

Rape law in Victoria

A summary paper on options for reform

Introduction

The Department of Justice has conducted an extensive review of Victoria's sexual offence laws. The review covers the main sexual offences of rape, sexual assault, sexual offences against children, and some other offences. There is widespread agreement that many aspects of these laws need reform. Some of the problem areas include what state of mind makes a person guilty of rape when they have sex with a person who is not consenting and the directions that trial judges are required to give to juries.

The department has prepared a consultation paper, which identifies and analyses the main problems with, and limitations of, Victoria's sexual offence laws. The paper contains proposals and options for improving those laws. It also asks a number of questions about how best to deal with certain aspects of the law and addresses some procedural laws that limit the effectiveness of sexual offence laws. The consultation paper has been prepared to enable the Victorian community to have its say on how to improve Victoria's sexual offence laws. The consultation paper discusses many different sexual offences and considers some issues in considerable detail. This depth of analysis is necessary to ensure any potential changes to sexual offence laws are considered thoroughly and, if introduced, will work effectively.

This summary paper is based on the consultation paper. It is focused on the offence of rape and how rape is to be proved in a trial. It does not cover all the issues addressed in the consultation paper. The purpose of this summary paper is to provide a short summary of the main problems with the current offence of rape and to outline the three principal options for reform. It does this by showing how the three options apply to some fictional rape scenarios. Three such scenarios are presented and discussed.

In considering the options for reforming the law on rape, two important considerations are:

- ♦ Practical issues — How clear or complex is the law? Can the law be explained more clearly? Will jurors readily understand the law and be able to apply the law to the facts in the case they are considering?
- ♦ Policy issues — Does the law properly identify what ought to be the crime of rape? Does the law appropriately distinguish between what should and should not be criminalised in the offence of rape?

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.

Rape laws

Rape is one of the most serious sexual offences and provides a model for other sexual offences in terms of its structure and the meaning of some key concepts.

Rape involves sexual intercourse without consent. Other sexual offences do not require proof that a person did not consent (e.g. sexual offences against children) or do not involve sexual intercourse (e.g. sexual assault). Sexual intercourse is a lawful activity except in certain situations. It becomes rape where:

- ♦ a person does not consent to another person having sexual intercourse with her or him, and
- ♦ the other person is at fault in having sexual intercourse in those circumstances.

When is a person at fault? This has become the most important and difficult issue in defining rape. Currently, Victoria's rape laws provide that a person is at fault if they:

- ♦ are aware that the person they are having sexual intercourse with *is not* consenting, or
- ♦ are aware that the other person *might not* be consenting, or
- ♦ do *not give any thought* to whether the other person is not consenting or might not be consenting.

These are known as the 'fault elements' of rape. The prosecution needs to prove one of these three alternative fault elements, in addition to proving that the accused intentionally sexually penetrated the other person and that the other person did not consent.

Proving a fault element becomes very complicated when an accused says they believed that the complainant (the person alleging they were raped) was consenting. How does the jury deal with this evidence or assertion? How is a belief in consent reconciled with the tests for fault?

The *Crimes Act 1958* indicates that an accused's belief that the other person was consenting is relevant to deciding whether the accused was at fault. Where an accused believed that the complainant was consenting, it becomes much harder to prove that the accused knew that the complainant was not or might not have been consenting.

Further, the jury may consider whether a belief in consent was reasonable, but only for the limited purpose of determining whether or not the belief was actually held. This is because it is assumed that if a belief would have been unreasonable, it would be less likely to have actually been held.

Accordingly, if a belief is genuinely held, no matter how unreasonable it is, it will usually mean that the person is not guilty of rape. We say 'usually' because the jury must assess how strongly the accused believed there was consent and must decide whether the belief was so strong that it prevented the accused from being aware that the complainant was not or might not be consenting. The interaction between a belief that the complainant is not consenting and an awareness that the complainant might nonetheless not be consenting is inherently complex.

As the above discussion demonstrates, the current law of rape is complex and often difficult to understand. The above is just a simplified sketch of the offence of rape and makes the law appear clearer and much less complex than it actually is. The complexity and lack of clarity in rape laws has led to different interpretations by appeal courts. The explanation above reflects the most recent interpretation of key aspects of the offence of rape.

Calls for reform of rape laws

Not surprisingly, given the complexity of the law, 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 (*Worsnop*) which set out the law to be applied in rape cases (which was then different from the law as explained above). In brief, the effect of the Court's decision in *Worsnop* was that there was no need to assess the nature and strength of an accused's belief in consent because any belief in consent would be enough to prevent the prosecution from proving the accused was guilty. As a result of this decision, more than 15 convictions for rape were set aside on appeal, because the trial judge directed the jury in accordance with what was generally understood to be the law before that decision.

Almost two years after the decision in *Worsnop*, the High Court (in the case of *Getachew*) considered this issue and decided that the decision in *Worsnop* was wrong. The High Court's decision is reflected in the sketch of the law provided above. While the law is now more settled, it remains complex and inherently difficult to explain, understand, and apply. In September 2012, the Victorian Court of Appeal said that the problems with the offence of rape 'can only be addressed by urgent and wholesale amendment'.

Options for reform

The consultation paper presents three options for reforming the offence of rape, concerning the possible ways in which a person is at fault when having sexual intercourse with another person who is not consenting.

Option 1

Option 1 would maintain the current law's three alternative fault elements with regard to absence of consent but would seek to improve the clarity and structure of the offence and address a number of matters that are currently too complex or uncertain. This option focuses primarily on addressing some of the practical problems with respect to this fault element.

Option 2

Option 2 would take a fresh approach. Knowledge that the other person was not consenting would still be a fault element: this would capture many of the cases where consent is not in issue. In addition, Option 2 would present an alternative test for the fault element: the accused did not believe on reasonable grounds that the other person was consenting. This approach means that if someone had sexual intercourse with someone who was not consenting, then he or she will need to have reasonable grounds for believing that the other person was consenting, or else be guilty of rape.

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

Option 3

Option 3 would be a variation of Option 2. Knowing that the other person does not consent and not believing that the other person is consenting would be the alternative fault elements of rape. Where a person does not have reasonable grounds for believing that the other person is consenting, then he or she will be guilty, not of rape, but of a lesser offence to be called 'sexual violation'. Option 3 thus separates the conclusion that an accused did not believe the complainant was consenting from the conclusion that such a belief, if held, was not held on reasonable grounds.

A key difference between Option 1, on the one hand, and Options 2 and 3, on the other, is that under Option 1, a person who firmly believed the other person was consenting but had no reasonable grounds for such a belief would not be guilty of rape (or indeed any offence), while under Option 2 that person would be guilty of rape and under Option 3 he or she would be guilty of sexual violation. Options 2 and 3 also address some of the practical problems of the current definition of the offence of rape and reflect the policy position that a person who has no reasonable grounds for believing that another person is consenting to sexual intercourse should be guilty of a criminal offence. Option 2 reflects the law in the United Kingdom, New Zealand and New South Wales.

Objectives and guiding principles for the offence of rape

The key objectives and guiding principles for the law on sexual offences, including rape, were inserted into the *Crimes Act* in 2006. These objectives and guiding principles follow VLRC recommendations from its *Sexual Offences: Final Report* (2004). They provide an important context for assessing existing laws and each option for reform. The objectives of the law on sexual offences (in section 37A) 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.

When interpreting and applying rape and other sexual offence laws, section 37B provides that 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.

Scenarios – discussing Options 1, 2 and 3

A useful way of considering how these options would work in practice is to present several scenarios and discuss how each option would work in relation to those facts. This provides an opportunity to assess each option from a practical perspective (e.g. is the option clear? is it complex?) as well as a policy perspective (e.g. does it appropriately distinguish between what should and should not constitute the offence of rape?).

The scenarios consider these issues from the perspective of a jury considering the evidence in the case. The evidence in these scenarios would mostly consist of the testimony given in court by the complainant and by the accused (if the accused chose to do so). In addition, the prosecution can present as evidence recordings of the accused's answers to police questions when interviewed by police. As in all criminal cases, the onus is on the prosecution to prove the accused's guilt beyond reasonable doubt.

The following scenarios are designed to highlight issues concerning the fault element in rape. Accordingly, the scenarios concern cases where there is dispute between the accused and the prosecution about whether the fault element has been proved. The scenarios also cover the question of proof that the complainant did not consent. In some rape trials, there is no dispute about consent and the issue is about something else (e.g. the accused may agree that the complainant was raped but denies that he was the one who raped her)

In the three scenarios below, the accused is male and the complainant is female. Males can also be victims of rape, and it is also possible for females to commit rape. Nonetheless, the great majority of people who commit sexual offences are men and the overwhelming majority of adults who report sexual offences are women.

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 or Centres Against Sexual Assault on the numbers above.

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.