

Victoria's New Sexual Offence Laws

An Introduction

Criminal Law Review



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Preface

From Special Counsel, Criminal Law Review

The number and breadth of current and recent enquiries into sexual offending in Australia has shed further light onto the extent of sexual offending and the tremendous harm caused by sexual offending. The criminal justice system plays an important role in responding to sexual offending. Better sexual offence laws are an essential part of an effective criminal justice system.

Victoria Police Crime Statistics show that in the 2013/ 2014 financial year, 2144 offences of rape and 7,467 other (non-rape) sexual offences were recorded in Victoria. However, it is widely acknowledged that sexual offences are significantly under-reported.

Despite the work of the Victorian Law Reform Commission in its report *Sexual Offences: Final Report* (2004) (VLRC Report), Victoria's sexual offence laws are notoriously complex. These problems have led to numerous appeals and retrials, and Victoria's sexual offence laws have again been subject to intense criticism over recent years.

In 2010, the department embarked on a comprehensive review of Victoria's sexual offences. The VLRC Report provided a clear foundation for many of the policy objectives of the review. However, it was clear that in the process of translating this policy into law and its interpretation and application in the courts, there were significant problems. The department has built upon the VLRC Report and has focussed in particular on ways of making the offences clear, simple and complete.

In October 2013, the department publicly released the *Review of Sexual Offences: Consultation Paper*. We received many detailed submissions in response to the Consultation Paper's proposals, which greatly assisted in refining the reforms. I thank all those who took the time to share their views with us.

Following consultation on these proposals for reform, the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* was passed by Parliament in October 2014. This Act will make a number of important improvements to Victoria's sexual offence laws, including rape and sexual assault. These reforms will commence operation on 1 July 2015.

This document provides an introduction to these reforms. It is primarily designed to assist the judiciary, lawyers and police in applying the new laws, and may also be a useful tool for members of the community who are interested in better understanding the law in this area.

These reforms have been developed in consultation with the Sexual Offences Advisory Group, which comprises judges of the County and Magistrates' Courts, and high-level representatives from the Office of Public Prosecutions, Victoria Legal Aid and the Criminal Bar Association. I would like to thank members of the Advisory Group for their expertise, advice and dedication to improving the law in this area.

I would also like to thank past and current members of Criminal Law Review, including Katya Zissermann, Anna Tucker, Jeen Boyd and Steven Tudor, for their perspicacity, patience, persistence and positivity in the face of many challenges in the reform process.

Greg Byrne PSM

Special Counsel

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1 Introduction

The *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (the Act) will introduce major reforms to the law on rape and sexual assault in Victoria. Among the most important reforms are:

- ◆ a clear, simple and consistent drafting style for the offences of rape and sexual assault
- ◆ a new fault element in rape and sexual assault: the accused does not reasonably believe that the complainant is consenting
- ◆ making jury directions in rape and sexual assault trials better tailored to the specifics of each case, and
- ◆ a new 'course of conduct charge', which will assist in the prosecution of people who engage in repeated and systematic sexual abuse over a period of time.

These reforms are expected to commence on 1 July 2015.

The Act also introduced new exceptions to child pornography offences for minors engaging in non-exploitative 'sexting' and two new summary offences relating to the distribution of intimate images. These reforms commenced on 3 November 2014.

This document explains key aspects of these reforms, and outlines how the new provisions are intended to operate in practice. It is intended to assist anyone who has an interest in Victoria's new sexual offence and sexting laws, but especially the judiciary, lawyers and police who will be working with the new laws.¹

To assist users of this document, the following appendices are also included:

- ◆ sample 'question trails' for jurors in rape and sexual assault trials (Appendix 1)
- ◆ a flowchart for a question trail to use in a rape trial (Appendix 2)
- ◆ sample integrated jury directions for rape trials (Appendix 3)
- ◆ illustrative scenarios for the sexting reforms (Appendix 4)
- ◆ a 'ready reckoner' table showing how the provisions of the old law correlate to the provisions of the new law (Appendix 5).

This document will usually refer to an accused as male and the complainant as female. Of course, both males and females can be perpetrators and victims of sexual offences. Nonetheless, it is clear that the overwhelming majority of sexual offenders are male and that sexual offences are gendered offences. It is therefore appropriate to reflect this in the language used in this document, while also respectfully acknowledging that males are also victims of sexual offending.

¹ It is convenient to refer to the provisions introduced by the Act as the 'new' provisions and to the current provisions as the 'old' provisions, even though the 'old' provisions are still operative in relation to offences alleged to have been committed prior to 1 July 2015.

2 Background to the new sexual offence laws

2.1 Review of Sexual Offences: Consultation Paper and other publications

The Department of Justice's *Review of Sexual Offences: Consultation Paper* (Consultation Paper) was released in October 2013. It contained 49 proposals and 10 questions. The Department received 28 submissions from various criminal justice stakeholders and members of the public.

The Consultation Paper was produced following extensive consultation with the Sexual Offences Advisory Group, which included representatives from a range of criminal justice stakeholders, including the Courts, the Office of Public Prosecutions, the Criminal Bar Association and Victoria Legal Aid.² It was also developed within the policy framework developed by the Victorian Law Reform Commission (VLRC) in its *Sexual Offences: Final Report* (2004).

A number of other recent inquiries and reports provided important background for the development of the Act. These include:

- ♦ the Report of the Protecting Victoria's Vulnerable Children Inquiry (the Cummins Inquiry) (February 2012), which included a recommendation that a new offence of grooming a child for sex be created
- ♦ the Parliament's Law Reform Committee's Report on the *Inquiry into Sexting* (May 2013), which made recommendations concerning defences to child pornography offences and new offences concerning distribution of intimate images without consent
- ♦ *Betrayal of Trust*, the Parliament's Family and Community Development Committee's report on its inquiry into the handling of child abuse by religious and other organisations (November 2013), which made recommendations regarding new offences of grooming, failure to report sexual offending against children, and failure to protect a child from sexual abuse, and
- ♦ the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse (commenced January 2013 and still continuing).

This variety of inquiries and reports indicates the breadth of community concern about sexual offending and highlights the range of issues that need to be considered when developing reforms in this important and sensitive area of law.

2.2 Statistics on sexual offence trials and conviction rates

Over the last decade, sexual offences have become a much bigger component of the criminal trial system. In the County Court, sexual offences now constitute almost 50% of all trials (2012–13), which is an 81% increase in sexual offence trials in the last 10 years.³

This high proportion underscores the importance of reducing the risks of mistrials so that the burdens of appeals and retrials on complainants and witnesses is kept to a minimum and the courts can maintain their capacity to process cases efficiently. This means that clear offence elements and clear and simple jury directions are of particular value in sexual offence cases.

² Note, however, that the proposals and any views expressed in the Consultation Paper are the Department's and do not necessarily reflect the views of any members of the Advisory Group.

³ *Review of Sexual Offences: Consultation Paper*, vii.

2.3 Problems with old rape laws

2.3.1 Complex fault element

Under the old law, for the accused to be convicted of rape, the prosecution was required to prove one of three alternative fault elements, in addition to proving that the accused intentionally sexually penetrated the other person and that the other person did not consent. The three alternative fault elements for rape were:

- ◆ the accused was aware that the other person was not consenting, or
- ◆ the accused was aware that the other person might not have been consenting, or
- ◆ the accused did not give any thought to whether the other person was not consenting or might not have been consenting.

These fault elements generated complex problems for juries to grapple with. A key problem area was the relationship between the fault elements and evidence that the accused believed that the complainant was consenting. Where there was evidence that the accused believed the complainant was consenting, the jury had to assess the nature and strength of that belief and whether it was held with sufficient strength that it precluded the prosecution from proving one of the fault elements beyond reasonable doubt.⁴ The distinction between awareness (the fault element the prosecution must prove) and belief (as raised by the accused) was very difficult for juries to apply.

There was also the complex issue of the reasonableness of an accused's belief in consent. Whether it was reasonable to hold a belief was only relevant to the question of whether a belief was actually held, on the assumption that an unreasonable belief would be less likely to have been held. However, an actually held belief in consent did not have to be reasonable for it to be of the kind that created a doubt about the fault element.

In addition, if the accused was aware of a circumstance deemed to negate consent (e.g. that the complainant is asleep), that was relevant to whether it would have been reasonable to believe that the complainant was consenting. But that issue of reasonableness of belief was only indirectly relevant to guilt.

By any measure, the above complexities and subtleties surrounding the old fault element created a difficult task for jurors. These difficulties prompted numerous calls for reform, including from judges themselves. For instance, in *Wilson v The Queen* [2011] VSCA 328; (2011) 33 VR 340 at [2], President Maxwell said:

The law governing the trial of sexual offences is now so extraordinarily complex as to throw into doubt the expectations on which the system of trial by jury is founded. Those expectations are, first, that a judge can reasonably be expected to explain the relevant law to the jury, in all its permutations and combinations, without falling into error; and, secondly, that the jury can reasonably be expected not only to comprehend the law as so explained, but to apply it ... to the evidence which they have heard.

Also, in *NT v The Queen* [2012] VSCA 213; (2012) 225 A Crim R 102, the Court of Appeal observed (at [19]) that these provisions had been made 'almost unworkable in the context of jury trials. The problems raised by this legislation can only be addressed by urgent and wholesale amendment'.

2.3.2 Complex and uncertain jury directions

The complexity of the fault element gave rise to complex jury directions. The decision as to which jury directions should be given in a particular trial was also prone to uncertainty. Under the old law, certain jury directions were mandatory if they were relevant to the facts in issue in a proceeding. The trial judge was responsible for assessing that relevance. A trial judge was

⁴ *NT v The Queen* [2012] VSCA 213; (2012) 225 A Crim R 102 at [15]-[16].

potentially required to give certain directions even if neither party wanted the directions given. The trial judge's decision to give such directions was also vulnerable to appellate judges reassessing what was relevant to the case and holding that the directions given should not have been given or directions that were not given should have been given.

2.3.3 Policy objections to unreasonable belief in consent exculpating the accused

As a question of policy, the old subjective approach to the fault element in rape has been subject to many criticisms. The fact that a person could sexually penetrate another person without her consent, and do so without having any good reason for believing that she consented, and yet not be guilty of rape (or indeed any offence) just because he believed she was consenting, has long been seen by many people as unjust.

As noted by Lord Simon of Glaisdale in his dissenting judgment in the House of Lords' decision in *DPP v Morgan* [1976] AC 182, at 221, a woman subjected to sexual penetration without her consent 'would hardly feel vindicated by being told that her assailant must go unpunished because he believed, quite unreasonably, that she was consenting to sexual intercourse with him'.

Given the seriousness of non-consensual sexual penetration and the fact that finding out if the other person consents is not a difficult step to take, it is fair for the criminal law to require a person to have a reasonable belief in consent before he can avoid criminal liability for intentionally sexually penetrating another person without her consent. As stated in the leading English criminal law textbook, *Smith and Hogan's Criminal Law* (13th ed, 2011, by David Ormerod), at p 744:

there are powerful arguments against adopting a purely subjective approach in this context. When the conduct in question is of a sexual nature, the ease with which the defendant can ascertain the consent of his partner, coupled with the catastrophic consequences for the victim if the defendant acts without consent, militate strongly against the purely subjective approach.

2.4 Other jurisdictions

A number of other jurisdictions have an objective reasonableness standard in their rape and sexual assault laws. The relevant case law and practice from those jurisdictions will likely provide some assistance in the application of Victoria's new rape and sexual assault laws. These jurisdictions have not experienced difficulties in the application of the reasonableness standard.

2.4.1 The United Kingdom

It is notable that in the United Kingdom there appears to be a distinct absence of reported appeal cases on the operation of the objective reasonableness test. Given that the United Kingdom adopted the test in 2003, it is reasonable to infer from such an absence that there has been little difficulty in the meaning and application of the test of reasonableness.

There have been some appeal cases relating to the operation of the UK legislation's complex provisions on evidentiary and conclusive presumptions regarding consent and reasonable belief. However, these cases are of minimal relevance to the new Victorian law as it does not contain such presumptions.

The Judicial Studies Board (England and Wales) has produced the *Crown Court Bench Book: Directing the Jury* (March 2010). Chapter 17 of the Bench Book contains useful guidance on a number of aspects of directing the jury on applying the *Sexual Offences Act 2003* (UK), including:

- ♦ alerting the jury to the danger of assumptions

- ◆ allegations of historical sexual abuse, and
- ◆ consent, capacity and voluntary intoxication.

It also includes a very helpful juror's question trail (or 'route to verdict' as it is called there) and a range of helpful sample or 'illustrative' jury directions.

2.4.2 New South Wales

New South Wales adopted a version of the reasonableness test in 2007. Under section 61AH(3)(c) of the *Crimes Act 1900* (NSW), the fault element for the NSW equivalent of rape includes where the accused 'has no reasonable grounds for believing that the other person consents to the sexual intercourse'.

In its *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900* (October 2013), the NSW Department of Attorney-General & Justice found that the amendments 'have not resulted in a significant increase in sexual assault trials, and they had not resulted in a high level of technical challenges' (p 5). The Review identified five cases appealed to the NSW Court of Appeal. None of the decisions showed that there was any difficulty in the operation of an objective fault element. The Review noted that 'the limited number of appeals leads the Review to conclude that the statutory definition is understood and is working in NSW courts' (p 18).

The Judicial Commission of New South Wales' *Criminal Trial Courts Bench Book* (available online) also contains some useful suggested directions in relation to the steps the jury should follow in assessing whether the Crown has proved that the accused either did not believe that the complainant was consenting or, if he or she did have an honest belief in consent, had no reasonable grounds for that belief.

2.4.3 New Zealand

New Zealand has had an objective reasonableness test in relation to sexual offences since 1985 (see *Crimes Act 1961* (NZ), section 128). While there have inevitably been appeals that address the requirements of that test, there is little doubt that the meaning of the provisions are settled, uncontroversial and working in practice.

In 2008, the New Zealand Ministry of Justice released *Improvements to Sexual Violence Legislation in New Zealand: Public Discussion Document* as part of a review of the operation of its sexual offence laws. One of the issues the paper addressed was whether more statutory guidance was required concerning the 'reasonable belief' test. There was no question that it should be reformed. The particular statutory guidance considered in that paper was the inclusion of a requirement that the jury have regard to all the relevant circumstances, including any steps taken by the accused to ascertain whether the complainant was consenting — provisions found in the United Kingdom legislation and in the new Victorian rape and sexual assault laws.

2.4.4 Australian Code States

The Australian Code States (Western Australia, Queensland and Tasmania) incorporate an objective test into their rape offences through the operation of the defence of honest and reasonable mistake of fact. The offence of rape in these jurisdictions has no fault element with regard to the complainant not consenting, but the accused may raise the defence that he honestly and reasonably believed the complainant was consenting. (See *Criminal Code* (Qld) sections 349 and 24, *Criminal Code* (Tas) sections 185 and 14, and *Criminal Code* (WA) sections 325 and 24.)

The new law in Victoria is similar in practical effect. The essential difference is that in all cases in Victoria, the prosecution will need to prove that the accused did not reasonably believe the other person consented, whereas in the Code states the prosecution will have the burden of

disproving an honest and reasonable belief only if the accused has first met the evidential burden and put the matter in issue.

The law of rape in the Code jurisdictions, while subject to appeals as with any other area of the criminal law, has not been beset by the kind of difficulties encountered by Victoria's old rape laws.

3 The new sexual offences in the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014*

The Act substitutes an entirely new Subdivision (8A) of Division 1 of Part I of the *Crimes Act 1958* ('*Crimes Act*'). There will now be six distinct offences:

- ◆ rape
- ◆ rape by compelling sexual penetration
- ◆ sexual assault
- ◆ sexual assault by compelling sexual touching
- ◆ assault with intent to commit a sexual offence, and
- ◆ threat to commit a sexual offence.

The elements of these new offences are briefly laid out below and then key aspects are further explained in Parts 4 to 9 of this document. Additional background information is available in the Consultation Paper. However, please note that some offences have changed from the proposals in the Consultation Paper. The Explanatory Memorandum to the Act also provides further details about the new offences.

3.1 Rape

The new offence of rape is in the new section 38 of the *Crimes Act* (with a maximum penalty of 25 years imprisonment). The elements of the new offence are:

Rape (section 38)

- A person (A) intentionally sexually penetrates another person (B)
- B does not consent to the penetration, and
- A does not reasonably believe that B consents to the penetration.

The form of the fault element in the new offence differs from that proposed in Option 2 in the Consultation Paper. The fault element, 'A does not reasonably believe that B consents to the penetration', is based on the *Sexual Offences Act 2003* (UK).

In contrast, Option 2 in the Consultation Paper proposed two alternative fault elements:

- ◆ A knows that B is not consenting, and
- ◆ A does not believe on reasonable grounds that B is consenting.

Option 2 was designed to make clear that if an accused has knowledge that the complainant is not consenting, this is one way of establishing that he does not have a reasonable belief in consent. However, the first alternative fault element is technically unnecessary and has been removed for simplicity.

The term 'believe on reasonable grounds' was proposed in the Consultation Paper due to its similarity to existing self-defence laws. Those self-defence laws have since been changed,⁵ and during consultation, stakeholders expressed preference for the wording 'reasonably believe', as used in the United Kingdom. However, there is no significant difference between these terms.

3.2 Rape by compelling sexual penetration

This offence covers conduct that was previously covered by old sections 38(3) and 38A of the *Crimes Act*, even though the essence of the offending conduct is the same: making another person perform an act of sexual penetration without consent. The new offence of rape by compelling sexual penetration is provided for in new section 39 (with a maximum penalty of 25 years imprisonment). The elements of this offence are:

Rape by compelling sexual penetration (section 39)

- A person (A) intentionally causes another person (B) to sexually penetrate either A, themselves, a third person, or an animal
- B does not consent to doing the act of sexual penetration, and
- A does not reasonably believe that B consents to doing that act.

3.3 Sexual assault

In the new section 40, the new offence of 'sexual assault' replaces the old offence of 'indecent assault' (and has a maximum penalty of 10 years imprisonment). The elements of the new offence are:

Sexual assault (section 40)

- A person (A) intentionally touches another person (B)
- The touching is sexual
- B does not consent to the touching, and
- A does not reasonably believe that B consents to the touching.

3.4 Sexual assault by compelling sexual touching

Consistent with the new offence of rape by compelling sexual penetration, there is now, in new section 41, a new offence of sexual assault by compelling sexual touching (which has a maximum penalty of 10 years imprisonment).

Sexual assault by compelling sexual touching (section 41)

- A person (A) intentionally causes another person (B) to touch either A, themselves, a third person, or an animal
- the touching is sexual
- B does not consent to the touching, and
- A does not reasonably believe that B consents to the touching.

Though a new offence, this offence largely captures conduct that would have been caught under indecent assault, as the 'assault in indecent circumstances' element of the old offence was reasonably broad (though unclear).

⁵ See the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*.

3.5 Assault with intent to commit a sexual offence

The old offence of assault with intent to rape has been replaced by two new offences: assault with intent to commit a sexual offence (section 42) and threat to commit a sexual offence (section 43). The elements of the new offence of assault with intent to commit a sexual offence (which has a maximum penalty of 15 years imprisonment) are:

Assault with intent to commit a sexual offence (section 42)

- A person (A) intentionally applies force to another person (B)
- B does not consent to the application of force
- at the time of applying that force, A intends that B take part in a sexual act, and
- A does not reasonably believe that B would consent to taking part in that sexual act.

3.6 Threat to commit a sexual offence

The new threat offence in new section 43 (which carries a maximum penalty of 5 years imprisonment) has the following elements:

Threat to commit a sexual offence (section 43)

- A person (A) makes to another person (B) a threat to rape or sexually assault B or a third person, and
- A intends that B will believe, or believes that B will probably believe, that A will carry out the threat.

4 Clearer approach to drafting

The old sexual offence provisions in the *Crimes Act* are notable for their complex and varying drafting styles. The *Crimes Act* as a whole contains at least seven different drafting styles for offences, and the old sexual offence provisions, from Subdivisions (8A) to (8EA), contain four different drafting styles.

A key part of the reforms created by the Act is the introduction of a clearer and more consistent approach to drafting offences. There are several notable features of the drafting style of the new sexual offences in Subdivision (8A).

4.1 Each element to be proved is distinctly identified

The new drafting style focuses on clearly defining the relevant offence. The approach is to separate the elements of the offence and present each element in its own distinct paragraph. This clearly identifies the facts that the prosecution must prove in a trial for the offence.

The basic pattern is to present the conduct element(s) first (such as sexual penetration), followed by a circumstance (such as lack of consent), followed by the main fault element in relation to the circumstance (such as the person did not have a reasonable belief in consent). The fault element of intention with regard to conduct has been incorporated into the conduct element as the two usually run very closely together, with intention rarely being in issue. ('Fault element' is the more contemporary term used to refer to what was traditionally — and inaccurately, in this context — called 'mens rea'. See the Glossary of key terms in the Consultation Paper.)

The drafting approach will assist judges with formulating jury directions by clearly identifying the matters of which the jury needs to be satisfied beyond reasonable doubt. Question trails for juries can be readily generated by taking each element and turning it into a question. For example, the element 'the touching is sexual' in the offence of sexual assault is easily converted into the jury question 'Are you satisfied that the touching was sexual?' or 'Are you satisfied that when Albert touched Betty's buttocks, the touching was sexual?'

4.2 Exceptions are distinctly identified

Exceptions set out the circumstances in which an offence is not committed. Exceptions to offences are distinctly and separately identified rather than incorporated into the definition of the offence. For example, the exception to rape for good faith medical procedures is provided for in a distinct subsection. In contrast, under the old law, this exception was built into the definition of the conduct element of sexual penetration. That is conceptually odd because it introduces the accused's purpose into the definition of the physical element of conduct.

It is clearer to state directly the general scope of the offence in the offence definition and then to identify any exceptions that then restrict the scope of the offence. Mixing an exception into the very definition of an offence, especially when the exception applies only rarely, can make it more difficult to identify the elements to be proved. A distinct statement of the exception also helps to make it clearer that an exception is a distinct matter which it is for the accused to raise.

4.3 Use of 'A' and 'B' to identify persons

Another distinctive feature of the new drafting style is its use of 'A' and 'B' to identify the different people involved in the offence elements. This approach helps to make the provisions clearer and avoids use of 'the first mentioned person', 'the second mentioned person', 'another person' and so on, which can become distracting and confusing.

The same technique is used to help readers understand the definition of 'sexual penetration'. However, each provision is self-contained, which means that persons A and B in the offence provisions are not necessarily the same as persons A and B in the definition of 'sexual penetration' (see Note to new section 37D). Usually they will match, but with some of the less common permutations (such as causing a person to engage in sexual penetration), A and B in the offence elements might be different to A and B in the definition of 'sexual penetration'.

5 Sexual penetration and sexual touching

The key conduct elements in rape and sexual assault are sexual penetration and sexual touching, respectively. These terms have been defined in sections 37D and 37E.

5.1 Sexual penetration

The new definition of 'sexual penetration' covers much the same conduct as under the old law, but is conceptually simpler and easier to apply. Six kinds of conduct are identified in section 37D, which provides that a person (A) sexually penetrates another person (B) if:

- ◆ A introduces (to any extent) a part of A's body or an object into B's vagina
- ◆ A introduces (to any extent) a part of A's body or an object into B's anus

- ◆ A introduces (to any extent) their penis into B's mouth
- ◆ A, having introduced a part of A's body or an object into B's vagina, continues to keep it there
- ◆ A, having introduced a part of A's body or an object into B's anus, continues to keep it there, or
- ◆ A, having introduced their penis into B's mouth, continues to keep it there.

The reference to 'a part of A's body' includes a penis, so the definition does not need to distinctly specify penetration with a penis. This will also cover the situation where a complainant is unable to identify what body part penetrated their vagina or anus (or, indeed, whether an object was used). This approach will also help in moving away from the presumption that penile penetration is necessarily more serious than other forms of penetration.

The new definition also covers the continuation of sexual penetration. This means it is not necessary for the offence of rape to include a separate offence of 'failing to withdraw' after consent is withdrawn, as is the case under the old offence.

Section 37D(2) provides that person A sexually penetrates person B if A causes a third person to penetrate B or causes B to take part in an act of bestiality within the meaning of section 59(2)(b) and (d). These scenarios cover cases of 'innocent agency' where the person or (in the case of bestiality) the animal doing the direct physical act of penetration is essentially just the tool of person A.

5.2 Sexual touching

Under the new laws, 'sexual assault' replaces 'indecent assault'. The word 'indecent' has been removed as an anachronistic description. The core criminality of the offence is the fact that there has been sexual contact without consent. It is not any inherent 'indecent' to the sexual touching itself that makes the conduct wrong. Rather, the wrongfulness consists in the non-consensual nature of the sexual touching.

The conduct element of sexual assault is sexual touching. There need be no great force involved or any causing of injury. The assault is the non-consensual touching. The new version of the offence helps to make clear that this is the core of the offending conduct.

The definition of 'touching' in section 37E allows for a wide range of kinds of conduct to count as 'touching'. Touching may be done with any part of the body or with anything else, and can be done through anything, including anything worn by either person.

What makes touching 'sexual'? There are many ways in which an instance of touching can have a sexual dimension, and the definition in section 37E appropriately provides an open and inclusive definition whereby touching may be sexual due to:

- ◆ the area of the body that is touched or used in the touching, including the genital or anal regions, the buttocks and a female's breasts, or
- ◆ the fact that the person doing the touching seeks or gets sexual gratification from the touching, or
- ◆ any other aspect of the touching, including the circumstances in which it is done.

To try to specify in more detail what counts as sexual touching would be problematic and could serve to unduly constrain juries, judges and magistrates.

Section 37E(2) also covers cases of innocent agency whereby a person touches another through the agency of another person or an animal.

6 Consent

6.1 Definition of 'consent' and consent-negating circumstances

The complainant's lack of consent is a key element of the offences of rape and sexual assault. New section 34C retains the definition of 'consent' as 'free agreement'.

Section 34C also retains, with some slight modifications, the list of legally defined consent-negating circumstances contained in the old section 36. Such circumstances include where:

- ◆ the person submits to the act because of force or the fear of force, whether to that person or someone else
- ◆ the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal
- ◆ the person submits to the act because the person is unlawfully detained
- ◆ the person is asleep or unconscious
- ◆ the person is so affected by alcohol or another drug as to be incapable of consenting to the act
- ◆ the person is incapable of understanding the sexual nature of the act
- ◆ the person is mistaken about the sexual nature of the act
- ◆ the person is mistaken about the identity of any other person involved in the act
- ◆ the person mistakenly believes that the act is for medical or hygienic purposes
- ◆ if the act involves an animal, the person mistakenly believes that the act is for veterinary, agricultural or scientific research purposes.

The Act does not 'deem' these to be circumstances in which consent is absent, if 'deeming' is taken to be the creation of a 'legal fiction', a matter of making something a legal fact that is not an actual fact. Instead, this provision fleshes out the definition of 'consent' as 'free agreement' by identifying some of the circumstances where there is in fact no free agreement. These circumstances usually fall into one of the following general categories: mere physical submission without free agreement, incapacity to give consent, and mistaken belief about a central fact that vitiates any apparent consent.

The *Jury Directions Act 2015*, which commences operation on 29 June 2015, adds two further items to the list of defined consent-negating circumstances in section 34C of the *Crimes Act*:

- ◆ the person does not say or do anything to indicate consent to the act, and
- ◆ having initially given consent to the act, the person later withdraws consent to the act taking place or continuing.

The addition of these situations to the list of consent-negating circumstances provides an even clearer endorsement of the communicative model of consent. The first circumstance is a development of what was a jury direction under the old section 37AAA(d) of the *Crimes Act*. Elevating this from a jury direction about evidence to a matter of definition concerning the nature of consent will make clear that an absence of any word or action to indicate consent is not merely good evidence of a lack of consent but, rather, *is* a lack of consent. This reflects the principle that consent does not exist unless it is communicated. The second circumstance reiterates the importance of a person's capacity to withdraw their consent to sex. It emphasises that if a person withdraws their consent, it ceases to exist from that time onwards. (See Part 6.3 below for further discussion of the communicative model of consent.)

6.2 Jury directions on consent

There are various jury directions relevant to consent in rape and sexual assault trials. The Act brings these into the framework of the *Jury Directions Act 2015*. The *Jury Directions Act 2015* replaces the *Jury Directions Act 2013*. However, the greater part of the substantive content and, importantly, the framework and general principles embodied in the 2013 Act are maintained under the 2015 Act. See Part 10 below for more information about how the *Jury Directions Act 2015* operates.

Under the relevant jury directions provisions (in section 46(3)), in relation to the meaning of consent, the trial judge may inform the jury of the following matters:

- ◆ a person can consent to an act only if the person is capable of consenting and free to choose whether or not to engage in or allow the act
- ◆ where a person has given consent to an act, the person may withdraw that consent either before the act takes place or at any time while the act is taking place, or
- ◆ evidence of any of the following alone is not enough to regard a person as having consented to an act:
 - the person did not protest or physically resist
 - the person did not sustain physical injury, or
 - on any particular occasion the person consented to another act that is sexual in nature (whether or not of the same type) with the accused or with another person.⁶

In relation to circumstances which are defined as negating consent, the jury directions provisions also enable the trial judge to:

- ◆ inform the jury of the circumstances in which a person is defined not to consent, or
- ◆ direct the jury that if the jury is satisfied beyond reasonable doubt that one of the consent-negating circumstances existed in relation to a person, then they must find that the person did not consent.

These jury directions, which reflect the communicative model of consent endorsed by the VLRC in its 2004 report, largely preserve the content of the jury directions under the old law, and add some further matters to help further clarify the nature of consent and its absence. Housing the jury directions provisions in the *Jury Directions Act 2015* will enable the trial judge, with the assistance of counsel for the prosecution and defence, to tailor the jury directions to the specifics of each case.⁷

6.3 Communicative model of consent

The definition of consent as 'free agreement' and the list of consent-negating circumstances are intended to support the communicative model of consent that was at the foundation of the VLRC's 2004 report.

Under the communicative model, consent is understood as not merely an internal state of mind or attitude (like willingness or acceptance) but also as permission that is *given* by one person to another. Therefore, it is something that needs to be communicated (by words or other conduct) by the person giving the consent to the person receiving it. By definition, on this model, an uncommunicated internal attitude is insufficient consent for the purposes of the law on rape and sexual assault.

⁶ The Act also included a jury direction to the effect that a person's not saying or doing anything to indicate consent is enough to show that consent was absent. The *Jury Directions Act 2015* removes this jury direction and, as noted above, recasts it as a defined consent-negating circumstance.

⁷ For further information on jury directions, see *Jury Directions: A Jury-Centric Approach* (2015).

The relationship between the state of mind of consent and the communicative giving of consent can be very close. For example, it will often be the case that a person gives their consent to a sexual act to another person by communicating or indicating to that person that they have the relevant attitude or state of mind. In other words, in the right context, indicating one's attitude can itself be the giving of consent. But, on the communicative model, that indication is still a distinct and essential step for the giving of consent to the other person.

Under the communicative model, consensual sex should, at a minimum, only take place where there has been communication and agreement between the parties. The reformed law of rape and sexual assault is intended to support that model by:

- ◆ requiring that both parties freely agree to the act
- ◆ providing that the fact that a person did not say or do anything to indicate consent to an act means that the act took place without the person's consent, and
- ◆ providing that among the circumstances which might make a belief in consent reasonable are any steps the accused took to find out whether the complainant was consenting.

7 Accused does not reasonably believe complainant consents

A major feature of the new sexual offences is the objective fault element: the accused does not reasonably believe that the other person consents. This is a distinct move beyond the old subjective approach. The new approach largely follows the UK example and is similar to that used in New Zealand's and New South Wales' rape laws. It is also similar in effect to the Australian Code States' defence of reasonable belief in consent in relation to sexual offences.

The requirement that a belief be reasonable is well known in a number of contexts in the criminal law. For example, at common law, self-defence required that the accused believed on reasonable grounds that his or her actions were necessary in self-defence.⁸

7.1 Reasonableness depends on the circumstances

Section 37G(1) provides that 'whether or not a person reasonably believes that another person is consenting to an act depends on the circumstances'. To provide some further guidance as to how juries are to determine whether a person did or did not reasonably believe the other person was consenting, the Act also:

- ◆ provides that the circumstances 'include any steps that the person has taken to find out whether the other person consents' (new section 37G(2))
- ◆ provides that self-induced intoxication cannot be taken into account in assessing reasonableness, but non-self-induced intoxication can (new section 37H), and
- ◆ provides a new jury direction to the effect that an accused's knowledge of the existence of a defined consent-negating circumstance 'is enough to show' that the accused did not reasonably believe the complainant was consenting (new section 61(5)(a), *Jury Directions Act*).

Other than these provisions, the Act does not put statutory limits on what kinds of circumstances will be relevant or irrelevant to the question of reasonableness.

⁸ The common law was abrogated by the *Crimes (Abolition of Defensive Homicide) Act 2014*, but a requirement of reasonableness remains part of the test.

7.1.1 A hybrid standard of reasonableness

Reasonableness is an objective concept. There are broadly two types of approach to the construction of a reasonableness standard. On the first approach, the standard is set as that of the 'reasonable person' or 'ordinary person', which is a purely objective standard. The reasonable or ordinary person is a relatively abstract and hypothetical person, who does not necessarily share any of the personal characteristics of the particular accused, though he or she needs to be located in the same general circumstances as the accused. (This is the standard that applied in the former defence of provocation: see *Stingel v The Queen* (1990) 171 CLR 312.) This can set a very high standard of reasonableness for an accused, depending on how far the accused's personal characteristics make them diverge from the abstract reasonable or ordinary person.

The other approach to constructing a reasonableness standard is a hybrid standard of reasonableness. This does not involve the construction and use of a reasonable person. The test focuses on the accused's belief and whether that belief was reasonable in the circumstances. This approach will involve considering some of the accused's particular characteristics and the circumstances of his situation. The standard then becomes a matter of what it would be reasonable for a person with those relevant characteristics and in that situation to believe.

Section 37G should be read as involving a hybrid standard of reasonableness. It provides that 'whether or not a person reasonably believes that another person is consenting to an act depends on the circumstances'. It does not refer to 'all the circumstances' and does not refer to 'the reasonable or ordinary person'. This indicates that some of the circumstances will be relevant, but not necessarily all. If there is evidence that the accused's youth, any perceptual disability, or limited intellectual capacity affected the accused's capacity to understand the circumstances, and are matters over which he has no control, these matters may be relevant in determining what the accused may have reasonably believed. Other characteristics of the accused may also be relevant in some cases. Which characteristics and circumstances are relevant will largely depend on the particular case, though there is some guidance from other jurisdictions to inform the identification of what is relevant (to be discussed below).

7.1.2 Guidance from other jurisdictions

There are several cases and learned commentaries that provide some guidance as to how courts and juries should approach the task of applying the reasonableness standard under Victoria's new sexual offence laws.

The Western Australian Court of Appeal provides very helpful guidance in *Aubertin v Western Australia* [2006] WASCA 229; (2006) 33 WAR 87. This was an appeal dealing with the reasonable mistake defence in sexual offences. At [43], McLure JA (later President of the Court of Appeal) (with whom Roberts-Smith and Buss JJA agreed) said that:

The mixed element [i.e. that the accused's belief must be reasonable] is not wholly objective; reasonableness is not to be adjudged by the standard of the hypothetical ordinary or reasonable person. The mixed element is a combination of subjective and objective aspects. The requirement that the belief be reasonable imports an objective standard. The subjective aspect is that the reasonableness is to be judged by reference to the personal attributes and characteristics of the accused *that are capable of affecting his or her appreciation or perception of the circumstances in which he or she found himself or herself*. However, the ambit of what constitutes the personal attributes and circumstances of a particular accused has not to my knowledge been identified or exhaustively enumerated. It covers matters over which an accused has no control such as age (maturity), gender, ethnicity, as well as physical, intellectual and other disabilities. This list does not purport to be exhaustive. [Emphasis added.]

Her Honour then, at [46], further expanded on what matters are not relevant in the assessment of the reasonableness of a belief in consent:

[A] person's values, whether they be informed by cultural, religious or other influences, are not part of a person's characteristics or attributes for the purpose of assessing the reasonableness of an accused's belief. For example, values resulting in extreme views as to the appropriate mode of dress for women, from which inferences about consent are purportedly drawn, cannot positively affect or inform the reasonableness of an accused's belief. *Values do not impact on the capacity to perceive or appreciate primary objective facts or the capacity to process that information.* In any event, reasonableness must be judged in the light of generally accepted community standards and attitudes. [Emphasis added.]

In a similar context, the Queensland Court of Appeal has held that an accused's mental illness can be relevant to the assessment of the reasonableness of belief. In *R v Dunrobin* [2008] QCA 116, Muir JA (with whom Fryberg and Lyons JJ agreed) said, at [45], that:

[t]he jury should have been instructed also that the appellant's mental condition [which had been diagnosed as chronic paranoid schizophrenia] was relevant to the appreciation of what, on his part, constituted a reasonable belief. In that regard the jury should have been referred by the primary judge to the evidence of Dr De Alwis which bore on the appellant's capacity to comprehend completely and accurately what the complainant was attempting to convey to him at relevant times by words and conduct. The jury, uninstructed, was not in a position to know the relevance of the appellant's psychiatric condition to the questions to be determined by them in relation to the s 24 defence.

His Honour also cited this passage from Holmes J's judgment in *R v Mrzljak* [2004] QCA 420; [2005] 1 Qd R 308 at [90]:

It is not the handicap per se which bears on the excuse of mistake. It is the fact that the handicap results in the accused having to form his belief on a more limited set of information that is relevant, just as other external circumstances affecting the accused's opportunity to develop and test his perception are relevant. A jury cannot assess the rationality of a belief in isolation from the circumstances in which, and the information on which, it is formed.

In the United Kingdom's authoritative text *Sexual Offences: Law and Practice* (4th ed, 2010) by Judge Peter Rook QC and Robert Ward CBS, the authors suggest (at [1.244]) that:

in a rape case, when determining whether a defendant's belief was reasonable, the jury should be directed to consider what society should reasonably expect of a person in all the circumstances and with the defendant's relevant characteristics when it comes to appreciating the risk that a person is not consenting to sex. Those characteristics should not include psychosis or delusional thinking nor matters which are character defects, such as alcoholism or excessive vanity. They certainly should include extreme youth, blindness, deafness and learning disability. Then it will be for the jury to decide whether any of the relevant characteristics have any bearing on the issue of reasonable belief.

The way in which mental impairment is relevant can vary, depending on the nature of the impairment and the particular case. In *B v The Queen* [2013] EWCA Crim 3, in a case involving an accused who was 'affected by paranoid schizophrenia and harbouring a number of delusional beliefs' (at [1]), the Court of Appeal of England and Wales held that the reasonableness of the accused's belief was not to be assessed by reference to those delusional beliefs. Lord Justice Hughes, for the Court, held (at [41]–[42]):

We conclude that unless and until the state of mind amounts to insanity in law, then under the rule enacted in the *Sexual Offences Act* beliefs in consent arising from conditions such as delusional psychotic illness or personality disorders must be judged by objective standards of reasonableness and not by taking into account a mental disorder which induced a belief which could not reasonably arise without it. The defendant's mental condition, and its impact on his behaviour, is of course extremely relevant to sentence. If punishment is inappropriate, a non-custodial sentence may result when otherwise there would have been a substantial sentence of imprisonment, and whether a hospital order is needed by the time of trial or not. In other cases it may significantly mitigate the punishment required. In yet others, it may result in a substantial custodial sentence recognising the danger which the defendant presents.

It does not follow that there will not be cases in which the personality or abilities of the defendant may be relevant to whether his positive belief in consent was reasonable. It

may be that cases could arise in which the reasonableness of such belief depends on the reading by the defendant of subtle social signals, and in which his impaired ability to do so is relevant to the reasonableness of his belief. We do not attempt exhaustively to foresee the circumstances which might arise in which a belief might be held which is not in any sense irrational, even though most people would not have held it. *Whether (for example) a particular defendant of less than ordinary intelligence or with demonstrated inability to recognise behavioural cues might be such a case, or whether his belief ought properly to be characterised as unreasonable, must await a decision on specific facts. It is possible, we think, that beliefs generated by such factors may not properly be described as irrational and might be judged by a jury not to be unreasonable on their particular facts.* But once a belief could be judged reasonable only by a process which labelled a plainly irrational belief as reasonable, it is clear that it cannot be open to the jury so to determine without stepping outside the Act. [Emphases added.]

It is possible that the UK takes a narrower view of what is relevant in this context. This is a matter on which some case law is likely to be necessary to provide further guidance, though in the ten years of such laws in the UK, this issue has not arisen often.

7.1.3 Summary

The above guidance on reasonableness provided by case law and commentaries in other jurisdictions may be summarised as follows.

- ◆ A personal attribute or characteristic of the accused may be relevant in assessing whether he or she reasonably believed in consent if that attribute or characteristic:
 - was capable of affecting his or her capacity to appreciate or perceive the objective circumstances, and
 - is something over which he or she had no control (e.g. youth, blindness, deafness or learning disability).
- ◆ The values held by the accused (whether informed by cultural, religious or other influences) are not relevant.
- ◆ When determining whether or not a belief in consent was reasonable, the jury should consider what the community should reasonably expect of a person with the accused's relevant attributes and characteristics and in the relevant circumstances.

The above general principles mean that in many cases the personal attributes and characteristics of the accused will not be relevant to the application of the objective test of reasonableness. Many attributes and characteristics that may in fact have influenced the accused in forming a belief in consent will be matters which the person does have capacity to control (e.g. flaws such as vanity) or misogynistic values and attitudes (e.g. the opinion that women who wear revealing clothing are more likely to be willing to have sex with strangers) and therefore are not relevant.

The fact that there are few cases on this issue from different jurisdictions indicates that qualifications on what is reasonable are not common and do not arise frequently, even though there may be many accused with some learning disabilities or cognitive impairment that may affect them to some degree.

7.2 Relevant circumstances include steps taken to find out whether other person consents

There are also some new statutory provisions that provide guidance on the assessment of reasonableness of belief in consent. The first and perhaps most important circumstance that the legislation specifies as relevant to the question of the reasonableness of belief in consent is 'any steps that the person has taken to find out whether the other person consents' (section 37G(2)). This provides helpful guidance to jurors by drawing attention to the importance of examining the accused's conduct in assessing the reasonableness of his beliefs and not just the complainant's conduct.

Section 37G(2) does not, strictly speaking, impose a legal duty on a person initiating sexual contact to take active steps to ascertain whether the other person consents. Nonetheless, a failure to do so will be a factor that the jury can take into account in assessing any subsequent belief that the other person was consenting. In the usual case, such a failure will count strongly against the belief being a reasonable one. Thus, an accused is very unlikely to evade conviction by arguing that, while he did not try to find out if the other person consented, she hadn't said or done anything to indicate she wasn't consenting, so he assumed she was consenting.

Making clear that a failure to take such steps to ascertain consent is relevant also reflects the communicative model of consent and the importance of mutuality in the formation of free agreement. If a person making a sexual advance has no reason for thinking that consent has been given to him, then, from his point of view, there is no meeting of minds sufficient to count as free agreement and he should take relevant steps to ascertain consent or else cease his sexual advances.

Exactly what kinds of steps of inquiry are appropriate will depend on the facts of each case. Where there is a longstanding relationship and a history of intimacy between two people, the kinds of inquiries appropriate may be quite subtle and non-verbal. Where the two people are strangers, then much more clear and explicit steps will usually be appropriate. As Rook and Ward note (at [1.245]):

More steps are likely to be expected where there is no established relationship. It is likely that police interviews with those suspected of rape will now focus more than in the past on what steps, if any, the suspect took to ascertain whether the complainant was consenting.

7.3 Intoxication and reasonableness

Many sexual offences are committed when the offender is intoxicated to some degree. An important policy question is how intoxication is to be dealt with in relation to the objective requirement that the person's belief in consent be reasonable. The basic choice is between, on the one hand, allowing intoxication to play a role in determining reasonableness and, on the other hand, excluding it. It is a common policy position to exclude self-induced intoxication as a relevant factor in these cases.

As the Tasmanian Supreme Court observed in *McCullough v The Queen* [1982] Tas R 43 at 53:

The criterion of reasonableness is in its nature an objective one, and in our view it would be incongruous and wrong to contemplate the proposition that a person's exercise of judgment might be unreasonable if he was sober, but reasonable because he was drunk.

If intoxication were allowed to play an accommodating role in the context of sexual offences, it would invite criticism that the new law would create a 'drunkard's rape charter'.

The new law does not take that course. It provides that where intoxication is self-induced, regard must be had to the standard of a sober reasonable person in the same circumstances (section 37H(1)(a)). This approach reflects a basic policy decision that self-induced intoxication should not be allowed to lower the standards of acceptable conduct.

Where intoxication is not self-induced (e.g. where the accused has had his drink spiked), the new law provides that regard must be had to the standard of a reasonable person intoxicated to the same degree as the accused (section 37H(1)(b)). This recognises the unfairness of holding an involuntarily intoxicated accused to the higher standard of reasonableness.

Section 37H essentially reflects the old law concerning intoxication and reasonableness of belief in the context of defences to homicide (former section 9AJ).

7.4 Jury directions on reasonable belief

The *Jury Directions Act 2015* provides (in section 47(3)) for two jury directions on reasonable belief in consent.

The first direction provides that if the jury concludes that the accused knew or believed a defined consent-negating circumstance (as referred to in section 34C of the *Crimes Act*) existed, then that knowledge or belief is enough to show the accused did not reasonably believe in consent.

The phrase 'is enough to show' is not a technical legal term. It is intended to convey, in non-technical language, that a finding that the accused had such knowledge or belief may be a sufficient basis for a finding that he did not reasonably believe in consent. This means that the jury may draw that conclusion but is not obliged to do so. The phrase 'is enough to show' is not a presumption (proof in the absence of counter-evidence) or a deeming provision (defining such knowledge or belief as equivalent to an absence of reasonable belief in consent). (See *ISJ v The Queen* [2012] VSCA 321.)

The UK statute takes a different and more directive approach to this issue and has adopted a complex set of evidentiary and conclusive presumptions in such circumstances. These have proved problematic in practice, and most of the appeals in the UK have concerned the operation of these provisions.

The second jury direction on reasonable belief in consent is simply a matter of telling the jury about the law on the relevance (or not) of intoxication on the question of the reasonableness of belief in consent.

For a summary of the operation of the *Jury Directions Act 2015*, see Part 10 below.

7.5 Proving the new fault element

How may the prosecution prove that A did not reasonably believe that B consented?

It is important to be clear that the fault element is not 'A had an unreasonable belief that B consented'. Rather it is 'A did not reasonably believe that B consented'. How might a jury be satisfied that A did not reasonably believe that B consented? There are different basic ways a jury could be so satisfied.

First, there will be cases where the jury is satisfied beyond reasonable doubt that the accused did not believe the complainant was consenting. In such a case, there simply was no belief, reasonable or otherwise, that the complainant was consenting. This could be because the accused formed a state of mind inconsistent with such belief. An obvious example would be where the accused plainly knew there was no consent because he was a stranger to her and had violently attacked her at knife point. Other categories of 'non-belief' are where the accused does not give any thought to whether or not the victim consents and so forms no belief one way or the other about the matter. Other cases could include where the accused believes only that the complainant might be consenting. Such a belief in the possibility of consent is not a belief that she is actually consenting.

Secondly, there will be cases where the jury decides that the accused *did* believe the complainant was consenting or that the accused *might* have had such a belief. In either case, the question for the jury becomes: was such a belief unreasonable?

Where the jury decides positively that the accused did believe that the complainant was consenting, then it needs to decide whether that particular belief was unreasonable. For example, if an accused did believe that the complainant was consenting, but formed that belief despite knowing she had been drinking heavily, had repeatedly rebuffed his advances, and

asked him repeatedly to just let her sleep, then his belief would be unreasonable. If, in such a case, the accused only believed that the complainant might have been consenting, then to proceed to sexually penetrate her would itself be an unreasonable thing to do. Even if there were reasonable grounds for believing that the complainant might be consenting, that is not yet enough to amount to a reasonable belief that she is consenting.

Where the jury decides only that the accused *may* have believed in consent, then the jury needs to decide whether any such belief, if held, would have been not reasonable in the circumstances. For example, in a sudden, violent stranger-rape case, the prosecution case might be that the accused could not possibly have reasonably believed he had the person's consent. In such cases, it is not necessary for the jury to decide what belief the accused did or did not actually have, because, whatever his actual state of mind, there was no basis to support any belief in consent.

The above shows that proving the fault element won't necessarily always be a 'two-step' process along the lines of: 'Did A believe in consent? If so, was it a reasonable belief?' The jury will not always need to first decide the question of what the accused actually believed before addressing reasonableness. In some cases, they will be able to go straight to the issue of reasonableness, especially if unreasonableness is obvious in the circumstances and the evidence about what the accused actually believed is uncertain.

The above approach can be contrasted with that articulated by the Court of Appeal in *Babic v The Queen* (2010) 28 VR 297, a decision concerning the former law on defensive homicide, which involved a 'reasonable grounds for a belief' standard. (The relevant belief in such cases was that it was necessary for the accused to do what he or she did to defend him or herself or another from death or really serious injury). Justices Neave and Harper held (at [95]) that if the jury found the accused not guilty of murder because the prosecution had not proved that the accused did not have the relevant belief (i.e. the jury found that the accused *might* have had the relevant belief), then it should *assume* that the accused had that belief when they went on to decide whether or not the accused had any reasonable grounds for that belief. This amounts to assessing the reasonableness of a particular supposed subjective belief of the accused.

In contrast to the *Babic* approach, where the accused might have believed the complainant was consenting, the new reasonableness standard under the Act is simpler in two ways.

First, if the jury concludes that there could have been *no* reasonable basis for the accused believing that the complainant was consenting, then that element will have been proved. This conclusion does not involve the jury considering the supposed subjective belief of the accused.

Second, if the jury considers that there *could* have been a reasonable basis for believing in consent, the jury will then need to assume the accused had that belief and go on to consider whether that particular belief was reasonable in the circumstances. In this situation, the test will still be simpler than the *Babic* test because whether the belief was reasonable depends on the circumstances rather than on whether the grounds for the (supposed) belief were reasonable.

It is important to note that just because a reasonable basis for believing in consent is possible does not necessarily mean that the accused's belief in consent had that reasonable basis. That is still a question to be decided on the evidence.

7.6 Reasonableness and the communicative model of consent

The new objective fault element is also an important aspect of the general communicative model of consensual sexual relations. It promotes the positive behavioural standard that a person who intends to sexually penetrate or sexually touch another person should first turn his mind to the question of consent and should not proceed unless he is reasonably satisfied that the other person in fact freely agrees to the penetration or touching.

If it is not clearly apparent from the other person's present words and actions that she is freely agreeing to sex, then a reasonableness standard will almost always require the person who intends to engage in sexual activity to take some positive steps to find out whether or not the other person consents, such as asking her directly, in order to have a reasonable basis for believing that she is consenting. Failure to thus form a reasonable belief in consent would mean running the risk of being charged with rape or sexual assault if it turns out that the other person was not in fact consenting.

8 Compelling Offences

There are equivalent compelling offences for rape and sexual assault: rape by compelling sexual penetration and sexual assault by compelling sexual touching. (See Part 3 above for the elements of these offences.)

In these offences, the accused is not personally doing the sexual penetration or the sexual touching. Rather the complainant is doing the sexual penetration or sexual touching, and is being compelled to do so by the accused.

The term 'compel' is not expressly defined in the Act. Instead, the concept of compelling is substantiated in the two elements of causing the complainant to perform the relevant sexual act and the complainant not consenting to doing that act. How the accused might 'cause' the complainant to so act can be left relatively open. It doesn't always require force or threats. It could, for example, involve deception. What matters is that the complainant does not consent to doing the act, but is being caused or made to do so by the accused. That constitutes the essence of compelling a person to do something.

It is this non-consensual participation in sexual activity which makes such offending forms of rape or sexual assault, rather than distinct kinds of offences. The old law treats some forms of compelled sexual penetration as rape, while other forms of it are categorised as the distinct offence of compelling sexual penetration. In the case of compelled sexual touching, it is likely that most cases would previously have been classified as forms of indecent assault.

Because the conduct elements of the compelling offences differ in their basic structure to those for rape and sexual assault, it is appropriate to draft them as distinct offences. Nonetheless, because they remain as kinds of rape or sexual assault, the names of the offences have been drafted to make this clear. They are rapes and sexual assaults by means of compelled sexual penetration or sexual touching, respectively.

9 Assault with intent to commit sexual offence and threat to commit sexual offence

The old offence of assault with intent to rape (which includes a threat offence) will be replaced with two distinct offences: assault with intent to commit a sexual offence and threat to commit a sexual offence. Given the distinct elements involved in an assault with an ulterior intent⁹ and a

⁹ An ulterior fault element is a fault element that does not correspond to a physical element of an offence. Where that ulterior fault element is intention, that intention is usually in relation to a result or future circumstance which does not itself need to be proved for the offence to be proved. This is discussed in more detail in the glossary in the Consultation Paper.

threat to perform some act, it is clearer to have two distinct offences. (See Part 3 above for the elements of these two offences.)

9.1 Assault with intent to commit a sexual offence

New section 42 provides for the offence of assault with intent to commit a sexual offence. The offence involves the non-consensual application of force to another person with an intent that the other person take part in a sexual act, and without a reasonable belief that the other person would consent to that act.

Force may be applied directly or indirectly to the other person, and may be applied to her body, her clothing or equipment worn by her. Moreover, the other person does not need to be aware of the application of force.

Section 37F provides that 'taking part in a sexual act' covers both sexual penetration and sexual touching, and covers both 'active' and 'passive' roles. This means that the new offence is broader than the old offence as it covers assault with intent to commit rape and/or sexual assault, whereas the old offence only covered assault with intent to commit rape. In many cases, it may be difficult to discern the precise sexual act that the accused intended.

The other person's actual lack of consent to the sexual act is not an element of this offence. This is because the sexual act is only intended to be committed and is not actually committed. The element is that the accused does not reasonably believe the other person *would* consent to the sexual act. Nor does this offence include as an element the other person's lack of consent to the application of force (although in many cases, it can be expected that there would in fact be no consent to the application of force). Instead, it is the intended sexual offending that is the key to this offence.

9.2 Threat to commit a sexual offence

The threat offence involves a person (A) making a threat to another person (B) to rape or sexually assault B or a third person (C), while intending that B will believe the threat will be carried out or believing that B will probably believe the threat will be carried out.

A threat may be made by any conduct and may be explicit or implicit. Words or conduct may constitute a threat to rape or sexually assault if they convey an intention either to sexually penetrate or sexually touch B or C without B or C's consent or to cause B or C, without B or C's consent, to sexually penetrate or sexually touch another person, themselves or an animal.

The threat offence is essentially modelled on the offences of threat to kill and threat to inflict serious injury, in sections 20 and 21 in the *Crimes Act*. The fault element of recklessness in those offences is made clearer by being explicated in terms of a belief in a probable result. Also, the term 'fear' used in sections 20 and 21 is replaced with 'belief', to avoid any suggestion that the nature of the emotional response of the other person is relevant.

10 Jury directions integrated into *Jury Directions Act 2015*

The jury directions on consent and reasonable belief in consent (outlined above) have been integrated into the framework of the *Jury Directions Act 2015*. (As noted above, the *Jury Directions Act 2015* replaces the *Jury Directions Act 2013*, though it maintains the framework and general principles embodied in the 2013 Act as well as the greater part of its substantive

content.) Under this new framework, there is much greater emphasis on counsel working with the trial judge in working out the relevant jury directions to be given in each particular case.

Under the framework of the *Jury Directions Act 2015*, the trial judge:

- ◆ must give the jury any directions that have been requested by the prosecution and defence counsel, unless there are good reasons for not doing so, and
- ◆ must not give the jury a direction that has not been requested by counsel, though the judge retains a residual obligation to give an unrequested direction, in appropriately important situations.

This new approach, which has been well received by the judiciary and practitioners, helps to ensure that jury directions are tailored to the specific issues of each case. This should help to keep directions short and relevant, and so make them easier for the jury to follow and apply.

Under the old law, certain jury directions in sexual offence trials are mandatory 'if relevant to the facts in issue in a proceeding' (section 37 of the *Crimes Act*). It is up to the trial judge to determine which of the directions are relevant. In doing so, the trial judge may or may not consult counsel. This increases the risk of judicial error and subsequent intervention by an appeal court which may discern the relevant issues at trial differently.

Under the new framework, the task of crafting jury directions involves much more collaboration between the judge and counsel. The result will be directions that are more closely tailored to the actual issues in the case. This will reduce the risk of irrelevant and formulaic directions being given. Also, appellate courts will be less likely to have a different view of what directions would have been relevant if it is clear from discussions between the parties and the trial judge what is and is not in issue and what forensic decisions have been made by trial counsel.

11 Course of Conduct Charge

One of the other major reforms contained in the Act is the introduction of the new 'course of conduct charge'.¹⁰ This is a new way of charging a person accused of engaging in systematic and repeated sexual abuse over a period of time (or in high volume theft or fraud-related offences).

11.1 Failure to address repeated sexual offending

The new course of conduct charge has been developed in response to the failure of the previous law to provide an effective way of prosecuting cases involving repeated and systematic sexual abuse, particularly of children.

The problem was discussed in *Podirsky v The Queen* (1990) 3 WAR 128 at 136:

[T]here is a possibility that the more acts of intercourse or other acts of sexual abuse and the greater the length of time over which they occur, the more difficult it may be to establish that any one of a series of multiple offences has been committed.

Legal responses to this problem vary across the world. Australia has taken a very strict approach on the need for particulars and what is required to avoid duplicity. For example, in the High Court decision in *S v The Queen* (1989) 168 CLR 266, the limited particulars of the allegation of long term sexual abuse meant the trial was held to be unfair.

¹⁰ In the Consultation Paper, this proposal was labelled as a 'multiple offence charge'. This has been changed to 'course of conduct charge', which is a more accurate and helpful description.

Section 47A, which deals with persistent sexual abuse, was inserted into the *Crimes Act* in 1991 to address these problems. However, problems remain with this section, as illustrated in the case of *R v SLJ* [2010] VSCA 16; (2010) 24 VR 372. In that case, the complainant gave evidence as follows (at [15]):

He gave me koala hugs with my clothes on. We were sitting on the couch together, me on top of him, legs on either side and him pushing my butt up and down and him rubbing his hard penis against my vagina like we were having sex and he would push me and push his tongue down my throat, so that I couldn't really breathe ... also he would pull my top down and suck my breast like a baby does and lick it and I would hug him and I would just look behind him and I'd just find something to counter or something to look at that would entertain me so that I wouldn't have to think about it.

The Court of Appeal held (at [17]) that this evidence was not capable of supporting the conclusion that the accused had, on an occasion identified with 'some specificity', committed a relevant sexual offence:

As is apparent from the complainant's repeated references to what the accused 'would' do to her, she was describing a course of conduct. She was giving an account of what typically or routinely or generally occurred. There was nothing which distinguished one offending act from another.

As a result, section 47A has not been very effective in practice, as it still requires a high degree of specificity about each offence alleged. It is often difficult for a victim to remember details due to the repeated and systematic nature of the sexual abuse. Use of section 47A has, therefore, been limited primarily to guilty pleas rather than trials.

11.2 New course of conduct charge

To address these issues, the Act introduces a 'course of conduct' charge into the *Criminal Procedure Act 2009* ('*Criminal Procedure Act*'). This reform is based on provisions in the United Kingdom's *Criminal Procedure Rules 2010*. Similar laws exist in New Zealand. Neither jurisdiction has an equivalent to section 47A.

11.2.1 What offences can be the subject of a course of conduct charge?

A course of conduct charge is a charge for a relevant offence that alleges more than one incident of the offence. 'Relevant offences' are broadly of two kinds: sexual offences and theft and fraud-type offences.

'Sexual offences' in the *Criminal Procedure Act* has a broad meaning, covering rape and sexual assault, incest, sexual offences against children, sexual offences against persons with a cognitive impairment, sexual servitude, and various other sexual offences.

Theft and fraud-type offences are relevant where a high volume of offending is alleged. In such cases, the particulars of each incident are likely to be clear, but the high volume of incidents makes it beneficial, to all parties, to make use of a course of conduct charge. (This document focuses primarily on sexual offending.)

11.2.2 When can a course of conduct charge be used?

A course of conduct charge, involving more than one incident of an offence, can be used where:

- ◆ each incident constitutes an offence under the same provision
- ◆ each incident relates to the same complainant (in a sexual offence case)
- ◆ the incidents take place on more than one occasion over a specified period, and
- ◆ the incidents, taken together, amount to a course of conduct, having regard to their time, place or purpose of commission and any other relevant matter.

The charge is not restricted to one type of relevant conduct. For example, a charge could allege acts of digital penetration as well as acts of penetration using an object.

11.2.3 What needs to be proved?

The prosecution will need to prove beyond reasonable doubt that the accused engaged in a course of conduct, having regard to the time, place or purpose of the commission of the incidents and any other relevant matter. Often, in the case of repeated sexual offending against the same victim, certain patterns of behaviour are apparent that help to make the various acts clearly instances of one overall course of conduct. The concept of a 'course of conduct' is already known to the criminal law (e.g. stalking under section 21A of the *Crimes Act*). It is also similar to the kind of multiple-instance drug trafficking discussed in *Giretti v The Queen* (1986) 24 A Crim R 11.

The prosecution does not need to prove any particular number of incidents, or dates, times, places or occasions of incidents, or that there were distinctive features differentiating them. This means that proving a course of conduct charge does not require proving a particular number of specific incidents which add up to a course of conduct. Rather, what is proved is that the accused engaged in a course of conduct, and that is understood as consisting of a number of incidents, but no particular number of specific incidents needs to be proved. The basic 'trade off' underlying the new course of conduct charge is that, though less specificity is necessary, an additional matter must be proved beyond reasonable doubt, namely that the accused engaged in a course of conduct.

A course of conduct is more likely to be able to be proved where there are systematic and repeated acts of abuse. This is the situation in which it is often more difficult for the complainant to provide particulars, making it difficult to provide specifics of each incident. But it is the repeated and systematic nature of the alleged offending that provides the foundation for the allegation that the accused engaged in a course of conduct. Thus, the solution matches the problem.

11.2.4 A break from the previous approach

The introduction of section 47A in 1991 was an attempt to shift the law from the narrow approach of *S v The Queen*, but was not successful. The clear intention behind the introduction of the course of conduct charge is to make a definitive break from the earlier approach in *S v The Queen* and the approach in section 47A. It makes changes to laws governing duplicity and the particulars that must be provided for a charge. It better recognises the nature and effect of repeated and systemic sexual abuse.

A good illustration of the difference is that the kind of evidence that was held to be inadequate in *SLJ* is very much the type evidence that supports a course of conduct. Evidence of that kind would be admissible to prove a course of conduct. Lack of specificity regarding individual incidents— due to the regularity and repetitive nature of the offending — may in fact go to the strength of the evidence in showing a course of conduct as opposed to sporadic, isolated incidents.

11.2.5 Other matters concerning course of conduct charge

The new course of conduct provisions also deal with some other matters, including:

- ◆ providing that a section 47A charge cannot be used with a course of conduct charge (to avoid complexity in the one indictment)
- ◆ when a single incident may be charged that alleges an incident within the period covered by a course of conduct charge, and
- ◆ how to deal with the situation where an accused wishes to plead to part of the period covered by the charge but not all of it (e.g. 'I had sex with her after she turned 15 but not before then').

Unlike a section 47A charge, a course of conduct charge may be heard and determined summarily. Such a charge may only be filed with the consent of the Director of Public Prosecutions.

If the jury hearing a course of conduct charge is not satisfied that the evidence proves a course of conduct, but is satisfied that there was a particular incident constituting a criminal offence, then it will not be possible for the jury to find the accused guilty of a charge of having committed that one offence unless that specific offence is charged separately in the indictment. This is because the nature of the prosecution's allegation is quite different (with a course of conduct) and the lack of particulars for that charge means the accused may not have sufficient notice to be able to defend himself in relation to the specific offence. If the prosecution considers there is evidence of a specific offence, then that will need to be charged as such.

12 Background to new sexting laws

In May 2013, the Victorian Parliament's Law Reform Committee (the Committee) released its Report on the 'Inquiry into Sexting', which considered:

the creating, sharing, sending or posting of sexually explicit messages or images via the internet, mobile phones or other electronic devices by people, especially young people.

The Report concluded that Victorian laws applying to sexting 'miss the mark'.

In particular, the Report found that child pornography laws, which were designed to protect minors from predatory sexual behaviour, were inadequate as they criminalised non-exploitative, peer-to-peer and consensual sexting by minors. This produced the anomalous situation in which some teenagers could legally engage in sexual activity, but it was unlawful for them to capture an image of that sexual activity.

At the same time, the Committee found that the law was 'relatively weak' in relation to the distribution of intimate images by adults or minors without consent.

Accordingly, the Committee recommended (among other things):

- ◆ the introduction of a defence to Victorian child pornography offences where a minor takes, possesses or distributes sexualised images of themselves or their peers (Recommendation 6), and
- ◆ the introduction of a new offence to prohibit the distribution of an 'intimate image' of a person (whether adult or minor) without that person's consent (Recommendation 9).

13 New exceptions to child pornography

In Victoria, there are four child pornography offences, which prohibit the following:

- ◆ producing child pornography (section 68(1) of the *Crimes Act*)
- ◆ inviting, procuring, causing or offering a minor to be concerned with making child pornography (section 69(1) of the *Crimes Act*)
- ◆ knowingly possessing child pornography (section 70(1) of the *Crimes Act*), and
- ◆ publishing or transmitting child pornography (section 57A of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995*).

In response to the Committee's recommendations, the Act introduces exceptions to the above offences where minors are involved in non-exploitative sexting. These exceptions only apply to minors (persons under 18) and only apply where the child pornography is an image.

The Act introduces new section 70AAA into the *Crimes Act*. It contains four exceptions to the child pornography offences in sections 68 (production), 69 (procuring) and 70 (possession) of the *Crimes Act*. The same exceptions have also been introduced into the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* in relation to the publication and transmissions of child pornography.

Four exceptions are needed to deal with different permutations and combinations of certain relevant factors, namely:

- ◆ does the image depict only the accused child or is another child or person depicted?
- ◆ whose depiction makes the image child pornography?
- ◆ what is the age difference between the accused child and the child whose depiction makes the image child pornography?
- ◆ does the image depict criminal conduct?
- ◆ is the accused the victim of the depicted criminal conduct?

In some situations, the exceptions may overlap. This is not problematic, as the exceptions are not mutually exclusive.

The exceptions are further explained below, and, in Appendix 4, a number of scenarios are presented to illustrate how the new laws apply.

13.1 First exception

Under the first exception (s 70AAA(1)), a minor (A) will not commit a child pornography offence where:

New section 70AAA(1) of the *Crimes Act*

- a) the child pornography is an image
- b) the image depicts A alone or with an adult, and
- c) the image is child pornography because of its depiction of A.

This exception applies where the image depicts the minor (A) alone or with an adult.

The rationale behind this exception is that it is not appropriate to criminalise a minor's conduct when they are themselves the subject of the child pornography (e.g. where a minor takes a naked 'selfie').

Where A is depicted with an adult, the exception will apply to A, but will not apply to the depicted adult if he or she produced, possesses etc the same image.

13.2 Second exception

Under the second exception (s 70AAA(2)), a minor (A) will not commit a child pornography offence where:

New section 70AAA(2) of the *Crimes Act*

- a) the child pornography is an image
- b) the image depicts A with another minor

New section 70AAA(2) of the *Crimes Act*

- c) the image is child pornography because of its depiction of A or another minor
- d) where the image is child pornography because of its depiction of a minor other than A, at the time at which the offence is alleged to have been committed:
 - i A is not more than 2 years older than the youngest minor whose depiction in the image makes it child pornography, or
 - ii A believes on reasonable grounds that they are not more than 2 years older than the youngest minor whose depiction in the image makes it child pornography, and
- e) the image does not depict an act that is a criminal offence punishable by imprisonment.

This exception applies where a minor (A) is depicted with another minor or minors in the image. It requires that A be no more than two years older than the youngest minor depicted in the image. This requirement is designed to ensure that the exception only applies to minors who are peers (in terms of age).

If the image is child pornography only because of its depiction of A, then the age of other minors in the image will not be relevant. Similarly, where A is depicted with several minors, those minors who are not depicted in a way that makes the image child pornography will not be relevant for the purposes of this exception.

In relation to possession of child pornography, the relevant time at which the age of A is to be assessed is the time at which the image first came into his or her possession: new section 70AAA(6). This means that A will not lose the benefit of the exception as he or she ages simply by retaining the image. However, the exception is only available while A is under 18 years.

The exception also requires that the image not depict a criminal offence. This means that the exception will not protect young people who possess, produce etc pornographic images of criminal activity. An example is the DVD made and sold by Werribee students in 2006 of the rape and sexual assault of a 17 year old girl. This is because the exceptions are designed to only protect minors who engage in non-predatory and non-exploitative sexting.

By way of example, this exception will apply where the image depicts A taking part in an act of sexual penetration with another minor who is not more than 2 years younger and both are consenting to the act.

13.3 Third exception

Under the third exception (s 70AAA(3)), a minor (A) will not commit a child pornography offence where:

New section 70AAA(3) of the *Crimes Act*

- a) the child pornography is an image
- b) the image depicts A alone or with another person
- c) the image depicts an act that is a criminal offence, and
- d) A is a victim of that offence.

This exception applies to protect a minor (A) from child pornography charges where they themselves are the victim of a criminal offence depicted in the image. An example is where the image depicts A being raped by another person.

13.4 Fourth exception

Under the fourth exception (s 70AAA(4)), a minor (A) will not commit a child pornography offence where:

New section 70AAA(4) of the *Crimes Act*

- a) the child pornography is an image
- b) the image does not depict A
- c) the image:
 - i does not depict an act that is a criminal offence punishable by imprisonment, or
 - ii depicts an act that is a criminal offence punishable by imprisonment but A believes on reasonable grounds that it does not, and
- d) at the time at which the offence is alleged to have been committed:
 - i A is not more than 2 years older than the youngest minor whose depiction in the image makes it child pornography, or
 - ii A believes on reasonable grounds that they are not more than 2 years older than the youngest minor whose depiction in the image makes it child pornography.

This exception applies where the minor (A) is not depicted in the image. It requires that A be no more than two years older than the youngest minor whose depiction makes the image child pornography. Minors depicted in the image who are not depicted in a way that makes the image child pornography are not relevant for the purposes of this exception.

New subsection 70AAA(5)(a) provides that where this exception concerns the offences of production of child pornography or possession of child pornography, the age of the youngest minor (whose depiction makes the image child pornography) is their age at the time the image was made or produced. It is not their age at the time the offence is alleged to have been committed.

In relation to possession of child pornography, the relevant time at which the age of A is to be assessed is the time at which the image first came into his or her possession: new section 70AAA(6). This means that A will not lose the benefit of the exception as he or she ages simply by retaining the image. However, the exception is only available while A is under 18 years.

The exception will only apply where the image does not depict a criminal offence, or A believes on reasonable grounds that it does not depict a criminal offence. For instance, the image may depict sexual penetration of a 12 year old by a 15 year old. The image will, therefore, depict an offence under section 45 of the *Crimes Act* (sexual penetration of a child under the age of 16). This means that the exception will not apply to A, unless he or she believes on reasonable grounds that the image does not depict a criminal offence (e.g. where the ages of the minors depicted are not clear).

13.5 Evidential burden

New subsection 70AAA(7) provides that the accused bears the burden of proving (on the balance of probabilities) that they believed on reasonable grounds that:

- ◆ they were not more than 2 years older than the relevant person in subsections 70AAA(2)(d)(ii) and 70AAA(4)(d)(ii), and
- ◆ an image did not depict a criminal offence punishable by imprisonment in subsection 70AAA(4)(c)(ii).

14 New summary offences

The Act introduces two new summary offences into the *Summary Offences Act 1966*. The offences prohibit the distribution of, and a threat to distribute, an 'intimate image' in circumstances that are contrary to community standards of acceptable conduct.

These offences may be committed by adults or children and apply to 'intimate images' of children or adults. Under amended section 40, an 'intimate image' is one that depicts:

- ◆ a person engaged in sexual activity
- ◆ a person in a manner or a context that is sexual, or
- ◆ the genital or anal region of a person or, in the case of a female, the breasts.

This definition is deliberately broad and is intended to cover any image which may be considered to be intimate.

The illustrative scenarios in Appendix 4 also cover these new summary offences.

14.1 Distribution of an intimate image

New section 41DA(1) provides that:

Distribution of intimate image (section 41DA(1))

A person (A) commits an offence if:

- a) A intentionally distributes an intimate image of another person (B) to a person other than B, and
- b) the distribution of the image is contrary to community standards of acceptable conduct.

This offence is designed to address the serious harm or distress that distribution of intimate images to third parties may cause. An example provided in section 41DA is where a person (A) posts a photograph of another person (B) on a social media website without B's express or implied consent and the photograph depicts B engaged in sexual activity.

Under subsection 41DA(3), the offence will not apply where the person depicted in the image is an adult and has given consent to the distribution. It provides that:

Distribution of intimate image (section 41DA(3))

Subsection (1) does not apply to A if:

- a) B is an adult, and
- b) B had expressly or impliedly consented, or could reasonably be considered to have expressly or impliedly consented, to
 - i the distribution of the intimate image, and
 - ii the manner in which the intimate image was distributed.

'Consent' is defined in section 40 to mean 'free agreement', which is the same as the definition of consent in relation to sexual offences in new section 34C of the *Crimes Act*. This consent exception only applies to adults — consent is not relevant where the image depicts a child.

The offence includes the element that the distribution of the image is 'contrary to community standards of acceptable conduct'. This provides a safeguard against overreach by the new offence. In the absence of this element, the new offence might capture activities which are generally considered to be socially acceptable, such as:

- ◆ a parent sending family members and friends a photograph of their nude newborn baby
- ◆ a school posting on its website photographs of students at a swimming competition in their bathers, or
- ◆ emailing someone the Pulitzer Prize winning photograph of the naked young girl fleeing a napalm attack during the Vietnam War.

Whether a distribution of (or a threat to distribute) an intimate image is 'contrary to community standards of acceptable conduct' will be determined on a case by case basis. New section 40 provides that factors relevant to making this determination include:

- ◆ the nature and content of the image
- ◆ the circumstances in which the image was captured
- ◆ the circumstances in which the image was distributed
- ◆ the age, intellectual capacity, vulnerability or other relevant circumstances of a person depicted in the image
- ◆ the degree to which the distribution of the image affects the privacy of a person depicted in the image.

The maximum penalty for this offence is 2 years imprisonment.

14.2 Threat to distribute an intimate image

New section 41DB(1) provides that:

Threat to distribute intimate image (section 41DB)

A person (A) commits an offence if:

- a) A makes a threat to another person (B) to distribute an intimate image of B or of another person (C)
- b) the distribution of the image would be contrary to community standards of acceptable conduct, and
- c) A intends that B will believe, or believes that B will probably believe, that A will carry out the threat.

This offence aims to address the significant harm or distress that can occur when threats to distribute intimate images are used as a tool of coercion (e.g. in the context of relationship breakdown). It is modelled on the new offence of 'threat to commit a sexual offence' introduced by the Act.

Under section 41DB(3), a threat may be made by any conduct and may be explicit or implicit.

The maximum penalty for the threat to distribute offence is 1 year's imprisonment.

Appendix 1 Sample Question Trails for Rape and Sexual Assault Trials

In trials for the new offences of rape and sexual assault, it will often assist the jury if they have before them a written copy of the factual questions that they must determine in reaching their verdict. This can help the jury progress logically through the issues in an ordered way.

Some suggested generic question trails for rape and sexual assault are provided below. The judge's oral directions to the jury will provide the broader context for the question trails and may also integrate those questions with the evidence so that the specific questions the jury must consider refer to the particular accused and complainant and the more specific evidence in the case.

The following question trail is based (with some minor modifications) on the illustrative 'route to verdict' contained in Chapter 17 of the Judicial Studies Board (England and Wales), *Crown Court Bench Book: Directing the Jury* (March 2010).

Rape Question Trail

Question 1

Did the accused sexually penetrate the complainant?

If you are satisfied that the accused sexually penetrated the complainant, then proceed to Question 2.

If you conclude that the accused did not sexually penetrate the complainant or that he might not have done so, then find the accused not guilty.

Question 2

Did the accused do so intentionally?

If you are satisfied that the accused did so intentionally, then proceed to Question 3.

If you conclude that the accused did not do so intentionally or that he might not have done so intentionally, then find the accused not guilty.

Note: where there is no issue that the sexual penetration was intentional, this question may be combined with Question 1.

Question 3

Did the complainant consent to the penetration?

If you are satisfied that the complainant did not consent to the penetration, then proceed to Question 4.

If you conclude that the complainant did consent or may have consented, then find the accused not guilty.

Question 4

Did the accused believe that the complainant was consenting to the penetration?

If you are satisfied that the accused did not believe that the complainant was consenting, then find the accused guilty.

If you conclude that the accused did believe or may have believed that the complainant was consenting, then proceed to Question 5.

Question 5

Was the accused's belief reasonable in the circumstances?

If you are satisfied that it was not a reasonable belief, then find the accused guilty.

If you conclude that it was or may have been a reasonable belief, then find the accused not guilty.

Sexual Assault Question Trail

Question 1

Did the accused touch the complainant?

If you are satisfied that the accused touched the complainant, then proceed to Question 2.

If you conclude that the accused did not touch the complainant or that he might not have done so, then find the accused not guilty.

Question 2

Did the accused do so intentionally?

If you are satisfied that the accused did so intentionally, then proceed to Question 3.

If you conclude that the accused did not do so intentionally or that he might not have done so intentionally, then find the accused not guilty.

Note: where there is no issue that the touching was intentional, this question may be combined with Question 1.

Question 3

Was the touching sexual?

If you are satisfied that the touching was sexual, then proceed to Question 4.

If you conclude that the touching was not sexual or that it might not have been, then find the accused not guilty.

Question 4

Did the complainant consent to the touching?

If you are satisfied that the complainant did not consent to the touching, then proceed to Question 5.

If you conclude that the complainant did consent or may have consented, then find the accused not guilty.

Question 5

Did the accused believe that the complainant was consenting to the touching?

If you are satisfied that the accused did not believe that the complainant was consenting, then find the accused guilty.

If you conclude that the accused did believe or may have believed that the complainant was consenting, then proceed to Question 6.

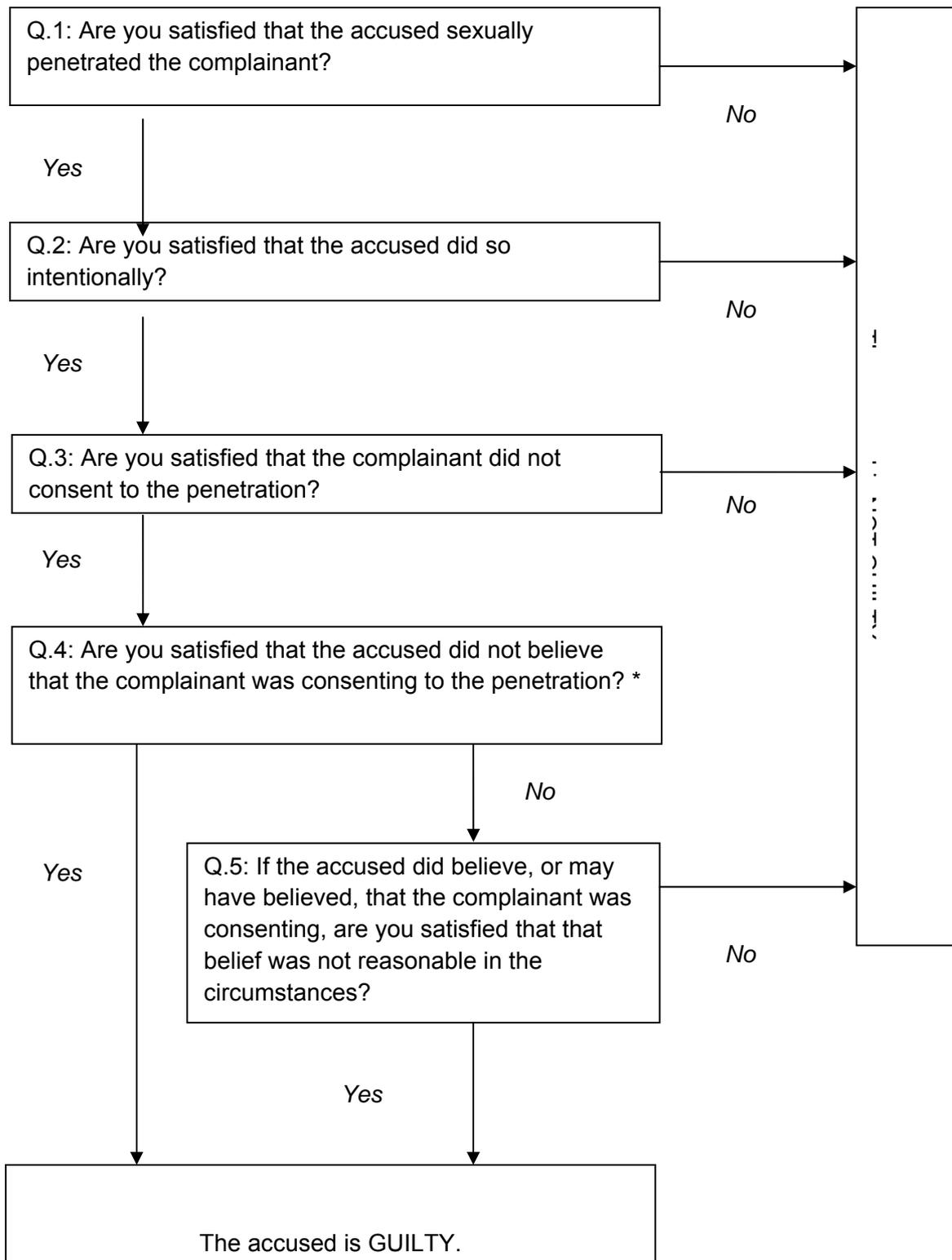
Question 6

Was the accused's belief reasonable in the circumstances?

If you are satisfied that it was not a reasonable belief, then find the accused guilty.

If you conclude that it was or may have been a reasonable belief, then find the accused not guilty.

Appendix 2 Flowchart for Question Trail for Rape Trials



* Questions 4 and 5 can be treated as two parts of the one question. They have been separated in the diagram above to highlight how a question trail might work where both the accused's belief, and whether such a belief was reasonable, are in issue.

Appendix 3 Sample Integrated Directions for Rape Trials

Below are four examples of integrated jury directions for rape trials. Under the approach of the *Jury Directions Act 2015*, the trial judge may provide the jury with questions for the jury to answer on the way to its verdict, and these questions may integrate facts and law.

That is to say, rather than summarising the law in the abstract, summarising the parties' evidence, and then instructing the jury to 'apply the law to the facts' as the jury finds them, the trial judge may instead pose to the jury a sequence of questions which are factual in nature, but which also incorporate or embed the legal questions that need to be answered for a verdict to be properly reached.

'Integrated directions' incorporate a summary statement of the prosecution and defence cases with respect to each of the particular questions. These summaries are normally prepared by counsel and the trial judge working together to reach an agreed-upon form of words to give the jury.

In addition, any relevant further jury direction to be given may be included at the relevant point in the integrated directions.

The four sets of sample directions below relate to fictional cases (though some elements have been adapted — and altered — from actual cases). In these scenarios, 'satisfied' is used as a shorthand reference to 'satisfied beyond reasonable doubt'.

Scenario 1: Alec (accused)

Alec, 23, has been charged with the rape of Briony, 21. The two met through an internet dating app. The offence is alleged to have happened in Alec's car after the two had been out to a restaurant and bar, and Alec had offered to drive Briony back to her house.

The agreed facts are that the two met over the app several weeks before the night of the alleged offence. They met in person on the night of the offence, after Alec offered to take Briony out for dinner in the city. After the dinner, they proceeded to a nearby bar on Bourke Street for a drink. Close to midnight, Alec asked Briony if she wanted to go back to his apartment. After declining and saying that she had an early start the following day, Briony decided to take a taxi. Alec said he would wait with her to make sure she got one safely. After waiting for 20 minutes, Alec offered to give Briony a lift home in his car, which he had parked around the corner. Appreciating the gesture, Briony agreed and got into Alec's car. Giving Alec the directions, Briony relaxed and continued chatting to Alec. After 20 minutes, Alec stopped the car in a suburban street.

Briony, looking around noticed that it was not her street and was not sure exactly where they were. She was about to ask Alec if he was lost when she felt his hand brush her face. Pulling her towards him, Alec began to kiss Briony. She responded positively, kissing him back. Alec began to unbutton Briony's shirt and caress her thigh. He then reached over to move Briony's seat back, reclining it at the same time. Alec then maneuvered himself on top of Briony and continued kissing and caressing her. She continued kissing him back. Alec then moved his hand up Briony's skirt and inside her underwear. Briony responded by saying 'Um. I'm ... I'm ... What are you doing?' and moved in her seat from side to side. Alec then proceeded to remove Briony's underwear and penetrate her vagina with his penis. After Alec had finished, Briony pulled up her underwear and told him to take her home, which he did. As he dropped her off outside her home, he said, 'I'll text you again tomorrow, yeah?'. Afraid and uncertain as to what Alec would do, Briony said, 'Um, yeah, okay', and went inside.

Question 1: Did Alec intentionally sexually penetrate Briony by penetrating her vagina with his penis?

Alec has admitted he intentionally penetrated Briony by introducing his penis into her vagina, so this element is not in dispute. You should proceed directly to Question 2.

Question 2: Did Briony consent to being sexually penetrated by Alec?

If you are satisfied that Briony did not consent to being sexually penetrated by Alec, you should proceed to Question 3.

If you conclude that Briony did consent or may have consented, then Alec is not guilty of rape.

Prosecution case: Briony did not consent to being sexually penetrated by Alec. She had already refused his offer to go back to his apartment and knew that she did not want to sleep with Alec that night. She only accepted his offer of the ride home when it seemed to be the only option and since Alec had been considerate enough to wait with her for a taxi. Once in the car she felt safe, thinking that Alec was indeed driving her home, but when she realised they had not stopped in her street she began to worry. She did enjoy Alec's kisses, but when he got on top of her and he put his hand inside her underwear she realised that he wanted more. She asked him what he thought he was doing but he did not answer her. She tried to move away from him but he was already on top of her. As she couldn't leave and didn't know where she was, and there was no one around, she submitted and waited for the ordeal to be over.

Defence case: Briony did consent. She agreed to travel with him and chatted happily during the car trip. She responded positively when Alec kissed her, rubbing her hand on his thigh, and moaning as Alec undid her blouse and put his hand up her skirt. When Alec moved her seat back, she adjusted how she was sitting to accommodate him. The words she spoke did not indicate a lack of consent but were simply part of their sexual interplay. She said okay to him texting her when he dropped her home.

Question 3: Did Alec believe that Briony was consenting to the penetration?

If you are satisfied that Alec did *not* believe that Briony was consenting, then Alec is guilty of rape and you don't need to consider any further questions.

If you conclude that Alec did believe or may have believed that Briony was consenting, then proceed to Question 4.

Prosecution case: Alec did not believe that Briony was consenting. He had purposefully stopped in a location other than where he said he would take Briony, in order to trap her in his car and have sex with her. Further, he must have known Briony was not consenting when she tried to move away from him in her seat.

Defence case: Alec believed that Briony was consenting. She had been flirting with him all night, and once he began kissing and fondling her, he thought she responded positively to his actions. She said okay to him texting her the next day when he took her home.

Question 4: If Alec did believe, or may have believed, that Briony was consenting, was that belief reasonable in the circumstances?

If you are satisfied it was not a reasonably held belief, Alec is guilty of rape.

If you conclude that it was, or may have been, a reasonably held belief, Alec is not guilty of rape.

Prosecution case: Alec did not have a reasonable basis for believing that Briony was consenting. He did not ask her at any stage if she wanted sex, and, at best, he just assumed that because she had responded positively to the kissing that she would consent to sex. He ignored her question about what he was doing and ignored her attempts to move away from him.

Defence case: Alec did have a reasonable basis for believing Briony was consenting. While he did not ask her directly if she wanted sex, she did other things that gave Alec reason to believe she was consenting, namely, responding positively to his kisses and caresses, moaning when he put his hand inside her underwear, and moving in her seat to accommodate him. She said okay to him texting her the next day when he took her home.

Scenario 2: Adam (accused)

Adam, 23, has been charged with raping Brooke, 22, in a nightclub on King Street. He admits to having sexually penetrated Brooke in a cubicle in the women's toilet, but claims it was consensual. Brooke says she had agreed to have sex with another man, Chris. Chris had told her to wait in the cubicle with her back to the cubicle door and facing the wall. She did not turn around when Adam came into the cubicle, so she did not realise she was having sex with Adam and not Chris. During the sex, she turned around and saw that it was Adam, not Chris. She immediately told him to stop and get out, which he did. She then left the club.

Question 1: Did Adam intentionally sexually penetrate Brooke by penetrating her vagina with his penis?

Adam has admitted that he intentionally sexually penetrated Brooke by putting his penis into her vagina, so this element is not in dispute. You should proceed directly to Question 2.

Question 2: Did Brooke consent to being sexually penetrated by Adam?

There is no dispute that Brooke was consenting to sex, but the issue is whether she had consented to sex with Adam. If you are satisfied that Brooke was mistaken about the identity of the person she was having sex with (i.e. she thought she was having sex with Chris and not Adam), you must find that she did not consent to the act, and you should proceed to Question 3.

If you conclude that Brooke was not mistaken, or may have not been mistaken, about the identity of the person she was having sex with, then Adam is not guilty.

Prosecution case: After arriving at the nightclub, Brooke danced with several men, including Adam and Chris. At the end of the night, she and Chris kissed and she agreed to meet him in the women's bathroom to engage in sex. He told her he was going outside for a cigarette, and she should undress and wait for him in one of the cubicles facing the wall, which she did. Brooke did not turn around when she heard the man entering the cubicle and lock the door. Without saying anything, the man penetrated her vagina with his penis. Brooke did not know that the man having sex with her was actually Adam and not Chris. Brooke was consenting to sex with Chris, not Adam. When she realised that it was Adam, she told him to stop.

Defence case: Brooke freely agreed to have sex with Adam. She had been dancing and flirting with him all night, and had had consensual sex with him in the same nightclub 12 months before. As she was walking towards the women's bathroom, Adam saw Brooke wink at him, which he thought was an invitation to follow her into the bathroom. When he found Brooke in a cubicle, she was undressed and facing the wall. She participated willingly when he penetrated her vagina. Brooke knew it was Adam. The fact that she told him to stop just shows that she changed her mind about having sex, not that she had made a mistake about who she was having sex with.

Question 3: Did Adam believe that Brooke was consenting?

If you are satisfied that Adam did not believe that Brooke was consenting, then Adam is guilty of rape.

If you conclude that Adam did believe, or may have believed, that Brooke was consenting, then proceed to Question 4.

Prosecution case: Adam knew that Brooke thought she was having sex with Chris. He had seen them kissing and saw Brooke pointing in the direction of the bathroom to Chris. When entering the cubicle, he intentionally did not say anything before penetrating her, so that she would not realise that he was not Chris. Although she danced with Adam earlier in the night, Brooke had spent the rest of the night talking to and kissing Chris. Brooke says she did not wink at Adam when walking towards the bathroom. He knew that she was not consenting to sex with him.

Defence case: Brooke had been flirting and dancing with Adam all night, and gestured to him when walking towards the bathroom. Adam and Brooke had had consensual sex in the bathroom of the same nightclub 12 months earlier, so he thought she was inviting him to have sex with her again. She participated willingly when he penetrated her and seemed to enjoy it.

Question 4: If Adam did believe, or may have believed, that Brooke was consenting, was that belief reasonable in the circumstances?

If you are satisfied that it was not a reasonably held belief, then Adam is guilty of rape.

If you conclude that it was, or may have been, a reasonably held belief, then Adam is not guilty of rape.

Prosecution case: Even if Adam honestly believed that Brooke was consenting to sex with him, such a belief was not reasonable in the circumstances. He did not take any steps to check whether Brooke was consenting to sex with him or not (such as speak to her before penetrating her), and she had not given him any indication that she was willing to have sex with him.

Defence case: Brooke and Adam had had consensual sex in the bathroom of the nightclub 12 months earlier. After dancing and flirting with him earlier in the night, Brooke invited Adam to follow her into the bathroom by winking at him. Adam thought Brooke was agreeing to have sex with him when he found her naked in the cubicle and she participated freely when he started penetrating her. Although he'd seen Brooke kissing Chris earlier, he had just seen Chris leave the nightclub so he assumed Brooke was no longer interested in him. In these circumstances, Adam's belief that Brooke was consenting to sex with him was reasonable. He stopped penetrating her when she told him to do so, as he understood that, from that point, she had withdrawn her consent. Up until then, he had good reason to think Brooke was consenting.

Direction: If you find that Adam knew that Brooke was mistaken about his identity, this is enough to show that he did not reasonably believe that she was consenting. If you are not sure about whether Adam knew that Brooke was mistaken about his identity, you should consider whether Adam had a reasonable basis for thinking that Brooke was consenting to sex, taking into account any steps he took to ascertain whether she was consenting.

Scenario 3: Angus (accused)

Angus is charged with one count of raping Blake by compelled sexual penetration. Angus, 41, is a small business owner. Blake, 21, was an administrative assistant at Angus's business at the time. The alleged offence happened after Angus and Blake went back to the office after a social dinner with other staff at a nearby restaurant. Angus and Blake went back to the office because Blake had missed the last tram and Angus suggested he sleep in the office overnight. Angus went with Blake to let him in the office and make sure he was settled for the night. Blake went

upstairs to sleep on a sofa in the staff area. A short time later, Angus went upstairs and woke Blake up by rubbing Blake's thigh before engaging in fellatio upon Blake while masturbating himself. Blake did not say anything when he felt Angus touching him. When Angus began fellating him, he had an erection, but did not ejaculate. When Angus himself had ejaculated, Blake told him to stop touching him and to get away from him, which Angus did.

Question 1: Did Angus intentionally cause Blake to sexually penetrate Angus by taking Blake's penis into his mouth?

Angus has admitted that he intentionally caused Blake to sexually penetrate him by taking Blake's penis into his mouth, so this element is not in dispute. You should proceed directly to Question 2.

Question 2: Did Blake consent to sexually penetrating Angus?

If you are satisfied that Blake did not consent to doing the act of penetration, then proceed to Question 3.

If you conclude that Blake did consent or that he may have consented, then Angus is not guilty.

Prosecution case: Blake did not consent. He was asleep when Angus woke him up by rubbing his thigh. He did not say or do anything to indicate consent to Angus touching him, unzipping his pants or then taking his penis into his mouth. He felt scared and confused. He didn't know how to tell Angus to stop because he was his boss and he froze up. His erection was an involuntary physiological reaction. Blake moved his head from side to side to avoid Angus's kisses, and was whimpering while Angus was fellating him. It was not up to Blake to protest — it was up to Alan to get consent first and he didn't.

Defence case: Blake did consent. He responded positively to Angus touching him on the thigh by touching him on the shoulder. He moaned while Angus was fellating him and got an erection. He did not say or do anything to indicate that he was not enjoying the oral sex.

Question 3: Did Angus believe that Blake was consenting to the penetration?

If you are satisfied that Angus did *not* believe that Blake was consenting, then Angus is guilty of rape by compelling sexual penetration and you don't need to consider any further questions.

If you conclude that Angus did believe or may have believed that Blake was consenting, then proceed to Question 4.

Prosecution case: Angus must have known that Blake was not consenting because he knew he had said and done nothing to indicate that he wanted to have sex with him. He orchestrated events so that Blake would stay in the office and used his power as Blake's manager.

Defence case: Angus honestly believed Blake was consenting. He thought Blake had responded positively to his actions.

Question 4: If Angus did believe, or may have believed, that Blake was consenting, was that belief reasonable in the circumstances?

If you are satisfied that it was not a reasonable belief, then Angus is guilty of rape by compelling sexual penetration.

If you conclude that it was or may have been a reasonable belief, then Angus is not guilty of rape by compelling sexual penetration.

Prosecution case: Any belief that Angus may have had that Blake as consenting was unreasonable. Angus had no basis for believing that Blake had consented to the sexual penetration. Blake's erection was simply an involuntary physiological reaction to the stimulation, not an indication of consent. It was unreasonable of Angus to treat Blake's touching his shoulder — an ambiguous act in the absence of other information — as a form of giving his consent to the oral sex. He never took any steps to find out whether Blake was consenting. He never asked

Blake what he wanted. He self-centredly and unreasonably misinterpreted Blake's passivity as consent and unreasonably misread his frightened whimpering as pleasurable moaning.

Defence case: In the circumstances, it was quite reasonable for Angus to think that Blake was consenting. They had been flirting over dinner, and Blake had been very happy for Angus to show him where he could 'bed down for the night' in the office. Blake later indicated no discomfort at Angus's more sexual touching, and he moaned with apparent pleasure when Angus fellated him. The fact that Blake's penis became erect during the fellatio is evidence that he enjoyed it. All these facts made it reasonable for Angus to believe Blake consented to Angus's actions.

Direction: It is agreed between the parties that Angus was mildly intoxicated at the time of the sexual penetration. In determining whether Angus had a reasonable belief that Blake was consenting, you should ignore the fact that Angus was mildly intoxicated and should instead have regard to the standard of a reasonable person who was not intoxicated and was in the same circumstances as Angus at the relevant time.

Scenario 4: Arnold (accused)

Arnold, 53, is a naturopath and has been charged with raping one of his patients, Bianca, 25. The rape is alleged to have occurred while Arnold was giving Bianca a therapeutic massage for her endometriosis.

Question 1: Did Arnold intentionally sexually penetrate Bianca by penetrating her vagina with his finger?

Arnold has admitted that he intentionally sexually penetrated Bianca by putting his finger into her vagina, so this element is not in dispute. You should proceed directly to Question 2.

Question 2: Did Bianca consent to being sexually penetrated by Arnold?

If you are satisfied that Bianca did not consent to being sexually penetrated by Arnold, you should proceed to Question 3.

If you conclude that Bianca did consent or may have consented, then Arnold is not guilty of rape.

Prosecution case: Bianca had been receiving treatment from Arnold, who is a naturopath, for a gynaecological medical condition (endometriosis). On her fourth visit, Arnold massaged Bianca's legs and back, and then removed her underpants. He then put his finger inside her vagina. Bianca asked what Arnold was doing and he said he was massaging the scar tissue away in order to loosen the muscles through her pelvic area. On that basis, she believed that the treatment was necessary to relieve her endometriosis pain.

Defence case: While Arnold was massaging Bianca, she told him it was nice and moved so that his hands were in contact with her genitalia. The massage then changed from a professional massage to an intimate one. As Arnold was massaging Bianca's clitoris and vagina, she responded positively and told him how great she felt. She never told him to stop.

Direction: If you are satisfied that Bianca mistakenly believed the act was for a medical purpose, then you must conclude that Bianca did not consent to being sexually penetrated by Arnold.

Question 3: Did Arnold believe that Bianca was consenting to the penetration?

If you are satisfied that Arnold did not believe that Bianca was consenting, then Arnold is guilty of rape.

If you conclude that Arnold did believe, or may have believed, that Bianca was consenting, then proceed to Question 4.

Prosecution case: Arnold's claim that he believed Bianca was consenting is implausible. Bianca was Arnold's patient and she had been coming to him for therapy to treat her endometriosis and she did not give any express consent to penetration. Instead, he moved seamlessly from massage to penetration without asking her permission. When she asked what he was doing, he told her he was massaging the scar tissue away. In these circumstances, Arnold knew that Bianca mistakenly believed the penetration was for a medical purpose and was not consenting to the penetration as a sexual act.

Defence case: Bianca told Arnold that she was enjoying his massage and moved so that his hands were in contact with her genitalia. When he penetrated her vagina with his finger, she told him it felt good. She never told him to stop what he was doing, so he thought she was enjoying it.

Question 4: If Arnold did believe, or may have believed, that Bianca was consenting, was that belief reasonable in the circumstances?

If you are satisfied it was not a reasonably held belief, then Arnold is guilty of rape.

If you conclude that it was, or may have been, a reasonably held belief, then Arnold is not guilty of rape.

Prosecution case: Even if Arnold did believe that Bianca was consenting to sexual penetration, this belief was not reasonable in the circumstances. Their relationship was a professional one of therapist and patient, he was much older than her, there was no context of personal intimacy leading up to the penetration, and he did not take any steps to find out if she was consenting, such as asking her before he penetrated her vagina. He had also deliberately misled her about the purpose of his penetrating her.

Defence case: Arnold had a reasonable basis for believing that Bianca was consenting, since she said she was enjoying the penetration and never told him to stop what he was doing. In these circumstances, his belief in consent was a reasonable one.

Evidential direction: If you conclude that Arnold knew or believed that Bianca mistakenly believed that the penetration of her vagina with his finger was to treat her endometriosis, this is enough to show that Arnold did not have a reasonable belief in Bianca's consent. Further, in deciding whether Arnold's belief in consent was reasonable, you should take into account any steps he took to find out whether she was consenting.

Appendix 4 Illustrative scenarios for sexting reforms

Below are a number of fictional scenarios that illustrate the operation of the new laws regarding exceptions to child pornography offences and the new summary offences relating to distribution of intimate images. The scenarios cover a range of situations in which young people may find themselves. However, not every possible situation is covered.

Please note that the discussion of how the laws apply is concerned only with Victorian laws and is focused on the new exceptions to child pornography offences and the new distribution offences. The pre-existing defences to child pornography (particularly those defences to possession of child pornography contained in section 70(2)) will also be taken into account where relevant. Other offences may also be applicable in some scenarios, such as sexual offences or Commonwealth offences regarding child pornography, but these will not be covered in any detail. Please also note that the discussion of the new laws is only in a brief and summary form, illustrating how the new laws are expected to work.

Scenario 1: Ashleigh, Aaron and Brandon

Ashleigh, 15, meets Aaron, 18, at the 18th birthday party of Brandon, a mutual friend. After chatting and drinking for a little while, they hook up in Brandon's bedroom, kissing and caressing each other. They chat over Facebook in the days following the party, often sending messages of a sexual nature to each other.

After a week, they organise to meet up again on a Friday night at Aaron's house. Aaron's parents often travel to their holiday house for weekends, leaving Aaron alone in the house. Aaron has invited Ashleigh and a few of his mates (including Brandon) around for pizza and beers.

As the night progresses, Ashleigh and Aaron leave the group and head to Aaron's room. They kiss and fondle each other, and Aaron performs oral sex on Ashleigh. Afterwards, they continue to fondle each other, and Aaron asks Ashleigh if he can take a photo of her performing oral sex on him. Ashleigh is not sure if she wants to, but now feels like she owes Aaron something. Sensing her reluctance, Aaron assures her that the image will just be between them. Trusting Aaron, Ashleigh allows him to take the photo.

Some weeks after Aaron's pizza and beer night, Brandon tells Ashleigh he has seen the photo Aaron took of Ashleigh performing oral sex on him. He tells her that a couple of days after the party Aaron sent it by text message to Brandon and his other mates who were at Aaron's house that night. Brandon says he feels bad about the photo being sent and thought Ashleigh should know about it. He knows that Ashleigh is only 15. Ashleigh asks Brandon to forward the photo to her phone so she has evidence of what Aaron did. Brandon does so, and, at Ashleigh's request, deletes from his phone the original text message from Aaron containing the photo.

Ashleigh is distraught and embarrassed by the photo. Aaron does not go to Ashleigh's school, but she is worried that the image will be uploaded online and more people will find it. Not knowing what to do, she tells her parents she is unwell and stays home from school for a number of days. On the third day, Ashleigh's mother is worried that there is something wrong that Ashleigh is not telling her. After some discussion with Ashleigh, she is told about Aaron and the picture. Ashleigh's mother, outraged at Aaron's actions and worried about her daughter's privacy, takes Ashleigh to the police station to find out what they can do.

How do the new laws apply?

Aaron

Because Aaron is 18, an adult, the new exceptions to the child pornography offences do not apply to him. Neither do any of the other statutory defences to the child pornography offences. Aaron is therefore liable to be found guilty of production and possession of child pornography and possibly also of procuring a minor for the production of child pornography.

He is also liable to be found guilty of the new summary offence of distribution of an intimate image. Although Ashleigh did not consent to the distribution of the photo, her consent would not be relevant in any event as she is under 18.

Furthermore, because he is 18 and Ashleigh is 15, the oral sex they engaged in is unlawful. The fact that it was consensual is irrelevant because Aaron knew that Ashleigh was 15. Aaron is also, therefore, likely to be found guilty of taking part in an act of sexual penetration with a person under 16 years.

Ashleigh

Ashleigh possesses child pornography on her mobile phone. It might also be arguable that she was involved in the production of child pornography by allowing Aaron to take the photo of her. However, Ashleigh will not be liable for any offence. Since the image depicts a minor, Ashleigh, with an adult, Aaron, the first new exception for child pornography offences applies to Ashleigh. Also, she would already have a defence to possession as she is the minor depicted.

Ashleigh is not guilty of any offence for engaging in a sexual act with Aaron.

Brandon

Brandon was 18 when he came into possession of child pornography in the form of the photo of Ashleigh and Aaron. While Brandon did not knowingly take possession of it (because it was sent to him by Aaron), he did keep possession of it up until he deleted it on Ashleigh's request. It is an offence to knowingly possess child pornography. Deleting the photo some weeks later does not mean that he is not guilty. Because he knows Ashleigh's age, he cannot claim the defence of reasonably believing that she was 18 years or older. Similarly, Aaron's mates who also received the photo may be guilty of the possession offence if they knew Ashleigh's age and did not immediately delete the photo.

There is also a possibility that Brandon could be charged with the new summary offence of distribution of an intimate image because he sent the image to Ashleigh. However, his distribution of the image (at her request and in the context of him telling her about the photo out of concern for her) is not contrary to community standards of acceptable conduct.

Scenario 2: Thomas, Mia, Michael, Van and Chloe

Thomas, 17, met Mia, 16, at an under-18 music gig in the city. They danced, kissed and flirted in the mosh pit of the gig, leaving together when the gig was over. Thomas later added Mia on Snapchat and over the course of the next couple of weeks they proceeded to send sexually explicit 'selfies' to each other via the app. The two began going out together, and after a couple of weeks began to engage in consensual sexual intercourse.

One time, at Mia's house, while having sex, Mia suggested to Thomas that they video part of it. Mia had got the idea from a magazine and thought it would be hot, though she wanted to make sure that Thomas would keep the video private. Thomas, who knew other friends who had done similar things, was eager to try it, but he agreed to keep the video just between them. He recorded them using his mobile phone, and sent the video to Mia the following day.

Later that week, Thomas was boasting to his older friend Michael, 19, who did not believe that Mia had had sex with Thomas. In order to prove Michael wrong, Thomas showed him the video. Michael, upon seeing the video, demanded a copy.

When Thomas refused, Michael eventually left the matter alone, but later, when Thomas had left the room, Michael blue-toothed the video to his phone. Michael then sent the video on to his friends Van, 19, and Chloe, 17. A few weeks later, Michael was charged with another, unrelated offence. His phone was seized and examined by the police. The police also found the video of Mia and Thomas on his phone, and saw that he had sent the video on to Van and Chloe. When questioned by the police about the video, Michael explained how he came by it and what he had done with it.

How do the new laws apply?

Thomas

In relation to the selfies of Mia that she sent to him, Thomas does continue to possess child pornography, but, because the images don't depict him, he was less than two years older than Mia (the minor depicted in them) and they don't depict an offence, the fourth exception applies and he has not committed the offence of possessing child pornography. Thomas also has a defence to possession because he was sent the images by the minor depicted in them and he is less than two years older than her.

In relation to the video of the both of them, Thomas did produce and continues to possess child pornography, but the second exception to child pornography offences applies because he is a minor appearing in the image with another minor who is less than two years younger than him. Also the defence for possession of the video applies because he is one of the minors depicted. In addition, another defence applies because he made the video and was not more than two years older than Mia at the time. However, Thomas risks being found guilty of the summary offence of distribution of an intimate image because in showing Michael the video he could be said to be 'exhibiting' it, which comes within the definition of 'distribute' (in section 40 of the *Summary Offences Act 1966*).

Mia

In relation to Thomas's selfies that he sent her, and the video of the both of them, Mia's situation is the same as Thomas's. Also, she has not shown the video to anyone. She has not committed any offence.

Michael

Because Michael is 19, the new exceptions to child pornography offences will not apply to him and he can be charged with possession of child pornography for having the video of Mia and Thomas on his phone. Also, assuming he knew Thomas's and Mia's ages, none of the defences to possession apply to him.

He is also guilty of the summary offence of distribution of an intimate image in sending the video to Van and Chloe, as the persons whose images were distributed were under 18 and did not consent in any case. It is also arguable that when Michael blue-toothed the video from Thomas's phone to his own, he was 'distributing' an intimate image (because he was possibly making the image 'available for access by any other person') and so may also be guilty of the summary offence for that conduct as well.

Van

Van risks being found guilty of possessing child pornography in the form of the video of Thomas and Mia on his phone, if he was aware of their ages and did not delete the video straight away. Being 19, he does not come under any of the new exceptions or the defences to the child pornography offences.

Chloe

Chloe is under 18 and so potentially comes within the scope of the new exceptions for child pornography offences. In this case, if she kept possession of the video then she would likely be able to argue that she comes within the fourth exception because, while she is not one of the minors depicted in the image, the image does not depict an offence and she is not more than two years older than Mia, the youngest minor in the image.

Scenario 3: Sarah and Jack

Sarah, 16, had met Jack, 19, once before at a party and was excited when he added her on Facebook. Sarah was flattered and pleased that Jack, an attractive ex-student from her school, would be interested in her. They chatted online for a several weeks and on a number of occasions Jack asked Sarah to send nude 'selfies' which she did, including some photos of her masturbating.

Eventually, Sarah invited Jack to a party that her friend was having. At the party, the two drank, kissed and eventually they moved to an empty room. They continued to kiss and Jack began to touch Sarah's genital area. Sarah was comfortable with this, but when she realised that Jack was trying to remove her underwear she told him to stop.

Jack disregarded what Sarah said, saying 'Don't worry about it. I'll just do it now so you don't have to', and continued to remove her underwear. Sarah tried to pull away and called out to other people at the party, but no one heard. Jack, using force, removed Sarah's underwear and proceeded to penetrate her with his finger. Sarah felt in shock, and could not believe what was happening. She turned her head and looked away, saying nothing more for some time. After about a minute, she looked up and noticed that Jack was holding his phone in one hand and recording what he was doing. Sarah told Jack to stop but he continued. After another couple of minutes Jack finished and left the room, saying to Sarah, 'Come on, you were up for it, weren't you? After all those pics you sent me?'. Sarah then left the party and reported what Jack did to the police the next day. When the police arrested him, they seized his phone and found the video recording of him digitally raping Sarah.

How do the new laws apply?

Jack

Jack is guilty of rape, because he intentionally sexually penetrated Sarah, without her consent and without reasonably believing that she consented.

He is also guilty of producing and possessing child pornography in recording his rape of Sarah and keeping the video. He is also guilty of possessing child pornography in keeping the nude 'selfies' Sarah had previously sent him. He is 19 and so is not exempt from the child pornography offences. Nor does he come within the defences to possession of child pornography, since he is more than two years older than Sarah.

Sarah

In relation to her making and sending her nude selfies, Sarah is exempt from the offences of production and possession of child pornography because she is under 18 and is the only minor in the images. Sarah, of course, bears no liability in relation to the recording of her being raped by Jack, as she did not produce or possess the video, and even if she did, she was the victim of the crime that is depicted in the video.

Scenario 4: Ryan and Liam

Ryan is 17 and has recently been sent by a friend, Liam, 19, a video of two young people, male and female, having consensual sex. The couple in the video look like they are in their late teens. Liam sent the video in a group message to a few of his friends. Liam said in the accompanying text message, 'See what I got off the Aussie Uni Hotties site!'. Ryan does not know either of the young people in the video. Ryan believes that the female in the video is 18 because he saw a notice on the website that said 'All people appearing in these videos are 18 years of age and have consented to making these videos'. Ryan thought that was probably true because if the female was a uni student, then she must be at least 18. As it happens, the police have managed to break a child pornography production ring based in Melbourne that operates, among others, the website Liam used, and know that the male in the video, Sean, is 16 and the female, Alice, is 14. Police have tracked down Liam as a user of the website and have interviewed him. He told police who he had sent the video to.

How do the new laws apply?

Ryan

Ryan possesses child pornography in the form of the video of Sean and Alice. Ryan is under 18 and potentially comes under the fourth new exception as the minors depicted in the video are not him and the video does not depict an offence. However, Ryan is more than two years older than Alice when he first comes into possession of the video, so whether Ryan does satisfy the exception will depend on whether his belief that Alice was 18 was based on reasonable grounds. His belief is based on accepting as true the (false) notice on the website about the people appearing in the videos being 18 or older, and on his own (mistaken) belief that university students have to be 18. If the court accepts Ryan's belief that Alice is 18 as reasonable (though mistaken), then he has not committed an offence. However, if his belief is not accepted as reasonable, exception four would not apply, and Ryan will have committed the offence of possessing child pornography.

Liam

Liam is 19 and so will not come within any of the four new exceptions under section 70AAA. He is likely to be guilty of the offence of possession of child pornography unless he can prove that one of the defences applies by satisfying the court that he believed on reasonable grounds that the minors appearing in the video were 18 years or older. Liam may also be guilty of production of child pornography as 'production' includes the copying of the video by way of downloading it from the Internet, and the defence of reasonable mistaken belief as to age does not apply to the production offence. Liam would also probably be guilty of the offence of transmitting child pornography under section 57A of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995*.

Scenario 5: Nathan and Dylan

Nathan, 15, is unsure about his sexuality and is interested in talking to other guys about it. Looking to get in touch with guys who might have experienced similar feelings at this age, he downloaded a geosocial dating app, lying about his age in order to access it.

On the App, Nathan began talking to Dylan, 19. Nathan found Dylan easy to chat to and soon admitted his real age. Dylan said he understood how Nathan was feeling and talked about his own similar experiences at Nathan's age. Their relationship progressed, and Nathan and Dylan met up several times. Eventually, they began to engage in a sexual relationship. During the

course of this, Dylan and Nathan took a number of sexually explicit photos of themselves having sex together.

After a couple of months, Nathan tried to break up with Dylan. Angry at Nathan after all the support and friendship he had provided, Dylan threatened to send the images to Nathan's friends and family.

How do the new laws apply?

Nathan

Nathan was involved in the production of child pornography and still possesses the images. However, as he is 15 and is the minor in the images, he comes within the first exception. Also, Nathan is the victim of Dylan's sexual offending (since Dylan is more than two years older than Nathan, a minor) and so Nathan will come under the third new exception. Also, one of the defences for possession applies, as Nathan is the minor depicted.

Dylan

Dylan is guilty of the sexual offence of sexual penetration of a person under the age of 16.

Also, being an adult, he does not come under any of the new exceptions for child pornography offences. In addition, he does not satisfy the defences to possession because he knows Nathan's age and is more than two years older than Nathan. Therefore, Dylan is guilty of the offences of production and possession of child pornography.

His threat to send the images to Nathan's family also make him guilty of the new summary offence of making a threat to distribute an intimate image.

Scenario 6: Sean, Grace and Daniel

Sean, 20, recently purchased a new phone and is transferring all his files from his old phone onto his computer before getting rid of his old mobile. As he downloads the files, he realises that some of the photos are of his old girlfriend, Grace, from when he was in high school. They had gone out for two years from when he was 15, and she was 14, to when he was 17.

She was the first person he had slept with, and during the period that they had dated, they often sent nudie 'selfies' to one another and also took a number of sexually explicit pictures of themselves together. All of these photos were still on Sean's phone, although he had forgotten that they were there. Sean, not really wanting to delete the photos, transfers them to his computer.

However, Sean has forgotten that after he broke up with Grace he sent some of the naked pictures of Grace to his friend Daniel, who is the same age as Sean. Daniel, now 20, still has the images stored on his computer and looks at them from time to time.

Grace, now 19, has also recently bought a new computer and phone. She still has the photos that they made and shared stored on her old laptop. She does not use her old laptop or phone, and has forgotten that she did not delete the photos from these devices.

A few weeks after purchasing his new phone Sean is arrested for another offence. During a search investigating that offence, Sean's computer is seized by police, and the photos of Grace and Sean are discovered when the files are examined.

How do the new laws apply?

Sean

As Sean is now 20, none of the new exceptions to child pornography offences apply to his continuing possession of child pornography. However, in relation to possible production and

procurement charges in relation to the original making of the images, Sean would come within the new exceptions, as he was under 18 years at the time and he is either the minor in the image or not more than two years older than the other minor (Grace).

In relation to his continuing possession of the images, Sean comes under two of the defences: he was given the images by the depicted minor (Grace) or was himself one of the minors depicted. So Sean will not be guilty of the possession offence.

In relation to his sending the images of Grace to Daniel when he was 17, Sean is guilty of the summary offence of distributing an intimate image. (However, as this summary offence was committed more than 12 months ago, he cannot be charged.)

Grace

Grace is in the same position as Sean in relation to her making and possessing the images of themselves. She comes under the same defences that apply to Sean.

Daniel

When Daniel received the photos, he was under 18 and not more than two years older than Grace. So the fourth new exception would have applied to him then. However, now that Daniel is over 18, the new exceptions no longer apply to his possession of the photos. Also, because Daniel was given the images of Grace by Sean, he does not come within the defence of receiving the image from the depicted minor. Daniel could therefore be charged with possession of child pornography. As the protection of the new exceptions only apply to people under 18, Daniel should have deleted all the images before his 18th birthday.

Appendix 5 Ready Reckoner for the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014*

The table below provides a summary of how the old provisions correlate to the new provisions. All section references are to the *Crimes Act 1958*, unless otherwise indicated.

Old provision		New provision	Comment
35	Definitions	s 37C (Definitions) s 37D (Sexual penetration) s 37E (Touching) s 37F (Taking part in a sexual act)	<p>New s 37C contains definitions that will apply to new Subdivision (8A) (definitions in old s 35 will continue to apply to offences in Subdivision (8B) to (8G)). This section replicates the definition of 'vagina' in old s 35.</p> <p>New s 37D contains a clearer, gender-neutral definition of 'sexual penetration', which includes continuation of penetration. This provision makes clear that A can sexually penetrate B by causing a third person to penetrate B, or by causing B to take part in an act of bestiality.</p> <p>New s 37E defines 'touching' for the purposes of the new sexual assault offences, and includes circumstances in which touching may be 'sexual'.</p> <p>New s 37F defines 'taking part in a sexual act' for the purposes of the new offence of 'assault with intent to commit a sexual offence' (new s 42).</p>
36	Meaning of consent	s 34C (Consent)	<p>New s 34C defines consent as 'free agreement' (like old s 36) and contains a slightly revised list of consent-negating circumstances. The revisions include:</p> <ul style="list-style-type: none"> • adding two new consent-negating circumstances: <ul style="list-style-type: none"> ○ the person does not say or do anything to indicate consent, and ○ having initially consented, the person later withdraws consent • separating being asleep or unconscious from incapacity to consent due to being affected by alcohol or another drug, and • providing that, if the act involves an animal, the person does not consent if they mistakenly believe that the act is for veterinary, agricultural or scientific research purposes. <p>New s 34C applies to both new offences in Subdivision (8A) and existing offences in (8B) to (8D).</p>
37 37AA A 37AA	Jury directions	<i>Jury Directions Act 2015 (JDA)</i> Part 5 (ss 46 & 47)	New Part 5 of the JDA sets out a process for requesting jury directions on consent and reasonable belief in consent, within the JDA framework (i.e. the directions are not mandatory). The directions are based on the old directions, but are tailored to the

Old provision		New provision	Comment
			<p>elements of the new offences and contain further directions clarifying the meaning of consent and reasonable belief in consent.</p> <p>Note: the new jury directions will apply to proceedings relating to offences committed on or after commencement of the Act (while old ss 37, 37AAA and 37AA will continue to apply in proceedings relating to existing offences in subsection (8A) committed before commencement).</p>
37A 37B	Objectives and guiding principles	N/A	These sections have not been amended by the Act.
38	Rape	s 38 (Rape)	<p>This new offence is simpler and clearer than the old offence, and contains a new fault element: 'A does not reasonably believe that B consents' to the penetration.</p> <p>Note: new section 37G provides that 'reasonable belief' depends on the circumstances, while s 37H sets out the effect of intoxication on 'reasonable belief'.</p>
38A	Compelling sexual penetration	s 39 (Rape by compelling sexual penetration)	<p>This new offence is simpler and clearer than the old offence, and contains a new fault element: 'A does not reasonably believe that B consents' to the penetration.</p> <p>The new offence will cover conduct covered by old s 38(3) and s 38A.</p>
39	Indecent assault	s 40 (Sexual assault) s 41 (Sexual assault by compelling sexual touching)	<p>The old indecent assault offence has been divided into two new offences, which will capture the same conduct. The new offences are simpler and clearer than the old offence, and contain a new fault element: 'A does not reasonably believe that B consents' to the touching.</p> <p>The new offences have replaced the anachronistic term 'indecent assault' with 'sexual assault'.</p>
40	Assault with intent to rape	s 42 (assault with intent to commit a sexual offence) s 43 (threat to commit a sexual offence)	<p>The old offence of 'assault with intent to rape' has been divided into two new offences. The conduct captured by the new offences is broader, as they apply to threats and assaults with intent to commit a 'sexual offence' (which includes sexual assault, and is not limited to rape).</p> <p>The maximum penalties have also been varied. While assault with intent to rape had a maximum penalty of 10 years imprisonment, the new offences have a maximum penalty of 15 years and 5 years imprisonment respectively.</p>