme itself.

Actus Reus

- "sexually penetrates another person"
- "without that person's consent"

Mens Rea

- "intentionally"
- "while being aware that the person is not consenting or might not be consenting"

These requirements are now examined in turn.

C 'Sexually Penetrates Another Person'

1 Definition

Sexual penetration extends beyond vaginal penetration by a penis, and does not require the emission of semen:

s 35(1):

'sexual penetration' means –

- (a) the introduction (to any extent) by a person of his penis into the vagina, anus, or mouth of another person, whether or not there is emission of semen; or
- (b) the introduction (to any extent) by a person of an object or a part of his or her body (other than the penis) into the vagina or anus of another person, other than in the course of a procedure carried out in good faith for medical or hygienic purposes;

The definition of 'vagina' is similarly inclusive:

s 35(1):

'vagina' means –

- (a) the external genitalia; and
- (b) a surgically constructed vagina.

The wide scope of these definitions prevents arguments about the extent to which a victim was penetrated.

2 Applicability

These definitions of sexual penetration are relevant to several offences besides rape. Sections 45-6, 48, 54, 56, 58 and 60 (sexual offences against children), and ss 51-2 (sexually offences against intellectually impaired people) also make reference to 'sexual penetration', to which the above sections are applicable.

3 Hierarchy of culpability

Issue: are all forms of sexual penetration equally culpable?

The Act sets out several categories of sexual penetration: penile penetration, oral rape, digital penetration, etc. Commonly, it is thought that penile penetration is more serious than digital and oral penetration.

Ibbs v R (1987) HCA:Facts:

- A was charged with rape after failing to withdraw from sexual intercourse with V despite V requesting him to do so
- The trial judge imposed the maximum sentence [???

Issue:

- Was the sentence manifestly excessive?

Reasoning:

- Just because there are many forms of penetration which each amount to rape, this does not mean that they are all of equal heinousness
- Seriousness depends on the facts of each case
- All rapes are not the same

Decision:

- On the facts, the sentence was 'manifestly excessive' because here the factual scenario was not of the most heinous kind
- Failing to withdraw when asked is less serious than if no consent was given from the outset

R v Da Silva (1995) NSW CCA, Unreported agreed:

- Grove J: 'It is submitted that an act of digital penetration is less serious than an offence of, for example, penile penetration. Generally I would agree that this is likely to be so.'
- There thus exist other grades of moral (and corresponding legal) culpability
- However, it was noted that there exists some difficulty in determining the exact gradations of sentence

Recently, however, several appellate courts have attempted to eschew this 'hierarchy of seriousness'. See, for example, Ormiston JA in *R v Lomax (Kenneth Edward)* [1998] 1 VR 551 (especially at 559).

R v Lomax (Kenneth Edward) (1998) VSCA:Issue:

- Should a digital penetration attract a lesser sentence than a penile penetration?

Reasoning:

- Per Ormiston JA at 559:
 - 'Each category of penetration cannot necessarily be placed equally in the scale...'
 - 'The legislature now views this kind of penetration [digital] as very serious, so serious that what was thought sufficient to justify a 10 year maximum penalty is now viewed as justifying a maximum penalty twice as long...'
 - 'This form of penetration has now to be considered as meriting condign punishment, unless there be other exceptional factors.'

Decision:

- Prima facie, digital penetration is just as serious as penile or other forms of sexual penetration.

This case was later described by Tadgell J in *Gysberts* [1998] VSCA 7, [5] in the following terms:

this Court has characterised acts of digital penetration of a sexual nature as serious, notwithstanding that they are obviously different in character and in some respects carried less risk of physical injury and infection, than other means of sexual penetration.

D 'Without That Person's Consent'

In determining whether a legal rape has occurred, two stages of enquiry occur. The first relates to the mentality of the victim; the second stage relates to the mentality of the accused.

In relation to the victim's mental state, the question is asked: 'as a matter of her actual conduct, did the victim consent or not consent to the sexual penetration?' If she did not, then at the second stage, the question arises: 'did the accused know that the victim was not or might not have been consenting?'

Section 36 sets out the statutory definition of consent. It may be contrasted with the previous common law definition, 'against her will'. Today, consent is defined negatively:

s 36:

For the purposes of Subdivisions (8A) to (8D) "consent" means *free agreement*.

Circumstances in which a person does not freely agree to an act **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;
- (c) the person submits because she or he is unlawfully detained;
- (d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;
- (e) the person is incapable of understanding the sexual nature of the act;
- (f) the person is mistaken about the sexual nature of the act or the identity of the person;
and
- (g) the person mistakenly believes that the act is for medical or hygienic purposes.

These circumstances negating apparent consent may be loosely grouped into a number of categories. The categories are non-exhaustive, meaning that it may be possible to argue for the creation of a new category or the widening of one of the elements listed in s 36 in the appropriate circumstances.

1 *Force and harm (actual and threatened) by the accused (s 36 (a), (b), (c), s 37 (1)(b))*

Here, it is the violence of circumstances surrounding the act of penetration that is said to negate the free agreement of the victim.

s 36:

Circumstances in which a person does not freely agree to an act 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;
- (c) the person submits because she or he is unlawfully detained;

Some commentators have remarked that such a concern with violence and harm is predicated upon the stereotypical image of rape as a violent crime: 'if it is not violent then she must have wanted it' is, arguably, what is implied by s 36(a)-(c). However, s 37(1)(b)(i), (ii) somewhat negate such a stereotype.

If any component of the actus reus cannot be established to the requisite degree, some of the following alternative charges could be relevant, and perhaps more successful:

- Indecent assault (s 39)
- Procuring sexual penetration by threat or fraud (s 57)
- Abduction (ss 55-6)

It can be difficult to distinguish consent from mere acquiescence. This is a task for the jury to determine, 'applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of the case' (*R v Olugboja*).

***R v Olugboja* (1981) UK CA:**

Facts:

- A is a Nigerian staying at Oxford
- A drives J, a 16 year old girl, and her friend, S, to his bungalow, where A has intercourse with J
- J later complains to the police, her mother, and a nearby hospital
- A claims J consented

Issue:

- Did J consent?

Reasoning:

- Consent is a question of fact and common sense
- It should be asked whether the victim's will was overborne
- On appeal, A argues that the trial judge misdirected the jury because consent is only vitiated by a threat of violence – not duress or fraud
 - Appeal dismissed
 - The extent of the range of factors vitiating consent is uncertain, and is an area left to be defined by the jury
 - No error of law; the conviction stands
- 'There is a difference between consent and submission; every consent involves submission, but it by no means follows that mere submission involves consent.'

Decision:

- The grey line between consent and mere acquiescence is for the jury to determine, 'applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of the case.'
- Appeal dismissed

Question of Law (No 1 of 1993) SA CCA:Facts:

- A man is accused of raping his wife
- The trial judge, Bolland J, says that rougher than usual treatment may be used to induce consent

Issue:

- Is submission, where it is induced by violence, valid consent?

Reasoning:

- Submission is not the same as consent
- Reasonable persuasion is an acceptable method to induce consent, but 'rougher handling' is *not* a valid persuasive technique
 - Any consent thus obtained would be predicated upon a threat (or the actual existence) of force and therefore be vitiated
- Perry J:
 - '...the difference between submission and consent can be a fine line.... It is for juries, properly instructed, to deal with the matter.'
 - Consent is not automatically invalidated by violence [???]; it depends on the circumstances, and is ultimately a question of fact for the jury
 - Submission is not consent: "... consent must be freely given, and acquiescence to intercourse by reason of any threat or duress may properly be regarded as negating consent for the purposes of the law of rape."

Decision:

- Appeal allowed, but the acquittal stands

The following hypothetical scenario is based on *Brewer's* case.

Hypothetical:

Facts:

- X has just finished articles. She is being interviewed about staying on as a first year solicitor.
- Times are very tough and firms are cutting staff all over Melbourne.
- X says that she really needs the job, and that no one else is hiring first year solicitors.
- The interviewing partner starts asking a lot of questions about her personal life and relationships, and eventually tells her that there is a lot of competition for the job, but that if she takes her top off, he will probably give it to her
- She refuses at first, but he then goes and locks the door
- She is crying now, but takes her top off
- He then tells her that she can have the job if she gives him oral sex. She does so.

Issue:

- Did X consent?

Reasoning:

- X's apparent consent may possibly be vitiated by the following factors:
 - Unlawful detainment (depending on capacity of interviewer to detain her)
 - Threat of harm
 - Economic
 - Definite loss? She is already employed
 - Potential gain? Job not hers to begin with, so not necessarily a harm
- Ultimately a question of fact for the jury to decide

Decision:

- Consent likely to be vitiated

McKinnon argues that consent is a socially-constructed power exchange, and that juries should play a role in regulating the exchange.

Consent must be given verbally or by conduct, and must amount to the granting of free and conscious permission (*R v Wilkes & Briant*).

Some specific comments on s 36:

- (a) See *R v O*: where the victim is younger or weaker this is more likely to vitiate consent
- (b) A friend or family member besides the victim could also be threatened such as to vitiate consent
- (c) Thus if, in *R v Olugboja*, J was unlawfully detained in A's bungalow, any consent there given would now be vitiated

2 Incapacity of the victim (s 36 (d), (e))

The victim must possess the capacity to consent. If a victim is incapable of consenting, *the question* whether she did actually consent must be answered in the negative.

s 36:

Circumstances in which a person does not freely agree to an act include the following –

- (d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;
- (e) the person is incapable of understanding the sexual nature of the act;

Causes of incapacity specified in s 36 are sleep, unconsciousness, and intoxication (see, eg, *Galliene*). However, these sections do not prevent defence counsel attempting to use intoxication to demonstrate the presence of consent (see, eg, *Saragozza*).

However, *O'Connor* suggests that s 36(d) will be interpreted narrowly: the victim really needs to be completely incapable of consenting, as where, for example, they are unable to speak, move, or interact with the accused in any way.

If any component of the actus reus cannot be established to the requisite degree, some of the following alternative charges could be relevant, and perhaps more successful:

- Administering a drug in order to lower resistance (s 53)
 - *O'Connor*: 'candy is dandy but liquor is quicker'

In relation to sub-section (e), it must be established that the victim does not have sufficient knowledge or understanding of either:

- The physical fact of penetration; or
- The sexual nature of the act.

Such a standard of understanding is not especially high – basic comprehension will suffice (*R v Morgan*).

***R v Morgan* (1970) Vic Full SC:**

Facts:

- A engaged in intercourse with V, who was disabled
- Crown argued that V lacked the mental capacity to consent
- The accused convicted at trial, but appealed on the basis that the jury was misdirected about the meaning of s 36(e)

Issue:

- Was V's consent vitiated by s 36(e)?

Reasoning:

- Winneke J:
 - The trial J's directions, though correct in tenor, are too prescriptive and go well beyond requiring an understanding of the act of *sexual penetration* that forms the physical actus reus of rape
 - The test for incapacity will only be made out if the Crown show that V did not have sufficient knowledge or understanding to comprehend:
 - (a) that what is proposed to be done is the physical fact of penetration of her body by the male organ **or**, if that is not proved;
 - (b) that the act of penetration proposed is one of sexual connection as distinct from an act of a totally different character.
 - The question is thus whether V could understand the sexual, social, and moral significance of the act – its nature
 - (c) A proper and mature judgment is not required
 - (d) Just a capacity to understand the nature itself
 - (e) This is a lower standard than that proposed by the trial judge – V does not need a complete understanding
- [A prosecution under s 51 {a status offence} may have been more successful; only applies to a person providing care or medical services to the mentally impaired person]

Decision:

- Though a lower standard of understanding is required than that outlined by the trial judge [???], the victim still lacked this capacity and the appeal is dismissed

3 *Mistaken belief of the victim* (s 36 (f), (g))

Though exceptions to previous formulations of consent focused on the fraud of the accused, s 36 is centred on the state of mind of the victim; specifically, their mistaken beliefs.

In order to negate their consent, the victim's mental state must be characterised by a mistaken belief as to either the sexual nature of the act or to the identity of the person performing it.

s 36:

Circumstances in which a person does not freely agree to an act include the following –

- (f) the person is mistaken about the sexual nature of the act or the identity of the person; and
- (g) the person mistakenly believes that the act is for medical or hygienic purposes.

A mistaken belief as to the identity of a person (eg, where the victim mistook the accused for her husband, and the resulting sex for marital sex) will not necessarily vitiate consent; there must be a mistake as to the nature of the act itself or the identity of the person with whom it is done (*Papadimitropoulos*). The outcome will often depend on the extent to which the judiciary is willing to logically separate 'consent to fornication' from 'consent to marital intercourse'.

R v Papadimitropoulos (1958) HCA:Facts:

- A meets the victim, Dina Karnezi, soon after she arrives in Melbourne from Greece; she speaks no English
- A asks V to marry him four days after they meet; they go to the marriage registry and sign some papers
- They go to a hotel and have sex for a couple of days, after which A disappears to Sydney
- However, these papers were only preliminary to marriage
- A says that V knew that they weren't married; V says she thought they were because A had told her (and others) that they were
- Trial judge: fraudulent marriage could vitiate consent
- Appeal dismissed 2:1

Issue:

- Did Karnezi consent to sexual intercourse with the accused despite mistakenly believing that the man with whom she was engaging in the activity was her lawfully-wedded husband?

Reasoning:

- Rape is penetration of a woman without her consent, and it is therefore her consent to that act of sexual penetration by the person in question that is (often) the central question
 - *“Such a consent demands a perception as to what is about to take place, as to the **identity** of the man and the **character** of what he is doing. But once the consent is comprehending and actual, the inducing causes cannot destroy its reality and leave the man guilty of rape.”*
 - ‘Identity’ and ‘character’ are the components of the act to which V is alleged to have consented
- Because consent embodies an understanding of the act itself and the person with whom it is being done, mistakes about the nature of the act may take two forms:
 - Mistakes about the nature of the sex itself
 - Deception about the sexual nature of the act will negate consent to it
 - Consent induced as to a matter ‘antecedent or collateral’ to the act
 - Will not negate consent
- The appeal court classed the mistake as falling into the first category:
 - V consented to ‘marital sex’; instead, she received ‘fornication’ (extra-marital)
 - The act was of a fundamentally different moral character
 - The normative component to this decision is somewhat more questionable in a contemporary environment of religious diversity, in which the moral (and certainly not the legal) quality of sex outside marriage is not necessarily substantially different from that within marriage
- Fraudulent conduct inducing consent will not form the basis of a charge of rape, however ‘wicked and heartless’, unless it causes a fundamental mistake as to identity or as to the character of what is being done

Decision:

- Here, no mistake was made about the nature of the act itself or the identity of the person with whom it was done
- V’s belief in the existence of a legal marriage is a matter ‘antecedent or collateral’ to the intercourse itself, and will not vitiate her valid consent

- Appeal allowed; conviction quashed

Similarly, in *Saunders v Williams* (1835), no rape occurred because the consent of the victim was held not to be vitiated, despite mistakenly thinking the man with whom she was having sex was actually her husband. This approach was followed in *Jackson v R*. In 1885, legislation was introduced such as to vitiate consent where consent is obtained by fraud or mistake.

Today, fraud that induces a mistake on the part of the victim will vitiate consent and subsequent intercourse may be rape. However, where the victim consents to an act of a specific sexual character with the particular accused in return for payment, this will not amount to rape, despite being fraudulent (*R v Linekar*).

***R v Linekar* (1995) UK:**

Facts:

- A arranged to have sex with a prostitute, the victim, for 25 pounds
- He didn't have any money on him and fled without paying
- A was convicted of rape at trial

Issue:

- Was the victim's consent induced by A's fraudulent promise to pay?

Reasoning:

- If fraud induces a mistake as to the nature of the act or the identity of the person doing the act, this will vitiate consent and there may be rape
- But inducing someone to have sex in return from a promise she will be paid does not negate her consent to an act of *sexual character* with that *particular man*, and so this cannot be rape, despite fraud by A
- This is because there was no mistake made as to the sexual character of the act or the identity of the recipient

Decision:

- Conviction quashed

The so-called 'medical treatment' cases are authority for the statement that where the accused fraudulently induces a mistake on the part of the victim as to the 'character' or purpose for the act of penetration, any consent given by the victim will be vitiated and a rape may occur – despite the victim's apparent consent.

This is because a mistake is made by the victim as to the character of the act – they believe it to be medical or hygienic, when in fact it is sexual. Some examples follow.

***R v Williams* (1923) UK:**

Facts:

- Choirmaster explains to a student that he must 'open up another passage' to improve her breathing

Issue:

- Did the student consent to intercourse?

Decision:

- A rape occurred

R v Flattery (1877) UK:Facts:

- V was taken by her mother to a man who pretended to be a doctor
- She was suffering from fits
- A said that 'nature's string wanted breaking' and had intercourse with her, both V and her mother believing they were consenting to a surgical operation

Decision:

- Rape occurred

Mobilio logically follows on from the reasoning in *Papadimitropoulos*. It deals with a person who consented to sexual penetration while believing the penetration was for medical treatment. *Mobilio* has since been the subject of considerable criticism, and has been overruled by statute.

R v Mobilio (1991) Vic SC:Facts:

- A was a radiographer who on three occasions inserted an ultrasound transducer into the vagina of three young women
- Each woman had consented to medical treatment by him, including insertion of the ultrasound transducer (consenting expressly or implicitly by conduct)
- At trial: convicted of rape

Issue:

- Did the victims consent to the penetration?

Reasoning:

- The victims all consented to the act, even though they thought it was for medical reasons rather than for his sexual gratification
- Earlier cases distinguished because it was a physical act that was understood here

Decision:

- Convictions quashed

This decision has since been overruled by statute in all jurisdictions. In Victoria, s 36 (g) has the effect of specifically making fraud a factor vitiating consent to penetration of an apparently

medical or hygienic nature. That sub-section overrules the ruling in *Mobilio* to the extent that it applies to medical and hygienic treatment.

4 Comparative analysis

The Victorian definition of consent is substantially similar to that of other jurisdictions:

- Tasmanian definition of consent (*Tasmanian Criminal Code 1924 (Tas) s 2A*):
 - ‘...a reference to consent means a reference to a consent which is *freely given* by a *rational and sober person* so situated as to be *able to form a rational opinion* upon the matter to which the consent is given.’
- Canadian definition of consent (*Canadian Criminal Code 273.1*):
 - ‘(1) “consent” means *the voluntary agreement of the complainant* to engage in the sexual activity in question
 - (2) No consent is obtained... where...
 - (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority.’

5 Consent and its withdrawal

The fact that consent was withdrawn only after the initial penetration is still indicative of there being a lack of consent (s 38(2)).

R v Ibbs (1987) HCA:

- Refusal to withdraw following initial consent is still rape, but the heinousness and resulting sentence will depend on the facts

Kaitemaki (1980):

- Refusal to withdraw following initial consent is still rape
- Common law restatement of s 38(2)

6 Directions to the jury

s 37:

(1) If relevant to the facts in issue in a proceeding the judge must direct the jury that –

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

With the exception of s 61 (delay), s 37 is the only statutory section in the *Crimes Act* that specifies directions to be given to the jury on a particular issue.

It is conventionally presumed that lack of consent must be evinced by some evidence of resistance. That is, that the victim should resist rather than passively submit to the rape. Section 37(1)(a) addresses the concern that such a requirement may only escalate the violence by explicitly stating that lack of resistance is sufficient indicates a lack of consent.

According to *Laz*, s 37(1) merely establishes a rebuttable presumption that, in the absence of other evidence, silence indicates the absence of consent. A judge cannot, thus, direct a jury that 'evidence that the woman did not say or do anything is evidence that she did not consent' (at 460). The words 'is normally enough' are said to indicate the presumptive nature of the sub-section. Were they intended to give rise to a strict rule of law, the word 'is' would have been used instead. It may therefore be possible for evidence to overturn the presumption such that silence may indicate consent to the penetration.

***R v Laz* (1998) Vic CA:**

Facts:

- The trial judge directed the jury as follows:
 - "Consent is a state of mind. It means free agreement. It may be evidenced by what she says and does or what she does not say or do. *Evidence that the woman did not say or do anything is evidence that she did not consent.*"

Issue:

- In light of s 37(1), was the jury misdirected by the trial judge?

Reasoning:

- The trial judge's directions were a 'radical departure' from the statutory guidelines
- Evidence of not saying or doing anything is not a conclusion of fact in itself; it is merely a piece of evidence to be weight up in light of all the circumstances
- As a factual matter, consent could occur without notice
- The trial judge was usurping the role of the jury by telling them what was ultimately a finding of fact

Decision:

- Appeal allowed [???

The Victorian Law Reform Commission, in a recent report on the law of sexual offences, concluded that the trial judge in *Paz* was, in fact, correct. Consequently, the VLRC recommended that the mandatory jury direction under s 37(1) be changed to read:

"The fact that a person did not say or do anything to indicate free agreement to *the particular sexual act at the time that the act occurred* is evidence that the act took place without that person's free agreement."

Contrast VLRC proposal with the current provision:

"The fact that a 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."

This would elevate what is presently a rebuttable presumption to an irrefutable rule of law that silence equates to non-consent.

Were the VLRC's proposal to be adopted, this would make blanket (ie, continuing) consent impossible, and instead require consent for each act of penetration. Such a requirement embodies the communicative model of consent, and is arguably more conducive to the accurate identification of the victim's mental state.

7 *Sexual history and consent*

Evidence of the sexual history of the victim was traditionally construed by defence counsel as being relevant to two issues:

- The *credibility* of the victim when she testified (the rather questionable presumption was urged upon the court that the greater the victim's promiscuity, the greater her propensity to lie); and
- The *legal issue* of whether or not the victim consented (more promiscuous victims are presumed to consent more readily to acts of intercourse).

Section 37(1)(b)(iii) ostensibly prevents evidence of sexual history and experience as being relevant to the legal issue of consent. Though such evidence may still be led, it can no longer be connected to the legal issue of consent.

8 *Other problems*

It is worth noting that consent is likely to be problematic irrespective of the definition of consent adopted by law, because of three difficulties:

- (i) Objectively articulating the victim's state of mind in the context of established trial and evidentiary procedures;
- (ii) Evaluating the influence of duress (no decision is ever made completely freely – the legal judgment to be made is how much significance to attribute to the determinative constraints placed upon a decision); and
- (iii) Drawing a line between refusal, reluctant acquiescence, and full consent.

E *'Intentionally'*

The mens rea of rape has two components. The prosecution must prove beyond reasonable doubt that the accused possessed both mental states:

- An attitude towards the act of sexual penetration (legally defined as an intention to sexually penetrate); and
- An attitude towards the victim's (lack of) consent (legally defined in terms of knowledge or awareness)

The mens rea is set out by s 38(2):

s 38:

- (2) The accused –
- (a) Intentionally sexually penetrated another person;
 - (b) While being aware that the person:
 - (i) Was not consenting; or
 - (ii) Might not be consenting.

The intention to sexually penetrate is rarely capable of dispute, since it is unlikely that it is possible to perform such an act accidentally or inadvertently.

F *'Knowledge That the Victim Was Not or Might Not Be Consenting'*

What must be proved, in addition to the intent to sexually penetrate, is either:

- (a) Knowledge that the victim *was not* consenting; or
- (b) Knowledge that the victim *might not be* consenting

This standard of knowledge or awareness is a *fully subjective* standard. Component (a) imports a standard of knowledge and (b) a standard of recklessness.

1 *The standard of recklessness*

Issue: does 'might not' be consenting invoke knowledge of a possibility or does it invoke the higher standard of knowledge of a probability?

The language of lawyers suggests that the standard being *used* is the lesser standard of possibility. It is generally agreed that the standard 'might not be consenting' is a lower standard of recklessness than is the standard in relation to murder. For rape, advertence by the Accused to the mere *possibility* of non-consent is sufficient for the mens rea to be satisfied (rather than advertence to the *probability* of death or grievous bodily harm in the case of reckless murder).

Lord Hailsham phrased the standard of recklessness in respect of consent in *Morgan* as intending to have sex 'willy nilly'.

2 *The degree of knowledge*

Issue: must the accused's belief in the victim's consent be reasonable?

The test for criminally negligent homicide was set out by the Full Victorian Supreme Court in *Nydam*:

***Nydam* (1977) Full Vic SC:**

Reasoning:

- ‘In order to establish manslaughter by *criminal negligence*, it is sufficient if the prosecution shows that the act which caused death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances that involved such a great falling short of the standard of care which a reasonable man would have exercised, and which involved such a high degree of risk that death or grievous bodily harm would follow, that the doing of the act merited criminal punishment.’

Decision:

- The rule is that, for the argument of defence counsel to be successful, the mistaken belief of the accused need only be honest; it need not be ‘honest and reasonable’
- In addition, when deciding whether the accused honestly believed that the victim was consenting, the jury must consider the reasonableness or unreasonableness of the belief
- See *Morgan and Saragozza* and s 37(c)

Pemble (1971) HCA:

Issue:

- What is the difference between the mens rea of reckless murder and that of manslaughter?

Reasoning:

- ‘To do an unjustifiable act causing death, knowing that it is likely [probable] to cause death or grievous bodily harm, is murder, whereas to do a careless act causing death, without any conscious acceptance of the risk which its doing involves, is manslaughter [if the negligence is of so high a degree as to show a disregard for life deserving of punishment...]’
- ‘The difference between murder and manslaughter is not to be found in the degree of carelessness exhibited; the critical difference relates to the state of mind with which the fatal act is done’
 - le, conscious advertence to risk (in the case of reckless murder) but only a criminally negligent failure to consider risks (in the case of negligent manslaughter)
 - Per Menzies J in *Pemble* (RY 336–7)

In the context of sexual offences, *DPP v Morgan* emphasises that liability for rape is predicated upon mens rea (and not strict liability or any objective standard other than the accused’s own mental state).

DPP v Morgan (1976) HL:

Facts:

- The basic facts were not in dispute: RY 237–8
- The trial judge directed the jury that, to be acquitted, each accused must have believed that the victim was consenting, or might have been consenting, and that this belief:
 - ‘...must be a reasonable belief; such a belief as a reasonable man would entertain if he applied his mind and thought about the matter. It is not enough for a defendant to rely upon a belief, even though he honestly held it, if it was completely fanciful.’

- The appellants claim that this direction was wrong in law, arguing that an honest belief is enough
 - They argue that the accused's belief does not also have to be *reasonable*
- The Court of Appeal referred a question of law to the House of Lords

Issue:

- 'Whether, in rape, the defendant can properly be convicted notwithstanding that he in fact believed that the woman consented *if such belief was not based on reasonable grounds.*'

Reasoning:

- Per Lord Hailsham:
 - '...to insist that a belief must also be reasonable to excuse it is to insist that either the accused is to be found guilty of intending to do that which in truth he did not intend to do, or that his state of mind, though innocent of evil intent, can convict him if it be honest but not rational.' This is incorrect at law
 - *Thus the Accused's belief in the Victim's consent need not be reasonable, so long as it is honestly held*
 - Reasonableness is relevant primarily to supporting a defence contention that the opinion was *in fact* held by the Accused
 - Thus, the more unreasonable the belief, the less likely the jury is to believe that it was actually held by A
 - However, if it is found to have been honestly held, such a belief in consent (however unreasonable on the face of it) will negate the mens rea for rape

Decision:

- Despite the misdirection, no miscarriage of justice occurred
- Convictions upheld

R v Saragozza (1984) Full Vic SC:Facts:

- V, a 21 year old, obtained a job working for A as a cleaner and meal preparer, two days each week
- On the second day, when she came to work he answered the door wearing only a towel
- He then drugged her and had sex with her while she was in a drugged state
- She remembered nothing after collapsing early in the evening
- A alleges that he gave her only some whiskey and orange juice, and that he thought she was consenting to sex

Issue:

- Was the jury improperly directed regarding the issue of consent?
- The trial judge directed as follows:
 - 'If you were satisfied that intercourse occurred... you will then have to consider whether she consented to this intercourse, or even if she did not, whether the accused believed that she was consenting. If that was his belief and he believed *reasonably* that in the circumstances she was consenting, well then, it would not be an act of rape on his part because he believed that he had her consent.'

Reasoning:

- Starke, Kaye and Brooking JJ:
 - 'Once it is accepted that it is an element of the crime of rape 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 that 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.'

- The Court endorsed the approach in *Morgan*, in which it was found that it was 'a matter of inexorable logic that a man who believed, reasonably or unreasonably, that he had consent was no rapist.'
 - Here: '... he who believes, reasonably or unreasonably, that he has consent commits no rape.'
 - 'A mistaken belief in consent need not be reasonable: the reasonableness of the belief bears only on its existence.'

Decision:

- However, the conviction is upheld; here, there was no miscarriage of justice
- The single word in the direction escaped the notice of judge, counsel, and, most likely, the jury
- If the judge had elaborated even only slightly further, the conviction would have had to have been quashed
- Thus, an unreasonable belief in consent by the accused may reduce the jury's likelihood of finding that the accused did, in fact, hold that belief, but it can still be exculpatory, if genuinely held

In summary, then, an accused's belief in the victim's consent need not be reasonable for it to exculpate him.

A prosecutor is likely to draw attention to unreasonableness, and use this to persuade the jury that the belief was not actually held. In this respect, the reasonableness of the accused's belief is not totally irrelevant; it is, however, irrelevant to legal (rather than factual) issues of mens rea.

3 Reasonableness and honest belief

However, s 37(1)(c) requires the judge to direct the jury that 'in considering the accused's alleged belief that the complainant was consenting to the sexual act, [the jury] must take into account whether that belief was reasonable in all the relevant circumstances.' This merely formalises what was said in *Saragoza* that the reasonableness of a belief is a relevant matter for the jury to consider when it decides whether that belief was, in fact, held.

In the Second Reading Speech to the Crimes (Rape) Bill 1991, the then Attorney-General explained the proposed section 37(c) as follows:

It must be emphasized that just because an accused says he believed the other person was consenting does not mean a jury has to believe him. If the claim is unreasonable, it may well not believe him. The Bill ensures that, in considering whether or not an alleged belief that the complainant was consenting was genuinely held, the jury will take into account whether the alleged belief was reasonable. The Bill requires the judge to direct the jury to this effect.

Section 37(c) does *not* require the claimed belief of the accused to be both honest and reasonable for it to be accepted by the jury. The section simply requires that, where a mistaken belief in consent argument is run by the accused, the judge must direct the jury to consider the evidence of reasonableness and unreasonableness of the belief when they are deciding the question of whether or not the accused did in fact honestly believe that the victim was consenting.

Reasonableness is relevant to the question, 'did the accused actually hold that belief at the time?', in that the more unreasonable the alleged belief, the less likely it is that the accused held it at the time of the intercourse.

The ultimate question that the jury must decide in respect of the mistaken belief is whether or not the mistaken belief actually existed in the particular case: 'did the accused hold the belief now claimed and hold it at the time of the alleged rape?'

4 *Inadvertence and wilful blindness*

Issue: what if the accused gives *no thought* to the question of consent?

To form the mens rea of rape in Victoria, the Accused must have given *conscious* thought to the question of the Victim's consent; mere inadvertence will not suffice.

The Accused must have been '*aware* that the woman was not consenting, or else *realised* that she might not be and determined to have intercourse with her whether she was consenting or not' (*R v Flannery and Prendergast* [1969] VR 31). Such an awareness is mandated by the entirely *subjective* mens rea of rape.

- *Flannery*: need conscious awareness of non-consent or the possibility of non-consent
- *R v Paul Ev Costa*: there is no such thing as culpable inadvertence; the accused *must* be aware that the victim was not or might not be consenting.

The correct way to define recklessness in the mens rea of rape is as follows: 'knowing she [the victim] might not be consenting' (*Ev Costa*).

***R v Paul Ev Costa* (1996) Vic CCA:**

Facts:

- As per VLRC case study (Frank and Genevieve); see AM 8.13
- V works at a massage parlour; she had only been working there for one week, when, after a dinner outing, she was given a lift back to the office by F, her boss (etc)

Issue:

- Was there a miscarriage of justice on the basis of the trial judge's inadequate directions to the jury?

Reasoning:

- Jury directions regarding reasonableness
 - 'The third element after considering the actus reus is that the accused must act with a guilty mind; they must have ... been aware that the complainant was not consenting or reckless thought she was ... You must ask: "was the belief reasonable in all the circumstances?"'
 - On appeal, this direction was held to be 'fundamentally wrong'
 - The belief does not have to be reasonable – just *honestly* held

- Reasonableness can be a factual matter going towards whether the defendant did, in fact, genuinely hold such a belief
- However, it is not relevant to mens rea in the sense of 'having to have a reasonable belief'
- The definition of 'recklessness' in the context of rape
 - Trial judge: a lower standard is necessary; only need to the possibility of non-consent
 - Here, there is no need to decide or precisely define reckless; it is better to use the language of the statute: 'might not be consenting'
 - This is not a kind of negligence, so it is perhaps better to say: 'knowing she [the victim] might not be consenting' (*Ev Costa*)
- Jury directions regarding intoxication
 - The defence argued that, because F was drunk, he honestly believed in consent
 - Also possibly involuntary at the level of actus reus
 - Ie, the defendant became so drunk as to not be acting with volition (unlikely)
 - The prosecution argued that the victim cannot consent because *she* was also intoxicated
 - They point to V's lack of memory of the incident, and draw a contrast with what they claim is the sober mind of the defendant, who proceeds with the intercourse regardless of V's consent
 - On appeal: the trial judge only directed on the basis of the defence's claim that the defendant was not acting voluntarily – he missed the other lines of argument
- Sentence at trial
 - The trial judge sentenced the offender to 4 years in jail
 - But: 11 offences had been previously committed by the defendant, all while on parole
 - Evidence pertaining to the defendant's propensity to commit crimes is excluded from the trial proceedings, unless the crimes are similar in nature to the factual evidence being raised

Decision:

- Yes, there was a miscarriage of justice
- Two misdirections have been identified, and a new trial is necessary
 - Cf *Saragozza*: mere mention of the word 'reasonable' – *without elaboration* – was not grounds for a retrial

In NSW, 'recklessness' also includes 'indifference' as to whether or not V consented, rather than requiring actual advertence to this possibility. The argument for such a broad conception of recklessness was that to criminalise conscious advertence but ignore the inadvertence of consent would be unacceptable (see *Kitchener*). Instead, reckless mens rea is said to include culpable inadvertence.

See, for example:

- *R v Kitchener* (1993) NSW C of CA (WW 123)
- *R v Tolmie* (1995) NSW C of CA (following *Kitchener*).

III **Indecent Assault**

A *History and Structure*

'Indecency' emerged as a category of criminal liability throughout the early 19th century. As a legal description, it evaluates sexual conduct by reference to the legal institution's construction of sexual normality, penalising by way of 'indecent assault' and 'gross indecency between men' conduct deemed to fall outside established boundaries of acceptability. Such 'perverse' conduct is the subject of what is now s 39 in the *Crimes Act 1958* (Vic), which supplants the old common law offences with a new structure of liability.

B *Basic Definition*

Section 39 creates the crime of indecent assault. It is prohibited in s 39(1) and defined in s 39(2). The crime has three elements to be proved beyond reasonable doubt by the prosecution:

- The accused assaulted the victim (the element of assault; actus reus)
- The assault took place in indecent circumstances (the element of indecency; actus reus)
- The accused knew that the victim was not or might not be consenting to the conduct of the accused (the element of knowledge of consent; mens rea).

s 39:

- (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*.

Penalty: 10 years maximum.

C *Actus Reus*

1 *Assault*

The prosecution is required to prove all the elements of the crime of common assault:

An assault is the creation of an apprehension of an imminent or immediate application of force to another person (without their consent), or the actual application of force to another person (without their consent).

Indecent assault requires the accused to have actually touched another person's body. These elements will typically be satisfied by an intentional and non-consensual touching.

The assault must satisfy two requirements:

- The conduct which constitutes the assault must be intentional
- The touching must not have been consented to by the victim
 - Consent is a defence to common assault and, therefore, to indecent assault
 - See *R v Shore* (1893) 19 VLR 45

There is an *evidentiary burden* placed on the accused to adduce evidence of circumstances which negate the elements of the alleged assault (eg, that no touching occurred, that it was unintentional, or that the victim consented to it).

From a prosecutorial perspective, if the accused engages in conduct which does not involve penetration but is still indecent and threatening, then a prosecution for indecent assault is more likely to be successful than one for rape.

2 Indecency

(a) Circumstances of indecency

Issue: must the *act* of touching itself be indecent, or can the *circumstances* surrounding it be sufficient to create indecency?

There is no statutory requirement that the act of touching must itself be indecent. This is consistent with the previous common law of assault (see *Nesbitt* [1952] VLR 298).

The legal definition of indecency focuses upon the *circumstances* in which the touching takes place. This means that the element of assault may be constituted by one particular act of the accused, while the element of indecency is constituted by a second and different act (see *Kennard v Fitzgerald and Court*).

(b) Boundaries of indecency

The accepted formal test of indecency is whether 'right-minded persons' of the community would think that the conduct of the accused was indecent (see *Court* as cited in *Harkin*; RY 269).

***R v Court* (1988) HL:**

Facts:

- A seized the arm of a twelve year old girl, lay her across his lap, and spanked her twelve times on the buttocks outside of her shorts
- Asked 'why', the accused answered, 'I don't know. Buttock fetish'
- V was unaware of the sexual nature of the act
- A admitted to the assault, but denied that it occurred in circumstances of indecency

Issue:

- The act of spanking is an ambiguous gesture
- It was not an unequivocally indecent act (objectively speaking), since it can be used as a legitimate means of administering corporal punishment
- Subjectively, however, it was indecent for the accused
- How should the law determine indecency in the face of ambiguity?

Reasoning:

- The buttocks are a private area, the touching of which would normally be indecent
 - But they can also be used to administer acceptable admonishing
- Other acts may be on their face innocuous, but also impart some similarly indecent pleasure upon their performer
 - For example, a passenger on a train standing on strangers' feet for sexual

gratification

- The act of standing on someone's feet is not indecent (though it may amount to an assault), but, subjectively – for the doer – it was
- A tripartite structure of classifying acts into indecency and non-indecency is proposed:
 - First: where 'right-minded persons' would regard the act as indecent
 - This is an objective standard of indecency determined by the jury
 - If right-minded persons would regard the act as indecent, it is to be regarded as so in law
 - Second: actions incapable of being seen as indecent (*R v George*)
 - Eg, talking to victims – completely innocuous
 - Third: genital proximity test
 - Acts satisfying this test are unequivocally indecent

Decision:

- [???

However, 'the assault must have a sexual connotation' (*Harkin*; RY 265, 268).

***R v Harkin* (1989) NSWCCA:**

Facts:

- During a school holiday, two girls (Tammi and Elizabeth), both aged 11, stayed with the family of their parents' 38 year-old 'family friend' (A) for several days
- One night, A took both girls for a drive on a country road; he let each one of them steer by placing them on his lap, with his arm across them as a 'seat belt'
- He felt the breasts of Tammi under her T-shirt, and Elizabeth's breasts outside her shirt
- A was charged and convicted of indecently assaulting both girls

Issue:

- Was the act of touching their chests indecent?

Reasoning:

- In considering the meaning and scope of 'indecency', the NSW Court of Appeal adopted a slightly modified version of the tripartite approach used by the House of Lords in *R v Court*:
 - Indecency must have sexual connotations
 - Can flow from the part of the body being touched, or some other aspect of the circumstances
- Three situations arise:
 - **Unequivocally indecent acts**
 - Examples: touching V's breasts, genitals or anus
 - In such circumstances, the motives/intentions of A are *not* relevant, even if they are non-sexual in nature
 - The only exception is medical procedures, which are not indecent
 - **Equivocally indecent acts**
 - Example: an ambiguous act such as spanking a 12 year-old on the buttocks
 - In this context, the motive of A is relevant, and will often help the jury to interpret ambiguous circumstances

- The sexual gratification of A (subjective intention) will frequently be the deciding factor, but other factors may also assist the jury in resolving the ambiguity, such as the relationship between A and V
- (If A is V's parent, and is spanking V for the purposes of the discipline, this also resolves the ambiguity)
- **Acts that are clearly *not* indecent**
 - Example: A has a fetish about standing on V's shoe
 - There will be no indecent assault, because the act was not committed in circumstances of indecency
 - A's motives are *irrelevant*, even if A does obtain sexual gratification from the act
 - Ie, if the circumstances of the assault are incapable of being regarded as indecent, an undisclosed sexual intention of A will not convert an assault into an indecent assault

- Thus, A's subjective intention or motives for performing the act are relevant only in interpreting *ambiguous* situations
- What amounts to circumstances of indecency is determined by the jury by reference to the current standards of the community.

Decision:

- [???

(c) Intent and indecency

Issue: must the accused intend to create indecent circumstances (as well as touching the victim)?

Where the assault is classified as 'objectively indecent' according to the tripartite test above, the accused's intent to assault the victim is equivalent to an intention to be indecent. All that is necessary is for the prosecution to establish that the act itself was indecent, and that the accused intended to do the act constituting the assault.

However, if the touching said to constitute the assault is classified as 'equivocal' or 'ambiguous', then (it is arguable that) an 'intention ... to obtain sexual gratification' (*Harkin*; RY 269) needs to be proved in order to establish the element of indecency.

3 *Non-consent*

For an indecent assault to have been committed, the victim must not have consented to the indecent act. The consent element can be dealt with in the same manner as the equivalent element of the actus reus for rape.

4 *Actus reus summary*

- (i) Assault
 - A touching of the victim or threat of force
- (ii) Indecency
 - The assault must occur in circumstances of indecency

- As deemed by respectable people of the community (*R v Harkin*)
- (iii) Consent
- The actus reus requires that there was a lack of consent by V to being touched by A in those circumstances of indecency
 - The determination of consent proceeds identically to the equivalent element of the rape actus reus

D *Mens Rea*

1 *Common law assault*

In order for the mens rea of an indecent assault to have occurred, the elements of the mens rea of assault also need to be satisfied.

The accused –

- (i) *Intended* to create an apprehension on the part of V that force would be applied, or intended to apply force; or
- (ii) A was *reckless* as to whether such an apprehension would be created, or as to the application of force.

That the mens rea of common law assault encompasses recklessness as to the creation of apprehension or the application of force is confirmed by *Fitzgerald v Renard*.

2 *Indecent assault*

As section 38(2) states, the accused must commit the indecent assault 'while being aware that the [victim] is not consenting or might not be consenting'. The mens rea of indecent assault is thus identical as that of rape.

The Accused must also have committed an assault, which has its own mens rea; in practice, these two mens rea will usually overlap. The mens rea of both these offences is that A must be aware of lack of consent/intending to create apprehension/use force, or reckless as to whether or not consent was given/apprehension was created/force was used.

Other issues:

- Mere negligence will not suffice because, as for rape, the mens rea is entirely *subjective*.
- Some UK authorities suggest that 'recklessness' requires that the accused foresaw that it was *possible* that the victim would apprehend the immediate application of physical force (*Fagan v Metropolitan Police Commissioner*). However, Victorian appeal courts appear to prefer a standard of *probability* for recklessness in relation to most criminal offences, and this may extend to assault (*MacPherson v Brown* (1975) 12 SASR 184).

IV Status Offences

A Overview

The portion of the *Crimes Act 1958* (Vic) which deals with sexual offences spans ss 35-60A.

- Sexual penetration without victim's consent (rape);
- Indecent (non-penetrative sexual act) without victim's consent (indecent assault);
- Sexual acts (penetration, indecent acts) and sexual relationships with persons of a particular status:
 - Children;
 - Persons with impaired mental functioning;
 - Persons within family (incest)
- Other offences – administering drugs, bestiality, abduction, procuring penetration by threats or fraud, etc

In addition to the primary offences described and discussed in previous sections, the *Crimes Act* also defines and prohibits several sexual offences by reference to the status of the victim and/or the accused:

Sub-Division 8C:

- | | |
|----------|---|
| s 44: | Incest; |
| ss 45-7: | Sexual penetration and indecent acts with children under the age of 16;
Consent irrelevant since victim below the age of consent |
| s 47A: | Sexual relationship with a child under 16;
Used if can't a specific offence under ss 45-7 cannot be proven |
| ss 48-9: | Sexual penetration and indecent acts with 16 and 17 year olds under the care, supervision or authority of A; |
| ss 51-2: | Sexual offences against people with impaired mental functioning or who are residents of care facilities. |

B Evaluative Criteria

The specific definitions contained within ss 45-52 are various. The offences employ several distinct criteria as determinants of liability:

- **The conduct of the accused**
 - The definition will either refer to sexual penetration (section 45, 48, [49A]) or to indecent acts (s 47, 49, [49A]) or to sexual relationship (see s 47A and 49A)
 - Sexual penetration is as defined in section 35 and hence is the same as for the legal definition of rape
 - 'Indecent acts' has much the same meaning as the element of indecency in the legal definition of assault. But note that the 'indecent act' here does not have to be an assault and does not have to involve any physical contact with another (eg, the proverbial 'flashing')

- ‘Sexual relationship’ is new. Its primary referent is to be found in s 47A. This section was created to deal with problems of proof that prosecutors were experiencing – it requires simply that the prosecution prove three or more acts of the accused which would constitute a sexual offence
- Section 49A however is different – it criminalises the international sex trade
- **The actual age of the victim**
 - There are four classes of age in the legislation: under 10 (see s 45), 10 to 16 years old (see s 45), under 16 (see s 45, 47 & 47A) and 16 years old (see s 48 & 49)
- **Is there a marital relation between the accused and the victim?**
 - See sections 45, 47-49 and 47A
 - Note however that this issue of marital status has more to do with whether or not the accused *believed* that there was a marital relation.
- **Is the accused in a caring, supervisory and authoritative role?**
 - See specifically s 45(2)(b) and s 48 & 49.
 - The targets of these definitions are socialworkers generally and youthworkers in particular, parents and stepparents and parental boyfriends, priests, managers of hostels, boarding schools, and so on. They draw on debates about child (sexual) abuse that began in the 1970s and which slowly introduced the idea that child (sexual) abuse was an abuse of *trust*.
- **The mental attitude of the accused**
 - This criteria primarily relates to the role of consent in sexual offences with and against children. This is addressed below in para 9.

Child Sex Case Studies:

Case Study: Hopper

- V was 14 years old when a three year relationship started with Hopper, a PE teacher at Wesley College
- She says they had sex hundreds of times
- Hopper was convicted of three counts of indecent assault and six counts of gross indecency with a person under 16 who was under his care, supervision or authority (‘gross indecency’ as was then in force as an offence based on acts of indecency rather than assaults)
- Hopper was sentenced to 3.5 years jail with a minimum of 2.25 years

Case Study: David Sims

- David Sims was drunk and affected by drugs when he passed by V’s house, and saw her asleep on the couch
- He walked in through the unlocked front door and commenced oral sex on her
- She woke and froze, fearing violence; he penetrated her digitally, then left
- She called the police and he was found asleep in a nearby flat
- He was sentenced to 33 months for 2 counts of rape, as well as for indecent assault and aggravated burglary; his sentence was fully suspended

There are three general types of sexual conduct that are prohibited against children under *Subdivision 8C: Sexual Offences Against Children*:

- **Sexual penetration** (as defined in s 35)
- **Indecent acts** (though not necessarily indecent *assault*, so can occur without touching)
- **Sexual relationships** (defined as three or more acts which would constitute sexual offences under other specific provisions)

1 *Section 45: Sexual Penetration of a Child*

Section 45 prohibits the sexual penetration of children. The younger the child, the more serious the resulting offence:

s 45 – Sexual penetration of a child under the age of 16:

- (1) A person who takes part in an act of sexual penetration with a child under the age of 16 is guilty of an indictable offence.
- (2) Penalties –
 - (a) If the court is satisfied beyond reasonable doubt that the child was under the age of 10: 25 years maximum; or
 - (b) If the court is satisfied beyond reasonable doubt that the child was aged between 10 and 16: 15 years maximum; or
 - (c) Otherwise, 10 years maximum.
- (3) Sub-section (1) does not apply if –
 - (a) The child is aged between 10 and 16; and
 - (b) The persons are married to each other
- (4) Consent is not a defence unless at the time of the penetration the child was aged 10 or older and –
 - (a) The accused believed on reasonable grounds that the child was 16 or older; or
 - (b) The accused was not more than 2 years older than the child; or
 - (c) The accused believed on reasonable grounds that he or she was married to the child.

Lack of consent is presumed, but, if the victim is 10 years of age or older, this presumption can be rebutted in some circumstances. Depending on the specific statutory section, such circumstances include:

- An honest and mistaken belief (on reasonable grounds) as to the age of the victim;
- An honest and mistaken belief (on reasonable grounds) as to their marital status; and
- The actual age difference between the accused and the victim.

In these situations, the meaning of consent is as set out in s 36 which is stated to apply to subdivisions 8A-8D (s 45 appears in sub-division 8C).

If there is consent, sub-division 8C may still apply. However, if there is no consent, rape might also apply.

- (a) Where the child is under 10 years old

The presence or absence of consent is *absolutely irrelevant* to the question of innocence and guilt where the child victim is under 10 years old (see s 45(4)).

A child under the age of 10 is constitutionally incapable of consenting.

There are no defences to this offence. Penalty: 25 years maximum.

(b) Where the child is 10 or older but under 16

Prima facie, the consent of the child is irrelevant. However, it may afford a defence if the Accused can establish (on the balance of probabilities) that:

- The accused and the child are married (or the accused believed on reasonable grounds that they were married); or
- The accused believed on reasonable grounds that the child was 16 or older; or
- The accused was not more than two years older than the child.

If the child was under the care, supervision or authority of the Accused, the maximum jail term is 15 years. Otherwise, the maximum penalty is 10 years imprisonment.

2 Section 47: Indecent Acts with Children

Section 47 prohibits indecent acts with children.

s 47 – Indecent act with a child under the age of 16:

- (1) A person must not wilfully commit, or wilfully be in any way a party to the commission of, an indecent act with or in the presence of a child under the age of 16 to whom he or she is not married.

Penalty: 10 years maximum.

An indecent *act* does not have to be an *assault*. This is a much broader offence, and does not necessarily involve the accused touching the child.

Conceivably, this offence could include, for example, parents engaging in an act of intercourse in front of their children.

(a) Where the child is under 10 years old

Like s 45, consent is irrelevant, and will afford no defence to the accused.

(b) Where the child is 10 or older but under 16

Consent of the child is irrelevant *unless* Accused can establish (on the balance of probabilities) that:

- The accused and the child are married (or the accused believed on reasonable grounds that they were married); or
- The accused believed on reasonable grounds that the child was 16 or older; or

- The accused was not more than two years older than the child.

Penalty: 10 year maximum imprisonment term for all offences.

3 Section 47A: Sexual Relationship with a Child under 16

s 47A – Sexual relationship with a child under the age of 16:

- (1) A person who maintains a sexual relationship with a child under the age of 16 to whom he or she is not married is guilty of an indictable offence.
- (2) It must be proven that –
 - (a) The accused did an act that would constitute an offence under Sub-division 8A-8C; and
 - (b) The act took place between the accused and the child on at least two other occasions during that period.
- (2A) It is not necessary that the acts be the same offence.

This section is used in the event that other offences cannot be proven to the degree required by ss 45 or 47, but there was nevertheless a relationship in which sexual activity occurred in respect of the child on 3 or more occasions while he or she was under 16 (and they were not married) (*KBT v R* (1997) HCA).

Years later, when the child has grown up and filed a complaint, they are often unable to remember exact dates or particular incidents. Section 47A attempts to overcome the evidentiary problems arising out of this delay caused by the passage of time by being non-specific in the nature of the 'occasions' at which the section is directed.

It is often possible to charge an accused with s 47A and, in the alternative, ss 47 and 45. However, if an accused is guilty of both, the doctrine of double jeopardy prevents a penalty being imposed in respect of both; usually, the maximum sentence will prevail.

4 Section 48: Sexual Penetration of a 16 or 17 Year-Old Child under the Care, Supervision or Authority of the Accused

s 48 – Sexual penetration of a 16 year old child:

- (1) A person must not take part in an act of sexual penetration with a 16 or 17 year-old child to whom he or she is not married and who is under his or her care, supervision or authority.

Penalty: 10 years maximum.

Consent of the child is irrelevant *unless* Accused can establish (on the balance of probabilities) that:

- The accused and the child are married (or the accused believed on reasonable grounds that they were married); or
- The accused believed on reasonable grounds that the child was 18 or older.

Note that 'care, supervision or authority' is interpreted broadly. It could, for example, extend beyond the simple teacher/student relationship to include other positions of authority, such as an instructor, carer, service-provider, or employer.

5 *Section 49: Indecent Acts with a 16 Year-Old Child under the Care, Supervision or Authority of the Accused*

s 49 – Indecent act with a 16 year-old child:

- (1) A person must not wilfully commit (or be party to) an indecent act with or in the presence of a 16 year-old child to whom he or she is not married and who is under his or her care, supervision or authority.

Penalty: 5 years maximum.

Consent of the child is irrelevant unless the accused can establish (on the balance of probabilities) that:

- The accused and the child are married (or the accused believed on reasonable grounds that they were married); or
- The accused believed on reasonable grounds that the child was 17 or older.

6 *Section 49A: Facilitating Commission of a Sexual Offence against Children*

s 49A – Facilitating sexual offences against children:

- (1) A person who in Victoria makes travel arrangements for another person or aids, facilitates or contributes to in any way whatever the commission by another person of an offence against this Sub-division (or against the Commonwealth *Crimes Act*) is guilty of an indictable offence and liable to level 3 imprisonment (20 years maximum).

(2) To be guilty, the person –

- (a) Must make the travel arrangements or do (or omit to do) the act with a view to personal gain or gain for another person; and
- (b) Must –
 - (i) Intent that the conduct would aid, facilitate or contribute to the commission of the offence by the other person; *or*
 - (ii) Be reckless as to whether the conduct would aid, facilitate or contribute to the commission of the offence by the other person.

section was introduced in 1997 as a response to the child sex tour industry.

7 Sections 56-58: Abducting and Procuring Children for Sexual Acts

s 56:

- (1) A person must not take away (or, under (2), 'cause ... to be taken away') a child under the age of 16 against the will of a person who has lawful charge of the child with the intention that the child should take part in an act of sexual penetration outside marriage with him or her or any other person.

Penalty: 5 years maximum.

It is an offence to abduct (take against the child's will) and procure (influencing by fraud, threat, etc) children for sexual acts.

D Offences against Persons with Impaired Mental Functioning

Sections 51 and 52 define offences in relation to the identity of the accused. Section 51 targets providers of 'medical or therapeutic services' (eg, counsellors, psychologists, doctors, nurses), while s 52 targets workers at residential facilities for the mentally ill and the intellectually disabled (see definition of residential facilities in s 50).

The prohibited conduct can be either 'sexual penetration' (as defined in s 35) or 'indecent acts'.

Consent is not a defence to a charge brought under ss 51 or 52, unless the accused can establish an honest belief (on reasonable grounds) that the victim was the spouse (de jure or de facto) of the accused. If such a belief is established, then the victim's consent is a defence. The meaning of consent is as defined by s 36.

1 Section 51: Sexual Offences against People with Impaired Mental Functioning

s 51:

- (1) A person who provides medical or therapeutic services to a person with impaired mental functioning who is not his or her spouse or de facto spouse ('such a person') must not take part in an act of sexual penetration with that person.

Penalty: Level 5 imprisonment (10 years maximum).

- (2) Such a person must not commit, or be in any way a party to the commission of, an *indecent act* with that person.

Penalty: Level 6 imprisonment (5 years maximum)

- (3) Consent is not a defence to a charge under this section unless at the time of the alleged offence the accused believed on reasonable grounds that he or she was the spouse or de facto spouse of the other person.

It might also be possible to prosecute an offender under ss 51 or 52 for rape or indecent assault, since the victim is probably incapable of understanding the sexual nature of the act. However, note that *Morgan* set a low threshold for understanding the sexual nature of an act (after all, law would be overly paternalistic towards mentally impaired people if it required too high an understanding of the act before allowing persons to consent to its performance).

2 Section 52: Sexual Offences against Residents of Residential Facilities

s 52:

- (1) A worker at a residential facility must not –
 - (a) Sexually penetrate; or
 - (b) Commit an indecent act with a resident of that facility unless they are married.
- (2) Consent is not a defence to a charge under this section unless at the time of the alleged offence the accused believed on reasonable grounds that he or she was the spouse or de facto spouse of the other person.

Penalty: Level N imprisonment (N*3 years maximum).

Note also the following definitions:

- ‘Residential facility’ means an institution approved by the *Mental Health Act 1986* or a body substantially for the purpose of providing residential services to intellectually disabled people
- ‘Indecent act’ excludes medical, therapeutic or hygienic procedures
- ‘Worker’ includes volunteer

If the Accused does not fall within the categories set out in ss 51 and 52, then they may still be guilty of a sexual offence against one of the general provisions, such as rape or indecent assault under s 38 or s 39.

To establish that consent could not have been given by the victim because under s 36(e) ‘the person is incapable of understanding the sexual nature of the act’, the prosecution must establish that the victim did not comprehend:

- (a) that what was proposed to be done was the physical penetration of their body; or, if that is not proved;
- (b) that the proposed act of penetration was one of sexual connection as distinct from an act of a totally different character

(*R v Morgan* (1970) Vic Full SC).

E Incest

Incest is prohibited under s 44, and this prohibition applies both to children and consenting adults from the same immediate family (including adopted and step-children).

Offences against children are also covered by *Sub-division 8C* offences.

s 44 – Incest:

- (1) A person must not take part in an act of sexual penetration with a person whom he or she knows to be his or her child or other lineal descendant or his or her step-child.

Penalty: Level 2 imprisonment (25 years maximum).

- (2) A person must not take part in an act of sexual penetration with a person under the age of 18 whom he or she knows to be the child or other lineal descendant or the step-child of his or her de facto spouse.

Penalty: Level 2 imprisonment (25 years maximum).

- (3) A person who is aged 18 or older must not take part in an act of sexual penetration with a person whom he or she knows to be his or her father or mother or other lineal ancestor or his or her step-father or step-mother.

Penalty: Level 6 imprisonment (5 years maximum).

- (4) A person must not take part in an act of sexual penetration with a person whom he or she knows to be his or her sister, half-sister or half-brother.

Penalty: Level 6 imprisonment (5 years maximum).

- (5) Consent is not a defence.

- (6) It is a defence if the accused was coerced by the other person.

- (7) It shall be presumed that –
(a) The accused knew he was related to the other person ...

Under ss 44(4) and 44(4), both participants can be charged, even if both are consenting.

Obviously, if the victim did not consent, any intercourse covered by s 44 will amount to rape.

Incest laws are an example of Parliament legislating morality. A similar argument can be made for the abolition of these laws as could be made for the abolition of prohibitions on intercourse between homosexuals: assuming the intercourse is not for the purposes of creating new genetic material, no harm is caused by incestuous intercourse between consenting adults.

Section 57 is an alternative provision with which to prosecute offenders. Because it is not based on an absence of consent, it is a useful alternative to examine if rape is likely to fail.

s 57 – Procuring Sexual Penetration by Threats or Fraud:

Circumstances in which a person does not freely agree to an act include the following –

- (1) A person must not by threats or intimidation procure a person to take part in an act of sexual penetration.

Penalty: Level 5 imprisonment (10 years maximum).

- (2) A person must not by any fraudulent means procure a person to take part in an act of sexual penetration.

Penalty: Level 6 imprisonment (5 years max).

For example, in *Brewer v R*, a New Zealand case, the victim was 'willing if not eager' to engage in intercourse with a prospective employer. Because no threat of loss or damage was made to the victim (she was only being offered a job), her consent was not vitiated. However, applying s 57(1) would be unlikely to result in a conviction, because no 'threats or intimidation' took place, as required.

Hansard for the second reading speech of the Act that introduced this section into the *Crimes Act* suggests that only threats of detriment will be sufficient for the purposes of sub-section (1):

- Where a person in a position of authority threatens a detriment to the victim unless they engage in intercourse, (1) has been contravened; however
- Where a person offers a reward or inducement to the victim if they engage in intercourse, (1) has not been contravened (though if the inducement turns out to be fraudulent, (2) may have).

G Other Offences

- Spousal rape by husbands
 - Common law rule of 'marital immunity' to rape charges has been abolished by the legislature: s 62(2)
 - See also *R v L* (1991) HCA
 - Although the old common law rule is abolished, the fact that A was married to V might still have a significant influence on criminal charges for rape within that marriage
- Other sexual offences (sodomy and bestiality)
- Sexual offences against sex workers
 - See, eg, *Hakostaki*
- Administering a drug in order to lower resistance (s 53)
 - *O'Connor*: 'candy is dandy but liquor is quicker'

V Reform Possibilities

A Legal Definition of Rape

Currently, the legal paradigm of criminal responsibility employed by the courts when deciding sexual offences cases may be described as follows:

- *Woolmington*: punish for intention not action
- Need to establish a subjectively held, criminal belief on the part of the accused
- Serious penalties should be imposed for the causation of serious consequences
- Inadvertence as to the occurrence of an eventuality cannot be classed together with intentional criminals
 - Would this suggest the creation of a new standard of ‘negligent rape’ with a supporting offence?
 - But this might make it difficult to convict persons of intentional rape who would currently be convicted, were this new offence created
 - It could compromise jury verdicts – the less ‘sure’ they are of the factual/legal/moral character of the offender’s conduct, the more likely they are to award a lower penalty (as opposed to *the* penalty), if it was available

Three proposed models for a more objective standard:

- Change the current subjective mens rea to include an objective test based on what a ‘reasonable person’ would have believed in those circumstances;
- Remove the mens rea element of awareness of (or recklessness towards) lack of consent
 - Instead, allow the accused to raise a *defence* of an honest and reasonable belief that there was consent
 - It would then be up to prosecution to disprove beyond all reasonable doubt the honesty or reasonableness of this alleged belief
 - This is the approach adopted under the *Model Criminal Code*
 - This would essentially make rape an offence of strict liability
- As above, but the accused’s belief need only be honestly held, provided that the accused took reasonable steps to ascertain consent
 - The judge is to decide if there is sufficient evidence of an honest belief before putting it to the jury (similar to provocation)

Changing the law might not impact on case outcomes as much as is commonly postulated. In offences of strict liability, the defence of honest and reasonable mistake of fact is only pleaded in approximately 1 out of 5 cases.

It is perhaps more important to:

- Change the minimum standard of behaviour expected of sexual partners
- Use the communicative model of consent to specify a standard of care in determining the presence or absence of consent
- Emphasise the educative role of law in shaping sexual conduct in society

With this in mind, the following definition of rape was also proposed (Rush, 2002) as a way of reconstructing the current legal definition of sexual offences:

Rape – Causing Serious Injury with Sexual Penetration:

(1) A person who –

- (a) Voluntarily engages in the sexual penetration of another person; and
- (b) Voluntarily causes that other person serious injury; with
- (c) The intention of causing serious injury; or with
- (d) Recklessness as to causing serious injury

is guilty of the offence of rape.

(2) Rape is an offence of sexual assault, and all references to rape and sexual assault shall be construed accordingly.

VI *Theoretical Criticism*

A *Gardner and Shute*

Gardner and Shute argue, in 'The Wrongness of Rape', that rape is an inherently dehumanising wrong, and that the legal conception of rape does not always comprehend the full extent and duration of the harm that is caused by perpetrators of sexual violence:

- Rape is 'fundamentally wrong'
- Harms are not always medically quantifiable
 - But a wrong is still being committed
- Rape is invasive, similar to property crimes (eg, theft and burglary)
 - But more serious: property is an extensions of the self
 - Rape involves the self itself
- Objectification of personhood
 - Subject/subject becomes subject/object
 - Humiliating, debgrading, dehumanising
 - Use of the victim
- Rape is a crime of sexual violation

B *Grix*

Grix argues, in 'Law's Truth and Other Lies', that the process of the trial is ill-suited to the discovery of the truth of the rape victim.

C *Young*

Young, in 'The Wasteland of the Law', argues that alternative narratives of a sexual encounter are suppressed in favour of the aggressor's account:

- The trial process is such as to place the victims under scrutiny
- Cross-examination tactics silence the victim's responses
 - Their replies are ignored
 - Their narrative is contrasted and amalgamated into the defence's story, with the effect of substituting victimisation with blame
- The accused is not cross-examined in the same way as the victim, because they rarely take the witness stand

VII *Hypothetical*

A *Tutorial Problem 37*

Before leaving for work one morning Harry insists on having intercourse with Wendy. They have gone through a wedding ceremony but the marriage is invalid because Harry was, at the time, already married.

Wendy reluctantly agreed to the intercourse because she did not wish to jeopardise the marriage by a refusal.

- Start with broad analysis of applicable offences before delving into issues
- Two core offences apply here:
 - *Rape*
 - *Indecent assault*
- Other relevant sexual offences:
 - *s 57: Procuring sexual penetration by threats or fraud.*

Rape:

- Sexual penetration: yes
- Consent (frequently a major issue – see s 36)
 - Harm suffered by invalidation of marriage
 - Fear of such harm: *Papadimitropoulos*
 - Even though mistaken belief as to marriage, may still not be rape
 - Would not vitiate consent because this widens the scope of rape too wide
- Actus reus not made out because W's consent was validly given

Also note s 57 (fraud):

- Need threats or fraud: yes
- (Intentionally) fraudulent nature of circumstances: yes
- Conviction possible

B *Tutorial Problem 38*

Driving to work, David induces Velha, a girl of eight, to get into his car on the pretext of driving her to school. David drives Velha to a large local park and has intercourse with her.

- Status issue: s 45
- Don't use s 38 – don't know whether she consented
- Even if she did consent, argue under s 36(e) that she didn't comprehend the sexual nature of the act
- Consent can't be raised for a child under 10
- Procurement and abduction under false pretences may apply: s 59

C Tutorial Problem 39

Donald is looking for a public relations officer for his company. He grants an interview to a Ms Verdun and tells her she will be ideal for the position. Ms Verdun has in fact come for an interview for a job as a packer; she has a low IQ (42) and the interview has been arranged through the local TAFE who run a skills course in order to assist people with intellectual disabilities find jobs on the open market.

Donald tells Ms Verdun that the final test of suitability for the job involves allowing him to have intercourse with her. She does so.

- Penetration: yes
- Consent: yes; vitiated?
 - s 369e): incapable of consent
 - *Morgan*: state test
 - To establish that Virginia was "incapable of understanding the sexual nature of the act" under s.36(e), the prosecution would need to establish that Virginia did not comprehend:
 - (a) that what was proposed to be done was the physical penetration of their body; or, if that was not proved;
 - (b) that the proposed act of penetration was one of sexual connection as distinct from an act of a totally different character (*R v Morgan* (1970))
 - With respect to the second limb, (b), V think it's a job interview – a 'test of suitability'
 - However, the level of comprehension must be extremely low
 - s 36(f) – mistaken as to the sexual nature of the act (possible since mentally impaired)
 - Only offering an inducement (*Brower*), so fear of harm cannot be said to have vitiated consent
- Mens rea – intentionally: yes
- Consenting or might not be consenting?
 - Belief in consent – D thought she actually did want to?
 - However, facts indicate that no honest belief was here held

Section 57:

- Quite possible, but much less serious penalty

- Prosecutors would resort to this section if V was capable of understanding the sexual nature of the act but consented due to the fraudulent representations of D

Sections 51 and 52:

- Do *not* apply to this hypothetical scenario, since D is not a provider of care

D Tutorial Problem 40

Damien is the managing director of a large company that employs Ms Vegan as a 'tea-lady'. Vegan approaches Damien one day about a pay-rise. Damien refuses but discusses with Vegan her financial situation. He suggests to her that she would be financially better off if she was receiving a sole parent's pension or found a man to support.

She has one child but is told by Damien that if she has two children she would receive a much higher rate of pension. Damien also tells her that he would like to have a child and that if she has intercourse with him and becomes pregnant, he will support the child. Ms Vegan and Damien have sexual intercourse.

No offence was committed, since consent was given without vitiating factors being present.

E Tutorial Problem 41

V has just commenced a job with D. D runs a small shop in the suburbs and V is employed as a sales assistant. It is her first job and as she had been looking for employment for some 9 months, she is particularly pleased to have found work. Unfortunately, soon after she starts work D starts to ask her questions about her boyfriend and her sex life. On a number of occasions when the shop is empty he has come up behind her and squeezed her buttocks. He has also unzipped her uniform three or four times.

One Friday evening he closes the shop early, blocks V's exit from behind the counter and asks her to have sexual intercourse with him. He mentions the long dole queues in her area. She is very frightened but agrees to have intercourse with him.

Indecent assault:

- Actus reus – conduct:
 - Touching buttocks
 - Unzipping blouse
 - Intercourse
 - Are these assaults?
 - Threat of harm?
 - No, since he came up behind her
 - Actual harm?
 - Yes, touched
 - Consent?
 - No, behind her
- Actus reus – indecency:

- Three categories: unequivocally not, equivocal, unequivocally is
- Here, clearly is indecent; no ambiguity here
 - But if there was, it would be resolved by reference to the accused's intention in touching (ie, whether for sexual gratification or some other, 'decent' purpose; eg, helping her with her uniform)
- Mens rea – intention: yes
- Mens rea – consent: no
 - Lack of a response to D's assaults may either indicate consent (unlikely) or a fear of being unemployed (more likely)

False imprisonment:

- Assault committed

Rape:

- Intercourse: yes
- Consent: yes, but vitiated?
 - *R v Olugboja*: submission not necessarily consent
 - s 36(c) – detained
 - s 36(b) – economic harms threatened (distinguish *Brower* since this is a threat, not an inducement)
 - s 36(a) – D blocked V's way with his body, prior assaults were committed
 - Therefore, consent not valid
- Mere acquiescence?
 - s 37: 'the fact that a 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'
 - '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'
 - Under the communicative model of consent, V did not do so
- Mens rea – knowledge of non-consent:
 - Visibly frightened implies that V clearly 'might not be consenting'
 - D locking the front door implies he knew she might not want to go through with it (ie, might not be consenting)

F *Tutorial Problem 43*

A and B agree, after much discussion, to have sexual intercourse. A penetrates B's vagina. After about twenty seconds, B screams for A to stop. A, knowing that B no longer wishes to have sex, refuses to stop and completes the act.

Has A raped B?

Rape:

- Penetration: yes
- s 38(2)(b) satisfied
 - '(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....'

- Refusal after initiation: yes
- Knew of withdrawal: yes, knew, just refuses to stop
- See *Ibbs* and *Nykomake* (NZ)
- A rape has occurred

G Tutorial Problem 45

Diana, a 29 year old woman, used to talk to a teenage boy who travelled on the same bus route. She was attracted to him, and asked him round to her place to play records. They had intercourse. Later Vincent, who was 15 years old, found that he had contracted V.D. He told his parents about Diana and they went to the local police station and asked that charges be laid against her.

*What charges might be laid against Diana?
What defence/s would you argue on her behalf?*

- No rape occurred because there was consent (we assume)
- s 45 may apply unless:
 - (4)(a) the accused believed on reasonable grounds that the child was aged 16 or older
 - Quite possible, since he was quite close to that age
 - Only need to prove on the balance of probabilities
 - However, failing to make enquiries prior to having intercourse is probably unreasonable
- s 19A does not apply, but s 17 (recklessly causing injury) may well apply

H Tutorial Problem 46

David, a 23 year old, met Virginia, who was 17, at a party. He had intercourse with her and this resulted in pregnancy. Virginia had a mild mental disability and her parents want David charged with rape. David comes into your office for advice.

What advice would you give him?

- Rape prosecution unlikely to succeed
- The father will probably argue that V's consent was vitiated by her mental disorder – not knowing about pregnancy/consequences of intercourse, etc
 - But *Morgan*: issues beyond the act of penetration not relevant to question of whether she understood the sexual nature of the act
 - No basis for satisfying the *Morgan* test
- ss 51-2: not applicable

I *Tutorial Problem 47*

Daniel, who is 40, asked Victor, a nine year old boy, to watch him expose himself and to touch him. This the boy did; he later told his parents who reported the matter to the police.

*What charge/s might be laid against Daniel?
What if Daniel was 11?*

- No rape since no intercourse
- No assault since D didn't touch V (V touched D)
- However, s 47 applies: indecent acts committed with a child under the age of 16
- If Daniel was 11, no offence would have been committed because they would be within 2 years of one another – regardless of the fact that V is under 10

J *Tutorial Problem 50*

Dale knowing that Vicky was addicted to heroin took her to his place on the pretext of selling her the drug. Once she was there he took her money and then refused to allow her to have the drug until she engaged in intercourse with him. Later Vicky joined a drug rehabilitation program and told the police about Dale's method of trafficking.

*With what offence/s might Dale be charged?
(Assume they had intercourse, although we haven't been told that explicitly.)*

Rape:

- Penetration: yes
- Consent: yes; but vitiated?
 - s 36(d) – not free agreement to due the fact of her addiction
 - Not exhaustive list, so possible to argue addition as a new specific vitiating factor
 - s 36(c) - fear of harm (withdrawal symptoms?)
 - Another new category: withholding a drug from someone who is dependant upon it
 - Consent probably vitiated
- Rape likely to succeed

Procuring sexual penetration by threats or fraud:

- s 57(1) may apply