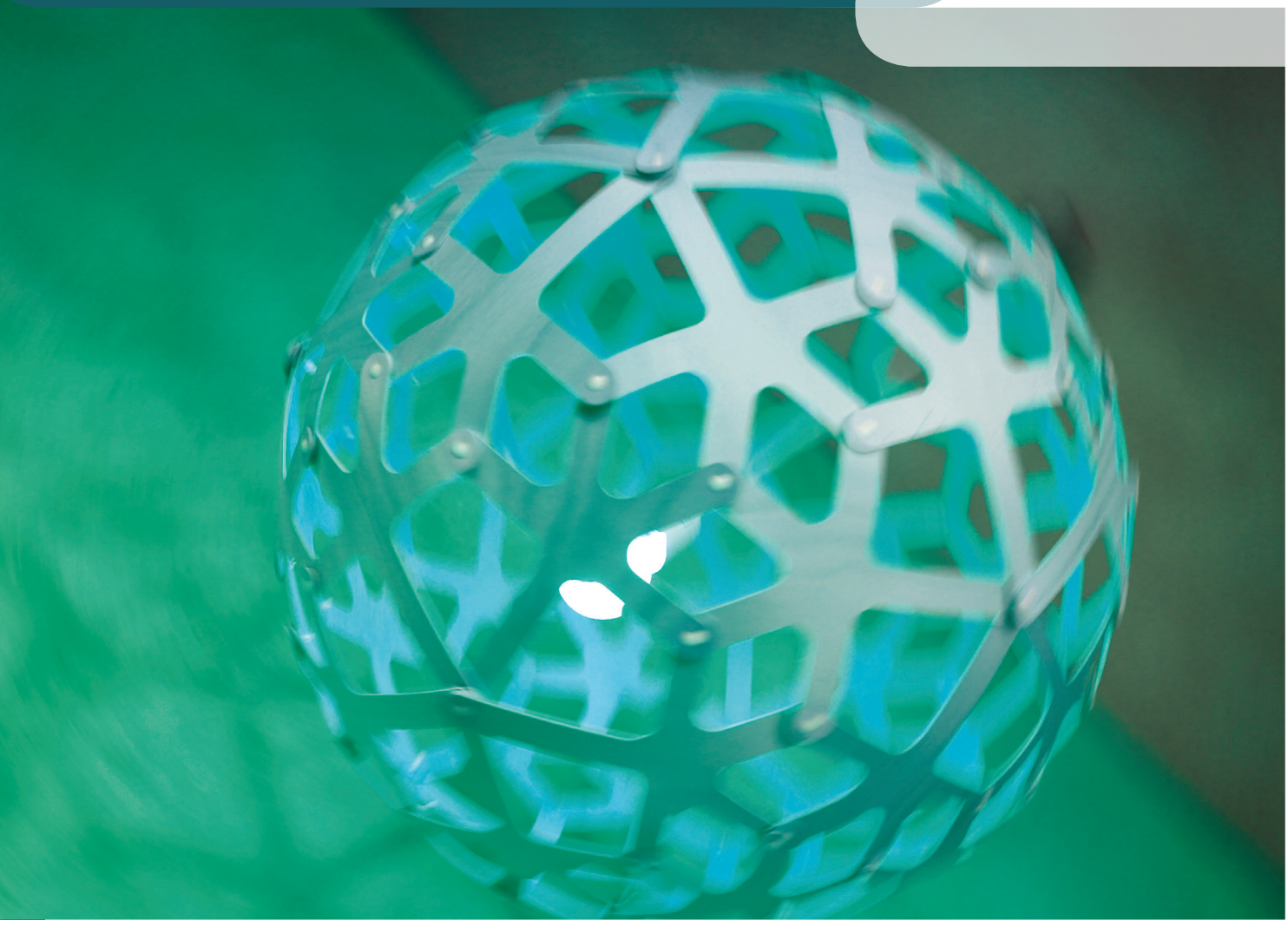
Review of Sexual Offences

Consultation Paper

Criminal Law Review



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Preface

From the Secretary, Department of Justice

The Department of Justice brings together a number of agencies to prevent, detect and prosecute crimes, support victims/survivors of crime, dispense justice and manage offenders in correctional settings.

Since the landmark Sexual Offences report from the Victorian Law Reform Commission in 2004, the department has been actively engaged in long-term improvements to the functioning of the criminal justice system and as a result, the experience of sexual assault victims/survivors. The Sexual Assault Reform Strategy was evaluated in 2011. The department is working on a number of initiatives to further improve the criminal justice system's response to sexual assault.

The department's continuing focus on community safety and improving sexual offence laws is evidenced by this comprehensive consultation paper. It is clear that significant changes are required to improve our laws so that they reflect community understanding of key issues, such as what constitutes rape, and to bring our laws up to date with modern technology which enables new ways for offences to be committed.

Sexual offence laws are too complicated as are the directions given to juries. Removing or reducing this complexity is no easy task. It requires clear thinking and new approaches. The proposals in this paper meet this challenge and I look forward to considering the ideas, comments and responses to the proposals and options in this paper.

The Legal Services Board provided some of the funding to enable this review to be conducted and the support of the Board is gratefully acknowledged. I also wish to thank Criminal Law Review for their professionalism and dedication to producing this paper and members of the Sexual Offences Advisory Group for their advice on the department's proposals and options for change.

Greg Wilson

Secretary

From the Director, Criminal Law Review

Sexual offence laws have for many years been the subject of intense scrutiny in the media and public discourse. Community views towards sexual assault continue to change and evolve. Substantial changes to sexual offence laws in the 1990s and the 2000s have sought to keep up with those changes.

However, it is clear that since the last set of amendments in 2006/7 following the Victorian Law Reform Commission's 2004 report on Sexual Offences that:

- our laws have not kept up to date with community views, and
- there are more fundamental problems with our laws – they lack clarity, they are too complex and this leads to many appeals and retrials.

Accordingly, this paper focuses on opportunities to update Victoria's laws and to make these laws both clearer and more effective. These issues are most acute in the offence of rape. Appellate decisions, interpreting complex legislation, led to additional uncertainty over the last three years in Victoria. While this uncertainty has been reduced by the High Court, what is left is a complex offence that fails to meet the needs of the Victorian community and the criminal justice system.

In addition to proposing improvements to substantive laws, this paper tackles problematic procedural impediments to fair and effective prosecution of sexual offences arising from the high degree of specificity required in sexual offence charges. Where a child is repeatedly and systematically sexually abused, it is often difficult to prosecute because the child cannot sufficiently distinguish between each incident. This paper proposes significant changes to overcome these problems by enabling multiple incidents of an offence to be charged as a course of conduct within the one charge.

Where a person can distinguish between specific acts, for example, where they all happen as part of one episode of offending, at present every discrete act will be charged. This may result in many charges in an indictment, making the task of the trial judge and jury much more difficult. This paper proposes to simplify the way that these offences can be charged.

This consultation paper was developed as a result of funding provided by the Legal Services Board. The support of the Board is gratefully acknowledged.

This paper is the product of the substantial contribution, commitment and sustained effort of members of Criminal Law Review over several years. In particular, the analysis, ideas and quality of work from Katya Zissermann, Steven Tudor and Anna Tucker have been central to the development of this paper. This process has also greatly benefited from the expertise and advice of the Sexual Offences Advisory Group. I would like to thank everyone involved. Their expertise and commitment to improving Victoria's sexual offence laws has been invaluable in the development of this paper and the proposals and options for change within this paper.

Greg Byrne

Director

The purpose of this paper

The Department of Justice has conducted an extensive review of Victoria's sexual offence laws. This paper identifies and analyses the main problems with, and limitations of, those laws. The paper contains proposals and options for improving Victoria's sexual offence laws. The paper also asks a number of questions about how best to deal with certain aspects of the law.

This paper has been prepared to enable the Victorian community to have its say in how to improve Victoria's sexual offence laws. The department welcomes your submissions concerning the issues raised in this paper.

With the benefit of your submissions, the department will then provide advice to the Attorney-General concerning whether, and if so how, Victoria's sexual offence laws can be improved.

Victims support

Please note that this paper does not attempt to cover issues faced by victims of crime and witnesses. If you need help or support in relation to sexual assault, please contact the Victims of Crime Helpline on 1800 819 817 or Centres Against Sexual Assault on 1800 806 292.

How to make a submission

If you wish to comment on the matters raised in this paper, you can make a written submission. If possible, please respond to the offence proposals, options and questions outlined in the paper, in addition to any other relevant matters you wish to bring to our attention.

Please email or post your submission to:

Review of Sexual Offences: Submissions
Department of Justice
GPO Box 4356
Melbourne Vic 3001
E. clr@justice.vic.gov.au

If you have any questions regarding the submission process, call (03) 8684 0873.

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Even if a submission is marked 'private and confidential' the submission is still subject to the provisions of the *Freedom of Information Act 1982* (Vic) (FOI Act). However, it should be noted that the FOI Act requires the department, if practicable, to notify you if a request is made for access to a document containing information relating to your personal affairs and, if a decision is made to release that document, to notify you of rights of appeal under that Act.

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Executive summary

Many of Victoria's sexual offence laws are complex, inconsistent and unclear. Nowhere is this problem worse than with the offence of rape. These problems make it extremely difficult, if not impossible, for a judge to explain the law to a jury in a clear and intelligible manner and for the jury to understand and apply the law to the facts in the case. These problems have resulted in numerous appeals, convictions being set aside and retrials being ordered, most notably in *Worsnop v The Queen* (2010) 28 VR 187 and *Getachew v The Queen* [2011] VSCA 164.

There have been many calls for significant reform of Victoria's rape laws since these decisions. These calls have emanated from the judiciary, lawyers, academics, victim/survivor support groups and the media. The Attorney-General has publicly committed to reforming sexual offence laws and jury directions in order to address the current complexity, inconsistency and uncertainty.

Victoria's sexual offence laws are also failing to respond adequately to the problem of persistent sexual abuse of a child. The current approach does not work effectively for child victims/survivors who, because of the repeated and systematic nature of the offending against them, are unable to distinguish between the different instances of abuse. A fresh approach to this problem is needed.

While rape laws have been frequently amended in the last 20 years, other sexual offences have not received the same attention. As a consequence, some have become outdated, inconsistent and unclear in their scope, structure and terminology. Other offences fail to recognise that sexual offences can be committed in new ways through advances in technology.

This review examines rape and other sexual offences in the *Crimes Act 1958*, focussing not only on policy issues, but also on the structure and components of each offence. This practical focus is essential for effective reform. Our aim is to make sexual offences as clear, simple, consistent and effective as possible. Simpler and clearer offences will assist judges to direct juries, and juries to understand and apply the law. This will help to reduce successful appeals against conviction for a sexual offence. A better functioning criminal justice system will help to improve the experience of victims/survivors who report a sexual offence to the police.

The County Court is Victoria's principal trial court. Almost 50% of all trials that go to verdict in the County Court are sexual offence trials. In 2002/03 only 36% of all trials were sexual offence trials. Over the last 10 years there has been an 81% increase in the number of sexual offence trials. This reflects an increase in the proportion of sexual offence cases as well as an increase in the overall number of trials conducted. Better laws will deliver substantive justice in individual cases and, in combination with other proposed reforms to jury directions, will assist in reducing delay.

This paper contains 49 proposals for, and 10 questions about, reform of Victoria's most important sexual offences and procedure. The paper also contains a number of options and questions about possible reforms. The Department of Justice seeks feedback on each of the proposals, options and questions in this paper in order to provide advice to the government on how best to reform sexual offences.

Rape and compelling sexual penetration

The existing rape laws are highly complex and difficult to explain to juries. As a result, they have been the subject of numerous appeals and retrials, which are extremely stressful for victims/survivors, create delays in the criminal justice system and are costly. Many rape convictions

have been set aside on appeal; the complexity of the law is the principal reason for the appeals succeeding.

Many of the problems stem from the fault element in relation to the complainant not consenting. For the offence of rape, the principal fault elements refer to the state of mind of the accused: was the accused aware that the complainant was not consenting or might not be consenting? However, if the accused argues that he or she did not have that state of mind because he or she believed the complainant was consenting, which often occurs, the issues become very complex. The jury must consider whether the accused's belief was reasonable in all the circumstances. However, the trial judge must 'balance' this direction by explaining that whether the accused had reasonable grounds goes only to the issue of whether the accused actually had the belief.

There may also be evidence that the accused was aware that the complainant was asleep, or was so intoxicated as to be incapable of consenting, or that the complainant was submitting because of fear of force or harm. The *Crimes Act* specifies that this evidence is relevant to the accused's claimed belief that the complainant was consenting but does not indicate that it has any relevance to the fault elements, namely whether the accused was aware that the complainant was not or might not be consenting. In this kind of situation, the trial judge must give the jury a number of directions concerning these issues.

The accused's awareness of the above kinds of factors (e.g. that the complainant was asleep) is relevant to determining whether the accused's belief that the complainant was consenting was reasonable in the circumstances. This must be understood in the limited way of assisting the jury to determine whether the accused actually or genuinely believed the complainant was consenting. And if the accused did so believe, the nature and strength of this belief must then be assessed in determining whether this prevents the prosecution from proving beyond reasonable doubt that the accused was aware that the complainant was not consenting or might not be consenting.

Applying these directions to disputed evidence, where the evidence is also often the subject of directions about the purposes for which certain evidence may or may not be used, makes these directions even more difficult in a real case.

These directions are extraordinarily complex. The VLRC called for the review of sexual offence laws in its *Jury Directions: Final Report* (2009). Not surprisingly it has led to the Court of Appeal commenting that these laws throw into doubt the expectations of the jury system that the trial judge can explain the law and that the jury can comprehend the law, in all its permutations. Further the Court of Appeal has called for the 'urgent and wholesale amendment' of these laws.

In addition, there is a concern that the offence of rape is too narrow because it does not criminalise situations in which the accused's belief that the complainant consented is completely unreasonable in all the circumstances.

In Part 3, we present three options for reforming the fault element in relation to the complainant not consenting in the offence of rape.

Option 1 would maintain the current law's alternative fault elements with regard to the complainant not consenting, but seek to improve the clarity and structure of the offence and address a number of matters that are currently too complex or uncertain.

Option 2 would replace the three current alternative fault elements with two new alternative fault elements: either the accused knew that the complainant was not consenting or did not believe on reasonable grounds that the complainant was consenting. This option addresses the inherent

functional complexities in the current fault element. Option 2 replaces these technical legal issues with more practical tests that can be applied by a jury. It also incorporates a policy proposal that a person who has no reasonable grounds for believing that another person is consenting to sexual intercourse should be guilty of the offence of rape.

Option 3 would split the proposal in Option 2 into two separate offences. The first offence would cover where the accused knew that the complainant was not consenting or did not believe that the complainant was consenting. The second offence would cover where the accused did not have reasonable grounds for believing that the complainant was consenting. This second offence would be called 'sexual violation' and would be subject to a lesser penalty than rape.

Part 3 also proposes a number of changes to the other elements of rape and the offence of compelling sexual penetration in order to make these offences simpler, clearer and easier to explain to juries.

Sexual assault and related offences

The offences of indecent assault and assault with intent to rape are inadequate in several respects. The notion of 'indecency' is unclear and outdated, and the definition of 'assault' is complex and unclear. The elements of the offence of assault with intent to rape are also unclear, and the maximum penalty for this offence (10 years imprisonment) is too low to properly reflect its seriousness as an offence preparatory to rape.

In Part 4 we discuss the forms of non-penetrative sexual assault that require proof of physical contact between the accused and the complainant. Our proposed changes would:

- replace the offence of indecent assault with a new offence of sexual assault, which would modernise the terminology of the existing offence, and clarify its elements and scope
- revise the offence of assault with intent to rape in order to clarify its elements, in particular the meaning of 'intent to rape'
- increase the maximum penalty for assault with intent to rape from 10 years imprisonment to 15 years imprisonment, and
- create a new offence of compelling sexual touching to complement the offence of compelling sexual penetration.

In Part 10 we discuss offences related to sexual assault that do not require proof of physical contact between the accused and the complainant. Our proposed changes would:

- replace the current offence of threatening to assault with intent to commit rape with a clear new offence of threat to rape
- create a new offence of performing a sexual act intended to cause another person to experience fear or distress, and
- replace the current statutory and common law offences of wilful and obscene exposure with a clear and revised summary offence of sexual exposure.

Sexual intercourse with a child

In Part 5 we discuss sexual penetration offences against a child. The current approach to sexual penetration offences against children under 16 – a single offence with three different maximum penalties – differs from the approach used for all other sexual offences. It is unnecessarily complex for police, lawyers, judges and juries. In addition, the maximum penalty for sexual penetration of a child under 16 (but not under 12) warrants further consideration.

Our proposal is to simplify the current approach by replacing the offences in sections 45 and 48 of the *Crimes Act* with three new offences:

- sexual intercourse with a child under 12
- sexual intercourse with a child under 16, and
- sexual intercourse with a child aged 16 or 17 who is under the care, supervision or authority of the accused.

We also propose changes that would:

- increase the maximum penalty for sexual intercourse with a child under 16 from 10 years to 15 years imprisonment in all situations (by removing the need for the prosecution to prove that the child is under the care, supervision or authority of the accused), in order to reduce the large gap in the maximum penalty for offences against a child under 12 and a child aged 12 or older
- use a description of conduct that is consistent with the conduct in rape offences
- expand the definition of 'care, supervision or authority' to include a broader range of people within religious organisations who provide religious care or religious instruction to a child
- modernise and clarify the available exceptions and defences to the offences, and the allocation of the burden of proof in relation to each exception and defence, in order to reduce the complexity of jury directions concerning the defence of consent and reasonable mistake, and
- make offences generally much clearer and easier to prosecute and to explain to juries.

Sexual touching of a child, and sexual activity in the presence of a child

The current offences of committing an indecent act with or in the presence of a child contain a number of complexities and limitations. The notion of an 'indecent' act is unclear, outdated and requires modernisation. In addition, these offences have not kept pace with technological changes and need to be broadened to include sexual activity directed at a child through the use of technology.

In Parts 6 (dealing with sexual touching of a child) and 7 (dealing with sexual activity in the presence of a child), we propose changes that would:

- create separate new offences of sexual touching of a child and sexual activity in the presence of a child
- clarify the conduct involved in each new offence by distinguishing clearly between contact forms of sexual activity with a child (that do not involve sexual penetration) and non-contact forms of sexual activity with a child
- replace the notion of 'indecent act' with the simpler concepts of 'sexual touching' (consistent with the approach in the proposed offence of sexual assault) and 'sexual activity'
- expand what it means to engage in conduct 'in the presence of' a child, in order to capture different ways of committing child sexual offences, including over the internet, and
- clarify fault elements, exceptions and defences in relation to the current offences, which should assist judges in directing juries.

Encouraging and grooming a child to engage in sexual conduct

The current offences of soliciting or procuring a child to take part in an act of sexual penetration or an indecent act are unclear, outdated and rarely used. The Cummins Report, *Protecting Victoria's Vulnerable Children* (2012), recommended that Victoria enact an internet grooming offence.

In Part 8 we propose changes that would:

- provide a more modern, useable and responsive scheme of preparatory sexual offences, by replacing the current soliciting or procuring offences with new offences of encouraging a child to engage in sexual conduct
- expand criminal liability to apply where a person encourages a child to engage or be involved in sexual conduct, regardless of whether the child in fact engaged in any sexual conduct
- remove the requirement that an accused be aged 18 or older, and
- create a new offence of grooming a child under 16 for sexual conduct, which would apply whether the grooming occurs online, face to face or by any other means.

Exceptions and defences to sexual offences against children

In this review, we distinguish between 'exceptions' and 'defences' to sexual offences. We define an 'exception' as a provision which limits the scope of an offence by setting out particular conditions under which no offence is committed. In contrast, a 'defence' provides a separate basis for exculpating the accused, even where he or she has committed an offence. An accused who falls within an exception commits no offence, whereas an accused who successfully relies on a defence commits the offence, but is not guilty of the offence.

In Part 9 we discuss in more detail the rationale for, and scope of, each exception and defence to child sexual offences. We also propose a number of changes to make the exceptions and defences more consistent, less complex and easier to use, including clarifying the allocation of the burden of proof.

Changes to other sexual offences

In Part 11 we propose a number of changes to incest offences and the current offence dealing with persistent sexual abuse of a child.

We pose an important question in relation to the current incest offences. In all reported cases of incest involving a parent, step-parent or lineal ancestor and their child (of any age), the child is the victim/survivor. However, the *Crimes Act* makes it an offence for a person (aged 18 or over) to have sexual intercourse with their parent or lineal ancestor. The very existence of this offence contributes to a perception that child victims/survivors are complicit in some way in incestuous sexual abuse. The VLRC recommended in its *Sexual Offences: Final Report* (2004) that this offence be repealed. Part 11 poses the question whether this offence be kept, repealed or amended to provide an exception for adult children who were previously the victim of child sexual abuse.

We also propose minor changes to update the terminology and scope of the incest offences. These changes would modernise the definition of 'child' and related terms to reflect new types of parent-child relationships, and expand the scope of the offences to include domestic partnerships.

Procedural reforms and prosecuting multiple charges

Parts 12 and 13 address some current problems concerning the way certain kinds of sexual offending are prosecuted.

Part 12 deals with repeat and systematic sexual offending. The current offence of persistent sexual abuse of a child fails to deal effectively with this most serious form of sexual offending. This is because it requires victims/survivors to provide specific details of each different instance of offending, and this is often not possible due to the repeated and systematic nature of the sexual

abuse. As a result, either no offence can be charged or only isolated offences can be charged. Several attempts have been made by parliaments across Australia to address the problems identified by the High Court in the case of *S v The Queen* (1989) 168 CLR 266.

No other Australian jurisdiction has found a way of dealing effectively with this heinous form of sexual offending. However, these problems have been successfully avoided or addressed in other jurisdictions such as the United Kingdom and New Zealand.

In Part 12 we propose a significant new approach to enable repeat offending to be charged. This new approach, based on the United Kingdom's laws, could be used effectively for child sexual offences, but is not limited to these offences. This new approach would allow the filing of a charge (known as a 'multiple offences charge') that alleges a course of conduct of offending. Under this approach, it would not be necessary to identify specific offences in separate charges. This approach uses the very problem, the repetitive nature of offending, as the source of the solution. It essentially replaces the need for specific details with the need for proof of a course of conduct. This new approach would provide a fair and effective process for dealing with allegations of repeated sexual offences.

Part 13 deals with problems which can arise with sexual offences where one episode or occasion of offending gives rise to multiple charges because of the way the definition of rape, for example, covers a variety of types of sexual penetration. Such indictments treat the different instances of penetration as if they were distinct episodes of offending. To cover the whole episode, every separate penetration is charged as rape. This can make the jury's task more complex than it needs to be and arguably may not properly reflect the true extent of the offender's criminality. Sometimes this results in an indictment being 'overloaded'. In Part 13 we propose a way to simplify such prosecutions by allowing the prosecution to allege multiple offences, in relation to the one occasion of offending, in the one charge.

The volume of charges can also be a problem because of limitations concerning when a court may take into account the surrounding circumstances, when these circumstances constitute a separate offence. The general presumption is that a person cannot be sentenced for an offence with which they have not been charged (*Newman and Turnbull v The Queen* [1997] 1 VR 146). This results in the prosecution charging lesser offences to ensure that the court can take all relevant circumstances into account when sentencing an offender. Part 13 proposes a simpler way for the court to consider less serious offences when sentencing, thereby allowing the prosecution to file indictments with fewer charges, which will make the jury's task much easier.

1 Introduction

1.1 Why is the Department of Justice reviewing sexual offences?

1.1.1 Calls for reform of rape laws

There have been many calls for significant changes to Victoria's sexual offence laws in recent years. These calls have come from a wide range of people, organisations and courts. These calls rose sharply after a decision of the Victorian Court of Appeal in July 2010.

In *Worsnop v The Queen* (2010) 28 VR 187 (*Worsnop*), the Court of Appeal considered the question of whether an accused who believed that a complainant was consenting to sexual penetration could also be aware of the possibility that the complainant was not consenting, and could therefore be guilty of rape.

The explanatory memorandum that accompanied the *Crimes Amendment (Rape) Act 2007* indicated that an accused in this situation could be guilty of rape. At the time that the Court of Appeal decided *Worsnop*, the Victorian Criminal Charge Book (which guides judges on how to explain to juries what their task is) contained a statement to the same effect.

The Court of Appeal said in *Worsnop* that the explanatory memorandum and the Charge Book were wrong – that a belief that the complainant consented precluded the jury finding that the accused was aware that the complainant might not be consenting. This decision led to numerous appeals against rape convictions in cases where the trial judge directed the jury in accordance with the Charge Book and therefore inconsistently with the decision in *Worsnop*.

The interaction between a belief that the complainant is consenting and awareness that the complainant might not be consenting is inherently complex. Whether or not this complexity can be reduced or avoided is central to the clarity and effectiveness of the offence of rape. This issue will be discussed further in Part 3 of this paper.

Following the decision in *Worsnop*, more than 15 convictions for rape were set aside on appeal, because the trial judge directed the jury in accordance with the Charge Book. Following some of these appeals there were retrials. In others there was no retrial as that process would have been too traumatic for the victim/survivor. Trials can be extremely stressful for victims of crime. A retrial can take an especially heavy toll on a victim/survivor who believes the trial process is over. Further, retrials add to delays in the court system and in getting other cases heard, and they are costly.

In the wake of the decision in *Worsnop*, there were numerous calls from senior members of the judiciary for change, including the following observations from the President of the Court of Appeal in *Wilson v The Queen* (2011) 33 VR 340 (*Wilson*) (at [2]):

> [T]he 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.

Justice Neave was Chair of the Victorian Law Reform Commission when the VLRC conducted a major review of sexual offences between 2001 and 2004. In *Sibanda v The Queen* [2011] VSCA 285, Justice Neave commented that the decision of the Court of Appeal in *Worsnop* and the cases following it 'demonstrate the need for legislative change to clarify and simplify the required mens rea for rape', and that existing legislation has 'failed to implement the recommendations made by the Victorian Law Reform Commission'.

In *GBD v The Queen* [2011] VSCA 437, the Court of Appeal quashed the rape conviction of a man alleged to have sexually penetrated a girl aged 14. The man knew that his friend had injected the girl with drugs. Justice Harper said that the accused 'must have known that she might not be giving her free consent' to the sexual penetration. Justice Harper echoed the comments of Neave JA in *Sibanda*, and then said:

> Nevertheless, on the authority of *Worsnop*, the law cannot, so long as the Crown fails to prove the absence of his belief in her consent, convict him … But in my opinion, the gap in the law which was identified in *Worsnop* cries out for the remedial intervention of the legislature.

In *Getachew v The Queen* [2011] VSCA 164, the accused was alleged to have sexually penetrated the complainant while she was asleep. The trial judge directed the jury that the prosecution had to prove that the accused was aware that the complainant was not consenting or that she might not be consenting. His Honour said that this element would be satisfied if the prosecution could prove that the accused was aware that the complainant was or might be asleep.

The Court of Appeal held that this direction was incorrect, and set aside the rape conviction. The Court said that, because the complainant did not protest when the accused pulled her skirt up and her underwear down, the jury might have concluded that the accused thought the complainant might be asleep. However, the Court also said that a properly instructed jury could also have inferred from the complainant's lack of protest that the accused believed that she had 'finally' consented to sexual intercourse.

The setting aside of the conviction in *Getachew v The Queen* sparked public criticism, with the following statements appearing in the *Herald Sun* (Carly Crawford, 'Sleeping woman rape trial sparks fury', *Herald Sun*, 15 June 2011):

> One of the three appeal judges disagreed with the decision to order a new trial, which has stunned the woman and angered women's rights and sentencing campaigners.
>
> Centres Against Sexual Assault convenor Carolyn Worth said: 'These types of appeals would not encourage women to report rapes. Why would someone report when the spirit of the legislation is manipulated in this way?'
>
> … Crime Victims Support Association president Noel McNamara said the outcome was out of step with public sentiment. 'Nobody's disputing that this woman said 'no' but somehow the court says, at the 11th hour, maybe he didn't know that because maybe he thought she wasn't sleeping,' he said. 'It's ridiculous.'

This same case was discussed further in the *Herald Sun* on 1 August (Carly Crawford, 'Rape law reform call', *Herald Sun*, 1 August 2011):

> The University of Melbourne's Dr Wendy Larcombe said the state's outdated consent laws were at the heart of the problem. 'Victoria is well out of step with

> international standards and standards in other states,' Dr Larcombe said. 'There is demonstrable need for statutory law reform in Victoria.'

Chief Justice Warren of the Supreme Court of Victoria discussed directions in rape cases at the Australian Institute of Judicial Administration's *Criminal Justice in Australia and New Zealand* conference in 2011. Chief Justice Warren described the directions that need to be given to explain the offence of rape to the jury as being 'replete with length, turgidity, complexity, and double, even multiple negatives' and noted that 'the jury will be confused or fazed'.

Almost two years after the decision in *Worsnop*, the High Court considered the principal fault element in the offence of rape in *R v Getachew* [2012] HCA 10 (*Getachew*), in an appeal brought by the Director of Public Prosecutions. The High Court held that the line of reasoning emanating from the decision in *Worsnop* was wrong. This did not change any of the convictions that the Court of Appeal had set aside (except the conviction of Tomas Getachew). However, it stopped further appeals on the basis that the trial judge had not directed the jury in accordance with the decision in *Worsnop*. It also meant that for almost two years, trial judges had been directing juries in accordance with *Worsnop*. Those directions were unduly favourable to the accused.

Getachew addressed some of the issues that have plagued the offence of rape in Victoria. However, other issues are intrinsic to the way in which the offence is constructed. In the aftermath of the High Court's decision, Dr Greg Lyon SC, then Chair of the Criminal Bar Association said, 'This case does not address the complexity of the law in relation to consent in rape cases' (Farah Farouque, 'Jail term reinstated for "sleep rape"', *The Age* 29 March 2012). The article went on to report that:

> Attorney-General Robert Clark praised the work of the Director of Public Prosecutions. He confirmed the government was working on reforms to jury directions and sex offence laws to tackle complexity and uncertainty.

Since the High Court's decision in *Getachew*, the Victorian Court of Appeal has considered the continuing problems with sexual offence laws. In *NT v The Queen* [2012] VSCA 213 (*NT*), it made the following observations about the current legislative provisions concerning rape, consent, belief in consent and the reasonableness of a belief in consent:

> These provisions have created much difficulty for trial judges and this Court for a lengthy period. We do not take issue with the policy which underlies the provisions, but, unfortunately, however, some of the concepts utilised including those which involve subtle differences between the state of mind of belief or awareness, the interrelationship between these concepts and their degree of prescription have made these provisions almost unworkable in the context of jury trials. *The problems raised by this legislation can only be addressed by urgent and wholesale amendment*. [emphasis added]

A significant part of this review concerns these problems with the offence of rape and consequential and related issues that affect other sexual offence laws.

1.1.2 Complexity in prosecuting sexual offences

The complexity of sexual offence trials

Over the last 30 years, sexual offence trials have become increasingly complicated. There are a number of reasons why this has occurred. First, the definition of rape has been expanded to include additional ways in which rape may be committed. Secondly, as a consequence of certain appellate

decisions, if the prosecution wants a court to sentence a person for conduct not included in the principal offence, the prosecution will usually need to charge an offence as a separate charge in the indictment to cover that conduct.

It is now not uncommon for many charges to be included in an indictment even where those charges are closely connected in time and would commonly be described as the one offence or the one set of offences. In recent years, the Court of Appeal has also commented on the problem of indictments being 'overloaded' with charges.

The more charges that are included in an indictment, the more directions that the trial judge will need to give to the jury and the more issues that the jury will need to understand and apply when considering its verdict. Often the issues in dispute in relation to these charges will be the same. For example, the issue may be who committed the offences or whether the accused had the requisite fault element as to the complainant not consenting. Accordingly, in many instances, the inclusion of additional offences does not change the nature of the issues in dispute, merely the number of times that the same issue in dispute arises.

Sexual offences against children

The problems caused by unnecessary complexity in the law are particularly acute in sexual offence cases involving children. Analysis of the retrials ordered following appeals related to jury directions shows that there is a disproportionate number of cases involving both sexual offences and child victims/survivors. There are a number of reasons for this.

First, the offence of sexual penetration of a child under 16 is complex. This offence was substantially amended in 2000 to address problems arising in situations where it is difficult to prove whether the child was younger or older than 10 at the time of the offence. This is an important issue as the age of the child is relevant to the maximum penalty for the offence. While the amendments in 2000 addressed this problem, they also introduced a number of other complexities into every prosecution for an offence of sexual penetration against a child under 16.

Secondly, prosecutions of child sexual offences often involve a number of different offences and different complainants. The jury therefore has to deal with the complexity arising from the volume of charges as well as the complexity of the offences themselves. Related offences sometimes define the same or similar concepts in different ways. This means the trial judge must direct the jury about each different law and the jury must understand and apply each law. This unnecessary level of complexity increases the risk of juror confusion and errors leading to retrials.

Thirdly, the jury directions that need to be given in sexual offence cases are very complex. While some aspects of the complexity of jury directions for the offence of rape do not extend to the child sexual offences, the directions remain difficult for jurors to understand and apply. The *Jury Directions Act 2013* has provided some much needed reforms to jury directions in general terms, but there is more that can be done specifically in relation to jury directions about sexual offences.

Delay

One of the consequences of this complexity is delay in our courts. The County Court is Victoria's principal trial court. Almost 50% of all trials that go to verdict in the County Court are sexual offence trials. In 2002/03 only 36% of all trials were sexual offence trials. Over the last 10 years there has been an 81% increase in the number of sexual offence trials. This reflects an increase in the

proportion of sexual offence cases as well as an increase in the overall number of trials conducted. Clearer and less complex laws will assist in reducing delay.

1.1.3 Failure to deal effectively with repeated and systematic sexual offending against children

The laws in Victoria and all other Australian jurisdictions have failed to deal effectively with one of the most heinous forms of sexual offending. This occurs where a person repeatedly commits sexual offences against a child, often over a number of years.

In this situation, a child is often unable to distinguish one instance of offending from another. This means that the prosecution will not be able to provide the accused with necessary particulars for each charge. As a result, at best, it is only possible to charge a small number of offences (for example, where something different happened, or where the child can remember the day it occurred because it was after the summer holidays, or their birthday or Christmas or some other event). So instead of dealing with all of the alleged offending (where there may be hundreds of offences) the prosecution may only be able to charge several offences.

In *R v Accused* [1993] 1 NZLR 385, Cooke P of New Zealand's Court of Appeal, noted that New Zealand diverged from the Australian High Court's strict adherence to the requirement for full particulars in *S v The Queen* (1989) 168 CLR 266. Cooke P went on to say:

> The evil of this kind of offending [repeated sexual abuse of children] appears to be virtually worldwide. While the Courts cannot solve the social problem, a response to it in the Courts invoking a technical legal doctrine of some obscurity seems unsatisfying.

Several attempts have been made in Victoria and other jurisdictions in Australia to address this problem in legislation. The first Victorian attempt was made in 1991, with the introduction of a specific offence to deal with the problem of persistent sexual abuse of a child. Further amendments were made to this offence in 1997 and 2006. However, it is clear that these amendments have failed to address this problem. As a result it is very difficult, if not impossible, to prosecute those who perpetrate repeated and systematic sexual abuse against children for all of their crimes.

Other countries have not encountered the same difficulties. Prosecutions in the United Kingdom and New Zealand, for instance, effectively deal with the long-term systematic sexual abuse of children. In Part 12 of this paper we propose a fresh approach to address this problem, based on the United Kingdom's approach. This will enable the prosecution to allege in a single charge that the accused engaged in a course of conduct involving multiple incidents of the same sexual offence.

1.1.4 Problems with other sexual offences

While the offence of rape has been amended a number of times over the last 10 years, other sexual offences have not been amended for many years and substantively reflect the law as it was when the *Crimes Act* was passed in 1958. This has led to three areas of problems.

First, as indicated above, sexual offences now form a major part of the trial work of the County Court and a disproportionate number of appeals in the Court of Appeal. This means legal issues concerning the elements of offences and defences are being scrutinised and tested in ways that they have not been before. For many offences, Victoria's legislation only sets out some of the

elements and defences relevant to an offence. Reliance is then placed on the common law to read elements into the offence to make them complete. This means that Victoria's laws are not always clear to judges and lawyers, and certainly not to non-lawyers reading the legislation. This lack of clarity increases the complexity of the law.

Secondly, the language used to define many sexual offences is unclear and needs to be updated. For example, in the offences of indecent assault, and indecent act with or in the presence of a child, the notion of 'indecency' is unclear and outdated. The concept of 'assault' in indecent assault is complex and unclear. The elements of the offence of assault with intent to rape are also unclear. Other sexual offences do not adequately recognise changed family relationships, and definitions of 'child' and 'parent' need to be updated, and domestic partnerships more consistently recognised by the criminal law.

Thirdly, some sexual offences have failed to keep up to date with changes in technology and the ways in which sexual offences may be committed. For example, the offence of indecent act in the presence of a child can only be committed if the child is physically present with the accused. This means that this offence does not apply to sexual activities directed at a child through the use of technology (such as Skype), and is therefore too limited in scope. The Cummins Report, *Protecting Victoria's Vulnerable Children* (2012), recommended the creation of a new Victorian offence to cover using the internet to 'groom' a child for sex. It is important to update our sexual offence laws to address contemporary problems.

1.2 This review

The issues identified above have been a catalyst for this review. However, the review is not limited to these issues. As can be seen from the above summary, the problems and limitations of current sexual offence laws are many and varied. These problems and limitations are often interconnected – issues arising from one offence often highlight issues with other offences.

It is also apparent that it is not enough to focus on policy issues. Unlike previous reviews of sexual offences, this review has also given considerable attention to how to make the components of an offence (elements, exceptions and defences) clearer and more effective. This practical focus is essential for effective reform.

The government has undertaken to reform sexual offences and the jury directions given in sexual offence cases in order to reduce their complexity and address the problems identified above.

Jury directions are an important part of this review. As noted by the President of the Court of Appeal, it is very important that judges be able to explain the law to juries in a manner that jurors can readily understand and apply to the evidence.

In its *Jury Directions: Final Report* (2009), the VLRC made 52 recommendations for legislative, procedural and administrative reforms to improve jury directions in criminal trials. A number of these recommendations were aimed at improving the jury directions given by a judge in sexual offence cases, specifically in relation to the issues of delay in making a complaint, failing to make a complaint and the credibility of the complainant.

Predating the most recent difficulties which commenced with the decision in *Worsnop*, the VLRC (at [4.51]) also recommended that the department review sexual offences, observing that:

> The density of parts of the existing law of sexual offences makes it difficult to provide the jury with simple and clear directions. The commission believes that the Departmental review provides an opportunity to consider whether the substantive law of sexual offences could be simplified in order to make it easier for the trial judge to give the jury directions about the law that they must apply.

The *Jury Directions Act 2013* has already delivered significant reforms to jury directions. This paper seeks to continue the reforms in this area. In order for jury directions about sexual offences to be clarified, it is necessary first to clarify the offences themselves. For this reason, this paper considers the structure of sexual offences in the light of the jury directions that would need to be given to explain the offences to a jury.

The purpose of this paper is to seek the views of the community on the changes to sexual offence laws and jury directions which are proposed in this paper.

1.3 Scope of the review

This review covers almost all of the sexual offences in the *Crimes Act*. The offences discussed in this paper are:

- rape (including compelling sexual penetration)
- sexual assault and related offences
- sexual intercourse offences against children
- sexual touching offences against children
- offences of engaging in a sexual activity in the presence of a child
- new offences of encouraging or grooming a child to engage in sexual conduct
- persistent sexual abuse of a child, and
- incest.

This paper does not discuss other sexual offences, such as sexual servitude offences, bestiality and sexually motivated abduction offences. This is because the department has not identified any substantial policy issues with these offences. However, to ensure that they are as clear and effective as possible, and drafted in a manner that is consistent with other offences involving similar issues, these offences may also need to be amended.

The issue of children sending sexually explicit images of themselves to other children or adults (‘sexting’), and whether it should be dealt with as production or possession of child pornography, is the subject of a report by the Victorian Parliament Law Reform Committee, which was released in May 2013. The government will formulate its response to that report. Therefore this issue is not discussed in this paper.

In addition to discussing offences, this paper discusses whether changes to criminal procedure should be made in two areas. First, the paper addresses how to charge allegations of repeat and systematic sexual offending against a child. However, the proposals concerning this issue are not limited to child sexual offences. They are potentially relevant to sexual offences involving an adult and some non-sexual offences (e.g. fraud offences). Secondly, the paper looks at ways of charging multiple instances of offending occurring in the one episode of offending.

1.4 The Sexual Offences Advisory Group

From 2010, the department has been developing the reforms proposed in this paper with the assistance of an expert Advisory Group. The Advisory Group comprised County Court judges, magistrates, and representatives of the Office of Public Prosecutions, Victoria Legal Aid and the Criminal Bar Association.

This has involved many meetings and consideration of many complex issues. The Advisory Group has been invaluable to this process. However, any views expressed in this paper are the views of the department and do not necessarily reflect the views of any individual member of the Advisory Group.

1.5 Structure of this paper

Part 2 of this paper describes the department's approach to the review, and key principles underpinning our approach.

Parts 3 to 11 contain proposals and options for reform of specific sexual offences.

Part 3 is particularly detailed. This is because there are many complex issues with the offence of rape and careful explanation of the subtleties involved is essential. To assist in understanding the practical operation of proposals for change to the offence of rape, several examples are discussed (in Appendix 1 to the paper).

In Part 12 we propose a new 'multiple offences charge' to address persistent sexual abuse of a child.

In Part 13 we propose a new way of charging multiple offences in relation to the one episode of alleged offending and new ways of taking less serious offences into account at the sentencing stage.

This paper is not a traditional discussion paper. As indicated above, the department has worked with an expert Advisory Group over the last three years to develop proposals for reform. As a result, the paper is a combination of an interim report and a discussion paper with options.

As the VLRC's review of sexual offences from 2001–2004 shows, developing substantial reform proposals can take time. The approach in this paper has sought to progress these issues as quickly as possible by setting out proposals and questions, some of which refer to options for reform. The department seeks feedback on each of the proposals and questions contained in this paper in order to provide advice to the government on how best to reform sexual offences.

2 Approach to the review

Effective reform of sexual offences requires consideration of offences from two different perspectives:

- the policy context and objectives of the reform, and
- the technical way in which those objectives are given shape and form in the drafting of provisions.

These two perspectives are intertwined. Previous reviews of sexual offences have focussed more on the policy objectives and less on the technical way in which the objectives are realised in legislation. This review includes a greater focus on the technical issues than previous reviews.

This is because there has already been considerable focus on policy objectives of sexual offence reforms in Victoria. However, in recent times, it has become increasingly apparent that these objectives have not been translated into sexual offences that are as clear, consistent and effective as possible.

In addition to a low conviction rate in sexual offence trials, where there have been convictions, there have been many successful appeals against conviction over the last three years. The climate of uncertainty concerning sexual offence laws creates difficulties for police in knowing what offences to charge (if any), for the Director of Public Prosecutions in conducting a prosecution, for defence lawyers in representing their client's interests and for judges in explaining the law to juries. All of this means that the criminal justice system is not meeting the needs of victims/survivors of crime or the community more broadly.

2.1 Policy objectives of this review

The key aim of this review is to make the law governing sexual offences as clear and effective as possible. The existing laws are far too complex. Reducing this complexity is a key objective. The two main areas in which the review aims to achieve clarity and reduce complexity are the elements of offences and the jury directions given by judges in sexual offence trials.

Achieving this aim of clarity and effectiveness in the law is intended to have a number of flow-on practical benefits, including:

- better identification of the issues to be decided in sexual offence trials, and
- fewer appeals in sexual offence cases.

The review also aims to update the law to take into account advances in communications technology and to ensure the law applies effectively to some less common sexual offences.

2.2 The policy context for this review

The VLRC undertook a large-scale policy review of sexual offences in its *Sexual Offences: Final Report* (2004). The VLRC's work provides important background and policy context for this review.

The VLRC's review built upon other major reviews of sexual offences in Victoria and Australia including the:

- Victorian Parliamentary Drugs and Crime Prevention Committee's 1995 report on Combating Child Sexual Assault and 1996 report on Combating Sexual Assault Against Adult Men and Women
- Rape Law Reform Evaluation Project's 1996 report into the Crimes (Rape) Act 1991, and
- Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General's 1999 report on Sexual Offences Against the Person.

In 2008 the department commissioned Success Works to evaluate the implementation of the *Sexual Offences: Final Report* (2004) and issues raised by the VLRC. The 2011 *Sexual Assault Reform Strategy – Final Evaluation report* prepared by SuccessWorks provides further context for this review.

In conducting the review, we have also had regard to sexual offences laws in other jurisdictions, most notably the United Kingdom, New Zealand and New South Wales. The United Kingdom introduced significant reforms to its sexual offences laws in the *Sexual Offences Act 2003* (UK).

The key objectives and guiding principles for the law on sexual offences that were included in the *Crimes Act* in 2006 following VLRC recommendations are of particular importance to this review. Section 37A provides that the objectives of the law on sexual offences are:

- to uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity, and
- to protect children and persons with a cognitive impairment from sexual exploitation.

Section 37B provides that, in interpreting and applying subdivisions 8A to 8G, courts must have regard to the fact that:

- there is a high incidence of sexual violence within society
- sexual offences are significantly under-reported
- a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment
- sexual offenders are commonly known to their victims, and
- sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.

It must also be borne in mind that the offences operate within a system of criminal laws and that a person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law. Sometimes the standard burden of proof is altered in order to provide additional protections for vulnerable complainants. (For example, in relation to sexual offences against children there is a legal burden on the accused to prove on the balance of probabilities that he or she believed on reasonable grounds that the child was aged 16 (or 18 as the case may be) or older. See the discussion in Part 9.3 below.) It is important that this is done carefully and only when it is consistent with the principles of justice.

2.3 Fair labelling

The principle of fair labelling refers to fairness in the description of an offence under the law. Andrew Ashworth (*Principles of Criminal Law,* 2008 at p 78) observes that:

> Fairness demands that offenders be labelled and punished in proportion to their wrongdoing; the label is important for public communication and, within the criminal

> justice system, for deciding on appropriate maximum penalties, for evaluating previous convictions, classification in prison and so on.

It is important that an offence label describes the kind and magnitude of wrongdoing and harm and reflects community perceptions of culpability.

For example, in recommending the retention of the label ‘rape’ for the offence of sexual penetration without consent, the Law Reform Commission of Victoria said in its 1986 Discussion Paper on *Rape and Allied Offences: Substantive Aspects*:

> The main argument for retention, regardless of the form and substance of the law, is that the term ‘rape’ is synonymous in our culture with a particularly heinous form of behaviour. The application of the term ‘rapist’ to a person is a particularly effective and appropriate form of stigma.

The labelling of offences is a fine balancing exercise. The offence name must take into account the needs of the community and fairness to the victim/survivor, and fairly label the offender without unnecessarily stigmatising him or her. Above all, the offence name must adequately describe the conduct and/or harm being criminalised so that the community and jury members readily understand it.

2.4 Turning good policy into good laws

The lack of clarity, consistency and certainty concerning the law of sexual offences means that different interpretations of the law are more likely, as evidenced by the spate of appeals in recent years resulting in convictions being overturned. An important feature of this review is that it focuses on the more technical aspects of sexual offences, for example, the structure of offences, the terminology used to describe offence elements, the definitions of key terms and the language and structure of jury directions.

Victoria’s criminal laws originally emanated from the United Kingdom. Those laws were a mixture of common law and statutory offences. For some time, specific statutory offences were created where the limits of the common law were found and common law offences did not apply. One of the great benefits of the common law is that it can develop over time and therefore has a degree of inbuilt flexibility or adaptability. However, this is not without limits.

Over time, Victoria has progressively developed more comprehensive statutory offences, replacing the common law offences. However, Victoria’s statutory offences must generally be understood in the context of the common law. For instance, many statutory offences do not set out all of the matters that the prosecution must prove to establish that a person is guilty. The common law will assist in this situation, implying that certain elements, usually fault elements, form part of the offence.

This process of having to know both the statutory offence and common law implied elements makes understanding and applying offences much more complicated than they should be.

In this review we have developed proposals for setting out the elements, exceptions and defences as well as definitions in greater detail in legislation. This process aims to provide greater clarity, consistency and certainty in sexual offence laws.

However, this does not involve creating a code. We do not propose that a 'criminal code' for sexual offences be introduced in Victoria.

Such a code would involve exhaustively stating all principles of criminal responsibility for sexual offences in Victorian legislation, and abolishing all common law defences and exceptions to criminal responsibility. An example of such a code can be found in the Commonwealth's *Criminal Code Act 1995* (Criminal Code), based on the Model Criminal Code. The Model Criminal Code also provides a process for working out all of the elements of an offence and any relevant defences.

Introducing a code, like the Model Criminal Code, would also face significant challenges. The drive for precision can result in complicated laws designed to deal with all eventualities. It would involve significant change for judges, lawyers and police. It would also mean that sexual offences would have to be interpreted very differently from other Victorian offences. Accordingly, the department does not propose such an approach.

Nevertheless, this review draws on the Model Criminal Code in several ways. In order to clarify Victoria's sexual offences, it is necessary to develop a systematic approach to analysing the structure of offences. The principles underpinning the Model Criminal Code provide a very useful framework for doing so. Many of the concepts and terms used in this review, such as 'physical elements' and 'fault elements' (discussed below) are used in the Model Criminal Code. We have also examined the Model Criminal Code's model sexual offences in developing proposals for reform of Victoria's sexual offences.

2.5 General and specific offences

Sometimes it is not clear whether an offence provision contains a single offence or multiple offences. Knowing whether a provision contains one or more offences is important in achieving clarity in the law and providing clarity about the offence charged.

In this review, we have been mindful of the principle that a smaller number of overarching general offences is usually preferable to a larger number of more specific and detailed offences. In particular, offences should not focus on criminalising the particular way in which harm is caused (for example, whether an offence is committed face to face or via the internet). Wherever possible we have sought to minimise the number of new sexual offences, in order to reduce complexity overall.

However, we have balanced this principle against the strong need for clarity in individual offences for all involved in the criminal process (especially the jury), particularly in defining the elements of sexual offences, and ensuring that the elements in revised offences are appropriate. This has led us to propose the creation of a number of new sexual offences.

The nature of the conduct in an offence plays a role in determining whether a single offence is created or more than one, and how maximum penalties are set. The current scheme of sexual offences distinguishes between 'penetrative' sexual activity (such as that involved in rape) and 'non-penetrative' sexual activity (such as that involved in indecent assault). Offences involving penetrative sexual conduct normally attract higher maximum penalties than those involving non-penetrative conduct, on the basis that unlawful sexual penetration is generally more harmful than unlawful sexual touching.

2.6 The structure of offences

In this review we have sought to deconstruct sexual offences in order to understand their basic components, and then to rebuild clearer, simpler and more effective offences. In order to do this, we have developed a consistent vocabulary to describe the basic components or building blocks of an offence. A general principle of this review is that words and phrases should be used as consistently as possible throughout offence provisions, rather than giving a single word or phrase different meanings depending on the context. Also, the same concept should generally be described across different contexts by the same word or phrase.

The concepts we have used to analyse existing offences and to develop new offences are referred to briefly below, and are explained in more detail in the glossary in Part 16 of this paper. While these concepts inform each offence proposal in this paper, it is not necessary to understand the concepts in order to read or understand the proposals contained in Parts 3 to 13.

2.6.1 Physical and fault elements

An offence is comprised of 'elements'. An element of an offence is a matter which the prosecution must prove beyond reasonable doubt before an accused may be found guilty of that offence. All elements of an offence must be proved beyond reasonable doubt for the offence to be proved.

An element can be either a 'physical element' or a 'fault element'.

Physical elements are sometimes described as the 'actus reus' or 'guilty act' of an offence. In this review of sexual offences we identify three different kinds of physical elements: conduct, circumstances and results.

All offences have a conduct element. Conduct usually involves an act. A circumstance is an element that gives greater context to the conduct of an offence. For example, for the offence of rape, the conduct is *sexually penetrating another person*, and this conduct takes place in the circumstance that *the other person does not consent to the penetration*. Results do not arise very often in sexual offences. An example of a result is that a person suffered a *serious injury* in the offence of causing serious injury intentionally.

A fault element describes the 'fault' (usually the state of mind of the accused, which is sometimes described as the 'mens rea' or 'guilty mind') which applies in relation to a physical element. For example, for the offence of rape, the accused must have *intentionally* sexually penetrated another person while being *aware that the other person is not or might not be consenting*. That is, the fault element of intention applies to the conduct of sexual penetration, and the fault element of awareness applies to the physical element of the other person's lack of consent.

All sexual offences contain at least one fault element. The sexual offences under review currently use different fault elements to refer to similar concepts. This can create confusion. In this review, we propose that a number of standard fault elements be used consistently across offences. These are intention, knowledge, and recklessness.

In some offences there can also be a fault element that does not apply to any physical element. This is known as an ulterior fault element. An example is found in the offence of assault with intent to rape. In this offence, there is an assault but no rape. The *intention* to rape thus does not attach to any physical element of the offence. Instead, it is a state of mind directed at some possible future conduct.

There may be occasions where none of these standard fault elements work appropriately for an offence. While a key aim of this review is to rationalise the fault elements that are used in Victorian sexual offences, this does not mean that a different fault element cannot be used where there are strong reasons for doing so. An example is in the revised offence of rape, which is discussed in Part 3 of this paper.

2.6.2 The relationship between physical and fault elements

The expression 'fault element' is similar to the common law expression 'mens rea', meaning 'guilty mind'. However, there is an important difference between the expressions 'fault element' and 'mens rea'. The common law refers to 'the mens rea of an offence'. This makes 'mens rea' sound like an indivisible notion, which in turn can make it difficult to identify more than one relevant state of mind for an offence.

This can be confusing. For example, in the offence of sexual penetration of a child under the age of 16, there are two physical elements – taking part in an act of sexual penetration with a person (conduct) and the fact that the other person is a child is under 16 (circumstance).

If we say that the 'mens rea' for this offence is 'intention', what does this mean? Does it mean that the accused intended to engage in sexual penetration, or does it mean that the accused intended to engage in sexual penetration *with a child under the age of 16*? Is it necessary for the prosecution to prove that the accused intended that the child be under the age of 16, or was aware that the child was under 16?

In order to be as clear as possible and to avoid confusion, in this review we consider each physical element separately and ask whether a fault element should apply to that physical element. For example, the offence of rape has two physical elements:

- the accused sexually penetrates another person (conduct), and
- the other person does not consent to being sexually penetrated (circumstance).

Our approach is first to identify what, if any, is the fault element applicable to the conduct of this offence. Is the current fault element appropriate? The next question is what is the fault element applicable to the circumstance? Is it appropriate?

At present, many sexual offences specify a physical element but do not expressly state whether a fault element applies to that physical element. For example, section 45 of the *Crimes Act* provides that a person who 'takes part in an act of sexual penetration' with a child under the age of 16 is guilty of an offence. The offence does not expressly state that the accused must *intend* to take part in the act of sexual penetration.

In contrast, section 38 states that a person commits rape if he or she '*intentionally* sexually penetrates another person without that person's consent'. Does the absence of the word 'intentionally' in section 45 mean that the prosecution does not have to prove that an accused intended to take part in the act of sexual penetration?

The High Court held in *He Kaw Teh v The Queen* (1985) 157 CLR 523 that there is a presumption that 'mens rea' is an essential ingredient of any offence. Thus, the common law often operates to imply the existence of a fault element in an offence. In section 45, the implied fault element applicable to the physical element of taking part in an act of sexual penetration is most probably intention.

To avoid uncertainty in developing new sexual offences, it is preferable to specify any applicable fault elements, rather than relying on the common law to imply the existence of a fault element.

Not every physical element will have an applicable fault element. If a physical element has no applicable fault element, we refer to it as an element to which strict liability or absolute liability applies.

Applying strict or absolute liability to a physical element imposes a higher standard of conduct on an accused, by removing the need for the prosecution to prove a fault element in relation to that physical element, and, in the case of absolute liability, by also removing the availability of a defence based on a reasonable mistake by the accused. Strict and absolute liability should therefore only be applied where there are strong reasons for imposing a higher standard on the accused.

3 Rape offences

3.1 Overview of proposals

Section 38 of the *Crimes Act* makes rape an offence. It provides for a number of different types of rape: sexual penetration without consent, continuation of sexual penetration without consent, compelling sexual penetration of the offender or a third person, and compelling continuation of sexual penetration of the offender or a third person. Section 38A of the *Crimes Act* makes it an offence to compel an act of sexual self-penetration or to compel an act of bestiality. Both of these are essentially forms of rape, and it is proposed they continue to be treated as such.

As discussed below, there are significant problems with the fault element in these offences with regard to the complainant not consenting. The problems include:

- uncertainty about what this fault element covers and what states of mind are inconsistent with it
- complexity in the law about this fault element has made jury directions complex for trial judges to give and for jurors to understand and apply, and
- complexity in the law about the fault element has led to many convictions being overturned on appeal.

In addition to these functional problems, there is also concern that the fault element does not focus on the key issues and the offence is too narrow because it does not criminalise situations where the accused's belief that the complainant consented is unreasonable in all the circumstances.

These offences can be improved in a number of ways to achieve:

- a simpler and clearer structure
- clearer and more distinct elements, which will more clearly identify the distinct issues that must be resolved
- clearer and more comprehensive definitions of key terms, and
- simpler and clearer jury directions.

The offence of rape would continue to be the leading sexual offence, in the sense that it would remain one of the most serious sexual offences and its structure and elements would continue to provide a central reference point for many other sexual offences. It is expected that rape would continue to be much more commonly charged than compelling sexual penetration.

We present three options in this Part for reforming the offences of rape and compelling sexual penetration. The three options are the same with regard to the physical elements of the offences (the conduct element and the complainant not consenting) and the first fault element (intention with regard to the conduct).

Where the three options differ is in relation to the fault element concerning the complainant not consenting. Option 1 would maintain the current law's alternative fault elements with regard to the complainant not consenting but seek to improve the clarity and structure of the offence.

Option 2 would replace the current alternative fault elements with two alternative fault elements: either the accused knew that the complainant was not consenting; or he or did not believe on reasonable grounds that the complainant was consenting. This option addresses the functional problems with respect to this fault element in the existing offence. It also incorporates a policy

proposal that a person who has no reasonable grounds for believing that another person is consenting to sexual intercourse should also be guilty of the offence of rape.

Option 3 would replace the current offence of rape with two offences: rape and what is here called 'sexual violation'. Rape under Option 3 would have two alternative fault elements: either the accused knew that the complainant was not consenting, or the accused did not believe that the complainant was consenting. Sexual violation would have the one fault element with respect to the complainant not consenting: the accused does not have reasonable grounds for a belief that the complainant is consenting. Sexual violation would have a lower maximum penalty than rape.

Examination of the offence of rape involves consideration of a wide range of issues. To assist in explaining these issues as clearly as possible, this paper deals with the issues in the following order:

- 3.2 – Evolution of the current offence of rape
- 3.3 – Proposed improvements to the first three elements of the offence of rape
- 3.4 – Three options to improve the fourth element of the offence of rape
- 3.5 – Discussion of Option 1
- 3.6 – Discussion of Option 2
- 3.7 – Discussion of Option 3
- 3.8 – What should be the fault element with respect to the complainant not consenting?
- 3.9 – Proving the elements of rape
- 3.10 – Proposed improvements to the offence of compelling sexual penetration, and
- 3.11 – Jury directions.

3.2 Evolution of the current offence of rape

The current statutory text of the offence of rape dates from 2007. The relevant provisions have emerged from a long and complex history of statutory amendment. The main steps in the evolution of the offence up to 2007 are summarised below. The elements of intentional sexual penetration without consent have remained relatively constant (though with some definitional changes). The main amendments have been to the fault element with respect to the complainant not consenting. The summary below will focus primarily on that aspect of the offence.

3.2.1 Common law offence

The common law offence of rape involved sexual penetration (or 'carnal knowledge') by a man of a woman without the woman's consent. Sexual penetration was understood as penile-vaginal penetration, to any degree.

The common law (as stated in *R v Flannery and Prendergast* [1969] VR 31 at 33 (Winneke CJ, Little and Barber JJ)) defined the fault element (or *mens rea*) of rape as:

> an intention on the part of the accused to have carnal knowledge without the consent of the woman concerned, and … this involves proof by the Crown either that the accused was aware that the woman was not consenting, or else realized that she might not be and determined to have intercourse with her whether she was consenting or not.

In more modern and simpler terms, the alternative fault elements with respect to the complainant not consenting under the common law were knowledge and (a form of) recklessness.

Under the common law offence, an honest belief that the complainant was consenting operated as a complete defence to a charge of rape. This is because '[t]he existence of such a belief necessarily negatives an awareness that the woman was not consenting, or a realization that she might not be' (*Flannery and Prendergast* at 33). In other words, it was assumed that a belief that the complainant is consenting did not allow for any doubt about whether the other person in fact consents.

3.2.2 Statutory reforms 1980–2007

Crimes (Sexual Offences) Act 1980

This Act put the offence of rape on a statutory footing (as a new section 45 of the *Crimes Act*) and amended the definition of the conduct that could be rape so that it covered oral and anal penetration. However, the 1980 Act did not define the principal fault element for the statutory offence of rape and so continued to rely on the common law understanding of the fault element.

Crimes (Rape) Act 1991

This Act put into effect the recommendations of the Law Reform Commission of Victoria in its report *Rape: Reform of Law and Procedure* (Report No. 43, 1991). The Act abolished the common law offence of rape (section 6) and defined both physical and fault elements in the *Crimes Act*. A person was said (in section 38) to commit rape if:

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

The physical elements were essentially unchanged from their statutory definition prior to this Act. The statutory fault element (underlined above) drew upon the common law fault element. However, as the High Court held in *Getachew* (at [12]), this did not amount to a codification of the common law of rape and the statutory version of rape was not to be limited by the common law version of the offence.

Crimes Amendment (Rape) Act 2007

This Act amended the fault element of rape in section 38 by adding a new alternative fault element with respect to the complainant not consenting: a failure to give thought to the question of the complainant's consent. This gave partial effect to one of the recommendations of the VLRC in its *Sexual Offences: Final Report* (2004) (recommendation 174).

3.2.3 Current text of section 38

Section 38 of the *Crimes Act* currently provides as follows:

> (1) A person must not commit rape.
>
> Penalty: Level 2 imprisonment (25 years maximum).

(2) A person commits rape if—
  (a) he or she intentionally sexually penetrates another person without that person's consent—
    (i) while being aware that the person is not consenting or might not be consenting; or
    (ii) while not giving any thought to whether the person is not consenting or might not be consenting; or
  (b) after sexual penetration he or she does not withdraw from a person who is not consenting on becoming aware that the person is not consenting or might not be consenting.

(3) A person (the offender) also commits rape if he or she compels a person—
  (a) to sexually penetrate the offender or another person, irrespective of whether the person being sexually penetrated consents to the act; or
  (b) who has sexually penetrated the offender or another person, not to cease sexually penetrating the offender or that other person, irrespective of whether the person who has been sexually penetrated consents to the act.

(4) For the purposes of subsection (3), a person compels another person (the victim) to engage in a sexual act if the person compels the victim (by force or otherwise) to engage in that act—
  (a) without the victim's consent; and
  (b) while—
    (i) being aware that the victim is not consenting or might not be consenting; or
    (ii) not giving any thought to whether the victim is not consenting or might not be consenting.

Within section 38 there are four distinct forms of rape:

- sexual penetration of a person without consent
- after sexual penetration, failure to withdraw from a person who is not consenting
- compelling a person to sexually penetrate the offender or another person, and
- compelling a person not to cease sexually penetrating the offender or another person.

It should also be noted that within section 38A there are two distinct offences:

- compelling a person to sexually penetrate him or herself, and
- compelling a person to take part in an act of bestiality.

Accordingly, within the offences of rape and compelling sexual penetration there are effectively six different offences of rape. However, the following discussion refers to the offence of rape as if it were a single offence, unless otherwise stated.

3.2.4 The four elements of the current offence of rape

The current rape offences have four basic elements:

1) sexual penetration or compelling sexual penetration
2) intention to sexually penetrate or compel sexual penetration
3) the other person does not consent, and
4) the fault element with regard to the complainant not consenting.

The fourth element covers three alternative fault elements with respect to the complainant's lack of consent:

a. knowledge: the accused is aware that the complainant is not consenting

b. a form of recklessness:[1] the accused is aware that the complainant might not be consenting, and

c. non-advertence: the accused does not give any thought to whether the complainant is not consenting or might not be consenting (though this does not apply to the 'failure to withdraw' offence in section 38(2)(b)).

3.3 Proposed improvements to the first three elements of the offence of rape

The department proposes revising the offence of rape so that it covers cases where the accused engages in sexual intercourse with the complainant without the complainant's consent (and the relevant fault elements apply). This will cover cases where the accused compels the complainant to sexually penetrate the accused. It is proposed that where the accused compels the complainant to engage in sexual intercourse with a third person, this should be included as a form of compelled sexual penetration.

In other words, rape would cover all forms of non-consensual sexual intercourse between the accused and the complainant, and compelling sexual penetration would cover other forms of non-consensual sexual penetration.

Below we present a number of proposals for improving the first three elements of the offence of rape. Proposed improvements to the offence of compelling sexual penetration are examined in Part 3.10 below.

The proposed improvements seek to make the offence of rape clearer and easier to understand and apply by improving upon the offence structure and the definitions of some key terms.

Proposal 1	**The first three elements of rape**
The proposed offence of rape would specify that a person (A) commits the offence of rape if: a) A has sexual intercourse with another person (B); b) A intends to have sexual intercourse with B; c) B does not consent to A having sexual intercourse with him or her; and d) *[the fault element with respect to the complainant not consenting — discussed in Parts 3.5 – 3.7 below].*	

These proposed improvements are further explained below.

3.3.1 A has sexual intercourse with B

The conduct element of this proposed offence is that the accused has sexual intercourse with the complainant.

Proposal 2	**Definition of 'sexual intercourse'**
For the purposes of the proposed revised offence of rape, a person (A) has sexual intercourse with another	

[1] This element is described only as a *form* of recklessness because it departs from the common law test for recklessness. A common law recklessness test would provide that 'the accused is aware that the complainant *is probably not* consenting'. The common law test for recklessness sets a higher standard and therefore would be harder for the prosecution to prove.

Proposal 2	Definition of 'sexual intercourse'

person (B) if he or she takes part in any activity consisting of or involving:

a) penetration (to any extent) of the vagina, anus or mouth of either A or B by the penis of the other person, whether or not there is emission of semen;

b) penetration (to any extent) of the vagina or anus of either A or B by a body part of the other person other than the penis or by an object manipulated by the other person; or

c) the continuation of any of the activities in paragraphs (a) or (b).

This proposed definition encompasses the same kinds of sexual penetration currently covered by section 35 of the *Crimes Act* but includes both where A penetrates B *and* where B penetrates A. (The current definition covers only where A penetrates B.) This proposed definition enables the offence of rape to cover the situation where the accused compels the complainant to sexually penetrate the accused. Such compelled conduct amounts to A having sexual intercourse with B without B's consent.

It is better to include under the one offence all cases of sexual penetration between the accused and the complainant. It is artificial to make the situation where the accused compels the complainant to penetrate the accused a separate offence to where the accused penetrates the complainant.

The proposed definition also encompasses the *continuation* of sexual penetration, which the current section 35 definition does not. This enables the offence to cover the situation where the accused commenced lawful sexual intercourse but fails to stop upon becoming aware that the other person is not or is no longer consenting. (This is the 'failure to withdraw' version of rape currently found in section 38(2)(b).)

3.3.2 A intends to have sexual intercourse with B

Consistent with the current rape offence, the proposed offence would require proof that the accused intended to have sexual intercourse with the complainant. In essence, to intend to engage in sexual intercourse with another person is to *mean* to so act. It is not an accidental act or the result of some oversight. The requirement of intention is essentially a continuation of a non-contentious aspect of the current law.

It is very uncommon for a person to engage in sexual intercourse with another person without any intention to do so, though it is not impossible. In the great majority of cases, there is no issue about intention.

3.3.3 B does not consent

That the complainant does not consent to the sexual intercourse is essential to any rape offence and to numerous other sexual offences. It is proposed that the current definition of 'consent' as 'free agreement' (section 36 of the *Crimes Act*) be maintained.

Proposal 3	Further explanation of 'consent'

In addition, it is proposed that the definition of 'consent' be further clarified by stating that:

a) a person can only consent to sexual intercourse if he or she has the capacity and freedom to choose whether or not to engage in sexual intercourse; and

b) even where consent to sexual intercourse has been given, it can be withdrawn either before the act takes place or while it is taking place.

These points are most likely already implied by the notion of consent as 'free agreement', but making them explicit in the legislation will help to make the meaning of consent clearer where consent is in issue.

It is also proposed that certain circumstances be identified as situations which are legally defined (or 'deemed') to constitute an absence of consent.

Proposal 4	**Consent-negating circumstances**

For the purposes of the proposed rape offences and other sexual offences in which absence of consent is an element, it is proposed that the following be specified as circumstances in which, by definition, a person does not consent (to sexual intercourse or other sexual conduct, depending on the offence in question):

a) the person submits to the act because of force or the fear of force to that person or someone else;

b) the person submits to the act because of the fear of harm of any type to that person or someone else;

c) the person submits to the act because she or he is unlawfully detained;

d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of consenting to the act;

e) the person is incapable of understanding the sexual nature of the act;

f) the person is mistaken about the sexual nature of the act or the identity of any other person involved in the act; or

g) the person mistakenly believes that the act is for medical or hygienic purposes.

This list essentially repeats the list of deemed consent-negating circumstances currently contained in section 36 of the *Crimes Act*.

In each of these circumstances the person does not consent, because she or he lacks either the capacity or the freedom to consent or lacks the information or understanding required for properly informed consent.

This proposed list would not limit the circumstances in which a person does not consent. It would simply provide a list of the situations in which consent is legally defined or deemed to be absent. There can be various other circumstances in which consent can be absent as a matter of fact in the particular case.

Should statutory definitions regarding consent and its absence be removed?

An alternative approach is to seek to streamline the relevant legislation by removing the statutory definition of consent, or any further explanation of consent, or the list of statutorily defined consent-negating circumstances, or a combination of these. This would be intended to reduce the number and complexity of jury directions in rape trials. It is arguable that the statutory deeming provisions in section 36 are common sense and hence not necessary to enshrine in legislation. For example, in 'The Criminal Law — A "Mildly Vituperative" Critique' ((2011) 35 *Melbourne University Law Review* 1177 at 1186), Justice Mark Weinberg, speaking off the bench, argued that

> [w]ith respect, the matters set out in s 36 need hardly have been expressly prescribed as vitiating free agreement. It is surely obvious that anyone subjected to sexual penetration in such circumstances has not 'freely agreed', or indeed relevantly 'consented', to sexual penetration. A jury would hardly need to be told that the presence of any one or more of these circumstances must be regarded as negating free agreement.

On the other hand, it could be argued that statutory guidance on such matters as the definition of 'consent' and its absence helps to reduce the risk of some jurors' giving undue credence to

stereotypical views about when people, especially women, give consent to sexual intercourse. Proposal 4 does not require directions about all of these matters in each case. A direction about a particular issue will only be given if it is relevant. Moreover, with the new approach to jury directions taken in the *Jury Directions Act 2013*, the trial judge will be free to draw upon only so much of the statutory guidance in this respect as is necessary in the particular case. Also, removing the list would risk making some things live issues. For example, a case involving the complainant fearing harm could involve an issue of whether the degree of fear was sufficient to vitiate consent. This would risk introducing further uncertainty into rape trials.

Question 1	**Removal of statutory definition of 'consent' and deemed consent-negating circumstances**
Should any of the following be excluded from the legislation: a) the definition of 'consent' b) further explanation of consent, and c) a list of defined consent-negating circumstances?	

3.3.4 Exception

Section 35 of the *Crimes Act* currently excludes good faith medical or hygienic procedures from the definition of sexual penetration. In the proposed revised offence, good faith medical or hygienic procedures would be distinctly identified as an exception to the offence, rather than as a matter of a definitional limit. It is simpler and clearer to have the definition of sexual intercourse as simply a matter of conduct, without reference to purposes. Where such conduct is engaged in for certain legitimate purposes then that can be made an exception to criminal liability rather than defined not to be sexual intercourse as such.

3.4 Three options to improve the fourth element of the offence of rape

In this section, we present three options for reform with regard to the fourth element of the offence of rape. Each option will then be discussed in more detail, in parts 3.5, 3.6 and 3.7 respectively.

The fourth element in the offence of rape is the fault element with respect to the third element, that is the fact that the complainant does not consent. Section 38 currently sets out three alternative fault elements with respect to the complainant's lack of consent:

(i) the accused is aware that the complainant is not consenting

(ii) the accused is aware that the complainant might not be consenting, and

(iii) the accused does not give any thought to whether the complainant is not consenting or might not be consenting.

This element has been the source of much of the difficulty and confusion with the current offence of rape. These problems will be summarised in the discussion of Option 1 below (part 3.5).

Each of the three options seeks to make the offence of rape clearer and more workable in practice. Option 1 is the closest to the current law, while Options 2 and 3 introduce, in different ways, a reform to ensure that intentionally engaging in sexual intercourse with someone without their consent is prohibited unless there are reasonable grounds for believing that that person consents.

3.4.1 Option 1

Proposal 5 Option 1 regarding fourth element of offence of rape

Under Option 1, a person (A) would commit the offence of rape if:

a) A has sexual intercourse with another person (B);

b) A intends to have sexual intercourse with B;

c) B does not consent to A having sexual intercourse with him or her; and

d) A:

i knows that B is not consenting;

ii knows that B might not be consenting; or

iii does not give any thought to whether B is not consenting or might not be consenting.

The maximum penalty for this offence would be 25 years imprisonment (level 2).

3.4.2 Option 2

Proposal 6 Option 2 regarding fourth element of offence of rape

Under Option 2, a person (A) would commit the offence of rape if:

a) A has sexual intercourse with another person (B);

b) A intends to have sexual intercourse with B;

c) B does not consent to A having sexual intercourse with him or her; and

d) A:

i knows that B is not consenting; or

ii does not believe on reasonable grounds that B is consenting.

The maximum penalty for this offence would be 25 years imprisonment (level 2).

3.4.3 Option 3

Proposal 7 Option 3 regarding fourth element of offence of rape

Rape

A person (A) would commit the offence of rape if:

a) A has sexual intercourse with another person (B);

b) A intends to have sexual intercourse with B;

c) B does not consent to A having sexual intercourse with him or her; and

d) A:

i knows that B is not consenting; or

ii does not believe that B is consenting.

The maximum penalty for this offence would be 25 years imprisonment (level 2).

Sexual violation

A person (A) would commit the offence of sexual violation if:

a) A has sexual intercourse with another person (B);

b) A intends to have sexual intercourse with B;

c) B does not consent to A having sexual intercourse with him or her; and

d) A does not have reasonable grounds for believing that B is consenting.

The maximum penalty for this offence would be 15 years imprisonment (level 4).

3.5 Discussion of Option 1

Option 1 essentially preserves the substance of the current law of rape, while presenting it more clearly by separately laying out each distinct element to be proved.

3.5.1 The alternative fault elements with respect to the complainant not consenting under Option 1

Under Option 1, the substance of the current law's three alternative fault elements would be preserved, but in a slightly revised form.

Knowledge

The first of the alternative fault elements is the accused's knowledge that the complainant does not consent. The current section 38 offence uses the term 'awareness'. Under Option 1, this would be changed to 'knowledge'. While these terms have essentially the same meaning, knowledge is a clearer, more commonsense concept than awareness. Juries generally find it easier to deal with the allegation that the accused knew that something was the case than with the allegation that the accused was aware that something was the case.

Recklessness

The second alternative fault element knowledge of the fact that the complainant might not be consenting. In this context 'might' is taken to mean a 'real possibility' as opposed to a 'theoretical possibility' (see *R v Ev Costa* [1996] VSC 27 at [67]). This is a form of recklessness. It is different from the standard approach to recklessness (which is knowledge of probability), but it would be retained as part of Option 1, because it is familiar in the context of the offence of rape.

Non-advertence

The first two fault elements reflect the 'subjectivist' approach to criminal offences, which requires the fault element of a crime to be an actual mental state on the part of the accused. The third alternative fault element departs from a purely subjectivist approach because it involves an absence of a state of mind: the accused will be guilty if he or she fails to turn his or her mind to the question of the complainant's consent (and the other elements are proved). This fault element thus prevents an accused avoiding criminal liability on the basis that he or she did not have the requisite knowledge because he or she 'just didn't think about' the question of the complainant's consent. The simple fact of non-advertence will be enough to satisfy the fault element.

This sort of scenario is not likely to arise often but it may do so and as the VLRC said in Chapter 8 of its 2004 report, '[n]o accused should be acquitted just because he has completely failed to turn his mind to the question of consent' (p 411). So long as the accused gave some thought to the question of consent, this fault element will not be satisfied. It does not matter what kind of thought was given or whether or not the thinking resulted in a reasonable (or unreasonable) belief that the complainant was consenting.

3.5.2 Arguments in favour of Option 1

Option 1 would make essentially no policy change to the current law of rape. The current law would, in its essentials, continue to apply. There are two main arguments in favour of preserving the status quo.

The first is essentially a practical one: preserving the status quo would mean that there would be continuity with existing practices. Adoption of Option 1 would mean that prosecutors, defence lawyers and judges would already be familiar with the basic content of the new provisions and their operation. This in turn would mean that little time would need to be invested in learning the new rape laws and revising existing practices, although exactly what the current law does cover is not necessarily clearly settled (as will be discussed shortly).

The second argument is based on a particular view about the proper basis for imposing criminal liability on the individual for their conduct. On this view, serious criminal offences should be limited to those offences which contain, in addition to the physical elements, an element which is an actual state of mind or *mens rea* (such as intention, knowledge, etc) because people should only be held criminally liable for what they did when they had some sort of conscious state of mind about their act and its circumstances, and not when they *fail* to have some particular state of mind. This 'subjectivist' principle is usefully summarised by Professor Andrew Ashworth (in his book *Principles of Criminal Law*, 6th ed, p 154–5) as follows:

> The essence of the principle of *mens rea* is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and its consequences. This approach is grounded in the principle of autonomy: individuals are regarded as autonomous persons with a general capacity to choose among alternative courses of behaviour, and respect for their autonomy means holding them liable only on the basis of their choices.

When applied to rape, the subjectivist principle holds that criminal liability should only be imposed where the accused chooses to engage in sexual intercourse with a person known not to be consenting or known to be possibly not consenting. This is reflected in the previous common law offence of rape and the first two alternative fault elements under both the current law and Option 1. (However, the third alternative fault element under both the current law and Option 1, namely inadvertence, does not fit this subjectivist principle.)

3.5.3 Arguments against Option 1

The main disadvantage of Option 1 is that, because it makes no substantive change to the law, it does not deal with a number of issues associated with the current law of rape. These issues would therefore persist if Option 1 were adopted. The main problems with the current law of rape are:

- complexity concerning the role of an accused's belief that the complainant is consenting in negating fault,
- complexity concerning the role of reasonableness of belief that the complainant is consenting,
- complexity concerning the evidential significance of an accused's awareness of the existence of a circumstance deemed by law to negate consent, and
- the controversial policy of allowing an unreasonable belief that the complainant is consenting to excuse an accused from criminal liability

These problems are explained in further detail below.

Complex relationship between belief that the complainant is consenting and fault elements

A key problem area in the current law of rape concerns the role of belief that the complainant is consenting in answering a charge of rape. The problems are largely due to the inherent conceptual complexities involved in how an accused's belief that the complainant is consenting interacts with

the alternative fault elements. There is an inherent complexity in working out what such a belief is, and what such a belief is consistent with and what it is not consistent with.

Section 37AA of the *Crimes Act*, introduced in 2007, provides that if the accused leads evidence or asserts that he or she believed the complainant was consenting, the trial judge must direct the jury that, in considering whether the prosecution has proved that the accused was aware that the complainant was not consenting or might not have been consenting, the jury must consider any evidence of that belief and whether that belief was reasonable.

However, exactly how a belief that the complainant is consenting is relevant to proof of the fault element(s) has been hard to pin down because the interpretation of section 37AA has gone through several evolutionary stages since its introduction in 2007. Initially, section 37AA was taken to mean that the trial judge should direct the jury that the accused's belief that the complainant was consenting was relevant to whether the prosecution had proved the first two alternative fault elements, but the accused's belief was not determinative of whether the prosecution had proved that the accused was aware that the complainant might not be consenting. That was because belief that the complainant consents and awareness of the possibility that the complainant does not consent were taken to be not necessarily mutually exclusive.

Then, in *Worsnop v The Queen* [2010] VSCA 188, in July 2010, the Court of Appeal said that a belief that the complainant was consenting contradicted both awareness that the complainant was not consenting and awareness that the complainant might not have been consenting. Accordingly, after the decision in *Worsnop*, trial judges directed the jury that if the jury accepted that the accused believed the complainant was consenting, then this meant that the prosecution could not prove the fault elements.

Following the Court of Appeal decision in *Worsnop*, the High Court in *The Queen v Getachew* [2012] HCA 10, in March 2012, changed once more the interpretation of the law concerning an accused's belief that the complainant was consenting. The High Court held that, under the offence of rape, an honest belief that the complainant was consenting would not automatically negate the fault element of the offence of rape. This is because it is possible, depending on the case, that such a belief could be consistent with accepting that the complainant might not be consenting. According to the High Court (at [27]):

> if an accused asserted, or gave evidence at trial, that he or she thought or 'believed' the complainant was consenting, the prosecution may yet demonstrate to the requisite standard either that the accused was aware that the complainant might not be consenting or that the asserted belief was not held.

Such a belief remains relevant to proof of the offence, since it shapes how the prosecution may prove the fault element.

Though the High Court did not expressly say so, what the prosecution will presumably be able to prove in such cases will depend in part on the nature and strength of the particular belief. In some cases, the nature and strength of a particular belief that the complainant is consenting will be inconsistent with an awareness of the possibility of being in error, while in other cases it will be consistent. Where a belief that the complainant is consenting is very strongly held it is more likely to be inconsistent with an awareness of the possibility of error. In such cases, the jury must acquit the accused — even when the jury agrees that the belief is unreasonable.

This means it will be a matter for the jury to decide in each case, though this is by no means an easy question for the jury to answer. As the Court of Appeal said in *NT v The Queen* [2012] VSCA 213 (at [16]):

> We consider it desirable that a jury be told the following. There is a difference between the state of mind of belief in consent and awareness that the complainant might not be consenting. It is for the prosecution to establish that the accused did not have a belief in consent that creates a reasonable doubt that he was aware that the complainant was not or might not be consenting. Whether the belief does create a doubt will depend upon the jury's findings of fact as to the nature and extent of that belief.

It may be queried, however, whether the Court of Appeal's gloss here on the High Court's decision in *Getachew* in fact goes beyond the High Court's decision. The High Court did not appear to suggest that a belief that the complainant is consenting could, depending on its nature and extent, be consistent with awareness that the complainant *is not* consenting. It is arguable that the High Court was only allowing that a belief that the complainant is consenting could, in some cases, be consistent with awareness that the complainant *might not* be consenting.

In *Getachew*, the High Court refrained from providing a definitive or detailed exposition of the meaning of 'belief in consent'. The High Court's decision was helpful in clarifying some aspects of the current law of rape, but it did leave some questions about the nature of belief and knowledge (or awareness) in this context unanswered. The Court expressly stated that it need not explore whether 'belief in consent' encompassed 'a state of mind where the accused accepts that it is possible that the complainant might not be consenting' (at [26]). This leaves the meaning of 'belief in consent', as something relevant to determining proof of fault elements, uncertain.

The decision in *Getachew* thus adds a further layer of complexity to the way in which the jury is to address the issue of an asserted belief that the complainant is consenting and there is still a degree of uncertainty about the role of such a belief and hence still scope for further judicial reinterpretation of the existing law of rape.

Complexity regarding reasonableness of belief

An associated area of complexity concerns the role of the reasonableness of a belief that the complainant is consenting. In considering whether an accused believed that the complainant consented, the jury must, under section 37AA(b), consider 'whether that belief was reasonable in all of the circumstances'. The Court of Appeal has indicated that this direction must usually be 'balanced' with a direction explaining that 'the reasonableness or otherwise of a belief is no more than a guide to whether it was in fact held' (see *R v Munday* [2003] VSCA 189 at [47], citing *R v Ev Costa* [1996] VSC 27).

It is important for the jury to be told that, under the current law, the ultimate issue is not whether or not the belief was reasonable; nor is it even whether or not the belief was held. Instead, the ultimate issue is whether the accused was aware that the complainant was not or might not have been consenting, or gave no thought to the issue of consent. Whether any of these three possibilities was the case may be influenced by whether the accused believed the complainant was consenting. In turn, whether the accused in fact had such a belief could be influenced by whether or not such a belief would have been reasonable, on the basis that an unreasonable belief would have been less likely to have been held, though this is possible.

This is undoubtedly a complex set of issues for the jury to sort through. But the complexity is inescapable on any subjectivist model that focuses on the knowledge of the accused. This is because a belief that the complainant was consenting will always remain a possible answer to an allegation that the accused knew the complainant was not or might not be consenting, and the reasonableness or unreasonableness of a claimed belief will virtually always be relevant to assessing whether or not such a belief was actually held.

It is clear that this area of complexity has caused difficulties for trial judges in explaining the law as evidenced by the number of times it has been the subject of comment and consideration in the Court of Appeal (e.g. see *R v Lucin* (Unreported, Full Court of the Supreme Court of Victoria, 25 March 1994), *R v Ev Costa* [1996] VSC 27, *R v Munday* [2003] VSCA 189, *R v Zilm* [2006] VSCA 72, *R v Gose* [2009] VSCA 66, *Wilson v The Queen* [2011] VSCA 328).

Complexity regarding accused's awareness of a consent-negating circumstance

A further area of complexity in the current law of rape is where the accused is aware of a circumstance that the law deems to negate consent (e.g. that the complainant was 'asleep, unconscious or so affected by alcohol or another drug as to be incapable of freely agreeing'). Such awareness is relevant to the ultimate issue of proving the fault element only through a multi-step process. First, awareness of a circumstance legally deemed to negate consent is relevant to whether it would have been reasonable to believe that the complainant was consenting. Secondly, such reasonableness or lack of reasonableness is relevant to whether the accused actually did believe that the complainant was consenting. Thirdly, such a belief, if held, is relevant to whether or not the accused had the requisite knowledge of consent or turned their mind to the issue of consent.

While each step is logical enough, they together add up to a complex collection of inferences which are easy to confuse. Moreover, to many jurors it may seem more directly obvious that an accused who knows, for example, that the complainant is asleep or very drunk, is 'doing the wrong thing' in having sex with him or her. This can lead to a subverting or short-circuiting of the legally required inferential steps.

It is clear that this complexity has also caused difficulties for trial judges in explaining the law, as it has been the subject of comment and consideration in the Court of Appeal in recent times (e.g. see *Getachew v The Queen* [2011] VSCA 164, *Roberts v The Queen* [2011] VSCA 162, *Neal v The Queen* [2011] VSCA 172, and *Wilson v The Queen* [2011] VSCA 328).

The difficulties faced by juries

Much of the discussion above concerns inherent complexities in the law itself. These legal complexities present problems for trial judges in their management of a trial and how they direct juries. There are many other complex and challenging issues for a trial judge to navigate in a rape case, such as balancing the need to accord a fair trial to the accused with the need to protect complainant witnesses from further distress. Even when the trial judge navigates these difficulties successfully, and manages to give correct directions to the jury, the jury will often still have great difficulty in understanding and applying the directions to the facts of the case.

It is in this context that Justice Maxwell, President of the Court of Appeal, said in *Wilson* (at [2]):

> As their Honours' detailed exposition reveals, 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, in all its permutations and combinations, to the evidence which they have heard.

The complex relationships between the various concepts of ‘belief’, 'reasonable belief', ‘awareness’, ‘might not be consenting’, etc are difficult for a trial judge to explain to jurors and very difficult for jurors to understand and apply. The difficulties are multiplied when the subtleties of such fine philosophical distinctions collide with the practical realities of a criminal trial where there are often sharply conflicting evidence and contested interpretations of the same evidence. As the Court of Appeal said in *NT* (at [19]):

> These provisions have created much difficulty for trial judges and this Court for a very lengthy period. We do not take issue with the policy which underlies the provisions but, unfortunately, however, some of the concepts utilised including those which involve subtle differences between the state of mind of belief or awareness, the interrelationship between these concepts and their degree of prescription have made these provisions almost unworkable in the context of jury trials. The problems raised by this legislation can only be addressed by urgent and wholesale amendment.

Should unreasonable belief in consent negate criminal responsibility?

In addition to the conceptual complexities inherent in the current law of rape, there is controversy concerning the fact that under the current law, an accused may be found not guilty of rape if they sincerely believed that the complainant was consenting, even though there were no reasonable grounds for such a belief. This is because it is not reasonableness or unreasonableness that matters but simply whether or not the accused actually did believe the complainant consented. As the Court of Appeal stated in *Wilson* (at [153]):

> even if [the jury] concluded that the [accused’s] belief in consent was unreasonable, he would still be entitled to be acquitted if the Crown failed to disprove that his belief, although unreasonable, was genuinely held.

The controversial nature of such a legal policy was noted by Lord Simon of Glaisdale in his dissenting judgment in the House of Lords’ decision in *DPP v Morgan* [1976] AC 182. His Honour said (at 221) that 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.

It can be argued that the law should not allow an accused who had no reasonable grounds for their belief that the complainant was consenting to avoid criminal liability for rape just because their belief was so strongly held that they did not recognise the possibility of being mistaken. The current law (which Option 1 would preserve) may be argued to have the effect that the more self-serving, stubborn or un-empathetic a person is in how they form and maintain a belief that the other person consents, the more likely it is that they will avoid criminal liability.

This objection to the current law maintains that a strictly subjectivist approach to criminal responsibility in relation to sexual conduct will not adequately meet community expectations about what are acceptable forms of sexual conduct. Professor Andrew Ashworth (in *Principles of Criminal Law*, 6th ed, p 189) points out the limits of strict subjectivism as follows:

> [A]n approach that focuses solely on advertence [i.e. states of mind such as awareness or intention] fails to capture some moral distinctions and to satisfy all social expectations. Subjective tests heighten the protection of individual autonomy, but they typically make no concession to the principle of welfare and the concomitant duties to take care and avoid harming the interests of fellow citizens.

It can be argued that a strict subjectivism in rape has inadequate regard to the welfare, health or safety of the victims of non-consensual sex, as Lord Glaisdale's comment in *Morgan* above illustrates. It may be argued that given the ease of finding out whether the other person consents to sex, the law of rape should not excuse non-consensual sexual intercourse when it is accompanied by an unreasonable and false belief that the complainant is consenting.

This important policy issue will be further discussed in relation to Option 2 below.

3.6 Discussion of Option 2

Option 2 sets out to achieve two main policy goals. First, it aims to make the law of rape simpler and clearer, both in principle and in practice. Secondly, it aims to introduce an objective element into the offence of rape by making intentional non-consensual sexual intercourse a crime where the person either knows the other person does not consent or the person does not believe on reasonable grounds that the other person consents.

Option 2 has two main alternative fault elements with respect to the complainant not consenting. The prosecution must prove either:

- the accused knew that the complainant was not consenting, or
- the accused did not believe on reasonable grounds that the complainant was consenting.

Strictly speaking, knowing that the other person does not consent is a particular form of not believing that the other person consents. However, it is helpful to identify knowledge as a separate fault element in order to facilitate the prosecution of the straightforward cases where the evidence is clear and strong that the accused knew the complainant did not consent.

The focus of the discussion is on the second alternative fault element (not believing in consent on reasonable grounds). The first fault element (knowledge that the other person is not consenting) is the same as under Option 1. The main difficulties with Option 1 arise in relation to its second and third fault elements and their interaction with the accused's belief. The second fault element in Option 2 aims to cut through these seemingly intractable problems by approaching these issues differently.

3.6.1 Background to Option 2

Option 2 is based on law reform in other jurisdictions.

New Zealand, United Kingdom and New South Wales

Option 2's proposed introduction of an objective component to the fault element into the offence of rape follows similar reforms in New Zealand (in 1985), the United Kingdom (in 2003), and New South Wales (in 2007).

In New Zealand, an objective element in the offence of rape was introduced in 1985. The current definition of 'rape' in the *Crimes Act 1961* (NZ), section 128(2) is as follows:

> Person A rapes person B if person A has sexual connection with person B, effected by the penetration of person B's genitalia by person A's penis,—
>
> (a) without person B's consent to the connection; and
>
> (b) without believing on reasonable grounds that person B consents to the connection.

In the United Kingdom, the *Sexual Offences Act 2003* (UK), section 3, states:

> (1) A person (A) commits an offence if—
>
> (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
>
> (b) B does not consent to the penetration, and
>
> (c) A does not reasonably believe that B consents.
>
> (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

In New South Wales, the *Crimes Act 1900* (NSW), section 61I creates the offence of sexual assault (the equivalent of 'rape' in Victoria). It states:

> Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years.

The element of knowledge with respect to the other person not consenting is explained in section 61HA(3), which (since 2007) provides as follows:

> A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if:
>
> (a) the person knows that the other person does not consent to the sexual intercourse, or
>
> (b) the person is reckless as to whether the other person consents to the sexual intercourse, or
>
> (c) the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.
>
> For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case:
>
> (a) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but
>
> (b) not including any self-induced intoxication of the person.

Thus, in New South Wales, there are in fact three alternative fault elements with respect to the complainant not consenting: knowledge, recklessness and absence of reasonable grounds for belief in consent.

Queensland, Western Australia and Tasmania

The proposal under Option 2 is also broadly in line with the law on rape in the criminal codes of Queensland, Western Australia and Tasmania. In those jurisdictions, the offence of rape (or its

equivalent) has no fault element regarding the complainant not consenting, but the general defence of honest and reasonable mistake of fact applies to the offence. (See the *Criminal Code* (Qld) sections 349 and 24, *Criminal Code* (Tas) sections 185 and 14, and *Criminal Code* (WA) sections 325 and 24.) This means that if an accused had an honest and reasonable belief that the complainant was consenting, then he or she would not be guilty of rape. However, if the belief is merely honest (i.e. actually held) but is not based on reasonable grounds, then that will not be enough to avoid criminal liability.

This is in essence what Option 2 proposes, but with a difference. The difference between Option 2 and the law in Queensland, Western Australia and Tasmania is that in the latter three jurisdictions, the accused must first raise the defence of honest and reasonable mistake of fact before the prosecution is required to prove that the accused did not believe, or did not have reasonable grounds for believing, in consent. In contrast, under Option 2, the prosecution has that obligation at the outset, as an element of the offence, and the accused does not need to raise that defence. In other words, Option 2 would be substantially the same as the law in Western Australia, Queensland and Tasmania but with disproof of the defence being turned into proof of an element of the offence.

Victorian Law Reform Commission *Sexual Offences: Final Report* (2004)

Option 2 is broadly in keeping with the approach recommended by the VLRC in its *Sexual Offences: Final Report* (2004).

The VLRC recommended that rape be redefined as intentional sexual penetration of another person, without that person's consent. There would be no fault element with regard to the other person not consenting, but it would be a defence to a rape charge if the accused had honestly believed in consent.

However, the VLRC also recommended that, following what it called the Canadian model, the honest belief defence should not be available where the accused did not take reasonable steps to ascertain consent, or did not turn his or her mind to the question of consent, or was aware of the existence of one of the consent-negating circumstances listed in section 36 of the *Crimes Act* (e.g. the complainant was asleep). In effect, these three exceptions to the defence amount to situations in which the belief that the complainant is consenting (if it existed) would have been unreasonable.

The VLRC recommendation is unnecessarily complex in its three-step approach of creating criminal liability for certain conduct, then providing for a defence, and then disallowing that defence when certain exceptions apply. Given that many accused would raise the defence of honest belief in consent, the effective result would be that in many cases the prosecution would need to disprove the defence by proving either that the accused did not really have that belief or that, if he or she did, it should not be a defence because in the circumstances it was unreasonable (because the accused took no reasonable steps to ascertain whether there was consent, or did not turn his or her mind to the issue, or was aware of a consent-negating circumstance).

The proposal in Option 2 is much simpler: it incorporates the practical effect of the VLRC's three-step approach into the one-step approach of making an absence of belief in consent on reasonable grounds an element of the offence, rather than an exception to a defence to the offence. This will be simpler and easier for juries to understand. It also leaves open a wider range of circumstances that could make a belief that the complainant is consenting unreasonable.

It is important to note that, anyone guilty of rape under the existing law would still be guilty of rape under Option 2. This is because all the states of mind covered by the existing law would be

captured by the proposed law. In addition, the proposed revised offence would apply to the accused who did not have reasonable grounds for believing that the complainant was consenting.

3.6.2 The fault elements explained

The alternative fault elements under Option 2 are (i) A knows that B is not consenting and (ii) A does not believe on reasonable grounds that B is consenting. The latter can be proved either by proving that A did not believe that B was consenting or by proving that A did not have reasonable grounds for believing that B was consenting. Option 2 leaves it open as to what can satisfy these alternative fault elements.

A knows that B is not consenting

This corresponds to one of the two situations currently covered by section 38(2)(a)(i) of the *Crimes Act* ('while being aware that the person is not consenting'). As with Option 1, knowledge replaces awareness as it is a clearer, more commonsense concept, though they are effectively the same thing in this context. Juries generally find it easier to deal with the allegation that the accused knew that something was the case than with the allegation that the accused was aware that something was the case.

Because knowledge that the complainant does not consent will be a common scenario in rape trials, it has been identified separately and expressly in the first of the alternative fault elements under Option 2, even though, strictly speaking, it is a particular form of not believing in consent (as discussed below). Separate identification in this way will facilitate the prosecution of those straightforward cases where there is clear evidence of the accused knowing the complainant was not consenting.

The advantage of this approach is that in some cases it will be very easy to prove that A knows B is not consenting. For example, this will be obvious in stranger-rape cases and where a rape occurs in circumstances of other significant physical violence. This may also be easier for jurors as it involves proof of a positive state of mind. In such cases there may be no need to discuss the alternative fault elements. This would occur where the issues in the case are not focussed on consent, but on something else, such as the identity of the perpetrator. For example, there may be no dispute that the complainant did not consent and no dispute that the perpetrator knew this; instead, the accused disputes that he was the perpetrator.

A does not believe that B is consenting

Meaning of 'belief'

The High Court in *George v Rockett* (1990) 170 CLR 104 at [14] defined 'belief' as 'an inclination of the mind towards assenting to, rather than rejecting, a proposition'. Thus a belief is a state of mind in which a person thinks or accepts that something is a fact or is true. So A's belief that B is consenting to A having sex with B is a state of mind in which A thinks it is true that B is consenting to A having sex with B. Beliefs can be held with different degrees of strength or conviction. Some beliefs can be held with complete conviction. Others can be held with much less confidence. A mere suspicion is not held with the same degree of confidence as a belief. If a person only suspects that something is the case, they do not think that it actually is the case. A belief need not be true: a person can believe something which is not the case. Moreover, a person can hold a mistaken belief with complete conviction or with a large degree of doubt.

The fact that beliefs may be held with differing degrees of strength or conviction gives rise to an important — and difficult — problem for juries under Option 1. Under Option 1, the jury needs to assess the strength of an accused's belief that the complainant was consenting and then assess whether such a belief is consistent or inconsistent with the accused being aware that the complainant might nonetheless not be consenting. In contrast, under Option 2, this problem falls away. The jury needs only to assess whether the accused had the belief or not; there is no need to assess its strength or whether the belief was compatible with another state of mind. Whether there were reasonable grounds for such a belief is a separate issue.

How does this fault element compare with other fault elements and states of mind?

There are various ways in which a person can *not* believe that another person was consenting. That is to say, there are various positive or actual facts which can each constitute the same negative fact that A does not believe that B is consenting (just as a person can be 'not at home' because she is at work, out shopping, visiting a friend, etc). The following are the main ways in which an accused can 'not believe that the complainant is consenting'. (This list is not exhaustive and does not need to be.)

First, there is the situation where A knows that B is not consenting. This is a form of not believing that B is consenting, but has been separately identified as the first alternative fault element, for the reasons outline above.

Secondly, there is the situation where A has no belief one way or the other as to B's consent. In this situation the accused has intentional sexual intercourse with the non-consenting complainant but does so without having formed *any* belief about the complainant's consent. The accused neither believes that the complainant *is* consenting nor believes that the complainant is *not* consenting. It may be that the accused has not given any thought to whether or not the complainant is not consenting (which would correspond to the current section 38(2)(a)(ii) of the *Crimes Act*). If so, then the complainant will certainly have not formed any belief as to consent. However, it is possible that the accused *has* given thought to the question of consent but that such thought was inconclusive and did not lead to the formation of any particular belief with regard to consent. Either way, the accused does not believe in consent.

A third way of not believing in consent is the situation where the accused believes only that the complainant is *possibly* consenting, that is, without yet believing that she or he does *actually* consent. Such a belief in the *possibility* of consent does not amount to a belief in the *actuality* of consent. Such a belief is not yet strong or substantive enough to count as a belief that the complainant is consenting. It is more like a suspicion or conjecture.

How would the prosecution prove this fault element?

In order to prove that A did not believe that B was consenting, the prosecution would not first need to prove the existence of any of these specific states of mind. Rather, the prosecution will be able argue that the jury should conclude, from the evidence as a whole, the single, direct inference that the accused did not believe that the complainant was consenting. In effect, the prosecution would argue that, given all the evidence about the circumstances and events, it can be concluded beyond reasonable doubt that the accused did not form a belief that the complainant was consenting. The prosecution would not, for example, need to argue that the evidence proves that the accused believed merely that the complainant was possibly consenting, and that this conclusion then proves that the accused did not believe that the complainant was consenting. The only exception to this is

where the prosecution alleges that the accused knew that the complainant was not consenting, as this has been separately identified as an alternative fault element.

A does not have reasonable grounds for belief in consent

Under Option 2, even if the accused did believe that the complainant was consenting, if he or she did not have reasonable grounds for such a belief then the fault element would be satisfied. There are two basic situations in which the accused may fail to have reasonable grounds for a belief that the complainant is consenting.

In the first situation there are no reasonable grounds available to anyone in the accused's position for any such belief. This would be because, in the circumstances, there would have been clear and strong evidence that the complainant was *not* consenting and no or little evidence that the complainant *was* consenting. So, even if the accused *did* believe that the complainant was consenting, then that belief could not have been held on reasonable grounds.

In the second scenario the evidence shows that the accused's grounds for believing in consent (if such a belief was held) were not reasonable. The accused may have had no grounds at all for believing in the complainant's consent (and so the belief would have been arbitrary or baseless). Alternatively, the accused may have had some grounds for the belief but they were not reasonable ones. Many such unreasonable grounds would be obvious enough, for example, where the belief was based on the willingness of the complainant to have a drink with the accused and go home with him, or on how the complainant was dressed, or on the fact that the complainant had had sex with other men that evening, or on the sexual reputation of the complainant, or where the accused's beliefs are based on strange or unusual beliefs about sex or about women.

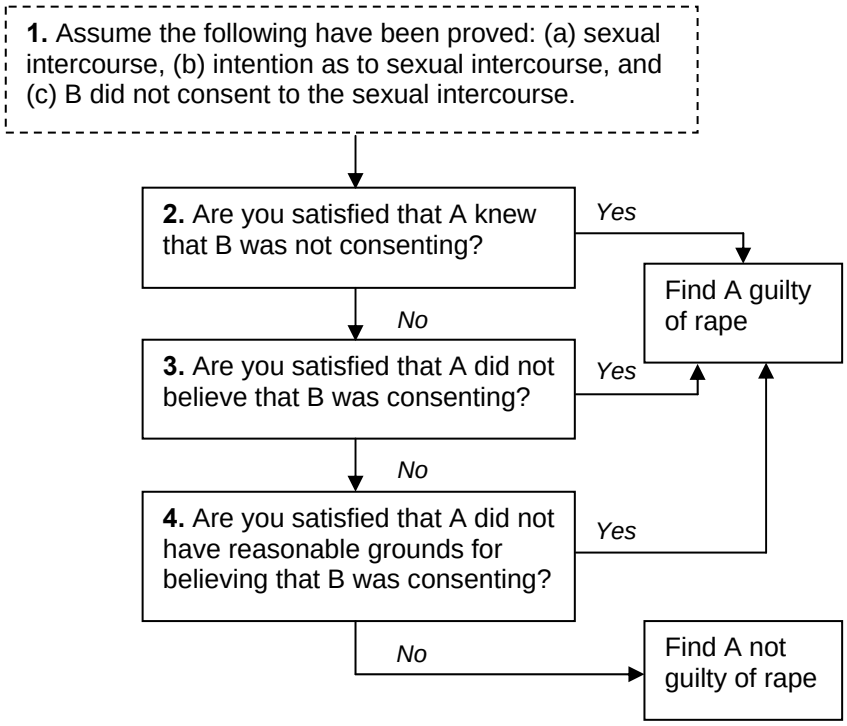
The evidence that someone did not have a belief will very often be substantially the same as the evidence that such a belief would have been unreasonable. This is because the more unreasonable a belief would have been, the less likely it would actually have been held. Juries will thus commonly look at the evidence as a whole and conclude, as a single inference, that the accused either did not believe that the other person was consenting or, at least, if he did, then he did not have reasonable grounds for that belief.

Where A knows that B might not be consenting

There is also the scenario in which the accused knows that the complainant *might not* be consenting. In such situations, the accused may or may not *also* believe that the complainant was nonetheless probably consenting (as acknowledged by the High Court in *Getachew*.) Where the accused does not also believe that the complainant was consenting, then that will clearly satisfy the fault element for rape under Option 2. Where the accused does believe that the complainant is consenting, while being aware that the complainant might not be consenting, then it is very unlikely that such an accused would have had reasonable grounds for that belief. Indeed, the accused's very knowledge of the possibility that the complainant might not be consenting would most likely count as strong evidence of the unreasonableness of the belief. (Engaging in sexual intercourse while knowing of the possibility of non-consent could more naturally be described as unreasonable *conduct* rather than a matter of being without reasonable grounds for a *belief* that the complainant is consenting, but nothing much rests on this distinction.)

3.6.3 How would Option 2 work in practice?

The following diagram shows how Option 2 would work in practice, focusing on the proof of the fault element with respect to the complainant not consenting. The diagram below shows the essential questions that the jury would be required to answer. This sort of 'question trail' is something that could be used by trial judges to help guide the jury through its task.



3.6.4 Arguments in favour of Option 2

There are a number of advantages to Option 2. Option 2 would:

- make the law simpler in principle and in practice
- establish the wrongfulness of engaging in non-consensual sexual intercourse without a reasonable belief that the other person consents
- involve the application of familiar concepts, and
- help move many rape trials beyond the impasse of conflicting testimonies.

These points are explained below.

Simplifying the law

Option 2 would avoid many of the complexities and subtle distinctions that beset the current law of rape, especially those relating to an accused's claimed belief that the complainant was consenting. Those current difficulties include the need to:

- restrict use of the evidence of unreasonableness to the issue of whether the accused in fact believed in consent, and
- restrict use of conclusions about the existence or non-existence of a belief that the complainant is consenting to the ultimate issue of whether the fault element has been proved, and

- in deciding that ultimate issue, distinguish, on the one hand, the inconsistency of belief in consent with the fault element of awareness that the complainant is not consenting from, on the other hand, the possible consistency of belief in consent with the fault element of awareness that the complainant might not consent.

In contrast, under Option 2, the jury will be able to deal with an assertion or evidence of belief that the complainant was consenting by a simple, two-step process:

- Has the prosecution proved that the accused did not have such a belief?
- If not, and assuming the accused had such a belief, did he or she have reasonable grounds for it?

Option 2 thus provides for a simpler and more direct way of dealing with the issues because the absence of reasonableness is now an element of the offence and not something only indirectly relevant through a series of inferential steps. This allows the jury to take a broader view of the whole of the circumstances. The jury can look at the accused's behaviour in the whole context and assess whether there would have been reasonable grounds for belief that the complainant was consenting.

In this way, many of the complex issues about what the accused may or may not have believed would be sidelined under Option 2 because if there is any doubt about whether or not the accused believed in consent then the issue becomes simply whether such a belief would have been reasonable. In relation to that issue, many of the factors that make the question of belief difficult to assess would be easily dealt with because they clearly undermine the reasonableness of any belief that the complainant was consenting. For example, where there is clear evidence that the complainant was very drunk and that the accused was aware of this, it can be very difficult for the jury, under the current law, to work out what exactly the accused may have believed and whether such belief as he or she may have had was consistent with knowing that the complainant was not or might not have been consenting. In contrast, under Option 2, delving into the psychology of the accused's belief formation would no longer be necessary. The jury can simply reason that, given the accused knew the complainant was very drunk, then, whatever belief about consent the accused had, it would have been unreasonable to believe that the complainant was consenting.

Establishing the wrongfulness of non-consensual sexual intercourse without reasonable belief in consent

For one person to have sexual intercourse with another person while that other person is not consenting is a clear harm to that other person and so ought not to be done. Option 2 gives expression to the policy view that a person who engages in such harmful conduct should be criminally liable for it unless he or she had reasonable grounds for believing that the other person's consent had been given.

It can be argued that the ease with which one can confirm the other person's consent, when compared with the seriousness of the harm suffered by the other person in being subjected to non-consensual sex, creates a clear moral responsibility not to proceed with sex unless one has formed a reasonable belief that the other person consents. It may then be argued that it is fair to require that a person who intends to engage in sexual intercourse with another person should only do so if he or she believes the other person is consenting and he or she has reasonable grounds for that belief. The proposed approach in Option 2 thus places a responsibility on those initiating sexual intercourse to seek to find out whether the other party is consenting and to not proceed unless reasonable grounds for belief in consent have been established. It can be argued that such a requirement is not onerous and reflects the importance and desirability of reasonable and respectful communication between the participants in sexual interactions.

In his influential judgment in *He Kaw Teh v The Queen* (1985) 157 CLR 523, Justice Brennan of the High Court articulated some relevant general principles for criminal responsibility. In relation to rape, his Honour said (at 578–9) that it would be relevant to a policy review of the offence of rape to consider:

> whether a woman's freedom to give or withhold consent to … intercourse is properly protected by holding a man liable to conviction for rape only if he has … intercourse knowing that the woman is not consenting or whether he should be liable to conviction for rape unless he has at least reasonable grounds for believing and believes that she consents.[2] The policy of the law, to which Lord Simon of Glaisdale referred in *Morgan* (at p.221), is a valid consideration when applied to statutory offences as it is when applied to common law offences. …

His Honour then helpfully summarised in general terms the key policy principles for criminal responsibility (which Option 2 then applies):

> It seems to me to be wrong to describe offences where the absence of an exculpatory belief is the relevant form of mens rea as offences imposing responsibility for negligence. … Criminal liability in cases to which that form of mens rea applies is imposed for the intentional doing of the physical act involved in the offence in circumstances where the supposed offender has no reasonable grounds for believing that his conduct is innocent. That is a liability imposed for doing the act, not for failing to take care in enquiring into the circumstances. That kind of criminal liability arises usually when the physical act is of such a kind that it ought not be done unless there are reasonable grounds for believing that the doing of the act is innocent.

Brennan J's analysis here combines well with Professor Ashworth's observations quoted above concerning the need for the criminal law in some areas to take account of 'the principle of welfare and the concomitant duties to take care and avoid harming the interests of fellow citizens'.

Applying those general principles to rape, it is strongly arguable that engaging in intentional sexual intercourse where the other person does not consent, but where it would be simple to find out whether or not the other person consents, is within that class of conduct which ought not to be done without having reasonable grounds for believing that the other person consents. Strictly speaking, it may be better not to say that such an act ought not to be done 'unless' there are reasonable grounds for a belief that the complainant is consenting, as that may imply that the act *may* be done where there are such grounds. On the contrary, non-consensual sexual intercourse should never be condoned by the law. The question is whether the presence of a reasonable belief that the complainant was consenting should allow an accused to avoid criminal liability for that act. The policy underlying Option 2 is that it should, but that a failure to have reasonable grounds for a belief that the complainant was consenting should *not* displace a basic prohibition of non-consensual sexual intercourse.

Familiar concepts

Though it would constitute a change in the substantive law of rape, Option 2 would in fact draw and build upon familiar features of the existing law in three important respects. First, the existing law requires a person who has intentional sexual intercourse with another person at least to turn his or her mind to the question of the other person's consent. The proposal under Option 2 is that the thought that must be given to this issue should be such that it results in a belief on reasonable

[2] His Honour refers here to 'extra-marital' sexual intercourse but this is not material to present purposes and simply reflects a now defunct legal principle about the effect of marriage on consent. His point applies generally to sexual intercourse whether inside or outside of marriage.

grounds that the other person is consenting, before the person engages in intentional sexual intercourse.

Secondly, the existing law already requires the jury to consider the reasonableness of an asserted belief that the complainant was consenting, but only in the limited context of ascertaining whether such a belief was actually held. Under Option 2, the proposal is that the jury would consider the issue of the unreasonableness of a belief in consent as itself an element of the offence of rape. Option 2 would still be asking the jury to consider the reasonableness of a belief that the complainant was consenting. The difference is where the question of reasonableness fits into the ultimate issue of whether or not the accused is guilty of rape.

Thirdly, the kind of reasoning about reasonable belief required under Option 2 is already well-known to the criminal law in relation to the defence of self-defence and defence of honest and reasonable mistake of fact. In relation to self-defence, an accused will not be guilty of assault where they honestly and reasonably believed that their conduct was necessary to defend themselves or another from being injured by the victim. Similarly, where the defence of honest and reasonable mistake applies, an accused will not be guilty if they honestly and reasonably believed in the existence of facts which, if true, would have made their conduct innocent. In both cases, where the defence is properly raised, the prosecution then bears the onus of proving that the accused either did not have the relevant belief or at least did not have reasonably grounds for having such a belief. This is, of course, precisely the reasoning proposed under Option 2, with the difference that the prosecution has that onus from the start, without the accused having to raise it first. That difference does not, however, change the nature of the reasoning. Thus, there is nothing novel in the kind of reasoning proposed under Option 2. (It is worth recalling in this context that under the rape law of Western Australia, Queensland and Tasmania, there is no fault element to be proved in relation to the complainant not consenting but the defence of honest and reasonable mistake of fact as to consent is available. Option 2 in effect simply makes disproving such a mistake an element of the offence.)

Getting beyond the impasse of conflicting testimonies

A further benefit of Option 2 is that it may help to get beyond the common impasse in which the jury is simply presented with two conflicting testimonies, that of the complainant and that of the accused. If the accused's belief that the complainant was consenting must be reasonable, then evidence of the objective nature of the circumstances in which that belief was formed becomes directly relevant in assessing the reasonableness of the accused's belief. This will, in relevant cases, allow the jury to take into account evidence beyond simply what the complainant and the accused each say happened or what each says they were thinking or not thinking at the time.

3.6.5 Arguments against Option 2

There are some arguments that could be raised against Option 2.

First, some people may object to the basic policy involved in adding an objective component to the fault element with respect to the complainant not consenting consent. Some may resist any further shift away from the principle of a strict subjectivism for serious offences like rape and oppose making anyone criminally liable when they honestly, albeit unreasonably, believed there was consent. (This is a 'further shift' because the alternative fault element of not giving any thought to consent under section 38(2)(a)(ii) already involves moving beyond strict subjectivism.) The arguments in support of adopting an objective standard were presented above.

Secondly, Option 2 involves proving a negative fact (i.e. proving that something is not the case). This kind of reasoning is sometimes more logically challenging than proving a positive fact. This is partly because there is often more than one way to prove a negative fact, because different positive facts can constitute a negative fact. (For example, a person can be 'not at home' because they are at work, out shopping, visiting a friend, etc.)

It is partly because of this that Option 2 identifies knowledge that the complainant does not consent as the first alternative fault element with respect to the complainant not consenting. It is strictly speaking not necessary to do so, because such knowledge is already one of the forms of an absence of a reasonable belief in consent. But it will help in the more straightforward cases to distinctly and separately identify that form of culpability and give the jury a simple, positive fact to find.

Thirdly, some may object that even though unreasonable belief cases do warrant being criminalised, the degree of moral culpability involved is less than the culpability in those cases where the person knew that other person was not consenting, and so such offending should be separately identified. This objections forms one of the arguments in favour of Option 3. See below for further discussion of this issue.

3.7 Discussion of Option 3

In essence, Option 3 takes Option 2 as its starting point, separates out lack of reasonable grounds for belief that the complainant is consenting, and makes that the basis for a distinct offence (here named 'sexual violation'), leaving the offence of rape to cover those cases where the accused knew that the complainant was not consenting or did not believe that the complainant was consenting.

3.7.1 Sexual violation as alternative offence to rape

The offence of sexual violation would most likely serve as an alternative offence to rape. That is, if the jury were not satisfied that the accused knew the complainant was not consenting and not satisfied that the accused did not believe that the complainant was consenting, then they would find the accused not guilty of rape but then go on to consider the question whether the accused lacked reasonable grounds for believing in consent. If so, then the accused would be guilty of sexual violation.

In considering whether the accused lacked reasonable grounds for believing in consent, the jury would not need first to be satisfied that the accused did in fact believe that the complainant was consenting. Rather, the jury could just assume that the accused did have that belief and go straight to the issue of whether there were reasonable grounds for such a belief. Such an assumption is fair to make, as it is in fact favourable to the accused. Of course, there may well be cases in which the jury is in fact satisfied on the evidence that the accused did believe that the complainant was consenting. Either way, the jury should go on to consider the reasonableness of that (assumed or found) belief in consent.

3.7.2 Arguments in favour of Option 3

The arguments for and against Option 3 are essentially the same as those for Option 2 (since the two options ultimately criminalise the same conduct, albeit with different names and different applicable maximum penalties). However, there are some additional arguments in relation to the splitting of the primary non-consensual penetrative sexual offence into rape and sexual violation.

First, as noted above, some may argue that non-consensual sexual intercourse without reasonable grounds for believing in consent should be criminalised, but as a separate offence to rape because it involves a lesser form of culpability. Having the one offence with the one maximum penalty does not (on this view) adequately register that difference in culpability because it treats all forms of rape as equally blameworthy.

In response to that argument, it can be pointed out that the maximum penalty for any offence is always reserved for the worst cases of that offence. Where an offence covers worse forms and less serious forms of the offending, that maximum penalty will be for the worst cases of the worse forms. The less serious forms of the offence are not to be assumed to be equivalent to the worse forms just because they come under the one offence name. In every case, the sentencing judge will need to decide how serious the individual offending was. It may well be expected that on average, rapists who had an unreasonable belief that the complainant was consenting will receive lesser sentences than those who had positive knowledge that the complainant did not consent. However, some may argue that, regardless of the gravity of what occurred in any particular case, there is a qualitative difference in the nature of the culpability between acting when knowing the other person does not consent and acting on the basis of a genuine but unreasonable belief that the person does consent, and that this should be reflected in having two separate offences. This could be argued to be consistent with the objective of 'fair labelling' (see Part 2.3 above).

A second point in favour of having a separate form of the objective offence is that jury verdicts would provide clearer facts for sentencing. Where an offence can take a number of forms (such as manslaughter) and the jury verdict is simply guilty or not guilty, the facts upon which the judge may then sentence a person found guilty will often not be as clear as in those offences which have one basic set of elements. This means that the sentencing judge will need to ascertain the relevant facts for sentencing for him or herself based on the evidence at trial.

3.7.3 Arguments against Option 3

One of the main objections to Option 3 is that it would introduce a new complexity into the law by creating a new offence. Having a separate offence, and in particular one that would serve as an alternative to rape, would increase the complexity of the jury directions because the trial judge would need to direct the jury about the relationship between the two offences of rape and sexual violation and the further steps involved in treating the latter as an alternative to the former.

A second objection is that having the separate and lesser offence of sexual violation available could result in the lesser offence being accepted in charge negotiations when a rape charge would have been more appropriate. That is, the prosecution may charge rape but offer to accept a plea of guilty to sexual violation instead, or the accused may counter a rape charge with an offer to plead guilty to sexual violation. While plea negotiation often has its merits, it would not be desirable if having the two offences meant that in the long run too many accused were pleading guilty to the lesser offence when their true criminality would have been captured by a rape conviction. If a second offence were created, the prosecution would need to be willing to persevere with prosecuting for rape where the prosecution considered the evidence justified doing so.

A third objection is that if a distinction were to be made between the objective and subjective versions of the offence covering non-consensual sexual intercourse, then the same distinction would then need to be introduced in all other sexual offences where the complainant not consenting was an element, such as compelling sexual penetration and sexual assault. This would see a

marked increase in the number of sexual offences overall, which would not serve the aim of simplifying the law of sexual offences.

A fourth objection is that Option 3 would most likely have the effect of 'carving out' some of the offences currently covered by rape and thereby reducing the scope of the offence of rape. For example, an accused who has a weak belief that the complainant is consenting but is aware that the complainant might not be consenting would be guilty of rape under both Options 1 and 2, but would guilty of sexual violation and not rape under Option 3. Many would object to the idea that some people who are currently guilty of rape would be guilty of a lesser offence instead.

3.8 What should be the fault element with respect to the complainant not consenting?

Having laid out the arguments for and against the three options for the fault element with respect to the complainant not consenting, we now pose the question as to which option should be adopted.

Question 2	**Fault element with respect to the complainant not consenting**
In the offence of rape, in relation to the fault element with respect to the complainant not consenting, which of the Options 1, 2 and 3 should be adopted?	

3.9 Proving the elements of rape

A key part of the law on rape concerns how a rape charge is to be proved. We propose a number of revised and new provisions in this regard. The proposals relate to proof of the third and fourth elements of rape (the complainant not consenting and the fault element with respect to that fact). There are no particular provisions proposed with respect to the first and second elements (sexual intercourse and intention to engage in sexual intercourse).

The proposed provisions apply to Options 1, 2 and 3. Some provisions would be revised continuations of the substance of existing law, while some new provisions would be needed to help clarify how the reasonableness of a belief that the complainant was consenting is to be determined, if Option 2 or Option 3 is adopted. For ease of exposition, the discussion and examples below adopt the language and approach of Option 2.

3.9.1 Proving that the complainant did not consent to sexual intercourse

B did not say or do anything to indicate consent at the time

In many rape cases, the victim does not say or do anything at the time to indicate that she or he consents to the sexual act. An evidential question is what can properly be inferred from evidence of an absence of communication of consent?

Proposal 8	**B did not say or do anything to indicate consent at the time**
It is proposed that where there is evidence that the complainant did not say or do anything to indicate consent to sexual intercourse at the time the act took place, this evidence can be sufficient for the jury to conclude that the complainant did not consent, but the jury is not required to do so.	

This reflects, in plain English, that evidence of non-communication is *prima facie* evidence that the complainant does not consent.

The current section 37AAA(d) of the *Crimes Act* states that such evidence 'is enough to show' that there is no consent. The precise meaning of this provision is unclear. On its face, it seems to say that such evidence is sufficient (and, by implication, *always* sufficient) to prove that the complainant does not consent, which would in effect be a deeming provision or an irrebuttable presumption.

However, that would be too strong a standard, since it is a factual possibility, though no doubt rare, that a person could be consenting to sex without giving a contemporaneous verbal or behavioural indication of consent. The Judicial College of Victoria's Criminal Charge Book (which constitutes a manual for judges in giving jury directions) interprets section 37AAA(d) as providing for a *prima facie* evidential standard. The proposed reform would therefore seek to make the language more technically accurate while still avoiding the obscure and ambiguous Latin phrase.

Moreover, a deeming provision or irrebuttable presumption here would not reflect the VLRC's intention in recommending the amendment of the relevant provision in its *Sexual Offences: Final Report* (2004). The VLRC recommended (Rec. 169) that the *Crimes Act* be amended to provide that absence of contemporaneous communication of consent 'is evidence' of the complainant not consenting. The VLRC confirmed that this was intended to reflect its earlier recommendation in its *Sexual Offences: Interim Report* (2003). In the *Interim Report*, the VLRC stated that it believed 'that failure to say or do anything indicating consent should be prima facie, and not presumptive, evidence of the absence of free agreement' (at p 335). The proposed reform will therefore more accurately reflect the VLRC's original intention.

B did not protest, resist or sustain physical injury, or B had previously had consensual sex

It is a common feature of many cases of rape that the victim does not verbally or otherwise protest against the sexual act, or physically resist the offender. Further, rape does not necessarily involve a physical injury to the victim. Moreover, some victims of rape have had consensual sex with the offender or with another person on an earlier occasion.

It is important that these sorts of facts not be treated as showing, on their own, that the complainant in a rape case in fact consented to the sex.

Proposal 9	B did not protest or resist, was not injured, or had previously had consensual sex
It is proposed that where there is evidence that the complainant did not protest, resist, or sustain physical injury, or had earlier had consensual sex with the accused or another person, this evidence will not prevent the prosecution from proving that the complainant did not consent.	

This essentially reflects the existing section 37AAA(e) of the *Crimes Act*.

It might be thought that this multiply-negative way of putting things is too complex and should be replaced by something simpler, such as 'evidence that the complainant did not protest or physically resist, etc. is not enough to prove that the complainant consented'. However, this way of putting things would be misleading because the accused does not have to prove consent. Rather, it is the prosecution that must prove that B did not consent. This means that the accused in a rape trial will sometimes lead or point to evidence of consent in an effort to cause jurors to doubt that the prosecution has proved that B did not consent. But the accused does not have to prove consent as such.

While the statutory provision needs to be precise on this point, it is possible for the relevant jury direction to break things down and be phrased in a less technical way to help provide a gloss on the law. For example, it may be appropriate for the jury direction to provide that 'You should not regard

the complainant as having consented to sexual intercourse just because she/he did not protest or physically resist, etc'. This phrasing does not imply that the accused has to prove consent.

3.9.2 Proving the fault element with respect to complainant not consenting: assessing reasonableness

One of the main sources of complexity and confusion under the current law is the provisions (principally in section 37AA) concerning jury directions in relation to proof of the fault element with respect to the complainant not consenting. It is worth considering whether the rules governing how juries may and must reason in this respect can be improved upon.

An important specific aspect of proof of the fault element with respect to the complainant not consenting is assessment of the reasonableness of grounds for belief in consent. This issue of reasonableness of belief arises under each of Options 1, 2 and 3, though only indirectly under Option 1. For that reason, Proposal 10 below would apply only to Options 2 and 3. It would introduce undesirable complexity to include such provisions under Option 1.

In this context, legislative silence on the issue of assessing reasonableness would be undesirable. There are many substantive issues involved here, and they would inevitably have to be addressed by trial judges in their directions to the jury. Legislative silence on this topic would then virtually inevitably lead to those issues being litigated before the Court of Appeal and possibly the High Court before the law would become settled, and possibly settled in ways that Parliament would not intend.

It would therefore be of assistance if some legislative guidance were given on how the jury is to determine whether a belief or alleged belief that the complainant was consenting was based on reasonable grounds.

Proposal 10 Assessing reasonableness of belief in consent

It is proposed that in deciding whether the accused did not have reasonable grounds for believing that the complainant was consenting to sexual intercourse, the jury would need to assess the reasonableness of any such grounds. The jury would need to do so by considering all of the circumstances of the case. Those circumstances would include but not be limited to:

a) the factual circumstances that were known to the accused at the time; and

b) what steps the accused did or did not take to find out whether or not the complainant was consenting.

However, the jury would be required *not* to take into account:

c) the accused's general values, views, ideas or expectations about people's sexual roles, behaviour or preferences; or

d) the accused's intoxicated state where that state of intoxication is self-induced.

Paragraph (a) would require the jury to have regard to the objective facts that the accused knew at the time. The 'circumstances known to the accused at the time', because they are *known*, are objective circumstances that exist as a matter of fact. This means that they are not the circumstances 'as the accused believed or perceived them to be'. Instead, they are those objective facts which are accurately and truthfully known by the accused. How much the accused knew will depend on the case.

Not every relevant fact that helps to make up all the circumstances of the case would necessarily be known to the accused. However, in considering *all* the circumstances of the case, the jury may be able, in some cases, to consider some facts not actually known to the accused, if they are otherwise relevant. Very often, they will be facts that the accused ought to have known (if he or she had made

appropriate inquiries) even if he or she happened not to have known them at the time. What relevance such facts would have will again depend on the particular case.

Paragraph (b) would make the accused's own acts and omissions relevant in assessing the reasonableness of his or her beliefs. This would reflect the communicative model of sexual relations as recommended by the VLRC in its *Sexual Offences: Final Report* (2004), by discouraging an accused from assuming consent in ambiguous circumstances. Such steps are already required to be taken into account by the jury when assessing the reasonableness of an asserted belief that the complainant was consenting (see section 37AA(b)(ii) of the *Crimes Act*).

Paragraph (c) would provide an important *exclusion* from the circumstances that may be considered. Excluding consideration of the accused's general values, views, ideas or expectations about people's sexual roles, behaviour or preferences would exclude views such as believing that accepting a lift home from a nightclub implies consent to sex, or that a sex worker who accepts payment cannot withdraw consent but must submit to whatever the customer wishes to do, or that men cannot be blamed for their actions when women dress or behave 'provocatively'.

This is an important limitation on the reasonableness of belief because a person's beliefs about consent may be strongly influenced by his or her general values and expectations, many of which may be quite distorted or prejudiced. If reasonableness were permitted to be assessed with reference to such values and expectations, it would be a very weak form of objectivity, potentially restricted to what a reasonable misogynist or fantasist would believe.

The exclusion under paragraph (c) would not cover all of the accused's beliefs. It would only exclude those beliefs concerning people's sexual roles, behaviour or preferences.

Paragraph (d) would exclude from consideration the accused's self-induced intoxicated state (where this applies). It is a common policy position that reasonableness of belief is to be assessed by reference to the beliefs formed by a sober person. A person who voluntarily becomes intoxicated should not be able to hide behind what might appear 'reasonable to a drunk person'.

It should also be noted that the various matters referred to above would be relevant in determining whether an accused *had* a belief that the complainant was consenting as well as in determining the reasonableness of such a belief.

3.9.3 Proving the fault element with respect to complainant not consenting: should certain beliefs be defined as unreasonable?

There is also the question whether the legislation should define that belief in consent that is based on certain grounds is not reasonable. In particular, it could be argued that it should be made clear that an accused's belief in the complainant's consent is not based on reasonable grounds where the accused formed that belief solely on the basis that the complainant did not protest against or physically resist the sexual intercourse at the time. This would make clear that where a belief that the complainant was consenting was formed solely on such a basis then this will not be a belief based on reasonable grounds.

It is important not to present this as 'the accused will not prove that he or she had reasonable grounds for a belief in consent solely on the basis that the complainant did not protest or physically resist' or similar. This way of putting it would imply that the accused needs to prove that his or her belief was reasonable. On the contrary, under Option 2 the accused would bear no such burden. It

is the prosecution that would have to prove either that the accused did not believe that the complainant was consenting or that the accused did not have reasonable grounds for such a belief. The accused may well seek to prevent the prosecution succeeding in this by leading or pointing to evidence that suggests his or her belief that the complainant was consenting *was* reasonable. But this would only be in order to prevent the prosecution from proving beyond reasonable doubt that the accused's belief *was not* on reasonable grounds. The proposed provision would make clear that an accused who tried this line of attack on the prosecution case would not succeed.

Against such a proposal it could be argued that such a legislative provision would be too prescriptive and overcomplicate what could be said to be fairly commonsensical and straightforward ideas about what is reasonable in this context.

Question 3	**Belief in consent based on absence of protest or resistance**
Should the legislation specify that a belief that the complainant is consenting is not based on reasonable grounds where it is formed solely on the basis that the complainant did not protest or physically resist, whether immediately before or during sexual intercourse?	

3.9.4 Proving the fault element with respect to complainant not consenting: relevance of knowledge of consent-negating circumstances

Where the complainant is alleged not to have consented because there is strong evidence that one of the deemed consent-negating circumstances existed, such as the complainant being asleep, heavily intoxicated, fearful of harm, etc, there may also be evidence that the accused knew that those circumstances existed. (The accused may well not know that such circumstances are deemed by law to be consent-negating circumstances; here we are focused simply on the accused's knowledge of the existence of a certain circumstance, which circumstance the law defines as negating consent.) Evidence of such knowledge on the part of the accused will usually be very strong evidence that the fault element with regard to the complainant not consenting (whether under Option 1, 2 or 3) is satisfied.

A question for law reform is whether the legislation should provide any guidance as to what inferences may or should be drawn from evidence of such knowledge on the part of the accused. There are three main options in relation to how that question should be answered:

- the legislation should be silent on the relevance of such evidence
- the legislation should provide that such evidence is relevant to proof of the fault element, and
- the legislation should identify such evidence as yielding a rebuttable presumption that the fault element is proved

Option A: Legislative silence

On this approach there would be no legislative guidance as to the relevance of the accused's knowledge of the existence of a consent-negating circumstance The issue of what evidence in a given trial is relevant to proving this element would be left to the trial judge to determine. This would have the benefit of keeping the legislation shorter and simpler. However, the problem with not addressing this sort of evidential matter in legislation is that such issues will most likely eventually arise in cases and will need to be addressed by the courts at some stage. For example, the existence of a deemed consent-negating circumstance (such as the complainant being asleep) will, in relevant cases, be brought to the attention of the jury in relation to proof that the complainant did not consent.

In many of those cases, there will also be evidence that the accused knew that that circumstance existed. The follow-up question of how the accused's knowledge of such circumstances should then bear upon proof of the fault element will in most such cases arise very soon afterwards. While this can be expected to be usually straightforward, it may not be in all cases. It is possible that the Court of Appeal — and possibly the High Court — would eventually be called upon to clarify how the law operates and what directions should be given to a jury where an accused knew of the existence of a consent-negating circumstance.

Option B: Identify evidence of such knowledge as relevant

On this approach the legislation would provide some guidance to the trial judge and jury, but without being overly prescriptive. This option proposes identifying that if the jury concludes that the accused knew that one or more of the circumstances deemed to negate the complainant's consent existed or that there was a real possibility that one or more such circumstances existed, then such knowledge is relevant to proof of the fault element with regard to the complainant not consenting.

Under the current section 37AA of the *Crimes Act*, the relationship between the accused's awareness of a consent-negating circumstance (e.g. that the complainant was 'asleep, unconscious or so affected by alcohol or another drug as to be incapable of freely agreeing') and the fault elements is very complex. The accused's awareness of such a circumstance is relevant to whether it was reasonable for the accused to believe that the complainant was consenting. If it was not reasonable, then it is less likely — but not impossible — to have been held. If the belief was held, than that *may* mean the fault element is negated, but it is not certain.

Under option B, such crucial facts as the accused's knowledge of the consent-negating circumstance would be expressly identified as directly relevant to proof of the fault element with respect to the complainant not consenting. Such knowledge is not identical with the fault element, but simply relevant (and often highly relevant) to the proof of the fault element. The express identification of such relevant facts would be inclusive only; it would not limit the range of other kinds of evidence that can be relevant. The directions needed here would be simple and short. No complex steps of reasoning are needed (as is currently the case under section 37AA or would be the case if the evidence gave rise to a presumption, as below).

It could be argued that, because it is a truism that all relevant and admissible evidence may be used in deciding whether the fault element is proved, this proposal will not add anything to existing law. However, given the complex and troubled history of the relevance and use of this type of evidence (in such cases as *Getachew, Neal,* and *Wilson*), a legislative declaration of the relevance of this evidence to the fault element would most likely assist in clarifying the law and providing guidance to jurors without unduly constraining them.

The accused's knowledge of the existence of consent-negating circumstances will have different relevance depending on which option is taken with respect to the fault element of rape. Under Option 1, such knowledge will be relevant to the question of whether or not the accused knew the complainant was not or might not be consenting. Generally, it can be expected that evidence that the accused knew of the existence of consent-negating circumstances would make it more likely that the accused knew or believed that the complainant was not consenting.

Under Options 2 and 3, such knowledge will be relevant to whether or not the accused believed that the complainant was consenting and also to whether the accused had reasonable grounds for believing the complainant was consenting. Generally, it can be expected that evidence that the accused knew of the existence of consent-negating circumstances would make it more likely that

the accused did not believe that the complainant was consenting. If, despite this, the accused did in fact have such a belief, it would also make it much more likely that he or she did not have reasonable grounds for such a belief.

Option C: Presumption

Another possibility is to go further and accord evidence of the accused's knowledge of the existence of consent-negating circumstances greater importance in the determination of proof of the fault element concerning the complainant not consenting.

One approach in this respect would be to provide that such evidence constitutes 'prima facie evidence' of the fault element, in the sense that the jury may draw certain conclusions from the accused's knowledge of the consent-negating circumstance. This would be more evidential weight than simple relevance, but would be less than a presumption.

Another, more emphatic approach is to specify that acceptance of certain evidence will give rise to a presumption that the fault element has been proved. This approach maintains that in relevant cases it would be safe to presume, without further evidence, that because of the accused's particular knowledge, the accused also satisfies the fault element with respect to the complainant's absence of belief. However, because of the possibility that sometimes this presumption may not be correct, it should be left open to the accused to prove otherwise, on the balance of probabilities.

Such presumptions are not currently contained in the *Crimes Act*. Because presumptions can shift the onus onto the accused to prove something, they should not be employed lightly in the criminal law. Some reasons in favour of their use in this context are presented below.

First, the presumptions reflect common sense reasoning in such cases. In the great majority of cases where it is proved that the accused knew of the existence of a consent-negating circumstance, it will also be the case that the accused (under Option 2) either knew that the complainant did not consent, or did not believe the complainant consented, or had no reasonable grounds for believing in consent. It will be a very unusual case where this is not so, and evidence would be necessary to show what is so unusual about such a case that would prevent the normal conclusion from being drawn.

Secondly, the evidence that could prove that an accused who had such knowledge did in fact have reasonable grounds for believing in consent would, in most cases, be peculiarly within the knowledge of the accused. In such cases, it is fair and reasonable to require the accused to present that evidence. The accused's task of persuading the jury that he or she did have reasonable grounds for believing in consent would thus not be as onerous as it may appear, since such evidence will in virtually all cases be something well-known to the accused. Moreover, proof need only be on the balance of probabilities.

However, it may also be argued that where there is evidence that the accused knew of the existence of a consent-negating circumstance, the jury will rarely have much difficulty in drawing appropriate conclusions. Further, many of the problems that have plagued the offence of rape have stemmed from attempts to legislate which are based on fine distinctions and directive reasoning processes and which have made the law more complicated than it needs to be.

The United Kingdom's *Sexual Offences Act 2003*, section 76, provides for *conclusive* (i.e. irrebuttable) presumptions in this respect where the accused deceived the complainant as to the

nature or purpose of the act or induced the complainant's consent by impersonating a person known personally to him or her. A conclusive presumption is in effect really a deeming provision rather than a true (rebuttable) presumption. However, to deem that all cases of a certain kind necessarily involve an absence of reasonable belief in consent, where this is not in fact part of the definition of such cases, would be too harsh because it would deny an accused even the chance to prove that, in his or her case, he or she did in fact have a reasonable belief in consent.

Which approach to take?

Question 4	Evidential value of evidence that the accused knew a consent-negating circumstance existed, and other matters

Which of the following three options should apply where there is evidence that the accused knew that one or more of the circumstances deemed to negate the complainant's consent existed?

A. The legislation should be silent about the evidential value of evidence that the accused knew that one or more of the circumstances deemed to negate the complainant's consent existed or that there was a real possibility that one or more such circumstance existed.

B. Where there is evidence that the accused knew that one or more of the circumstances deemed to negate the complainant's consent existed or that there was a real possibility that one or more such circumstance existed, the legislation should identify such evidence as relevant to the proof of the fault element with respect to the complainant not consenting.

C. Where the jury concludes that the accused knew that one or more of the circumstances deemed to negate the complainant's consent existed, the legislation should identify such evidence as giving rise to a rebuttable presumption that the fault element with respect to the complainant not consenting has been proved.

3.10 Proposed improvements to the offence of compelling sexual penetration

The second type of rape offence involves the offender compelling the victim to engage in a sexually penetrative act.

As noted above, Options 1, 2 and 3 would again apply to this offence. The first three elements would be the same on all three options, but the fault elements with respect to the complainant not consenting would differ (matching the relevant fault element for rape).

Proposal 11	Compelling sexual penetration

The proposed offence of compelling sexual penetration would specify that a person (A) commits an offence if:

a) A causes another person (B) to:

   i sexually penetrate himself or herself;

   ii have sexual intercourse with a third person (C); or

   iii have sexual intercourse with an animal; and

b) A intends to cause B to sexually penetrate himself or herself, or have sexual intercourse with C, or have sexual intercourse with an animal, as the case may be; and

c) B does not consent to engaging in that act; and

d) *[fault element with respect to absence consent, the same as the equivalent fault element in rape, as discussed above].*

The proposed maximum penalty for this offence is 25 years imprisonment (level 2).

3.10.1 Points of difference

This offence differs from the offence of rape only with respect to the conduct element and the applicable exceptions. The other elements (intention as to conduct, the complainant not consenting, and the fault element with regard to the complainant not consenting) would be the same as for rape. (Whichever of Options 1, 2 and 3 is adopted for rape would apply to compelling sexual penetration as well, and so the respective advantages and disadvantages of those options also apply equally here.) Accordingly, the discussion of this proposed offence is limited to explaining these different features of the offence.

The conduct element covers three different kinds of sexually penetrative acts that an offender can compel a person to do. These are explained shortly. First, the concept of compulsion is briefly explained.

Compulsion as causation without consent

Compulsion is not itself an element of the offence. Instead, the different elements of the offence combine to define 'compulsion'. The essence of compulsion is that the accused causes another person to do something which that person does not consent or freely agree to do. Causing a person to do something which that person does not consent to do can occur by means of force, explicit or implicit threats, or the use of a position of authority or dominance.

Compelled sexual self-penetration

The first kind of compelled sexually penetrative act would be where the accused compels the other person to sexually penetrate himself or herself. (This is currently covered in section 38A of the *Crimes Act.*)

Proposal 12	**Definition of 'sexual self-penetration'**
For the purposes of this proposed offence, sexual self-penetration would be defined to cover situations where the person: a) in the case of a female, introduces (to any extent) a part of her body or an object into her own vagina; b) introduces (to any extent) a part of his or her body or an object into his or her own anus; or c) continues any of the activities in paragraphs (a) or (b).	

Compelled sexual intercourse with a third person

The second kind of compelled sexual penetration would be where the victim (B) is compelled to have sexual intercourse with a third person (C). (This is currently covered in section 38(3) of the *Crimes Act.*)

In some cases, C might consent to the sexual intercourse, but it is proposed that that would be no defence to this offence. It is B's not consenting to having sexual intercourse with C that would make it an offence, not C's. Where C does not consent, A will *also* have committed rape against C, through the 'innocent agency' of B.

Compelled sexual intercourse with an animal

The third kind of compelled conduct would be where the victim is compelled to have sexual intercourse with an animal (bestiality). (This is currently covered in section 38A of the *Crimes Act.*)

Proposal 13	Definition of 'sexual intercourse with an animal'

For the purposes of the proposed offence, a person would be defined as 'having sexual intercourse with an animal' if he or she takes part in any activity consisting of or involving:

a) penetration (to any extent) of the vagina, anus or mouth of the animal by the penis of the person, whether or not there is emission of semen; or

b) penetration (to any extent) of the vagina, anus or mouth of the person by the penis of the animal, whether or not there is emission of semen; or

c) penetration (to any extent) of the vagina or anus of the animal by a body part of the person other than the penis or by an object manipulated by the person; or

d) penetration (to any extent) of the vagina or anus of the person by a body part of the animal other than the penis; or

e) the continuation of any of the activities defined in paragraphs (a), (b), (c) or (d).

Because of the variety of animal anatomies, references to the 'vagina' or 'anus' of an animal would include references to any similar part.

The proposed definition of 'sexual intercourse with an animal' would slightly broaden the current definition of 'bestiality' in section 59 of the *Crimes Act* (by including non-penile penetration of the anus or vagina of an animal and engaging in oral sex with an animal) to be more consistent with the definition of human-to-human sexual intercourse.

3.10.2 Exceptions

Section 38A of the *Crimes Act* currently excludes good faith medical or hygienic procedures from the definition of sexual self-penetration. In the proposed revised offence, this exclusion would continue to be made, but as a distinctly identified exception to the offence rather than as a matter of a definitional limit. It is simpler and clearer to have the definition of sexual self-penetration as simply a matter of conduct, without reference to purposes. Where such conduct is engaged in for certain legitimate purposes then that can be made an exception to criminal liability rather than defined not to be sexual self-penetration as such.

In relation to the offence of compelling sexual intercourse with an animal, an exception would be created for veterinary, agricultural or scientific research activities that involve certain forms of animal penetration, but which are done for good faith purposes. The current offence under section 38A does not provide for any exception for such cases. It is proposed that such an exception be provided, in order to clearly exclude conduct engaged in in good faith by veterinarians, farmers and researchers. Of course, if a person is being *compelled* to penetrate an animal (e.g. in an emergency situation where a cow is having difficulty giving birth) the person being so compelled may have some other complaint against the person who compels him or her, but the compeller should not be guilty of a sexual offence against the person so compelled.

3.11 Jury directions

Section 37 of the *Crimes Act* provides that the trial judge:

- must give a jury direction *only* where it is relevant
- must *not* give a direction where it is *not* relevant, and
- must relate directions to the facts and the elements so as to aid the jury's comprehension.

The *Jury Directions Act 2013* has already introduced some important general reforms to jury directions. Much of that reform will be applicable and beneficial to rape trials.

A key focus of the *Jury Directions Act 2013* is to make directions as clear as possible. The lack of clarity concerning the law is a key cause of complexity in directions and the number of appellate decisions. An important feature of these problems has been the relationship between issues of the accused's belief that the complainant was consenting and proof of the fault element concerning the absence of the complainant's consent. Section 37AA, on the jury directions relating to the accused's awareness, is a prime example of how complicated these issues and jury directions have become.

Whether some other directions, more specific to rape trials, would be needed (e.g. to explain the various proposed definitional, evidential and procedural provisions outlined above in simplified, less technical terms that would suit a lay audience) will be considered further in the light of other important decisions concerning which option is adopted as the fourth element.

It will also be important to bear in mind the principles concerning jury directions from the *Jury Directions Act 2013* and the department's report, *Jury Directions: A New Approach,* in particular that, generally, legislation should set out the essential elements of a jury direction, where it is necessary for a jury direction to be included in legislation. However, this will not usually involve setting out the precise words which a trial judge must use.

In this respect, it should be noted that some of the proposals above seek to clearly set out what the law is and how it works rather than how the judge must direct the jury. Currently, section 37AA provides rules for judges as to how they must direct juries. However, in doing so it assumes that those jury directions accurately state what the law is. However, the statements are not always accurate or clear reflections of the law, and this has contributed to confusion about sexual offence laws. It is better for the legislation to state the law directly. It can then be determined whether it is necessary for legislation to give any more prescriptive detail about how judges should direct juries on particular issues.

4 Sexual assault and related offences

4.1 Overview of proposals

Section 39 of the *Crimes Act* contains the offence of indecent assault. Section 40 contains the offence of assault with intent to rape.

These offences are inadequate in several respects. In the offence of indecent assault, the notion of 'indecency' is unclear and outdated, and the definition of 'assault' is complex and unclear. The elements of the offence of assault with intent to rape are also unclear, and the maximum penalty for this offence (10 years imprisonment) is too low to properly reflect its seriousness as an offence preparatory to rape.

We propose that sexual offence laws be changed by:

- replacing the offence of indecent assault with a new offence of sexual assault, which would modernise the terminology of the existing offence, and clarify its elements and scope
- revising the offence of assault with intent to rape in order to clarify its elements, in particular the ulterior fault element of 'intent to rape'
- increasing the maximum penalty for assault with intent to rape from 10 years imprisonment to 15 years imprisonment, and
- creating a new offence of compelling sexual touching to complement the offence of compelling sexual penetration.

It is also proposed that two additional new offences that relate to sexual assault be created. These are the offences of sexual act directed at another person and threat to rape. Neither of these offences would require proof of any physical contact between the accused and the complainant. They are discussed in Part 10 of this paper.

4.2 Sexual assault

The proposed new offence of sexual assault would replace the current offence of indecent assault in section 39 of the *Crimes Act*.

It is proposed that the offence be renamed 'sexual assault'. Taken at its plain meaning, 'indecent' refers to a departure from accepted social standards. However, it is the complainant not consenting, together with the sexual nature of the physical contact, that makes this behaviour criminal, rather than the fact that the 'assault' is contrary to community standards of decency. The term 'sexual', with its proposed accompanying definition (discussed below), more clearly identifies the conduct at which the offence is directed.

The offence label would retain the word 'assault' despite the fact that assault would not be an element of the proposed offence. This is because the phrase 'sexual assault' is well recognised, and its meaning clearly encapsulates the non-consensual sexual touching that constitutes the offence.

Because sexual assault is an offence of non-consensual sexual touching, it shares a conceptual basis and many structural elements with the offence of rape. Where this is so, reference will be made to the extensive discussion of the elements of rape in Part 3.

Proposal 14	Sexual assault

The proposed offence would specify that a person (A) commits an offence if:

a) A touches another person (B);

b) A intends to touch B;

c) the touching is sexual;

d) B does not consent to the touching; and

e) [*fault element for complainant not consenting, consistent with equivalent element in rape*].

The proposed maximum penalty for this offence is 10 years imprisonment (level 5).

4.2.1 A touches B

The conduct in the proposed offence of sexual assault is that the accused touches another person.

The current offence in section 39 uses the term 'assault', which is understood by reference to the common law on assault. As a result, there is some ambiguity as to whether the offence includes cases where the victim 'apprehends' imminent contact, as well as cases involving actual contact (known as 'battery').

The use of the term 'touching' rather than 'assault' follows the approach of the Model Criminal Code. The term 'touching' more clearly specifies the conduct targeted by the offence and marks out sexual assault as a distinctive type of sexual offence, rather than a species of assault.

Under the current law, the contact in an indecent assault does not have to be a violent application of force or cause any pain or injury. Contact of any degree of force (even the lightest touching) can be an assault for the purposes of the offence of indecent assault. Defining the element of the proposed revised offence as 'touching' would, then, be a continuation of the current law, but in clearer and more direct terms.

Identifying the conduct as 'touching' rather than 'assault' would also make it more logical to include the complainant not consenting as a separate element of the offence.

Proposal 15	Definition of 'touching'

The proposed offence would specify that 'touching' would include touching:

a) with any part of the body;

b) with anything else; or

c) through anything.

This definition is found in section 79 of the UK's *Sexual Offences Act 2003*. It is a wide definition, which is necessary in order to accommodate the variety of conduct that should be covered by the offence. The proposed definition would apply to a person who touched the clothing worn by another person. An example of this occurred in *R v H* [2005] EWCA Crim 732, where the accused grabbed a woman's tracksuit pants by the fabric and attempted to pull her towards him. The definition of 'touching' would also include ejaculating or urinating on a person (see *R v Bounekhla* [2006] EWCA Crim 1217 in which the offender surreptitiously ejaculated onto the clothing of a woman while dancing close to her at a nightclub).

The proposed offence would require proof that the accused intended to touch the complainant. This would make clear what is currently implied by the common law. To intend to touch another person is

to mean to do so. This will exclude unintentional touching from this offence, such as may happen on a very crowded train.

4.2.2 The touching is sexual

Section 39(2) of the *Crimes Act* provides that a person commits an indecent assault if he or she assaults another person in 'indecent circumstances'. Case law provides that for the circumstances to be 'indecent' they must have a sexual connotation and be contrary to 'community standards of decency'.

The ordinary meaning of 'indecent' is 'unseemly' or 'vulgar'. However, the essence of the offence of indecent assault is the lack of consent of the person who is sexually touched, rather than the 'indecency' of the touching itself. The same conduct when engaged in consensually is not criminal and, moreover, is not viewed as 'indecent'. Thus, recasting the offence as 'sexual assault' will be clearer and more accurate.

The new offence would therefore require proof that the touching was sexual.

Proposal 16	**Definition of 'sexual'**
The proposed offence of sexual assault would specify that touching may be 'sexual' due to: a) the area of a person's body that is touched or used in the touching; or b) the fact that A seeks or gets sexual gratification from the touching; or c) some other aspect of the touching, including the circumstances in which it occurs.	

The sexual nature of the touching would be defined in an inclusive way. This definition would cover what is currently covered by the notion that the act had a 'sexual connotation'.

Under the proposed approach, the touching may be sexual due to the areas of the body that are touched or used in the touching (for example, touching on the genitals or breasts). But it is also possible that the accused's motivation to obtain sexual gratification is what primarily gives the conduct its sexual characteristic. Further, for the definition to be appropriately open and inclusive, it would specify that 'some other aspect' of the touching could be involved in making the touching sexual, including its circumstances.

It is unusual to provide that an accused's motivation or purpose (or some other aspect of his or her state or mind) is possibly relevant in determining the sexual nature of the touching, in contrast with the state of mind simply being a distinct fault element of the offence. However, in this context, the common law already allows this (see for example, *R v Court* [1989] AC 28), so this would reflect the current offence.

The prosecution would not be required to prove any fault element with respect to the element that the touching is sexual (such as that the accused knew that the touching was sexual). It is also proposed that the defence of honest and reasonable mistake of fact with respect to this element be excluded, making the element of the touching being sexual subject to absolute liability. The accused would therefore not be able to rely on a defence that he or she believed on reasonable grounds that the touching was not sexual.

If an accused genuinely and, for him or her, reasonably did not understand that the touching was sexual, then this would more likely be a matter going to the accused's fitness to be tried. This is because such cases are very likely to involve accused who suffer from some sort of social

adaptation disorder, such as Asperger's syndrome (see for example, *Parish v DPP* [2007] VSC 494).

4.2.3 B does not consent to the touching

In section 39, the requirement that the complainant does not consent is most probably implied by the term 'assault', which, at common law, implies that the person assaulted does not consent.

It is preferable to state the elements of an offence as clearly as possible. Accordingly, the new offence would specify that the prosecution must prove that B does not consent to being touched by A. This would align sexual assault closely with rape. The only substantive difference between rape and sexual assault is the degree of physical intrusion: rape involves sexual penetration, while sexual assault involves sexually intrusive physical contact that is other than sexual penetration.

'Consent' would be defined as 'free agreement', reflecting the current position. Consistent with the proposed offence of rape, 'consent' would be further explained by stating that 'a person can only consent to touching if he or she has the capacity and freedom to choose whether or not to engage in sexual activity' (see Part 3.3.3). The circumstances that deem consent to be absent for the purposes of rape ('consent-negating circumstances') would also apply to sexual assault. Thus the prosecution could prove that the complainant did not consent by proving, for example, that the complainant was mistaken about the sexual nature of the touching, or that the complainant mistakenly believed that the touching was for medical or hygienic purposes.

At present, it is not clear whether the prosecution must prove that the complainant did not consent to the assault, or to the 'indecent' assault. Under the proposed offence, the prosecution would be required to prove that the complainant did not consent to the 'touching', but would not be required to prove that the complainant did not consent to the 'sexual' nature of the touching. This is a simpler and clearer approach.

4.2.4 Fault element with respect to B not consenting

The offence in section 39 requires proof that the accused was aware that, or did not give any thought to whether, the complainant was not consenting or might not be consenting. This is the same as the fault element that currently applies to the complainant not consenting in rape.

Options for reform of the fault element applicable to the complainant not consenting are discussed in Part 3 in relation to rape.

As noted above, the substantive difference between rape and sexual assault is the degree of physical intrusion involved in the offending. As such, it makes sense to ensure consistency in the other elements of the offences, including the fault elements.

It is therefore proposed that the same fault element apply in relation to the complainant not consenting in the offences of rape, compelling sexual penetration, sexual assault and compelling sexual touching.

4.2.5 Exception for good faith medical or hygienic procedures

The current offence of rape excludes sexual penetration with an object which occurs in the course of a medical or hygienic procedure carried out in good faith. The proposed offence of rape would

also include such an exception. The current offence of indecent assault does not include an equivalent exception, presumably because such procedures are necessarily not 'indecent', and a specific exception is therefore unnecessary.

However, with the proposed replacement of 'indecent' with 'sexual' in the new offence of sexual assault, the question arises whether the concept of 'sexual' automatically excludes good faith medical or hygienic procedures. The use of the word 'may' in the proposed definition of 'sexual' touching is intended to make it clear that just because a certain part of the other person's body is touched (such as the genitals), this is not always sufficient to make the touching 'sexual'.

However, it might be argued that the concept of touching being 'sexual' is more straightforwardly descriptive than 'indecent' and so could include, for example, a doctor's touching of the genitals as part of a medical examination. It is therefore proposed that an express exception for good faith medical and hygienic procedures be provided. This would reflect the proposed exception in relation to rape.

A medical practitioner who carried out a medically justified procedure involving 'sexual touching' in terms of body parts touched, but who also obtained sexual gratification from the procedure, would not fall within the exception. This is because such conduct could not be said to be carried out 'in good faith', a notion that implies not just the existence of an objective medical reason for the procedure, but also proper and honest motives on the part of the medical practitioner.

4.2.6 Maximum penalty and offence classification

The maximum penalty for the proposed offence is 10 years imprisonment. This is the same as the current maximum penalty for the offence of indecent assault. The proposed offence would be an indictable offence able to be determined summarily.

4.3 Compelling sexual touching

It is proposed that a new offence of 'compelling sexual touching' be created.

The *Crimes Act* does not currently contain compulsion offences in relation to indecent touching. Though many instances of compelled sexual touching would amount to forms of assault or sexual assault, there are good policy grounds for introducing a distinct offence of compelling sexual touching.

A person who is compelled to sexually touch another person (whether the offender or a third party), or himself or herself, or an animal, might suffer just as much psychological distress as someone who is sexually touched by another person. Indeed, it would seem possible that in some cases, depending on the nature of the compulsion and the nature of the touching, the distress could be even greater than is experienced in some cases of being touched.

Although there are child sexual offences that may cover some of these situations (for example, the proposed offence of sexual activity in the presence of a child discussed in Part 7), there is no specific equivalent offence for adults or children aged 16 or over who are not under the care, supervision or authority of the accused. Adults and such children who are compelled to undertake sexual acts are also harmed by this conduct and should therefore also be protected.

The proposed offence of compelling sexual touching would parallel the revised offence of compelling sexual penetration (discussed in Part 3.10), thus reinforcing the commonality between rape and sexual assault.

Proposal 17	**Compelling sexual touching**
The proposed offence would specify that a person (A) commits an offence if: a) A causes another person (B) to touch A, B himself or herself, a third person (C), or an animal; b) A intends to cause B to touch A, B, C or the animal; c) the touching is sexual; d) B does not consent to the touching; and e) [*fault element for the complainant not consenting, consistent with equivalent element in rape*]. The proposed maximum penalty for this offence is 10 years imprisonment (level 5).	

4.3.1 A causes B to touch a person or an animal

Like the proposed revised offence of compelling sexual penetration, 'compulsion' would not itself be an element of this offence. Instead, the different elements of the proposed offence would combine to define 'compulsion'. To compel a person to do an act is to cause the person to do the act without that person's consent.

The conduct in the proposed offence is therefore causing another person (B) to touch a person or an animal. The complainant not consenting is a separate element of the proposed offence (discussed below). Causing a person to engage in conduct can be by means of force, explicit or implicit threats, or the use of a position of authority or dominance.

The proposed offence would cover a wide range of scenarios. The person whom the complainant touches could be the accused, the complainant herself or himself, or a third person. The proposed offence also makes provision for the touching of an animal, which is consistent with the Model Criminal Code offence. To be compelled to masturbate a dog, for example, could be a very disturbing experience.

'Touching' would have the same broad definition as in relation to the proposed offence of sexual assault.

The Model Criminal Code includes within the scope of its compelled touching offence situations where a person is compelled 'to be indecently touched by' a third person or an animal. It is not proposed that these situations be included within the scope of this proposed offence. This is because such situations, in which the complainant is the person touched, rather than the person touching, will already come within the scope of the proposed offence of sexual assault.

In the case of a person being compelled to be sexually touched by a third person (or compelled to submit to being touched by a third person), this should come within the scope of the principle of innocent agency. That is to say, the accused, in compelling the complainant to be touched by a third person is using the third person as his or her 'agent'. So the charge should be sexual assault (through an innocent agent).

In the case of compelling the complainant to submit to being sexually touched by an animal, then the animal is effectively an 'instrument' of the offender, and so the offence charged should be sexual assault.

The proposed offence would require proof that the accused intended to cause the complainant to touch the person or animal (as the case may be). This is consistent with the Model Criminal Code offence on which the proposed offence is based, and with the proposed offences of rape, compelling sexual penetration, sexual assault, and most other offences in this review.

4.3.2 The touching is 'sexual'

The proposed offence would require proof that the touching was 'sexual'. This would have the same broad definition as in relation to the proposed offence of sexual assault (discussed above). Touching in this context may be sexual due to the area of a person's body or an animal's body that is touched or used in the touching, or to the fact that the accused seeks or gets sexual gratification from the touching, or from causing the touching.

Consistent with the proposed approach in relation to sexual assault, it is not proposed that the offence require proof of a fault element in relation to the touching being sexual. It is also proposed that the defence of honest and reasonable mistake of fact in relation to this element be excluded, making the element of the touching being sexual subject to absolute liability.

4.3.3 B does not consent to the touching

This element would be the same as the corresponding element in the proposed offence of sexual assault. The difference in this context is that the complainant does not consent to performing the touching, whereas in sexual assault, the complainant does not consent to being touched. 'Consent' would have the same meaning as in relation to rape and sexual assault.

While it can be argued that a lack of consent is implicit in the notion of 'compulsion', it is preferable to make it clear that the complainant not consenting is an element of the proposed offence.

4.3.4 Fault element with respect to the complainant not consenting

Options for reform of the fault element applicable to the complainant not consenting are discussed in Part 3 in relation to rape. The same fault element should apply in relation to the complainant not consenting in the offences of rape, compelling sexual penetration, sexual assault and compelling sexual touching.

4.3.5 Exception for good faith medical, hygienic or other purposes

It is proposed that an exception for good faith medical or hygienic procedures apply to the proposed offence of compelling sexual touching.

A possible scenario could be where a doctor orders a trainee nurse to hold the penis of a patient while a catheter is inserted. The trainee nurse does not consent but complies out of fear of being reprimanded or dismissed. If the doctor was medically justified in so ordering the trainee nurse, and was acting in good faith, then it would be reasonable that the doctor's conduct not constitute an offence.

In relation to compelling the touching of an animal, it is proposed that an exception for good faith veterinary, animal husbandry or scientific research purposes be included.

For example, it is possible that a person could be directed by an employer to engage in certain activities which are for veterinary, agricultural or scientific research purposes and which involve touching, directly or indirectly, the sexual organs of an animal (for example, assisting in artificial insemination or the birth of a calf). The person so directed may not consent to such activity but feels compelled to follow the direction (for example, because of a fear of dismissal).

While such compulsion by the employer may be wrong and possibly in breach of relevant employment or contractual obligations, it should not be criminalised as compelling sexual touching. This is because the compelled activity is, in this scenario, for a good faith veterinary, agricultural or scientific research purpose.

4.3.6 Consent of the accused or third person not a defence

The consent of the accused or the third person to being touched would not be a defence to the proposed offence of compelling sexual touching.

4.3.7 Maximum penalty and offence classification

The proposed maximum penalty for compelling sexual touching is 10 years imprisonment, the same as the current maximum penalty for indecent assault and for the proposed offence of sexual assault. Sexual assault and compelling sexual touching are essentially the same in terms of their potential effects and the degree to which they breach the right of the victim/survivor to personal autonomy and security. This would align with the approach to rape and compelling sexual penetration, both of which have a maximum penalty of 25 years imprisonment.

The proposed offence would be an indictable offence able to be determined summarily.

4.4 Assault with intent to rape

Section 40 of the *Crimes Act* currently contains two distinct, though related, offences, namely assault with intent to commit rape, and threatening to assault with intent to commit rape.

It is proposed that these two offences be made more clearly separate, by creating one offence of assault with intent to rape and a separate (and more substantially revised) offence of threatening to rape. Threat to rape is discussed in Part 10 of this paper.

Is an offence of assault with intent to rape necessary when there is an offence of attempted rape? According to the Criminal Charge Book Bench Notes, assault with intent to rape is broader than attempted rape (*R v Worland* [1964] VR 607). Attempted rape is closer to rape than assault with intent to rape, because in an attempted rape ‘nothing remains to be done but to commit the crime’ (*Worland* at (611)). This suggests that attempted rape is rape without the final act of penetration. For assault with intent to rape, the accused need not have got that far.

The offence of assault with intent to rape may be charged as an alternative to attempted rape, or as a stand alone charge where it is unclear whether the accused’s conduct amounts to an ‘attempt’.

4.4.1 Proposed offence

Proposal 18	Assault with intent to rape

The proposed offence would specify that a person (A) commits an offence if he or she:

a) applies force to another person (B);

b) intends to apply force to B; and

c) intends to have sexual intercourse with B without his or her consent.

The proposed maximum penalty for this offence is 15 years imprisonment (level 4).

4.4.2 A applies force to B

Currently, section 40 of the *Crimes Act* simply refers to 'assault'. In the interests of clarity, it is proposed that the elements of assault in the proposed offence of assault with intent to rape be set out clearly in the offence provision.

Section 40(2) provides that 'assault' in subsection (1) has the same meaning as in section 31 of the *Crimes Act*. Section 31(2) defines 'assault' as:

> the direct or indirect application of force by a person to the body of, or to clothing or equipment worn by, another person where the application of force is—
>
> (a) without lawful excuse; and
>
> (b) with intent to inflict or being reckless as to the infliction of bodily injury, pain, discomfort, damage, insult or deprivation of liberty—
>
> and results in the infliction of any such consequence (whether or not the consequence inflicted is the consequence intended or foreseen).

This is a complex definition. It requires proof of a result (bodily injury, pain, discomfort, damage, insult or deprivation of liberty), as well as proof of intention or recklessness as to that result. In addition, the inclusion of the 'without lawful excuse' component makes it unclear when an assault is committed and when it is not.

It is proposed that a simpler meaning of 'assault' be adopted for the purposes of the proposed offence of assault with intent to rape. The proposed offence would simply require proof that the accused 'applied force' to the complainant. This is consistent with the common law meaning of 'battery'. A broad definition of 'applies force' would be adopted. It would include touching a person or touching the clothes they are wearing, causing an object to touch the person, or otherwise making any physical contact with them.

Despite the fact that 'applies force' will include 'touching', it is proposed that the conduct be characterised as 'applying force', rather than 'touching'. This is because the proposed offence is a form of general assault. The 'sexual' aspect of this offence resides in the fault element (discussed below).

It is proposed that the offence specify that a person may apply force to another person even though the other person may not be aware of the application of force at the time. This is consistent with the Model Criminal Code approach to causing harm offences (section 5.1.1(2)).

4.4.3 Proof of result not required

An important difference between the proposed offence of assault with intent to rape and the current offence in section 40 is that the proposed offence does not require proof that the application of force resulted in some form of harm.

The current section 40 offence could be said to focus as much on the result of the conduct (whether that be bodily injury, pain, discomfort, insult or deprivation of liberty) as on the intention to rape.

However, the essence of this offence is not so much the damage done by the assault as it is the simple application of force with the intention to rape. Any application of force with an intent to rape is seriously reprehensible conduct, whether or not any injury, pain, discomfort, insult or deprivation of liberty resulted from it.

In cases where harmful consequences do result, this may aggravate the offence or constitute a distinct offence of causing injury.

4.4.4 A intends to apply force

The proposed offence of assault with intent to rape would require proof that A intended to apply force to B. For common law battery, it may be sufficient to prove that the accused was reckless as to the application of force, in other words, that he or she knew that he or she would probably apply force to a person. It is not proposed that this approach be adopted for assault with intent to rape. For an offence as serious as this, the prosecution should be required to prove that the accused intended to apply force to the complainant.

4.4.5 A intends to have sexual intercourse with B without consent

The current offence in section 40 simply refers to ‘intent to commit rape’. Precisely what this means is not clear. This is because rape as currently defined in section 38 includes a number of alternative fault elements with respect to the accused’s awareness of the complainant’s lack of consent: awareness that he or she is not consenting; awareness that he or she might not be consenting; and failure to give any thought to consent.

On a narrow view, section 40 could be read as referring to an intention to sexually penetrate another person without his or her consent. In other words, the offender *intends* that the other person *be non-consenting* when sexually penetrated by the offender. Alternatively, it could be an intention to sexually penetrate another person *whether or not* he or she consents (which is consistent with a wish or hope that the other person consents). A further alternative is that it could be an intention to sexually penetrate another person *without giving any thought* to whether or not he or she consents.

Any proposal for change should make clear what the prosecution must prove in contrast to the uncertainty of the existing element of an ‘intent to commit rape’. The proposed offence would require proof that the accused intended to have sexual intercourse with B without B’s consent (i.e. the accused intends both to have sexual intercourse and that B will not be consenting). This would align the ulterior fault element in assault with intent to rape more clearly with the first three elements of rape (intentional sexual intercourse with a person without the person’s consent). To require proof that A intends to have sexual intercourse with B whether or not B consents would cover a range of states of mind but could make the offence of assault with intent to rape more difficult to apply when it is an alternative to rape.

The proposed offence would not cover scenarios in which the accused applies force to a person while intending to have sexual intercourse with that person but without turning his or her mind to whether the other person would consent to sexual intercourse, or while believing on unreasonable grounds that the other person would consent to sexual intercourse. Instead, the proposed offence would limit assault with intent to rape to situations in which a person intends to have sexual intercourse with a non-consenting person. This is appropriate for a preparatory offence of this nature.

4.4.6 Consent to application of force not a defence

It is not proposed that a defence of consent to the offence of assault with intent to rape be included. If such a defence existed, it would amount to the complainant freely agreeing to the accused applying force to him or her with the intention of sexually penetrating the complainant without his or her consent. This sort of situation would be one in which ‘free agreement’ is not actually given, because the person is effectively saying that he or she is consenting to giving up his or her right not to consent later on. Free agreement must include a right to withdraw agreement later on.

4.4.7 Maximum penalty and offence classification

The current (and proposed) maximum penalty for rape is 25 years imprisonment, and for attempted rape, it is 20 years imprisonment. The current maximum penalty for assault with intent to rape is 10 years imprisonment.

There is therefore a 5 year difference between the completed offence and the attempted offence, but a 10 year difference between the attempted offence and assault with intent to rape. The attempted offence and assault with intent to rape would seem to be much closer to each other in seriousness than the current penalties would suggest. It is therefore proposed that the maximum penalty for assault with intent to rape be increased from 10 years to 15 years imprisonment.

Assault with intent to rape would be an indictable offence able to be determined summarily, as it currently is.

5 Sexual intercourse with a child

5.1 Overview of proposals

The current approach to sexual penetration offences against children is complex. For children under 16 it relies on a single offence (section 45 of the *Crimes Act*) with three different maximum penalties, two of which reflect the presence of additional aggravating circumstances. There is then a separate offence dealing with sexual penetration of a 16 or 17 year old child who is under the care, supervision or authority of the accused (section 48 of the *Crimes Act*).

The approach of creating a single offence with three different maximum penalties differs from the approach used for all other *Crimes Act* sexual offences. It is unnecessarily complex for police, lawyers, judges and juries. Further, the maximum penalty for sexual penetration with a child under 16 (but not under 12) warrants further consideration.

We propose that the current approach be simplified by replacing the offences in sections 45 and 48 with three new offences:

- sexual intercourse with a child under 12
- sexual intercourse with a child under 16, and
- sexual intercourse with a child aged 16 or 17 who is under the care, supervision or authority of the accused.

Other proposed changes would:

- increase the maximum penalty for sexual intercourse with a child under 16 from 10 years to 15 years imprisonment in all situations, in order to reduce the large gap in the maximum penalty for offences against a child under 12 and a child aged 12 or older – this would remove the need for the prosecution to prove that the child is under the care, supervision or authority of the accused
- adopt a description of conduct that is consistent with that for rape and other proposed sexual intercourse offences
- expand the definition of ‘care, supervision or authority’ to include a broader range of people within religious organisations who provide religious care or religious instruction to a child
- modernise and clarify the available exceptions and defences to the offences, and the allocation of the burden of proof in relation to each exception and defence, in order to reduce the complexity of jury directions, and
- make the offences much clearer and easier to prosecute and to explain to juries.

5.2 Current offences

Section 45 in its current form is drafted as a single offence – taking part in an act of sexual penetration with a child under the age of 16. However, section 45(2) specifies three different maximum penalties, depending on the existence of certain ‘circumstances of aggravation’. The maximum penalties are:

- 25 years imprisonment if the child was aged under 12
- 15 years imprisonment if the child was aged between 12 and 16 and was under the care, supervision or authority of the accused, or
- 10 years imprisonment in any other case where the child was aged between 12 and 16.

This is an unusual structure for an offence. This structure was introduced into the *Crimes Act* in 2000. Prior to 2000, two separate offences existed:

- sexual penetration of a child under the age of 10, with a maximum penalty of 25 years imprisonment, and
- sexual penetration of a child aged between 10 and 16, with a maximum penalty of either 15 years imprisonment if the child was under the care, supervision or authority of the accused, or 10 years imprisonment in any other case.

The offences were consolidated in 2000. The second reading speech for the *Crimes (Amendment) Act 2000* explains that the consolidation addressed a problem where there was uncertainty in relation to whether the alleged offence was committed before or after the child turned 10. If the child could not recall when the alleged offence was committed and there was no other evidence, potentially neither offence could be proved. As a result, the accused would be acquitted.

Section 45 was created to remove the requirement that the prosecution prove that the child was under or over the age of 10 at the time the alleged offence was committed. In order to prove the offence under section 45, the prosecution would have to prove that the child was under the age of 16 at the time of the offence. If it could also prove that the child was under 10 (this age was increased to 12 in 2010), the accused would be subject to a higher maximum penalty. If it could not prove that the child was under 10, the accused would not be acquitted, but would be subject to the lower maximum penalty of 10 years imprisonment.

Creating a single offence successfully addressed this problem. However, in order to do so, the offence introduced a number of new issues and complications. One difficulty arises from the fact that section 45(5) states that a circumstance of aggravation is not an element of the offence. However, other parts of section 45 treat the circumstances of aggravation as if they are elements of the offence. For example, the circumstance of aggravation must be stated in the indictment. In addition, the accused may have an aggravating circumstance dealt with either by the judge or the jury.

In some criminal offences, an aggravating circumstance is considered within a single maximum penalty, while in others it changes the maximum penalty. Where it changes the maximum penalty, there is a rule of interpretation that the new maximum penalty creates a separate offence. However, clear legislative intent to the contrary can rebut this rule of interpretation. Section 45 was drafted so as to rebut this rule.

The result of consolidating the offences in 2000 was to create an offence which is more complex in structure and process than is necessary. It is possible to reduce the complexity of the section 45 offence, while still addressing the problem that arises where it is unclear whether the child was under or over the age of 12 at the time of the offence. The proposed new offences would achieve this by replacing the requirement to prove that the child is aged between 12 and 16 with a requirement to prove that the child is aged under 16.

5.3 Proposed approach

We propose that the current approach be simplified by replacing sections 45 and 48 with the following three offences:

- sexual intercourse with a child under 12
- sexual intercourse with a child under 16, and

- sexual intercourse with a child aged 16 or 17 who is under the care, supervision or authority of the accused.

There are a number of benefits in creating separate offences:

- the offence of sexual intercourse with a child under 16 would not be complicated by aggravating features
- there would be greater clarity in how the aggravating circumstance of age or 'care, supervision or authority' is determined, in this case as a separate element of the offence decided by the jury
- the process of instructing the jury would be clearer and would overcome uncertainty as to whether the jury must reach a unanimous verdict in relation to an aggravating circumstance, and
- there would be a clearer sense of the seriousness of each offence, its distinct policy basis and its maximum penalty.

5.4 Sexual intercourse with a child under 12

Proposal 19 Sexual intercourse with a child under 12

The proposed offence would specify that a person (A) commits an offence if:

a) A has sexual intercourse with another person (B);

b) A intends to have sexual intercourse with B; and

c) B is a child under the age of 12 years.

The proposed maximum penalty for this offence is 25 years imprisonment (level 2).

As discussed above, sexual intercourse with a child under 12 would become a separate offence, rather than being reflected solely in a higher maximum penalty as it currently is in section 45.

5.4.1 A has sexual intercourse with B

The proposed offence would require proof that the accused 'had sexual intercourse with another person'. This is different from the current description of conduct in section 45, which is 'takes part in an act of sexual penetration with'.

As discussed in Part 3 on rape offences, it is proposed that the phrase 'has sexual intercourse with' be used to describe the conduct in rape offences. This more accurately encapsulates the range of conduct which may occur in rape, in which the accused may be passive rather than active. The phrase 'has sexual intercourse with' and its proposed definition would apply to situations in which the accused sexually penetrates a child and in which a child sexually penetrates the accused.

Using the same phrase to describe the conduct in different sexual offences will make it easier for the judge to direct the jury, and for the jury to understand the law, in cases where different offences are charged.

The proposed offence would require proof that the accused intended to have sexual intercourse with the child.

Section 45 currently does not specify whether proof of a fault element is required in relation to taking part in an act of sexual penetration. However, the common law operates to imply intention as a fault element in section 45, following the High Court decision in *He Kaw Teh v The Queen* (1985) 157 CLR 523.

An aim of this review is to make the elements of offences clear. One way of achieving this is to state the elements of an offence in a statutory provision, rather than having to rely in part on the common law to understand the structure of the offence.

5.4.2 B is a child under 12

The proposed offence would require proof that the person with whom the accused had sexual intercourse was a child under the age of 12. As noted above, section 45 was amended in 2010 to increase the age limit from 'under 10' to 'under 12', following the Sentencing Advisory Council's recommendation in *Maximum Penalties for Sexual Penetration with a Child under 16: Report* (2009).

The Sentencing Advisory Council viewed the age limit of under 10 as failing to protect vulnerable 10 and 11 year olds. It recommended against the offence capturing children aged 12 due to the risk, albeit small, of a child aged 12 being in a 'consensual' sexual relationship.

5.4.3 Absolute liability in relation to the age of the child

It is not proposed that the offence require proof of a fault element in relation to the age of the child, such as that A knew that B was a child under the age of 12. Further, it is proposed that absolute liability, rather than strict liability, apply to this circumstance. This would mean that an accused charged with this offence could not argue that he or she reasonably believed that the child was 12 or older. This would reflect the current law (see *Azadzoi v County Court of Victoria* [2013] VSC 161).

It may be argued that the inclusion of an absolute liability element in a criminal offence may limit the right to be presumed innocent in section 25(1) of the *Charter of Human Rights and Responsibilities Act 2006* (*Charter Act*), as it relieves the prosecution of part of its usual task of proving the guilt of the accused beyond reasonable doubt. This task normally includes proving a fault element with respect to each physical element of the offence, or disproving a defence based on the mistaken belief of the accused.

However, this limitation must be balanced against the right in section 17(2) of the *Charter Act* of a child to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

The proposed offence is underpinned by a protective principle according to which the state has an obligation to protect young children who are particularly vulnerable to sexually predatory behaviour. The offence is also based on the recognition in law that a child under the age of 12 does not have the capacity to consent to sexual intercourse. Requiring proof of knowledge or recklessness as to the fact that the child was under 12 is not appropriate for an offence that aims to protect children.

Imposing absolute liability in relation to the circumstance of the child's age effectively imposes a higher standard of responsibility on a person who has sexual contact with a child under 12. Even if this proposal does limit the right to be presumed innocent under the *Charter Act*, this limitation is justifiable.

5.4.4 Exceptions and defences

The defence of consent would not be available in relation to this offence. This would reflect the current position that children under 12 cannot consent to sexual penetration.

Currently, section 35 of the *Crimes Act* defines 'sexual penetration' to include the introduction by a person of an object or a part of his or her body (other than the penis) into the vagina or anus of another person 'other than in the course of a procedure carried out in good faith for medical or hygienic purposes'. Thus, at present, the definition of the conduct in child sexual penetration offences excludes penetration for medical or hygienic purposes.

As discussed in Part 3 in relation to rape, it is proposed not to include these words in the definition of 'sexual intercourse', and instead to create a separate exception for good faith medical or hygienic purposes. This exception would also apply to offences involving sexual intercourse with a child. It would provide that a person does not commit an offence if the conduct is in the course of a procedure carried out in good faith for medical or hygienic purposes.

This exception is discussed in more detail in Part 9 (exceptions and defences to sexual offences against children).

5.4.5 Maximum penalty and offence classification

The maximum penalty for the proposed offence would be 25 years imprisonment (consistent with the current maximum penalty). This is the same maximum penalty as for the current (and proposed) offence of rape, and reflects the seriousness of the offence. The offence would be indictable only.

5.5 Sexual intercourse with a child under 16

Proposal 20	**Sexual intercourse with a child under 16**
The proposed offence would specify that a person (A) commits an offence if: a) A has sexual intercourse with another person (B); b) A intends to have sexual intercourse with B; and c) B is a child under the age of 16 years. The proposed maximum penalty for this offence is 15 years imprisonment (level 4).	

The proposed offence of sexual intercourse with a child under 16 resembles the current offence in section 45(1). It could be used where there is insufficient evidence to prove that the child was under the age of 12 when the sexual intercourse occurred. In cases where the evidence of the child's age (above or below 12 years) is equivocal, this offence could be charged together with the proposed offence of sexual intercourse with a child under 12, as an alternative offence. The jury would determine the age of the child and return a verdict in accordance with that determination.

The structure of this offence is very similar to the proposed offence of sexual intercourse with a child under 12, discussed above. Like that offence, this offence would require proof that the accused had sexual intercourse with another person (B), and that the accused intended to have sexual intercourse with B. The only differences are the age of the child, and the available exceptions and defences.

5.5.1 B is a child under 16

The proposed offence would require proof that the child was under 16 at the time of the sexual intercourse. There would therefore be an overlap between this offence and the offence of sexual intercourse with a child under 12. However, the overlap is necessary to ensure that where there is uncertainty about whether the child was under or over 12 at the time of the alleged offence, this offence would apply to the alleged offending.

It is not proposed that an element of 'care, supervision or authority' be included in this offence. Nor is it proposed that a separate offence of sexual intercourse with a child under 16 who is under the care, supervision or authority of the accused be created. Instead, it is proposed that the general offence of sexual intercourse with a child under 16 be sufficiently broad to apply to situations in which the child is under the care, supervision or authority of the accused. Where such a situation applies, it will be an aggravating factor in sentencing. This is the current approach in relation to indecent acts with a child.

It is therefore proposed that the maximum penalty for the offence of sexual intercourse with a child under 16 be increased from 10 years imprisonment to 15 years imprisonment. This is discussed further below in part 5.5.4.

5.5.2 No fault element in relation to age

The proposed offence would not require proof of any fault element in relation to age, such as that the accused knew or was reckless as to whether the child was under 16 years of age. Moreover, subject to the limitation discussed below relating to consent, it is not proposed that the defence of reasonable mistake of age apply. This reflects the current law (see *Azadzoi v County Court of Victoria* [2013] VSC 161).

However, reflecting the current position in section 45, a defence based on the accused's belief that the child was aged 16 or older would be available where the child consented to the sexual intercourse, the mistaken belief about the child's age is based on reasonable grounds and the child is aged 12 or older.

Allowing a qualified defence of consent and mistaken belief as to age in situations where a child is aged 12 or older reflects the view that children aged between 12 and 16 may in fact be able to consent to sexual intercourse. However, the defence requires more than the consent of the child. It also requires proof that the accused mistakenly believed on reasonable grounds that the child was aged 16 or older.

This defence is discussed in more detail in Part 9 on defences and exceptions to sexual offences against children.

5.5.3 Exceptions and defences

Consistently with the proposed offence of sexual intercourse with a child under 12, an exception to this offence would be available for procedures carried out in good faith for medical or hygienic purposes.

Currently, section 45(4) provides for a number of defences to the offence of having sexual intercourse with a child under 16. Each defence only applies where the child was aged 12 or older

at the time of the sexual intercourse, he or she consents to the sexual intercourse and one of the following apply:

- the accused believed on reasonable grounds that the child was 16 or older
- the accused was not more than 2 years old than the child, or
- the accused believed on reasonable grounds that he or she was married to the child.

It is proposed that the defence of reasonable mistaken belief as to age be maintained and that the defence based on similarity of age be kept, but as an exception rather than a defence. It is proposed that the defence based on a mistaken belief about marriage to the child not be kept. These proposals are discussed in more detail in Part 9.

5.5.4 Maximum penalty and offence classification

The current maximum penalty for sexual penetration of a child under 16 is 10 years imprisonment. The current maximum penalty for sexual penetration of a child under 16 who is under the care, supervision or authority of the accused is 15 years imprisonment.

It is proposed that the maximum penalty for the revised offence of sexual intercourse with a child under 16 be 15 years imprisonment. This would result in the following hierarchy of child sexual offences:

Age of child	Sexual intercourse with a child	Sexual touching of a child	Sexual activity in the presence of a child
Under 12	25 years	-	-
Under 16	15 years	10 years	10 years
Aged 16 or 17 and under care, supervision or authority	10 years	5 years	5 years

The increased maximum penalty of 15 years imprisonment for sexual intercourse with a child under 16 would:

- reduce the large gap between the maximum penalties currently applicable where the child is under 12 as compared to where the child is 12 years old
- create a logical difference in maximum penalties between sexual intercourse and non-intercourse offences against children under 16
- create a logical difference in maximum penalties between offences against children under 16 and offences against children aged 16 or 17, across different forms of conduct
- achieve greater symmetry in the treatment of care, supervision or authority across different forms of conduct (by limiting this factor to offences involving children aged 16 or 17), and
- allow ‘care, supervision or authority’ to be treated as an aggravating factor in sentencing in relation to sexual offences against children under 16, regardless of the conduct.

The proposed offence of sexual intercourse with a child under 16 would be an indictable offence (not able to be determined summarily), as is currently the case under section 45(9) of the *Crimes Act*.

5.6 Sexual intercourse with a child aged 16 or 17 and under care, supervision or authority

The general approach to sexual offences against children in the *Crimes Act* is to distinguish between offences against a child under 16, and offences against a child aged 16 or 17. It is proposed that this approach be maintained.

In part, this distinction reflects the view that from the age of 16, a child can legally consent to sexual intercourse. However, this approach also recognises that in certain situations a young person may be exploited despite their general capacity to consent. Where there is a relationship of care, supervision or authority between an adult and a child aged 16 or 17, there is a significant risk that any sexual activity between the adult and the 16 or 17 year old is likely to involve a power imbalance and an abuse of trust.

Proposal 21	**Sexual intercourse with a child aged 16 or 17 and under care, supervision or authority**
The proposed offence would specify that a person (A) commits an offence if: a) A has sexual intercourse with another person (B); b) A intends to have sexual intercourse with B; c) B is a child aged 16 or 17; and d) B is under the care, supervision or authority of A. The proposed maximum penalty for this offence is 10 years imprisonment (level 5).	

The proposed offence would reflect the current offence in section 48 of the *Crimes Act*. Consistent with the other proposed offences of sexual intercourse with a child, this offence would require proof that the accused had sexual intercourse with another person (B), and intended to do so. 'Sexual intercourse' would be defined consistently with the proposed offence of rape and other sexual intercourse offences.

5.6.1 B is a child aged 16 or 17

The proposed offence would apply only to children aged 16 or 17. This reflects the current offence in section 48.

It is not proposed that the offence require proof of a fault element in relation to the age of the child (for example, that A knew or was reckless as to B's age). This is consistent with the current approach. However, a combined defence of consent and mistaken belief on reasonable grounds as to age would be available. This defence is referred to below in Part 5.6.4 and is discussed in detail in Part 9.

5.6.2 B is under the care, supervision or authority of A

The proposed offence would require proof that the child was under the care, supervision or authority of the accused. This is an expression used in sections 45 and 48 of the *Crimes Act*. The current non-exhaustive list of 'care, supervision or authority' relationships was inserted into section 48 following a recommendation of the VLRC in 2004.

It is proposed that the current approach of including a non-exhaustive list of 'care, supervision or authority' relationships for the purposes of this offence be retained. This is a flexible approach which has the benefit of clearly listing a number of obvious relationships, while recognising that it is not

possible for the offence to specify every situation in which a person may have care, supervision or authority with respect to a 16 or 17 year old child. This is a question of fact for the jury to determine on a case by case basis.

Proposal 22	Definition of 'care, supervision or authority' for sexual intercourse offence

For the purposes of the proposed offence, situations in which a child is under the care, supervision or authority of the accused would include situations where the accused is:

a) the child's teacher;

b) the child's foster parent;

c) the child's legal guardian;

d) a religious official or spiritual leader (however described and including a lay member) who provides religious care or religious instruction to the child;

e) the child's employer;

f) the child's youth worker;

g) the child's sports coach;

h) the child's counsellor;

i) the child's health professional;

j) a member of the police force acting in the course of his or her duty in respect of the child; or

k) employed in, or providing services in, a remand centre, youth residential centre, youth justice centre or prison and is acting in the course of his or her duty in respect of the child.

The only proposed change to the current list is to expand the category of 'a minister of religion with pastoral responsibility for the child' in section 48(4)(d). This category of relationship should include any religious official or spiritual leader who provides religious care or religious instruction to the child (see paragraph (d) of the above list). The proposed description is based on section 49(5a) of the South Australian *Criminal Law Consolidation Act 1935*.

This expansion is intended to include lay people who are involved in a religious organisation and who provide religious instruction or care other than pastoral care to a child. An example would be the leader of a church youth group.

Question 5	Religious official or spiritual leader

Does the proposed inclusion of 'any religious official or spiritual leader (however described and including a lay member) who provides religious care or religious instruction to the child' adequately cover the broad range of positions of 'care, supervision or authority' that may exist in a religious setting?

It is proposed that legislation specify that a relationship of care, supervision or authority may be formal or informal, and may be paid or unpaid. This would avoid any argument that a person who babysat a child occasionally did not have care, supervision or authority of or over the child because the arrangement and the relationship were informal. It would also clarify that a person who deals with a child in a voluntary capacity (for example, a parent supervising a group of children on a school excursion) may still have care, supervision or authority with respect to that child.

The child's 'parent' is not included in this list as a parent who engages in sexual intercourse with his or her child would be covered by the offence of incest, discussed in Part 11 of this paper.

5.6.3 Care, supervision or authority: absolute or strict liability?

Section 48 does not currently specify a fault element in relation to 'care, supervision or authority'. Although it is possible that a fault element could be implied by operation of the common law, there

is no authority for this. It is more likely that, at present, a defence of honest and reasonable mistake of fact is available in relation to this element.

The proposed offence would not require proof that the accused knew that he or she was in a relationship of care, supervision or authority with the child, or was reckless as to this fact. However, it is then necessary to determine whether the accused should have a defence where he or she mistakenly believed on reasonable grounds that the child was not under his or her care, supervision or authority.

While this issue is discussed here, it is also relevant to offences of sexual touching of a 16 or 17 year old child (see Part 6) and sexual activity in the presence of a 16 or 17 year old child (see Part 7). A consistent approach to this issue is required for all three offences.

Option 1 – absolute liability (no defence of reasonable mistake available)

The first option would be to make the element of care, supervision or authority subject to absolute liability. This would mean that the prosecution would not have to prove a fault element in relation to the position of care, supervision or authority (for instance, knowledge), and the accused would have no defence where he or she had a reasonable but mistaken belief that the child was not under his or her care, supervision or authority.

This option would be consistent with the general approach to child sexual offences, where a higher standard of responsibility is required of individuals in their dealings with children, as a justifiable limitation on the right to be presumed innocent. This is particularly important for an offence that concerns an abuse of a position of trust or responsibility. Including a defence of honest and reasonable mistake of fact could undermine the policy objective of the offence.

This option would also avoid the complexity and risks associated with option 2 (discussed below). That option would allow an accused to argue, for example, that while he was aware that the child with whom he had sexual intercourse babysat his children occasionally, he did not realise that this legally placed him in a position of care, supervision or authority with respect to her, or that sexual intercourse in such circumstances would be prohibited.

The proposed exception for a person who is not more than two years older than the child (discussed below) would mitigate the potential harshness of making the element of care, supervision or authority an absolute liability element.

Option 2 – strict liability (defence of reasonable mistake available)

The second option would be to make the element of care, supervision or authority subject to strict liability. This would mean that the prosecution would not have to prove a fault element in relation to this element, but a defence would be available where the accused believed on reasonable grounds that the child was not under his or her care, supervision or authority. As with similar proposed defences to sexual offences against children, the defence could only apply where the child consented, and the accused would have to prove his or her reasonable but mistaken belief on the balance of probabilities.

Strict liability is the approach adopted in the Commonwealth's *Criminal Code* in relation to the aggravated offences of engaging in sexual activity with a child under 16 using a carriage service, and causing a child under 16 to engage in sexual activity using a carriage service (see section 474.25B). A circumstance of aggravation is that the child is under the care, supervision or authority

of the accused. Section 474.28(7A) of the *Criminal Code* provides that strict liability applies to that circumstance.

Although the legal position is not clear in other Australian jurisdictions, it is likely that strict, rather than absolute, liability applies to the equivalent element in corresponding sexual offences.

There may be circumstances in which a person will believe on reasonable grounds that a 16 or 17 year old child is not under their care, supervision or authority. For instance, a 20 year old shift supervisor at a fast food restaurant may believe that a 17 year old cash register operator is his co-worker, as his responsibilities as supervisor are limited to assigning lunch breaks and tasks to staff. He may not consider that the position of shift supervisor is a position of care, supervision or authority over the other person.

The difficulty of allowing a defence of mistaken belief on reasonable grounds, is that the availability of such a defence may imply a fault element of *knowledge* that the child was under care, supervision or authority, even where the offence clearly excludes this fault element. There is also a risk that such a defence may become based on a mistaken understanding of the legal concept of care, supervision or authority and of prohibited sexual relationships, rather than on a mistaken understanding of the nature of the actual relationship.

For instance, a 40 year old volunteer for a not-for-profit organisation runs an out-of-school-hours group for ‘at risk’ teenagers. At the group, he meets a 16 year old, and takes the 16 year old to the movies, after which they have sexual intercourse. The volunteer may argue that he had a reasonable belief that the child was not under his care, supervision or authority because it was an informal occasion, he was a volunteer and had no ‘official’ position in relation to the child.

This is problematic, because the offence of sexual intercourse with a child aged 16 or 17 is specifically intended to combat this kind of opportunistic offending against a child by an adult in a position of care, supervision or authority, whether that be within an obvious class of relationship (teacher/student) or a less obvious relationship that nonetheless involves an adult exercising authority over a child aged 16 or 17.

Question 6 Care, supervision or authority – absolute liability or strict liability?

Should the element that the child is under the care, supervision or authority of the other person be subject to absolute liability (option 1) or strict liability (option 2)?

Option 1

There would be no defence that the accused believed on reasonable grounds that the child was not under his or her care, supervision or authority.

Option 2

A person would not be guilty of the offence if he or she believed on reasonable grounds that the child was not under his or her care, supervision or authority, and the child consented to the sexual intercourse.

The accused would bear the legal burden of proving on the balance of probabilities that he or she believed on reasonable grounds that the child was not under his or her care, supervision or authority. The accused would also bear the evidential burden of presenting or pointing to evidence that the child consented. The prosecution would then bear the legal burden of proving beyond reasonable doubt that the child did not consent.

5.6.4 Exceptions and defences

Consistent with the other proposed sexual intercourse offences, an exception for procedures carried out in good faith for medical or hygienic purposes would be available in relation to this offence.

The other two proposed exceptions to this offence are for situations in which:

- the child consents and the accused is not more than two years older than the child, and
- the accused is married to, or the domestic partner of, the child.

Similarity in age is not currently an exception to the offence in section 48. The reasons for including this exception are discussed in Part 9.

Section 48(1) provides that a person must not take part in an act of sexual penetration with a 16 or 17 year old child 'to whom he or she is not married' and who is under his or her care, supervision or authority. This drafting makes it appear as if it is an element of the offence (which the prosecution must prove in every case) that the accused is not married to the child.

It is proposed that this element be reclassified as an exception to the offence. The exception would also be modified by including a domestic partnership. This exception is discussed in more detail in Part 9.

The proposed defences to the proposed offence of sexual intercourse with a child aged 16 or 17 and under care, supervision or authority are:

- consent and reasonable mistake as to age, and
- reasonable mistake as to marriage or domestic partnership.

These defences are discussed in Part 9.

5.6.5 Maximum penalty and offence classification

The proposed maximum penalty for this offence is 10 years imprisonment. This would reflect the current maximum penalty in section 48 of the *Crimes Act*. This offence would be an indictable offence able to be determined summarily.

6 Sexual touching of a child

6.1 Overview of proposals

There are currently two offences in the *Crimes Act* which cover sexual touching of a child. These are indecent act with a child under 16 (section 47) and indecent act with a 16 or 17 year old child who is under the care, supervision or authority of the accused (section 49). These offences also cover indecent acts 'in the presence of' a child.

These offences have a number of complexities and limitations. The notion of an act being 'indecent' is unclear and outdated. These offences also contain the ambiguous fault element 'wilfully'. In addition, the offences are too limited in scope, as they exclude sexual acts directed at a child through the use of technology. Finally, the current offences do not restrict the application of the defence of mistaken belief as to age to children aged 12 or older, which makes them inconsistent with sexual intercourse offences against children.

It is proposed that sections 47 and 49 be replaced with four new offences:

- sexual touching of a child under 16
- sexual touching of a child aged 16 or 17 and under care, supervision or authority
- sexual activity in the presence of a child under 16, and
- sexual activity in the presence of a child aged 16 or 17 and under care, supervision or authority.

The proposed changes would:

- clarify the conduct involved in each offence by distinguishing clearly between contact forms of sexual activity with a child (that do not involve sexual penetration) and non-contact forms of sexual activity with a child
- replace the notion of 'indecent act' with the simpler and clearer concept of 'sexual touching' (consistent with the approach in the proposed offence of sexual assault), and
- clarify fault elements, exceptions and defences in relation to the current offences, which should assist judges in directing juries.

This Part discusses the proposed sexual touching offences. The proposed offences involving sexual activity in the presence of a child are discussed in Part 7.

6.2 Sexual touching of a child under 16

Proposal 23 Sexual touching of a child under 16

The proposed offence would specify that a person (A) commits an offence if:

a) A touches another person (B) or allows B to touch A;

b) A intends to touch B or to allow B to touch A;

c) B is a child under the age of 16 years;

d) the touching is sexual; and

e) the touching is contrary to community standards, having regard to:

   i the purpose of the touching;

   ii whether A seeks or gets sexual gratification from the touching; and

   iii any other relevant factor;

Proposal 23	Sexual touching of a child under 16
but not having regard to whether B consents to the touching, or to whether A believes that B consents to the touching.	
The proposed maximum penalty for this offence is 10 years imprisonment (level 5).	

6.2.1 A touches or allows touching

The conduct in the current offence in section 47 of the *Crimes Act* is expressed as 'committing' or 'being in any way a party to the commission of' an act. This is a very general and broad way of expressing conduct in a sexual offence.

Many, if not most, sexual acts with a child involve touching the child. It is therefore proposed that a more precise form of conduct for these offences be adopted, which focuses exclusively on touching. The current section 47 offence covers an indecent act *with* a child as well as an indecent act *in the presence of* a child. Recasting the conduct of this offence as 'touching' is likely to cover much of what section 47 covers in terms of indecent acts *with* a child. Sexual activity with a child which does not involve the accused touching the child would be covered by separate proposed offences (see Part 7 for a discussion of these offences).

The use of the term 'touching' to describe the conduct is consistent with the description of the conduct in the proposed sexual assault offence. This proposed offence is not described as 'sexual assault' for the same reason that 'rape' is not used to describe sexual intercourse with a child. These terms imply that the victim does not consent, which is not an element of child sexual offences.

The proposed offence would cover situations in which the accused touches a child. 'Touching' would be defined broadly, to include touching with any part of the body, with anything else (such as an object), and through anything (such as clothing). This would be the same definition as for the proposed offence of sexual assault.

This offence would be broader than sexual assault in that it would cover situations in which the accused 'allows' a child to touch him or her. This would cover situations in which the accused has not prompted the child to touch him or her, but permits the touching by not stopping it. Permission need not be verbal.

'Allow' is a broad term, which will need to be assessed by considering all of the circumstances. However, it would not include accidental or unknown sexual touching by a child, as the proposed offence would require proof that the accused intended to allow the touching.

The current section 47 offence contains the fault element of 'wilfulness'. In *R v Papamitrou* (2004) 7 VR 375, there was some support given to the view that the wilful commission of an indecent act was simply an intentional act, and did not include recklessness.

Consistently with this approach and with the proposed child sexual intercourse offences, it is proposed that the offence be clarified to require proof that the accused intended to touch B, or to allow B to touch the accused.

6.2.2 B is a child under 16

Like section 47 of the *Crimes Act*, the proposed offence would apply to children under 16. A separate offence would apply to a child aged 16 or 17 who is under the care, supervision or authority of the accused.

Unlike the proposed sexual intercourse offences, a separate offence is not proposed for a child under the age of 12. This would reflect the current position in section 47, which does not refer to separate 'circumstances of aggravation', as section 45 does. It is simpler to retain a general offence of sexual touching of a child under 16, which can accommodate a range of offending.

Further, the current and proposed maximum penalty for this offence is 10 years imprisonment. If separate offences were created for sexual touching of a child under 12 and sexual touching of a child under 16, the latter offence would logically have a lower maximum penalty of 5 years imprisonment. This would not adequately reflect the seriousness of the offending.

Consistently with the proposed child sexual intercourse offences, it is proposed not to require proof that the accused knew or was reckless as to the age of the child. Where the complainant is aged 12 or over, and consents to the touching, a defence of honest and reasonable mistake as to age would be available (this defence is discussed further below in Parts 6.2.6 and 9).

Where the complainant is under the age of 12, a defence based on consent and honest and reasonable mistake of fact would not be available. Section 47 does not currently include such a limitation on the availability of the defence. This currently allows an accused to argue (for example) that he believed on reasonable grounds that the 11 year old child whom he or she touched was 16 years old.

This is at odds with the current and proposed approach in relation to sexual intercourse offences, where consent cannot be a defence if the child is under 12 years of age. The proposed approach would make clear that there are no circumstances in which a child under the age of 12 can legally consent to sexual touching.

6.2.3 The touching is 'sexual'

Like the proposed offence of sexual assault, this offence would require proof that the touching was 'sexual'. The definition of sexual touching would be broad and would replicate the definition in the proposed offence of sexual assault, according to which touching may be sexual due to:

- the area of a person's body that is touched or used in the touching
- the fact that the accused seeks or gets sexual gratification from the touching, or
- some other aspect of the touching, including the circumstances in which it occurs.

The motivation of the accused to obtain sexual gratification from the touching is included to cover situations in which the part of the body that is touched would not necessarily suggest that the touching was sexual, but it is clear from the accused's behaviour that he or she derives sexual gratification from the touching. This is currently taken into account in the context of the section 47 offence.

The proposed reference to 'some other aspect of the touching' is also broad and inclusive of touching involving a part of the body which may not be obviously sexual.

It is proposed that the element that the touching is sexual be subject to absolute liability. This means there would be no applicable fault element, for instance that the accused knew that the touching was sexual. There would also be no defence available where the accused believed on reasonable grounds that the touching was not sexual. This is consistent with the proposed approach to sexual assault. While it may be argued that this limits the right to be presumed innocent under the *Charter Act*, it is justifiable as a reflection of community standards that a child under 16 should not be exposed to touching of a sexual nature, regardless of whether the accused was or was not aware that the touching was sexual. This means there is an onus on those who intentionally touch children to ensure that the touching is not sexual.

6.2.4 The touching is contrary to community standards

Proof that the touching was sexual would replace the current element in section 47 that the act is indecent. It is also proposed that the act be required to be contrary to community standards. As discussed in Part 4, the concept that the act is 'contrary to community standards of decency' adds little to those sexual offences which include the element that the complainant did not consent to the touching.

However, in child sexual offences, the absence of the child's consent is not an element. As such, replacing the notion of 'indecency' with the circumstance that the touching is 'sexual' has the potential to broaden the scope of the offence considerably. Without further limitation, any touching of a child's genitals could appear to be a criminal offence.

Although there is an argument that touching a child's genitals in the course of changing the child's nappy is not sexual without some further evidence that the accused obtained sexual gratification from doing so, it is preferable to limit the scope of the offence more clearly. For this reason, it is proposed that the offence also require proof that the touching was contrary to community standards.

This may appear to be broader than the common law approach, according to which an indecent act is one which 'right-minded persons would consider to be contrary to community standards of decency' (*Curtis v The Queen* [2011] VSCA 102).

However, these two approaches are unlikely to result in different outcomes in practice. Sexual touching involving a child is 'contrary to community standards' if, in the circumstances, the touching does not conform to generally accepted standards of sexual behaviour. This is likely to cover the same conduct as an act that is 'contrary to community standards of decency'.

It is also proposed that two factors be expressly identified as potentially relevant to the fact finder's assessment of whether or not the conduct of the accused was contrary to community standards. Those factors are the purpose of the touching and whether A seeks or gets sexual gratification from the touching.

In many cases, these factors would overlap, as the purpose of the touching would be to obtain sexual gratification. However, it is necessary to list them separately, so as to exclude touching of a child's genitals which is for a legitimate purpose (such as a medical or hygienic purpose) and which is not accompanied by any desire for sexual gratification.

On the basis of these factors, a person who touched a child for a medical purpose, or for any purpose associated with caring for the child, without any intention to obtain sexual gratification from the touching, would not act contrary to community standards. In contrast, a person who touched a

child ostensibly for a legitimate purpose, but who was also motivated by the desire to obtain sexual gratification, would act contrary to community standards.

The proposed offence would take an inclusive approach to the factors relevant to determining whether the touching was contrary to community standards, by referring to 'any other relevant factor'. However, the proposed offence would specifically exclude the child's consent to the touching, and any belief by the accused in the child's consent, from consideration in this context.

Sexual offences against children do not include the absence of consent as an element. Nevertheless, an accused may argue that the fact that the child consented to the touching (or that the accused believed that the child consented to the touching) meant that the touching was not contrary to community standards. In many cases, allowing the child's apparent consent to deny an element of the offence (that the touching is contrary to community standards) would undermine one of the policy bases for sexual offences against children, which is to protect children from premature sexual activity.

It is therefore proposed that the offence specify that the child's consent to the touching, and any belief by the accused that the child was consenting, must not be taken into account in determining whether the touching was contrary to community standards.

Sexual offences against children currently provide a defence where the child is 12 or older and consents to the sexual conduct, and the accused is not more than two years older than the child. This defence reflects the view that it is not criminally wrong for children who are close in age to engage in consensual sexual activity. It is proposed that this approach to similarity in age be retained.

A child or young person who fell outside this exception may wish to argue that his or her sexual touching of a child was not contrary to community standards because of the consent of the other child and their similarity in age (greater than two years). However, allowing such an argument would undermine the exception to criminal liability based on a two year age difference.

Excluding consent as a relevant factor in determining whether the touching was contrary to community standards, and retaining an exception based on a two year age difference, would therefore mean that a child (A) aged 17 who sexually touched another child (B) aged 14 would be acting contrary to community standards for the purposes of this offence (assuming there is no other non-sexual purpose for the touching). This would reflect the current law under section 47 of the *Crimes Act*.

The prosecution would not be required to prove that the accused knew that the touching was contrary to community standards. Absolute liability would also apply to this element. This would deny a defence to the accused based on a belief on reasonable grounds that the touching was not contrary to community standards, which is a concept that should be assessed objectively. This should also exclude any argument that such a mistaken belief was relevant to the assessment of whether the touching was contrary to community standards.

6.2.5 No special provision for a person who is 'wilfully a party to the commission of an indecent act'

The current offence in section 47 of the *Crimes Act* extends liability to a person who is 'wilfully … in any way a party to the commission of, an indecent act'. It is not clear why this phrase is included in

section 47. The phrase also appears in section 49 but does not appear in any other offence in the *Crimes Act*.

It is not proposed that such a phrase be included in the revised offence. It is likely that conduct which would be covered by the notion of being wilfully 'party to the commission of an indecent act' would be covered by:

- the proposed offence of sexual touching of a child under 16
- the proposed offence of sexual activity in the presence of a child under 16 (see Part 7.2)
- the proposed offence of encouraging a child under 16 to engage in sexual conduct (see Part 8.4), or
- an offence of complicity in a sexual offence against a child.

6.2.6 Exceptions and defences

Currently, section 47 provides that a person must not commit an indecent act with a child under the age of 16 'to whom he or she is not married'. This wording suggests that the prosecution must prove as an element of the offence that the accused and the complainant are not married.

It is not proposed that this wording be retained, nor that an exception to the offence based on marriage be included, as it is not possible to be legally married in Australia under the age of 16 years. Neither marriage nor domestic partnership should provide any exception or defence to a sexual offence against a child under the age of 16.

For similar reasons, it is proposed that the defence in section 47(2)(c) for an accused who believed on reasonable grounds that he or she was married to the child be removed.

An accused who is not more than two years older than the child currently has a defence to the offence in section 47 if the child consents to the commission of the indecent act. In contrast to the current approach in relation to sexual penetration offences, the section 47(2)(b) defence appears to apply where the complainant is under the age of 12.

It is proposed that the essence of section 47(2)(b) be retained. However, it is proposed that similarity in age be re-characterised as an exception, which would provide that a person who sexually touches a child under 16 does not commit an offence if the child is aged 12 or older and consents to the touching, and the accused is not more than two years older than the child. It is important to set a lower age limit on the availability of the exception in order to be consistent with sexual intercourse offences against children and to maintain the protective policy bases for the offence.

Section 47(2)(a) currently contains a defence for an accused who believed on reasonable grounds that the child was aged 16 or older, where the child consented to the indecent act. It is also proposed that this defence be retained.

Each of these exceptions and defences is discussed in more detail in Part 9 of this paper.

6.2.7 Maximum penalty and offence classification

The proposed maximum penalty for this offence is 10 years imprisonment. This reflects the current maximum penalty for indecent act with a child under 16 in section 47 of the *Crimes Act*. The offence would be an indictable offence able to be determined summarily.

6.3 Sexual touching of a child aged 16 or 17 and under care, supervision or authority

Proposal 24	**Sexual touching of a child aged 16 or 17 and under care, supervision or authority**

The proposed offence would specify that a person (A) commits an offence if:

a) A touches another person (B) or allows B to touch A;

b) A intends to touch B or to allow B to touch A;

c) B is a child aged 16 or 17;

d) B is under the care, supervision or authority of A;

e) the touching is sexual; and

f) the touching is contrary to community standards, having regard to:

   i the purpose of the touching;

   ii whether A seeks or gets sexual gratification from the touching; and

   iii any other relevant factor;

   but not having regard to whether B consents to the touching, or to whether A believes that B consents to the touching.

The proposed maximum penalty for this offence is 5 years imprisonment (level 6).

This proposed offence would cover part of what is currently covered by section 49, namely committing an indecent act 'with' a child of 16 or 17. It has the same elements as the proposed offence of sexual touching of a child under the age of 16. The only differences are that:

- this offence would apply to children aged 16 or 17 rather than under 16, and
- this offence would require proof of an additional element, namely that the child was under the care, supervision or authority of the accused.

6.3.1 B is a child aged 16 or 17

The proposed offence would apply to sexual touching of a child aged 16 or 17. This would maintain the current approach to child sexual offences in the *Crimes Act*, where a distinction is drawn between offences against children under 16 on the one hand, and those against children aged 16 or 17 on the other.

There would be no requirement to prove any state of mind (such as knowledge or recklessness) on the part of the accused with respect to the child's age. However, a qualified defence of mistake as to age would be available (see discussion below in Parts 6.3.3 and 9).

6.3.2 B is under the care, supervision or authority of A

The proposed offence would require proof that the child was under the 'care, supervision or authority' of the accused. This would also reflect the current approach in section 49 of the *Crimes Act*.

Proposal 25	Definition of 'care, supervision or authority' for non-intercourse offences

For the purposes of the proposed offence, situations in which a child is under the care, supervision or authority of the accused would include situations where the accused is:

a) the child's teacher;

b) the child's parent, step-parent or foster parent;

c) the child's legal guardian;

d) a religious official or spiritual leader (however described and including a lay member) who provides religious care or religious instruction to the child;

e) the child's employer;

f) the child's youth worker;

g) the child's sports coach;

h) the child's counsellor;

i) the child's health professional;

j) a member of the police force acting in the course of his or her duty in respect of the child; or

k) employed in, or providing services in, a remand centre, youth residential centre, youth justice centre or prison and is acting in the course of his or her duty in respect of the child.

This non-exhaustive definition mirrors the definition proposed in relation to the offence of sexual intercourse with a child aged 16 or 17 (discussed in Part 5), but also includes the child's parent, and step-parent. The equivalent sexual intercourse offence does not include these relationships as the offence of incest criminalises sexual intercourse between a parent or step-parent and his or her child.

In this definition, 'parent' would be defined to include an adoptive parent, as well as a person who is a parent through the operation of the *Status of Children Act 1974*, as amended by the *Assisted Reproductive Treatment Act 2008*. This would be consistent with proposed changes to incest offences (discussed in Part 11), which are designed to modernise definitions in order to reflect a greater number of ways in which a person can have the status of 'parent'.

The proposed definition of 'care, supervision or authority' would include formal and informal relationships, as well as both paid and unpaid roles. This would be consistent with the proposal in relation to sexual intercourse with a child aged 16 or 17.

Proof of fault would not be required in relation to the element of care, supervision or authority. However, as discussed in Part 5 in relation to the proposed offence of sexual intercourse with a child aged 16 or 17, this element could be subject to either absolute liability or strict liability. Whichever approach is adopted in relation to the sexual intercourse offence should also apply to the sexual touching offence. Consistency in this regard is important in order to minimise the complexity of jury directions and the risk of confusing the jury in the event that the sexual intercourse offence and sexual touching offence are charged together.

The two options (absolute liability and strict liability) are discussed in Part 5.6.3. The advantages and disadvantages discussed in the context of sexual intercourse with a 16 or 17 year old child apply equally in the context of the proposed sexual touching offence.

6.3.3 Exceptions and defences

Section 49 currently includes the words 'to whom he or she is not married' in the text of the offence. It is proposed that this be re-characterised as an exception that also includes the consent of the

child. In order to avoid discrimination on the basis of marital status, it is also proposed that domestic partnership relationships be included in this exception. This is discussed further in Part 9.

A similarity in age exception is not currently included in any sexual offences against 16 or 17 year old children. The proposed offence would cover a range of relationships. It could extend to a young tutor and his or her 16 or 17 year old student, or a young sports coach and his or her 16 or 17 year old team member. If the accused in such a relationship is not more than two years older than the child and their sexual activity is consensual, it is appropriate to provide an exception for the accused.

Such an exception recognises that a person who is in a relationship of care, supervision or authority with a child and who is of similar age to the child is ordinarily in a more informal relationship, where it is less likely that there is a power imbalance and an abuse of trust.

Two defences are currently included in section 49. They are mistaken belief as to age and mistaken belief as to marriage. It is proposed that a revised form of both of these defences apply to the proposed offence of sexual touching of a child aged 16 or 17.

Each of these exceptions and defences is discussed in greater detail in Part 9.

6.3.4 Maximum penalty and offence classification

The proposed maximum penalty for this offence is 5 years imprisonment (level 6). This reflects the current maximum penalty for the offence of indecent act with or in the presence of a 16 or 17 year old child in section 49 of the *Crimes Act*. The proposed offence would be an indictable offence able to be determined summarily.

7 Sexual activity in the presence of a child

7.1 Overview of proposals

Section 47 of the *Crimes Act* prohibits indecent acts with or in the presence of a child under 16. Section 49 prohibits the same conduct with respect to a 16 or 17 year old child who is under the care, supervision or authority of the accused.

These offences have a number of complexities and limitations. The notion of an act being 'indecent' is unclear and outdated. These offences also contain the ambiguous fault element 'wilfully'. In addition, the offences are too limited in scope, as they exclude sexual acts directed at a child through the use of technology. Finally, the current offences do not set a lower age limit of 12 in relation to the defence of mistaken belief as to age, which makes them inconsistent with sexual intercourse offences against children.

It is proposed that the conduct in each of these offences be separated to create the following four clear, new offences:

- sexual touching of a child under 16
- sexual touching of a child aged 16 or 17 and under care, supervision or authority
- sexual activity in the presence of a child under 16, and
- sexual activity in the presence of a child aged 16 or 17 and under care, supervision or authority.

The proposed sexual touching offences are discussed in Part 6. This Part discusses the proposed offences of sexual activity in the presence of a child.

The proposed changes would:

- clarify the conduct involved in each offence by distinguishing clearly between contact forms of sexual activity with a child (that do not involve sexual penetration) and non-contact forms of sexual activity with a child
- replace the notion of 'indecent act' with the simpler concept of 'sexual activity' (consistent with the approach in the proposed offences of sexual assault and sexual touching)
- expand what it means to engage in conduct 'in the presence of' a child, in order to capture different ways of committing child sexual offences, including over the internet, and
- clarify fault elements, exceptions and defences in relation to the current offences, which should assist judges in directing juries.

7.2 Sexual activity in the presence of a child under 16

Proposal 26	**Sexual activity in the presence of a child under 16**
The proposed offence would specify that a person (A) commits an offence if: a) A engages in an activity; b) A intends to engage in the activity; c) another person (B) is present at the time that A engages in the activity; d) A knows that B is, or is probably, present at the time that A engages in the activity; e) B is a child under the age of 16 years; f) the activity is sexual; and	

Proposal 26	Sexual activity in the presence of a child under 16

g) engaging in the activity in the presence of B is contrary to community standards, having regard to:

i the purpose of the activity;

ii whether A seeks or gets sexual gratification from the activity or from the presence of B; and

iii any other relevant factor;

but not having regard to whether B consents to being present or to A engaging in the activity, or to whether A believes that B consents to being present or to A engaging in the activity.

The proposed maximum penalty for this offence is 10 years imprisonment (level 5).

Section 47 of the *Crimes Act* currently covers indecent act 'with or in the presence of' a child under the age of 16. The proposed offence of sexual touching of a child under 16 would cover much of what is currently covered by section 47. However, section 47 also covers conduct by an accused which does not involve the accused touching a child. This proposed offence would cover those remaining aspects of section 47.

7.2.1 A engages in an activity

The proposed offence would require proof that the accused engaged in an activity. This is taken from the United Kingdom offence of engaging in sexual activity in the presence of a child (section 11, *Sexual Offences Act 2003*). This may be slightly broader than the current description of conduct in the offence in section 47, namely that the accused 'commits an act'.

Examples of an 'activity' for the purposes of the proposed offence would include the accused masturbating, engaging in sexual activity with another person or an animal, performing a striptease or taking photos of a naked child. Watching or viewing pornographic material would also constitute an 'activity' for the purposes of this offence. In order to constitute an offence the 'activity' must also be 'sexual' and must be engaged in 'in the presence of a child'. These elements are discussed below.

Consistently with other proposed sexual offences against a child, this offence would require proof that the accused intended to engage in the activity. This is a clearer way of expressing the current requirement of 'wilfulness' in section 47.

7.2.2 Another person (B) is present at the time

The current offence in section 47 contains the phrase 'in the presence of a child'. Similarly, the proposed offence would require proof that the accused engaged in the activity in the presence of another person (a child under 16). The age of the child is not included in this element, as it is proposed that proof of fault in relation to the *presence* of the child be required, but not in relation to the *age* of the child (see discussion below).

A child may be 'present' while an accused engages in a sexual activity, even though the child is not aware of the activity. In *R v AWL* [2003] SASC 416, a person who photographed his erect penis on a pillow next to the head of a sleeping child was found to have committed an act of gross indecency in the presence of a child. This type of activity would be covered by the proposed offence.

The proposed offence does not specify a particular physical distance within which a child will be 'present', as it may be unnecessarily limiting to do so. For example, is a child 'present' if he or she is 20 metres away from a person in a park who is engaging in a sexual activity, or if he or she is in the

next room and can hear sexual activity? This is a question of fact dependent on the circumstances, and should be determined by the jury, as is currently the case.

Currently, it would appear that the accused must commit the indecent act in the physical presence of the child (see *Azadzoi v County Court of Victoria* [2013] VSC 161 where Bell J affirmed that presence requires physical proximity). In *R v Alexander and McKenzie* [2002] VSCA 183, the Court of Appeal held that using indecent and sexually explicit language in a telephone conversation with a child was not an indecent act 'in the presence of' that child.

It is proposed that this offence cover situations in which an accused engages in a sexual activity in the presence of a child who is not within physical proximity, but is 'present' by some other means, such as the internet or telephone.

To achieve this, the offence would define being 'present' as including situations in which the child is present by an 'electronic communication' within the meaning of the *Electronic Transactions (Victoria) Act 2000*. That Act defines 'electronic communication' to mean:

(a) a communication of information in the form of data, text or images by means of guided or unguided electromagnetic energy, or both; or

(b) a communication of information in the form of sound by means of guided or unguided electromagnetic energy, or both, where the sound is processed at its destination by an automated voice recognition system.

This would cover situations in which a child observes a person engaging in a sexual activity via internet video conferencing (for example, using Skype, 'face to face video calling' on Facebook, or 'video chat' on Messenger). It would also cover sexually explicit conversations with a child via fixed or mobile phone, or via an internet instant messaging service (i.e. real time online chat). Further, this definition is media and technology-neutral, so it will be effective when new forms of social media are developed and used.

While it is slightly unusual language to refer to a person being 'present' via an electronic communication, this is preferable to more standard language such as 'being party' to an electronic communication, which suggests that the child must be directly involved in the communication.

The proposed offence is intended to be a 'real time' offence. In other words, it would only cover activity engaged in *while* the child is present. This means that sending a sexually explicit text message or email image to a child that is not viewed by the child for many hours or days would not be covered by this proposed offence as the child would not be 'present' at the time the person engaged in the activity of sending the message or email. However, sending sexually explicit text messages or emails would be covered by existing Commonwealth offences, or by the proposed Victorian offences of encouraging a child to engage in sexual conduct or grooming a child for sexual conduct (discussed in Part 8).

Expanding the offence in the manner proposed would create some overlap with certain offences in the Commonwealth's *Criminal Code*. Section 474.25A(1) of the *Criminal Code* makes it an offence for a person who is at least 18 years of age to engage in a sexual activity with a child under 16, using a 'carriage service'. Section 474.25A(2) makes it an offence for a person who is at least 18 years old to cause a child under 16 to engage in a sexual activity with another person using a carriage service.

'Carriage service' is defined in the *Telecommunications Act 1997* (Cth) as 'a service for carrying communications by means of guided and/or unguided electromagnetic energy'. This is a very broad

definition that covers communication by fixed or mobile telephone, internet, intranet and radio communication.

There are some obvious differences between the *Criminal Code* offence in section 474.25A(1) and the proposed Victorian offence. For example:

- For the Commonwealth offence, the accused must be at least 18 years of age. In this respect, the proposed Victorian offence is potentially broader, as it includes a similarity in age exception rather than requiring proof that the accused was aged 18 or older. For example, if a 17 year old male masturbated within view of a 14 year old girl via Skype, this would be covered by the Victorian offence (if all of the other elements of the offence were proved). However, such conduct would not be covered by the Commonwealth offence, as the accused was not at least 18 years old.
- A defence to the Commonwealth offence (with a legal burden on the accused) is that the accused believed that the child was at least 16 years old. In the proposed Victorian offence, for a defence based on mistaken belief as to age to succeed, the belief must be held on reasonable grounds. The child must also consent to being present while the accused engages in the sexual activity. As the equivalent defence to the proposed Victorian offence is narrower, the Victorian offence may (in this respect) be broader than the Commonwealth offence.

Section 475.1 of the *Criminal Code* provides that Part 10.6, which contains the offences discussed above, is not intended to exclude or limit the operation of any law of a State of Territory.

In light of the High Court decision in *Momcilovic v The Queen* (2011) 245 CLR 1, it is anticipated that these differences between the Victorian and Commonwealth offences would not amount to constitutional inconsistency.

7.2.3 A knows that B is present, or is reckless as to B's presence

It is not currently clear whether the word 'wilfully' applies to the presence of the child, as well as to the commission of the act. In other words, it is not clear whether the prosecution must prove that the accused intended that the child be present during the commission of the indecent act, or knew that the child was present, or was reckless as to the child being present.

It is proposed that this issue be clarified. The proposed offence would require proof that the accused:

- knew that the other person (the child) was present, or
- knew that the other person (the child) was probably present,

at the time that the accused engaged in the activity.

The second alternative above describes the accused's recklessness as to the child's presence. The word 'reckless' suggests carelessness, and therefore requires clarification and explanation in the context of a criminal offence. It is therefore proposed that this word not be used in the offence, and instead that the offence specify that recklessness in this context amounts to knowledge that a particular circumstance – the presence of the other person – probably exists (in other words, A knows that B is probably present).

7.2.4 B is a child under the age of 16

The proposed offence would apply to children under 16 years of age. This is consistent with section 47 of the *Crimes Act* and with the proposed sexual touching offences.

Consistent with other proposed child sex offences, strict liability would apply to this element. That is, it would not be necessary to prove that the accused knew that the child was under 16, or was reckless as to the child being under 16. However, the accused could rely on a defence that he or she had a belief on reasonable grounds that the child was 16 or older. This defence would only be available where the child was in fact 12 or older and consented to being present while the accused engaged in the activity (see *Azadzoi v County Court of Victoria* [2013] VSC 161). This defence is discussed below and in Part 9.

7.2.5 The activity is 'sexual'

In the proposed offence, the activity must be 'sexual', rather than 'indecent'. This places a qualification on what types of activities would be covered by the proposed offence. The activity may be sexual due to the area of a person's body or an animal's body that is involved in the activity, or the motivation of the accused to obtain sexual gratification from the activity, or some other aspect of the activity. This definition would be broadly consistent with the definition of 'sexual' in the proposed offences involving sexual touching of a child.

Consistent with the proposed sexual touching offences, the prosecution would not be required to prove that the accused knew that the activity was sexual, and the defence of honest and reasonable mistake would be excluded in relation to the sexual nature of the activity.

7.2.6 Engaging in the activity in the presence of the child is contrary to community standards

It is proposed that proof be required that engaging in the sexual activity in the presence of the child is contrary to community standards. This reflects the approach proposed in relation to the offence of sexual touching of a child.

Consider the example of a couple kissing passionately on a train. The couple intentionally engages in the activity and the activity is 'sexual' if the couple obtains a moderate level of sexual gratification from it. If a child is sitting opposite the couple on the train, the child is present for the purposes of the offence. If there were no further requirement to prove that it is contrary to community standards to engage in that activity in the presence of the child, then the couple would be committing a criminal offence, which would seem overly harsh.

The factors relevant to assessing whether the activity is contrary to community standards include the purpose of the activity and whether the accused seeks or gets sexual gratification from the activity, or from the presence of the child. Where the couple's purpose was merely to express affection to each other, then this would weigh against the conduct being contrary to community standards. Similarly, if the couple did not obtain sexual gratification from the presence of the child, then they would be less likely to be acting contrary to community standards.

Consistent with the proposed sexual touching offences, the child's consent to being present or to the accused engaging in the activity, and any belief by the accused in the child's consent, would not be relevant to determining whether engaging in the activity in the presence of the child was contrary to community standards.

Also consistent with the proposed sexual touching offences, absolute liability would apply to the element of 'contrary to community standards'. This means the prosecution would not be required to prove that the accused knew that engaging in the activity in the presence of the child was contrary

to community standards. Also, the accused could not argue as a defence that he or she believed on reasonable grounds that engaging in the activity in the presence of the child was not contrary to community standards.

7.2.7 Exceptions and defences

Currently, section 47 provides that a person must not commit an indecent act with a child under the age of 16 'to whom he or she is not married'. It is not proposed that any such exception to the proposed offence be provided, as it is not possible to be legally married in Australia under the age of 16 years. Neither marriage nor domestic partnership should provide any exception or defence to a sexual offence against a child under the age of 16.

For similar reasons, it is not proposed that the defence in section 47(2)(c) be replicated for an accused who believes on reasonable grounds that he or she is married to the child.

As with the proposed offence of sexual touching of a child, it is proposed to include a consent and similarity in age exception for the proposed offence of sexual activity in the presence of a child. This reflects the current defence in section 47. However, it would contain a lower age limit on the availability of the exception, consistent with proposed sexual intercourse offences.

Section 47(2)(a) currently contains a defence for an accused who believed on reasonable grounds that the child was aged 16 or older, where the child consented to the indecent act. It is also proposed that this defence be retained in relation to the proposed offence of sexual activity in the presence of a child under 16.

Each of these exceptions and defences is discussed in more detail in Part 9 of this paper.

7.2.8 Maximum penalty and offence classification

The proposed maximum penalty for this offence is 10 years imprisonment. This reflects the current maximum penalty for indecent act with or in the presence of a child under 16 in section 47 of the *Crimes Act*. The offence would be an indictable offence able to be determined summarily.

7.3 Sexual activity in the presence of a child aged 16 or 17 and under care, supervision or authority

Proposal 27	**Sexual activity in the presence of a child aged 16 or 17 and under care, supervision or authority**

The proposed offence would specify that a person (A) commits an offence if:

a) A engages in an activity;

b) A intends to engage in the activity;

c) another person (B) is present at the time that A engages in the activity;

d) A knows that B is, or is probably, present at the time that A engages in the activity;

e) B is a child aged 16 or 17;

f) B is under the care, supervision or authority of A;

g) the activity is sexual; and

h) engaging in the activity in the presence of B is contrary to community standards having regard to:

   i the purpose of the activity;

Proposal 27	Sexual activity in the presence of a child aged 16 or 17 and under care, supervision or authority

ii whether A seeks or gets sexual gratification from the activity or from the presence of B; and

iii any other relevant factor;

but not having regard to whether B consents to being present or to A engaging in the activity, or to whether A believes that B consents to being present or to A engaging in the activity.

The proposed maximum penalty for this offence is 5 years imprisonment (level 6).

The proposed offence of sexual activity in the presence of a child aged 16 or 17 and under care, supervision and authority would cover conduct currently charged as an indecent act in the presence of a child aged 16 or 17 under section 49 of the *Crimes Act*. It has the same structure as the proposed offence of sexual activity in the presence of a child under 16 (see discussion above).

However, this offence would:

- apply to children aged 16 or 17 (rather than to children under 16), and
- require proof that the child was under the care, supervision or authority of the accused.

The expression 'care, supervision or authority' would have the same definition as in the proposed offence of sexual touching of a child aged 16 or 17 (see Part 6). Similarly, this offence would not require proof that the accused knew that there was a relationship of care, supervision or authority.

Whether this element should be subject to absolute liability or strict liability is examined in the context of the proposed offence of sexual intercourse with a child aged 16 or 17 and under care, supervision or authority (see Part 5.6). A consistent approach with respect to this element and the availability of the defence of belief on reasonable grounds that the child was not under the accused's care, supervision or authority should be adopted across all sexual offences against a 16 or 17 year old child.

7.3.1 Exceptions and defences

Section 49 currently includes the words 'to whom he or she is not married' in the text of the offence. It is proposed that this be re-characterised as an exception. In order to avoid discrimination on the basis of marital status, it is also proposed that domestic partnerships be included in this exception. This is discussed further in Part 9.

As discussed in Part 6.3.3, a similarity in age exception is not currently included in any sexual offences against 16 or 17 year old children. The proposed offence would cover a range of relationships. It could extend to a young tutor and his or her 16 or 17 year old student, or a young sports coach and his or her 16 or 17 year old team member. If the accused in such a relationship is not more than two years older than the child and their sexual activity is consensual, it is appropriate to provide an exception for the accused.

Such an exception recognises that a person who is in a relationship of care, supervision or authority with a child and who is of similar age to the child is ordinarily in a more informal relationship, where it is less likely that there is a power imbalance and an abuse of trust.

Two defences are currently included in section 49. They are mistaken belief as to age and mistaken belief as to marriage. It is proposed that a revised form of both of these defences be made available to the proposed offence of sexual touching of a child aged 16 or 17.

Each of these exceptions and defences is discussed in greater detail in Part 9.

7.3.2 Maximum penalty and offence classification

The proposed maximum penalty for this offence is 5 years imprisonment (level 6). This reflects the current maximum penalty for indecent act with or in the presence of a 16 or 17 year old child in section 49 of the *Crimes Act*. The proposed offence would be an indictable offence able to be determined summarily.

8 Encouraging and grooming a child to engage in sexual conduct

8.1 Overview of proposals

Currently, there are three offences in the *Crimes Act* which target the solicitation or procurement of a child for sexual penetration or an indecent act (section 58 of the *Crimes Act*). The current offences have failed to keep up to date with changes in technology and are rarely used.

It is proposed that the offences in section 58 be replaced with the following offences:

- encouraging a child under 16 to engage in sexual conduct, and
- encouraging a child aged 16 or 17 and under care, supervision or authority to engage in sexual conduct.

It is also proposed that a new offence of grooming a child under 16 for sexual conduct be created. This offence is proposed in order to implement recommendation 51 of the Cummins Report, *Protecting Victoria's Vulnerable Children* (2012), namely that Victoria enact an internet grooming offence.

The proposed changes would:

- provide a more modern, useable and responsive scheme of preparatory sexual offences
- expand criminal liability to apply where a person encourages a child to engage or be involved in 'sexual conduct', which would include sexual intercourse, sexual self-penetration, sexual touching, sexual self-touching and non-contact forms of sexual activity
- clarify that the offences would not require proof that the child in fact engaged in sexual conduct
- remove the current requirement in section 58 that an accused be aged 18 or older, and
- remove the current offence applying to a person who solicits or procures another person to take part in sexual conduct with a child (this offence is unnecessary, because the conduct is effectively covered by the general offences of incitement or by offences of being complicit in a sexual offence against a child).

8.2 Current offences of soliciting or procuring

Prior to 2006, section 58 of the *Crimes Act* made it an offence for a person to procure a child under 16 to take part in an act of sexual penetration with another person, or to procure a person to take part in an act of sexual penetration with a child under 16. This offence carried a maximum penalty of 5 years imprisonment. Section 60(1) of the *Crimes Act* contained the summary offence of soliciting or otherwise actively encouraging a child under 18 and under the care, supervision or authority of the accused to take part in an act of sexual penetration or an indecent act. This offence carried a 1 year maximum penalty.

In its *Sexual Offences: Interim Report* (2003), the VLRC observed that these offences were rarely used. It noted that they had emerged from policies dealing with prostitution, and had become less relevant given the offences contained in the *Prostitution Control Act 1994* (now the *Sex Work Act 1994*). In its *Sexual Offences: Final Report* (2004), the VLRC recommended consolidating the two offences in order to create an expanded general offence which would be more relevant to contemporary issues such as sexual exploitation and the 'grooming' of children on the internet.

As a result of the VLRC recommendations, the *Crimes (Sexual Offences) Act 2006* repealed section 60 and amended section 58 to create three new offences to cover situations in which a person aged 18 years or more solicits or procures:

- a child under 16 to take part in an act of sexual penetration or an indecent act with the accused or another person (section 58(1))
- another person to take part in an act of sexual penetration or an indecent act with a child under 16 (section 58(2)), and
- a child aged 16 or 17 who is under the care, supervision or authority of the accused to take part in an act of sexual penetration or an indecent act with the accused or another person (section 58(3)).

The second reading speech explained that the purpose of the offences was 'to capture the kinds of grooming activities commonly engaged in by paedophiles, whether online, through electronic communications or through other means or activities'.

However, despite the 2006 amendments, the offences in section 58 are rarely used. There may be a number of reasons why this is the case. There may be other offences which adequately cover the offending (such as those in the *Sex Work Act* or the Commonwealth's *Criminal Code*, or sexual offences charged on a complicity basis). Alternatively, there may be a misconception that the offences require proof that a sexual act occurred as a result of the conduct of the accused.

8.3 The proposed approach

It is proposed that the current offences in section 58 be replaced with offences of encouraging a child (under 16, or aged 16 or 17 and under care, supervision or authority) to engage in sexual conduct, or to be involved in sexual conduct.

8.3.1 'Encouraging' a child to engage in sexual conduct

The phrase 'solicits or procures' arose from offences created to deal with child prostitution. The offences now contained in the *Sex Work Act*, in particular the offences of causing or inducing a child to take part in sex work (section 5) and agreement for the provision of sexual services by a child (section 7), appear to cover in part the offending which the soliciting or procuring offences were originally intended to cover. However, it is important to note that the offences in the *Sex Work Act* require proof of some 'payment or reward', whereas the offences in section 58 do not.

It is proposed that the phrase 'solicits or procures' be replaced with the notion of 'encouraging' a child to engage in conduct. The word 'encourages':

- is a neutral and readily understood term which better reflects the preparatory nature of the targeted conduct
- acknowledges the vulnerability and suggestibility of children
- does not imply any requirement to prove that the child in fact engaged in the encouraged conduct (in contrast to the ordinary meaning of 'procures'), and
- does not imply an absence of consent, in the way that the word 'compels' does in the context of the proposed offences of compelling sexual penetration and compelling sexual touching.

8.3.2 Proof that the child engaged in sexual conduct not required

In the proposed offences of compelling sexual penetration and compelling sexual touching (discussed in Parts 3.8 and 4.3), 'causing' is the description of conduct. An example is 'A causes B to touch A'. This is appropriate for such offences, which would require proof that the complainant in fact engaged in the relevant conduct, and did not consent to engaging in the conduct.

In contrast, the proposed encouraging offences would not require proof that the child in fact engaged in sexual conduct. Mere words of encouragement would be sufficient to constitute an offence, without the child acting on the encouragement and engaging in the encouraged sexual intercourse, sexual touching or sexual activity. (If in fact the child did act on the encouragement, this would not be a bar to prosecution under the proposed new offences.)

This approach would reflect the current offences in section 58, which also do not require proof that the child in fact took part in an act of sexual penetration or an indecent act (despite the fact that the ordinary meaning of the word 'procure' would suggest the need to prove that the child did engage in the sexual conduct). In its *Sexual Offences: Interim Report* (2003), the VLRC said (at 389):

> Whether or not the sexual act actually takes place should not affect the criminal nature of the act. An adult who invites a child to take part in an act of sexual penetration but does not actually follow through with the act should be regarded as culpable in the same way as a person whose 'grooming' behaviour succeeds in inducing the child to take part in an act of sexual penetration. Both of these adults intend to influence the mind of the child to cause him or her to take part in a sexual act.

Proof that the child engaged in the sexual conduct is not necessary when the proposed offences are considered in the wider criminal law context. This is because the principles of complicity cover the vast majority of situations in which a person's encouragement of a child to engage in sexual conduct results in the child engaging in the encouraged conduct.

For example, two adults (A and C) decide together that they will encourage a child (B) to engage in sexual intercourse with C. A talks B into having sexual intercourse with C, then B and C engage in sexual intercourse while A is present. In this situation, both A and C could be charged with sexual intercourse with a child, with A being charged on an acting in concert basis.

A could also be charged with sexual intercourse with a child even if A had left the building prior to the sexual intercourse occurring. In this situation, A would be charged on a counselling or procuring basis (although this distinction as to presence is possibly no longer as relevant to complicity, see *Likiardopoulos v The Queen* [2012] HCA 37).

Even if there was no prior agreement, but A still talked B into having sexual intercourse with C, A could be charged with the offence of sexual intercourse with a child on an aiding or abetting basis (see *R v Hewitt* [1997] 1 VR 301). A would still be criminally liable even if C had a viable defence (for example, if A told C that B was 16 or older) and could be acquitted (see *Giorgianni v The Queen* (1985) 156 CLR 473).

Another example is a person (A) who makes a child (B) sexually penetrate an animal. Although B may not commit the offence of bestiality because the young child is under the age of criminal responsibility, or because of the defence of duress, A could still be charged with bestiality on the basis that B is A's 'innocent agent'.

Even if the proposed encouraging offences required proof that the child in fact engaged in the sexual conduct, it would often be preferable to charge a person with the substantive sexual offence on a complicity basis. This is because, first, there would be no causation requirement; to prove guilt on a complicity basis does not require the prosecution to prove that the principal was in fact encouraged or assisted by the accused (see *R v Lam & Ors (Ruling No 20)* (2005) 159 A Crim R 448 and *Croxford v The Queen* [2011] VSCA 433). Secondly, in relation to encouraging sexual intercourse, the substantive offence may have a higher maximum penalty (25 or 15 years imprisonment) than the maximum penalty proposed for the encouraging offences (10 or 5 years imprisonment).

Under the proposed approach, there would be some overlap between the encouraging offences and the general offence of incitement. Section 321G of the *Crimes Act* provides that a person commits incitement if he or she incites another person to pursue a course of conduct which would involve the commission of an offence. Thus, for example, if an adult (A) incites a child (B) aged 15 to have sexual intercourse with another child (C) aged 11, A could be charged with incitement of sexual intercourse with a child under 12, regardless of whether B actually had sexual intercourse with C (see *R v Massie* [1998] VSCA 82 and *R v Dimozantos* (1991) 56 A Crim R 345).

Although there would be some overlap, the proposed encouraging offences would be broader than incitement. This is because the proposed encouraging offences would cover the encouragement of acts (such as self-penetration by the child) which would not in themselves constitute a criminal offence.

Given the likely coverage under the proposed substantive offences, there would be only a small number of situations where the child in fact engaged in the sexual conduct, but A could not be charged with a substantive child sexual offence, with the result that the encouraging offence would need to be charged instead. This would be in situations where A encourages a child to engage in sexual conduct, the child engages in that sexual conduct, and the child does not commit a criminal offence. For example:

- A encourages self-penetration and the child self-penetrates (though, it should be noted that where a child self-penetrates and there is a clear lack of consent, the proposed new offence of compelling sexual self-penetration could be charged)
- A encourages two children who are under 16 to have sexual intercourse and they do so, and
- A encourages the child to do something which doesn't involve active participation by A, such as performing a striptease.

In these situations, the encouraging offence could be charged, despite the situation having gone beyond mere words and the encouragement producing a result. The fact that a result did occur would obviously make the offending more serious for the purposes of sentencing.

8.3.3 Soliciting or procuring an adult to take part in sexual conduct with a child

Currently it is an offence under section 58(2) for a person aged 18 years or more to solicit or procure *another person* to take part in an act of sexual penetration or an indecent act with a child under the age of 16 years. It is not proposed that this offence be retained.

Such an offence is unnecessary. This is because, as discussed above, where the third party acts on the encouragement, there is already sufficient coverage under the criminal law for both parties to be charged with a more substantive offence, such as sexual intercourse with a child (with the encourager charged on a complicity basis), or an offence under the *Sex Work Act*.

In situations where the third party does not act on the encouragement, it is then a case of words spoken by one adult to another adult. Where the words reach the threshold of 'incitement' then the inciter could be charged under section 321G of the *Crimes Act*, provided the act they are inciting would constitute a criminal offence. If the words do not reach the level required for incitement, those words, while morally reprehensible, would arguably not warrant a serious criminal offence such as those proposed.

Further, the use of the word 'encourages' is specifically designed to address the suggestibility of a child, and it is therefore less appropriate when directed at an adult. The proposed offences acknowledge that children are vulnerable and that there are limitations on their capacity to consent and understand what they are consenting to. Applying an 'encouragement' element to an adult in respect of a sexual offence would provide too low a threshold for a criminal offence.

In addition, an offence such as that contained in subsection 58(2) does not align with the underlying purpose of the proposed offences. The proposed encouraging offences are aimed at protecting children and prohibiting adults from encouraging children (not other adults) to engage in inappropriate sexual activity. This differs from the purpose of the original soliciting or procuring offences, which was to combat child prostitution.

8.3.4 Relationship with proposed sexual activity offences

There would be some overlap between the proposed encouraging offences and the proposed offences of sexual activity in the presence of a child.

The overlap would be due not only to both groups of offences being primarily non-contact offences, but also to the proposed extension of the offence of sexual activity in the presence of a child to situations in which a child is 'present' by means of an 'electronic communication' (for example, over the internet or the telephone). Although this would significantly expand the current offence of indecent act with or in the presence of a child, the proposed sexual activity offences would require proof that the child was present *at the time* the accused engaged in the sexual activity. Thus, sending a text message or an email to a child would not be covered by the proposed sexual activity offences.

However, if the text message or email encouraged a child to engage in, or be involved in, sexual conduct, then the situation would be covered by an encouraging offence.

The other difference between the two groups of offences is the element in the proposed sexual activity offence that the accused *engage* in an *activity*. Although 'activity' would not be defined and would be broad in scope, there would be situations in which a person's encouragement of a child may not constitute 'engaging in an activity' for the purpose of the sexual activity offence. For example, encouraging a child to perform a striptease may not amount to engaging in a sexual activity, but would amount to encouraging a child to engage in sexual conduct.

8.3.5 Commonwealth offences

Some 'encouraging' or 'grooming' behaviour may already be covered by the Commonwealth's *Criminal Code* offences, for example, using a carriage service:

- for sexual activity with a person under 16 (section 474.25A)
- to procure a person under 16 (section 474.26)

- to groom a person under 16 (section 474.27), and
- to transmit an indecent communication to a person under 16 (section 474.27A).

As noted above, it is not anticipated that this overlap will be a problem.

8.4 Encouraging a child under 16 to engage in sexual conduct

Proposal 28 Encouraging a child under 16 to engage in sexual conduct

The proposed offence would specify that a person (A) commits an offence if:

a) A encourages another person (B) to engage, or be involved, in sexual conduct;

b) B is a child under the age of 16 years;

c) A intends that B engage, or be involved, in the sexual conduct; and

d) A's encouragement is contrary to community standards, having regard to:

  i the purpose of the encouragement;

  ii whether A seeks or gets sexual gratification from the encouragement or from B's engagement or involvement in the sexual conduct; and

  iii any other relevant factor;

  but not having regard to whether B consents to the encouragement or to engaging or being involved in the sexual conduct, or to whether A believes that B so consents.

The proposed maximum penalty for this offence is 10 years imprisonment (level 5).

8.4.1 A encourages B

The proposed offence would require proof that the accused encouraged the child to engage, or be involved, in sexual conduct.

As discussed above, the term 'encourage' is proposed instead of 'solicit' or 'procure'. 'Encourage' would be broadly and non-exhaustively defined to include suggesting, requesting or demanding. This would ensure that the offence covered different forms of communication, such as asking a child to engage in sexual conduct, offering money or gifts in exchange for participation in sexual acts, and threatening to do something (such as informing the child's parents about the child's drug use) if the child does not engage in sexual conduct.

The offence would also specify that encouragement could occur by words or actions (whether implicitly or explicitly), and in person or by 'electronic communication' (as defined in the *Electronic Transactions (Victoria) Act 2000*). This would cover encouragement over the internet, over the phone and via text message.

8.4.2 To engage, or be involved in, sexual conduct

For the purposes of the proposed offence, 'sexual conduct' would be very broadly defined to cover:

- sexual intercourse with any person (whether the accused or another person) or with an animal
- sexual self-penetration
- sexual touching of a person (whether the accused or another person) or an animal
- sexual self-touching, or
- any other sexual activity in the presence of the accused or another person.

'Sexual intercourse' would have the same definition as in the proposed offence of rape, and 'sexual self-penetration' would have the same definition as in the proposed offence of compelling sexual penetration.

'Sexual' in relation to 'touching' and an 'activity' would be defined consistently with the relevant definitions in the proposed offences of sexual touching of a child (see Part 6) and sexual activity in the presence of a child (see Part 7). Touching or an activity could be 'sexual' due to the part of a person's body or of an animal's body that is touched or used in the touching, or used or involved in the activity, or due to the motivation of the accused to obtain sexual gratification from the touching or the activity, or from the presence of the child.

Many situations would be covered by the accused encouraging a child to 'engage in' sexual conduct. For example, the accused may encourage a child to have sexual intercourse with a person, masturbate, sexually touch any person or perform another (non-contact) sexual activity, such as a striptease, in another person's presence.

The proposed offence would also include encouraging a child to 'be involved in' sexual conduct. This is intended to cover situations in which the accused encourages a child to allow himself or herself to be sexually touched, or to watch others engaging in sexual intercourse, or to be present while the accused or another person masturbates (where the child would not be an active participant, but would nevertheless be 'involved' in the sexual conduct).

8.4.3 Proof of intention to encourage not required

The proposed offence would not require proof that the accused intended to encourage the child (in the sense that the accused *meant* to encourage the child). Rather, the offence would require proof that the accused intended that the child engage in, or be involved in, the encouraged sexual conduct.

A simple intention to encourage (intention as to the conduct in this offence) would be subsumed by an intention that the child in fact do what is encouraged. In other words, if the accused did not mean to encourage the child, the accused will not have intended that the child engage in the relevant conduct. This is an ulterior fault element, which is discussed below.

8.4.4 B is a child under 16

The proposed offence would apply to children under 16. A separate offence would apply to 16 and 17 year old children who are under the care, supervision or authority of the accused (discussed below). With the exception of sexual intercourse with a child under 12, it is the approach of sexual offences against children in the *Crimes Act* to distinguish between children who are under 16 years of age, and children who are 16 or 17 and under the care, supervision or authority of the accused.

Consistent with other proposed sexual offences against children, the age of the child would be subject to strict liability. This means that the offence would not require proof of a fault element with respect to the age of the child. However, a defence based on a belief on reasonable grounds that the child was 16 or older would be available. This defence is discussed below in Part 9.

8.4.5 A intends that B engage, or be involved, in the sexual conduct

As discussed above, the prosecution would not need to prove that the child in fact engaged in, or was involved in, sexual conduct. This reflects the preparatory nature of this offence. However, the offence would require proof that the accused *intended* that the child engage in, or be involved in, the encouraged sexual conduct. This state of mind is the essence of the proposed offence.

This is an ulterior fault element, as it does not specifically apply to a physical element of the offence (for example, there is no element that A's conduct caused B to engage in sexual conduct). In this case, the ulterior fault element refers to a further motive or intention of the accused that is related in a less direct way to a physical element of the offence, namely the conduct element of the offence, which is that the accused encourages the child to engage in sexual conduct or to be involved in sexual conduct. An ulterior fault element is appropriate in this context because the proposed offence is preparatory in nature.

As noted above, it is not proposed that that the offence require separate proof that the accused *intended to encourage* the child to engage, or be involved, in sexual conduct. In proving the ulterior fault element, the prosecution would, in effect, also be proving that the encouragement itself was intentional.

8.4.6 A's encouragement is contrary to community standards

The proposed offence would require proof that the encouragement was contrary to community standards. Consistent with the proposed offences of sexual touching of a child and sexual activity in the presence of a child, this element would focus on the relevant considerations that are currently contained within the notion of an 'indecent act'.

What is assessed as contrary to community standards is the accused's encouragement rather than the sexual conduct encouraged. This is because sometimes an accused may encourage a child to do something which would not be contrary to community standards for the child to do. For example, a 40 year old man might encourage a 14 year old girl to masturbate. It is not contrary to community standards for a 14 year old girl to masturbate. However, it is contrary to community standards for a 40 year old man to encourage such conduct for his own sexual gratification.

The proposed offence specifies the following factors as being relevant to determining whether encouragement is contrary to community standards:

- the purpose of the encouragement
- whether A seeks or gets sexual gratification from the encouragement or from the child's engagement or involvement in the sexual conduct encouraged, and
- any other relevant factor.

As with the proposed offences of sexual touching and sexual activity in the presence of a child, these factors are designed to:

- focus on key aspects that make the encouragement contrary to community standards (for example, a 45 year old male encourages a 13 year old girl to have sex with him because he is seeking sexual gratification from the encouraging itself), and
- exclude good faith activity which occurs for a legitimate purpose (such as in a medical or counselling context, or where a trusted person advises a child about safe sexual practices), but which could arguably be construed as a form of encouragement, though one in which the 'encourager' does not seek or obtain sexual gratification.

The lawfulness of the encouraged conduct

The proposed element inclusively lists 'any other relevant factor'. The likely lawfulness of the encouraged sexual conduct may be a relevant factor in many cases. This aspect of the encouragement must be understood in the broader context of sexual offences against children and, in particular, the proposal to retain an exception from criminal liability for a child who is not more than two years older than the other child, where the other child consents to the relevant conduct.

Where the sexual conduct encouraged would not be unlawful (for example, because it would involve children of similar age, or a child sexually penetrating or touching himself or herself), the encouragement may or may not be contrary to community standards. Much will depend on the relative ages of the accused and the child, the nature of their relationship and whether the encouragement was motivated by the desire for sexual gratification. The greater the age difference between the accused and the child, the more likely there is to be some form of exploitation or 'grooming' involved.

However, where the sexual conduct encouraged would be unlawful, and the accused is aware of the circumstances that would make the conduct unlawful (namely the age of the child and of any other person involved), then the encouragement would be contrary to community standards. An example would be a 21 year old male (A) who offers his 14 year old cousin payment to perform oral sex on A's 23 year old friend.

This would mean that the proposed encouraging offences could apply to a young person (A) who encourages:

- his or her girlfriend or boyfriend (B) to have sex with A, where A is more than 2 years older than B and B is under 16, or
- his or her friend (B) (who is under 16 and is more than two years younger than A) to engage in sexual conduct with a third person (C), whom A knows is more than two years older or younger than B.

This is a necessary consequence of maintaining an exception based on consent and a two year age difference between the accused and the child.

Irrelevance of consent and belief in consent

Consistent with the proposed sexual touching and sexual activity offences, consent and belief in consent would be excluded from the assessment of whether the encouragement is contrary to community standards. It is important to exclude consent in order to avoid an argument by a 40 year old who says that his encouragement of a 13 year old child to have sex with him was not contrary to community standards because the child was an enthusiastic participant in the sexual conversations and had expressed a desire to have sexual intercourse with him.

If the 40 year old (A) encouraged the 13 year old (B) to have sex with another 13 year old (C), B's consent to having sex with C would also not be relevant to whether A's encouragement was contrary to community standards. Rather, the focus would be on A's purpose for encouraging B to have sex with C, and whether A sought sexual gratification from the conversation with B or from B and C having sex.

Application of the 'community standards' element to young people

The scenarios below illustrate the likely operation of the proposed element (that the encouragement is contrary to community standards) in the context of scenarios involving young people and children

who are reasonably close in age. The following discussion shows the adaptability of the element to a range of scenarios, demonstrating how it works to criminalise conduct where appropriate, and not criminalise conduct where it is inappropriate to do so.

A (aged 17) encourages B (aged 14) to have sexual intercourse with him

A 17 year old who encourages his 14 year old girlfriend to have sex with him (while they are 17 and 14) will be acting contrary to community standards. This is because the purpose of his encouragement is to have sex with his girlfriend (and obtain sexual gratification), and it would be unlawful for him to have consensual sex with her because of their three year age difference. B's consent to having sex with A would not be relevant.

A (aged 19) suggests to B (aged 15) that they have sex when B turns 16

A 19 year old (A) who suggests to a 15 year old girl (B) that they have sex when she turns 16 may not be acting contrary to community standards, because A and B are reasonably close in age and what the accused is suggesting would not be unlawful (assuming there is no relationship of care, supervision or authority between A and B). (If a 40 year old made the same suggestion to a 15 year old, there would be an issue about whether this was 'grooming' behaviour. This would in turn focus significantly on the age difference between A and B, and whether there was some exploitation in the relationship.)

A (aged 17) encourages B (aged 14) to have sexual intercourse with C (aged 15)

A 17 year old girl (A) encourages her 14 year old friend (B) to have sex with a 15 year old girl (C). Relevant factors to consider in assessing the encouragement would include whether A's purpose was to support B or to bully or exploit her, whether A sought sexual gratification from the encouragement, and whether the encouraged conduct would be unlawful. For the typical 17 year old in this situation, the encouragement would not be contrary to community standards, as the conduct encouraged would not be unlawful, she does not seek sexual gratification and she is supporting her friend.

Whether or not the encouraged conduct in this example would be unlawful is dependent on the application of the similarity in age exception in the context of sexual intercourse with a child under 16. This exception applies where the accused is not more than two years older than the child, the child is aged 12 or older and the child consents to the sexual intercourse.

In relation to this example, B and C are both older than 12, they are sufficiently close in age (14 and 15 years old) to fall within the exception, and we assume on these facts that both would consent to having sexual intercourse. The exclusion of the child's consent from the assessment of community standards does not preclude this analysis of the likely lawfulness of the sexual conduct. The exclusion of consent in relation to community standards focuses on B, not C. This reflects the preparatory nature of the offence. C's state of mind in relation to the act B is encouraged to perform will, in many cases, be hypothetical. As a result, it will often be unclear whether B would be acting unlawfully if she engaged in the encouraged sexual conduct.

The fact that B could be acting lawfully if he or she had sex with C will be relevant, in that A would be able to argue that she was not encouraging B to do anything unlawful. However, this would not end the analysis. The other relevant factors (that A was not seeking sexual gratification, and was supporting her friend rather than bullying her) would also need to be considered. In such circumstances, A's encouragement would not be contrary to community standards.

A (aged 17) encourages B (aged 14) to have sexual intercourse with C (aged 18)

If a 17 year old (A) encourages her 14 year old friend (B) to have sex with 18 year old C, A would be encouraging unlawful sexual conduct. In determining whether this encouragement is contrary to community standards, an important issue is whether A knew exactly how old C was.

If A knew that C was 18, her encouragement would be contrary to community standards, because (even if she did not know that what she was encouraging would constitute an offence) she was aware of the circumstances that would make the encouraged sexual conduct unlawful. The relevant issue is not whether A is aware of the relevant laws, but whether A is aware of the relevant circumstances which make the encouraged conduct an offence.

In contrast, if A did not know C's age, A may argue that she was not intending to encourage B to do anything unlawful, and her encouragement was therefore not contrary to community standards. Whether the encouragement was contrary to community standards would then depend on factors such as A's purpose in encouraging B, and whether A sought or obtained sexual gratification from the encouragement.

The prosecution may focus on any general information that A has about C's age. If A knows C, there are likely to be factors which indicate that A will have a general idea about C's age, for instance, what year C is in at school, his general appearance, who his friends are, and his level of maturity. This general information is then likely to be relevant in combination with other matters such as A's purpose in encouraging B. The greater the likelihood that A knew of the age difference between B and C, the more important evidence of A's purpose will become in determining whether the encouragement was contrary to community standards.

If A does not know exactly how old C is, but has a general idea and thinks C is 16, then A is encouraging conduct which, if A's belief were correct, would not be unlawful. In determining whether encouragement in these circumstances is contrary to community standards, A's purpose is likely to be a very important factor.

A (aged 18) encourages B (aged 13) to have sexual intercourse

An 18 year old (A) who suggests to a 13 year old boy (B) that he have sex at a party may not act contrary to community standards. The details of the encouragement will be important. Did A encourage B to have sex with a specific person, or was his encouragement non-specific? If A referred to a specific person (C), what was C's age, and did A know C's age?

Where A provides general encouragement as opposed to identifying a specific person, and A does not get sexual gratification from the encouragement, in many situations he would not be acting contrary to community standards. However, if A's general encouragement was that B have sex with a person at a particular party, and A knew that there would only be adults at the party, this encouragement would be contrary to community standards.

Absolute liability as to the encouragement being contrary to community standards

It would not be necessary for the prosecution to prove that the accused knew that the conduct was contrary to community standards, nor would any defence be available based on a belief on reasonable grounds that the encouragement was not contrary to community standards. Making this element subject to absolute liability would be consistent with the protective principle underpinning sexual offences against children.

It would be problematic if an accused were able to argue that he or she believed on reasonable grounds that the encouragement was not contrary to community standards. Such a defence may invite arguments along the lines that the accused was not aware that what he or she was encouraging was unlawful. This could make the assessment of the element that the encouragement was contrary to community standards very complex. This element should be assessed objectively.

8.4.7 Proof of a result not required

As discussed above, the proposed offence would make it clear that proof that the child in fact engaged in the sexual conduct encouraged, or in any other sexual conduct, would not be required. This is because the encouraging offence targets predatory behaviour. This is consistent with the current soliciting or procuring offences in section 58.

8.4.8 No element of an accused being over 18

Currently it is an element of the soliciting or procuring offences that the accused be over 18 years old. It is not proposed that the encouraging offence be limited in this manner. A 17 year old who encourages a five year old child to have sexual intercourse with him or another person should be held criminally liable.

It is proposed that an exception based on similarity in age and a defence of mistaken belief as to age be included, which would ensure that situations which involve children of similar age engaging in the encouragement of sexual acts are not caught by these serious criminal offences. This exception and defence are discussed below.

8.4.9 Exceptions and defences

Similarity in age

In the context of other proposed offences, a ‘similarity in age’ exception would apply where:

- the child is aged 12 or older
- the accused is not more than two years older than the child, and
- the child consents.

A similar exception is proposed for the offence of encouraging a child to engage in sexual conduct. However, it is proposed that the exception not include the consent of the child to being encouraged to engage in sexual conduct. The notion of a person freely agreeing to another person saying particular words to them, or of having the capacity and freedom to choose not to be spoken to in a particular manner, is a complex one. There are situations where the absence of consent could be inferred. However, there would be many situations where it would not be able to be shown that the child did not consent to being encouraged.

The complexity is compounded by issues concerning the burden of proof. In order to raise the exception, the accused would need to present or point to evidence suggesting a reasonable possibility that each aspect of the exception was satisfied, including that the child consented to the encouragement. To negate this aspect of the exception, the prosecution would have to prove beyond reasonable doubt that the child did not consent to (in most cases) the utterance of particular words.

In light of this complexity, it is proposed that the exception operate where the child is aged 12 or older and the accused is not more than two years older than the child, without reference to whether the child consents.

Where the child does not consent to engaging in the encouraged sexual conduct, and does in fact engage in the conduct, there are other proposed offences A could be charged with, such as rape or one of the proposed compelling offences.

Mistake as to age

Other proposed sexual offences against a child under 16 would include a defence for situations in which:

- the child is aged 12 or older
- the accused believes on reasonable grounds that the child is aged 16 or older, and
- the child consents.

If this defence applied to the proposed encouraging offence, it would result in the age of the child becoming subject to absolute liability where the child is under the age of 12. In other words, if the child was aged 11 or younger, there could be no defence based on reasonable mistake as to age.

This could result in unfairness to the accused in some situations, given that the proposed offence could take the form of encouragement over the internet, where the accused may never see the child. If a group of 11 year old children accessed an internet sex chat site as a joke and communicated with an adult via instant messaging, that adult may encourage one of those children to self-penetrate, believing on reasonable grounds that he was communicating with another adult. In this situation, the adult would have no defence.

The competing rights contained in the *Charter Act* must be taken into account when considering the inclusion of an absolute liability element. This is because an absolute liability element may limit the right of an accused to be presumed innocent under section 25(1) of the *Charter Act*. However, this must be balanced against the right of a child to have protection under section 17(2) of the *Charter Act*.

Including an absolute liability element in relation to age where the child is under 12 can be reasonably justified (under section 7 of the *Charter Act*) when the conduct involves physical contact and is face to face. However, in the context of an offence which can occur online without the accused ever seeing the child, the potential unfairness to an accused makes it more difficult to justify the limitation on the right to be presumed innocent.

It is therefore proposed that a lower age limit of 12 not apply, and that the defence be available to the proposed encouraging offence where the accused believes on reasonable grounds that the child is aged 16 years or older. (The consent of the child would not be included for the reasons discussed above in relation to the similarity in age exception.)

This would make the defence broader than in relation to other child sexual offences, and could result in an accused arguing that he believed that an 11 year old whom he encouraged face to face to engage in sexual intercourse was 16 or older. However, the potential breadth of the defence needs to be considered in the context that the accused would bear the legal burden of proving on the balance of probabilities not only that he or she held such a belief, but also that the belief was held on reasonable grounds.

8.4.10 Maximum penalty and offence classification

The current maximum penalty for procuring or soliciting a child to engage in an act of sexual penetration or an indecent act is 10 years imprisonment. The proposed maximum penalty for this offence is also 10 years imprisonment.

This would be lower than the proposed maximum penalties for sexual intercourse with a child under 12 (25 years) and with a child under 16 (15 years), and equivalent to the maximum penalties for sexual touching of a child under 16 and sexual activity in the presence of a child under 16.

The proposed offence would be an indictable offence able to be determined summarily.

8.5 Encouraging a child aged 16 or 17 and under care, supervision or authority to engage in sexual conduct

Proposal 29 Encouraging a child aged 16 or 17 to engage in sexual conduct

The proposed offence would specify that a person (A) commits an offence if:

a) A encourages another person (B) to engage, or be involved, in sexual conduct;

b) B is a child aged 16 or 17;

c) B is under the care, supervision or authority of A;

d) A intends that B engage, or be involved, in the sexual conduct; and

e) A's encouragement is contrary to community standards having regard to:

   i the purpose of the encouragement;

   ii whether A seeks or gets sexual gratification from the encouragement or from B's engagement or involvement in the sexual conduct; and

   iii any other relevant factor;

   but not having regard to whether B consents to the encouragement or to engaging or being involved in the sexual conduct, or to whether A believes that B so consents.

The proposed maximum penalty for this offence is 5 years imprisonment (level 6).

This offence would have the same structure as the proposed offence of encouraging a child under 16 to engage in sexual conduct. However, this offence would require proof that the child was aged 16 or 17 (rather than under 16), and that the child was under the care, supervision or authority of the accused.

'Care, supervision or authority' would have the same definition as in the proposed offences of sexual touching of a child aged 16 or 17, and sexual activity in the presence of a child aged 16 or 17 (see Parts 6.3 and 7.3 for a discussion of this definition).

It is not proposed that proof of a fault element in relation to the element of 'care, supervision or authority' be required, consistent with all other proposed sexual offences against 16 or 17 year old children.

The question remains whether an accused who reasonably believed that the child was not under his or her care, supervision or authority should be able to rely on a defence, that is, whether strict or absolute liability should apply. This issue is discussed in Part 5.6 in the context of the proposed offence of sexual intercourse with a child aged 16 or 17 (see options at [5.6.3]). A consistent approach to this question should be adopted across all sexual offences against 16 or 17 year old children.

However, if a defence is made available to the proposed offence of encouraging a 16 or 17 year old child to engage in sexual conduct, that defence should not refer to the consent of the child, due to the complexity of the notion of consenting to the utterance of words, and the difficulty of proving the absence of consent, as discussed in Part 8.4.9.

8.5.1 Exceptions and defences

Consistent with other proposed sexual offences against a 16 or 17 year old child, the proposed encouraging offence would provide for an exception where:

- the accused is not more than two years older than the child, or
- the accused is married to, or the domestic partner of, the child.

A defence would be available where:

- the accused believes on reasonable grounds that the child is aged 18 or older, or
- the accused believes on reasonable grounds that he or she is married to the child, or is the domestic partner of the child.

These exceptions and defences are discussed in Part 9.

8.5.2 Maximum penalty and offence classification

The proposed maximum penalty for the offence is 5 years imprisonment. This would be one penalty level lower than the maximum penalty for the proposed offence of encouraging a child under 16 to engage in sexual conduct. This sentencing hierarchy is consistent with that proposed for the offences of sexual intercourse with a child, sexual touching of a child and sexual activity in the presence of a child.

The offence would be an indictable offence able to be determined summarily.

8.6 Grooming a child under 16 for sexual conduct

The Cummins Report on *Protecting Victoria's Vulnerable Children* was tabled in Parliament on 28 February 2012. Recommendation 51 of that report is that 'the Victorian Government should, consistent with other Australian jurisdictions, enact an internet grooming offence.'

In the context of sexual offences against children, 'grooming' can be described as the process by which a person takes steps to prepare a child for sexual activity. Grooming may commence with non-sexual acts aimed at developing a child's trust, such as chatting online or bestowing gifts. It can then escalate over time to include acts such as massage, or showing pornography to the child. The purpose of grooming is to normalise sexual behaviour so that the child will gradually become accustomed to sexual activity, and less likely to reject more serious sexual advances later. With developments in technology, much 'grooming' now occurs online.

There is a need for an offence which adequately deals with this predatory behaviour. Grooming may overlap with the proposed encouraging offences. However, not all grooming behaviour may be covered by an encouraging offence. A grooming offence would go further, by covering conduct that does not involve any encouragement, but does assist a perpetrator in cultivating a relationship where sexual offending is more likely.

As discussed above, the Commonwealth's *Criminal Code* contains grooming offences. The proposed grooming offence and the existing Commonwealth grooming offences are similar, in that the criminality in the offences lies in the state of mind of the accused. Each offence has the same broad aim of protecting children from predatory sexual behaviour. However, there are differences between the Commonwealth offences and the proposed Victorian offence. These include the following:

- While the Commonwealth offences apply to grooming only by a postal or carriage service, the new grooming offence would not be limited by the means used to communicate with the child. This is in line with the VLRC's recommendation in its *Sexual Offences: Final Report* (2004) that a general offence was preferable to an internet-specific offence.
- The Commonwealth offences apply in situations where the child is actually under 16, but also where the accused believes the 'recipient' is under 16. The proposed grooming offence would not extend to the situation where the accused believes the 'recipient' is under 16, because to do so would go beyond the scope of the purpose of this offence, and create inconsistencies with other Victorian sexual offences against children.
- Unlike the Commonwealth offences, it is not proposed that a new grooming offence require proof that the accused be 18 years or older. To do so would make the offence inconsistent with all other Victorian child sexual offences.

Proposal 30 Grooming a child under 16 for sexual conduct

The proposed offence would specify that a person (A) commits an offence if:

a) A communicates to another person (B);

b) B is a child under the age of 16 years;

c) A communicates to B with the intention of facilitating B's engagement or involvement in sexual conduct;

d) A's intention to facilitate B's engagement or involvement in sexual conduct is contrary to community standards having regard to:

   i A's purpose in B engaging or being involved in the sexual conduct;

   ii whether A intends to get sexual gratification from B engaging or being involved in the sexual conduct; and

   iii any other relevant factor;

   but not having regard to whether B consents to the communication or to engaging or being involved in the sexual conduct, or to whether A believes that B consents to the communication or to engaging or being involved in the sexual conduct.

The proposed maximum penalty for this offence is 10 years imprisonment (level 5).

8.6.1 A communicates to B

The proposed grooming offence would require proof that A 'communicated to' another person (the child, B). The offence would specify that a person may communicate by words (such as speaking or writing to a child) or actions (such as giving a gift or showing an image to a child).

In ordinary speech, when a person communicates *to* another person, it is typical to specify what it is that the first person is communicating (for example, 'she communicated a message / her thoughts / her views *to* him'). When the nature or content of the communication is not specified, it is more typical to use the preposition 'with' (as in 'he communicated *with* her').

Despite this, the proposed element refers to A communicating *to* B, without specifying the nature of the communication. This structure is proposed in order to avoid any suggestion that the child must have responded to or reciprocated A's communication. The offence would make clear that the prosecution would not be required to prove that the child responded in any way to the communication in order to prove the offence.

The proposed offence is not intended to be an internet-specific offence. This reflects the VLRC's recommendation in its *Sexual Offences: Final Report* (2004) that the 'procuring or soliciting' offence not be based on the medium used by the alleged offender. However, it is important that the offence clearly cover predatory sexual behaviour on the internet. Accordingly, the offence would specify that the communication may be in person or by an 'electronic communication' within the meaning of the *Electronic Transactions (Victoria) Act*, or by any other means.

The offence would not require proof that the accused intended to communicate to the child. An element of this nature is unnecessary given the proposed requirement to prove that the accused communicated with the intention of facilitating the child's engagement or involvement in sexual conduct. This element is discussed below.

The proposed grooming offence is likely to overlap with the Commonwealth's *Criminal Code* offences such as using a carriage service to procure persons under 16 (section 474.26) and using a carriage service to groom persons under 16 (section 474.27). As noted above, it is not anticipated that this overlap will be a problem.

8.6.2 B is a child under 16

The proposed grooming offence would only apply to children under 16. This is consistent with other child sexual offences.

The proposed offence would not require proof that the accused knew that the child was under 16, or was reckless as to the child being under 16. However, consistent with other child sexual offences, strict liability would apply to this element, so a defence based on a reasonable belief that the child was 16 or over would be available. This defence is discussed below and in Part 9 of this paper.

It is not proposed that a separate offence be created for children aged 16 or 17 and in a relationship of care, supervision or authority with the accused. 'Grooming' involves conduct which is more preparatory than the proposed encouraging offences. It also often involves predatory behaviour against a child by an adult who is not known to the child, or with whom the child has no pre-existing relationship (such as a relationship of care, supervision or authority). As such, it is proposed that the proposed grooming offence be limited to children under 16. The proposed offence of encouraging a child aged 16 or 17 and under care, supervision or authority to engage in sexual conduct would cover less preparatory conduct directed at this age group.

8.6.3 A intends to facilitate B's engagement or involvement in sexual conduct

The sole fault element of the proposed grooming offence is that the accused communicates with the intention of facilitating the child's engagement or involvement in sexual conduct. This is an ulterior fault element, as it does not attach to a specific physical element of the offence. It is this state of mind which makes the usually non-criminal communication a preparatory sexual offence.

The Commonwealth offence of using a carriage service to groom persons under 16 years of age (section 474.27 of the Commonwealth's *Criminal Code*) refers to the intention of the accused of 'making it easier to procure' the child to engage in sexual activity. In contrast, it is proposed that the word 'facilitating' be used, because the phrase 'making it easier' invites a comparison between the conduct of the accused and the situation that would exist if the accused had not communicated to the child. This could add unnecessary complexity to this element. The phrase 'making it easier' may also open up issues about the child's willingness to be involved in sexual activities.

'Sexual conduct' would be broadly defined to include sexual intercourse with any person or with an animal, sexual self-penetration, sexual touching of any person or an animal, sexual self-touching and any other sexual activity in the presence of another person. This would be consistent with the proposed definitions in relation to encouraging a child to engage in sexual conduct (discussed in Part 8.4.2).

The proposed offence would make it clear that the prosecution does not have to prove:

- that the accused communicated to the child in order to facilitate the child's engagement or involvement in a *specific type* of sexual conduct, or
- that the accused intended that the sexual conduct occur at any particular time.

For example, the prosecution would not have to prove that the accused communicated to the child in order to digitally penetrate the child the following day. To require proof of such a specific state of mind would make the offence extremely difficult to prove. Nevertheless, the prosecution would need to particularise the conduct to some degree, and would usually specify the general type of sexual conduct intended (for example, 'sexual intercourse' or 'sexual touching').

Finally, the proposed offence would make it clear that the prosecution is not required to prove that the child in fact engaged, or was involved, in any sexual conduct.

8.6.4 A's intention is contrary to community standards

Consistent with all other proposed non-penetrative child sexual offences (see Parts 6 and 7 and the discussion of the proposed encouraging offences, above), the grooming offence would require proof that an aspect of the offending was contrary to community standards. The community standards element in this offence would focus on the state of mind of the accused. Although it may seem unusual to ask the jury to assess whether a person's intention is contrary to community standards, it is consistent with the essence of grooming. The conduct in grooming is made criminal by virtue of the intention of the accused to facilitate the child's involvement in sexual conduct.

In addition, linking the community standards element to a different element of the offence would be problematic. The conduct in the proposed offence of grooming is a person communicating to another person. This communication may have no sexual content or connotation (for example, it might be about the child's friends or school). It is therefore not appropriate for the community standards element to focus on the communication.

In the type of cases at which this offence is targeted (e.g. 45 year old A chats to 13 year old B on the internet intending to make friends, arrange a meeting and have sex), it would be logical to ask the fact finder whether the sexual conduct in which A intends that B engage, would be contrary to community standards. However, in other situations, this question would not provide the right focus, for similar reasons to those discussed in relation to the proposed encouraging offences. For example, the accused may be grooming the child to self-penetrate or to engage in sexual self-touching (neither of which would be contrary to community standards).

The factors to guide the jury's determination of the community standards element would be essentially the same as those for the proposed encouraging offences. The factors are A's purpose in having B engage or be involved in the sexual conduct, whether A intends to get sexual gratification from the sexual conduct, and any other relevant factor.

A doctor who instructs a 15 year old child to apply a cream to her vagina to treat an infection can be said to intend to 'facilitate' the child's engagement in a form of 'sexual' conduct, namely sexual self-touching and self-penetration. However, if the treatment is medically appropriate and communicated in good faith, with no intention to get sexual gratification, the doctor's intention is not contrary to community standards.

The proposed exclusion from consideration of consent (to the communication or to engaging in the intended sexual conduct) and belief in consent, in the context of the community standards element, is consistent with the structure of the proposed sexual touching, sexual activity and encouraging offences.

It is proposed that absolute liability apply to the element that the accused's intention was contrary to community standards. This would mean there would be no requirement for the prosecution to prove that the accused knew that his or her intention was contrary to community standards, and a defence of belief on reasonable grounds would not be available. This would avoid any argument that the accused believed on reasonable grounds that his or her intention was not contrary to community standards (for example, because he thought the child would benefit from engaging in sexual activity with him or with another child).

8.6.5 Exceptions and defences

The proposed grooming offence would include the same exception (similarity in age) and defence (reasonable belief as to age) as the proposed offence of encouraging a child under 16 to engage in sexual conduct.

Consistent with the structure of this defence in the context of the encouraging offence, the defence would not apply solely where the child is aged 12 or older. Rather, the defence would also be available where the child was younger than 12, given the real possibility of this offending occurring online without the accused ever seeing the child (see Part 8.4.9 for a more detailed discussion of this defence in the context of the proposed offence of encouraging a child under 16 to engage in sexual conduct).

8.6.6 Maximum penalty and offence classification

The proposed maximum penalty for the offence is 10 years imprisonment (level 5), consistent with the proposed offence of encouraging a child under 16 to engage in sexual conduct. The offence would be an indictable offence able to be determined summarily.

8.7 Are offences of both grooming and encouraging necessary?

The proposed grooming and encouraging offences would cover similar territory. Effectively, both offences would target conduct preparatory to committing a substantive sexual offence against a child, but at different stages.

The proposed new offence of grooming would cover conduct that is engaged in with the intention of facilitating a child's involvement in sexual conduct. This would include a person who chats to a child online or gives a child gifts, with the intention that such conduct facilitate the child's involvement in some type of sexual behaviour. It would also cover a person who arranges to meet a child intending to recruit the child to engage in sexual conduct with another person. This conduct is preparatory and may not necessarily involve any actual discussion of sexual conduct.

The proposed offences of encouraging a child to engage in sexual conduct are also preparatory, but involve conduct that is at a later stage or closer to the substantive offence. These offences would apply to a person who encourages a child to engage in sexual conduct. This would normally involve some form of sexualised communication, and would usually occur at a later stage of an offender's 'grooming' conduct. The Australian Institute of Criminology notes that '[a]s trust is developed between the child victim and the offender, offenders then seek to desensitise child victims to sexual conduct by introducing a sexual element into the relationship.'[3] This is when an offender is likely to 'encourage' a child to, for instance, watch pornography, masturbate or engage in sexual conduct with the offender or another person.

Because of the breadth of the proposed grooming offence, a question arises as to whether it is necessary to adopt both the proposed grooming offence and the proposed encouraging offences. The grooming offence is likely to cover all of the conduct covered by the encouraging offence. Accordingly, the issue is whether there should be encouraging offences in addition to the grooming offence.

An argument in favour of having both grooming and encouraging offences is that they each target a different stage of preparatory conduct – the grooming offence targets the preliminary conduct, and the encouraging offence targets the later conduct. Most instances of 'encouraging' will be easier to prove than 'grooming', because it is more likely that there will be revealing evidence of sexually explicit communication (whether online, text messages or verbal communication) that will prove an intention that a child engage in sexual conduct.

The conduct covered by the proposed encouraging offences arguably demonstrates a greater level of culpability. This is because of the greater likelihood that the child will respond by actually engaging in sexual conduct, and the potential harm to the child from the sexually explicit communication itself. It could also be argued that an encouraging offence more accurately labels the specific conduct involved in the offending and is therefore more consistent with the principle of fair labelling.

On the other hand, the maximum penalties proposed for the grooming offence and the encouraging offence applicable to children under 16 are the same. In addition, cases involving 'encouraging' would be just as easy to prove in the form of a 'grooming' offence as they would be in the form of an encouraging offence.

Question 7	**Encouraging and grooming offences**
Are offences of both encouraging and grooming necessary, or would a single offence of grooming a child under 16 for sexual conduct be sufficient to cover preparatory conduct engaged in by offenders to prepare or 'groom' a child for subsequent involvement in sexual activity?	

[3] Kim-Kwang Raymond Choo, 'Online child grooming: a literature review on the misuse of social networking sites for grooming children for sexual offences' (2009) *AIC Reports: Research and Public Policy Series*, No. 103, 7.

9 Exceptions and defences to sexual offences against children

Parts 5, 6 and 7 of this paper discuss a number of proposed sexual offences against children. The discussion of each offence refers to the exceptions and/or defences that would be available in relation to each proposed offence. This Part provides more information about the rationale for, and scope of, each of those exceptions and defences.

As explained in the glossary in Part 16, in this review:

- an 'exception' limits the scope of an offence by setting out particular conditions under which no offence is committed, and
- a 'defence' provides a separate basis for exculpating the accused, even where he or she has committed an offence in the sense of having satisfied all the elements of the offence.

An accused who falls within an exception commits no offence. In contrast, an accused who has a defence commits the offence, but, because of the separate exculpating factor, is not guilty of the offence.

9.1 Exception – medical or hygienic purposes

Currently, section 35 of the *Crimes Act* defines 'sexual penetration' to include the introduction by a person of an object or a part of his or her body (other than the penis) into the vagina or anus of another person 'other than in the course of a procedure carried out in good faith for medical or hygienic purposes'. Thus, at present, the definition of the conduct in child sexual penetration offences excludes penetration for medical or hygienic purposes.

As discussed in Part 3, in relation to rape, it is proposed that this exception be removed from the definition of 'sexual penetration', and that a general exception be created that would apply to all offences involving sexual intercourse. This would include the proposed offences of:

- sexual intercourse with a child under 12
- sexual intercourse with a child under 16, and
- sexual intercourse with a child aged 16 or 17 and under care, supervision or authority.

Proposal 31	**Exception for medical or hygienic purposes**
The proposed exception would provide that a person does not commit an offence if the conduct is in the course of a procedure carried out in good faith for medical or hygienic purposes.	

This matter is more appropriately classified as an exception than a defence, in order to exclude from the scope of criminal liability conduct which occurs in very specific and limited circumstances. It is not expected that this exception would be relied upon often.

The exception would require evidence that the procedure was for medical or hygienic purposes, and that it was carried out in good faith. Although the concept of 'good faith' is inherently vague, it is necessary to include a concept of this nature in the exception in order to limit it to legitimate medical or related procedures.

The accused would bear the evidential burden with respect to this exception. This means that if the accused wished to rely on the exception, he or she would have to present or point to evidence suggesting a reasonable possibility that his or her conduct was in the course of a procedure carried

out in good faith for medical or hygienic purposes. If the evidential burden was met, the prosecution would bear the legal burden of proving beyond reasonable doubt that the exception did not apply.

The current offences of indecent act with or in the presence of a child (sections 47 and 49 of the *Crimes Act*) do not expressly exclude from their scope procedures carried out in good faith for medical or hygienic purposes. This is because sections 47 and 49 include the element that the act is indecent. The common law has defined 'indecency' as being contrary to community standards of decency. A procedure carried out in good faith for medical or hygienic purposes is unlikely to be considered indecent.

As discussed in Parts 6 and 7, it is proposed that sections 47 and 49 be replaced with revised offences of sexual touching of a child, and sexual activity in the presence of a child. These offences would require proof that the conduct of the accused was contrary to community standards. The inclusion of such an element would obviate the need to make the medical or hygienic purposes exception available to these offences. For example, a general practitioner who in good faith examines a rash on a child's genitals or anus would not commit a sexual offence if the examination or treatment of the rash required the general practitioner to touch the child's vagina or anus.

Similarly, the proposed offences of encouraging a child to engage in sexual conduct, and grooming a child for sexual conduct do not require this exception, as each of those proposed offences would include an element requiring proof that the conduct or state of mind of the accused was contrary to community standards. A doctor who, in good faith and without any motivation to obtain sexual gratification, explains to an older child how to apply a cream to his or her genitals in order to treat a rash or infection does not act contrary to community standards.

9.2 Exception – consent and similarity in age

9.2.1 Sexual offences against a child under 16

Another exception proposed is where the person who engages in sexual activity with a child under 16 is similar in age to the child and the child consents. This exception is currently characterised as a defence to the offences of sexual penetration of a child under 16 (section 45) and indecent act with a child under 16 (section 47). In relation to sexual penetration offences, it is available only where the child was aged 12 or older, the child consented to the sexual penetration, and the accused was not more than two years older than the child.

The proposed exception is a revised version of these defences. The rationale for characterising it as an exception rather than a defence is that an accused who is not more than two years older than the child will very often also be a child. It is preferable to treat such a child or young person as not having committed an offence if he or she engages in consensual sexual activity with a child.

Proposal 32	**Exception for consent and similarity in age where child is under 16**
The proposed exception would specify that a person does not commit an offence if: a) the child is aged 12 or older; b) the person is not more than 2 years older than the child; and c) the child consents to the sexual intercourse or the sexual touching, or to being present while the accused engages in a sexual activity.	

This reflects the current structure of the defence in section 45(4)(b) of the *Crimes Act*. Section 47(2)(b) does not set a lower age limit of 12 on the defence. The rationale for this may be that a 13

year old who sexually touches an 11 year old does not commit an 'indecent' act. However, this rationale is not consistent with the policy underpinning sexual offences against children, which is that a child under the age of 12 cannot legally consent to sexual activity.

In order to create as consistent an approach as possible to defences and exceptions to sexual offences against children, it is proposed that the exception apply only where the child is aged 12 or older. On this basis, the exception would not apply to the proposed offence of sexual intercourse with a child under 12.

9.2.2 Sexual offences against a child aged 16 or 17

Currently, sexual offences against 16 or 17 year old children who are under the care, supervision or authority of the accused do not include an exception or defence based on similarity in age. It is proposed that such an exception be made available. This would mean (for example) that an 18 year old accused who was in a relationship of care, supervision or authority with a child aged 16 or 17, and who engaged in consensual sexual intercourse, sexual touching or other sexual activity with that child, could rely on the proposed exception.

In considering whether a similarity in age exception should be included in relation to offences against 16 or 17 year old children, it is necessary to balance the competing interests of:

- the policy basis for providing separate 'care, supervision or authority' offences, which is to protect children against an abuse of trust by a person in a position of authority with respect to the child, and
- ensuring that the conduct of a child or young adult accused who is close in age to the child with whom he or she engages in consensual sex is not inappropriately criminalised.

The proposed care, supervision or authority offences cover a range of relationships. They could extend to a young tutor and his or her 16 or 17 year old student, or a young sports coach and his or her 16 or 17 year old team member. If the accused in such a relationship is not more than two years older than the child and their sexual activity is consensual, it is appropriate to provide an exception for the accused.

Such an exception recognises that a person who is in a relationship of care, supervision or authority with a child and who is of similar age to the child is ordinarily in a more informal relationship, where it is less likely that there is a power imbalance and an abuse of trust.

The proposed exception would be in the same form as in relation to offences against a child under 16 (see above). However, there would be no need to specify that the child was under 12, as these sexual offences can only be committed against a 16 or 17 year old child.

Proposal 33	**Exception for consent and similarity in age where child is 16 or 17**
The proposed exception would specify that a person does not commit an offence if: a) the accused is not more than 2 years older than the child; and b) the child consents to the sexual intercourse or the sexual touching, or to being present while the accused engages in a sexual activity.	

9.2.3 Encouraging and grooming offences

It is also proposed that a similarity in age exception be made available to the proposed encouraging and grooming offences discussed in Part 8. However, given the differences in structure between

these preparatory offences and substantive sexual offences against a child, the exception would be altered slightly.

Proposal 34	Exception for similarity in age – encouraging and grooming

In relation to the proposed offences of encouraging or grooming a child, the exception would specify that a person does not commit an offence if:

a) the child is aged 12 or older (for the offence of encouraging or grooming a child under 16); and

b) the accused is not more than two years older than the child.

This version of the exception would not refer to the consent of the child. The encouragement offences do not require proof that the child in fact engaged in any sexual conduct. These offences therefore cover conduct that is, or may be, preparatory to having sexual intercourse with, or sexually touching, a child. The conduct in encouragement and grooming offences will often consist of words spoken to a child. It is difficult to conceive of a person consenting to being encouraged to perform an act or to being spoken to in a particular manner (in contrast to consenting to the act itself). Therefore, the similarity in age exception proposed in relation to encouragement and grooming offences refers only to the respective ages of the accused and the child.

9.2.4 Burden of proof for similarity in age exception

The accused would bear the evidential burden of raising the similarity in age exception, and the prosecution would bear the legal burden of disproving it, that is, the task of proving that the exception does not apply in a particular case.

9.3 Defence – consent and reasonable mistake as to age

Sexual offences against children currently do not require proof of any fault element in relation to the age of the child (for example, that the accused knew that the child was under the age of 16). Instead, they provide for a limited and qualified defence of reasonable mistake as to age.

An accused who believes on reasonable grounds that the child with whom he or she took part in an act of sexual penetration was aged 16 or older has a defence to a sexual offence against a child under the age of 16, only if the child was aged 12 or older and consented to the sexual penetration (section 45(4)(a) of the *Crimes Act*). In relation to an indecent act with or in the presence of a child under 16, the defence does not include the limitation that the child is aged 12 or older (section 47(2)(a)).

In the corresponding defence to offences against a 16 or 17 year old child, the defence applies where the accused believed on reasonable grounds that the child was 18 or older (sections 48(2)(a) and 49(2)(a)).

These defences recognise that in some situations, a child is capable of consenting to sexual activity. However, the consent of the child alone is not sufficient to provide a defence. Consent becomes relevant where the accused (mistakenly) believes that the child is aged 16 or older (or 18 or older, depending on the offence), and the belief is based on reasonable grounds. The accused bears the legal burden of proving that he or she had this belief, and that the belief was reasonable.

These are complex defences. One complexity arises from the fact that the allocation of the burden of proof in relation to the different parts of the defence is not entirely clear. Another is that it is currently not clear whether, in seeking to disprove the defence, the prosecution is required to prove

not only that the child did not consent to the sexual activity, but also that the accused was aware that the child was not consenting or might not be consenting.

It is proposed that a defence based on consent and reasonable belief as to age be retained, but also that these complexities be addressed. A reasonable (but mistaken) belief is better characterised as a defence than an exception, as it acknowledges that a criminal offence has been committed, but provides a basis for exculpating the accused.

This defence would apply to every proposed child sexual offence, with the sole exception of having sexual intercourse with a child under the age of 12. This is consistent with the current position, according to which a child under the age of 12 has no capacity to consent to sexual activity.

Proposal 35	**Defence of consent and reasonable mistake as to age**
The defence would specify that a person is not guilty of an offence if: a) the child is aged 12 or older (for offences against a child under 16); b) the accused believes on reasonable grounds that the child is aged 16/18 (as applicable) or older; and c) the child consents to engaging in or being involved in the relevant sexual conduct with the accused.	

This defence would also be available to the proposed encouraging and grooming offences. However, in the context of these offences:

- the defence would not include any reference to consent (for the reasons discussed above in relation to the similarity in age exception), and
- the defence would not be limited to situations in which the child is aged 12 or older, because of the risk of the offence unfairly applying to a person who reasonably believes that the 11 year old with whom he or she is communicating online, and whom he or she has never met or seen, is an adult.

Proposal 36	**Defence of reasonable mistake as to age – encouraging and grooming**
The defence would specify that a person is not guilty of an offence if the accused believes on reasonable grounds that the child is aged 16/18 (as applicable) or older.	

9.3.1 Burden of proof

It is proposed that the current approach of imposing a legal burden on the accused with respect to one aspect of the defence be retained, namely that the accused believes on reasonable grounds that the child is aged 16 (or 18) or older. This is consistent with the recommendations of the VLRC in its *Sexual Offences: Final Report* (2004).

A person charged with a relevant offence who wished to rely on this defence would bear:

- the legal burden of proving on the balance of probabilities that he or she believed on reasonable grounds that the child was aged 16/18 or older, and
- (depending on the particular offence) the evidential burden of presenting or pointing to evidence suggesting a reasonable possibility that the child was aged 12 or older, and consented to the sexual intercourse or sexual touching, or to being present while the accused engaged in the sexual activity.

If the accused did not discharge any of these burdens, the defence would fail. If the accused discharged each of these burdens, then the issues of the child being older than 12 and the child consenting would be ‘live’ issues in the trial. In such a case, the defence would fail if the prosecution proved beyond reasonable doubt (if applicable in the context of the particular offence) that:

- the child was not aged 12 or older, or
- the child did not consent to the sexual activity.

The allocation of the legal burden to the accused in this defence is a reasonably justified limit on the right to be presumed innocent under the *Charter Act*. The purpose of this limitation is to apply a higher standard of behaviour on individuals who are sexually involved with children (including a 16 or 17 year old child under their care, supervision or authority), and to fulfil the underlying protective objective of child sexual offences.

The limitation advances the *Charter Act* right of a child to protection that is in the child's best interests. The limitation reflects community expectations of individuals who have contact with children and recognises the difficult nature of prosecuting offences where the complainant is a child.

The *Charter Act* requires consideration of the availability of any less restrictive means of achieving the purpose of the limitation. It would be possible to impose an evidential burden on the accused with respect to belief as to age. This would require the accused to present or point to evidence suggesting a reasonable possibility that he or she reasonably believed that the child was 16/18 or older. If the accused met the evidential burden, the prosecution would bear the legal burden of proving that the accused did not hold such a belief, or that, even if he or she did hold such a belief, that the belief was not reasonable.

An evidential burden is unlikely to achieve the purpose of imposing a higher standard of behaviour on individuals who are sexually involved with children, and fulfilling the underlying protective objective of child sexual offences. In this context, it should also be noted that a *more* restrictive approach would be not to provide a defence of reasonable mistake as to age at all, by making the circumstance of the child's age one to which absolute liability would apply. This could be unduly harsh to an accused.

The current and proposed approach in relation to this issue strikes a balance between fairness to the accused and the need to protect children against inappropriate sexual activity.

9.3.2 Consent and the mental state of the accused

There is currently some uncertainty as to whether the mental state of the accused is relevant to the issue of consent in child sexual offences. The Criminal Charge Book Bench Notes in relation to section 45 of the *Crimes Act* state that the issue has not been authoritatively determined, but that:

> despite the contrast in drafting between s 38, s 38A and s 39 and the other sexual offences, it is likely that wherever consent is an issue, mens rea in respect of consent will also be relevant.

There is an important difference between offences in which the *absence* of consent is a physical element, and offences in which the absence of consent is not an element, but to which a defence based on the *presence* of consent is available.

Where the absence of consent is an element (as in the offences of rape and sexual assault), the prosecution must prove beyond reasonable doubt that the complainant did not consent to the sexual activity. The prosecution must also prove a fault element in relation to this circumstance. Currently, the fault element is that the accused was aware that the complainant was not consenting or might not be consenting, or did not turn his or her mind to whether the complainant was not or might not be consenting.

In contrast, where consent operates as a component of a defence, the accused must first present or point to evidence that the child consented to the sexual activity. The prosecution then has the legal burden of negating this aspect of the defence, by proving beyond reasonable doubt that the child did not consent. If the prosecution succeeds in its task, then the defence will have failed, the offence will have been proved (assuming the elements are proved) and there should be no need or indeed no occasion to go on to separately consider the state of mind of the accused with respect to the proven absence of consent.

Requiring the prosecution to prove that the accused had a particular state of mind in relation to the absence of consent in order to disprove the defence would in effect bring the child sexual offence much closer to rape. The child sex charge would become oddly transformed into a rape charge just because the prosecution has succeeded in rebutting a consent-based defence to the child sexual offence.

Structuring the defence in this manner would add an additional and unnecessary layer of complexity to what is already a complex defence, and would not adequately achieve the objective of having offences specifically tailored to protect children. It is therefore proposed that the defence include no reference to the state of mind of the accused in relation to the child's consent.

9.4 Exception – marriage or domestic partnership

Under the Commonwealth *Marriage Act 1961*, the 'marriageable age' is 18 years. This means that a person must (usually) be aged 18 or older in order to be legally married in Australia.

However, the *Marriage Act* allows a person who is 16 or 17 years old to apply for a court order authorising him or her to marry a person who is aged 18 or older. The court must not make such an order unless 'the circumstances of the case are so exceptional and unusual as to justify the making of the order' (section 12). Thus, it is possible, although unusual, to be legally married in Australia at age 16 or 17.

9.4.1 Children under 16

Currently, sexual offences against children under the age of 16 exclude from their scope conduct by an accused who is married to the child. For example, section 45(3) provides that the offence of sexual penetration of a child under 16 does not apply if the child is aged between 12 and 16 and the persons taking part are married to each other. Historically, the 'marriageable age' for a female was 16 and it was possible to obtain court authorisation for a marriage involving a female person aged 14 or 15. This may in part explain the scope of the current marriage exceptions.

Given that it is now not possible for a person to be legally married in Australia under the age of 16, an exception based on legal marriage is no longer required for any of the proposed sexual offences against a child under the age of 16.

It is also not proposed that an exception be provided for sexual offences against children under 16 for customary or foreign marriages. To do so would raise the problem of applying the law differently to different groups, inconsistently with the Commonwealth *Marriage Act*.

Not including an exception of this nature could be said to limit the right to freedom of religion under section 14 of the *Charter Act*. It may also limit section 19(2) of the *Charter Act*, which protects the distinct cultural rights of Aboriginal persons. It can, however, be argued that any limitation of these

rights is reasonably justified on the basis that the limitation is both important and proportionate to its purpose of protecting a vulnerable group in society, namely children under the age of 16. Any such limitation of sections 14 and 19(2) is justified because it is necessary in order to give effect to the right of every child to protection without discrimination under section 17(2) of the *Charter Act*.

9.4.2 Children aged 16 or 17

Marriage

As noted above, the *Marriage Act* provides a process for court authorisation of a marriage involving a 16 or 17 year old child in exceptional and unusual circumstances. The proposed sexual offences against a child of 16 or 17 all require proof that the child was under the care, supervision or authority of the accused. Should a marriage exception be available in relation to such offences?

The answer to this question requires a balancing of different considerations. On one hand, it may be argued that the fundamental policy basis of child sexual offences based on care, supervision or authority is to protect 16 and 17 year old children from being sexually exploited in a relationship where there may be a power imbalance due to the nature of that relationship. It could be argued that the fact of marriage does not eliminate what may be exploitative features of that relationship.

According to this view, the public interest in protecting children outweighs the interest in allowing a person to have sexual intercourse with his or her 16 or 17 year old spouse, where that child is under the person's care, supervision or authority. It would also prevent a person who is married to a 16 or 17 year old child from entering into a relationship of care, supervision or authority with respect to the child (for example, coaching the child's netball team or employing the child in a business).

On the other hand, not including a marriage exception would mean that a person who is legally married to a 16 or 17 year old under the *Marriage Act* could not lawfully have consensual sexual intercourse with his or her spouse. The process under the *Marriage Act* requires a judge or magistrate to examine the circumstances of the relationship, in order to determine whether to authorise the marriage. This arguably provides a sufficiently high threshold to protect a child from exploitative relationships.

An exception based on marriage is very unlikely to be relied on often, as it would be unusual for a 16 or 17 year old child to be legally married. However, as it is lawful for such a marriage to occur, it is necessary to ensure that Victorian law does not criminalise consensual sexual activity that takes place in the context of such a marriage.

Domestic partnership

In section 35 of the *Crimes Act*, the 'domestic partner' of a person is defined as someone who is in a 'registered domestic relationship' with the person, or 'a person to whom the person is not married but with whom the person is living as a couple on a genuine domestic basis (irrespective of gender)'. A couple may only register a domestic relationship if both parties are 18. There is no statutory age limit for a couple who live together 'on a genuine domestic basis'.

In determining whether people who are not in a registered domestic relationship are domestic partners, all the circumstances of their relationship are to be taken into account. These include matters such as the degree of mutual commitment to a shared life, the duration of the relationship, the nature and extent of common residence, and the degree of financial dependence or

interdependence between the parties (section 35(1A) of the *Crimes Act* and section 35(2) of the *Relationships Act 2008*).

It is proposed that domestic partnerships be added to the exception covering marriage. Extending the exception in this manner will avoid creating an offence which discriminates against same sex couples, who are prohibited from marrying under the *Marriage Act*. This proposal will also ensure that the offence and the exception are consistent with section 8(3) of the *Charter Act*, which provides that every person has the right to equal and effective protection against discrimination.

The proposed exception

Proposal 37	**Exception for marriage or domestic partnership**
The proposed exception would specify that a person does not commit an offence against a 16 or 17 year old child if: a) the person is married to the child in accordance with the *Marriage Act 1961*; or b) the marriage between the person and the child is recognised as valid under the *Marriage Act 1961* (for foreign marriages); or c) the person is the domestic partner of the child.	

This form of the exception would apply to the proposed offences of sexual intercourse with, sexual touching of, and sexual activity in the presence of, a 16 or 17 year old child. The marriage or domestic partnership exception would also be available to the proposed offence of encouraging a child aged 16 or 17 to engage in sexual conduct.

The accused would bear the evidential burden and the prosecution the legal burden in relation to this exception.

Consent is not currently included in the marriage exceptions to sexual offences against 16 and 17 year old children (see sections 48(1) and 49(1) of the *Crimes Act*) and it is not proposed to include it in the proposed version of the exception. Where there is evidence that the 16 or 17 year old spouse or partner did not in fact consent, then the accused would be liable to be charged with rape or other consent-based offences.

9.5 Defence – reasonable mistake as to marriage or domestic partnership

A number of sexual offences against children (sections 45, 47, 48 and 49 of the *Crimes Act*) include a defence of reasonable mistake as to marriage. Although this defence is rarely, if ever, relied upon, it is possible for a situation to arise in which a person reasonably but mistakenly believes that he or she is legally married to a 16 or 17 year old.

An example may be where a marriage was not solemnised in accordance with the requirements of the *Marriage Act* because the marriage celebrant was not properly authorised or registered under that Act. A reasonable mistake may also arise where the marriage celebrant is registered under the *Marriage Act*, but the parties to the marriage have not previously obtained the necessary court order authorising the marriage (as it involves a person who is under the ‘marriageable age’ of 18).

In such situations, it may be unfair to hold the older party to the marriage criminally liable for consensual sexual activity with his or her ‘spouse’. Providing for a defence based on reasonable mistake as to marriage is also consistent with making available an exception based on marriage,

according to which it is not an offence for a person to have consensual sexual intercourse with a 16 or 17 year old child to whom he or she is (in fact) legally married.

Accordingly, it is proposed that a defence based on reasonable mistake as to marriage be retained. However, in contrast with the current position under the *Crimes Act*, the defence would only apply in relation to offences against children aged 16 or 17.

This defence currently applies to sexual offences against a child under the age of 16. As discussed above in relation to the marriage exception, it is not possible to be legally married in Australia under the age of 16. It is therefore proposed that a defence based on mistaken belief as to marriage not be available in relation to offences against a child under 16. This would preclude an accused who was in a customary marriage with a child under 16 from relying on a defence that he or she believed on reasonable grounds that he or she was 'married' to the child.

Consistent with the proposed marriage exception, but unlike the current defence, the proposed defence would extend to a mistaken belief as to the existence of a domestic partner relationship, so as not to discriminate on the basis of marital status.

Where a domestic partner relationship is not a 'registered domestic relationship' under the *Relationships Act*, it is likely to be more difficult for an accused to establish the reasonableness of a mistaken belief that he or she was the domestic partner of a 16 or 17 year old child. This is because a 'domestic partner' is defined as a person who lives with another person as a couple 'on a genuine domestic basis'. This is necessarily an imprecise concept, which requires consideration of a number of factors and is therefore heavily dependent on the facts of each particular case.

It is likely to be insufficient to establish the defence for an accused to argue (for example) that he or she believed that there was a genuine domestic partnership simply because the child had moved in with him or her and had engaged in sexual intercourse on several occasions. A situation in which the accused had 'groomed' the child under his or her care, supervision or authority for sexual conduct is likely to be apparent.

Also consistent with the proposed exception based on marriage or domestic partnership, the consent of the child to engaging in the relevant conduct would not form part of the defence.

Proposal 38 Defence of reasonable mistake as to marriage or domestic partnership

The proposed defence would specify that a person is not guilty of an offence against a 16 or 17 year old child if the person believes on reasonable grounds that he or she is:

a) married to the child in accordance with the *Marriage Act 1961*; or

b) in a marriage which is recognised as valid under the *Marriage Act 1961* (for foreign marriages); or

c) the domestic partner of the child.

The defence would also apply to the proposed offence of encouraging a child aged 16 or 17 and under care, supervision or authority to engage in sexual conduct.

Consistent with the current approach, the accused would bear the legal burden of proving on the balance of probabilities that he or she believed on reasonable grounds that he or she was married to the child, or was the domestic partner of the child.

Imposing a legal burden on the accused with respect to the reasonable belief aspect of this defence is a reasonably justified limit on the right to be presumed innocent under section 25(1) of the *Charter Act*, when balanced against the protective principle underpinning the offences. The prosecution would bear the legal burden of proving beyond reasonable doubt that the child did not consent.

10 Threat to rape, sexual act directed at another person and sexual exposure

10.1 Overview of proposals

In Victoria, sexual assault offences that do not require proof of physical contact between the accused and the complainant include threatening to assault another person with intent to commit rape (section 40 of the *Crimes Act*) and wilful and obscene exposure (common law and section 19 of the *Summary Offences Act 1966*).

It is proposed that changes be introduced to:

- replace the current offence of threatening to assault with intent to commit rape with a clear new offence of threat to rape
- create a new offence of performing a sexual act intended to cause another person to experience fear or distress, and
- replace the current statutory and common law offences of wilful and obscene exposure with a clear, revised summary offence of sexual exposure.

The proposed new and revised offences would:

- clarify the different forms of general sexual offences not involving physical contact between the accused and the complainant
- provide a greater range of options for prosecuting such conduct, and
- modernise the language of the offence of wilful and obscene exposure, by replacing 'obscene' with 'sexual'.

10.2 Threat to rape

Section 40 of the *Crimes Act* provides that a person must not threaten to assault another person with intent to commit rape. In this offence, it is not clear whether the 'intent to rape' attaches to the assault, or to the threat to assault.

It is proposed that a simpler and clearer offence of 'threat to rape' be adopted. The proposed revised offence of assault with intent to rape (discussed in Part 4 of this paper) could be charged separately.

A new offence of threat to rape would also fit readily with other threat offences, such as threat to kill and threat to inflict serious injury (sections 20 and 21 of the *Crimes Act* respectively).

Proposal 39	**Threat to rape**
The proposed offence would specify that a person (A) commits an offence if he or she: a) makes to another person (B) a threat to have sexual intercourse with B or a third person (C) without the consent of that person; and b) A: i intends B to believe that A will carry out the threat; or ii believes that B will probably believe that A will carry out the threat. The proposed maximum penalty for this offence is 5 years imprisonment (level 6).	

10.2.1 A makes a threat to B

The proposed offence of threat to rape would require proof that the accused (A) made a threat to another person (B).

It is proposed that the offence specify that a threat may be made by any conduct, and may be explicit or implicit and conditional or unconditional. This is modelled on threat offences in the Model Criminal Code (for example, section 5.1.19 in relation to threat to kill and threat to cause serious harm).

It is important to define 'threat' broadly, as there are many and varied ways in which a threat can be made. A threat may be made in express words or by implication from the person's words. It may be made by wordless actions alone. It may also be a conditional threat in that the person threatens to rape the other person unless something else occurs (e.g. the threat is to rape the other person unless he or she settles a drug debt) or if something else occurs (e.g. the threat is to rape the other person if he or she informs the police of some criminal activity).

10.2.2 Threat to have sexual intercourse with B or C without consent

The proposed offence would require proof that A's threat was a threat to have sexual intercourse with a person without that person's consent. That person could be the person to whom the threat is made (B), or a third person (C). Including threats directed at a third person would reflect the structure of the current *Crimes Act* offences of threat to kill and threat to inflict serious injury.

As with the proposed offence of assault with intent to rape discussed in Part 4, it is proposed that the element of 'threat to rape' expressly incorporate the physical elements of rape. That is, the threat is to have sexual intercourse without the consent of the other person. This is narrower than the scope of the three options for the proposed offence of rape. However, it would be too complex for the threat of rape offence to incorporate all the elements of the offence of rape (whichever of the three options is adopted). Moreover, some of the permutations that would result from doing so would not make sense, for example a threat to have sexual intercourse with B or C while not giving any thought to whether they consent or not, or while not believing on reasonable grounds that they consent.

A threat is a statement of intention to do something at a future time. The threatened conduct therefore needs to be described in terms that more realistically encapsulate the person's frame of mind at the time of making the threat, not the full range of states of mind that can constitute rape. Even if this diverges slightly from the way the rape offence itself is phrased, the difference in time and the necessarily more inchoate form of the threatened conduct make this divergence necessary.

10.2.3 No need to prove that A intended to threaten B

The proposed offence would not require proof that A intended to make a threat to B. Instead, it would require proof that A intended that B believe that A would carry out the threat, or that A was reckless as to B believing the threat would be carried out (this is discussed below). Proof of either of these states of mind makes it unnecessary to require separate proof that A intended to threaten B.

10.2.4 No need to prove that B believed the threat would be carried out

Under the proposed offence, it would not be necessary for the prosecution to prove that the complainant actually believed that the accused would carry out the threat to rape. This would be consistent with existing threat offences in the *Crimes Act* such as threat to kill (section 20) and threat to inflict serious injury (section 21).

In these offences, it is not necessary for the person to whom the threat was made to actually fear that the threat would be carried out. It is enough that the threat was made and that the maker of that threat intended that the other person would have that fear or was reckless as to whether or not the other person would have that fear.

These threat offences are what can be called 'pure' threat offences, in that what is criminalised is not the engendering of a fear or a belief in another person (which is a kind of substantive or material harm), but simply the behaviour of making threats, regardless of actual consequences. This is because the harms that are threatened in such offences (death and serious injury) are serious.

Often the making of the threat *will* cause the other person to fear or believe that the threat will be carried out, but this will not always be the case. The fact that the other person may not fear being harmed should not be relevant to whether the accused has committed a crime. Threat offences focus more on the accused than on the person who is threatened.

10.2.5 A's state of mind

The proposed offence would require proof that the accused (A):

- intended that B believe that A would carry out the threat; or
- believed that B would probably believe that A would carry out the threat.

This is an 'ulterior fault element', as it requires proof of the accused's state of mind with respect to a result (B believing the threat would be carried out) that does not itself need to be proved.

The ulterior fault element has two alternatives. Both refer to B's 'belief' rather than his or her 'fear' that the threat will be carried out. The difficulty with the word 'fear' in this offence is that it is potentially ambiguous: it can be read as referring to a person experiencing an emotional reaction of fear, or as referring to a person forming a belief that a certain (negative, unpleasant, dangerous) event is likely.

In the context of threat offences, it is the latter state of mind that is most important. Emotional reactions vary too much from individual to individual to provide a reference point. What is more important (and what in fact would provide the basis for any fear actually felt) is what beliefs a person might form in response to a threat. Accordingly, the term 'believes' is proposed as it more accurately identifies that the issue concerns a cognitive rather than an emotional response to the accused's conduct.

The first alternative is an intention that the other person believe that the threat will be carried out. In this situation, the person means to produce such a belief as a result of his or her making the threat.

The second is a belief as to the likelihood of the other person believing that the threat will be carried out. This is a species of recklessness, though an unusual one, in that it relates not to an existing circumstance but a possible future state of affairs. Ordinarily, a person is 'reckless' as to a particular

result occurring if the person knows that the result will probably occur. However, 'knowledge' necessarily implies the existence of some objective fact or event outside the mind of the person with the relevant knowledge, and this fact or event is what that person knows probably exists or will probably occur.

The proposed offence would not require proof that the person to whom the threat was made in fact believed that the threat would be carried out. For this reason, it is proposed that reference be made to 'belief' rather than 'knowledge' in the second limb of the fault element in the proposed offence of threat to rape. Belief, like intention, is purely subjective. A person's belief that something will occur implies nothing about whether or not that something in fact occurred.

10.2.6 Maximum penalty and offence classification

The proposed maximum penalty for the offence of threat to rape is 5 years imprisonment (level 6). The existing maximum penalty for 'threat to assault with intent to rape' is 10 years, but this is inconsistent with the related rape offences, and threat offences.

The proposed penalty is proportionate in relation to the seriousness of the offence and in the context of the maximum penalties for other sexual offences: rape (25 years), attempted rape (20 years), assault with intent to rape (15 years, proposed), and sexual assault (10 years). The maximum penalty for the current section 21 offence of threat to inflict serious injury is 5 years. It is appropriate to treat a threat to rape as equivalent in seriousness to a threat to inflict serious injury.

The offence would be an indictable offence able to be determined summarily.

10.3 Sexual act directed at another person

It is proposed that a new offence be created which covers a sexual act that is directed at another person. This would cover such cases as a man who waits for a lone female jogger to run past in an isolated location, and who then masturbates as she runs past, intending her to see and to experience fear or distress. Such conduct can be the result of significant pre-meditation, and can be extremely threatening to victims/survivors, who may fear sexual assault or other offences by the perpetrator.

Where the victim/survivor is a child, this sort of act would be caught by the proposed offence of sexual activity in the presence of a child under 16. Also, 16 and 17 year old children under the care, supervision or authority of the accused would be covered by the equivalent proposed sexual activity offence. However, other 16 and 17 year olds, and all persons aged 18 or over, would not be covered by these offences.

Such conduct may be caught by the summary offence of wilful and obscene exposure (section 19 of the *Summary Offences Act*). However, section 19 only targets exposure of the genitals when it occurs in or within view of a public place. Intentionally or recklessly causing another person fear or distress by engaging in a sexual act within view of that person should be an offence regardless of whether it occurs in public or in private, since such conduct constitutes an offence against the person, rather than an offence against public order.

In addition, section 19 refers to exposure of the genitals, regardless of whether there is an intention to cause fear or distress. As such, it does not adequately identify the criminality of such conduct.

We therefore propose a distinct, indictable offence of performing a sexual act directed at another person, which causes fear or distress in that person, where the accused intends to cause, or is reckless as to causing, such fear or distress. This offence would be more akin to an 'attack' offence than to the offence of obscene exposure, which falls into the category of public order offences.

Compared with the offence in section 19 of the *Summary Offences Act*, the proposed new offence would:

- provide for more serious instances of sexual exposure, which are intended to, and result in, the complainant feeling fear or distress
- apply whether or not the conduct is in public or is capable of being seen by a person other than the complainant, and
- not be limited to exposure of the genitals.

Victoria is not the first jurisdiction to propose such an offence. The Model Criminal Code and the United Kingdom's *Sexual Offences Act 2003* include offences relating to indecent acts or exposure intending to cause alarm and distress. The proposed offence is in part adapted from the Model Criminal Code offence and the UK's exposure offence.

Proposal 40 Sexual act directed at another person

The proposed offence would specify that a person (A) commits an offence if:

a) A performs an act;

b) another person (B) sees the act;

c) A knows that B will see, or will probably see, the act;

d) the act is sexual;

e) seeing the act causes B to experience fear or distress; and

f) A intends that B experience fear or distress, or knows that B will probably experience fear or distress.

The proposed maximum penalty for this offence is 5 years imprisonment (level 6).

10.3.1 'Directed at'

The proposed offence would not include a distinct element that the sexual act was 'directed at' another person. Instead, a number of elements would combine to establish that a particular act was 'directed at' another person. These are that another person sees the act, the accused knows that another person sees the act (or is reckless as to another person seeing the act), and the accused intends to cause, or is reckless as to causing, the other person to experience fear or distress as a result of seeing the act. These elements are discussed below.

10.3.2 A performs an act

This element is broad in scope. It is intended to apply to masturbation, but could extend to exposure of the genitals, a person rubbing his own genitals through clothes, or making gestures that simulate a sex act. For such conduct to be a criminal offence, it would need to be accompanied by an intention to cause fear or distress in the viewer, or recklessness as to such a response.

The offence would not require proof that the accused intended to perform the act. This would be unnecessary, given the other fault elements in the offence, namely knowledge or recklessness in relation to the other person seeing the act, and intention or recklessness as to causing fear or distress.

10.3.3 B sees the act

The offence would specify that a person would 'see' the act even if he or she saw only part of it. The offence would also cover situations in which a person witnessed an act via Skype or another form of electronic communication.

Not all sexual acts performed online would come within the scope of the proposed offence. The offence requires that the other person experience fear or distress, and that the accused intended or was reckless as to that result. In many if not most instances, the person performing the act will most likely intend that the other person enjoy viewing the act.

The other person 'seeing' the act may be anyone, including a child under 16, or a 16 or 17 year old child under care, supervision or authority, or an adult. This means that the offence will overlap to some degree with the proposed offences targeting sexual activity in the presence of a child. However, it would be artificial and unduly complex to limit this offence only to cases involving complainants over 18 and those who are 16 or 17 and not under care, supervision or authority.

The prosecution would be required to prove that the accused knew that B saw the act, or knew that B would probably see the act. These are alternative states of mind of knowledge and recklessness, respectively. Proof of either of these states of mind is a key aspect of the act in question being 'directed at' another person.

10.3.4 The act is 'sexual'

The proposed offence includes the element that the act is 'sexual'. This would be defined broadly, consistent with the approach to the proposed offences of sexual assault, sexual touching of a child and sexual activity in the presence of a child. An act may be 'sexual' due to:

- the area of a person's body that is used, touched, exposed, pointed to or in some other way involved in the performance of the act
- the fact that A seeks or gets sexual gratification from performing the act, or
- some other aspect of the act, including the circumstances in which it occurs.

Consistent with the proposed sexual assault, sexual touching and sexual activity offences, the element that the act is 'sexual' would be an absolute liability element. This would mean that the prosecution would not be required to prove any state of mind on the part of the accused with respect to the act being sexual. There would also be no defence based on a reasonable belief that the act was not 'sexual'.

10.3.5 B experiences fear or distress

The proposed offence would require proof that the person who saw the act experienced fear or distress. This clearly differentiates the offence from the proposed summary offence of sexual exposure (discussed in Part 10.4).

The United Kingdom's exposure offence refers to 'alarm or distress'. In the offence proposed here 'fear' would replace 'alarm'. The two terms are very close in meaning but 'fear' in this context better accommodates those situations where the other person was fearful of some more specific event following the act, such as an assault of some kind. 'Alarm' may not so readily cover that more 'directed' state of mind.

In the proposed offence of threat to rape (discussed in Part 10.2), we avoid using the word 'fear' because of the possibility that it would be read as referring to a person experiencing an emotional reaction of fear, rather than the person forming a belief that a certain (negative, unpleasant, dangerous) event is likely. For the threat offence, only the latter meaning is intended. For this reason, the notion of 'belief' is proposed rather than 'fear'.

In contrast, in the context of the proposed offence of sexual act directed at another person, the fact that 'fear' can be read in different ways does not create difficulties. Either meaning works appropriately – in some cases the person at whom the act is directed will experience an emotional reaction of fear, and in others, the person may not be fearful in an emotional sense, but will anticipate that a further offence may be committed against him or her. In some cases, the person will experience both.

However, under the proposed offence, it would not be necessary to prove in more detail what it was, in particular, that the other person feared, or what particular beliefs about the accused caused the other person to experience fear or distress. In many cases, it may well be that the other person feared that the accused was about to sexually assault them, but it is not necessary to go into this level of detail. It would be enough that the other person's observation of the sexual act caused them to have one or both of those reactions.

It is not proposed that the offence require proof that the other person did not consent to seeing the act. The central harm of the proposed offence is the other person experiencing fear or distress; it is not primarily a matter of the other person not consenting to having someone perform a sexually suggestive act in front of him or her.

10.3.6 A's state of mind

The offence would require proof that the accused either intended to cause fear or distress, or knew that he or she would probably cause fear or distress. This is another key aspect of the 'directed' nature of the act.

In many cases, the accused will clearly intend to cause the complainant to experience fear or distress. In many other cases, however, the accused may not have such an intention but will know that such fear or distress is a probable consequence of his or her actions. For example, it is quite possible that some offenders are driven to compulsively masturbate in view of others only by the sexual gratification they gain from being observed and have no wish or intention to cause others fear or distress. Nonetheless, such an offender may be well aware that that is the probable result of his or her conduct. While such forms of the offence may not be 'attacks' in the same way, they nonetheless merit being criminalised.

10.3.7 Maximum penalty and offence classification

The proposed maximum penalty for this offence is 5 years imprisonment (level 6). The offence would be an indictable offence able to be determined summarily.

The proposed penalty is the same as the penalty for the proposed offence of threat to rape. Both offences are non-contact sexual offences which are intended to result in fear or distress to the complainant (albeit through different means). This places both of these proposed offences above the proposed summary offence of sexual exposure which would retain a maximum penalty of 2 years imprisonment (and is discussed below).

10.4 Sexual exposure

The current summary offence of obscene exposure was inserted into the *Summary Offences Act* in 2005, following its repeal from the *Vagrancy Act 1966*. It is proposed that this offence be retained with much the same content but in a revised form in line with proposed changes to other sexual offences in this review.

Proposal 41	**Sexual exposure**
The proposed offence would specify that a person (A) commits an offence if: a) A exposes the genital area of his or her body; b) A intends to expose the genital area of his or her body; c) the exposure has a sexual connotation; and d) the exposure is in, or within the view of, a public place. The proposed maximum penalty for this offence is 2 years imprisonment (level 7).	

The name 'sexual exposure' is preferable to the current offence name of 'obscene exposure' because it clearly denotes the sexual nature of the exposure that is targeted. 'Obscene' may include a sexual connotation but does not necessarily do so. It also more clearly excludes certain forms of exposure that, while anti-social or offensive, would not be considered 'sexual', such as urinating in public.

10.4.1 A exposes the genital area of his or her body

Like the current offence, the proposed offence would require proof that the accused exposed his or her genital area. 'Genital area' is not currently defined, and it is not proposed that a definition be included.

The proposed offence would also require proof that the accused intended to expose the genital area of his or her body. The existing section 19 offence refers to 'wilful' exposure. The fault element of intention sufficiently encapsulates the meaning of wilful in relation to the conduct in this offence. It is also consistent with other proposed sexual offences to require proof that the accused intended to engage in the relevant conduct.

10.4.2 The exposure has a sexual connotation

The current offence refers to 'obscene' rather than 'indecent' exposure. The only difference between 'indecent' and 'obscene' is one of degree. In *Pell v The Council of the Trustees* of *the National Gallery of Victoria* [1998] 2 VR 391, Harper J held that a failure to meet recognised standards of propriety 'at the lower end of the scale would amount to an indecency; and at the upper end of the scale would amount to an obscenity' (citing *R v Stanley* [1965] 2 QB 327).

In other sexual offences (such as indecent assault), it is proposed that the notion of the conduct being 'indecent' be replaced with the more straightforward notion that it is 'sexual'.

However, in this proposed offence there is no requirement to prove physical contact between the accused and another person, nor any requirement to prove that the accused 'directed' the exposure at anyone in particular. Describing the exposure as 'sexual' may make the offence too broad. It is therefore proposed that the offence require proof that the exposure has 'a sexual connotation'.

The offence would specify that a person's exposure of the genital area of his or her body may have a sexual connotation due to the fact that the person seeks or gets sexual gratification from the exposure, or due to some other aspect of the exposure, including the circumstances in which it occurs.

It is also proposed that the offence specify that exposure of the genital area does not have a sexual connotation only on the grounds that it is the genital area that is exposed. A person who exposes his or her genitals only because he or she urgently needs to urinate has not engaged in a sexually suggestive act. (The act may nonetheless be offensive, and be charged as offensive behaviour under section 17 of the *Summary Offences Act*.)

Similarly, a teenager's late night 'nudie run' across the street and back, done for a prank to amuse his or her friends, need not have any sexual connotation. Again, it is more in the realm of offensive behaviour, which is covered by section 17 of the *Summary Offences Act* and subject to a lesser penalty.

The current fault element of 'wilfulness' in section 19 may require proof that the accused intended the exposure to have a sexual connotation, or knew that it had such a connotation. In contrast, in the proposed offence, there would be no requirement to prove that the accused knew or was reckless as to the exposure having a sexual connotation. Consistent with the approach to this sort of element in other proposed sexual offences, there would be no defence of honest and reasonable mistake of fact available in relation to this element. This also reflects the simpler form of fault appropriate for a summary offence.

10.4.3 The exposure is in, or within view of, a public place

Reflecting the current offence, the proposed offence would require proof that the exposure was in a public place, or within view of a public place. It is proposed that a definition of 'public place' be included that mirrors the definition currently in section 3 of the *Summary Offences Act*. This definition is broad and extensive, and includes 'any place of public resort'.

The element that the exposure was in, or within view of, a public place would be subject to strict liability. This means the offence would not require proof of any state of mind on the part of the accused with respect to the exposure being in a public place. However, a defence would be available where the accused had a reasonable but mistaken belief that they were not in a public place or not visible from a public place (for example, a naked man on a hotel balcony who believes his genitals are concealed from public view by the balcony ledge).

The accused would bear the evidential burden of raising this defence, and the prosecution would bear the legal burden of disproving the defence once it has been raised.

10.4.4 Maximum penalty and offence classification

The proposed maximum penalty for the proposed offence of sexual exposure is 2 years imprisonment (level 7) consistent with the current maximum penalty in section 19. It would remain a summary offence.

10.5 Common law wilful exposure

If the proposed offence of sexual act directed at another person and the revised offence of sexual exposure are adopted, it is proposed that the common law offence of 'wilful exposure' be abrogated, as it would no longer be necessary.

Wilful exposure (recognised in section 320 of the *Crimes Act*) makes it an offence for a person to 'unlawfully, wilfully and publicly expose his naked person [i.e. his penis]'. (See *R v Towe* [1953] VLR 381, *R v Fonyodi* [1963] VR 86, and *R v Rainsford* [2000] VSCA 157.)

Wilful exposure is limited to exposure of the penis. This rules out females as offenders, and does not include sexually suggestive acts beyond exposure of the genitals.

Further, wilful exposure requires proof that, in addition to the person who sees the exposure, at least one other person is 'in a position' to see it, even if that other person does not in fact see it. This causes difficulties, as in *Fonyodi*, where the complainant's sleeping mother was held not to be 'in a position' to see the act, even though she was in the same room (in her own house) in which the accused exposed his penis to the complainant.

11 Changes to other sexual offences

11.1 Overview of proposals

This Part contains proposals for reforms to incest offences (Parts 11.2 and 11.3) and the current offence dealing with persistent sexual abuse of a child (Part 11.4).

11.1.1 Incest

A number of changes to the offence of incest are considered in Parts 11.2 and 11.3. The current incest offences use outdated terminology. Part 11.2 below proposes some minor definitional changes to the terminology and scope of the incest offences, which would:

- modernise the definitions of 'child' and related terms to align with the *Status of Children Act 1974*, and the *Adoption Act 1984*, while ensuring that biological children remain within the scope of the offence,
- replace references to 'de facto spouse' with 'domestic partner', and
- remove the step-child of the accused's de facto spouse from the incest offence, while still affording such children protection under general child sexual offences.

Part 11.3 then poses questions about some other possible reforms to the offence of incest, namely:

- whether to provide an exception in relation to older, independent step-children, and
- whether to repeal the offence of having sexual intercourse with a parent, lineal ancestor or step-parent, or at least to provide an exception for people who were subject to incestuous sexual abuse when they were under 18 years of age.

11.1.2 Persistent sexual abuse of a child

The current offence aimed at persistent sexual abuse of a child – section 47A of the *Crimes Act* – fails to deal effectively with this most serious form of sexual offending. This is because it requires victims/survivors to provide specific details of each different instance of offending, and this is often not possible due to the repeated and systematic nature of the sexual abuse.

In Part 11.4, we propose that minimal changes be made to the current section 47A, to allow it to continue to be charged where it is appropriate and useful to do so. However, in Part 12 we propose, in addition, a significant new approach to respond more effectively to the problem of persistent sexual abuse of a child. This new approach would allow the filing of a charge (known as a 'multiple offences charge') that alleges multiple incidents of offending of a certain kind, but without having to identify distinct incidents. This approach would address problems with the offence of persistent sexual abuse of a child by improving criminal procedure laws rather than by amending substantive criminal offences.

11.2 Definitional changes to incest offences

It is proposed that some minor changes be made to the structure and scope of the current offences in sections 44(1), 44(2) and 44(4) of the *Crimes Act*. The revised offences would continue to criminalise a person having sexual intercourse with:

- the person's child or other lineal descendant (maximum penalty 25 years imprisonment)

- the child or other lineal descendant of the person's spouse or domestic partner (maximum penalty 25 years imprisonment), and
- the person's sibling or half-sibling (maximum penalty 5 years imprisonment).

11.2.1 Modernising the meaning of 'child'

The word 'child' is not currently defined for the purposes of the offences in section 44 of the *Crimes Act*. However, it is likely that 'child' currently includes a person's genetic or birth child, and also an adopted child, due to the operation of section 53 of the *Adoption Act 1984*. That section requires that an adopted child be treated the same in law as a non-adopted child, unless a statute 'expressly distinguishes in any way between adopted children and children other than adopted children' (section 53(1)).

The current incest offences therefore reflect both a biological and broader legal conception of family members or relations, where there may be no genetic connection between the accused and the child.

Beyond adoption, a person may also be the child of another person through the operation of the *Status of Children Act 1974*. There are several scenarios covered by that Act in which a person is treated in law as the parent of a child, even though there is no genetic or birth connection between the person and the child.

For example, the husband of a woman who becomes pregnant as a result of artificial insemination or embryo implantation, using another man's semen, where the husband consents to the procedure, is the father of the child born as a result of the pregnancy (sections 10C and 10D). In addition, people who have entered into a surrogacy arrangement for a woman to carry a child on their behalf, and who have obtained a substitute parentage order, are parents of that child (section 26).

In order to encapsulate the various ways in which a person may be the parent of a child, it is proposed that a broad definition of 'child' be included in the revised incest offences.

Proposal 42	**Definition of 'child' in incest offences**
For the purposes of the incest offences, a person's 'child' would be defined as his or her genetic child, or her birth child, or his or her child through the operation of the *Status of Children Act 1974* or the *Adoption Act 1984*, regardless of the age of the child.	

11.2.2 Replacing 'de facto spouse' with 'domestic partner'

The offence in section 44(2) prohibits sexual penetration involving a person and the child, other lineal descendant or step-child of his or her de facto spouse. 'De facto spouse' is currently defined in the *Crimes Act* as 'a person who is living with a person of the opposite sex as if they were married although they are not' (section 35(1)).

The definition of 'domestic partner' (also in section 35(1) of the *Crimes Act*) is broader. It covers 'registered domestic relationships' and people who are not married but who are 'living as a couple on a genuine domestic basis (irrespective of gender)'.

Thus, the definition of 'domestic partner' effectively includes a 'de facto spouse', but also covers same sex relationships. There is no logical reason to exclude the children of same sex domestic partners from the protection currently available to children of opposite sex domestic partners.

Proposal 43	Extend incest to include sexual intercourse with the child of a person's domestic partner
It is proposed that the current offence in section 44(2) of the *Crimes Act* be extended to include sexual intercourse with the child or other lineal descendant of a person's domestic partner, as currently defined in the *Crimes Act*.	

11.2.3 Removing the step-child of A's de facto spouse from the offence

Section 44(2) currently makes it an offence for a person (A) to take part in an act of sexual penetration with the step-child (B) of his or her de facto spouse (C). B would be the child from a relationship between C's former spouse or partner (D) and someone other than C or A. This child is not the child of A's de facto spouse. This inclusion of such a child within the scope of section 44(2) would seem to be a legislative oversight, as the step-child of A's *legal spouse* is not included within any of the incest offences in section 44.

Given the relational distance between A and his or her de facto spouse's step-child, and the fact that incest offences are directed at intra-familial sexual intercourse, it is proposed not to include such children in the revised offence. Such children will, of course, still be covered by general sexual offences against children, so this change would not leave those children without legal protection.

11.3 Other changes to incest offences

11.3.1 Should there be an exception in relation to older and independent step-children?

The offence in section 44(2) prohibits a person (A) from taking part in an act of sexual penetration with a person (B) under the age of 18 who is the child, lineal descendant or step-child of A's de facto spouse. It is proposed that changes be made to:

- include A's own step-children in this offence, so that the children of A's legal spouse or domestic partner are included in a single offence, and
- remove the age limit from this offence, to make it consistent with the offence (currently in section 44(1)) prohibiting a person from having sexual intercourse with his or her own child, regardless of the child's age.

Broadening the offence by removing the age limit from section 44(2) raises the issue of whether it is necessary to create an exception for the situation in which a person has consensual sexual intercourse with his or her adult step-child, with whom he or she has no relationship of care, supervision or authority.

When considering whether such an exception is required, it is important to note that under the current offences:

- it is unlawful to have sexual intercourse with an adult step-child by marriage (section 44(1)), but
- it is lawful to have sexual intercourse with the adult child of a de facto spouse, as the offence in section 44(2) only concerns the children of a de facto spouse who are aged under 18.

It is preferable that the offences apply in the same way to the children of a domestic partner and the children of a legal spouse.

An example of the potential application of the proposed exception is where a 50 year old man marries a 50 year old woman. At his wedding he meets, for the first time, the 30 year old daughter of his new wife. The daughter lives independently and is not under the care, supervision or authority of her new 'step-father'. After six months, the marriage hits difficulties and the two 50 year olds separate, though they are still legally married. After a few months, the 50 year old male and his 30 year old step-daughter enter into a consensual sexual relationship.

Currently under section 44(1), the step-father is committing the crime of incest. (The step-daughter would also commit an offence if the offence in section 44(3) is not repealed or is modified only to provide an exception for victims of child sexual abuse — see discussion below.) While it is unlikely that the police or the Director of Public Prosecutions would charge or prosecute him, it may be appropriate to structure the criminal law so that such cases do not fall within the incest offences.

The proposed exception would enable lawful sexual intercourse, in limited circumstances, between a person and the adult child or other lineal descendant of his or her domestic partner or spouse. The exception would recognise that in some situations step-parents have never played the role of parent.

This approach would reflect an understanding in criminal law, and amongst the community, that attaining 18 years of age is an indicator of independence and sexual autonomy. It would also reflect the potentially greater familial distance between a person and the adult children or lineal descendants of their spouse or domestic partner.

It is proposed that two safeguards be included in the exception. The first safeguard would specify that the person has not engaged in any sexual activity with the child or other lineal descendant of his or her spouse or domestic partner before that child or other lineal descendant turned 18. This would prevent perpetrators of child sexual abuse from taking advantage of this exception where the conduct continues after the victim/survivor turns 18.

The second safeguard would look at the nature of the relationship between the person and the adult child or other lineal descendant. It would specify that the accused has never exercised care, supervision or authority over the child or other lineal descendant of his or her spouse or domestic partner.

This second safeguard recognises that a person commonly exercises a parental (or grand-parental) role in relation to their step-child or step-grandchild. Where the person has been in a position of care, supervision or authority in relation to that child, it seems that the rationale for the prohibition of sexual intercourse in close familial relationships should still apply.

The exception would in effect introduce an age limit with regard to the children and other lineal descendants of legal spouses (18 years of age) that is not currently found in section 44(1). However, given the proposed limitations on the exception, this should not remove any protection provided to step-children.

If such an exception were included, the accused would bear the evidential burden of presenting or pointing to evidence of the exception, and the prosecution would bear the legal burden of disproving the exception beyond reasonable doubt.

Question 8	**Independent adult step-child exception**
Should an exception be available for the proposed offence of sexual intercourse with a step-child where the	

Question 8	Independent adult step-child exception

child or lineal descendant (B) of the accused's (A's) spouse or domestic partner is an adult?

If so, should such an exception apply where:

a) B is aged 18 years or older; and

b) A has not engaged in any sexual conduct with B before B turned 18; and

c) B has not at any time been under the care, supervision or authority of A.

If such an exception to section 44(2) were introduced, should a parallel exception be introduced into section 44(3) for the step-child in such a circumstance?

11.3.2 Should the offence of having sexual intercourse with a parent or step-parent be retained, repealed or restricted?

Incest offences substantially overlap with other sexual offences. One exception to this overlap is that the incest offence applies to consenting adults. The offence of rape covers non-consensual sexual intercourse between family members (of any age) and the offences of sexual intercourse with a child cover sexual intercourse between a family member and a child under the age of 18. In NSW, the incest offence only applies to sexual intercourse between family members who are over 16, with general criminal offences used to cover non-consensual incest, or incest involving a child.

However, in Victoria, the incest offences are primarily charged in cases of sexual intercourse with a child under the age of 18 by a family member. This is possibly because of the high maximum penalty that applies to the offence (25 years imprisonment), and the specific recognition given to the harm caused by a family member who abuses their position of care over a child.

In *R v Sposito* (Unreported, Full Court of the Supreme Court of Victoria, 8 June 1993) at 4 Marks J described the dynamics of parent-child incest offending:

> A society which fails to protect its children from sexual abuse by adults, particularly those entrusted with their care, is degenerate. The offence of incest is particularly erosive of human relations and casts doubt on the assumption that parents are natural trustees of the welfare of their children. It ought to be unnecessary to recount the morbid features of incest, the most prominent of which include the exploitation by the stronger will of the adult of the weaker will of the child, the physical and psychological subordination of the child to the perverted indulgences of the adult, the gross breach of trust placed in the offender by the victim and the community, and the irreparable fundamental damage to the victim.

Section 44(3) currently prohibits a person from taking part in an act of sexual penetration with that person's father, mother, lineal ancestor or step-father or step-mother. This offence applies only to persons aged 18 years and above. A defence is available if the person is compelled to take part in the act of sexual penetration.

There is no record of any charge for this offence, or its predecessors, in reported Victorian cases. However, the potential application of the offence gives rise to significant issues. The VLRC recommended the repeal of section 44(3), to ensure that victims/survivors of sexual abuse within a family are not seen as complicit in the act of penetration.

An adult victim/survivor who as a child under 18 was raped by a parent, step-parent or grandparent, or has been coerced or groomed into sexual intercourse, will have committed an offence under section 44(3) if he or she engages in further sexual intercourse with their abuser. This is because section 44(3) also applies to victims/survivors of childhood sexual abuse, where that abuse

continues into adulthood. The continuation of childhood abuse is a relatively common occurrence, observable in many reported cases of parent-child incest.

For many, the power and influence wielded by a parent, step-parent or lineal ancestor does not diminish, even in adulthood. This is particularly evident in cases of childhood sexual abuse where repeat offending against the child results in eventual compliance with the abuser and the continuation of sexual abuse into adulthood.

The defence under section 44(6) for a person who has been ‘compelled’ to have sexual intercourse with a family member may not work in relation to the particular exploitative power dynamics that can exist in families. Where the child has been habituated into engaging in sexual intercourse with the older family member, the sexual activity may appear to be ‘consensual’ and it is therefore difficult to argue that the now adult child has been ‘compelled’.

Even where a victim/survivor can rely upon the defence of compulsion, the stigma of a potential charge and trial for the incest offence in section 44(3) may be a significant deterrent to reporting incest to police. The VLRC noted the case of an adult woman with an intellectual disability. When notified by a concerned party that the complainant had been sexually abused by her father, the police responded that both the father and adult daughter were guilty of the offence of incest (*Sexual Offences: Interim Report* (2003) at 357-358).

There are three main options with regard to the offence under section 44(3): retention, restriction, or repeal.

An argument in support of the first option — retaining section 44(3) — is that the existence of the offence has a declaratory effect, by clearly prohibiting sexual intercourse between adults and their parents and lineal ancestors. This, it can be argued, sends a clear message to the community and gives effect to the basic moral taboo of sexual intercourse between a person and their parent. However, it would not address the issue of the stigma for the child or other issues raised by the VLRC.

The second option — restriction — would involve retaining the offence but narrowing its scope so that it is clear that an adult person who had been subjected to incestuous sexual abuse as a child would not commit an offence they were to engage in sexual intercourse with that abuser after they turned 18. This approach, in recognising the particular dynamics behind the great bulk of cases of such activity, would thus create an exception to the offence of incest for cases where A was sexually abused by his or her parent, step-parent or lineal ancestor before he or she was aged 18. This would also help to remove the existing offence’s stigma for the abuse victim in coming forward.

The third option — repeal of the offence in section 44(3) — would not alter the declaratory role of incest offences, as the parent, step-parent or lineal ancestor would remain prohibited from engaging in sexual intercourse with a child, step-child or lineal descendant. The allocation of criminal responsibility to the older family member is appropriate, and supported by the overwhelming pattern of incest offending by a parent against a child.

Were the offence under section 44(3) to be repealed, the offence of rape would be applicable in the rare circumstance where an adult child has sexual intercourse with a parent or lineal ancestor, without the consent of the parent or lineal ancestor, for instance, in cases of elder abuse. This would ensure that there is no ‘gap’ left by the repeal of section 44(3) for conduct that should be

criminalised. In such circumstances, the offence of rape provides a more appropriate penalty than that under section 44(3), which is punishable by a maximum of 5 years imprisonment.

Question 9	Repeal of the incest offence in section 44(3)
Should the offence in section 44(3) of the *Crimes Act* be: a) retained as it is, or b) made subject to an exception for an accused who was sexually abused by his or her parent, step-parent, or lineal ancestor before he or she was aged 18, or c) repealed, so that a person aged 18 or older who takes part in an act of sexual penetration with his or her parent, step-parent or lineal ancestor can no longer be charged with incest?	

11.4 Persistent sexual abuse of a child

11.4.1 Legislative history

Section 47A was originally inserted into the *Crimes Act* by the *Crimes (Sexual Offences) Act 1991*. The new provision was closely modelled on the Queensland offence of maintaining a sexual relationship with a child under section 228B of the Queensland *Criminal Code*. The Queensland provision had, in turn, been enacted in 1989 in response to the High Court's decision in *S v The Queen* (1989) 168 CLR 266, in which the High Court held that the limited particulars provided in that case in relation to alleged child sexual abuse over a period of time meant that the trial was unfair. The Queensland legislature's response was to create an offence which permitted a lower degree of specificity in the particulars of the offence in such cases.

In 1997 some amendments to Victoria's section 47A were made by the *Crimes (Amendment) Act 1997*. The offence was no longer restricted to children under the care, supervision or authority of the accused, and some changes were made to clarify the elements of the offence and some matters of proof.

The section 47A offence was originally called 'maintaining a sexual relationship with a child under 16'. That name was changed by the *Crimes (Sexual Offences) Act 2006* to 'persistent sexual abuse of child under the age of 16' in response to the VLRC's recommendation in its 2004 report (recommendation 192). The VLRC argued that it was 'inappropriate to describe child sexual abuse as a "sexual relationship"' (para 9.35). However, the elements of the section 47A offence were not changed.

11.4.2 Rationale for section 47A

The main rationale for creating the new offence in 1991 lay in the difficulty many victims/survivors of repeated child sexual abuse have in providing details as to the time, place and circumstances of the offences against them. Many also find it difficult to differentiate one instance of sexual abuse from another, especially where there have been dozens, even hundreds, of such instances.

The offending often becomes a blurred series of repeated incidents that can be very difficult to distinguish from one another. The evidence is accordingly often vague and general, taking such forms as 'He would usually come into my room after Mum was asleep …' or 'He touched me there almost every time we visited his house …' and the like. However, such vagueness is by no means necessarily a sign of uncertainty on the complainant's part that the offending occurred.

Nonetheless, this sort of vague and non-specific evidence can make it more difficult for the accused to formulate and present a defence. Traditionally, the criminal law has required a high degree of specificity in the charges and evidence against an accused. This is to provide the accused with a fair opportunity to answer the case against him or her.

However, because of the particular problems with memory and event differentiation commonly experienced by victims/survivors of repeated child sexual abuse, a high degree of specificity is often not achievable in such cases. To insist on the usual standard of particularity in the charges would mean that some genuine cases of persistent child sexual abuse would never be brought to trial.

The Full Court of the Western Australian Supreme Court, in *Podirsky v The Queen* (1990) 3 WAR 128 at 136, observed that:

> [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.

The problem was also noted in the New Zealand case of *R v Accused* [1993] 1 NZLR 385 at 387, in which the trial judge observed that:

> There is a degree of absurdity in holding that someone cannot be prosecuted because he is alleged to have offended often in the same way, whereas he might well be if he had offended only once or twice.

The key innovation of the introduction of section 47A in 1991 was that it aimed to re-set the balance more favourably toward complainants by allowing their less specific evidence to be sufficient to identify and prove a charge. The current version of section 47A(3) states:

> It is not necessary to prove an act referred to in subsection (2)(a) or (b) with the same degree of specificity as to date, time, place, circumstances or occasion as would be required if the accused were charged with an offence constituted by that act instead of an offence against subsection (1).

11.4.3 Problems with the current section 47A

There are two main difficulties with the current section 47A:

- the degree of specificity required for particulars is still too high for some complainants' evidence to meet, and
- evidence of multiple occasions of offending is not accepted as proof of specific acts.

Specificity of particulars

Section 47A(3) still requires *some* degree of specificity; it is simply that it is not as high as the usual standard. In *KRM v The Queen* (2001) 206 CLR 221 at 245-6, Gummow and Callinan JJ made it clear that section 47A(3) as amended in 1997 required 'some degree of specificity as to date, time, place, circumstances or occasions of each relevant act'.

What degree of specificity is needed is largely a matter for decision on a case-by-case basis. In *R v SLJ* (2010) 24 VR 372, the Court of Appeal rejected a complainant's evidence as inadequate because it largely consisted of general statements of what the accused 'would do' to her, as part of a routine of abuse, and did not isolate specific instances.

The need for 'sufficient detail' means, in practice, that charges in section 47A cases that go ahead are sometimes as specific as charges in ordinary child sex cases, as anything less specific may see the charge struck out.

It is not known how many complainants have their evidence rejected, either by police, prosecutors or judges, as being insufficiently particular for the purposes of a trial. Nonetheless, it can be assumed that there is a significant number of such cases and that in those cases the law has not been able to do justice to victims/survivors of long-term sexual abuse. Such failure to do justice is essentially due to the fact that the evidence was not in the same form as the evidence found in single episode offences, and is not necessarily due to there being any less certainty that repeated offending in fact took place.

Evidence of multiple occasions

In *REE v The Queen* [2010] VSCA 124, the Court of Appeal addressed the related problem of evidence of multiple offending being insufficient to prove a *specific* occasion because of its generality. Maxwell P stated at [22]:

> [I]t is not possible as a matter of law for generalised evidence of multiple occasions to supply proof beyond reasonable doubt of a specific occasion. That has been the law in Victoria for a decade and remains so. If the Director of Public Prosecutions wishes to contend that the law should change, that is an argument which can only be made in the High Court.

The fact that the law does not allow generalised evidence of multiple occasions to prove a specific occasion is largely a reflection of the fact that persistent sexual abuse of a child is conceived as being, at base, an offence consisting of a certain number of discrete occasions of offending. It is a 'compound' offence entirely reducible to discrete 'component' offences, and so if the evidence does not disclose a sufficient number of component offences or indeed any specific component offence, then there is no compound offence proved.

Again, this may mean that a prosecution cannot be brought despite the fact that a complainant is in no doubt as to there having been multiple instances of sexual abuse. Even cases where evidence would be accepted by most people as reliable and as showing beyond reasonable doubt that there had indeed been multiple instances of abuse (even if an unspecified number of instances) can not be charged (and prosecuted) because of a deficiency in particularity.

11.4.4 Proposed offence

It is proposed that the substance of the existing section 47A offence be maintained but to make the offence clearer and the structure consistent with that of other proposed sexual offences.

As detailed above, the offence in section 47A has been unable to overcome issues relating to the requirement for detailed particulars. However, the offence continues to be charged, and convictions are recorded. The offence remains useful as a vehicle for recognising persistent sexual abuse of a child, where there is sufficient evidence of the discrete incidents of sexual abuse.

It is clear that, given the limits on the use of section 47A outlined above, only marginal improvements are possible. A new approach to bring about a more fundamental change to the prosecution of continued sexual abuse of a child is discussed in Part 12.

Proposal 44	Persistent sexual abuse of a child

The proposed offence would specify that a person (A) commits an offence if:

a) A sexually abuses another person (B) on at least three occasions during a particular period; and

b) B is a child under the age of 16 years during the whole of that period.

The proposed maximum penalty for this offence is 25 years imprisonment (level 2).

11.4.5 A sexually abuses B

It is proposed that the conduct in this offence be described as 'sexual abuse', and 'sexual abuse' be defined to refer to the component sexual offences. The term 'sexual abuse' matches the name of the offence (as revised in 2006) and is a clear description of the conduct of committing multiple sexual offences against a child.

Proposal 45	Definition of 'sexual abuse'

The proposed offence would define 'sexual abuse' as occurring where a person engages in conduct with or in relation to another person that would make the first person guilty of an offence under the equivalents of subdivisions 8A, 8B or 8C.

The specific kinds of conduct that would count as 'sexual abuse' in this context would be the offences that would replace the offences currently in subdivisions 8A (rape and indecent assault), 8B (incest) and 8C (sexual offences against children) of the *Crimes Act*. These include rape, compelling sexual penetration, sexual assault, compelling sexual touching, assault with intent to rape, threat to rape, sexual act directed at another person, incest, sexual intercourse with a child under 12, sexual intercourse with a child under 16, sexual touching of a child under 16, and sexual activity in the presence of a child under 16.

This list leaves out child sexual offences involving children aged 16 or 17. Such offences are excluded because the offence of persistent child sexual abuse only concerns children under 16.

It is not proposed that the proposed offences of encouraging a child to engage in sexual conduct or grooming a child for sexual conduct be included in the definition of offences that amount to 'sexual abuse'. The encouraging and grooming offences cover preparatory conduct, whereas the offences in the definition of 'sexual abuse' all involve the commission of a substantive sexual offence against a child, such as penetration, touching or sexual acts in a child's presence.

11.4.6 At least three occasions

The proposed offence requires proof that the accused has committed sexual abuse against the complainant on at least three occasions. This is a clarification of the current text of section 47A, which refers first to proving *one* occasion of sexual abuse and then to proving at least *two others*.

11.4.7 B is a child under 16 during the period of abuse

The prosecution must prove that the complainant was aged under 16 during the period of alleged abuse. This element would be subject to absolute liability, meaning that the accused could not argue that he or she made an honest and reasonable mistake of fact that the child was over 16 years of age. However, any defence that was available for the component offences with respect to a mistaken belief that the child was over 16 would still apply.

11.4.8 No need to prove that the accused was not married to the complainant

Under the current section 47A offence, it is necessary to prove that the accused is not married to the complainant. This is not included in the proposed offence, because it is not necessary. As noted in Part 9 in relation to exceptions and defences to child sexual offences, a child under 16 cannot be legally married in Australia, or have a marriage from overseas recognised.

11.4.9 Exceptions and defences

The exceptions and defences applicable to the component offences would apply to this offence. This is probably implied by the current offence, but it is preferable to make it clear.

11.4.10 Maximum penalty and offence classification

The proposed offence of persistent sexual abuse of a child under 16 would retain the current maximum penalty of 25 years imprisonment. It would be indictable only.

11.4.11 Proving the offence

The proposal would replicate the current sections 47A(2A) and 47A(3), which provide that:

- it is not necessary that the alleged acts be of a similar nature or constitute an offence under the same provision, and
- it is not necessary to prove an act with the same degree of specificity as to date, time, place, circumstances or occasion as would be required if the accused were charged with an offence constituted by that act instead of the proposed offence of persistent sexual abuse of a child.

The fact that different combinations of component offences can form the basis of this offence is a point of distinction with the proposed multiple offences charge, discussed in Part 12. The multiple offences charge would require a course of conduct of the same *type* of act, for instance penile-vaginal penetration of a child.

Like the current section 47A(3), the proposed offence would require a lower level of specificity of particulars as to date, time, place, circumstances or occasion than if the accused were charged with an individual offence. However, as noted above, this would remain a high threshold.

11.4.12 Alternative verdicts

The proposal would replicate the existing section 47A(5) by providing that a jury may return alternative verdicts for the ‘sexual abuse’ offences if they find the accused not guilty of persistent sexual abuse of a child, and by preserving the operation of section 421 of the *Crimes Act*, which deals with alternative verdicts.

11.4.13 Consent of the Director of Public Prosecutions

The proposal would replicate the existing section 47A(7) by requiring the consent of the Director of Public Prosecutions (DPP) to a prosecution for this offence. Because of the unusual nature of the offence, it is appropriate that the DPP’s personal authorisation be given to each prosecution.

12 Multiple offences charge

12.1 Overview of proposals

As noted in Part 11, persistent sexual abuse of a child is one of the most serious forms of sexual offending. However, the offence of persistent sexual abuse of a child in section 47A, with its requirement for particulars in relation to three discrete occasions of sexual offending (albeit to a lesser standard of specificity), is not capable of responding to the common character of evidence given by a complainant in cases of repeated and systematic sexual abuse of a child.

It is proposed that a new form of charge be created to respond to the repeated and systematic sexual abuse of a child. The 'multiple offences charge' would enable a course of conduct of offending to be contained in a single charge on an indictment. This charge would require particulars of the 'course of conduct', but not details of specific incidents (dates, times etc). The proposed approach would change the rule against duplicity and the requirement to give particulars, but only in relation to the multiple offences charge.

The proposal, based on the approach in the United Kingdom, provides justice to the accused through ensuring a fair trial, and justice to the victims of repeated and systematic child sexual abuse, by providing new procedures that recognise and accommodate their particular difficulties.

12.1.1 Why is a new approach to systematic child sexual abuse needed?

It is not possible to quantify the degree of injustice wrought by the failure of the law to respond to repeated and systematic child sexual abuse. Innumerable cases will not proceed to trial, even where the evidence suggests a period of continuing sexual abuse, because the evidence does not disclose a high level of detail in relation to a single incident of offending (let alone the three required for a section 47A charge). Such cases may be abandoned during the police investigation, during the preparation of the case by the prosecution, or at a committal hearing at the direction of a magistrate.

To consider the extent of this problem, it is necessary to consider how repeated and systematic sexual abuse of a child is treated under current law. In *R v SLJ* (2010) 24 VR 372 at [15], the Court of Appeal noted the complainant's evidence:

> 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 went on to note (at [16] – [17]) the judge's direction, and state why the complainant's evidence, though describing an ongoing period of sexual abuse, was insufficient for proving an offence under section 47A:

> With respect, the critical question was not whether the evidence disclosed 'qualifying offences', that is, whether acts of the kind alleged would, if proved to have occurred, constitute one or more relevant sexual offences. Rather, the

> question was whether the evidence in question was capable of supporting a conclusion, beyond reasonable doubt, that the applicant had on an occasion – identified with 'some specificity' – done an act which constituted a relevant sexual offence.
>
> In our view – and as senior counsel for the Crown conceded – this evidence was not capable of supporting such a conclusion. 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.* [emphasis added]

In many trials involving repeated and systematic child sexual abuse, the presentation of the evidence of the whole of the period of abuse is distorted as it is sculpted around specific incidents of abuse which the complainant can recall in more detail, for instance, because the abuse occurred on the first day of school, or on his or her birthday. The problem with this is that it does not recognise the totality of the offending conduct, and can present a view of the accused's conduct that does not reflect its standard form. For instance, where the accused has sexually penetrated a child every couple of nights for a year, the child might only have detailed evidence about an incident of oral sex, because it was 'out of the ordinary'.

The treatment of ongoing sexual abuse of a child is not unique to Victoria. All Australian jurisdictions have offences similar in nature to section 47A. As noted by the Australian Law Reform Commission (ALRC) in its report *Family Violence: A National Legal Response* (2010), no jurisdiction has overcome the difficulties posed by the requirement for detailed particulars of the 'occasions' that make up offences for persistent sexual abuse of a child. The ALRC noted numerous studies and reviews in which the offences for persistent sexual abuse of a child were found to be difficult to prove and underutilised.

The courts have struggled with issues of evidence of repeated and systematic sexual abuse of a child for many years. The fundamental tension for the courts is the need to uphold the common law rule against duplicity and the requirement to provide the accused with detailed particulars of a charge, while dealing with generalised evidence alleging a course of conduct of offending. As the Full Court of the Western Australian Supreme Court in *Podirsky v The Queen* (1990) 3 WAR 128 highlighted at 136:

> It also carries with it a potential for injustice to the complainant and generally because one effect of the decision in *S v The Queen* is that notwithstanding clear and cogent evidence of a course of conduct involving repeated acts of sexual intercourse in the relevant period, any one of which could have caused conception, the Crown have found it impossible to identify any particular act with sufficient precision to enable any one offence to be charged. This means that unless the law is changed there 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. Some reform would seem desirable to cover cases where there is evidence of such a course of conduct.

12.1.2 Looking to general criminal law for answers

The targeted approaches of legal reforms concerning repeated and systematic sexual abuse of a child have not resulted in any significant improvement in the ability of the criminal law to respond to this conduct. However, solutions exist outside of specialised law on sexual offences.

What is distinctive about evidence of repeated and systematic sexual abuse of a child is that it may be less detailed at the level of 'incident' or 'occasion' but include a higher level of detail regarding the:

- regularity of offending
- location of offending
- type(s) of offending, and
- period of offending.

As evidenced in section 47A cases, this does not exclude the possibility that the complainant will recall detail about one or more discrete occasions of abuse, but this is not the focus of the allegation. The focus of the allegation is not the incident, but the course of conduct. To require the charge and evidence to meet the legal form required for a single offence ignores the nature of the allegation, and the different quality of evidence that may prove a course of conduct of offending.

A comparison in general criminal law is the approach of the common law to conducting a business of drug trafficking over a period of time (*Giretti v The Queen* (1986) 24 A Crim R 112). This approach recognises the value of considering the conduct as a whole, and its repetition and regularity, in proving a continuous offence, namely that a person was operating a drug trafficking business. In this situation a number of specific offences of drug trafficking can be considered as constituting the one offence of drug trafficking which is understood as constituting the operation of a business.

There are other situations in which an offence may be regarded as a 'continuous offence' or a course of conduct that constitutes a single offence. For instance, harassing a person using a telephone may involve a number of acts (phone calls) before they reach the point of constituting harassment (see *R v Staker* [2011] SASCFC 87). The variety of ways in which a continuing offence, or a course of conduct, are already recognised as part of the way in which certain offences may be proved supports the view that the proposed new approach of a multiple offences charge does not involve a significant change from existing practices.

When proving repeated and systematic sexual abuse of a child, the fact of one or more distinct occasions should be less relevant than the jury being satisfied beyond reasonable doubt that the offending involved a course of conduct over a specified period. For instance, the jury may not be satisfied beyond reasonable doubt that a child was abused on Friday 17 August 2011, but may be satisfied beyond reasonable doubt that the child was abused by the accused at his mother's house on most Fridays from January to November 2012.

It is proposed that there be a fresh approach to tackling multiple offending of this type. This fresh approach would allow the DPP to file a charge that alleges multiple occasions of offending of the same type, without having to identify distinct occasions or an exact number of occasions. This approach tackles the issue as a problem for general criminal procedure rather than for substantive criminal offences.

12.1.3 Key features of a multiple offences charge

The proposed new form of charge would be titled the 'multiple offences charge'. The multiple offences charge would:

- create an exception to the rule against duplicity, by permitting the prosecution to include more than one of the same kind of offence in a single charge

- require the prosecution to prove a 'course of conduct' of offending, rather than multiple discrete incidents of offending (as is required by section 47A), and
- change the requirement for particulars that the prosecution must provide to the accused.

The general procedural approach of the proposed multiple offences charge exists in the United Kingdom and a variation of this approach is used in New Zealand. Neither of these jurisdictions has an offence matching Victoria's section 47A offence of persistent abuse of a child.

The proposed approach has been developed taking into account key issues for the accused in this area, including:

- forensic disadvantage, and
- disadvantage arising from the proposed amendment to the rules on duplicity and required particulars.

The proposed multiple offences charge is a measured and appropriate response to the failure of the law to respond to persistent sexual abuse of a child, without resulting in undue disadvantage to the accused.

The key components of the proposed multiple offences charge are that:

- it would apply to any offence where the prosecution can prove a course of conduct
- it would mainstream sexual offence prosecutions rather than treating this as a special process for sexual offences against children
- special provision would be made for certain specific issues concerning sexual offences
- it would focus on the key problems of duplicity and particulars that prevent the criminal justice system from responding effectively to:
  - repeated acts of sexual abuse
  - high volume offences
- the requirement that the prosecution prove a course of conduct would provide an appropriate counterbalance to changing the level of particulars that the prosecution must provide of specific incidents of an offence
- the change would match the problem — a course of conduct can be more readily proved where it involves systematic and/or repeated commission of a number of offences, which is also the situation in which particulars as to specific incidents of an offence can be most difficult for a complainant to provide
- it would limit the use of the offence to allegations of offences on more than one occasion so that it is not used for multiple specific offences on the one occasion, and
- it would provide a mechanism for dealing with certain types of 'mixed pleas' of guilty and not guilty.

12.1.4 General application of proposal

The proposed multiple offences charge would have a general application rather than being restricted to cases of child sexual abuse. This is also the approach of the United Kingdom's (UK's) multiple offences charge.

In circumstances other than child sexual abuse, it is desirable for there to be a capacity to file a multiple offences charge.

For example, there can be cases of systematic computer-based fraud in which the particular acts of appropriation number in the hundreds. Where there is nothing to differentiate the kind of offending in such cases (other than, for example, times and account numbers), it can be highly artificial and very impractical for the indictment to treat each act as a separate charge.

In such cases, the multiple offences charge would provide a procedural vehicle that acknowledges the repeated nature of the offending without undue complication.

While a multiple offences charge could be used for different offences, the following discussion focuses primarily on how it could be used for child sexual offences. This is because it would often be used for those types of offences rather than other types of offences and would address a fundamental problem that exists with child sexual offences.

12.1.5 Multiple offences charge limitations

The proposed multiple offences charge has its own inherent limitations and will not be applicable in all cases of child sexual abuse.

The minimum number of incidents of an offence would substantially determine whether there is a course of conduct. For instance, although a course of conduct can be found in as little as two occasions, it is less likely that a course of conduct will be found where there are only two or three incidents over a one year period, because a ‘course of conduct’ involves continuing or ‘regular’ conduct. If the prosecution used a multiple offences charge in this situation, it may not be able to prove a course of conduct. However, with only two or three incidents, the complainant is unlikely to have a problem in specifically identifying each incident.

Conversely, the more incidents there are, the greater the likelihood of there being a course of conduct. Where there are multiple incidents, the complainant is less likely to be able to remember the specifics of individual instances.

Where an accused is alleged to have committed many different forms of child sexual offences, he or she may not have committed a ‘course of conduct’ of each type of abuse. In such cases, it is more likely that single offences, or the section 47A offence of persistent sexual abuse of a child, would be charged.

These limitations reflect the role of the proposed multiple offences charge in limited scenarios of repeated and systematic offending.

12.1.6 Other forms of charges in Victoria

Victorian law already uses ‘rolled-up charges’ and ‘representative charges’ for specific purposes. These terms are explained in a note to section 9(4A) of the *Sentencing Act*. The note provides as follows:

> A representative charge is a charge in an indictment for an offence that is representative of a number of offences of the same type alleged to have been committed by the accused. A rolled-up charge is a charge in an indictment that alleges that the accused has committed more than one offence of the same type between specified dates.

Representative charges and rolled-up charges are recognised at common law as types of charges that can be used in certain circumstances. In particular they can only be used where the accused pleads guilty. They cannot be used in a trial. It is not proposed that any change be made to these existing charging practices.

12.1.7 Approach to the multiple offences charge in the United Kingdom

The proposed multiple offences charge is very similar to that adopted in the UK in 2007. The UK's multiple offences charge is set out in Rule 14.2 of the Criminal Procedure Rules 2010 (UK).

> **Form and content of indictment**
>
> **14.2.**—
>
> (1) An indictment must be in one of the forms set out in the Practice Direction and must contain, in a paragraph called a 'count'—
>
> (a) a statement of the offence charged that—
>
> (i) describes the offence in ordinary language, and
>
> (ii) identifies any legislation that creates it; and
>
> (b) such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant.
>
> (2) More than one incident of the commission of the offence may be included in a count if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission.
>
> (3) An indictment may contain more than one count if all the offences charged—
>
> (a) are founded on the same facts; or
>
> (b) form or are a part of a series of offences of the same or a similar character.
>
> (4) The counts must be numbered consecutively.
>
> (5) An indictment may contain—
>
> (a) any count charging substantially the same offence as one—
>
> (i) specified in the notice of the offence or offences for which the defendant was sent for trial,
>
> (ii) on which the defendant was committed for trial, or
>
> (iii) specified in the notice of transfer given by the prosecutor; and
>
> (b) any other count based on the prosecution evidence already served which the Crown Court may try.

The Explanatory Memorandum to the amendment creating the multiple offences charge provided the following information about the policy behind the reform (at paragraph 7.6):

> The Criminal Procedure Rule Committee consulted widely on these rules between March and June 2006. It invited comments from participants in the criminal justice system including the various professional bodies involved. It considered the compatibility of its proposals with Article 6 of the European Convention on Human Rights and took account of the corresponding rules in Scotland. It took advice from leading counsel. New rule 14.2(2) of the Criminal Procedure Rules 2005 recasts what is often called the "rule against duplicity". The new rule allows a prosecutor in certain circumstances to bring a single charge against a defendant even though that includes more than one incident of the offence alleged – for example, where the defendant has laundered the proceeds of drug trafficking in comparatively small weekly sums for week after week, or has assaulted the same victim in the same way repeatedly over a period of time. The Committee took account among other things of the potential under the old rules for a perceived unfairness to a victim of multiple offending where out of many alleged offences only a few are prosecuted as

examples, giving the impression that the victim's distress has been underestimated or that he or she has not been believed. The Committee was satisfied that the new rule reflects what judgments of the House of Lords in the past have found consistent with fundamental principles of fairness.

In addition, the Consolidated Criminal Practice Direction (issued by the Lord Chief Justice of England and Wales) provides the following direction concerning rule 14.2(2):

Multiple offending: count charging more than one indictment

IV.34.10 Rule 14.2(2) of the Criminal Procedure Rules allows a single count to allege more than one incident of the commission of an offence in certain circumstances. Each incident must be of the same offence. The circumstances in which such a count may be appropriate include, but are not limited to, the following:
(a) the victim on each occasion was the same, or there was no identifiable individual victim as, for example, in a case of the unlawful importation of controlled drugs or of money laundering;
(b) the alleged incidents involved a marked degree of repetition in the method employed or in their location, or both;
(c) the alleged incidents took place over a clearly defined period, typically (but not necessarily) no more than about a year;
(d) in any event, the defence is such as to apply to every alleged incident without differentiation. Where what is in issue differs between different incidents, a single "multiple incidents" count will not be appropriate, though it may be appropriate to use two or more such counts according to the circumstances and to the issues raised by the defence.

….

IV.34.13 In some cases, such as money laundering or theft, there will be documented evidence of individual incidents but the sheer number of these will make it desirable to cover them in a single count. Where the indictment contains a count alleging multiple incidents of the commission of such offences, and during the course of the trial it becomes clear that the jury may bring in a verdict in relation to a lesser amount than that alleged by the prosecution, it will normally be desirable to direct the jury that they should return a partial verdict with reference to that lesser amount.

IV.34.14 In other cases, such as sexual or physical abuse, a complainant may be in a position only to give evidence of a series of similar incidents without being able to specify when or the precise circumstances in which they occurred. In these cases, a 'multiple incidents' count may be desirable. If on the other hand, the complainant is able to identify particular incidents of the offence by reference to a date or other specific event, but alleges that in addition there were other incidents which the complainant is unable to specify, then it may be desirable to include separate counts for the identified incidents and a 'multiple incidents' count or counts alleging that incidents of the same offence occurred 'many' times. Using a 'multiple incidents' count may be an appropriate alternative to using 'specimen' counts in some cases where repeated sexual or physical abuse is alleged. The choice of count will depend on the particular circumstances of the case and should be determined

bearing in mind the implications for sentencing set out in *R v Canavan; R v Kidd; R v Shaw* [1998] 1 Cr App R 79.

12.2 Multiple offences charge proposal

If the proposed multiple offences charge proceeds, the law on the new charge will be particularly relevant to Part 5.2 and Schedule 1 of the *Criminal Procedure Act 2009*. These parts of the *Criminal Procedure Act* contain the statute law on indictments and charges in Victoria. As there are a number of components to this proposal, each paragraph has been numbered for ease of reference.

Proposal 46 Multiple offences charge

The proposed provisions to enable a multiple offences charge would specify as follows:

1. Multiple offences charge

The proposed **multiple offences charge** would be a charge that alleges more than one incident of an offence, where:

a) each incident of the offence is an offence under the same provision or law;

b) the offences take place over a clearly defined period of time;

c) the offences take place on more than one occasion; and

d) the incidents of an offence taken together amount to a course of conduct, having regard to their time, place or purpose of commission and any other relevant matter.

2. Using a multiple offences charge for a sexual offence

Where a **multiple offences charge** is:

a) for an offence against the person or a sexual offence, each incident of an offence must concern the same victim or complainant;

b) for a sexual offence where an element of the offence involves sexual intercourse, or sexual penetration, then the type of sexual intercourse or sexual penetration alleged must be the same.

3. Exceptions and defences

All of the defences and exceptions that would apply to an individual offence also apply when an offence is one of multiple offences alleged in the one charge in accordance with *[paragraph 1 above]*.

4. Proving the offence

For the avoidance of doubt, in proving a charge that contains more than one incident of an offence, the prosecution:

a) must prove the course of conduct beyond reasonable doubt; and

b) does not have to prove any of the following:

   i an exact number of incidents of an offence, or the times, dates, places or circumstances of those incidents of an offence;

   ii that there were distinctive features differentiating any of the incidents of the offence charged; or

   iii the general circumstances of any incident of an offence which forms part of the offences charged.

5. Particulars required

The particulars necessary to give reasonable information of the nature of the multiple offences charge, including the course of conduct alleged and any act, matter or thing alleged as the foundation of the charge:

a) must be determined having regard to the nature of a multiple offences charge and the limitations on the circumstances in which it may be used as provided in *[paragraphs 1 and 2]*;

b) do not include particulars of any of the specific incidents of an offence which form part of the multiple offences charge; and

c) do not include the times, dates, places or purpose of commission and other details that would be necessary in the case of a single offence charge to distinguish one charge from another charge.

6. Charges and alternatives

For the purposes of sections 193 and 194 of the *Criminal Procedure Act 2009*, a multiple offences charge is to be treated as a single charge.

For the purposes of section 220 of the *Criminal Procedure Act 2009*, a plea of previous acquittal or previous conviction applies to a single offence under the same provision or law that is alleged to have been

Proposal 46 Multiple offences charge

committed:

a) within the period to which the multiple offences charge applies; and

b) where the offence involves sexual penetration or sexual intercourse, the charge alleges the same type of sexual penetration or sexual intercourse as was alleged in the multiple offences charge;

unless the single offence is alleged as an alternative offence in the same indictment as the multiple offences charge and the accused is acquitted on the multiple offences charge.

7. Sentencing

When sentencing a person for a multiple offences charge:

a) the court must impose a sentence reflecting the totality of the offending that constitutes the course of conduct; and

b) the sentence imposed for the multiple offences charge must not exceed the maximum penalty applicable to the same offence when charged as a single offence.

8. Approval of the Director of Public Prosecutions

A prosecution for a multiple offences charge must not be commenced without the consent of the Director of Public Prosecutions.

9. Abolish common law

Any rule of law to the contrary of these paragraphs is abolished.

The proposed provisions would also involve amendments to Schedule 1 of the *Criminal Procedure Act 2009*. The significant proposed changes would be as follows:

10. Statement of particulars — multiple offences charge

In determining the particulars that are necessary to give reasonable information as to the nature of the course of conduct alleged in a multiple offences charge, regard must be had to the nature of the allegation, including:

a) that the offences are alleged to constitute a course of conduct over a period of time; and

b) that the usual information about particulars concerning dates and other details of the individual offences is not necessary to understand such an allegation, offence or charge.

11. Joinder of charges

a) A charge-sheet or an indictment that contains a multiple offences charge may also include a charge for an alternative offence where the alternative offence alleges a specific incident of the same offence that is charged in the multiple offences charge.

b) An indictment must not contain a multiple offences charge and a charge of persistent sexual abuse of a child under the age of 16, contrary to section 47A of the *Crimes Act 1958.*

12.2.1 Paragraph 1 — multiple offences charge

It is proposed that the term ‘multiple offences charge’ be used to describe the new form of charge. This accurately describes the nature of the charge and is distinguishable from representative charges and rolled-up charges.

It is proposed that a multiple offences charge be defined by outlining the specific circumstances in which such a charge may be used. Of particular relevance is the limitation in paragraph 1(a) of the use of the multiple offences charge to the one *type* of offence. This sets the multiple offences charge apart from the offence in section 47A. Paragraph 1(b) requires that the offences take place over a clearly defined period of time. This is consistent with the way in which charges are currently framed for some individual sexual offences against a child (where the exact date is unclear), and for section 47A.

The proposed paragraph 1(c) ensures that the charge is not used for multiple acts on the one occasion, reflecting the decision of the Court of Appeal in *Tognolini v The Queen* [2011] VSCA 113

in relation to the offence of persistent sexual abuse of a child, and the underpinning policy for the multiple offences charge. As the Court of Appeal stated at [3] and [4]:

> As will appear, the Crown case was put in two ways, the second of which was that the applicant had committed a relevant act on each of three "occasions" in the course of a single evening. On the complainant's evidence, the three individual sexual acts had all occurred during one period of sexual activity in the course of that evening.
>
> For reasons which follow, we have concluded that the circumstances in which those acts occurred could not in law have satisfied the requirement in s 47A that there be three separate occasions. Where two (or more) acts occur, it will not be open as a matter of law to conclude that they occurred on separate "occasions" unless there is a clear separation in time or circumstance between the acts.

The jury would need to be satisfied that over a certain time period the accused sexually abused the complainant on repeated occasions. Citing *KBT v The Queen* (1997) 191 CLR 417, the Court of Appeal in *R v SLJ* [2010] VSCA 16 stated (at [8]) that:

> It is well established that evidence of 'a general course of sexual misconduct' or of 'a general pattern of sexual misbehaviour' is not, or not necessarily, evidence of 'an act ... which would constitute an offence' for the purposes of s 47A.

The evidence in that case included numerous statements by the complainant of what the accused 'would' do to her (as part of alleged repeated offending). The Court of Appeal said (at [17]) that this sort of evidence was not capable of supporting a conclusion that the accused had done an act which constituted a relevant sexual offence, because:

> [a]s 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. [emphasis added]

Such distinguishing features are necessary under the current law. This was confirmed by the Court of Appeal in *REE v The Queen* [2010] VSCA 124, when Maxwell P stated 'it is not possible as a matter of law for generalised evidence of multiple occasions to supply proof beyond reasonable doubt of a specific occasion' (at [22]).

The proposal grasps this nettle and re-conceives proof of multiple offences in a single charge as a general course of conduct offence rather than as a number of discrete acts. As such, the multiple offences could in some cases be proved by 'generalised evidence of multiple occasions', for example, in the form of evidence of what would typically or routinely occur. Of course, not all such evidence would necessarily be persuasive, but the form of such evidence would not be problematic.

The approach here is to invite the jury to draw the single inference from the evidence that there was a course of conduct involving repeated instances of abuse, rather than to make numerous findings of specific instances of abuse and cumulate those findings up to a set number, at which point the jury may find the composite offence proved. The jury may infer from the evidence that there was a sustained practice of abuse or a course of conduct over and above specific instances of abuse.

The proposed paragraph 1(d) identifies time, place and purpose of commission as relevant considerations in determining whether incidents amount to a 'course of conduct'.

- Time — time may be relevant where there is regularity in the alleged offending (e.g. the offences occurred every week, every month, or at night when mum went on night shift). If there is a large gap in time between offending, it would be difficult to conclude there was a course of conduct. It may be that there are two episodes of offending separated by a 12 month gap.
- Place — there will usually be a regular place where these offences occur, such as in the one house, the same room (e.g. child's bedroom), or in the back room at the church. Where offences occur in many different places, this will not preclude there being a course of conduct, as the course of conduct may be completely opportunistic. In such circumstances, a higher degree of regularity may be more important in establishing a course of conduct.
- Purpose of commission — for sexual offences this will nearly always be the same, being sexual gratification and/or exercising power over the victim.

Paragraph 1(d) also includes 'any other relevant matter' as a consideration. This allows for flexibility in what material may be relevant to whether offending amounts to a 'course of conduct', so that the court may include, for instance, evidence of similarity in the method employed in offending, or evidence of attempts to stop the child from complaining (e.g. by using threats, bribes or other forms of pressure or manipulation).

12.2.2 Paragraph 2 — using a multiple offences charge for a sexual offence or an offence against the person

It is proposed that specific considerations be set out that apply to the use of a multiple offences charge for offences against the person or sexual offences.

This would require that where a multiple offences charge is used for an offence against the person or a sexual offence, then the charge must relate to incidents involving the same victim or complainant. This is necessary to avoid complexity involved in including different complainants and, for instance, a charge that the accused engaged in a course of conduct involving one offence against multiple children in his scout group or swimming club or assaults against a number of different people on different days.

This limitation is not relevant to other offences such as multiple offences of obtaining a financial advantage by deception where there may be a number of different victims and the course of conduct is apparent from the nature of the deception and the method of obtaining the financial advantage.

Paragraph 2(b) relates only to sexual offences, and would require that where the offences alleged involve sexual intercourse, then the same type of intercourse must be alleged within the multiple offences charge – for instance 'vaginal penetration by a penis'. This level of particularity remains important so that the accused is able to conduct their defence and, if the accused is convicted, the judge has sufficient details to be able to sentence the offender. This particularity also assists in identifying the offence of which the accused was acquitted or convicted for the purposes of a plea of previous acquittal or conviction.

This is consistent with existing practice concerning individual charges where different types of penetration would be charged separately. Connected with this proposal, it would be necessary for the legislation to specifically incorporate the current definitions of sexual intercourse (e.g. sexual penetration) to ensure that this method of charging can be used in relation to older forms of offences.

12.2.3 Paragraph 3 — exceptions and defences

It is proposed that the exceptions or defences available for an offence charged as a single offence be clearly available as exceptions or defences to the same offence when charged as a multiple offences charge.

12.2.4 Paragraph 4 — proving the offence

A significant aspect of the proposal is the requirement on the prosecution to prove a 'course of conduct' of offending, and how this affects what the prosecution is required to prove.

The proposed paragraph 4 would make explicit that the prosecution must prove the 'course of conduct' beyond reasonable doubt when proving a multiple offences charge. Although not an 'element' of the offences themselves, proving the course of conduct effectively provides a method by which the prosecution proves that the accused committed multiple offences, without requiring the prosecution to prove discrete offending 'occasions'.

The jury *would not* need to be satisfied about the specific number of occasions and the repeated occasions need not be specified in terms of time, place or exact circumstances. This is an explicit amendment to the requirement for particulars at common law, outlined above.

The prosecution *would not* have to prove an exact number of 'incidents' of an offence, or the times, dates, places or circumstances of those 'incidents'. This reflects that the focus with a multiple offences charge is on proving the course of conduct rather than that there were three (or more) separate offences, as required under section 47A.

The prosecution *would* have to prove that there was a course of conduct of offending. The jury, however, would not need to be satisfied of the particular details of the time, place and exact circumstances of the instances of offending. This is reasonable where the evidence supports the inference that there have been a number of occasions of offending.

The prosecution *would not* have to prove 'distinctive' features differentiating the incidents. One of the difficulties for complainants in cases of repeated sexual abuse can be distinguishing one instance of sexual abuse from another. Often, because of the repeated nature of the offending, there may be very little at all differentiating one instance from another.

Currently in such situations, the prosecution may need to focus on those instances which are more distinctive (e.g. when the accused is alleged to have used an object to sexually penetrate the complainant, in contrast to his usual practice of digital penetration) even though they may not be representative or the most significant instances of abuse. It is simply that they can more readily be identified as *different* from other instances. This kind of selection of distinctive but not necessarily the most important instances from the complainant's evidence in order to fit the legislative requirements can have the effect of distorting the evidence that the complainant might more naturally give and that might in fact be a better representation of his or her experience.

The proposed change makes clear that in such a situation the prosecution does *not* need to identify distinctive features of the different offences. Indeed, there need be nothing distinctive to differentiate the occasions. Thus, they may all involve the same kind of sexual offending (e.g. sexual touching), in the same room (e.g. the complainant's bedroom), at the same time of day (e.g. late afternoon), in the same circumstances (e.g. after the complainant got home from school but before her mother got

home from work). There should be no need to focus on an unusual occasion (e.g. when the complainant was on holiday or the day she got a new puppy) just because such an occasion 'stands out' from the others (but is no more certain to have occurred because of that).

The proposal would provide that the prosecution *does not* have to prove the general circumstances of any incident of an offence that is part of the offences charged, since it is not an accumulation of proved individual instances that is required under this approach. The proposal specifically picks up language used by McHugh J in *KRM v The Queen* (2001) 206 CLR 221 (at 227) when he said that:

> the prosecution does not have to prove the date or the *exact* circumstances of the offence. But that is all. [The legislature] has not said that the prosecution need not give particulars *or need not prove the general circumstances of each act constituting an offence. …* [T]he prosecution must prove the circumstances or the occurrences surrounding each of the acts in sufficient detail to identify each 'occasion'. … [emphasis added]

It is necessary to explicitly state that it is precisely this kind of limitation placed on the current section 47A offence that the proposed multiple offences charge approach is seeking to overcome.

12.2.5 Paragraphs 5 and 10 — particulars required

A further significant feature of the proposed multiple offences charge is the explicit changes to the requirement that the prosecution provide the accused with the particulars necessary to give reasonable information of the nature of the offences charged (as required by the *Criminal Procedure Act*, Schedule 1, clause 1).

It is important not to assume that 'particulars' amount to the same sort of thing whenever they are required or provided. The particulars of a charge are the details of the material facts that constitute the offending with which the accused is charged. What amounts to adequate particulars will, then, depend very much on the nature of the alleged offending. This means that particulars will not necessarily always be a matter of the details of individual discrete actions, occurring at more or less specific times and at more or less specific places, and involving specific physical movements by the accused. Where the offence charged is a single offence, then this may well be the case. But where the essence of the offending is that it was a course of conduct, it need not be so.

A course of conduct is not simply the accumulation of repeated instances up to a certain number. Rather, the particular actions that make up a course of conduct must have a similarity and connectedness that constitute, when taken together, a single course of conduct.

The particular details of time and place of the individual actions do not therefore play as important a role as they do in single instance offences. This does not mean that there is less to prove for a course of conduct offence. On the contrary, the prosecution needs to be able to prove that there was the kind of similarity or commonality in the various instances that create a course of conduct.

The proposed paragraph 5 links the issue of particulars with the issue of proof of a course of conduct. This would apply to both the charge itself and to the course of conduct alleged.

This paragraph is designed to assist in explaining that the requirement for particulars is different with this kind of charge. As discussed above, changing the law concerning duplicity and particulars is a central component of the proposed approach. This charge will be primarily relevant in relation to

an application for further particulars. It is necessary to change the normal requirements for particulars for this kind of charge to work.

In *Johnson v Miller* (1937) 59 CLR 467, the High Court discussed the notion of a 'latent ambiguity' in a charge. This describes where the prosecution cannot identify the one transaction out of a number on which it relies. This is important with a charge that relies on proof of a single incident and it is unclear which incident the prosecution relies upon. However, here the prosecution aims to prove a course of conduct, comprised of a number of incidents. What matters is whether the prosecution can prove a course of conduct rather than whether the prosecution can prove every incident alleged to form part of the course of conduct.

Part of this alternative process for charging an offence is that if the prosecution proves that the offences occurred on multiple occasions as part of a course of conduct, this changes the importance of precise details concerning each of the specific offences which comprise the course of conduct. For instance, suppose the complainant says that the accused sexually penetrated her every week for three months. If there is doubt about the first incident, when the alleged offending commenced, this doubt is not fatal to establishing a course of conduct over that period. However, this doubt would be fatal to an offence alleging the single incident.

The proposal must be read in conjunction with clauses 1 and 2 of Schedule 1 to the *Criminal Procedure Act* which set out requirements for particulars in a charge-sheet or an indictment. The proposal would apply to particulars as to the nature of the charge, the course of conduct and the more detailed level of particulars (any act, matter or thing alleged as the foundation of the charge) to which an accused is entitled.

Paragraph 5(a) provides that the particulars must be understood in the context of the limitations of the charge itself, that is, that the charge may only be used in limited circumstances.

Paragraph 5(c) provides that it is not necessary to provide times, dates, places or purpose of commission and other details that would be necessary in the case of a single offence charge to distinguish one charge from another charge. This reflects the fact that the same kind of particulars are not able to be given for this kind of charge, and the same kind of particulars are not required to answer such a charge. This also links back directly to the words used in paragraph 1(d), that is, the particulars are linked to when a multiple offences charge may be used.

The limitation of the particulars necessary 'to distinguish one charge from another charge' is connected to the idea that it is the lack of particulars that makes each incident alleged indistinguishable from a complainant's perspective.

12.2.6 Paragraph 6 — charges and alternatives

The proposed paragraph 6 provides that a multiple offences charge is to be treated as a single charge for the purposes of sections 193 and 194 of the *Criminal Procedure Act*, which deal with severance of multiple charges on an indictment.

It also provides that if a multiple offences charge is alleged, a single charge for the same offence within the same period may be included in the indictment as an alternative charge. However, in no other circumstances can such a single charge be alleged.

In *S v The Queen*, Dawson J noted the concerns that require a charge to be identified with sufficient particularity (at 276):

> [T]he law requires that there be certainty as to the particular offence of which an accused is charged, if for no other reason than that he should, if charged with the same offence a second time, be able to plead autrefois convict or autrefois acquit.

This proposal specifically addresses this concern by ensuring the accused can raise a plea of autrefois convict or autrefois acquit where they are charged under the multiple offences charge, but they have previously been convicted or acquitted of a single incident of the specified offence against the same victim during the time period alleged in the multiple offences charge.

Where the conduct alleged is a specified form of sexual penetration or sexual intercourse, this specificity must be reflected in what constitutes a previous conviction or acquittal.

12.2.7 Paragraph 7 — sentencing

A key aspect of the proposed multiple offences charge is that it would not involve any change to the maximum penalty for an offence that forms the basis of the multiple offences charge. For instance, if the base offence is punishable by a maximum of 10 years imprisonment, this would remain the maximum penalty for the multiple offences charge. This is in contrast to section 47A, which fixes a maximum penalty of 25 years, irrespective of the types of the three offences alleged.

However, the proposal would require that the court sentence differently for a multiple offences charge, by providing that the court must impose a sentence reflecting the totality of the offending that constitutes the course of conduct.

This effectively means that the court must sentence within the maximum penalty for the base offence, but reflecting the totality of the conduct. This would normally result in a separate, higher, sentencing range for multiple offences charges for that particular offence. This would reflect the fact that the accused has been convicted of a ‘course of conduct’ of that type of offence, not a single incident.

This is very similar to the way in which the court currently sentences for a ‘rolled-up’ charge. As such, it would not involve a significant change of practice for the sentencing judge. A judge may not reach a conclusion as to a specific number of offences, though findings as to the frequency of offences as part of a course of conduct are likely to be a regular feature of multiple offences charges.

In *R v Jones* [2004] VSCA 68, the Court of Appeal discussed and approved the use of rolled-up counts. Following that case, it is clear that when sentencing an offender for a rolled-up count:

- the court may impose a sentence reflecting the totality of the offending particularised in the rolled-up count, and
- the sentence imposed for the rolled-up count must not exceed the maximum penalty available for that offence.

12.2.8 Paragraph 8 — approval of the Director of Public Prosecutions

There are a number of situations in which a prosecution may only be commenced with the approval of the DPP. These situations involve important policy considerations. For instance, the offence of

persistent sexual abuse of a child must be authorised by the DPP. This reflects the unusual nature of the charge and the need for the highest prosecuting authority to consider the matter before determining whether it is appropriate to commence criminal proceedings.

The DPP's authority is also required in other situations with some variations (e.g. for charging a conspiracy offence, or filing a charge after the expiry of the relevant time period for filing a charge in relation to certain summary offences).

12.2.9 Paragraph 9 — abolish common law

While the above changes may by necessary implication modify the rule against duplicity and laws concerning particulars, it is important that any change to important common law rights and duties be expressly provided for in the legislation.

It would therefore be necessary to expressly abolish any rule or law contrary to the proposed reforms to the extent necessary to ensure the effectiveness of the proposed reforms.

12.2.10 Paragraph 11 — joinder of charges

The proposal contains a new clause prohibiting the joining in the one indictment of a multiple offences charge and a section 47A persistent sexual abuse charge. The combination of these charges would be too complex for a jury and too complex for the trial judge to direct a jury. Further, given that they both provide different mechanisms to address similar problems, the prosecution should elect to use one mechanism or another. To permit a trial to proceed where it contained both kinds of charges would be oppressive to the accused.

It is not necessary to specify this prohibition for summary matters even though a summary charge for a course of conduct offence may concern an indictable offence that may be heard summarily. Because persistent sexual abuse has a maximum penalty of 25 years imprisonment, it is not capable of being heard and determined summarily.

12.3 Reasoning by inference

The proposed approach rests on the idea that, in at least some cases, the instances of offending may be inferred from the accepted evidence rather than being directly and individually attested to by the evidence. This is a method of proving a criminal offence used where direct evidence may not be available.

The jury would reason in the following way when considering a multiple offences charge for repeated and systematic child sex offending:

- The complainant gave evidence that, when she was in Grade 5 or 6, the accused, her Mum's boyfriend, would have sexual intercourse with her, in one or more of the bedrooms at home, when her Mum was out at work or shopping, most days either before and after school, and that this went on for a couple of months.
- We accept beyond reasonable doubt that the complainant's evidence is truthful and reliable, even though she could not give details as to specific instances and was not sure of the time of the day, or where her mother was, or in which room the acts took place.
- It is implicit in the content of the evidence that the accused engaged in a course of conduct of having sexual intercourse on a number of occasions with the complainant, since if such an act took place most school days for a couple of months, this follows as a matter of arithmetic.

- We therefore conclude beyond reasonable doubt that the accused engaged in a course of conduct involving repeated instances of the offence of sexual intercourse with a child under 16, though we cannot say on which day or exactly at what time those instances occurred, or exactly what took place on any given day other than sexual intercourse.

There is nothing unusual in a fact-finder drawing such deductive inferences from evidence, provided that the evidence is accepted and that the inference is genuinely a logical inference from that evidence. Many facts in criminal cases are proved by inference rather than direct evidence.

This is not a case of tendency reasoning (i.e. reasoning along the lines of 'because he has done things like this before, he has a tendency to do this sort of thing, and so this makes it more likely that he did it again this time as well'). Instead, it is a matter of bringing out what is *implicit* in the evidence rather than identifying what the evidence makes *more likely*. (That is, it is a matter of deductive reasoning, not inductive reasoning.) However, in some multiple offence charge cases it is possible that tendency evidence will be relevant. In such cases, the tendency evidence will have the same relevance that it has in proving specific incidents. The difference in multiple offences charge cases is that tendency evidence may also help in proving a course of conduct by virtue of proving a number of specific incidents.

12.4 Particulars and duplicity

This discussion builds on the explanation of paragraphs 5 and 10 proposed above.

There are two particular aspects of the right to a fair trial that are most relevant to the multiple offences charge: the right to particulars, and the rule against duplicity in charging an accused. Insufficient particulars make it hard to know *what* the offending conduct is alleged to be; duplicity makes it hard to know *which* of various possible offences is charged.

The proposed multiple offences charge will amend the rule against duplicity and explicitly change the requirement for particulars for this type of charge. These issues are discussed below.

12.4.1 Particulars

Basic procedural fairness requires that the charge needs to be sufficiently detailed (or particularised) to allow the accused to know what case he or she has to answer. If an accused is not informed of the nature of the allegations against him or her, then he or she is less able to prepare an answer to those allegations. Of course, what counts as a sufficiently detailed charge is a question of degree, and the difference between sufficient and insufficient detail will often be a blurred one.

The common law has long maintained that detailed particulars are an essential ingredient of a fair trial. As Dixon J said in *Johnson v Miller* (at 480–90), 'a defendant is entitled to be appraised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge'.

Section 25(2)(a) of the *Charter Act* also affirms the right of a person charged with a criminal offence 'to be informed properly and in detail of the nature [of] and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands'.

The *Criminal Procedure Act*, Schedule 1, clause 1(b) also provides that a charge must 'contain the particulars, in accordance with clause 2, that are necessary to give reasonable information as to the

nature of the charge'. Clause 2 then goes on to provide that ordinary language must be used. It also provides that '[i]f a rule of law or a statute limits the particulars that are required to be given in a charge, nothing in this clause requires any more particulars than those required'.

The importance of particulars was also highlighted in the recent High Court decision in *Patel v The Queen* [2012] HCA 29. Mr Patel was convicted of three counts of manslaughter and one count of unlawfully doing grievous bodily harm. After discussing *Johnson v Miller*, French CJ, Hayne, Kiefel and Bell JJ said as follows at [167]:

> A representative instance of how the indictment expressed each manslaughter charge is count 9: "between the first day of April, 2003 and the fifteenth day of June, 2003 at Bundaberg in the State of Queensland, [the appellant] unlawfully killed [Mr Morris]." Count 9 raised many queries. In what circumstances did the unlawful killing take place? Had Mr Morris died in a fight with the appellant? Or had Mr Morris been run over by the appellant? No doubt the jury soon understood that the prosecution concerned the much-publicised behaviour of the appellant towards his patients. But what was the particular act, matter or thing which was alleged as the foundation of the charge? Was it a decision that Mr Morris should be operated on *at all*? Was it the decision of the appellant that *he* should operate? Was it some careless act or failure to act *while performing the surgery*? Was it some careless act or failure to act while providing and advising on *post-operative care*?

As can be seen from this discussion, there are many different ways in which the offence of manslaughter could have been alleged, but the way in which the prosecution case was put was not clear. In that case the prosecution case changed significantly during the course of the trial.

The multiple offences charge would explicitly amend the requirement to provide particulars. It would do this by outlining what type of particulars *are not* required (e.g. date, time) for a multiple offences charge, and relevant considerations for the court in determining what level of detail in particulars is required.

As discussed above in relation to paragraphs 5 and 10 of this proposal, the nature of particulars in relation to a multiple offences charge will differ from a single offence charge because the prosecution must prove a course of conduct.

One of the ways in which the proposal differs from a single offence charge is that a course of conduct must be alleged. It will then be a matter for the prosecution (in the first instance and subsequently a matter for the court) to determine the extent of particulars to be included in the indictment (or provided in addition to the particulars in the indictment).

There are various levels of specificity that could be provided by the prosecution and this will need to be determined on a case by case basis. The following provides examples of different levels of particulars that could be provided where the allegation is that A engaged in a course of conduct between (insert dates) in that he introduced his penis into B's vagina on multiple occasions:

- sexual intercourse occurred every month
- sexual intercourse occurred in B's bedroom at (home address)
- on each occasion A entered B's bedroom after B had gone to bed, and
- on each occasion A would get into B's bed and, before sexual intercourse took place, A would touch B's breasts.

Understood in this way, the multiple offences charge involves a course of conduct based on the time, place and purpose of the commission of the offences. The alleged course of conduct may be

readily disputed by the accused in many ways because the allegation is clear. It is not based on a range of possible interpretations as was the case in *Patel v The Queen*.

Proof of a course of conduct removes the focus from proof of individual or specific incidents. However, different views about the issues that arise for the accused where there is generalised evidence (of the kind relevant to proving a course of conduct) to support an individual charge are relevant.

In *S v The Queen* Justice Dawson said the following (at 275):

> The occasions upon which the offences alleged took place were unidentified and the applicant was, in effect, reduced to a general denial in pleading his defence. He was precluded from raising more specific and, therefore, more effective defences, such as the defence of alibi. Because the occasions on which he was alleged to have committed the offences charged were unspecified, he was unable to know how he might have answered them had they been specified.

It is clear that Justices Brennan and Dawson reached very different conclusions about this case. It also appears that Justice Brennan approached these issues from a premise which is much closer to the multiple offences charge proposal. Justice Brennan's premise was that the issues concerned a series of acts. As a result, the issues of concern discussed by Justice Dawson appeared in a very different light.

Justice Brennan (in dissent) said the following (at 271):

> It is not suggested that the applicant was not fully aware of the evidence to be called in the Crown case. There was no prejudice to be found in the admission of evidence. … The applicant was not prejudiced in countering the allegations. Had the applicant wished to impugn the imprecise evidence of the daughter relating to any of the intermittent acts of intercourse of which she spoke, he could have done so with as much (or as little) effect whether or not each of the counts in the indictment had been confined to a single act. … If there was embarrassment, it consisted in the lack of specificity in the evidence; not in the latent ambiguity or duplicity of the counts in the indictment. The case is not comparable with *Johnson v. Miller* where each set of facts to which the information in that case might have related opened the way to a distinct defence: see per Dixon J. at p 490.
>
> … The real choice for the jury was to be satisfied or not to be satisfied that the series of incestuous acts occurred. The jury could not have found that a particular act in the series occurred but another did not. There was nothing by which the jurors might have distinguished between one act and another.

The precise basis of the multiple offences charge differs from the approach Justice Brennan was considering. Justice Brennan's approach was akin to a representative charge where only one offence was alleged, occurring between dates, that could be proved by the series of acts alleged. If the series of acts alleged was accepted by the jury then necessarily the jury was satisfied that one offence occurred within the dates alleged. Despite the technical differences between this approach and this paper's proposed approach, the reasoning of Justice Brennan in relation to particulars remains relevant and a useful demonstration of how the proposal may work.[4]

[4] Justice Brenan's discussion of the admissibility of evidence and a plea of previous acquittal or conviction from the same premise are also of assistance in showing how the proposal may work in practice.

12.4.2 Duplicitous charges

In *Walsh v Tattersall* (1996) 188 CLR 77, Dawson and Toohey JJ noted (at 84) that:

> The proscription against duplicity is succinctly stated by Archbold:
>
> > The indictment must not be double; that is to say, no one count of the indictment should charge the defendant with having committed two or more separate offences ... This rule though simple to state is sometimes difficult to apply. ... Duplicity in a count is a matter of form, not evidence.
> >
> > The rule has been described as one of elementary fairness, to enable the defendant to know what it is of which he has been charged or found guilty and so that he has the opportunity of making a no case submission or a sensible plea in mitigation.

Kirby J, in the same case, succinctly summarised (at 111) the ways in which the rule against duplicity helped to ensure a fair trial:

> The rule helps to address the attention of the accused (and any legal representative the accused may have) to the elements of each alleged offence. It assists in decisions about how to plead. It clarifies contested questions about the admissibility of evidence relevant to the offences so specified. It contributes to accurate sentencing where a conviction is recorded upon those offences. It also avoids later problems with respect to pleas of autrefois acquit or autrefois convict.
>
> Unless a tight rein is kept upon the prosecution practice of rolling up allegedly connected events and presenting them under a single charge, much prejudice can be done to an accused person by the admission of evidence of a generally inculpatory character which would not be allowed under the similar fact rule of evidence and if the rule of specificity of pleading criminal charges continued to be insisted upon. Nowhere is this risk more evident than in cases of alleged sexual misconduct as illustrated by *S v The Queen*.

The proposed multiple offences charge explicitly amends the proscription on duplicity by allowing multiple offences (a ‘course of conduct’ of offending) to be included in one charge.

One of the basic problems with duplicitous charges is that it is not clear to the accused which of the possible offences contained in the charge he or she must answer. The problem is essentially one of ambiguity and this, in turn, creates an impediment or bar to the accused: he or she cannot satisfactorily prepare his or her defence because he or she does not know exactly which of the various possible offences to defend him or herself against. The only safe strategy in that case would be to prepare to answer all possible charges, which can be said to create an unfair burden on the accused.

Duplicity also creates a problem for the jury, in that while all jurors may agree that the accused sexually assaulted the complainant, they may be divided as to which of the two incidents alleged constituted the offence, six in favour of one and six in favour of the other. This was the problem in *R v Trotter* (1982) A Crim R 8, in which the Victorian Court of Criminal Appeal held (at 18):

> Whilst it is clear that the jury must have been unanimous that the applicant had committed an indecent assault on [the complainant], it is impossible to know whether there was unanimity on the part of the jury in respect of one or other of the two acts of the indecent assault. All members of the jury might have been unanimous on the fact that the applicant had committed an indecent assault on [the

> complainant], but some members of the jury might have arrived at that conclusion on the basis of the bathroom assault and others on the basis of the bedroom assault. There is no way of knowing which was the act which the jury found to be an indecent assault.

When duplicity is understood in this way, it is clear that the proposed multiple offences charge does not generate the same problem. There is the one charge and the one course of offending alleged by it, so there is no true duplicity. This is because the multiple offences taken together constitute the one course of conduct, and it is that one course of conduct that is the true basis of the charge. The accused will know that it is the totality of the multiple offences that he or she must defend him or herself against, rather than this or that particular offence in isolation.

Also, the jury is not being presented with a range of possible incidents, each of which, taken in isolation, could satisfy the charge, in the manner of *Trotter*. The jury is presented with just the one proposition, namely 'that the accused engaged in a course of conduct involving the same kind of sexual offence against the complainant.'

Where some of the multiple offences are also the subject of an alternative charge concerning a specific occasion, then this would be made clear through express alternative charges.

It should also be noted that the generality of the evidence can work both ways. While the lack of specificity can present some difficulties for an accused (as discussed above), it can also provide the accused with ammunition for undermining the prosecution case. For example, an accused may argue that the complainant's vagueness undermines his or her credibility, on the basis that a person would be able to remember such serious events more clearly. Also, if the complainant's evidence is that the abuse occurred every week for a year, but the accused had alibi evidence for some weeks during that period, then this, too, could be used to undermine the credibility of the complainant.

12.5 Mixed pleas

A multiple offences charge will allege a course of conduct over a specified period of time. What happens if the accused wishes to plead guilty to a course of conduct during part of the period alleged and not guilty to another part of the period alleged?

The table below refers to current offences and demonstrates the different permutations of instructions that an accused may give his or her lawyer, and whether (and how) the accused can enter a guilty plea to these offences consistent with these instructions.

MOC = multiple offences charge

	A's instructions in relation to the charge	Can A plead in accordance with these instructions?
1	Plead guilty to - sexual penetration (oral) (MOC) Plead not guilty to - sexual penetration (vaginal) (MOC)	Yes. These are different multiple offences and they must be charged as separate MOC's by the prosecution.
2	Plead not guilty to - sexual penetration (vaginal) (MOC) Plead guilty to - an indecent act (MOC)	Yes. These are different offences and need to be charged as separate MOCs. Whether the prosecution accepts a plea of guilty to an indecent act to resolve the matter is a standard plea negotiation issue. If A denies that there was penetration or some other aspect of the charge, and the case is not resolved as a plea, A can plead not guilty to the MOC for sexual penetration (vaginal).

	A's instructions in relation to the charge	Can A plead in accordance with these instructions?
3	Plead guilty to - sexual penetration (oral) after B turned 15 but not before then (MOC) Plead not guilty to – sexual penetration (oral) before B turned 15 (MOC)	Where there is one multiple offences charge that covers the period when B was 13, 14 and 15, A cannot plead in accordance with their instructions. This is discussed further below. If there are two MOCs (two separate courses of conduct), for the different periods of time, no difficulty will arise. A can plead in accordance with their instructions.
4	Plead not guilty to - sexual penetration (oral) during the relevant period (MOC) Plead guilty to - sexual penetration (oral) in relation to two specific incidents of the charge (e.g. on B's birthday and Xmas day).	A may plead guilty to two specific incidents if they are separately charged. Irrespective of whether the specific incidents are charged, A may plead not guilty to the MOC. In effect, A is saying that he or she did not engage in a course of conduct. Therefore, A is not guilty of the MOC.

While there are four different scenarios in which this issue may arise, it is only in scenario three that a difficulty arises.

Scenario three

In scenario three the accused is not able to enter a guilty plea to a multiple offences charge in a way that reflects his or her instructions. As indicated in the example, if the accused raises this as a plea offer and this is accepted by the prosecution, then separate multiple offence charges for the different periods of time can be included in the indictment. This will solve the problem. It would then involve two separate courses of conduct.

However, plea negotiations will not always resolve such issues. Accordingly, it is necessary to consider what to do where the charges are not agreed in plea negotiations.

The England and Wales Practice Direction (included above) discusses when a multiple offences charge is not appropriate:

> Where what is in issue differs between different incidents, a single 'multiple incidents' count will not be appropriate, though it may be appropriate to use two or more such counts according to the circumstances and to the issues raised by the defence.

If the accused were required to plead not guilty in this scenario, or a not guilty plea was entered because the accused could/would not plead, this may affect the accused's options at trial. For instance, the accused may want to give evidence in the case. If the accused does, can the prosecution cross-examine the accused about the plea of not guilty (or the plea entered on behalf of the accused) when the accused admits to some incidents of the offence but not to other incidents of the offence?

The key issue is what happens at the point the accused is arraigned before a jury or asked to plead before a magistrate.

Section 218 of the *Criminal Procedure Act* provides that the accused may enter a special plea. This plea may be entered upon arraignment either before the jury or if the accused has been arraigned

as part of the directions hearing process. Normally a special plea concerns a plea of previous conviction or previous acquittal. Section 218 simply recognises the existence of a special plea, it does not create the basis for a special plea.

Importantly, the department's *Criminal Procedure Act Legislative Guide* indicates at page 214 that, 'the sorts of issues dealt with by special plea have often been used as the basis of a submission that the proceedings are an abuse of process warranting a stay of proceedings.'

If a person cannot properly plead to a charge, that will form a novel but strong argument for an abuse of process application. This fact alone is likely to lead to resolution of the issue. To make such a case, the accused will presumably need to submit with a degree of specificity the basis on which they would enter different pleas of guilty and not guilty. This does not mean that the accused must set out their defence or admit anything. Rather, the accused would need to clearly indicate the period or incidents to which the accused would plead guilty and the period of the multiple offences charge to which the accused would plead not guilty.

Given this is a new situation, a clear legislative approach would be preferable to relying on arguments concerning an abuse of process.

Proposal 47 Mixed pleas and multiple offences charge

It is proposed that the *Criminal Procedure Act 2009* be amended to provide that where an accused is arraigned, or may be arraigned, on a multiple offences charge on an indictment:

1. If an accused *cannot plead* guilty or not guilty to a multiple offences charge, the accused must inform the court about this at a directions hearing or as soon as possible after a directions hearing.
2. An accused *cannot plead* guilty or nor guilty to a multiple offences charge if the accused would plead guilty to a course of conduct within a defined period that falls within the period alleged in the multiple offences charge, and not guilty to a course of conduct within a defined period that falls within the period alleged in the multiple offences charge.
3. The accused must specify the defined period that falls within the period alleged in the multiple offences charge to which they would plead guilty upon arraignment.
4. If the accused informs the court that they cannot enter a plea on arraignment in accordance with this section, then, subject to paragraphs 5 and 6, the court must not arraign the accused on that charge.
5. If the DPP files a fresh indictment which contains a charge, including a multiple offences charge, to which the accused has indicated they would plead guilty to in accordance with paragraphs 1 and 3 and the accused does not plead guilty to that charge, the DPP may file a fresh indictment containing the original charge, or any variation on that charge.
6. If the DPP files a further fresh indictment because the accused does not plead guilty in accordance with the information they provided to the court in accordance with paragraphs 1 and 3, unless there are good reasons not to do so, the court may arraign the accused on the further fresh indictment.

Discussion

If the accused faces any difficulties in pleading in their case, this is a matter peculiarly within the knowledge of the accused. Accordingly, it is appropriate to cast the obligation on the accused to inform the court about this problem.

While the focus of this process is on the directions hearing, this does not preclude raising this at a later stage (e.g. the trial stage). However, the earlier this issue is raised, the better.

The multiple offences charge necessarily involves an allegation that the accused engaged in a course of conduct. If the accused indicates that they are guilty of one or several specific incidents of an offence, but the prosecution's alleged course of conduct involves more than this, the accused can plead guilty to the specific charges and not guilty to a course of conduct.

The problem only arises where the accused admits engaging in a course of conduct during part of the alleged period of the course of conduct but denies a course of conduct for the remainder of the period alleged. Paragraph 2 helps to define this problematic scenario.

The proposed process ensures that the accused can appropriately plead to a charge. However, the process also caters for the situation where the accused does not have a genuine difficulty in pleading and is using this process to try to frustrate proceedings. To address this, paragraphs 5 and 6 provide an exception to the general prohibition on arraigning the accused where the accused has informed the court of his or her difficulty in pleading to the charge.

It would also be necessary to adapt this process for proceedings in the Magistrates' Court.

12.6 Challenging the use of a multiple offences charge

The proposed amendments to Part 5.2 of the *Criminal Procedure Act* outlined above set out the requirements for a multiple offences charge.

The accused may challenge the use of a multiple offences charge where it does not comply with these requirements. If the accused raises issues with the charge in court, the charge will either need to be amended (under section 165 of *the Criminal Procedure Act*) or there will be a defect in the charge and a fresh indictment may be filed.

In addition, the court would retain its power to stay an indictment that amounts to an abuse of process.

12.7 Risk of false allegations?

The risk of false allegations is often raised in the context of sexual offences. It is often said that a sexual offence is easy to allege and hard to disprove. This is one of the myths and misconceptions about sexual offences. In fact, there is clear evidence that the great majority of complainants find it difficult to make a complaint and, as conviction rates show, most complaints are hard to prove. This does not mean that false allegations do not or cannot happen, but concerns as to the prevalence of false allegations are often overstated.[5]

There does not seem to be any reason for concluding that the risk of false allegations is any different with a course of conduct charge when compared with a single charge.

Because a course of conduct charge involves less specificity, this may be thought to provide more opportunity for false allegations or exaggeration. However, the lack of specificity and uncertainty about specific events can also make such a complaint more difficult to prove beyond reasonable doubt. An accused will no doubt argue that if something so serious had happened to the complainant that is exactly the kind of thing they would remember.

Accordingly, while this proposal provides an opportunity for an additional range of alleged types of offending to be prosecuted, the risk of false allegations with this kind of charge does not seem to be greater than with a person making a complaint about one incident or a number of specific incidents.

[5] See Liz Kelly, 'The (In)credible Words of Women: False Allegations in European Rape Research' (2010) 16 *Violence Against Women* 1345.

12.8 Conclusion

The proposed multiple offences charge is a response to the failure of the criminal law to respond to repeated and systematic sexual abuse of a child. It would also provide a convenient vehicle for the prosecution and the court (and sometimes possibly the accused) in dealing with certain forms of repeat offending, such as fraud.

It is possible, and indeed likely, that the proposed multiple offences charge, and in particular its amendment to the rule against duplicity and the requirement for particulars, will be criticised as affecting the rights of the accused to a fair trial based on cases which have considered single offence charges.

However, a fair trial must be assessed in the entire context of the trial. Deane J said in *Jago v District Court (NSW)* (1989) 168 CLR 23, at 57:

> The general notion of fairness which has inspired much of the traditional criminal law of this country defies analytical definition. Nor is it possible to catalogue in the abstract the occurrences outside or within the actual trial which will or may affect the overall trial to an extent that it can no longer properly be regarded as a fair one. Putting to one side cases of actual or ostensible bias, the identification of what does and what does not remove the quality of fairness from an overall trial must proceed on a case by case basis and involve an undesirably, but unavoidably, large content of essentially intuitive judgment. The best that one can do is to formulate relevant general propositions and examples derived from past experience.

In the case of repeated and systematic sexual abuse of a child, the proposed multiple offences charge aims to provide a vehicle through which evidence of a course of conduct of offending is not discarded for reason of generality alone. A direct result of the course of offending conduct of this type is that the evidence very often has a level of generality. Where this evidence has sufficient probative value to establish a course of offending conduct, even where it does not contain detailed particulars of individual occasions of abuse, it provides an appropriate basis for a prosecution and conviction.

In *S v The Queen* the High Court considered whether a course of conduct of sexual abuse over two years, charged as three counts of incest, would infringe the rule against duplicity. Brennan J, dissenting, disagreed with arguments that the allegation of continuing sexual abuse prejudiced the defence of the accused. In a passage quoted earlier, he said (at 271):

> The applicant was not prejudiced in countering the allegations. Had the applicant wished to impugn the imprecise evidence of the daughter relating to any of the intermittent acts of intercourse of which she spoke, he could have done so with as much (or as little) effect whether or not each of the counts in the indictment had been confined to a single act.

A multiple offences charge will not suffer from ‘latent ambiguity’ as it must include particulars as to the course of conduct to be proven by the prosecution. As the cases consistently show, children’s evidence of repeated and systematic sexual abuse reveals a high level of detail of the course of offending conduct, which is ‘ambiguous’ merely in the sense that it does not list precise dates and times of abuse.

The charge will not, of itself, embarrass or hinder the accused in the conduct of his or her defence. In some cases the accused will be able to use the lack of particulars of different occasions of offending as a basis for his or her defence.

Members of the jury will reach a guilty verdict based on the same view as to which incidents occurred or did not occur. This is because the nature of evidence of repeated and systematic child sexual abuse means that the jury will only be able to conclude that the abuse either did or did not occur. As noted by Brennan J in *S v The Queen* (at 271):

> It is, in my respectful view, fanciful to suggest that the verdict could have been returned because some jurors were satisfied that one act of intercourse occurred, others that another act occurred and others again that a third act occurred within a relevant period. The real choice for the jury was to be satisfied or not to be satisfied that the series of incestuous acts occurred. The jury could not have found that a particular act in the series occurred but another did not. There was nothing by which the jurors might have distinguished between one act and another.

The accused may face some forensic disadvantages where a multiple offences charge is used to prosecute child sexual abuse. However, these are not fundamentally different from those faced in other sexual offence cases.

The main difficulties in prosecuting multiple offences were identified by Gaudron and McHugh JJ in *S v The Queen* (at 284–5):

> [A] court must know what charge it is entertaining in order to ensure that evidence is properly admitted, and in order to instruct the jury properly as to the law to be applied; in the event of conviction, a court must know the offence for which the defendant is to be punished; and the record must show of what offence a person has been acquitted or convicted in order for that person to avail himself or herself, if the need should arise, of a plea of autrefois acquit or autrefois convict. … The rule against duplicitous counts has also long rested upon a basic consideration of fairness, namely, that an accused should know what case he or she has to meet. …Of course, the degree of unfairness or prejudice involved will vary from case to case, and it may be, as suggested by Professor Glanville Williams in 'The Count System and the Duplicity Rule', [1966] Criminal Law Review 255, at 264, that on occasions the uncertainty is not 'such as to disable the defendant from meeting the charge'.

As discussed above, the proposal meets these challenges. It provides greater specificity as to the nature of the charge, what it is the prosecution must prove and what the charge is that the accused must meet. Clarity concerning the charge also makes the evidentiary issues concerning whether evidence is relevant much clearer. The proposal also specifically deals with problems concerning a previous conviction or acquittal.

There is a symmetry between the nature of the problem and the proposed solution. It is very difficult for children to provide sufficient particulars about repetitive and systematic sexual offences committed against them. However, it is this course of conduct that must be proved. This is likely to result in more investigations and prosecutions in which the evidence is of a course of conduct of repeated and systematic sexual abuse of a child. Instead of the evidence being dismissed as inadequate, it will assist in proving a multiple offences charge. The multiple offences charge should result in justice being done in a greater number of cases of child sexual abuse.

13 Simplifying sexual offence trials

13.1 Overview

The construction of many sexual offences and the manner in which they may be committed means that a single episode of alleged offences can lead to many charges. This arises for a number of reasons including:

- the need to precisely identify what the accused is alleged to have done
- the variety of ways in which certain sexual offences may be committed, and
- the need to ensure that an offender is only sentenced for the things they have done which have been proved beyond reasonable doubt.

As a result, the prosecution may allege that a person has committed many offences of rape (or other sexual offences) within the one episode or occasion of offending and within a relatively short period of time. This is an issue with existing offences and the situation would be the same if the proposals in this paper for changes to those offences were introduced.

The high number of charges can create difficulties for the judge in directing the jury and for the jury in understanding and applying the judge's directions. On some occasions, this gets to the point where the Court of Appeal has described indictment as being 'overloaded '. This adds complexity to both the trial and sentencing processes.

This paper presents two proposals to address these issues. First, addressing problems arising at sentencing by enabling a court to sentence a person for a less serious offence where that offence forms part of all the circumstances in which a more serious offence was committed. This in effect would overturn the case of *Newman and Turnbull v R* [1997] 1 VR 146.

Secondly, to enable the charging of multiple incidents of an offence in the one charge where the different incidents are of the same type of offences and are alleged to have been committed on the one occasion. For example, this would mean that charges of penile penetration of the vagina, mouth and anus could all be included in the one charge if they are alleged to have formed part of offending on the one occasion.

The aim of these proposals is to simplify the trial and sentencing processes while ensuring that the process remains fair to the accused.

13.2 Background

The problem of multiple charges concerning offences alleged to have been committed on the one occasion has gradually emerged since the 1980s. There are several reasons why this change in practice has occurred.

First, in 1980, the definition of rape was expanded, thereby including additional ways in which rape could be committed. The opportunity for multiple instances of charges was already present but this was much more limited because the ways in which the offence of rape could be committed were much more limited.

Secondly, in 1995, Winneke P (with whom Crockett AJA agreed) in *R v Newman and Turnbull* [1997] 1 VR 146 held that, when sentencing a person, a court could not take into account another

serious offence and sentence the person for that offence. Instead, the prosecution must charge the additional offence and, if the person is convicted, the court may then sentence the person for the additional offence.

Thirdly, rape is essentially a conduct offence that may be completed upon penetration. This is in contrast with a result based offence where many acts (conduct) can be considered in determining whether a person committed an offence. For example, if a person punches and kicks another person on numerous occasions, these punches and kicks can be considered in combination to determine whether the person has caused a serious injury (the result of the punches and kicks) intentionally.

As a result, for the last 15 years, the DPP's regular practice has been to charge each separate act of sexual penetration, and sometimes lesser related offences, to ensure that if the person is convicted, the court is able to sentence the person for all of their conduct.

Prior to these changes, the risk of 'overloading' the indictment was very low. This is not to suggest that there is a problem with the definition of rape. The problem is that criminal procedure and sentencing laws have not continued to adapt as the law has changed to reflect changed societal views about what constitutes rape.

13.2.1 Rape and other sexual offences

As a matter of convenience, the following discussion will focus on the offence of rape. However, the same issue arises with other offences where there are a number of different ways in which 'sexual penetration', or 'sexual intercourse' as proposed in this paper, may be committed. Therefore, the discussion in this section concerning the offence of rape is also relevant to offences including:

- sexual intercourse with a child under 12
- sexual intercourse with a child under 16
- sexual intercourse with a child aged 16 or 17 and under care, supervision or authority, and
- incest.

13.2.2 Examples of many charges concerning one occasion of alleged offending

There are numerous examples of multiple charges for offences arising out of the one episode of offending. Two examples are set out below.

For example, in the case of *CJJ v The Queen* [2012] VSCA 196 at [5]–[9], the Court of Appeal said:

> The complainant said that the applicant got on top of her and penetrated her vagina with his penis (count 1), that he then penetrated her vagina with his tongue (count 2), that he then moved behind the complainant and penetrated her vagina with his penis (count 3), that he attempted to penetrate her anus with a small vibrator (count 4) and then penetrated her vagina with his penis while she was on her back (count 5).

The Court of Appeal described the charges as being all part of one episode. The prosecution case and the defence case were the same in relation to all five charges.

Another example arose in *Sharma v The Queen* [2011] VSCA 356 where Sharma was charged with a number of offences which all occurred on the one morning. There was no dispute that the acts

took place. What was in dispute was whether the complainant consented and the accused's state of mind in relation to whether the complainant was consenting.

The Court of Appeal said at [7] that:

> [i]t was not disputed that the following acts then occurred:
>
> - The applicant rubbed the complainant's vaginal area (Count 1, indecent assault);
> - The applicant felt the complainant's breasts (Count 2, indecent assault);
> - The applicant inserted his fingers into the complainant's vagina (Count 3, rape);
> - The applicant licked and kissed the complainant's breasts (Count 6, indecent assault);
> - The applicant inserted his penis into the complainant's vagina for a couple of minutes (Count 4, rape);
> - The applicant inserted his fingers into the complainant's vagina (Count 5, rape);
> - The applicant inserted a finger into the complainant's anus (Count 7, rape);
> - The applicant simultaneously inserted one finger into the complainant's vagina and one finger into her anus (Counts 8 and 9, both of rape); and
> - The applicant introduced his penis into the complainant's anus (Count 10, rape).

13.2.3 To what extent are multiple charges a problem?

The number of indictments that would be described by a court as being 'overloaded' may be small because that conclusion will not be reached lightly. However, there are a significant number of cases where there are a high number of charges concerning one episode of alleged offending. A sample of 50 rape cases in the Court of Appeal in 2012 indicates that in approximately 20% of rape trials there were charges involving multiple rapes on what could be described as the one occasion by virtue of their proximity in time and circumstance, and the lack of any intervening event.

If this analysis is extended to all sexual offence cases, then there are likely to be approximately 40 trials every year where there are a significant number of offences which apply to the one episode of alleged offending.

That would mean that in each of these cases there would be:

- longer directions to the jury – making the trial judge's task more difficult and increasing the risk of an error
- more complex issues for the jury to determine, and
- if the accused is convicted, a more complicated sentencing task for the judge.

Further, this complexity arises in the context of the complexity of sexual offences generally and rape in particular.

13.2.4 When an indictment becomes overloaded

The decision as to what charges are to be included in an indictment is a matter for the DPP. The court does not decide what charges should be included in the indictment. However, in extreme cases the court could stay the indictment if it constituted an abuse of process.

The Court of Appeal expressed concern over what it described as an 'overloaded' presentment in *Davy v The Queen* [2011] VSCA 98 where at [22] Bongiorno JA said:

> The discretion that prosecutors have in relation to the framing of indictments is, of course, undoubted. However, the proper functioning of the criminal justice system and the efficient disposition of cases by trial courts is a matter of legitimate concern for this Court. Unwieldy, unnecessarily long and 'overloaded' indictments are productive, not only of oppression of those against whom they are brought, but also of an increased risk of judicial error in trials and in sentencing. They complicate and lengthen trials and place an unacceptable burden on trial judges and juries. It has long been accepted by prosecutors that in framing an indictment the prosecutor should aim to expose adequately the alleged criminality of the person to be arraigned and give the sentencing judge adequate scope to impose appropriate punishment, with properly constructed sentences, in the event of a conviction.

The Court of Appeal considered this issue further in *Walker and Kormez v The Queen* [2011] VSCA 160. The two accused were charged with 17 offences, concerning sexual offences in relation to two complainants, which were all alleged to have occurred within a relatively short period of time. The Court of Appeal described the overloading of charges as follows at [8]:

> The counts preferred against the two accused included not only counts of rape and other serious offences but also counts of aiding and abetting the commission of some of those offences. Why those counts or the count of threatening to inflict serious injury (of which both accused were acquitted) were necessary is not immediately apparent. In our view, they 'overloaded' the presentment.

As the Court of Appeal indicated, the many charges made the task of the judge in directing the jury and the task of the jury in understanding and applying those directions very difficult.

13.2.5 Conclusion

There are two ways in which these problems could be addressed while ensuring that any trial is fair and that if a person is convicted, the court can properly sentence the person for their offending. First, legislation could be introduced to overturn *Newman and Turnbull* to enable a court to take into account a lesser offence when sentencing an offender for a more serious offence. Secondly, legislation could be introduced to enable the prosecution to allege a number of incidents of rape in the one charge of rape.

13.3 Taking lesser offences into account when sentencing

As discussed in Fox and Freiberg, Sentencing, State and Federal Law in Victoria at [2.342], the principles that govern what a court may take into account as aggravating circumstances when sentencing an offender include:

- if the prosecution accepts a plea to a less serious offence than is open on the facts, it is not open to the prosecution to ask the judge to sentence on the basis of facts which would render the offender liable to a more serious penalty

- a judge must not have regard to facts which were the subject of a separate charge, where the accused was found not guilty of that charge, and
- if an offence (of which the offender has not been convicted) is of lesser gravity than the offence of which the offender has been convicted, then it is a question of degree and fairness whether such offences may be taken into account in sentencing the offender.

These issues were discussed in *Newman and Turnbull v The Queen* [1997] 1 VR 146 where Winneke P at 150 said:

> The common law principle that a person cannot be sentenced for an offence with which he has neither been charged nor convicted is a venerable one, but it is one which has created a tension with another equally venerable principle of sentencing; namely, that a sentencing judge is entitled, and indeed bound, to take into account all the circumstances which are relevant to the commission of the offence with which the prisoner has been charged. The latter principle however must, in the appropriate circumstances, give way to the former because it could never be consistent with fairness and justice to sentence a person for an offence with which he has not been charged or convicted.

This case led to a significant change in practice in the charges that were included in presentments. It is also important to note that in *R v Cincotta* (Unreported, Supreme Court of Victoria, Court of Appeal, Winneke P, Charles JA and Hampel AJA, 15 October 1997), Winneke P said:

> I think I should also say that I agree with the views which the learned judge expressed, that too much has been read, in the framing of presentments, into the decision of this Court in the case of *R v Newman and Turnbull* [1997] 1 VR 146. I fully appreciate the caution which must be exercised by the Director of Public Prosecutions to ensure that the entire criminal conduct of an accused person is captured within the four corners of the presentment so that the entirety of the criminal conduct can be punished. But it should be remembered that the decision in the case of *Newman and Turnbull* was but a particular example of the principles expressed in *De Simoni v The Queen* (1981) 147 CLR 383 that a person should not be punished for an offence for which he has neither been charged nor convicted.
>
> Nothing in the decision of *Newman & Turnbull* should be regarded as suggesting that a sentencing judge is not to have regard to all the consequences that flow directly from the criminal conduct constituting the offence charged. This was the subject of explanation by this Court in the cases of *R v Sessions* (unreported, 3 July 1997), especially per Hayne, JA at p4, and *R v Clarke* (unreported, 2 July 1997), especially in my judgment at p7-p8 and the judgment of Tadgell, JA at p11-p12.

Despite these further comments from Winneke P in 1997, the changes in charging practices attributed to *Newman and Turnbull* have remained.

Overturning the principles from *Newman and Turnbull* would provide courts with more flexibility in sentencing and this may generally assist the courts in sentencing.

Proposal 48	**When court must take into account a less serious offence**

The proposed provisions to enable a sentencing court to take into account a less serious offence would specify as follows:

Serious offence means the offence with which the offender has been convicted.

Less serious offence means an offence with which the offender has not been convicted that has a lower maximum penalty than the serious offence.

a) Where a court is satisfied beyond reasonable doubt of facts that would constitute the commission of a less serious offence, and those facts form part of all of the circumstances in which the serious offence was committed, the court must take the less serious offence into account when sentencing the offender

Proposal 48	When court must take into account a less serious offence

for the serious offence, unless it is not in the interests of justice to do so.

b) For the avoidance of doubt, if a court takes into account a less serious offence in accordance with paragraph (a), this does not limit in any way any other power or procedure in sentencing the offender for the offence charged.

How would this work in practice?

In *Sharma*, in addition to the seven charges of rape, there were three charges of indecent assault. Applying this proposal would mean that the prosecution would not need to include charges of indecent assault in the indictment to enable the court to take such offences into account when sentencing the offender for a more serious offence of rape.

Paragraph (a) — further explanation

While the discussion in this paper concerns sexual offences, this proposal is not limited to sexual offences. Accordingly, it is potentially relevant to any offence. While the limitations arising from the application of *Newman and Turnbull* are particularly evident in relation to sexual offences, these limitations arise with other offences, for example, in deciding whether an injury is sufficiently serious that it should be charged in addition to a principal offence of burglary or robbery.

The process does not involve any lowering of the standard of proof as the prosecution must still prove any offence which forms part of the circumstances in which the more serious offence occurred, beyond reasonable doubt. This is consistent with *R v Storey* [1998] 1 VR 359 where the Court of Appeal held that a sentencing judge may only rely on facts adverse to the offender if satisfied beyond reasonable doubt of that fact. This proposal would essentially restore the courts to the process that applied prior to *Newman and Turnbull* prior to 1995.

Paragraph (a) uses wording from the decision in *Newman and Turnbull*:

- ‘forms part of all of the circumstances’ – this describes or limits when a lesser offence is relevant to the offence for which the person is being sentenced, and
- ‘take the less serious offence into account when sentencing the offender’ – guides the exercise of the sentencing discretion, indicating that the offence may affect the sentence imposed for the main offence rather than a separate sentence being imposed for this offence.

Should the provision provide that the judge ‘must’ or ‘may’ take the less serious offence into account? *Newman and Turnbull* provides that the principle at common law, that this proposal seeks to reinstate, provides that the judge ‘is bound’ to take such matters into account.

If the court does not take a less serious offence into account, the prosecution is unlikely to proceed with that charge separately. It would be difficult to conduct another trial if the complainant needs to be called to give evidence again. Accordingly, the prosecution will need a high degree of confidence in this process or it will not use it.

However, in *Tremoana* (1990) 54 SASR 30 (see Fox and Freiberg at [2.342]), Cox J from the Full Court of South Australia indicated that it ‘will be a matter of degree and fairness’ concerning whether lesser offences should be taken into account.

The proposal provides a limited form of discretion for the court. The starting point is that lesser offences must be considered, unless the court considers that it is not appropriate to do so. It is not

expected that this discretion will be used frequently. It is in the interests of courts for this process to work as a general rule. However, it is also important that it is used in a fair manner.

Limitations of this proposal

This process would not assist with an equally serious offence, only less serious offences. Therefore it would not allow a rape charge to be taken into account for another rape offence, even if factually one offence was less serious than the other.

It also is limited to where the prosecution's reason for including the charge in the indictment concerns potential sentencing matters. Sometimes these charges may be included as alternative charges where the evidence may differ between the serious offence and less serious offence. For instance, the accused may admit an indecent assault but not rape. Or the evidence of indecent assault maybe corroborated but the evidence of rape is not. If the accused is acquitted of rape, the accused could only be sentenced for the indecent assault if that offence is charged in the indictment.

Therefore, lesser charges may still be charged in the indictment for these kinds of situations.

13.4 Alleging multiple incidents of an offence in the one charge

For the offence of rape, each specific act of penetration constitutes a separate offence. To avoid duplicity, it is essential that the particulars of a charge specifically identify the circumstances of the alleged offence so that it is clear that the jury are convicting the accused of the same incident.

As discussed in Part 12 above, the rules against duplicity, among other things:

- ensure that the accused knows what offence he or she has been charged with in order to conduct his or her defence
- enable the courts to determine whether evidence is admissible (e.g. is it relevant to the offence charged)
- make clear whether or not the accused has previously been acquitted or convicted of that offence, and
- remove uncertainty about what it is that the jury's verdict relates to (e.g. where the offence could apply to two or more different circumstances).

The issue with multiple offences alleged to have occurred on the one occasion is almost the opposite of the problem often encountered where there is a course of conduct of sexual offending involving many similar acts over a long period of time where the complainant has difficulty in distinguishing one act from another. Here, it is not the lack of particulars distinguishing each offence that generates the issue. It is because particulars can be provided of numerous discrete acts on the one occasion that constitute separate offences that are closely connected in time and place, that many charges may be required to properly address all of the offences that have allegedly been committed.

These multiple incidents of offences of offences would ordinarily be described as rape (in the singular). That is, we would say that the victim was raped (and may go on to give details of the rape – that she was raped in a number of different ways) rather than the victim was raped five times.[6] In

[6] This can also be illustrated by descriptions of gang rape which, for instance, would more likely be described as 'she was raped by five men', rather than there being five separate rapes.

this example, it is the operation of the law that turns what people would generally describe as one rape into five rapes.

The following proposal involves joining separate offences into the one offence. This proposal would operate as an exception to clause 5(2) of Schedule 1 to the *Criminal Procedure Act 2009* which provides that separate offences must be charged separately.

Proposal 49 Charging multiple offences in relation to the one occasion of alleged offending

The proposed provisions to enable the prosecution to allege multiple offences in the one charge would specify as follows:

1 A relevant offence is *[list of offences to which this would apply, which would include offences involving 'sexual penetration' or 'sexual intercourse'].*

2 Two or more incidents of an offence do not take place on the one occasion if there is a clear separation in time or circumstance between the alleged incidents.

3 A charge for a relevant offence may contain an allegation of more than one incident of an offence where:

a) each incident of the offence is an offence under the same provision or law;

b) each incident of the offence could be joined in the one indictment;

c) the offences take place on the one occasion; and

d) the charge includes particulars of each incident of the offence alleged.

4 In the indictment, the particulars of each incident of the offence alleged may be the same.

5 If the accused pleads not guilty to a charge on an indictment, the jury may only find the accused guilty if:

a) the jury is satisfied that the accused is guilty on the basis of one incident of the offence charged; but

b) the jury need not be satisfied that the accused is guilty of any other incident of the offence charged.

6 If the jury finds the accused guilty, the jury is not required to indicate which incident of the offence charged it is satisfied about.

7 If an accused has been found guilty of an offence, the court must determine which incidents of the offence have been proved for the purposes of sentencing the person.

Note: Section 253B of the *Criminal Procedure Act 2009* sets out when a finding of guilt occurs.

8 Without limiting any other power the court has to order that an indictment be amended, the court may order that a charge for a relevant offence that contains an allegation of more than one incident of an offence be severed if it considers that it is appropriate to do so.

Note: Section 165 of the *Criminal Procedure Act 2009* provides that the court may order that an indictment be amended.

Overview of this proposal

The following observations may be made about this proposal:

- it does not change the law concerning duplicity
- it does not change requirements concerning particulars
- it does not change requirements concerning agreement by jurors as to their verdict
- it will work where the complainant does not give evidence as to one or more of the particulars, provided that the charge is still proved
- it will shift fact finding from the jury to the judge in relation to the specific particulars relied upon for the purposes of sentencing, and
- in combination with proposal one (overturning *Newman and Turnbull*) it has the potential to make a significant improvement in avoiding overloading indictments and making indictments more manageable for judges, the jury and the accused.

In most rape cases, the issues in dispute concern one or two of the following matters:

- the identity of the perpetrator, or
- where there is no issue as to identity:
  - whether the complainant consented, and
  - whether the accused had the requisite fault element (e.g. did the accused know she was not consenting or believe she was consenting).

These kinds of issues will usually apply in the same way to each particular instance of rape alleged, where the allegations concern the one episode or occasion. Applying this proposal to the case of *Sharma* (discussed above), the seven charges of rape could be alleged as one charge of rape and the particulars giving rise to the seven charges would instead be alleged in the charge.

In *Sharma*, the issues for all charges were whether the complainant consented and whether the accused believed that the complainant was consenting. Accordingly, whether there is one offence or multiple offences covering the same episode of rape, it will not change the issues in the trial and will not change the approach of the defence.

If the accused was convicted, as in *Sharma*, the maximum penalty would be the maximum applicable to one offence of rape. However, the trial judge would form his or her own view about what facts were proved and if satisfied beyond reasonable doubt about each incident alleged, could sentence the person on that basis. In that case, Sharma was sentenced to a total effective sentence of six years' imprisonment with a non-parole period of four years. Accordingly, the same sentence could readily be imposed using this process.

Paragraphs 1, 2 and 3 — including multiple offences in the one charge

The purpose of paragraphs 1 to 3 is to specify (and narrow) the scope of the circumstances in which this process may be used. A 'relevant offence' would be confined to specified offences. This would include:

- any offence which includes the element of 'sexual penetration' as defined in section 35 of the *Crimes Act 1958*, and
- any offence which includes definition of 'sexual intercourse' (if adopted) as discussed in the consultation paper.

Section 47A of the *Crimes Act* provides that the offence of persistent abuse of a child applies where certain offences are committed on three or more separate 'occasions'. In *R v Tognolini* [2011] VSCA 113, the Court of Appeal (Maxwell P, Buchanan and Redlich JJA) considered what was included within one 'occasion', where the prosecution relied on three acts committed on one single evening. The Court of Appeal said that:

> Where two (or more) acts occur, it will not be open as a matter of law to conclude that they occurred on separate 'occasions' unless there is a clear separation in time or circumstance between the acts.

Accordingly, a good way of determining whether offences take place on the one occasion is to ask whether they are separated in time or circumstance. If there is a significant gap in time between the rapes, then a new charge may be required.

Paragraph 2 includes a partial definition of when incidents of offences occur on the 'one occasion', encapsulating the approach from *Tognolini*. It may not be strictly necessary, but it will help to clearly link to the reasoning in *Tognolini* and set some outer parameters on whether multiple incidents of offences can be said to occur on the one occasion. This definition does not mean that offences are

considered to be 'on the one occasion' where there is no clear separation in time or circumstance, rather it provides for when offences cannot be considered as occurring on the one occasion.

Paragraph 3 further limits and guides the use of this proposal by specifying that it can only be used:

- for the same offence – so it would not be possible to combine different offences such as rape with incest or sexual penetration of a child under 16
- where the offences are connected – the rules of joinder continue to apply so the offences must be capable of being joined in the one indictment, and
- where the offences take place on the one occasion.

Paragraphs 4 and 5 — particulars of the offences (and duplicity)

Paragraphs 4 and 5 are designed to do two things. First, confirm that the proposal does not change the requirement to give particulars. The particulars required for each incident of the offence will need to be at least the same as would be the case if the offences were charged separately. Secondly, paragraph 5 clarifies that the particulars provided in the indictment may in some instances be the same, at least in form and alleged conduct, but differ in some other regard (e.g. as to when each incident is alleged to have occurred).

For example, as discussed above in the case of *CJJ v The Queen* the presentment included particulars of the following five counts of rape (and attempted rape), in that the accused was alleged to have:

- introduced his penis into the complainant's vagina
- introduced his tongue into the complainant's vagina
- introduced his penis into the complainant's vagina
- *attempted to introduce a small vibrator into the complainant's anus,* and
- introduced his penis into the complainant's vagina.

In this example the first three offences could readily be joined together under this proposal in one charge of rape. This could include the two allegations of introducing his penis into the complainant's vagina.

However, the fourth offence is different as it involves attempted rape. A separate charge would be required for this offence. Whether fifth incident could be joined with the first three incidents is a matter that would need to be determined on a case by case basis.

Because the particulars in the first, third and fifth incidents are the same, the prosecution would need to be able to distinguish clearly between the acts which it alleges give rise to those particulars. This task is essentially the same as at present where these instances are charged as separate offences. The chronology of the evidence in support of these charges would provide the basis for that distinction. It is not necessary to include such matters in the indictment but it will be essential that the prosecution makes clear the factual basis on which each incident of the offence is alleged.

However, it may be that because of the intervening different alleged offence, this may constitute a separation in the circumstances (see *Tognolini*) sufficient to warrant a separate charge for the rape alleged in the last incident (point five).

While the proposed process is similar to a rolled-up charge, it is different in a number of ways. In *R v Jones* [2004] VSCA 68, the Court of Appeal said that:

> In [counsel for the respondent's] written submissions for the Crown, it was submitted, I think correctly, that *rolled-up counts are a collection of counts bundled together into a single count, a procedure which can only occur by agreement with the defence and only for the purpose of a plea of guilty*. If a rolled-up count were not included by agreement with the defence (demonstrated as here by the plea of guilty) the count would be vitiated for duplicity.

The proposed process provides a number of limitations which do not apply to rolled-up charges. For example, they can only be used with certain offences and the offences must be alleged to have occurred on the one occasion. By contrast, rolled-up charges are commonly used for offences committed on different occasions.

While the proposal provides strong support for avoiding the use of more than one charge in the one episode of rape, the prosecution should retain the discretion to use, or not use, this process as there may be a small number of cases where there is something different between the charges, which warrant separate charges.

In *R v Sessions* [1998] 2 VR 304 the offender pleased guilty to the rape of an eight month old girl. Sessions became annoyed at the baby's crying when changing her nappy. He inserted his finger into her vagina, intending to cause injury, resulting in part of her intestines protruding from her vagina. There were no other acts of rape. But suppose that a person committed the same act as Sessions and also inserted his penis into the baby's anus but did not cause any injury. If that had occurred, it may be that the circumstances were so different that separate charges would be more appropriate.

Paragraphs 6 and 7 — verdicts and sentencing

There are already many cases where the prosecution may put its case in alternative ways or where alternative ways in which an offence may be committed are left to the jury to determine and these ways may depend upon the acceptance by the jury of different facts. For example, where a person is charged on the basis that they were complicit in an offence, the prosecution may present a number of different pathways to the jury that it may follow that may lead to finding the accused guilty. Alternatively, a charge of manslaughter may allege an unlawful and dangerous act or it may allege criminal negligence.

The jury must be satisfied as to the guilt of the accused in relation to one incident of the alleged offence but will not be asked to indicate on which basis they have found the accused guilty. The judge then makes findings of fact about the offence, including, for example, which kind of manslaughter was committed. The Judicial College of Victoria's *Sentencing Manual* states at [27.3.2] that:

> [a]s a plea or jury verdict of manslaughter does not always indicate the form of manslaughter involved, the sentencer must interpret the jury verdict or plea. As stated in Burns 17/11/1986 CCA Vic by Kaye J at 4:
>
> > The starting point when assessing the appropriateness of the sentence is to determine the form of manslaughter of which the respondent was convicted....

Where there are a number of charges and verdicts of guilty (and sometimes not guilty), this will shed light on the facts that the jury accepted or did not accept. In this way the verdict may be interpreted, as it sheds light on the facts accepted. However, on other occasions there may only be one charge and the verdict simply indicates that one of the ways in which the prosecution case was

put was accepted by the jury. In such circumstances the judge will need to assess the evidence and form her or his own views about the facts proved for the purpose of sentencing. However, the judge's conclusions must be consistent with the jury's verdict.

Another variation of this arises with some property related offences. For example, an offence of theft may allege that the accused stole several items (e.g. a car, a lawn mower, and a leaf blower). These items of property may all be included in the one charge. If it subsequently turns out that the lawn mower was not stolen (the owner forgot that a neighbour had borrowed it) the failure of the prosecution to prove that each item was stolen is not fatal to the charge. If the prosecution can prove that one of the items was stolen then the charge of theft will have been proved.

Similarly, with this proposal, the prosecution must prove one set of the particulars (one incident of the offence) before the jury may find the accused guilty. However, the jury need not be satisfied about each incident alleged. Further, as with similar situations, the jury would not be required to indicate which incident(s) it is satisfied about, or that it is not satisfied about. It is then a matter for the judge to determine which incidents have been proved, as a basis for sentencing, in a manner which is consistent with the jury's verdict.

This approach should not result in any change to the actual sentence imposed. However, the sentence may be constructed differently. Where multiple offences of a similar type occur on the one occasion, and those offences are charged separately, there will be a high degree of concurrency in the sentences imposed. There may be small amounts of cumulation between offences. Under this proposal there will be one sentence and that sentence reflects the different offences that have been proved.

If the court finds that within the offence charged a number of charges have been proved, this would effectively be the same as where a person has pleaded guilty to a rolled-up charge. As with a rolled-up charge (see *R v Jones* [2004] VSCA 68), the court may sentence the offender for all of the offences charged and proved, but must impose a sentence that is within the maximum penalty for that offence.

Paragraph 8 — the court may order severance of the charges

This power has been included because of the new and different nature of the proposal. Section 165 of the *Criminal Procedure Act 2009* provides courts with the power to amend an indictment. Usually this power is exercised when the prosecution realises there is an error in the indictment or the evidence in the trial varies from the basis on which the indictment was drafted. Section 165(1) provides as follows:

> The court at any time may order that an indictment be amended in any manner that the court thinks necessary, unless the required amendment cannot be made without injustice to the accused.

The above scenarios generally operate on the basis that the issues in dispute will be the same for each of the incidents alleged (e.g. identity, consent, fault element as to consent). In most cases this will be true. However, it is possible to imagine different scenarios in which the issues in dispute may vary.[7]

[7] For example, the complainant may give evidence that after sexual penetration commenced she withdrew her consent. Suppose that B says there were three acts of penetration and she consented to the first and the second but withdrew her consent during the second act and then there was a third act of penetration to which she did not consent at any time.

It may be open to the jury to return different verdicts in relation to the incidents of offences. At the time of filing such an indictment, the prosecution may not know whether the issues in dispute will be the same or different. Accordingly, it is not appropriate to include a requirement about this in limiting when an indictment may be used. If the prosecution is aware of this risk at the time of filing the indictment, it would have the discretion to decide to charge the acts of penetration as separate offences.

Expressly providing the judge with the power to sever the charge in the indictment if the court considers it appropriate to do so, will ensure fairness in the proceeding.

13.4.2 Will this proposal simplify proceedings?

Analysis of a sample of 50 rape cases recently considered in the Court of Appeal indicates that this proposal might be of assistance in approximately 20% of rape cases. The remaining 80% of cases did not involve multiple incidents of rape on the one occasion. However, it is likely that a significant proportion of the 20% of cases will be ones in which the issues are, almost by definition, more complicated. As the cases discussed at the start of this paper indicate, the proposal is likely to be most helpful in some of the most complex cases.

In numerical terms the advantages could be described as follows. There are four elements in the offence of rape and suppose that there are three offences of rape. If the offences are charged individually, the judge will need to explain 12 elements to the jury (albeit the elements will often be the same). If the offences are charged under the proposal, the judge will need to explain the four elements of the offence and when explaining one element will explain that this is alleged to have been committed in two additional ways (making six elements).

While this will not necessarily equate to halving the time to discuss the elements, it should result in a significant saving in time and would remove large chunks of repetitive directions. This is likely to assist juries in their deliberations.

The combination of these two proposals should make a significant difference in more complex cases.

13.4.3 Consequential issues

The definition of a ‘serious sexual offender’ is set out in section 6B(2) of the *Sentencing Act 1991.* The most commonly relied upon paragraph of that definition refers to an offender who has been ‘convicted of 2 *or more* sexual offences for each of which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre’ (emphasis added).

If the proposal above is followed, a person may be convicted of one offence in circumstances where under the current law they would, for instance, be convicted of three or five offences. It may be argued that the approach under the proposal results in an unintended advantage to certain offenders. However, it could also be argued that the proposal will better reflect community understanding of when a person has committed ‘2 or more’ sexual offences punishable by imprisonment.

Question 10
Should the judge be provided with the power to declare that a conviction for one offence is to be treated as a conviction for however many incidents of the offences alleged in one charge that the judge finds proven?

14 Terminology

Below we explain some of the terminology used in this paper. Other key terms are explained in the glossary below.

accused/offender

We use the word 'accused' to refer to a person who is charged with a sexual offence. In the offence proposals in this paper, we refer to this person as 'A'. When we discuss patterns or types of sexual offending, we use the word 'offender'.

complainant and victim/survivor

As this paper focuses closely on the structure of sexual offences and on how those offences operate in the context of a criminal proceeding, we use the word 'complainant' to refer to a person against whom a sexual offence is alleged to have been committed. In the offence proposals in this paper, we refer to this person as 'B'. However, when we discuss patterns or types of sexual offending, we refer to a 'victim/survivor' of that offending.

he/she/they

The majority of people who are accused of sexual offences are men, and the majority of adults who report sexual offences are women. In its *Sexual Offences: Final Report* (2004), the VLRC used the pronouns 'he' to refer to a person accused of a sexual offence, 'she' to refer to adult victims/survivors and 'they' to refer to child victims/survivors.

This paper is concerned with sexual offence laws, which must apply to all situations and are expressed in gender-neutral language. As such, we have not adopted the VLRC's approach. Instead, we use 'A' and 'B' to refer to the accused and the complainant respectively. Where it is not possible to use 'A' and 'B', we use the gender-neutral pronouns 'he or she' or 'they'.

15 Abbreviations

the department	The Department of Justice
the Charge Book	The Judicial College of Victoria's Criminal Charge Book
VLRC	Victorian Law Reform Commission

16 Glossary of key terms

Below we explain some of the basic components of offences and important related concepts used in this review.

absolute liability

Absolute liability can apply to a physical element of an offence (usually a circumstance). This means that the prosecution is not required to prove a fault element in relation to that physical element. It also means that the accused cannot rely on a defence of honest and reasonable mistake of fact (or any other defence) in relation to that physical element. Absolute liability imposes a higher standard on an accused than strict liability. (See the entries below for these terms.)

burden of proof

In a criminal trial it is for the prosecution to prove that the accused is guilty of the offence charged. This responsibility is known as the 'burden of proof'. In special circumstances, the accused may have to prove something (for example, that he or she believed on reasonable grounds that the child was aged 16 or older). The expression 'burden of proof' is a general one which can be further explained by two specific 'burdens' – the evidential burden and the legal burden.

circumstance

A circumstance is a physical element of an offence. (Other physical elements are conduct and results.) Circumstances are used to provide greater context for the conduct of an offence. For example, in the offence of rape, the conduct is *sexually penetrating another person*. This element alone is insufficient to create a criminal offence. In order to properly describe when sexually penetrating another person will be criminal, the offence also requires proof that *the other person did not consent*. This is a circumstance of the offence of rape. Another example of a circumstance is that a child is under 12 years of age, in the offence of sexual intercourse with a child under 12.

Unlike conduct, a circumstance is not essential for the creation of a criminal offence. However circumstances are very common in sexual offences. This is because the conduct in most sexual offences is sexual intercourse, an activity which is inherently lawful. Circumstances are therefore required to clearly define the situations in which sexual intercourse is unlawful.

classification of an offence

In Victoria, offences are classified as indictable (the most serious offences), indictable offences which may be heard and determined summarily (certain serious offences, which can sometimes be dealt with in the Magistrates' Court), or summary (less serious offences).

Most sexual offences are indictable offences. A person who pleads not guilty to an indictable sexual offence which cannot be heard summarily will be tried before a jury in the County Court. A person aged under 18 who is charged with an indictable sexual offence will generally be dealt with in the Children's Court.

A person who pleads not guilty to an indictable sexual offence which may be heard summarily will either be tried before a jury in the County Court or dealt with by a magistrate in the Magistrates' Court, depending on the seriousness of the alleged offending. Where the alleged offending is a less serious example of the charged offence, the Magistrates' Court may be a more appropriate forum. If the accused is a child, the offence will be dealt with in the Children's Court.

A person charged with a summary sexual offence will be dealt with in the Magistrates' Court, or if the accused is a child, in the Children's Court.

conduct

Conduct is a physical element of an offence. It is not possible to create an offence without conduct. Conduct is usually an act, such as *sexually penetrating another person* (rape) or *taking part in an act of sexual penetration* (sexual penetration of a child under 16). This review examines

why the conduct in some sexual offences is described differently and whether it would be simpler if there were more consistency in expressing this element.

Conduct can also be a failure or omission to act. This type of conduct is not very common amongst sexual offences. One example is in the offence of rape, where after sexual penetration commences, the accused *does not withdraw* from a person who is not consenting. In this offence, the conduct is not the act of sexual penetration (which has already commenced), but the omission of 'failing to withdraw'.

defence

In this review, a defence provides a basis for exculpating the accused, even where he or she has committed an offence. This is different from an exception, which limits the scope of an offence by setting out particular conditions under which no offence is committed.

An accused who falls within an exception to an offence does not *commit* that offence. In contrast, an accused who has a defence may have committed the offence, but is nevertheless not *guilty* of the offence.

An example of a defence is duress. A person (A) sexually penetrates another person (B) without B's consent. A is aware that B does not consent. A has *committed* rape. However, A is *not guilty* of rape because A is acting under duress from a third person (C), who has threatened to kill A unless A rapes B. (C is guilty of rape and compelling rape.)

element

An offence consists of elements. An element of an offence is a matter that the prosecution must prove beyond reasonable doubt if the accused is to be found to have committed that offence. An element can be either a physical element or a fault element.

Elements are very important in structuring an offence. However, the structure of an offence cannot be completely understood without understanding two further concepts used in this review: exception and defence. (See the entries for these terms.)

evidential burden

The evidential burden is concerned with the threshold question of whether, in a criminal trial, there is sufficient evidence for an issue to be considered by the jury. That threshold is met (or the evidential burden is satisfied) by presenting or pointing to evidence which suggests a reasonable possibility of the existence of an element, exception or defence.

In a criminal trial, the judge decides whether the party who bears the evidential burden in relation to a particular matter has satisfied that burden. If the judge determines that the evidential burden in relation to a particular matter has not been satisfied, that issue cannot be considered by the jury. If the evidential burden is met, the legal burden of proving the existence or non-existence of that matter becomes relevant.

Usually, the prosecution bears the evidential burden in relation to the elements of an offence, and the accused bears the evidential burden in relation to exceptions and defences to the offence.

exception

An exception limits the scope of an offence by setting out particular conditions under which no offence is committed.

An accused who falls within an exception to an offence does not *commit* that offence. In contrast, an accused who has a defence may have committed the offence, but is not *guilty* of the offence.

An example of an exception is in the offence of rape. The current definition of 'sexual penetration' includes the introduction by a person of an object into the vagina or anus of another person 'other than in the course of a procedure carried out in good faith for medical or hygienic purposes'. A midwife who in good faith performs a vaginal examination on a pregnant woman for medical purposes does not commit rape. Her conduct is excluded from the scope of the offence of rape.

An exception is similar to an element of an offence, in that both describe the limits of criminal liability. The difference between them is that an element must be proved in every case. In the offence of rape, the absence

of the complainant's consent is an element of the offence.

In contrast, an exception need only be considered if relevant to the case against the particular accused, but not in every case. Thus, in a rape case, if there is no evidence suggesting that the sexual penetration was for medical purposes, there is no need for the prosecution to prove that the sexual penetration was not engaged in for these purposes.

The difference between exceptions and defences is important from a policy perspective because it signifies the dividing line between criminal and non-criminal behaviour. It is also very important in relation to criminal liability for complicity. At present, different words and expressions are used to refer to these concepts. It is an aim of this review for offences to make clear not only elements, but also exceptions and defences.

fault element

A fault element describes the 'fault' (usually the state of mind) of an accused in relation to a physical element. An offence can have more than one fault element.

Why do we need fault elements?

It would be possible to create a criminal offence using only physical elements. However, for serious offences the criminal law adopts the principle that physical elements alone are usually insufficient to create criminal liability.

To create serious criminal liability the prosecution must prove that an accused was at 'fault' in relation to the physical elements of the offence. For example, if a person (A) causes injury to another person (B), this is not sufficient to find that A has committed an offence. It is also necessary to prove that A *intended* to cause injury to B or was *reckless* about causing injury to B.

Is a fault element the same as 'mens rea'?

The expression 'fault element' is similar to the common law expression 'mens rea', meaning 'guilty mind'. However, there is an important difference. The common law refers to 'the mens rea of an offence'. This can make 'mens rea' appear to be an indivisible notion, which in turn can make it difficult to identify precisely which state of mind applies to each physical element of the offence. This can be confusing.

For example, in the offence of sexual penetration of a child under the age of 16, there are two physical elements – taking part in an act of sexual penetration with a person (conduct) and the fact that the other person is a child is under 16 (circumstance). If we say that the 'mens rea' for this offence is 'intention', what does this mean? Does it simply mean that the accused intended to engage in sexual penetration? Does it mean that the accused intended that the child be aged under 16? Or does it mean that the accused intended to engage in sexual penetration with a person and knew that the person was a child under 16?

Our approach

In order to be as clear as possible and to avoid confusion, in this review we consider each physical element separately and ask whether a fault element should apply to that physical element. For example, the offence of rape has two physical elements:

- the accused sexually penetrates another person (conduct), and
- the other person does not consent to being sexually penetrated (circumstance).

Our approach is first to identify what, if any, is the fault element applicable to the conduct of this offence. Is the current fault element appropriate? The next question is what is the fault element applicable to the circumstance? Is it appropriate?

All sexual offences contain at least one fault element. The sexual offences under review currently use different fault elements to refer to similar concepts. This can create confusion. In this review, we propose that a number of standard fault elements be adopted and used consistently across offences.

The three main fault elements used in this review are intention, knowledge, and recklessness. (See the entries for these terms.) However, there may

be occasions where none of these fault elements works appropriately for an offence, and we therefore propose a different fault element.

Sometimes a fault element does not relate to or attach to any physical element of the offence. This is known as an 'ulterior fault element'. (See the entry for this term below.)

intention

Intention is a fault element. It can apply to conduct and/or to a result. In this review, intention is used mainly in relation to conduct. For example, a person (A) *intends* to sexually penetrate another person (B). A person intends to engage in conduct if they *mean to* engage in the conduct.

At present, many sexual offences specify a physical element but do not expressly state whether a fault element applies to that physical element. For example, section 45 of the *Crimes Act* provides that a person who takes part in an act of sexual penetration with a child under the age of 16 is guilty of an offence. The offence does not expressly state that the accused must *intend* to take part in the act of sexual penetration.

In contrast, section 38 states that a person commits rape if he or she *intentionally* sexually penetrates another person without that person's consent. Does the absence of the word 'intentionally' in section 45 mean that the prosecution does not have to prove that an accused intended to take part in the act of sexual penetration?

It is preferable for offences to clearly specify fault elements. For this reason, many of the proposed offences in this paper specify 'intention' as the fault element applicable to the conduct of the offence.

jury direction

Jury directions are the instructions a judge gives to a jury to help them to decide whether a person is guilty of an offence.

knowledge

Knowledge is a fault element. In this review, knowledge is only used in relation to a circumstance. For example, a person (A) *knows* that a child is present while A engages in sexual activity. Knowledge is sometimes referred to as 'awareness'. One of the fault elements in the current offence of indecent assault is that the accused is aware that the complainant is not consenting to being touched.

'Knowledge' and 'awareness' are synonyms. In the interests of simplicity and consistency, this review uses 'knowledge' rather than 'awareness'.

legal burden

In a criminal proceeding, the legal burden (also called the 'persuasive burden') is the task of proving to the jury or magistrate the existence of an element, or the existence or non-existence of an exception or defence. The legal burden in relation to an element, exception or defence only becomes relevant if the evidential burden in relation to that matter has first been satisfied.

It is a longstanding common law principle that the prosecution must prove the guilt of the accused. This means that:

- for elements of an offence, the prosecution bears both the evidential and legal burdens, and
- for defences and exceptions, the accused bears the evidential burden of raising the defence or exception, and the prosecution bears the legal burden of disproving the exception or defence.

Thus, it is not typical to impose a legal burden on an accused (sometimes called a 'reverse onus'). Nevertheless, there may be good reasons for doing so. A number of defences to sexual offences against children impose a legal burden on the accused. The justification for this is generally that a higher standard of behaviour is expected of people who engage in sexual activity with children. (See also standard of proof.)

It is not always clear when looking at an offence provision where the burden of proof lies in relation to a particular element, exception or defence. It is an aim of this review that the allocation of the evidential and legal burdens be as clear as possible. In particular, if the offence imposes a legal burden on an accused, this should be very clear from the

legislation.

maximum penalty

Most sexual offences specify a maximum penalty by referring to a 'penalty level'. This is a reference to the penalty scale which is set out in the *Sentencing Act 1991*.

The maximum penalty for an offence is set having regard to a number of considerations. It needs to cover the worst case scenario for that offence. It must also have a logical relationship with related offences, so that more serious offences have a higher maximum penalty and less serious offences have a lower maximum penalty.

This review does not propose changes to the sentencing structure of sexual offences. However, this review does propose changes to the maximum penalty for some existing sexual offences in order to create a more logical and appropriate hierarchy of maximum penalties.

physical element

Physical elements are essential to creating an offence. They are sometimes described as the 'actus reus' or 'guilty act' of an offence. In this review we refer to three different kinds of physical elements: conduct, circumstances, and results. (See the entries for these terms.)

recklessness

Recklessness is a fault element. It can apply to a circumstance and/or to a result. Recklessness can be confusing for juries. This is in part because the ordinary meaning of the word – 'carelessness' – is different from the legal meaning. It is also because the legal meaning of 'recklessness' is sometimes imprecise.

The most common legal definition of 'recklessness' is 'knowledge that a result will probably occur'. This meaning comes from the offence of murder, where an accused is 'reckless' if he or she knows that his or her conduct will probably cause the death of, or really serious injury to, another person.

However, the current offence of rape contains a slightly broader form of recklessness. This is where the accused is aware that the complainant *might not* be consenting. Rather than knowledge that a circumstance *probably* exists, this is closer to knowledge that a circumstance *possibly* exists.

There may be good reasons to use different versions of a fault element in different offences. However, the approach of this review is that, where possible, one definition of 'recklessness' will be used. For a circumstance, this will be expressed as knowledge that the circumstance probably exists.

result

A result is a physical element of an offence. Very few sexual offences include a result. An example of a non-sexual offence with a result is intentionally *causing serious injury* to another person (B). The result element is that B received a serious injury.

standard of proof

The party which bears a legal burden with respect to an element, exception or defence must prove the existence or non-existence of that matter to a particular standard. This is known as the standard of proof. It is essentially a matter of how strong or convincing the evidence must be for the proposition in question to be proved. The standard of proof varies depending on whether the legal burden is on the prosecution or the accused.

Where the prosecution bears the legal burden of proving an element or of disproving an exception or defence, it must do so 'beyond reasonable doubt'. Where the accused bears the legal burden (usually in relation to a defence), the accused must prove the defence or other matter 'on the balance of probabilities'. This is a lower standard than that required of the prosecution.

strict liability

Strict liability can apply to a physical element of an offence (usually a circumstance). This means that the prosecution is not required to prove a fault element in relation to that physical element. However, the accused

can rely on a defence of honest and reasonable mistake of fact in relation to that physical element. (See also absolute liability.)

The High Court held in *He Kaw Teh v The Queen* (1985) 157 CLR 523 that there is a presumption that 'mens rea' is an essential ingredient of any offence. Thus, the common law often operates to imply the existence of a fault element in an offence.

To avoid uncertainty in developing revised and new sexual offences, it is preferable to specify any applicable fault elements, rather than to rely on the common law to imply the existence of a fault element.

ulterior fault element

An ulterior fault element is a fault element that does not correspond to a physical element in an offence.

An example of an ulterior fault element in a sexual offence is assault *with intent to rape*. In order to prove this offence it is not necessary to prove that the accused in fact raped a person, only that the accused intended to do so.

Ulterior fault elements which refer to an intention to commit a further offence (such as assault with intent to rape) can be complex. This complexity arises from the fact that it is often not clear precisely what state of mind on the part of the accused it is necessary to prove. For example, in assault with intent to rape, it is not clear whether the ulterior fault element is 'intention to sexually penetrate a person without his or her consent' or alternatively, 'intention to sexually penetrate a person regardless of whether or not the person will consent'. These are different states of mind which require different directions to the jury. In this review, we seek to ensure that ulterior fault elements are as clearly and precisely expressed as possible.

17 References

Frequently cited cases

NT v The Queen [2012] VSCA 213

The Queen v Getachew (2012) 286 ALR 196; [2012] HCA 10

S v The Queen (1989) 168 CLR 266

Wilson v The Queen (2011) 33 VR 340; [2011] VSCA 328

Worsnop v The Queen (2010) 28 VR 187; [2010] VSCA 188

Frequently cited reports

Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003)

Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004)

Victorian Law Reform Commission, *Jury Directions: Final Report* (2009)

Frequently cited legislation

Crimes Act 1958

Criminal Code Act 1995 (Cth)

Criminal Procedure Act 2009

Sexual Offences Act 2003 (UK)

In this paper, the Acts referred to are Victorian Acts unless otherwise stated.

Appendix 1 Illustrative fictional scenarios

To illustrate how the proposed options in relation to the offence of rape would apply to particular cases, some fictional scenarios are presented below. The following three case scenarios are drawn from actual cases, though with names and identifying features altered and some new aspects added for illustrative purposes.

The scenarios consist of a summary version of the evidence given at trial by the complainant and by the accused. The scenarios are necessarily briefer than the full evidence that would be given in a real trial, but they are sufficient to raise the issues and show the differences between Options 1, 2 and 3 with regard to the offence of rape. However, it should be noted that a real trial would be much more complicated because there would be considerably more evidence to assess and more issues to address, such as the inferences that can be drawn from the evidence and the credibility of witnesses. The extent of jury directions concerning how certain evidence may or may not be used can also make these issues more complicated.

For each scenario, after the evidence is presented, the paper outlines how the proposed laws would most likely apply. To streamline the presentation, it is assumed that the elements of sexual intercourse taking place and the intercourse being intentional have been proved or there is no dispute about them. The disputed facts to be decided are whether the complainant did not consent and the fault element with regard to the complainant not consenting. Options 1, 2 and 3 are then addressed in terms of how they would apply to those disputed issues.

Please note that the scenarios presented here may be distressing to some people. If you need help or support in relation to sexual assault, please contact the Victims of Crime Helpline on 1800 819 817 or Centres Against Sexual Assault on 1800 806 292.

Scenario 1

Alan (aged 41) is a small business owner. Bethany (aged 21) is the receptionist at Alan's business. Alan is accused of raping Bethany in the office of the business. (This scenario is adapted from the scenario discussed in the VLRC's *Sexual Offences: Interim Report* (2003), pp 326–7, which is itself drawn from an actual case.)

Evidence

Bethany's evidence

Bethany gave the following evidence at trial:

After work one Thursday, I went out for dinner with a group of the staff, including Alan. After dinner Alan asked me if I would like to come to the office for some more drinks. I said I couldn't because I had to work the next day. Alan was persistent, and I felt unable to refuse because Alan was my employer. We returned to the office.

By this stage, Alan was quite drunk. He sat next to me and tried to put his arm around me and kiss me. I ducked and Alan fell on the floor where he fell asleep. At this point I started to walk home. However, I did not feel safe walking alone on the street so late at night and I returned to the office and lay down on a couch in the staff room upstairs where I fell asleep.

Sometime later, I was awakened and saw that Alan had his hand on my crotch and was saying to me something like, ‘You sleep like a baby’. I was scared. I said, ‘You shouldn’t be doing that’. I was half asleep, half awake at the time.

I nodded back off to sleep for a couple of seconds and then awoke again. I noticed that Alan was kneeling alongside the couch. He was making advances on me, touching me, and I couldn’t do anything. I wasn’t fully awake, I was thinking ‘What’s going on?’ He was trying to undo my pants, pull down my top and kiss me. He tried to put his tongue in my ear. I was thinking to myself, ‘This can’t be happening to me’. He then got my pants down, touched me inside with his fingers, then with his tongue. Then he pinned my arms down and penetrated me. I kind of froze. I couldn’t say or do anything. I tried to avoid his kisses by moving my head from side-to-side.

Alan’s evidence

Alan did not dispute that sexual intercourse took place. Nor did he dispute Bethany’s evidence that he had asked Bethany back to the office for more drinks and that he had been persistent in asking her back to the office for more drinks (though he said he was ‘eager and very encouraging’ rather than ‘persistent’). He continued:

But I did not make any sexual advances toward Bethany back at the office before I fell asleep. I woke up later and went upstairs where I found Bethany asleep. I knelt beside her and said, ‘Gee you sleep like a baby. You’ve got beautiful eyes.’ She had her eyes open at the time. I then kissed her lips. She did not push me away. I then started to caress Bethany. I removed her pants and kissed her body. I believed that Bethany was responding. She didn’t discourage me in any way, so it was the natural thing to do, and we had intercourse. Bethany touched me on the shoulder, and that’s when I proceeded to have sexual intercourse with her.

When Bethany said, ‘You shouldn’t be doing this’ I took it to mean that she was enjoying the forbidden nature of the relationship (that I was her employer and she was my employee).

I was sure that Bethany in fact consented to having sex with me. All the signs were pointing in that direction. I certainly had no reason to think she was not consenting.

The complainant did not consent

The issue of whether Bethany did not consent is primarily a matter of what facts the jury is prepared to find proved beyond reasonable doubt on the basis of the evidence presented. Bethany’s own testimony that she did not consent and that she essentially just froze when Alan made advances toward her would be assessed alongside Alan’s testimony that Bethany was ‘responding’, that she touched him on the shoulder, and that she ‘didn’t discourage him’.

The jury would be instructed, on each of Options 1, 2 and 3, that evidence that Bethany did not say or do anything at the time to indicate consent to sexual intercourse could be sufficient for the jury to conclude that she did not consent. The jury would also be instructed that an absence of protest or resistance at the time would not be enough on its own to raise a reasonable doubt about whether Bethany did not consent.

There is also the relevance of the alcohol involved and the fact that Bethany had been asleep at the time that Alan began making advances towards her. It does not appear that the situation comes within the circumstances in which consent would be deemed by law to be absent. Nonetheless, the effects of the alcohol and Bethany’s groggy state could be treated as evidence, in this particular case, that she was not in the best state for freely agreeing to sex.

Also relevant here is that Alan was Bethany's employer and that her evidence was that she had therefore felt unable to refuse his request to come back to the office for more drinks. The power imbalance between Alan and Bethany thus makes it less plausible that her lack of protest or resistance was evidence that she did consent.

Fault element with respect to the complainant not consenting

The issue of the fault element with respect to Bethany not consenting would be dealt with differently under Options 1, 2 and 3.

Fault element under Option 1

Under Option 1, the jury would need to consider whether:

- Alan knew that Bethany was not consenting
- Alan knew that she might not have been consenting, or
- Alan gave no thought to the issue of whether or not she was consenting.

Has the prosecution proved that Alan knew that Bethany was not consenting?

Alan will not have known that Bethany was not consenting if he in fact believed that she was consenting. Alan gives evidence that he believed Bethany was consenting. The prosecution will therefore need to prove that he did not have that belief, before it can prove that Alan knew that Bethany was not consenting. Alternatively, the prosecution can try to prove that Alan did not believe Bethany was consenting by proving that he knew Bethany was not consenting, since the evidence in favour of Alan knowing that Bethany was not consenting is likely also to serve simultaneously as the evidence against Alan believing in the existence of consent. This is because these states of mind are incompatible (or inconsistent), so that if the prosecution proves that Alan knew that Bethany was not consenting, it will necessarily have excluded the possibility that he believed she was consenting.

In order to decide whether the prosecution has proved that Alan knew that Bethany was not consenting, a number of factors will be relevant. Those factors include:

- the commonly agreed fact that Bethany had been asleep when Alan woke her
- the commonly agreed fact that Bethany had drunk a lot of alcohol
- the commonly agreed fact that Alan was Bethany's employer
- the commonly agreed fact that Bethany had said 'You shouldn't be doing that' (though on Alan's evidence she said 'You shouldn't be doing *this*')
- the evidence of Bethany (denied by Alan) that she had rejected Alan's sexual advances prior to his falling asleep
- the evidence of Bethany (denied by Alan) that she 'couldn't do anything' (Alan says she touched him on the shoulder)
- Alan's evidence that Bethany did nothing to discourage him, and
- the fact that the events occurred in the context that Alan and Bethany had never had any prior sexual contact.

All these factors could be relevant to the question of whether Alan knew Bethany was not consenting, or did not believe that she was consenting. The evidence could be used in deciding whether a belief that Bethany was consenting would have been unreasonable, and therefore less likely to have been held, and so making it more likely that knowledge is proved.

If the jury is not satisfied that Alan knew that Bethany was not consenting, then it should turn to the next question.

Has the prosecution proved that Alan knew that Bethany might not have been consenting?

The jury will then need to consider whether Alan knew that Bethany might not be consenting, even if he believed that she was consenting. The jury could do so if they were satisfied that (a) the nature and strength of Alan's belief that Bethany was consenting was not inconsistent with knowing that Bethany might not have been consenting and (b) that he did in fact know that she might not have been consenting. That will ultimately be a matter of how the jury assesses Alan's evidence concerning his state of mind and the certainty or strength with which he held the belief that Bethany was consenting. The list of factors above will again be relevant here.

Has the prosecution proved that Alan gave no thought to whether Bethany might not have been consenting?

If the jury is not satisfied that Alan did not believe Bethany was consenting (i.e. if they conclude that it is a reasonable possibility that Alan honestly believed she was consenting), then the jury could not find Alan guilty on the basis that he gave no thought to the issue of consent. This is because the existence of such a belief is inconsistent with having given no thought to the issue.

It is unlikely that the jury would conclude that Alan had given no thought at all to the question, given the nature and content of his evidence.

Fault element under Option 2

Under Option 2, the jury would need to decide:

- whether Alan knew that Bethany was not consenting
- whether Alan did not believe that Bethany was consenting, or
- even if Alan did believe Bethany was consenting, whether he did not have reasonable grounds for that belief.

Has the prosecution proved that Alan knew that Bethany was not consenting?

The prosecution would most likely try to prove this by arguing that Alan's evidence about his belief that Bethany was consenting is untrustworthy and that, in all the circumstances of the case, Alan knew Bethany was not consenting. This is not likely to be the prosecution's strongest point because of Alan's evidence about his belief. Much will depend here on the credibility of the witnesses.

The prosecution can then explain to the jury that, even if they do not accept that Alan must have known Bethany was not consenting, he either did not believe she was consenting or had no reasonable grounds for such a belief, which are the next steps in the prosecution case.

Under Option 2, the question about knowledge that Bethany did not consent would be answered in a more streamlined way than it is under Option 1. This is because the issues about belief in consent and reasonable grounds for belief in consent do not need to be addressed within the context of answering the question about knowledge. Instead, they become distinct questions as alternative fault elements, as below.

Has the prosecution proved that Alan did not believe that Bethany was consenting?

The jury will need to assess all the relevant evidence to decide whether the prosecution has proved that Alan did not believe Bethany was consenting. The prosecution does not first need to prove the existence of some other specific state of mind which is incompatible with a belief that the complainant was consenting (such as awareness that the complainant might not be consenting) though it may be possible to do that in some cases.

Rather, it would be enough for the prosecution to argue — and the jury to accept — that in light of all the relevant evidence, it is clear beyond reasonable doubt that Alan did not believe that Bethany consented. That is, the prosecution could argue that, given all the relevant factors (such as Bethany having been asleep, the alcohol involved, the fact that Bethany was his employee, Alan's not taking positive steps to ascertain Bethany's consent, Bethany's lack of positive communication of consent, etc), the jury may draw the conclusion that Alan did not form a belief that Bethany was consenting.

Much would depend here on what evidence the jury would accept. It is not certain that the prosecution could prove beyond reasonable doubt that Alan did not believe that Bethany was consenting.

Has the prosecution proved that, even if Alan did believe that Bethany was consenting, he did not have reasonable grounds for that belief?

If the jury were not satisfied that Alan did not believe that Bethany was consenting (i.e. they conclude that it is a reasonable possibility that he did have that belief), then the jury would go on to decide whether such a belief would have lacked reasonable grounds. On this question, the prosecution has a much stronger case.

In order to assess whether a belief that Bethany consented would have lacked reasonable grounds, the jury would be instructed to take into account all the circumstances of the case. In this case, the main circumstances include the factors listed above under Option 1 (proving knowledge that Bethany did not consent).

Further, of particular relevance in this case is the question of what steps Alan took or did not take to find out whether Bethany was consenting. On the evidence of both Alan and Bethany, Alan appears to have taken minimal steps. Alan made advances, interpreted Bethany's passivity and lack of active discouragement as indicating consent and kept going. These may not amount to adequate steps. Moreover, any lingering effects of Alan's own earlier intoxication will not be of assistance to him, as reasonableness is not to be interpreted relative to the accused's state of self-induced intoxication.

In the light of all of the above, there is a reasonable prospect that the prosecution would succeed in proving that Alan did not have reasonable grounds for believing that Bethany was consenting. Much will depend on the credibility of the witnesses.

Fault element under Option 3

Option 3 essentially involves splitting Option 2 into two offences. The first offence (rape) would have two alternative fault elements with respect to the complainant not consenting: knowledge that the complainant did not consent and not believing that the complainant was consenting. The second offence (sexual violation) would have one fault element with respect to the complainant not

consenting: the accused does not have reasonable grounds for believing that the complainant was consenting.

The steps for the jury to follow in relation to Option 3 are thus essentially those for Option 2, but with the difference that if the jury does not accept either that Alan knew that Bethany was not consenting or that he believed that Bethany was consenting, but does accept that Alan did not have reasonable grounds for believing that Bethany was consenting, then under Option 2 he would be found guilty of rape, while under Option 3 Alan would be guilty of the lesser offence of 'sexual violation'.

Another difference is that the jury directions under Option 3 would be more complex than for Option 2, because sexual violation would need to be explained to the jury as an alternative verdict in every case of rape. This would mean an added step of reasoning for the jury: if they find against the prosecution on the first two steps (knowledge and belief), then they must acquit Alan of the charge of rape and then go on to consider the third step (reasonable grounds for belief) as a further charge and alternative verdict.

Scenario 2

Alex (aged 24) has been charged with raping Bianca (aged 23).

Evidence

Bianca's evidence

Bianca gave the following evidence at trial:

One Saturday evening in July I went to a bar in the centre of Melbourne where I met my friend Clarice. I drank champagne. While we were at this bar, we met Alex and his friend Dom. We had not met either of them before. We all then went to another bar in the city. I drank bourbon and champagne. In the early hours of the next morning the four of us left the bar. I was getting very drunk by this stage. I decided not to drive home in my car. Instead, Dom drove my car and took us all back to his place in the outer suburbs. On the way I became unwell and the car had to be stopped a couple of times so that I could vomit.

When we got to Dom's place we all went to his bungalow at the rear of the house where Dom's parents lived. The bedroom of the bungalow contained one bed. Dom placed a mattress on the floor of the bedroom for me and Alex, while Dom and Clarice shared the bed.

I was wearing a short skirt, a top and a coat. As I was going to sleep, Alex touched my leg. I told him to go away. Alex touched me again. I told him that if he did not stop touching me, I would sleep in the car. Alex offered to sleep somewhere else but I told him, 'Don't worry about it. Just don't touch me and let me sleep'.

After I went to sleep, I woke up and Alex was lying behind me and my clothing was all dishevelled and my skirt was up and my underwear was down and he was thrusting into me. I was lying on my left side and Alex was behind me. I had my knees up and Alex was holding me on my hips and thrusting his penis into my anus. It wasn't a deep penetration, I would estimate about one centimetre, but it was definitely inside me. I pushed Alex away, got up and went out to my car. I was in complete shock.

Clarice and Dom then came out and I then drove Clarice home in my car. I reported the matter to the police straight after that.

Alex's evidence

Alex admitted that intentional sexual intercourse had occurred but went on as follows:

Bianca had been flirting with me all evening. She was clearly out for a good time, wearing a short skirt and high heels and making lots of sexual jokes and innuendos all night. She repeatedly brushed up against me while we were at the bars in the city.

When we were given the one mattress to lie on in the bungalow, it was obvious what that meant and she didn't give any hint at that point that she was not interested. So when we lay down together on the mattress and I touched her and she said something like 'don't worry about it, just let me sleep' I thought that she was just being a tease, given the way the whole night had been going. So when I touched her again and starting moving her skirt up and her underwear down, and she said nothing, I assumed that she'd stopped teasing and was probably up for it.

The complainant did not consent

The prosecution evidence in favour of the complainant not consenting is strong. Bianca's evidence was that she was asleep. Being asleep is deemed to be a circumstance in which the complainant does not consent. In addition, Bianca stated that she told Alex on two occasions to stop touching her. Further, on both her evidence and Alex's evidence, she said or did nothing at the time to positively indicate consent.

Alex's evidence in favour of consent is not really enough to cast reasonable doubt upon Bianca's evidence. He has no evidence to counter the assertion that Bianca was asleep. In any case, even assuming the jury were not satisfied she was asleep, his other evidence is relatively weak. He said that Bianca had been flirting with him during the evening and that she did not protest on the third occasion he touched her. It is unlikely that her flirting (even if accepted as fact) and her non-protest on the third occasion would provide the jury with a basis for concluding this element was not proved.

Fault element with respect to the complainant not consenting

Fault element under Option 1

Under Option 1, the jury would need to consider whether:

- Alex knew that Bianca was not consenting
- Alex knew that she might not have been consenting, or
- Alex gave no thought to the issue of whether or not she was consenting.

Has the prosecution proved that Alex knew that Bianca was not consenting?

Given Alex's evidence that he assumed Bianca was 'probably up for it', to succeed on this point, the prosecution would need to prove that Alex did not have such an assumption or belief and in fact knew that Bianca was not consenting. To help prove that, the prosecution would address the issue of the reasonableness of such a belief on Alex's part (with the more limited purpose of trying to prove that an unreasonable view is less likely to have been held). There are various matters relevant to that issue:

- what Alex knew of the circumstances (the late hour, the effects of the alcohol, Bianca being sick, her being tired and having gone straight to bed, and her rebuffing him twice), and
- the minimal steps he took to find out whether she consented (the steps he took were merely to touch her twice in what was, if seen in its best light, an exploratory way).

If the jury were satisfied that Alex did not believe that Bianca was consenting, then the prosecution would still need to prove that Alex knew she was not consenting. This is because Alex's belief, or absence of belief, is not an element of the offence; the prosecution must still prove the fault element of the offence. Moreover, it is possible that the way in which Alex did not believe Bianca was

consenting did not amount to knowledge that Bianca was not consenting. Alex's lack of belief that Bianca consented could have amounted to no more than a belief that she might not be consenting. To prove that Alex positively knew Bianca was not consenting, the prosecution would need more.

The evidence as to what Alex knew would be circumstantial (since he does not admit it) and would largely consist of consideration of what he already knew of the circumstances. The argument would be that, given what he knew about the circumstances (which may include inferences about what he knew about the circumstances), it could be inferred that he knew that Bianca was not consenting.

On the other hand, if the jury were not satisfied beyond reasonable doubt that Alex did not believe in consent (i.e. they found that it was a reasonable possibility that he did believe in consent), then this will prevent proof that he knew she did not consent.

Has the prosecution proved that Alex knew that Bianca might not have been consenting?

The issue will then become whether Alex's belief that Bianca was consenting was also inconsistent with Alex knowing that Bianca might not have been consenting. This will depend on the nature and strength of Alex's belief. The jury would have to assess just what sort of belief Alex had and whether it was of sufficient strength that it prevented (or meant) that he did not know that Bianca might not be consenting.

Alex's evidence was merely that he 'assumed' Bianca had 'stopped teasing him and was probably up for it'. This is a weakly held belief and unlikely to be found to be incompatible with knowledge of the possibility that Bianca did not consent. Given Alex's evidence and what Alex knew about the circumstances, it seems arguable that he would be found to have known that Bianca might not have been consenting.

Has the prosecution proved that Alex gave no thought to whether Bianca might not have been consenting?

As an alternative limb, it remains possible to argue that Alex had failed to give any thought to the issue and just proceeded with intercourse. But given Alex's evidence, it is unlikely that such an absence of thought could be proved beyond reasonable doubt. It is likely that the jury would accept that Alex gave *some* thought to the issue, simply not enough thought or the right kind of thought.

Fault element under Option 2

Under Option 2, the jury would need to decide:

- whether Alex knew that Bianca was not consenting
- whether Alex did not believe that Bianca was consenting, or
- even if Alex did believe Bianca was consenting, whether he did not have reasonable grounds for that belief.

Has the prosecution proved that Alex knew that Bianca was not consenting?

The prosecution might simplify its case and not argue that Alex knew that Bianca was consenting, as the strength of its case is with the other fault elements. However, if the prosecution did allege that Alex knew that Bianca was not consenting, the prosecution would most likely argue that his claim that he 'assumed that she'd stopped teasing and was probably up for it' was implausible and that in all the circumstances, including his awareness of her drunkenness, her earlier rebuffs, and

her settling down to sleep, it is clear that he in fact knew she was not consenting because she was asleep. (Depending on how Question 4 in Part 3.9.4 above would be answered, evidence that the accused knew that the complainant was asleep would either be relevant to the question of fault or give rise to a presumption that the fault element was satisfied. We will assume that such evidence is simply relevant.)

Much would depend on the credibility of Alex as a witness here. Even if the prosecution does not succeed on this point (perhaps because the jury accepts as at least reasonably possible Alex's claim that he had assumed Bianca had 'stopped teasing and was probably up for it'), the prosecution can then rely on the alternative fault elements.

Has the prosecution proved that Alex did not believe that Bianca was consenting?

The prosecution would argue that Alex did not in fact form the belief that Bianca consented. Given all the evidence about Bianca's intoxication, her tiredness, her rebuffing his advances twice, it is quite possible that the jury would be satisfied that Alex did not in fact believe that Bianca was consenting. His own evidence was that he 'assumed' that she was 'probably up for it'. That could be argued to be insufficient to constitute a belief that Bianca was consenting.

Has the prosecution proved that, even if Alex did believe that Bianca was consenting, he did not have reasonable grounds for that belief?

Regardless of how the prosecution would fare in relation to the question of belief, the prosecution would have a strong argument that, even if Alex honestly believed that Bianca was consenting, it would not have been on reasonable grounds, given what Alex knew of the circumstances and the minimal steps he took to find out whether she consented.

It would not be relevant for the jury, in assessing reasonableness, to take into account Alex's own self-induced intoxication, or his general views and expectations about women's sexual behaviour and preferences (as evidenced by his views about the way she was dressed and had behaved).

Given all the above, the jury would be very likely to conclude beyond reasonable doubt that even if Alex did believe that Bianca was consenting, such a belief would not have been on reasonable grounds.

Fault element under Option 3

Again, under Option 3, the jury's task is essentially the same as in Option 2 but with the added step of needing to treat the first two steps as one offence and the third step as a distinct and alternative offence.

If the jury is not satisfied that Alex knew Bianca was not consenting or was not satisfied that Alex did not believe that she was consenting, but is satisfied that Alex lacked reasonable grounds for a belief that Bianca consented, then it would be required to acquit Alex of rape and find him guilty of the alternative offence of sexual violation.

Scenario 3

Arnold (aged 47) is a naturopath who has been charged with the rape of a client, Bernadette (aged 22).

Evidence

Bernadette's evidence

Bernadette gave the following evidence at trial:

I first saw Arnold on 22 August after I had undergone an operation for a gynaecological medical condition (endometriosis) that left me with various complaints, including back pain. Arnold was a naturopath recommended to me by a friend. Arnold suggested that I should see him three times a week to correct my back. He said that a lot of the pain was caused by scar tissue from the operation, that the pain was causing muscles to tighten and that I could be helped by massage. He also suggested vitamins and nutrients.

I saw him for several sessions over the next couple of weeks. On the first few occasions I got undressed, got on the massage table and put a towel over myself. Arnold did Bowen therapy down my legs and back. But nothing inappropriate happened.

Then on the fourth visit, on 7 September, I saw Arnold in the evening and he told me to get undressed. I undressed to my underpants and he performed Bowen movements down my back and legs. As I lay on my stomach, Arnold removed the towel and took my underpants off, saying they got in the way. He massaged my buttocks and thighs. He then put his finger inside my vagina and pressed on the vaginal wall. He asked, 'Does this hurt?' and I replied, 'Yes'. I asked what he was doing and he said that having his finger in my vagina and massaging the scar tissue away was the only way that he could loosen the muscles through my pelvic area.

He took his finger out and told me to roll onto my back. He then massaged the front of my legs, put his finger in my vagina and pushed against the vaginal wall. He said that I should not be in so much pain and that his actions would loosen the ligaments.

He behaved like his actions were in accordance with normal therapeutic practice. I thought that the treatment was necessary to relieve my endometriosis pain. After I got dressed, he hugged me and tried to kiss me on the lips, but I turned my head away. That made me even more concerned about his actions during the massage. I spoke to a friend the next day and then I made a complaint to the police.

Arnold's evidence

Arnold gave the following evidence at trial:

I have practised as a naturopath for more than 20 years. I am qualified to perform various massage techniques, including Swedish massage and Bowen therapy.

I first saw Bernadette for her back pain and associated problems arising from an operation. On 7 September, I gave Bernadette a full-body massage. She was undressed under a towel. During the course of the massage, we became intimate; it changed from a professional massage to an intimate massage. She told me that it was nice and started moving so that I was in contact with her genitalia. I massaged her clitoris and vagina. I thought that Bernadette consented to that because she seemed to respond positively and she told me how great she felt and kissed me afterwards. I know of no reason why Bernadette might think that the sexual massage was part of her therapeutic treatment.

The complainant did not consent

The prosecution's proof that Bernadette was not consenting would be on the basis that she had mistakenly believed that the act was for a medical purpose. (It could also be argued that she was mistaken about the sexual nature of the act; the two circumstances overlap.) Such a mistaken belief is deemed (under each of Options 1, 2 and 3) to be a situation in which there is no consent. This is because acquiescence or apparent consent in such a situation is not properly informed consent. If the jury accepted the evidence that Bernadette believed that the act was for a medical purpose (or was mistaken about its sexual nature), then they must conclude that she did not consent.

Arnold denies that he sexually penetrated Bernadette while she was under the impression it was for a medical purpose. He says that by the time he penetrated her with his finger, it had become an 'intimate massage'. This implies that Bernadette knew that the penetration was sexual in nature and did not mistakenly believe it was for a medical or therapeutic purpose. His evidence for that conclusion is that she seemed to respond positively and told him afterwards how great she felt. The prosecution would be likely to argue either that Bernadette did not say that or that she may have said it because she was distressed and just wanted to leave as quickly as possible.

The jury would need to assess all the relevant evidence and decide whether the prosecution had proved beyond reasonable doubt that Bernadette did not consent, due to her belief that the act was for a medical procedure. It would seem likely that the jury would conclude that Bernadette did not consent, on the basis of a mistaken belief. If the jury was *not* satisfied that Bernadette was not consenting (because there is a real possibility that she was consenting), then Arnold must be found not guilty.

Fault element with respect to the complainant not consenting

Fault element under Option 1

Under Option 1, the jury would need to consider whether:

- Arnold knew that Bernadette was not consenting
- Arnold knew that she might not have been consenting, or
- Arnold gave no thought to the issue of whether or not she was consenting.

Has the prosecution proved that Arnold knew that Bernadette was not consenting?

Arnold's evidence is that he believed Bernadette was consenting. Therefore, the prosecution would need to prove that he did not have such a belief before it could prove that Arnold in fact knew Bernadette was *not* consenting. (Alternatively, as noted previously, these two claims could be proved simultaneously.) To help prove that Arnold did not believe Bernadette was consenting, the prosecution would address the issue of the reasonableness of such a belief. Relevant factors that bear on the likelihood of Arnold actually holding the belief are:

- Bernadette was Arnold's patient; she had been in pain and had come to him for therapy and so they had a professional, therapeutic relationship which involves trust and a duty of care toward the patient
- Arnold is 25 years older than Bernadette
- There is no evidence from Bernadette that she did anything to communicate or suggest that she consented
- Arnold's evidence for why he believed she consented ('she told me it was nice and started moving so that I was in contact with her genitalia'), even if accepted, does not amount to clear evidence of communicated consent (if there was a risk of him coming into contact with her genitalia, he should have moved to avoid this, given there was, according to him, no other reason at that point for inferring consent)
- Arnold gave no evidence of taking any positive steps to find out whether Bernadette consented (for example, by asking her before he touched her vagina), and
- Bernadette's evidence that Arnold asked 'does this hurt', her reply 'yes', and his continuing to penetrate her digitally despite her reply.

If the jury were satisfied that Arnold did *not* believe that Bernadette was consenting, then it would next need to decide whether Arnold knew she was not consenting. The evidence as to what he knew would be circumstantial (since he does not admit it) and would largely involve consideration of

what he already knew of the circumstances. The argument would be that, given what he knew about the circumstances, he knew that Bernadette was not consenting. In this sense, the evidence for the unreasonableness of the belief that Bernadette was consenting largely overlaps with the evidence for knowledge that Bernadette was not consenting.

On the other hand, if the jury were *not* satisfied that Arnold did *not* believe in consent (i.e. they found that it was a reasonable possibility that he did believe in consent), then the jury must not conclude that he knew Bernadette was not consenting, because such a belief would be inconsistent with such knowledge.

Has the prosecution proved that Arnold knew that Bernadette might not have been consenting?

The next issue the jury will need to address is whether Arnold's belief that Bernadette was consenting was also inconsistent with Arnold knowing that Bernadette might not have been consenting. Again, this will depend on the nature and strength of the belief. The jury would have to assess just what sort of belief Arnold had and whether it ruled out his knowing of the possibility of consent.

There is little evidence from Arnold as to why he believed Bernadette was consenting, only a vague reference to her moving so that he came into contact with her genitals and 'she seemed to respond'. This makes it easier for the prosecution to argue that his belief was not based on clear evidence and so was most likely not a strong, confident belief in consent and therefore was consistent with knowing that Bernadette might not have been consenting.

The prosecution would then need to prove that Arnold *in fact* knew that Bernadette might not be consenting. Again, this would be largely based on what Arnold knew about the circumstances. Given what Arnold knew, it is possible that the jury would conclude that he knew that Bernadette might not be consenting.

Has the prosecution proved that Arnold gave no thought to whether Bernadette might not have been consenting?

Again, it would be unlikely that the prosecution could prove that Arnold gave no thought to the issue. His evidence was that he did give thought to the question. While there are problems with that evidence, it does not seem plausible to say that the prosecution could prove beyond reasonable doubt that Arnold gave no thought at all to the question of Bernadette's consent. Here the problem is not the absence of thought, but the strength and quality of the thought.

Fault element under Option 2

Under Option 2, the jury would need to decide:

- whether Arnold knew that Bernadette was not consenting
- whether Arnold did not believe that Bernadette was consenting, or
- even if Arnold did believe Bernadette was consenting, whether he did not have reasonable grounds for that belief.

Has the prosecution proved that Arnold knew that Bernadette was not consenting?

The prosecution would most likely try to prove that Arnold's claimed belief that Bernadette was consenting was implausible and that, given all the circumstances, he knew that she was not

consenting. The relevant circumstances include her being his patient, their difference in ages, her absence of explicit consent, and his implausible claim (according to Bernadette, which he denied) that the digital penetration was to 'massage the scar tissue away' and loosen her muscles. Again, much would depend on the credibility of the witnesses here. (If the prosecution proved that Arnold was in fact aware of Bernadette's mistaken belief that the digital penetration was for a medical or therapeutic purpose, then this would be at least relevant to proof of the fault element.)

If the prosecution were not successful in proving that Arnold knew Bernadette was not consenting, it would rely on the next two steps.

Has the prosecution proved that Arnold did not believe that Bernadette was consenting?

On the basis of his evidence, there seems to be little detail given as to why Arnold would have believed Bernadette consented. However, the prosecution does not have a great deal of evidence from Bernadette as to what Arnold actually thought. The main evidence from Bernadette in this regard is Arnold's question 'does this hurt?' and her reply 'yes'.

The prosecution would most likely rely on evidence such as Arnold telling Bernadette to undress, removing the towel, and moving seamlessly from massage to penetration without asking permission to penetrate her, to show that Arnold did not in fact believe Bernadette had given consent to a sexual penetration. However, it is not clear that the evidence would be strong enough to amount to proof beyond reasonable doubt. His evidence that he did believe she was consenting may be sufficiently plausible for the jury to have a reasonable doubt about concluding that he did not have such a belief.

Has the prosecution proved that, even if Arnold did believe that Bernadette was consenting, he did not have reasonable grounds for that belief?

Whether or not Arnold did have such a belief, there is strong evidence for finding that in all the circumstances Arnold had no reasonable grounds for believing that Bernadette was consenting. The relevant factors in this regard include the matters listed above in relation to proof of knowledge under Option 1, such as the patient-therapist relationship, the age difference, the lack of positive steps to ascertain consent, etc.

It is likely that the jury would conclude that Arnold is guilty, primarily because of this absence of reasonable grounds.

Fault element under Option 3

Again, under Option 3, the jury's task is essentially the same as in Option 2 but with the added step of needing to treat the first two steps as one offence and the third step as a distinct and alternative offence.

If the jury is not satisfied that Arnold knew that Bernadette was not consenting or is not satisfied that Arnold did not believe that she was consenting, but is satisfied that Arnold lacked reasonable grounds for a belief that Bernadette consented, then the jury would be required to acquit Arnold of rape and find him guilty of the alternative offence of sexual violation.

Appendix 2 Excerpts from the Criminal Charge Book

The Judicial College of Victoria's Victorian Criminal Charge Book contains model charges (or directions) to assist trial judges in determining the directions they must give to juries in trials. The model charges need to be adapted to fit the evidence in the particular case, but they are intended to provide a model for trial judges to follow. This is intended to minimise the risk of appealable error because the Charge Book is drafted to reflect the law as stated in the most recent appellate court decisions. This approach also promotes consistency across cases.

Below are the model jury charges (or directions) in relation to an accused's asserted belief in the complainant's consent in a rape trial. The first version is the current version of the charge (as updated on 22 October 2012). The second version is that which applied after the Court of Appeal's decision in *Worsnop* and before the High Court's decision in *Getachew*.

In these charges 'NOA' is the abbreviation for 'name of accused' and 'NOC' is the abbreviation for 'name of complainant'.

Charge concerning belief in consent, as at 22 October 2012

7.3.B - Consent and Awareness of Non-Consent

7.3.B.2 - Charge: Belief in consent

How to use this charge

This charge contains two alternative ways to explain the effect of Crimes Act 1958 s37AA. Judges should choose one form of explanation, or may combine several options depending on what is most likely to clearly and correctly explain the relevant law to the jury.

Alternative 1

In considering whether the prosecution has proved that NOA was aware that NOC was not consenting or might not have been consenting to the penetration, you must consider any evidence that the accused believed that the complainant was consenting and whether that raises a doubt about whether s/he was aware that NOC was not or might not be consenting.

[Briefly summarise relevant prosecution and defence evidence and arguments].

In deciding whether NOA believed that the complainant was consenting, you must consider whether it would have been reasonable for him/her to hold that belief in all the circumstances. This is not because the law requires that the belief be reasonable. It does not. A person may genuinely hold a belief, despite it being unreasonable and you could not find this element proven merely because you find that NOA's alleged belief in consent was unreasonable. The reasonableness of the accused's alleged belief is no more than a guide to help you decide whether or not the accused held that belief.

In considering the reasonableness of the NOA's belief, the following [two / three] factors may be relevant.

[Where a circumstance listed in section 36 or 37AAA(d) or (e) are relevant, add the following shaded section]

First, if you are satisfied that NOC was not consenting because you are satisfied that [describe relevant section 36 or 37AAA(d) or (e) circumstance(s)], then you must consider whether NOA was aware that [describe relevant section 36 or 37AAA(d) or (e) circumstance(s)] as his/her knowledge of that matter is also relevant to whether s/he believed that NOC was consenting. However, knowledge by NOA that [describe relevant section 36 or 37AAA(d) or (e) circumstance] does not determine whether s/he was aware that NOC was not or might not be consenting.

[First / Second], you must consider whether the accused took any steps to find out whether the complainant was consenting and if so, the nature of those steps. In this case [*identify any evidence and/or competing arguments about the steps taken by the accused*].

[Second / Third], you must consider any other relevant factors. That includes [*identify any evidence and/or competing arguments about the accused's state of mind. In particular:*

- *Evidence of what was said and done by both parties at the time of the alleged penetration (including evidence before the jury, statements in police interviews and any complaint evidence admitted as evidence of the facts);*
- *Consider the history of the parties;*
- *Consider both direct and circumstantial evidence.]*

It is not for the accused to prove that s/he believed that the complainant was consenting. It is for the prosecution to disprove the existence of a belief in consent which would have prevented NOA from having an awareness that NOC was not consenting or might not have been consenting. *[State whether the Crown disputes that NOA had such a belief at all]* The prosecution must satisfy you that NOA was aware that NOC was not or might not be consenting, even if he believed NOC was consenting.

There is a difference between a belief in consent which NOA relies upon and an awareness that NOC was not or might not be consenting, which is what this element is about. That is because there are different strengths of belief.

- At one end of the scale, I might have a belief as to something and the strength of that belief leaves no possibility for error.
- At the other end of the scale, I can have a belief as to something while being aware that I might be mistaken. For example, I might believe that I parked my car on the fourth level of a carpark, but I'm aware that it might be on the third level. I then go to the fourth level to find my car, even though I'm aware it might not be there.

In order to prove this element of awareness, the prosecution must prove to you that NOA did not have such a strong belief that NOC was consenting that s/he did not think of the possibility that she might not be consenting. In determining the strength of NOA's belief in consent, you should consider the matters I just mentioned that are relevant to whether the belief was held. This includes any evidence of the belief, *[whether the accused was aware that [describe relevant section 36 or 37AAA(d) or (e) circumstances]*, whether the accused took steps to find out whether the complainant was consenting and any other relevant factors.

It is for the prosecution to show NOA did not have a belief that creates a reasonable doubt that s/he was actually aware NOC was not, or might not have been, consenting.

The prosecution will therefore prove this element if you are satisfied that even though NOA believed NOC was consenting, he was still aware that s/he might not be consenting.

Alternative 2

In this case, *[evidence has been led / the defence argue]* that at the time of the sexual penetration NOA believed that NOC was consenting to the sexual act. *[Briefly summarise relevant prosecution and defence evidence and arguments].*

If the accused believed the complainant was consenting, that may raise a reasonable doubt about this element.

There are two matters you must consider regarding this [evidence / argument] about NOA's belief in consent.

First, you must look at any evidence of that belief. *[Identify relevant evidence].*

Second, you must consider whether that belief was reasonable in the circumstances. This is because the reasonableness of a belief is a guide to whether it is held. There are [two/three] factors for you to look at when judging whether a belief in consent was reasonable.

One, if you find that *[describe relevant section 36 or 37AAA(d) or (e) circumstance(s)]*, you must consider whether the accused was aware that *[describe relevant section 36 or 37AAA(d) or (e) circumstance(s)]*. However, even if you find that NOA was aware that *[describe relevant section 36 or 37AAA(d) or (e) circumstance(s)]*, that does not necessarily prove that NOA was aware that NOC was not or might not be consenting. It just affects whether a belief in consent was reasonable.

[One / Two], whether the accused took any steps to find out whether the complainant was consenting or might not be consenting and if so, the nature of those steps. In this case [identify any evidence and/or competing arguments about the steps taken by the accused].

[Second / Third], any other relevant factors. That includes *[identify any evidence and/or competing arguments about the accused's state of mind. In particular:*

- *Evidence of what was said and done by both parties at the time of the alleged penetration (including evidence before the jury, statements in police interviews and any complaint evidence admitted as evidence of the facts);*
- *Consider the history of the parties;*
- *Consider both direct and circumstantial evidence.]*

Remember though that these [two/three] factors are only relevant because the reasonableness of a belief is a guide to whether NOA in fact held that belief. However, the law does not require that the accused's beliefs are reasonable. An unreasonable belief that is genuinely held **can** raise a reasonable doubt about this element.

So far, I've been speaking about a belief in consent. But remember that the element is that the prosecution must prove that at the time of the sexual penetration the accused:

- was aware that the complainant was not or might not be consenting; or
- was not giving any thought to whether the complainant was not or might not be consenting.

A belief in consent and an awareness that the complainant might not be consenting are different ideas. It is for the prosecution to show that NOA did not have a belief in consent of a kind that leaves you with a reasonable doubt that s/he was actually aware that NOC was not or might not be consenting. Whether a belief in consent raises a reasonable doubt about this element depends on your view of the nature and extent of NOA's alleged belief in consent.

Charge concerning belief in consent, prior to the decision of the High Court in Getachew

7.3.1.1.2B

State of Mind of the Accused

The fourth element relates to the accused's state of mind about the complainant's consent. The prosecution must prove beyond reasonable doubt that at the time of sexual penetration the accused:

- was aware that the complainant was not or might not be consenting; or
- was not giving any thought to whether the complainant was not or might not be consenting.

If the prosecution fails to prove to you beyond reasonable doubt that NOA had one of these states of mind about the complainant's consent, then you must find this element not proven, and you must find NOA not guilty of this offence.

Belief in consent

[If evidence is led or an assertion is made raising belief in consent, add the following directions.]

In considering whether the prosecution has proved that NOA was aware that NOC was not consenting or might not have been consenting to the penetration, you must have regard to the following directions of law.

First, you must consider any evidence that the accused believed that the complainant was consenting. *[If there is relevant evidence, add: I will identify the relevant evidence shortly.]* The law says that a belief in consent is *inconsistent* with the states of mind that the prosecution must prove here. So if you find that there is a reasonable possibility that the accused believed that the complainant was consenting, the prosecution will have failed to prove this element.

Second, it is not for the accused to prove that s/he believed that the complainant was consenting. Instead, it is for the prosecution to prove beyond reasonable doubt that the accused did not believe that the complainant was consenting.

Third, in assessing whether NOA believed that the complainant was consenting, you must consider whether it would have been reasonable for him/her to hold that belief in all the circumstances of this case.

Fourth, in considering the reasonableness of the accused's alleged belief, you must have regard to whether the accused took any steps to find out whether the complainant was consenting and if so, the nature of those steps.

[Where a circumstance listed in section 36 is relevant, add the shaded section]

Fifth, if you are satisfied that NOC was not consenting because you found that [describe relevant section 36 circumstance(s)], then an awareness by NOA of the existence of [this/those] circumstance(s) is relevant to the reasonableness of the asserted belief.

Finally, you must not find this element proved just because you decide that NOA's alleged belief was unreasonable. A person may genuinely hold a belief despite it being unreasonable. Whether the accused's alleged belief was reasonable or unreasonable is no more than a guide to help you decide whether or not the accused held that belief.

In this case *[identify any evidence and/or competing arguments about the accused's state of mind. In particular:*

- *Refer to the evidence of what was said and done by both parties at the time of the alleged penetration (including evidence before the jury, statements in police interview and any complaint evidence admitted as evidence of the facts)*
- *Specifically identify any evidence that the accused believed that the complainant was consenting;*
- *Identify factual considerations relevant to the reasonableness of the accused's belief (including things said and done at the time of the penetration, the steps taken by the accused to find out whether the complainant was consenting, and the history of the parties)];*
- *Consider both direct and circumstantial evidence.*

To summarise, you must determine here whether the prosecution has proved that the accused was aware that NOC was not consenting, or was aware that NOC might not be consenting, or was not giving any thought to whether NOC was not or might not be consenting. In determining this question, you must consider whether NOA believed that NOC was consenting to the penetration, and in considering that question, you must have regard to whether, in all the circumstances of this case, it would have been reasonable for NOA to hold that belief.

If, upon consideration of all the evidence, you find that the prosecution has proven, beyond reasonable doubt, that NOA did not believe that NOC was consenting, and you are satisfied that NOA was aware that NOC was not consenting, or was aware that NOC might not be consenting, or

was not giving any thought to whether NOC was not or might not be consenting, then this fourth element will be met.

Department of
Justice

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