Law Reform Commission of Victoria

Discussion Paper No. 2

RAPE AND ALLIED OFFENCES:

ıbstantive Aspects

ıgust 1986

This is a discussion paper, *not* a report. Your comments on the matters raised in the paper would be most welcome. They will be taken into account by the Commission in compiling its report which is due to be completed by 31 December 1986. Comments should be addressed to the Commissioner-in-Charge of the reference, Mr Peter A. Sallmann, Law Reform Commission of Victoria, 7th Floor, 160 Queen Street, Melbourne (Telephone: (03) 602 4566)

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1. INTRODUCTION

TERMS OF REFERENCE

1.1 By letter dated 21 October 1985 the Law Reform Commission received from the Attorney-General, the Hon. Jim Kennan, M.L.C., a reference dealing with the law relating to sexual offences in Victoria. The Terms of Reference direct the Commission:

(i) to review the law relating to sexual offences in Victoria, in particular the adequacy of the operation in practice of the amendments to the law made by the *Crimes (Sexual Offences) Act* 1980; and

(ii) to recommend what, if any, reforms should be made.

The Commission is required to present its report not later than 30 June 1987.

BACKGROUND TO THE REFERENCE

1.2 Criminal behaviour, especially serious criminal behaviour, is always a matter of community concern. Sexual crimes cause particular disquiet, especially to women, who are the victims in the overwhelming majority of cases. Radical and substantial amendments were made to the relevant provisions of the *Crimes Act* in 1980.[1] As part of a general review of the sexual offences provisions of the Act, the conceptual and practical soundness of those amendments must be reviewed. Four other factors justify close attention being devoted to sexual offences. First, considerable emphasis is now being placed on the need for increased efficiency in the conduct of the criminal trial process. Criminal proceedings, especially trials in the higher courts, are expensive. In its *Report on*

1. *Crimes (Sexual Offences) Act* 1980.

Criminal Trials[2] the Shorter Trials Committee of the Victorian Bar and the Australian Institute of Judicial Administration suggested that the substantive criminal law often contributes to unnecessarily long trials, and singled out serious sexual offences for special mention.[3] A particular aspect of the conduct of sexual offence trials which has been causing difficulty is the large number of alternative verdicts available under the relevant provisions of the *Crimes Act*.[4] It is important to have some statutory alternatives to major charges but the present law means that considerable time and complexity is involved in conducting trials. The Shorter Trials Committee quoted one County Court judge as saying that the trial of serious sexual offences under Victorian law is 'quite unreal, unnecessarily complex and above all wasteful of time'. The alternative verdict provisions are discussed in a later section of this paper.

1.3 A second factor is that a number of overseas and Australian jurisdictions have recently passed major sexual law reform legislation involving, among other things, the abolition of the traditional concepts of rape and allied offences, and their replacement by comprehensive schemes of so-called 'graded sexual assault'.[5] These are important developments and have acted as an additional stimulus to re-examination of the present Victorian approach.

1.4 A third factor is the increasing concern over the many complex issues which arise in relation to sexual assaults on children. In recent times, there have been major reports produced in New South Wales, South Australia and Queensland on aspects of this problem.[6] In 1986, a similar inquiry was established in Western Australia. In Victoria, a discussion paper on *Child Sexual Assault* has recently been released by the Department of Community Services. Of particular concern from a legal standpoint are the evidentiary and procedural aspects of the law applying to child victims in the pre-trial and trial processes. A number of people argue that the evidence of child witnesses is subject to unnecessary restrictions and that in a number of areas child victims of sexual abuse are inadequately protected by the legal system.

1.5 The fourth factor is that, in the course of her *Inquiry into Prostitution*[7] in Victoria, Professor Marcia Neave came across a number of anomalies and other difficulties in relation to the sexual law provisions of the *Crimes Act*. In particular, Professor Neave drew attention to the need for examination of those provisions of the Act dealing with the age of consent in relation to sexual activity involving young people and the provisions dealing with sexual activity where one party is a young person and the other a considerably older person.

2. Shorter Trials Committee, *Report on Criminal Trials,* Victorian Bar and the Australian Institute of Judicial Administration, Melbourne, 1985.
3. Shorter Trials Report, paras. 7.174–7.175.
4. See Section 425 *Crimes Act* 1958.
5. Among these jurisdictions are Canada, New Zealand, New South Wales, Western Australia, the Australian Capital Territory and the Northern Territory.
6. *Report of the New South Wales Child Sexual Assault Task Force,* Premier's Department, New South Wales, 1985, *South Australian Government Task Force on Child Sexual Abuse,* Ministry of Health, South Australia. 1985, *An Inquiry into Sexual Offences Involving Children and Related Matters,* by D. G. Sturgess, Q.C., Director of Prosecutions, Queensland, 1985.
7. *Inquiry into Prostitution,* Ms Marcia Neave, Inquirer, Victorian Government, 1985.

SCOPE AND ORGANISATION OF THE REFERENCE

1.6 In dealing with the reference the Commission has decided to concentrate on the sexual offence provisions of the *Crimes Act*.[8] These, however, are considerable in number and complex in nature. They cover such offences as rape, rape with aggravating circumstances, indecent assault, indecent assault with aggravating circumstances, other offences related to rape and indecent assault, a variety of sexual penetration offences involving young people and intellectually handicapped people, gross indecency, incest, bestiality, prostitution and procuring, abducting and administering drugs for sexual purposes. In addition to the substantive law, a number of aspects of evidence and procedure are of vital relevance to the operation of sexual offences law. These must also be examined by the Commission.

1.7 The work on the reference has been divided into two parts. The first part will deal with the substantive, evidentiary and procedural aspects of non-consensual sexual offences (rape and allied offences).[9] The second part will deal with the substantive, evidentiary and procedural aspects of other *Crimes Act* sexual offences, basically those dealing with sexual exploitation and abuse of various kinds, particularly offences against children, and consensual sexual crimes. A report on rape and allied offences will be published early in 1987. A Discussion Paper dealing with the second part of the reference is scheduled to appear at the end of 1986. The Commission will then report on the second part of the reference at the end of June 1987.

1.8 This Discussion Paper deals with the substantive aspects of the law of rape and allied offences. It discusses the background to the law dealing with rape and allied offences, outlines the present law in Victoria, examines the question whether there is a need for change in the law, and indicates options for reform. Where possible, it sets out the Commission's tentative views in relation to those options. The paper deals only with major issues. The Commission is aware of a number of minor defects in the law. It would welcome comments on matters of this kind to assist it in making recommendations to remedy these minor defects. The purpose of the paper is to stimulate discussion on the issues examined in it and to solicit comments and submissions which can be taken into account by the Commission in drafting its final report. (A second Discussion Paper, dealing with some evidentiary and procedural aspects of rape and allied offences, will be published later in 1986.)

CONSULTATION AND COMMUNITY PARTICIPATION

1.9 Soon after commencing work on the reference, the Commission invited observations from a number of individuals and interested bodies. These included judges, barristers, solicitors, academic lawyers, magistrates, law reform bodies,

8. Sections 44 to 61 *Crimes Act* 1958.
9. It should be noted that though offences against children are either non-consensual or deemed to be non-consensual these will be covered in the second part of the reference.

women's groups, civil liberties organisations, the police, government departments, institutes of criminology and victim support groups. Many of these responded to the Commission's invitation and their views have been of great assistance in the preparation of this paper. In addition, a diverse and experienced group of honorary consultants has been appointed, with the approval of the Attorney-General, to assist the Commission in its work on the reference. Their advice has also been most valuable.

REFORM CONSIDERATIONS

1.10 A number of considerations should be borne in mind. The first is that the law should seek to protect the sexual integrity and personal autonomy of all members of the community. Offences should be designed to maximise protection from sexual assault. As the Law Reform Commission of Canada put it in 1978:

> The integrity of the human person should not be violated. Consequently, no individual should be forced to submit to a sexual act to which he or she has not consented. In sexual relations, therefore, consent must be of the essence. Sexual activity must be consensual and not procured by force or trickery; otherwise it constitutes a direct violation of the integrity of the human person.[10]

1.11 The second consideration is that it is important to take note of limitations on the protective role of the criminal law. There is much evidence that the criminal law and criminal justice system are not very successful in deterring crime, reforming convicted people and protecting the community.[11] It is trite but important to note that, while the criminal law is generally a clumsy tool for controlling behaviour, the difficulties it faces in relation to sexual behaviour are more pronounced than in other areas. As was noted in a recent New Zealand paper on rape:

> We should . . . be wary about expecting any reform of law and procedure to have any significant impact upon the incidence and control of rape in the community. Indeed, it is arguable that only a wholesale shift away from the adversary system of criminal justice would really achieve most of the instrumental goals sought, and few have advocated as drastic a measure as that.[12]

1.12 Despite the lack of empirical support for the preventive and crime reduction role of the criminal law and the criminal justice system in relation to sexual offences, the system does at least provide a mechanism for the punishment of wrongdoers on a retributive basis, that is, because they deserve it. Even if the community cannot rely on the legal system to eradicate sexual offences it can at least rely on it to do justice when accused persons are convicted.

10. Law Reform Commission of Canada, *Report on Sexual Offences*, Canada, 1978 p. 7.
11. See, for example, *The Effectiveness of Sentencing,* Home Office Research Study No. 35, H.M.S.O. London, 1975.
12. Rape Study, Volume 1, *A Discussion of Law and Practice,* Department of Justice and the Institute of Criminology, New Zealand, 1983 p. 25.

1.13 Also significant, especially in the sexual offences context, is the symbolic or educative function of the criminal law. The criminal law performs a vital role in the community by making significant moral denunciations of unacceptable conduct. In declaring certain types of sexual behaviour to be criminal, the law plays a crucial part in the development, maintenance, and perhaps even establishment, of community attitudes and expectations. This symbolic function may be particularly relevant in the sexual context because the law can influence community attitudes about relationships, particularly between women and men.

1.14 A third consideration is that the criminal law should be as simple and clear as is consistent with the attainment of its objectives. As mentioned earlier, there is some concern, especially among those responsible for administering the criminal law, that the Victorian law of rape and allied offences is not as clear and simple as it could be. A major objective of the work on this reference is to identify and to recommend changes which will clarify and simplify the law. Clarification and simplification are not sought merely in order to make life easier for judges, lawyers and police officers. A far more significant factor is that clarity and simplicity lower the risk of injustices, lead to greater efficiency and lower the cost of running the criminal justice system. Cases should come to trial more quickly, take less time to try, and involve less trauma for the victim. Also important is that clarity and simplicity allow greater community understanding of the law.

1.15 Finally, the political dimension of sexual law reform should be considered. Despite increasing recognition of the fact that children of both sexes are often the victims of sexual abuse (as indeed to a much lesser extent are men), it is women who are the victims in the vast majority of cases. During the 1960's and 1970's women in general, and women's groups in particular, were at the forefront of sexual law reform movements on a world- wide scale. The fact that so many changes occurred in relation to rape and to other sexual offence laws was in large measure directly attributable to the efforts of women. Despite these changes, women are still concerned about the state of the sexual offences laws. They are concerned that the reporting rates of these offences are low, that too few alleged offenders are charged and tried, and that victims are often humiliated and frequently feel they are on trial rather than the accused. They are keen that guilty plea rates be increased so that victims are spared the ordeal of giving evidence and being cross-examined. They are concerned about what they see as low conviction rates in sexual cases, especially as compared with other types of cases.

1.16 No law reform project dealing with sexual offences can proceed without specific recognition being given to the interests of women and without placing their concerns high on the agenda of items to be considered. However, in examining the alleged deficiencies in the law of rape and allied offences, the Commission does not favour interfering with the basic tenets of criminal jurisprudence. These include the presumption of innocence and the fact that the prosecution must prove all the elements of its case to the satisfaction of a jury beyond reasonable doubt. The Commission is confident that a satisfactory balance between the interests of victims and accused persons can be achieved without abandonment of these crucial principles.

2. THE PRESENT LAW

2.1 Non-consensual, sexual behaviour is dealt with by the offence of rape and a loose coalition of 'allied offences' directed at protecting the sexual integrity of people from the unwanted sexual advances of others. From a practical point of view, the most important of these 'allied offences' is indecent assault. Rape and indecent assault are the most common forms of non-consensual sexual behaviour and they are the offences which occupy most of the time of the criminal courts. The other 'allied offences', such as procuring people by threats or intimidation to take part in acts of sexual penetration, administering drugs to people for sexual purposes, and abducting and detaining people for sexual purposes, are really 'back-up' and gap-filling provisions. They are designed to catch a variety of sex-related activities not covered by offences dealing with direct sexual contact. In practice, they are far less significant in the day-to-day operation of the criminal law than rape and indecent assault.

2.2 This section of the paper sets out in broad terms the present law on rape and allied offences. Particular emphasis is placed upon the changes to the law introduced by the *Crimes (Sexual Offences) Act* 1980. That Act brought about a minor revolution in sex offences law. In the next section of the paper, problems with the present law are identified and discussed. That is followed by a section which deals with options and strategies for reform. The final part of the paper contains a brief summary of the Commission's tentative proposals for reform and mentions other matters in need of discussion.

THE LAW OF RAPE

2.3 The present law of rape consists of a rather odd combination of common law and statute law. Prior to the changes introduced by the *Crimes (Sexual Offences) Act* 1980 the law of rape had remained very much the same throughout our history. The traditional, common law crime of rape can broadly be described as follows: the slightest insertion by a man of his penis into the vagina of a woman (provided the woman was not his wife) without her consent, under

circumstances where the man knew the woman was not consenting or believed there was a possibility she was not consenting and went ahead regardless.[13] For a jury to record a conviction for rape the Crown was required to prove beyond reasonable doubt not only that there had been penetration of the vagina by the penis but that the penetration had occurred without the consent of the woman and that the man was aware of lack of consent or was aware that the woman might not have been consenting. In relation to wives a note of qualification needs to be added to the general definition. The common law, particularly in England, produced a number of decisions about the rape of wives by husbands. The general effect was that a prosecution could be launched against a husband where the husband and wife were living apart, provided there was some legal documentation or other evidence indicating separation, or the existence of a non-molestation order or some other steps preparatory to divorce proceedings.[14]

2.4 Thus, the common law crime of rape consisted of three vital legal ingredients: the physical circumstances, the absence of consent and the mental element. Each of these will now be dealt with separately. It is important to note that the legislation of 1980 brought substantial changes to the physical ingredients of the offence but did not affect either the consent or the mental element components.

(i) Physical Circumstances

2.5 In 1980, the rule that rape was limited to vaginal penetration by the penis was altered. The amending Act added to section 2A(1) of the *Crimes Act* a partial definition of the physical circumstances of rape:

> 'Rape' includes the introduction (to any extent) in circumstances where the introduction of the penis of a person into a vagina of another person would be rape, of—
>
> (*a*) the penis of a person into the anus or mouth of another person (whether male or female); or
>
> (*b*) an object (not being part of the body) manipulated by a person (whether male or female) into the vagina or anus of another person (whether male or female)—
>
> and in no case where rape is charged is it necessary to prove the emission of semen.

2.6 The general import of the section is clear enough. It is aimed at extending the scope of rape in a number of ways. The legislation expanded the scope of rape to include anal and oral penile penetration of women and men. It also included the manipulation of 'objects' by a person of either sex into the vagina

13. No emission of semen need occur.
14. For an outline of some of these cases see Sallmann, P. A. and Chappell, D. *Rape Law Reform in South Australia: A Study of the Background to the Reforms of 1975 and 1976 and of their Subsequent Impact*, Adelaide Law Review Research Paper No. 3, 1982 Ch. 2. See also *McMinn* [1982] V.R. 53.

or anus of a female or the anus of a male. The aim and effect of these changes was to make the offence gender neutral. This means that the offence of rape can now be committed by a person of either gender upon a person of either gender. As part of this same package of changes, the 'abominable crime of buggery' was abolished.

2.7 The rationale and philosophy behind these changes to the law is clear. Two important sets of value judgements were involved. One was the assessment that a number of types of unwanted sexual penetration, not then covered by the law of rape, can in some circumstances be more unpleasant and undesirable than behaviour traditionally covered by rape law. To take but one example, before 1980, a man could not be convicted of rape if he forced a woman to perform oral sex (fellatio) upon him. Many would argue that this may be a far more unpleasant experience than vaginal penetration by the man's penis. Also, it may be that some accused persons choose a particular form of behaviour with the intention of causing greater distress to the victim.

2.8 The other important statement made in the 1980 legislation was that it was no longer appropriate for the law of rape to be restricted to something that a man does to a woman. If different types of sexual penetration can be on the same or even a higher plane of seriousness than those traditionally associated with rape, there is no longer a valid reason for not expanding the concept to include behaviour between people of the same and different genders. The 1980 Act gave effect to that part of the preamble which reads:

> And whereas it is desirable for the law to protect and otherwise treat men and women so far as possible in the same manner.

2.9 Although the present law of rape contains an expanded and expansive coverage of physical circumstances it is by no means as exhaustive as the law in some other similar jurisdictions nor as extensive as some commentators would like it to be. The present law covers oral contact with the penis (fellatio) but not oral contact with female genitalia (cunnilingus). A number of other jurisdictions, for example, New South Wales, South Australia and Western Australia, make no such distinction. The present law covers the use of objects but specifically excludes parts of the body other than the penis i.e. fingers, hands, toes and so on. Again, other jurisdictions do not make this distinction. The New South Wales legislation specifies 'any part of the body of another person'. Similar provisions appear in South Australia, Western Australia and elsewhere.

2.10 Even the extensive definitions of 'sexual penetration' operating in the latter jurisdictions are not as wide as some suggested elsewhere. Some of these suggestions go beyond the notion of actual sexual penetration and involve a concept of sexual *contact*. For example, in the 1970's, the Women's Rape Council in the United States suggested to the New York legislature that sexual intercourse for the purposes of New York State law should include contact between 'the mouth and the anus, the mouth and the penis, the mouth and the vulva, or between the penis and the anus, or between the anus or the vulva and any artificial substitute'.[15]

15. See Le Grand, C. E. 'Rape and Rape Laws: Sexism in Society and Law (1973) 61 *California Law Review* pp. 919–941 at p. 941.

2.11 At common law, there were two forms of 'immunity' from prosecution for rape, that of males under fourteen years of age, who were conclusively presumed to be impotent, and, as already noted, that of husbands who, with some limited exceptions, could not be convicted of raping their wives. The 1980 legislation abolished the former and restricted the latter.[16] In the case of the marriage immunity, the 1980 legislation provided that, where a married couple were living 'separately and apart', the existence of the marriage would no longer protect a 'married person' from prosecution for rape of a spouse. In 1985, legislation was passed to remove the marital immunity altogether. The *Crimes (Amendment) Act* 1985 provides that:

> The existence of a marriage does not constitute, or raise any presumption of consent by a person to an act of sexual penetration with another person or to an indecent assault (with or without aggravating circumstances) by another person.

2.12 In summary, the 1980 Act removed the common law restriction of the offence of rape to heterosexual, vaginal penetration. It also expanded the physical circumstances which amount to rape. The 1980 amendments have resulted in the law in relation to the physical aspects being part common law and part statute. Consequently, Heath and Hassett refer to 'common law rape' (pre-1980 'rape') and 'statutory rape' (the new forms of 'rape' introduced by the 1980 amendments).[17]

(ii) Consent

2.13 The common law of rape requires an absence of consent in the victim at the time of the sexual penetration.[18] The *Crimes (Sexual Offences) Act* 1980 made no change to the consent aspect of the law of rape and it thus remains a creature of the common law. Absence of consent is an essential ingredient of the offence. It must be proved by the prosecution beyond reasonable doubt. The 'consent' element of rape has had a controversial history. Consent is the most common defence to a rape charge. In conceptual and practical terms, it gives rise to many difficulties. It is one of the most contentious issues in contemporary rape law reform discussions.

2.14 At common law, the expression 'against the will' was used to refer to the consent component of the offence of rape. This concept proved inadequate,

16. See Section 62 *Crimes (Sexual Offences) Act* 1980.
17. Heath, I. W. and Hassett, J. T. *Indictable Offences in Victoria,* Victorian Government Printer, 1983 pp. 87–94.
18. In this context it should be mentioned that if penetration is accomplished with consent and consent is later withdrawn during intercourse a person who persists may be guilty of indecent assault but not rape. Rape may only occur if there is a subsequent act of penetration without consent. Some Australian jurisdictions have legislated to change the law in this area; so too, has the Parliament of New Zealand, as part of its recent overhaul of sexual offence laws in that country. Changes have been introduced to provide that in a situation where penetration takes place with consent but then during the act of 'sexual intercourse' one party wishes to withdraw from the act and is prevented from doing so by the other a charge of rape, or its equivalent, will be available in law.

however, to deal with cases where victims were not in a good position, or any position at all, to indicate their attitude to sexual penetration. For example, there have been cases where victims were asleep or partially or fully unconscious as a result of having been drugged. In such cases, it could not be said with any confidence that penetration had occurred 'against the will' of the victim, but it could almost certainly be said that it occurred without the victim's consent. Thus, the phrase 'without consent' has become the accepted one to refer to this particular element of the offence.[19]

2.15 The concept of consent in the context of rape is a difficult one. It may be tempting to suggest that one either consents to an act of sexual penetration or one does not. Because of the complexities of human relationships and sexual behaviour, however, there are often situations where the question of consent is far from clear. Consent is an attitude of mind and a phenomenon of the will. This means that it is often difficult in the detached, forensic atmosphere of a courtroom, sometimes many months or even years after the event, for a court to determine whether there was consent to a sexual act. Where a stranger leaped out from behind a bush in the middle of the night armed with a knife and sexually attacked another person it is easy to conclude that there was no consent. It is much more difficult to do so where the incident in question occurred in the context of a relationship of long standing sexual intimacy and where there was no violence or overt threat of violence. While consent may have been absent in both, the latter case is likely to create more difficulty for outsiders, in general, and for the legal system, in particular.

2.16 As the common law moved away from the 'against the will' test and towards the adoption of the 'without consent' test, the courts placed less emphasis upon the need to demonstrate the use of force by an accused person and active resistance by an alleged victim. However, in many instances, it seems that the lack of a requirement to establish the use or threat of force was more theoretical than real. Courts tended in practice to limit the offence to situations of actual or threatened physical force. In the case of threatened physical force the courts looked for fear on the part of victims of immediate and unpleasant physical consequences to themselves or to those with whom they had a close relationship. As a recent New Zealand Paper on rape put it:

> The woman who allowed intercourse in order to obtain food for her starving child may not have been consenting any more than the woman who permitted intercourse to prevent physical injury to herself, but only the second was regarded by the common law as having been raped.[20]

2.17 The easiest cases to deal with are those where physical violence or the threat of it is involved. So easy are they to deal with that a number of commentators have argued that 'consent' should cease to exist as a separate element of the offence. The use or threat of violence would refute any suggestion of consent. Even without going so far, the cases involving the use or threat of

19. These developments are outlined in Howard, C. *Criminal Law* 4th ed. Law Book Company, 1982 p. 154.
20. New Zealand *Discussion Paper,* 1983 p. 77.

physical violence present little difficulty for the prosecution, for the circumstances are inconsistent with the idea that the sexual penetration was consensual.

2.18 As well as developing a concept of consent oriented around violence and threats of violence, the common law of rape also evolved a concept of rape by fraud, or, as it may more appropriately be labelled, rape by deception. In some quarters, there is a lively debate about the concept of fraudulent rape, not only in respect of how far it should extend, but also as to whether it should continue to operate at all as a separate category of rape. The law of fraudulent rape was stated by the High Court of Australia in *Papadimitropoulos*.[21] In that case the accused pretended to a Greek migrant woman who did not understand English that the lodging of a notice of intended marriage at a Melbourne Registry Office was in fact the ceremony of marriage. The woman believed she was married and consented to have intercourse with the accused. He was subsequently convicted of rape. The High Court quashed the conviction and stated that only fraud as to the identity of the accused and fraud as to the true character of the sexual act will operate to vitiate consent in rape. In *Papadimitropoulos* the woman knew who the man was and understood the nature of sexual intercourse.[22]

2.19 Deception cases aside, the emphasis on physical force in the law of rape has meant that difficult questions arise where the pressure applied by a person is not a threat of direct physical damage or is not directed at the victim or somebody with whom the victim has a close relationship. It has also meant that rather than 'consent' being given an ordinary meaning which may involve asking such questions as 'was this person's will overborne in all the circumstances?', a more objective approach has been followed. This tends to focus on the behaviour of the accused and to necessitate identification of types of behaviour which put extreme pressure on another person.

2.20 There are various pressures at work in a number of jurisdictions to bring about a change of approach in this area. Of particular relevance is the English case of *Olugboja*.[23] In that case there was no actual violence or explicit threat of violence. The question of law for the Court of Criminal Appeal was 'whether, to constitute the offence of rape it is necessary for the consent of the victim of sexual intercourse to be vitiated by force, the fear of force, or fraud; or whether it is sufficient to prove that in fact the victim did not consent'. There was a good deal of discussion about the nature and extent of the modern law of consent in rape. The Court stated clearly that absence of consent was to receive a wider meaning than submission as a result of force, fear or fraud:

> They (The Jury) should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission . . . In the majority of cases, where the allegation is that the intercourse was had by force or the fear of force, such a direction coupled with specific references to, and comments on, the evidence relevant to the absence of real consent will clearly suffice. In the less common type of case

21. [1957] 98 C.L.R. 249.
22. Section 1 (2) *Sexual Offences Act* 1956 (U.K.) limits fraud as to the identity of the accused to situations where a man impersonates the husband of the complainant.
23. (1981) 73 Cr. App. R. 344.

where intercourse takes place after threats not involving violence or the fear of it . . . we think an appropriate direction to the jury will have to be fuller. They should be directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse, having regard to all the relevant circumstances; and in particular, the events leading up to the act and her reaction to them showing their impact on her mind. Apparent acquiescence after penetration does not necessarily involve consent, which must have occurred before the act takes place. In addition to the general direction about consent which we have outlined, the jury will probably be helped in such cases by being reminded that in this context consent does comprehend the wide spectrum of states of mind to which we earlier referred, and that the dividing line in such circumstances between real consent on the one hand and mere submission on the other may not be easy to draw . . . Where it is to be drawn in a given case is for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of that case.[24]

2.21 Whether or not this case breaks new ground in the law of rape may be a matter of opinion but it certainly seems to have interesting and potentially important implications for the way in which the courts have traditionally interpreted the law. In focussing attention on the meaning of consent as an ordinary word, the Court of Criminal Appeal raised the prospect of the law recognising a novel range of pressures as being sufficient to negative any suggestion of consent, pressures which traditionally do not appear to have been treated as sufficient for the purpose. Consent is an amorphous legal concept. There is no statutory definition of it in Victoria. There is a major question whether it is susceptible to satisfactory definition. Although absence of consent is not limited to circumstances of physical force, the common law tradition has tended to restrict it (fraud apart) to situations involving physical force. Many people argue that consent should receive a much broader meaning and that the only way to achieve it is by legislation.

(iii) The Mental Element

2.22 The mental element of rape is an intention on the part of the accused to sexually penetrate another person, together with either an awareness that the penetration is occurring without the other person's consent, or with the belief that the other person might not be consenting. As in the case of the consent element, there is no statutory definition of the mental element. It is a matter of common law. The *Crimes (Sexual Offences) Act* 1980 made no change in this respect. Just as there has been a good deal of recent debate and controversy about consent as an ingredient of the offence of rape, so also has there been lively discussion, and a certain amount of confusion, about the mental element of the offence.

24. (1981) 73 Cr. App. R. 344, 350.

2.23 In Victoria, however, there has been little serious doubt about the state of the law in this area. What little doubt there may have been was removed in the case of *Saragozza*.[25] In that case the Court of Criminal Appeal held that, on a charge of rape, the Crown must prove that the accused was aware that the other person was not consenting or, realising that there might not be consent, went ahead regardless. On the question whether the belief of the accused was required to be a reasonable belief, the Court indicated a clear view:

> This court should now remove any doubts that may result from passing observations in its own earlier decisions by making it clear that *Morgan's Case* is to be followed in Victoria. A mistaken belief in consent need not be reasonable: the reasonableness of the belief bears only on its existence.[26]

2.24 The English case of *Morgan*[27] was the one which gave birth to the current controversies about the mental element of rape. The facts of *Morgan* were particularly sensational. As a result, it attracted media and public attention. By a majority of three to two, the House of Lords ruled that, if a person accused of rape believed that the complainant was consenting, the accused person was entitled to be acquitted of rape. It was, of course, for the Crown to prove that the accused did not have such a belief. The belief in consent did not need to be based upon reasonable grounds. The minority judges took the view that such a belief had to be based on reasonable grounds. Despite the fact that the convictions of all four accused men in *Morgan* were confirmed by the House of Lords, there was a considerable public outcry and debate about the ruling on the mental element of rape. It was proclaimed in some circles as 'a green light for rapists' and as a 'rapist's charter'. The debate continues today. It is certainly not restricted to England.

2.25 Such was the level of concern raised by *Morgan* that the Home Secretary established an Advisory Group, under the chairmanship of Mrs. Justice Heilbron, to consider the law of rape in the light of the Morgan case.[28] The Heilbron Group reported unanimously that in its view the decision in *Morgan* was correct. It also said that there was a need for legislation (*a*) to declare the mental element of rape and (*b*) to make an addition in the following terms:

> While there is no requirement of law that such a belief must be based on reasonable grounds, the presence or absence of such grounds is a relevant consideration to which the jury should have regard, in conjunction with all other evidence, in considering whether the accused genuinely had such a belief.

2.26 There was a quick legislative response to the Heilbron proposals. The *Sexual Offences (Amendment) Act* 1976 incorporated the 'honest' or 'genuine' belief test and also the recommendation concerning reasonableness:

> It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to

25. [1984] V.R. 187.
26. [1984] V.R. 187, 196.
27. [1976] A.C. 182.
28. *Report of the Advisory Group on the Law of Rape*, H.M.S.O. London, 1975.

> sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed. [29]

There is no equivalent statutory law in Victoria. The pros and cons of this approach will be examined in a later section of this paper.

2.27 Canada has also had a substantial debate on the mental element in recent times. After *Morgan* in England, but before *Saragozza* in Victoria, the Supreme Court of Canada decided the case of *Pappajohn*.[30] In that case, six out of seven judges held that the defence of honest belief in consent was available to an accused person charged with rape and that no principle of law required the mistake to be based on reasonable grounds. Although the particular convictions were upheld the ruling on the point of law raised the ire of a number of groups and individuals. In 1982, Canada produced major changes to the sexual law provisions of its Criminal Code, including the abolition of rape as a discrete offence.[31] Among other changes was a new 'mental element' section. Section 244 (4) of the Canadian Code states as follows:

> Where an accused alleges that he believed that the complainant consented to the conduct that is the subject matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

2.28 In a book dealing with the new Canadian sex offences legislation, Boyle has raised the question whether the new provision incorporates the subjective *Pappajohn* approach:

> As some commentators have suggested, this may be a codification of the *Pappajohn* approach, and probably will be criticised as such. The other view is that the provision is open to either interpretation, and indeed the subsection is silent as to the impact of a finding that the belief was not based on reasonable grounds.[32]

Whatever the technical problems of this provision may be there is substantial Canadian interest in the general question of principle. In essence, the choice is between the 'did this person believe the other person was consenting?' test and the 'would any reasonable person have thought the other person was consenting?' test.

2.29 Reference should also be made to New Zealand where the *Crimes Amendment Act (No.3)* 1985 came into operation on 1 February 1986. This abolishes the offence of rape and replaces it with a concept of 'sexual violation'.

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29. Section 1 (2) *Sexual Offences (Amendment) Act* 1976. It should be noted that this provision did not change the substance of the law but merely pointed out what factors juries must take into account.
30. [1980] 2 S.C.R. 120.
31. *Criminal Law Amendment Act* S.C. 1980-81-82, C-125.
32. Boyle, C. L. M. *Sexual Assault*, Carswell, Toronto, 1984, p. 79.

In turn, 'sexual violation' consists of the 'rape' of a female by a male and the 'act of a person having unlawful sexual connection with another person'. The mental element of both types of 'sexual violation' is established where the alleged offender has sexual connection with another person without that person's consent and 'without believing on reasonable grounds that [the other person] consents to that sexual connection'. Thus, New Zealand, has in effect, incorporated within the mental element of sexual violation the concept of negligent sexual assault. The objective test rejected in *Saragozza*, *Morgan* and *Pappajohn* has been adopted.

2.30 The position in Australian jurisdictions other than Victoria is mixed and quite complex. In the code states of Queensland, Western Australia and Tasmania the mental element is not part of the offence. The sexual act must be voluntary and intentional but the Crown is not required to prove that the accused acted with a particular intention or belief. The mental element only becomes relevant where the accused asserts a defence of mistake under the general sections of the codes which deal with mistake of fact. Such a mistake is required to be reasonable.[33] In the other two common law states, New South Wales and South Australia, the mental element of 'rape' is now dealt with in statutory form. In South Australia, the mental element of rape is defined by statute as knowledge on the part of the accused that consent is absent or reckless indifference as to the presence of consent.[34]

2.31 In New South Wales, the position in relation to the 'mental element' is complicated. In introducing radical new sexual offence laws in 1981, New South Wales abolished the separate offence of rape and created in its place a scheme of four grades of sexual assault.[35] The two most serious grades of sexual assault do not require proof of absence of consent as an element of the offences. They do not require proof of sexual penetration. These are offences which focus on the actual and threatened infliction of violence for sexual purposes. As such, the only mental element required is that of intending or threatening the infliction of violence with the intent of having sexual intercourse. If the accused claims that what happened was consensual, the legal position is not entirely clear. What, for example, if the accused claims that he and the complainant were engaged in consensual, sado-masochistic behaviour? In the case of the third level of sexual assault, sexual intercourse without consent, the Crown must prove either that the accused knew that the other person was not consenting or was reckless as to the possible absence of consent. A person who is reckless as to whether the other person is consenting is deemed to know that consent was absent.

ALLIED OFFENCES

2.32 The offence of rape, even in its post-1980 expanded form, does not cover all forms of non-consensual sexual behaviour. Other offences have been developed to fill the gaps that would otherwise exist. These are the 'allied

33. See Howard, C. *Criminal Law*, 1982 p. 154.
34. See Section 4 *Criminal Law Consolidation Act Amendment Act*, 1976 (S.A.).
35. See Section 4 *Crimes (Sexual Assault) Amendment Act* 1981 (N.S.W.).

offences'. Rape is limited to acts of sexual penetration of specified kinds. Obviously, there are types of non-consensual sexual behaviour which do not involve penetration. These may be acts carried out before, during or after sexual penetration, or they may be acts performed where there is no sexual penetration. The catch-all for most of this behaviour is the offence of indecent assault.[36]

2.33 Before 1980, the offence of indecent assault had a much wider field of operation than it has now. Penetration by the use of objects and penetration of the mouth by the penis are now included within the physical circumstances of rape. They were previously dealt with as forms of indecent assault. However, as already noted, it is still not rape to use a part of the body other than the penis to penetrate the vagina or anus. Nor is it rape to make oral contact with female genitalia. If non-consensual, these activities constitute indecent assaults.

2.34 As well as indecent assault, there are a number of other 'allied offences', most of which are directed at a range of unacceptable ways of procuring sexual penetration. Section 54 of the *Crimes Act*, for example, is directed at persons who use threats, intimidation, false pretences, false representations or other fraudulent means to procure or attempt to procure another person to take part in an act of sexual penetration outside marriage:

> (1) A person who—
>
> (*a*) by threats or intimidation procures or attempts to procure any person to take part in an act of sexual penetration outside marriage; or
>
> (*b*) by any false pretence, false representation or other fraudulent means procures or attempts to procure any person to take part in an act of sexual penetration outside marriage—
>
> is guilty of an indictable offence and liable to imprisonment for a term of not more than five years.
>
> (2) A person shall not be convicted of an offence against this section upon the evidence of one witness only unless the witness is corroborated in a material particular by evidence implicating the accused.

2.35 Section 55 of the Act makes it an offence to administer or cause to be taken by another person 'any drug, matter or thing' for the purpose of overcoming any resistance to sexual penetration:

> (1) A person who—
>
> (*a*) administers any drug, matter or thing to another person; or
>
> (*b*) causes any drug, matter or thing to be taken by another person—
>
> with intent to render the person incapable of resistance and thereby enable himself or a third person to take part in an act of sexual penetration outside marriage with the other person is guilty of an indictable offence and liable to imprisonment for a term of not more than ten years.

36. See Section 44 *Crimes Act* 1958.

(2) A person shall not be convicted of an offence against this section on the evidence of one witness only unless the witness is corroborated in a material particular by evidence implicating the accused.

There are also three other provisions, sections 56, 57 and 61 covering abduction and detention for purposes of sexual penetration.

2.36 Some reorganisation and rationalisation of all these provisions was undertaken in the 1980 amendments, including gender neutralising them in the same manner as the other sexual offences. In substance, however, the previous law was preserved. There is arguably a good deal of overlap between these allied offences and other crimes, especially rape and some of the non-sexual offences against the person. This raises the possibility of rationalising the present law of 'allied offences'. This matter is taken up in the next section of the paper.

3. PROBLEMS WITH THE PRESENT LAW

3.1 There are two types of problems with the present law—problems of principle and practical problems. The major issues of principle concern what types of offences there should be to deal with non-consensual sexual behaviour and what the ingredients of the offences should be. The major practical issues are related to the fair and efficient administration of justice. The present law is unsatisfactory in both respects. The 1980 amendments, while introducing major reforms, did not address some of the perennial issues of principle in the law of rape, issues such as consent and the mental element. They added to the difficulties of administration by introducing the concept of aggravating circumstances. The introduction of the aggravating circumstances offences substantially increased the potential for complexity in trials, particularly in relation to alternative verdicts. The treatment of each of the relevant problems is dealt with under sub-headings. First considered are the problems with the law of rape. Next follow some brief remarks about allied offences. Finally, there is a discussion of the practical problems experienced by courts in dealing with the present law of rape and allied offences.

RAPE

(i) Physical Circumstances

3.2 Even if the crime of rape were to be replaced by another offence, it would remain critical to define the relevant physical circumstances of that offence. If, for example, the law of rape and allied offences were to be replaced by a system of sexual assault it might well be that one or more of the new offences would involve a concept of sexual penetration. Any such concept would need definition. The common law crime of rape was a very narrowly defined offence in terms of physical circumstances i.e. penetration of the vagina by the penis. The 1980 amendments to the *Crimes Act* substantially expanded the range of physical

circumstances which may constitute rape. The question is whether the present range represents the best approach. For practical purposes, there are two broad possibilities. They are:

- to return to the traditional concept.
- to retain or expand the present concept.

3.3 *Return to the Traditional Concept.* Some people may advocate a return to the time, not very long ago, when, as they see it, rape was rape. On this basis, rape would only cover heterosexual, vaginal penetration. This concept of rape has been retained in English law. In 1975, the Heilbron Committee said:

> . . . we think the concept of rape as a distinct form of criminal misconduct is well established in popular thought, and corresponds to a distinctive form of wrongdoing. The law in our view, should, so far as possible, reflect contemporary ideas and categorisations.[37]

In 1984, the Criminal Law Revision Committee reported on sexual offences.[38] On the question whether rape should include other kinds of sexual penetration, the Committee followed the Heilbron line:

> We consider it likely to be harmful to the administration of justice if the definition of a serious offence becomes out of step with the understanding of a large section of the public. We appreciate that other forms of penetration are serious, degrading and can lead to pain and injury, but we take the view that they are distinct from rape.[39]

3.4 The approach of the Heilbron and Criminal Law Revision Committees, has been criticised by a number of commentators. The authors of a recent New Zealand Discussion Paper on rape observed of the English approach:

> . . . we cannot be certain that the majority of the public do subscribe to the definition of 'rape' imposed by law: 'homosexual rape', after all, is a common enough term. Nor can we be sure that they would wish the ambit of the law of rape to be confined to penetration of the vagina by the penis. In any case, the objection raised may be an argument for abandoning the word 'rape' if the definition of intercourse were expanded, but it can scarcely provide a reason in itself for retaining the present legal distinction between one form of penetration and another.[40]

3.5 A second factor which has been advanced in support of retaining the traditional notion of rape is the procreative function of heterosexual, vaginal intercourse. Whatever bearing this factor may once have had on the nature of the law, it would be dangerous to rely on it in contemporary society. Protection against the risk of pregnancy is not the sole nor even the main purpose of rape laws. The fact that pre-pubertal, menopausal, sterilised and infertile women, as well as those who use effective contraceptives, are all covered by rape laws

37. *Advisory Group Report,* 1975 p. 14.
38. Criminal Law Revision Committee, Fifteenth Report, *Sexual Offences,* H.M.S.O. London, 1984.
39. Criminal Law Revision Committee Report, 1984 p. 16.
40. New Zealand *Discussion Paper,* 1983 p. 115. See also Temkin, J. 'Towards a Modern Law of Rape' (1982) 45 *The Modern Law Review* pp. 399-419 at p. 411.

indicates that the pregnancy risk factor is not of major significance. This is not to say, of course, that the risk of pregnancy is not in some cases a factor to be taken into account in assessing relative levels of seriousness of various kinds of rape.

3.6 A related, but more substantial argument, in favour of retaining the traditional concept of rape is intimately and integrally associated with historical and traditional community views about sex. As one commentator has recently remarked:

> The view of rape as a unique offence proceeds from the special significance of sexual intercourse both as the means of procreation, as an expression of emotions, as a symbol of partnership, and as a vehicle for shared pleasure.[41]

This view of sex suggests that the law, as it has done for centuries, should continue to single out abuse of this distinctive, widely accepted and understood form of sexual behaviour. It suggests that it is qualitatively different from other types of sexual penetration. It is certainly not an exclusive view. In the contemporary community it is widely thought that violence and denial of sexual choice and autonomy are the issues rather than one particular form of sexual interference.

3.7 Another argument relies on the social and statistical reality that the vast majority of sexual offences are committed by males against females.[42] Although there can be no adequate statistical data on this, most of the offences of sexual penetration involve penetration of the vagina by the penis. Thus, to alter the definition of rape to include penetration of a wider range of sexual orifices, and particularly to 'de-sex' the offence, so that it is not limited to something men do to women, is to remove the law from what is social and political reality to a plane of almost theoretical abstraction, including the concept of women raping men.

3.8 There are a number of arguments against the proposition that the concept of rape should be limited to heterosexual, vaginal intercourse. One of these is based on the evolution of the law of rape.[43] A substantial body of historical material has been assembled which suggests that the law of rape did not develop exclusively to protect women from invasions of their sexual privacy and integrity but rather to protect male interests in women, akin to property interests. As one commentator in England has observed:

> Historically, the law of rape was concerned not with impregnation but with theft of virginity. It was preoccupied with the protection of propertied virgins from rape, abduction and forced marriage. This would explain why rape is confined to vaginal penetration with the penis.[44]

41. Leng. R. 'The Fifteenth Report of the Criminal Law Revision Committee: Sexual Offences—the Scope of Rape' [1985] *The Criminal Law Review* pp. 416–425 at p. 416.
42. See generally, West, D. J. 'Sexual Assaults: the Reality Behind the Statistics', (1980) 12 *The Australian Journal of Forensic Sciences* pp. 30–39.
43. For a detailed historical analysis of the law of rape, see Brownmiller, S. *Against Our Will: Men, Women and Rape,* Penguin, 1976.
44. Temkin, 1982, (see note 40) p. 412.

On this basis, rape laws evolved not to provide genuine protection to women and girls against physical and psychological damage caused by invasions of their bodily integrity, but to provide certain females with a limited amount of protection, not necessarily for their own sake, but in the interests of the men who in turn had an interest of some kind in them. Although there may be substance in this thesis, it need not be accepted as the sole explanation of the evolution of rape laws. Whatever the historical basis of rape laws, there seems to be substantial merit in the reappraisal of sex offences which has occurred in the last decade or so, largely as part of a much broader political and social movement towards greater equality of the sexes and towards recognising the sexual victimisation of women.

3.9 The modern emphasis is not upon the protection of virginity, the risk of pregnancy, or the defilement of another man's wife or daughter, but rather upon providing a level of protection for women and men in their entitlement to exercise sexual choice. Thus, sexual offences come to be seen as forms of interference with personal and sexual integrity. If this perspective is valid, what validity is there in drawing the distinctions which were involved in the common law offence of rape? Is it appropriate, for example, to draw a distinction between vaginal, oral and anal penetration, or between penetration by the penis and an inanimate object? As one commentator has suggested:

> By adjusting the definitions and the penalties to allow for harm, both psychological and physical, the law can attach liability to all who deny others the right of control over their own bodies, irrespective of gender.[45]

3.10 The expansion of the physical circumstances of rape which occurred in 1980 appears to accord with changed and changing views of human sexuality, sexual expression and the relationship between the sexes. South Australia first produced an expanded version of the physical ingredients of rape.[46] All Australian jurisdictions except Queensland and Tasmania have now done the same. There seems to have been little, if any, public opposition to these reforms of rape laws. The Commission believes that there should not be a return to the common law position.

3.11 *Retention or Expansion of the Present Concept.* It remains to consider whether the present approach is right or whether there is a need for further change. The law of rape requires proof of penetration, although the slightest penetration is sufficient. Despite the sweeping changes brought about in 1980 to the physical aspects of rape, the requirement of penetration has been perpetuated. In the same way that it has been argued that non-consensual anal and oral penetration are as unpleasant and injurious as vaginal penetration, and merit being dealt with on the same basis, it can also be argued that yet other forms of sexual abuse, not involving penetration, should be placed in the same general category. Unfortunately, some sexual attacks involve a variety of forms of sexual mutilation. An attack may consist of some form of sexual mutilation

45. McNiff, F. V. 'Reform of Sexual Offences in Victoria: The Time to Abandon the Victorian Perspective' (1980) 4 *Criminal Law Journal* pp. 328-346 at p. 332.
46. See Section 3 *Criminal Law Consolidation Act Amendment Act* 1976.

without penetration. More often, the mutilation accompanies one or more forms of sexual penetration. Some commentators argue that there is a case, not only for removing the traditional offence of rape, but also against having an offence or series of offences based on the concept of sexual penetration. They favour dealing with sex offences as assaults and calling the offences sexual 'attack', 'assault', 'violation' or 'interference'.[47]

3.12 A number of further observations should be made about the present law. First, while penetration of the mouth by the penis (fellatio) is included within the definition of rape, contact between the mouth and female genital organs (cunnilingus) is excluded. (It should be noted in passing that a majority of Australian jurisdictions now include cunnilingus as part of their definitions of intercourse or penetration.)[48]

3.13 Second, it is not rape to penetrate another person's vagina or anus with parts of the body such as fingers and hands. Given that Parliament decided in 1980 to develop the concept of rape into one of general sexual penetration, it is curious that penises and objects (e.g. bottles and broom handles) were included but not parts of the body other than the penis. The insertion of a pencil or thermometer into a vagina or anus may constitute rape but if the penetrating implement is a finger or a hand the law of rape is not applicable.

3.14 It can be argued that in many instances of non-consensual penetration by a part of the body other than a penis, the unpleasantness and trauma is not as great as that involved in cases of penetration by penises and inanimate objects. That argument is difficult to assess. In particular circumstances, it may be far more unpleasant to be penetrated by another person's hand rather than a penis. In the Commission's view, if an offence of sexual penetration is to be retained, there is a very strong case for including a wider range of sexual penetrations. Penetration by body parts and cunnilingus should be included.[49]

(ii) Consent

3.15 In the context of rape law, consent is a key ingredient in two respects. First, in most common law jurisdictions, absence of consent must be established. Consent is also part of the mental element of the offence. It must be established either that the accused was aware that the complainant was not consenting or else that the accused realised that consent might be absent and proceeded to have intercourse regardless. This section is concerned only with the former aspect of consent. The mental element of the offence is dealt with separately.

3.16 Although 'consent' is an ordinary English word, it has achieved no precise legal meaning. Despite some suggestions to the contrary, cases coming before the courts have generally been limited to circumstances of actual and threatened

47. See, for example, Brazier, R. 'Reform of Sexual Offences' [1975] *The Criminal Law Review* pp. 421–429.
48. South Australia, Western Australia, New South Wales and the Australian Capital Territory.
49. In relation to cunnilingus see note 110.

violence and some instances of fraud. Whatever the traditionally accepted scope of the law of rape, it has always been open for the courts to give the concept of consent a broader meaning. If the word were to be given its ordinary meaning, as the English Court of Criminal Appeal suggested in *Olugboja*,[50] it would have a field of operation well outside situations of actual and threatened violence and certain kinds of fraud. Before examining the general question of the scope of consent it is appropriate to deal with rape by deception.

3.17 *Rape by Deception.* It was mentioned earlier that the common law recognises certain types of fraudulent rape, namely, fraud as to the identity of the person and fraud as to the nature and character of the act involved. Rape by fraud is by definition non-violent in the strict sense. Those who believe that rape should be limited to circumstances of violence argue that obtaining sex by deception should not be classified as rape. These and other commentators suggest that there is a substantial, qualitative difference between obtaining sex by violent means and obtaining it by fraudulent or other underhand methods. There appear to be three options:

- the present position could be retained;
- fraudulent rape could be abolished;
- fraudulent rape could be extended to cover additional forms of deception.

As in the case of most debate about rape law reform, opinion is divided as to the relative merits of these three options.

3.18 In 1980, the English Criminal Law Revision Committee published its *Working Paper on Sexual Offences.* A majority of the Committee favoured abolishing fraudulent rape altogether:

> We consider that the distress which the victim of such frauds may suffer is, though a serious matter, not really comparable with the fear and shock that often accompanies true rape.[51]

They argued that the behaviour in question should be criminal and attract heavy penalties but should not be classified as rape. This approach was criticised in some circles. Temkin, for example, suggested that the majority view was based upon an unarticulated assumption as to the 'true' nature of the crime of rape and under-estimated the fear and shock involved in rape by fraud.[52]

3.19 When the Committee reported on sexual offences in 1984, it reversed its provisional position on rape by fraud.

> Where fraud vitiates consent the essence of rape is present and the offender deserves to be labelled and punished accordingly. In reaching this conclusion we have in mind that to define rape so as to exclude all cases of sexual intercourse obtained by fraud might be perceived as a narrowing of the definition of the offence and might possibly create

50. (1981) 73 Cr. App. R. 344.
51. Criminal Law Revision Committee, *Working Paper on Sexual Offences,* H.M.S.O. London, 1980 p. 10.
52. Temkin, 1982, (see note 40) p. 403.

> uncertainty among persons not conversant with the finer details of the legislation as to the precise ambit of the offence in cases involving issues other than fraud. Such a development would run counter to much of the thinking behind the Heilbron Report and the 1976 Act that the law should be improved by making it easier for victims to come forward.[53]

The Committee went on, however, to express its concern about the difficulties involved in distinguishing between the types of fraud which would negative consent for the purposes of rape law and those which would not. They noted that their concern was increased by the decision of the Court of Criminal Appeal in *Olugboja*[54] that the issue of consent is a question of fact for the jury and should be given its ordinary meaning. As the Committee put it:

> At one extreme, fraud as to the nature of the act is clearly accepted as rape; while, at the other, a man who promises a woman a fur coat in return for sexual intercourse, with no intention of fulfilling his promise, would not generally be regarded as committing rape. It is, however, in our opinion inherently unsatisfactory to leave what constitutes an offence to be determined on the facts of each case. We recommend, therefore, that it should be expressly stated in the legislation which cases of consent obtained by fraud amount to rape. Somewhere a line must be drawn. We would include within rape those cases that before 1976 clearly were rape, namely fraud as to the nature of the act and impersonation of a husband. We see no reason to distinguish between consent obtained by impersonating a husband and consent obtained by impersonating another man, so that latter case should also constitute rape. All the other cases of fraud should be dealt with under section 3 of the 1956 Act and should not amount to rape.[55]

The Commission favours the continued inclusion of fraud cases. There is the question which kinds of fraud are to be included and whether the matter should be dealt with by statute. These issues are covered in the next section of the paper.

3.20 *Scope of Consent in General.* As already mentioned, the cases coming before the courts have generally been cases of violence or some other force. The key question is whether absence of consent should receive a broader meaning. Opinion on this is divided. Writing in 1981, Professor Colin Howard observed:

> The problem is. . . whether any threat other than bodily harm . . . can be admitted as sufficiently serious to negative consent. The most likely situation would be a form of blackmail, the threat being either to publish some unpleasant fact about V [the victim], or about someone whose welfare matters to her, or else to bring down some economic loss upon her such as the foreclosure of a mortgage. The chief objection to admitting threats of this kind is that the difficulties delimiting what

53. Criminal Law Revision Committee Report, 1984 p. 10.
54. (1981) 73 Cr. App. R. 344.
55. Criminal Law Revision Committee Report, 1984 p. 10.

is a sufficiently improper pressure from what is not would make the law too vague.[56]

Professor Howard adds the further objection that it would remove the law too far from its original purpose of protection against physical assault. Such an extension, he suggests, should not occur without express statutory authority.

3.21 In the same vein, Professor Glanville Williams, referring in 1978 to a statutory definition of rape which in turn refers specifically to lack of consent, remarked:

> The law is doubtful. Among such other threats, the strongest candidates are threats of imprisonment or of prosecution (whether on good grounds or maliciously). . . On the whole, it would seem to be the best policy to limit rape to acts done by force or under the threat of force (which is its ordinary meaning). Other threats are best dealt with, if at all, by legislation making them separate offences.[57]

3.22 More recently in England, in 1984, the Criminal Law Revision Committee has declared its support for this view of the appropriate scope of the law of rape. In its view:

> . . . the offence of rape should arise where consent to sexual intercourse is obtained by threats of force, explicit or implicit, against the woman or another person, for example, her child; but that it should not be rape if, taking a reasonable view, the threats were not capable of being carried out immediately.[58]

The Committee suggested that all other cases of sexual intercourse obtained by threats not amounting to rape could be dealt with as a lesser offence under section 2 of the *Sexual Offences Act* 1956. Much the same general viewpoint was expounded by another English commentator in 1982:

> Rape, it is submitted, should be confined to cases where the victim's sexual choice is eliminated. The defendant who threatens his victim with violence denies her the choice of whether to have intercourse with him or not. He means to have intercourse with her in any event. Her choice lies between intercourse with violence or intercourse without it. In the unlikely event of a defendant inviting his victim to opt either for sexual intercourse with him or alternatively for a violent beating, her choice is similarly eliminated since there is no way she can be sure that the violent assault will not be accompanied by forced sexual intercourse. On the other hand, where the threat is to terminate a woman's employment, she is left with a choice, albeit an unpalatable one, as to whether to have intercourse with the defendant or not. In cases such as this where sexual choice remains but is unacceptably limited or confined, liability for an offence which is less serious than rape is appropriate.[59]

56. *Criminal Law*, 1982 p. 160.
57. Williams, G. *Textbook of Criminal Law*, Stevens, London, 1978 p. 107.
58. Criminal Law Revision Committee Report, 1984 p. 11.
59. Temkin, 1982, (see note 40) pp. 406-407.

3.23 There are strong critics of the view that the law of rape should be confined in this way. They argue that this view of the law of rape is not appropriate in a community where social and sexual attitudes are very different from those which prevailed when this area of law evolved. Some argue that, whereas in the past the emphasis was on physical protection, emphasis should now be placed on the protection of freedom of sexual choice. On this basis consent should be given a much broader meaning. In the United States, Harris has argued that the legal community has not yet developed what she calls a 'principled standard of effective nonconsent in rape'.[60] She argues that consent in rape has no clear legal meaning and that, because it is such an important question of policy, legislatures have a responsibility to produce a specific consent standard. As she puts it:

> The law's failure to develop a well-defined concept of consent in rape, its strong tendency to rely on categorical assumptions in dealing with issues surrounding the central issue of consent, and the biases built into those categorical assumptions mirror the tone and substance of legal debate on consent in rape set in the early part of this century. At a time when the political climate is ripe for reforming archaic rape laws, it is imperative to examine why the law failed to develop a standard of consent in rape law and to identify the policies that should mold such a standard before attempting to apply the concept through legislative or judicial rules.[61]

On the policy direction of such a consent standard Harris has a clear view:

> . . . since the basic element of rape is nonconsent and the basic value protected by that element is freedom of choice, then the law should recognize that forms of coercion other than threats or infliction of bodily harm should preclude effective consent to intercourse.[62]

She further points out that the long-standing legal recognition of rape by fraud is an interesting example of value being attached to the freedom of sexual choice rather than purely physical protection.

3.24 A similar point of view has been put in Canada by Clark and Lewis:

> What we [the community] call 'rape' is only that form of sexual coercion which is accompanied by the use or threat of physical force. In treating rape as a grave moral offence . . . we do not punish sexual coercion as such but only one particular form of it. We do not punish the end, the achievement of sexual contact through coercion, but only the means used to achieve that end. And we do this without even considering whether physical coercion is the most *harmful* form of such coercion.[63]

3.25 Writing in the Australian context, Scutt has suggested that to talk about consent in terms of violence and fraud is a classic case of question begging.[64] She argues that the restricted meaning traditionally given by courts to the notion

60. Harris, L. R. 'Towards a Consent Standard in the Law of Rape' (1976) 43 *The University of Chicago Law Review* pp. 613–645.
61. Harris, 1976 p. 628.
62. Harris, 1976 p. 643.
63. Clark, L. M. G. and Lewis, D. J. *Rape: The Price of Coercive Sexuality,* The Women's Press, Toronto, 1977 p. 131.
64. See generally Scutt, J. A. 'Consent Versus Submission: Threats and the Element of Fear in Rape' (1977) 13 *Western Australian Law Review* pp. 52–76.

of consent is artificial and unjustified. Consent should be given its logical, subjective, ordinary meaning. Rather than continue to enforce a restrictive interpretation of lack of consent (limiting this to physical force and fear of physical violence, as well as fraud), the courts should recognise lack of consent wholly as a matter of fact for the injury. Extortionary methods may be such as to oust consent and these and similar factors should be open to a jury to consider as negativing the reality of consent. If this general view were adopted, a variety of threats might be accepted as sufficient to negative consent. These might include threats to destroy a piece of property which was of enormous financial or sentimental value, to kill or mutilate a much loved pet or to destroy the professional reputation of a close relative. Also included might be cases of sexual harassment by employers and other people in positions of authority. An employer, for example, might threaten an employee with dismissal unless he or she submits to an act of sexual penetration. Equally, it can be argued that if a person is kidnapped they may not be threatened with physical force but it might be artificial to suggest that an act of sexual penetration between kidnapper and victim was consensual.

3.26 There are difficulties in this area. As one commentator has said:

> It seems to be an enormous task to begin to assess the culpability involved where a man, for example, takes advantage of his superior social and economic status and the relative docility and desire to please of a particular woman, or where sexual intercourse occurs because of fear of, not force, but negative social repercussions. Many of us are reluctant to grapple with these moral issues in our everyday lives . . .[65]

On the other hand, it should be possible to draw the line in a way that would encourage courts to examine the totality of the circumstances of an alleged rape to determine whether the complainant did or did not consent to the sexual act with the accused.

3.27 *Dealing with Consent by Statute.* The issue of fraud aside, the major issue which needs to be considered is whether an attempt should be made in Victoria to produce a statutory definition of consent for the purposes of the law of rape. At present, the common law provides the principles in this area. There is a recent trend towards defining consent by statute. In extensive revisions of their sexual offence laws, Canada and New Zealand have opted for the statutory approach.[66] A number of Australian jurisdictions have done likewise.[67]

3.28 Supporters of the legislative approach generally argue that although the common law concept of consent might be satisfactory if given its 'ordinary' meaning that has not happened in fact, and it is time that the legislature stepped in and declared the appropriate policy. Many of them, whether or not they have a particular formulation in mind, support legislative intervention on the grounds that the issue of consent is such an important matter of policy that it should be the subject of clear, legislative definition. Opponents of the legislative approach

65. Boyle, *Sexual Assault,* 1984 p. 61.
66. See Section 19 *Criminal Law Amendment Act* S.C. 1980-81-82, C-125 (Canada) and Section 2 *Crimes Amendment Act* (No. 3) 1985 (New Zealand).
67. See, for example, Section 8 *Acts Amendment (Sexual Assaults) Act* 1985 (W.A.) and Section 4 *Crimes (Sexual Assault) Amendment Act* 1981 (N.S.W.).

argue that the common law offers a flexibility which may be very important in tackling a complex concept like consent. This may be particularly important in the context of sexual behaviour, where community attitudes can vary considerably over quite short periods of time. The decision in the *Olugboja*[68] case is a good example of the common law adapting to changed and changing community attitudes and circumstances. They also argue the extreme difficulty of dealing on a legislative footing with a concept like consent in sex offence law. A general legislative definition would suffer from its generality. If, on the other hand a detailed, specific approach were adopted, there would be interpretive difficulties. Criminal trials for the offences to which the section applied would become even longer and more complicated than they already are. The level of trauma for complainants would be increased by the extra attention to detail which would be required at the trial.

3.29 A number of 'models' of legislative approaches to the consent question have emerged. One model is the revolutionary 'Michigan' approach, based upon the Michigan Criminal Sexual Conduct Statute of 1974.[69] Under this legislation, the separate offence of rape ceased to exist. A scheme of graded sexual assault replaced it. This scheme makes no mention of lack of consent. Consent has ceased to be an element of the new crimes but is still available to an accused person as a defence. Under the Michigan model the emphasis is very much on the behaviour of the accused, and, in particular, the use or threatened use of violence. It provides that a person is guilty of criminal sexual conduct if he or she uses force or coercion to engage in sexual penetration or sexual contact, or if the victim is incapable of resisting the penetration or contact. A list of circumstances of coercion and fraud is provided. The list is expressed to be non-exhaustive. There may be other factors not mentioned in the legislation which would have a similar effect on any suggestion of consent. The factors are as follows:

(i) When the offender overcomes the victim through the actual application of physical force or physical violence.

(ii) When the offender coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the offender has the present ability to execute these threats.

(iii) When the offender coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the offender has the ability to execute this threat. The words 'to retaliate' include threats of physical punishment, kidnapping or extortion.

(iv) When the offender engages in the medical treatment or examination of the victim in a manner or for purposes which are recognised as medically unethical or unacceptable.

(v) When the offender, through concealment or by surprise, is able to overcome the victim.

68. (1981) 73 Cr. App. R. 344.

69. A study of the impact of the Michigan statute is reported in Marsh, J. C., Geist, A. and Caplan, N. *Rape and the Limits of Law Reform,* Auburn House, Boston, 1982.

The victim is deemed to be incapable of resisting, thereby obviating the need to prove force or coercion, in three different circumstances:

(i) Where the victim suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.

(ii) Where the victim is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anaesthetic, or other substance administered to that person without his or her consent.

(iii) Where the victim is unconscious, asleep or for any other reason is physically unable to communicate unwillingness to an act.

3.30 There are a number of bases for this particular approach to the problem of consent but the essence of it has been expressed by the architect of the Michigan law to be as follows:

> If actual force or threats of force sufficient to meet the 'force' requirement can be shown, it is redundant to also require a separate showing of non-consent as part of the case in chief. . . . When the victim is threatened with a dangerous weapon, or is beaten, robbed or kidnapped, the possibility of her willingly consenting to sexual intercourse is so unlikely that it ought only be raised as an alternative theory for the defence rather than have to be shown from the outset.[70]

3.31 Thus, in large measure this approach to the consent issue is directed at resolution of what is seen essentially as a contradiction in terms i.e. the idea that although force may be used or threatened there may still be consent.

3.32 A variation on the Michigan approach appears in the recent New South Wales sexual offence laws.[71] The reforms abolished the common law felony of rape and replaced it with a four-part scheme of graded sexual assault. The two most serious grades deal with situations where violence is inflicted or threatened with intent to achieve sexual penetration. For the purposes of these two offences consent has been removed as an element of the offence.

3.33 A third and more common approach to law reform in relation to the element of consent in rape is to list in a statute a number of factors which if established, will negative any suggestion of consent. This, of course, involves the retention of the element of consent as a key ingredient of the relevant offences but represents a radical departure from the common law approach in that not only does consent become a creature of statute but is spelt out in considerable detail. It should also be noted that although a number of the available 'models' are quite lengthy and detailed in their treatment of consent most are nevertheless expressed to be non-exhaustive in their coverage.

3.34 A very good example of this kind of approach is contained in a Draft Sexual Offences Bill produced by Women's Electoral Lobby in 1980. The Bill

70. Nordby, V. B. 'Reforming Rape Laws: The Michigan Experience', in Scutt, J. A. (ed.) *Rape Law Reform*, Australian Institute of Criminology, 1980.
71. *Crimes (Sexual Assault) Amendment Act* 1981.

defines unlawful sexual intercourse in terms of intercourse without the 'full and free consent' of one of the parties. It then lists ten circumstances, the establishment of any one of which would tend to negative any suggestion that the complainant had consented:

(i) When the accused overcomes the victim through the actual application of physical force or violence, or by sudden attack.

(ii) When the accused coerces the victim to submit by threatening to use force, violence, or physical strength on the victim.

(iii) When the accused coerces the victim to submit by threatening to use violence on a companion of the victim.

(iv) When the accused coerces the victim to submit by threatening future punishment to the victim, or any other person. Future punishment as used in this sub-section includes threats of future physical or mental punishment, kidnapping, false imprisonment or forcible confinement, extortion, or public humiliation or disgrace.

(v) When the accused, without prior knowledge or consent of the victim, administers to or has knowledge of someone else administering to the victim any intoxicating substance, drug or anaesthetic, which mentally incapacitates the victim.

(vi) When the accused by words or acts induces the victim to submit in the belief that the person undertaking the act of sexual intercourse or the sexual act is some other person.

(vii) When the accused by words or acts induces the victim to submit in the belief that the act of sexual intercourse or the sexual act is some other act.

(viii) When the accused is in a position of authority, or professional or other trust over the victim, and exploits this position to induce the victim to submit.

(ix) When the victim is physically helpless to resist, or is mentally incapacitated or emotionally incapable of understanding the nature and character of the act or its implications.

(x) When the victim submits under circumstances involving kidnapping, false imprisonment or forcible confinement or extortion.

Despite evidence of the existence of any one or more of these circumstances it would still be open for an accused person to argue that the complainant consented to the sexual act in question.

3.35 The New South Wales legislation contains an offence of 'sexual intercourse without consent'. A variation of this 'listing' approach has been adopted in relation to that offence. The official commentator on the New South Wales reforms has observed:

> 'These provisions do not exhaustively set out the myriad circumstances by virtue of which consent to sexual intercourse may be vitiated. The

effect of the provisions is to clarify certain aspects of the law of consent to sexual intercourse where uncertainty or difficulty has arisen.[72]

3.36 A similar approach to that taken in New South Wales has been adopted in the recent New Zealand legislation. And in South Australia, in 1984, the Naffin Report recommended an expanded legislative approach to the consent issue. Part of that recommendation was that there should be a clause, as in New South Wales and New Zealand, to the effect that absence of physical resistance is not to be regarded, by reason of that fact alone, as indicating consent.

3.37 A fourth approach to dealing with consent is one which involves couching a consent provision in general terms rather than dealing with specific instances. There are a number of examples of this but it may be useful briefly to note three: Tasmania, Canada and Western Australia.

3.38 The Tasmanian Criminal Code of 1924 defines consent as:

> Consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents. A consent is said to be freely given when it is not procured by force, fraud, or threats of whatever nature.[73]

It should be noted that in 1982 the Law Reform Commission of Tasmania, in recommending a new scheme of graded sexual assaults, also recommended the legislative enactment of a non-exhaustive list of circumstances which would render an act of sexual intercourse or other sexual act unlawful.[74] It is a list modelled very much on the Women's Electoral Lobby proposal outlined above.

3.39 The new Canadian provision, which has been in operation since 1983, is part of a radical revamping of Canadian sexual offence laws which involved not only abolition of the offence of rape but also the removal of sexual penetration of any description as a concept of any legal significance. Section 244 (3) of the Canadian Criminal Code now reads as follows:

> For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
>
> (*a*) the application of force to the complainant or to a person other than the complainant;
>
> (*b*) threats or fear of the application of force to the complainant or to a person other than the complainant;
>
> (*c*) fraud; or
>
> (*d*) the exercise of authority.

72. Woods, G. D. *Sexual Assault Law Reforms in New South Wales: A Commentary on the Crimes (Sexual Assault) Amendment Act 1981, and Cognate Act.* Department of the Attorney-General and of Justice, (N.S.W.) 1981.
73. Chapter 1 *Criminal Code Act* 1924.
74. Report No. 31, Law Reform Commission of Tasmania, *Report and Recommendations on Rape and Sexual Offences,* 1982.

3.40 In Western Australia, major new sexual assault laws came into operation early in 1986.[75] Again, the discrete offence of rape under the Western Australian Criminal Code has been abolished and replaced by a system of graded sexual assaults. The following is the provision governing the issue of consent for the purposes of those provisions:

> For the purposes of this Chapter, 'consent' means a consent freely and voluntarily given and, without in any way affecting or limiting the meaning otherwise attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deception or fraudulent means.[76]

3.41 It is unclear whether the Tasmanian and Canadian definitions are intended as exhaustive. This is a problem in itself but, in addition, key concepts are left undefined. There must be difficulties with this approach, especially in the case of new legislative concepts such as the Canadian 'exercise of authority' provision. Similarly, although it is a recognised category of rape, the concept of fraud is not without difficulty. As one commentator on the new Canadian laws has observed:

> This will not help clarify an otherwise obscure area of law if it is approached in a purely theoretical fashion by the judiciary. However, if it is now recognised that the decks have been cleared for a policy decision as to what is culpable in the context of fraud, then the law may be improved tremendously. A range of alternatives is available in this regard. They always were available under the old wording, but the change may force or encourage judges to consider the possibilities anew.[77]

3.42 It may be desirable from the standpoint of stating and clarifying the law and of increasing community access to, and understanding of, the law to produce a statutory definition of consent for the purposes of dealing with serious sexual offences. As outlined in this section of the paper, efforts to achieve statutory definitions are fraught with difficulties. General approaches suffer from their very generality; detailed approaches from their prolixity and the complications of interpretation inevitably involved. But, as also pointed out, there are many critics of the vagueness and uncertainty of the common law position. It would clearly be possible to indicate the general boundaries of the consent notion by using the kind of approach adopted in Tasmania, Western Australia and Canada.

(iii) The Mental Element

3.43 The present law of rape requires that the prosecution prove not only that the complainant did not consent but also that the accused was aware of the lack of consent or disregarded the possibility that there may have been a lack of

75. *Acts Amendment (Sexual Assaults) Act* 1985.
76. Section 8 *Acts Amendment (Sexual Assaults) Act* 1985.
77. Boyle, *Sexual Assault,* 1984 p. 66.

consent. The case of *Saragozza*[78] is a clear statement to this effect. It is in turn consistent with the English approach in the now famous case of *Morgan*.[79] In the short term *Morgan* set off a noisy public debate about culpable states of mind in relation to rape and about rape law in general. There has also been a longer term impact and that has been the development of some serious thinking and writing on the appropriate mental element for rape, and about mental states in relation to criminal responsibility in general.

3.44 *Subjectivity Versus Objectivity. Morgan* in England and *Saragozza* in Victoria confirmed that the mental element applicable to rape is a subjective element. If the accused person believed that the other person was consenting then there must be an acquittal. Opposed to this position is the school of thought which maintains that not only must the accused believe that there was consent but also that the belief must be based upon reasonable grounds. So that, all other elements being satisfied, if the accused believed there was consent but the belief was not a reasonable one there could be a conviction.

3.45 In a nutshell, the debate about the mental element of rape is about whether there should be a subjective or objective test, or even some attempt at a combination of the two. The debate is thus a classic one about a key philosophical aspect of the criminal law. The broad background to this debate was sketched by the Heilbron Committee:

> Centuries ago a man might have been found guilty merely because it was his conduct which caused the harm even though his acts or omissions were quite accidental or even unintentional. This archaic and very harsh doctrine was gradually ameliorated, and the test of guilt became moral blameworthiness, with the accompanying assumption that any harm which a man had brought about must have been intended by him or caused by his recklessness, if he was to be held criminally responsible for it.[80]

3.46 The Heilbron Committee firmly supported the approach in *Morgan* and made the following remarks:

> The law recognises that man is susceptible to error and does not demand that he may never be mistaken in his mental appreciation or perception of the actual circumstances surrounding his actions. In the case of rape the man who makes a mistake fails to appreciate the woman's lack of consent, or misinterprets her actions but he does not intend deliberately nor recklessly to commit the crime. A mistaken, though erroneous, belief is inconsistent with and negatives the requisite mental element ie either an intent to have sexual intercourse with the complainant knowing she does not consent, or recklessly, not caring whether she was a consenting party or not. Conversely if the jury were to find that the accused did have sexual intercourse either with such intent or recklessly, this should have the effect of negativing the existence of any mistake, for if he intended to have non-consensual

78. [1984] V.R. 187.
79. [1976] A.C. 182.
80. *Advisory Group Report*, 1975 p. 8.

sexual intercourse, there could be no question of mistake, and if he did not care whether she was consenting or not, he could hardly be said to have held any genuine belief, one way or the other.[81]

3.47 More recently, however, counter arguments have been put. For example, Wells[82] in England and Pickard[83] in Canada, have both raised serious questions about the merits of the subjective test of the mental element in the law of rape. Wells raises the question whether an objective test might be appropriate:

> The definition of rape requires that the woman was not consenting. If there is sufficient evidence to satisfy a jury that consent was absent, can it not be argued that this is sufficient to distinguish, in terms of culpability, the mistaken defendant from those men who have never had sexual intercourse with a woman who was not consenting? If the defendant is so out of touch with the reality of the situation, is there not a suggestion that he should take more care to ensure that his sexual partner is willing? Social protection might be better served by the punishment of a defendant who failed to acquaint himself with this (seemingly) elementary fact.[84]

Wells goes on to suggest that, even if the mistaken 'rapist' is culpable, he may not be *as* culpable as the deliberate rapist and it could be argued that a lesser offence than rape may be appropriate.

3.48 Pickard puts the case for objectivity rather than subjectivity more explicitly than Wells. On the basis that it is not unreasonable to expect a person to pay some attention to the question of consent before proceeding, she then observes:

> There can be no doubt that it is a major harm for a woman to be subjected to non-consensual intercourse notwithstanding that the man may believe he has her consent. There can be little doubt that the cost of taking reasonable care is insignificant compared with the harm which can be avoided through its exercise: indeed, the only cost I can identify is the general one of creating some pressure towards greater explicitness in sexual contexts. To accept an honest but unreasonable belief in consent as a sufficient answer in these circumstances is to countenance the doing of a major harm that could have been avoided at no appreciable cost.[85]

Pickard raises the possibility of a test which is neither entirely subjective nor based on a subjective belief informed by the standards of the ordinary hypothetical person. She suggests modification of the traditional measure of reasonableness in such a way that the relevant characteristics of the particular person rather than those of the 'ordinary' person would act as the background for measurement of reasonableness. In her words:

81. *Advisory Group Report,* 1975 p. 9.
82. Wells, C. 'Swatting the Subjectivist Bug' [1982] *The Criminal Law Review* pp. 209–220.
83. Pickard, T. 'Culpable Mistakes and Rape: Relating Mens Rea to the Crime' (1980) 30 *University of Toronto Law Journal* pp. 75–98.
84. Wells, 1982 p. 213.
85. Pickard, 1980 p. 77.

> The fact finder must ask whether or not the belief was reasonably arrived at in the circumstances, given those attitudes and capabilities of the defendant which he cannot be expected to control.[86]

In this way, Pickard claims, unfairness would be avoided to people incapable of achieving objectively reasonable standards while people who were capable of exercising care and had not done so would not be excused.

3.49 At times, both authors seem to suggest that, because rape is a particularly serious and unpleasant crime, some compromise should be reached in relation to the mental element required for conviction. However, it might equally be argued that the more serious the crime the stronger the case for ensuring that only people who act intentionally are convicted. Of course, Wells and Pickard are suggesting that negligence might be sufficient to constitute the mental element of the offence. The Commission does not agree with this suggestion.

3.50 Finally, reference should be made to the *Naffin Report* in South Australia.[87] This document has been the main vehicle for contemporary Australian discussions about the mental element in rape. It is based on the view that too many people charged with rape are being acquitted and that one of the reasons for this is the rigidity of the requirement relating to the mental element. The options explored by Naffin are as follows:

1. The Crown is required only to prove in the first instance that intercourse took place without the victim's consent. It is then open to the accused to point to evidence that he genuinely believed that the victim was consenting. If he so elects, the Crown must then carry the burden of persuading the jury beyond reasonable doubt either that the accused knew that the victim was not consenting or that he was reckless thereto.
2. The Crown is required, in the first instance, to prove that intercourse took place without the victim's consent. It is a defence for the accused to argue that he honestly believed that the victim was consenting. He must persuade the jury on the balance of probabilities of his honest belief.
3. The Crown is required, in the first instance, to prove that intercourse took place without the victim's consent. It is a defence for the accused to argue that he honestly believed that the victim was consenting and he carries this burden on the balance of probabilities. In order to raise this defence, the accused must depose on oath.
4. The Crown is required to prove, in the first instance, that intercourse took place without the consent of the victim. It is a defence for the accused to argue that he honestly and reasonably believed that the victim was consenting. He must persuade the jury, on the balance of probabilities, of his honest and reasonable belief.[88]

86. Pickard, 1980, p. 79.
87. *An Inquiry into the Substantive Law of Rape,* Department of the Premier and Cabinet, South Australia, 1984.
88. These options are set out and discussed at pp. 45–47 of the *Naffin Report.* It is of interest to note that Naffin does not present the current South Australian position (which is the same as that of Victoria) as an option.

3.51 These options range from very moderate to radical. Option 1 merely involves a slight alteration in theory of the burden of proof. As Goode[89] points out, it is arguable that option 1 in fact 'represents the reality of jury trials'. The proposed change might not be without practical significance, however, because it might prove fatal in those marginal cases which rest on the burden of proof.

3.52 Option 2 involves a clear and direct reversal of the onus of proof. It would effectively deprive an accused person of the privilege against self-incrimination since he would be required to persuade the jury of his mistaken belief. Option 2 makes no mention of the 'recklessness' component of the mental element of rape. In fact, if the accused were required to establish that he 'honestly believed' that there was consent he would have no defence if he did not advert to the possibility of absence of consent. Under the existing law an accused would have a defence in such circumstances.

3.53 Option 3 is the same as option 2 save that an accused person who wished to base a defence on honest belief would have to give evidence on oath and be liable to cross-examination. This would have the effect of abolishing the right of a person relying on a defence of honest belief in consent to give unsworn evidence not subject to cross-examination. Option 4 is more far-reaching. Naffin comments:

> Option 4 meets all the objections to the current law. Not only does it require the accused to give an account of himself and convince the jury of his belief in consent, but it also obliges him to persuade the jury of the reasonableness of that belief. The principal benefit of option 4 is that it prevents the accused escaping liability on the basis of unreasonable beliefs about the nature of consenting sexual intercourse. A person accused of rape can no longer defend himself on the basis of a belief that the victim's protestations were merely a display of feminine wiles, if a reasonable person would have appreciated that they were genuine. In addition, an alleged rapist can no longer avoid guilt by maintaining that he simply failed to inquire into the wishes of the victim.[90]

Implementation of this option would involve a radical change to existing law. The overthrow of fundamental principles would be involved. In the case of all four options, the onus rests upon the proponents of change. In his detailed analysis of the *Naffin Report*, Goode concludes that Naffin has not presented a strong case for change.[91] It might be possible to create a separate and lesser offence to cover the case of a person who mistakenly but unreasonably believes the other person is consenting. It would be difficult to devise a satisfactory definition of 'reasonableness' for this purpose. Even if that hurdle were overcome, the resulting offence would be very likely further to complicate trials.

3.54 To change the law in any of the ways suggested by Wells, Pickard and Naffin might make the task of the prosecution easier and might lead to more

89. Goode, M. 'The Mental Element of Rape, the Naffin Report and Other Questions: A Defence of the Common Law' (1985) 9 *Criminal Law Journal* pp. 17–47.
90. *Naffin Report*, 1984 p. 47.
91. Goode, 1985, (see note 89).

convictions for rape. However, that is not beyond doubt. Even if it could be established that conviction rates for rape had risen in a jurisdiction which had altered the law relating to the mental element in a relevant way it would be hazardous to make the link between the increase and the change in the law. Even if such a relationship were established, there would remain the question of principle whether a shift from the traditional approach to the mental element of serious crimes like rape would be appropriate.

3.55 *Recklessness by Inadvertence.* Under the present law, as in most other common law jurisdictions, a person may be convicted of rape if a possibility of absence of consent was perceived but disregarded. Traditionally, recklessness is about the foresight of at least the possibility of an event or circumstance. In the English arson case of *Caldwell*[92] the House of Lords held that 'recklessness' should be given its ordinary meaning and that it covered cases where people failed to give any thought at all to the question whether their behaviour was creating certain unjustifiable risks to persons or property. This reasoning was applied to the law of rape in the case of *Pigg*.[93] Lord Lane L.C.J. stated:

> so far as rape is concerned, a man is reckless if either he was indifferent and gave no thought to the possibility that the woman might not be consenting in circumstances where if any thought had been given to the matter it would have been obvious that there was a risk that she was not or he was aware of the possibility that she might not be consenting but nevertheless persisted regardless of whether she consented or not.[94]

3.56 This trend was short-lived. In a number of subsequent cases, the Court of Criminal Appeal took the view that the statements in *Pigg* were not binding as matters of law and that the interpretation of recklessness developed in cases like *Caldwell* should be rejected in relation to the law of rape.[95] As Goode states:

> The reasons for the revolt in the Court of Appeal are clear and compelling. The definition of recklessness formulated by the House of Lords in the context of the offence of criminal damage and driving offences involves the punishment of the accused for what he or she ought reasonably to be, and not what he or she is; this is at best an abuse of language, at worst unjustifiable and unjust. It has no place in the law relating to rape. There is here no basis for the reform of the present law.[96]

This view appears to be right. The *Caldwell/Pigg* line of argument should not be adopted in Victoria.

92. [1982] A.C. 341.
93. [1982] 1 W.L.R. 762.
94. [1982] 1 W.L.R. 762, 772.
95. See cases such as *Bashir* (1982) 77 Cr. App. R. 59 and *Satnam and Kewal* (1983) 78 Cr. App. R. 149.
96. Goode, 1985 (see note 89) p. 39.

ALLIED OFFENCES

3.57 Reference has already been made to the role of allied offences in the section of this paper dealing with the present law. It was there pointed out that the general role of these offences is to provide protection not available under the law of rape. It was also noted, however, that there is arguably a considerable amount of overlap in this area and there is potential for some rationalisation of the law. A number of comments should be made about the provisions.

3.58 First, the overlap of some of them with the law of rape is readily apparent. If the element of consent in the law of rape is interpreted broadly there may be a complete overlap between rape, on the one hand, and procuring sexual penetration by threats, intimidation or deception under section 54 on the other, at least where the procuring is done so that the procurer rather than some other person can take part in an act of sexual penetration with the person procured. On this basis, the only independent operation of section 54 is in dealing with people who procure or attempt to procure persons for purposes of sexual penetration with a third person.[97]

3.59 Again, there would appear to be an overlap between section 55 and the law of rape. It is not a requirement of the section that an act of sexual penetration actually occur. It is sufficient that the administration of the drug took place with the intention of removing resistance for the purpose of accomplishing sexual penetration. This being so, there would appear to be a strong analogy with attempted rape. The *Crimes Act* now contains a codified set of attempt provisions.[98] Under these provisions, it is very likely that if the conditions of section 55 were established a prosecution would also lie for attempted rape, at least where the person who administers the drug is the person who intends to take part in the act of sexual penetration.

3.60 Overlaps also exist between some of the 'allied offences' and other areas of the criminal law. The legislation which codified the law of attempts introduced major changes to the law dealing with non-sexual offences against the person. These included the introduction of an offence of 'causing injury intentionally or recklessly'. 'Injury' is defined as including unconsciousness, hysteria, pain and any substantial impairment of bodily function. It is arguable, that in many instances, the administration of drugs for sexual purposes will cause 'injury' within the meaning of the new provisions. On this basis a great many 'section 55' cases could presumably be dealt with simply as 'offences against the person'.

3.61 Again, the *Crimes (Amendment) Act* 1985 contains an offence of administering 'certain substances'.[99] This section has brought together a number of similar offences contained in the previous law. Some cases which at present may be dealt with under section 55 could be prosecuted under the new section 19 of the *Crimes Act*. This may well be something favoured by those in the

97. In its present form there is also room for argument about whether the existence of a marriage should be a bar to prosecution. Why should it be a bar to successful prosecution under this section that the two people who take part in the act of sexual penetration are married?

98. See Section 4 *Crimes (Amendment) Act* 1985.

99. Section 8, inserting a new section 19 into the *Crimes Act* 1958.

community who support greater emphasis being placed on the violent rather than the sexual aspects of 'sexual offences'. This is a policy decision which has to be made. In any event, these are examples of substantial overlap between some sexual offence provisions and other parts of the criminal law. It should also be mentioned in passing that section 55 like section 54 is limited to situations where the act of sexual penetration takes place, or is intended to take place, outside marriage.[100]

3.62 Similar sorts of policy issues may arise in relation to the provisions dealing with abduction and detention for sexual purposes. Such situations may conceivably be dealt with under the common law of kidnapping or (and this is much less likely) under the *Crimes Act* kidnapping provision.[101] This is because whereas the statutory kidnapping offence requires proof of an intent on the part of the offender to demand a ransom or some other gain the common law offence contains no such element. Again, it is a question of policy whether situations of 'ordinary kidnapping' should be distinguished from situations where people are 'kidnapped' for a sexual purpose.

3.63 Even if it is believed important to place some emphasis or the sexual aspect the arguments in support of dealing with these cases on a non-sexual basis may, on balance, be stronger. This may be so simply on the grounds of parsimony i.e. the desire to limit the number of discrete criminal offences; or it may be because it is preferable to limit sexual offences to the performance of some overt sexual activity rather than merely related or preparatory behaviour.

3.64 The law of offences 'allied' with rape substantially mirrors English law. In this respect it is of significance and interest to note that for many centuries only three specifically sexual offences were known at common law: rape, sodomy and bestiality. The others have been produced by statute, most of them since the accession of Queen Victoria. And although, as indicated at the outset of this part of the paper, the general aim of the new laws was 'gap-filling' the process has occurred without any coherent pattern or planning. This would suggest there is no reason to assume that the present law necessarily best serves the interests of today's community.

COMPLEXITY OF TRIALS

3.65 One of the most serious difficulties with the present law of rape and allied offences is its complexity. The complexity of the law causes many trials to be unnecessarily long and involved. Judges' directions to juries are often required to be long and complex. They must be difficult for juries to follow. This is not only costly and inefficient. It may result in injustice. Accused persons may be convicted without proper analysis and assessment by the jury of the relevant law. Equally, accused persons may be acquitted simply because juries find the law,

100. As in the case of section 54, there is a question whether this should be so.
101. Section 63A.

and the evidence relating to it, too complicated. In either instance the result is highly unsatisfactory.

3.66 It seems that there are three interconnected causes of these difficulties. The first is that there have long been too many offences. The second is the introduction in 1980 of further offences in relation to aggravating circumstances. The third is the number of alternative verdicts available in serious sexual offence cases. The 1980 amendments increased the number of alternative verdicts available.

(i) The Number of Offences

3.67 Leaving aside the allied offences, except indecent assault, there is a confusing array of possible offences. There is rape and rape with aggravating circumstances, and indecent assault and indecent assault with aggravating circumstances. In addition, there are the offences of attempted rape, assault with intent to commit rape, attempted rape with aggravating circumstances and assault with intent to commit rape with aggravating circumstances. Quite often, assaults of a non-sexual nature are involved in what is predominantly a sexual attack. The addition of charges in relation to non-sexual assault further complicates the task.

3.68 Sexual cases often involve a number of accused persons, a number of victims and a number of incidents at different times. Even in the case of a lone alleged offender, there may be a number of allegations involving a number of offences against more than one victim. Where there is a case involving a number of accused persons or a number of alleged victims or incidents, the conduct of the trial can become enormously complex and demanding for all concerned. Some of the difficulties are, of course, unavoidable. However, provided the law sufficiently covers the possible range of unacceptable conduct, there is good reason for a reduction in the number of offences and the removal of other causes of unnecessary difficulty.

(ii) Aggravating Circumstances

3.69 The offences involving aggravating circumstances were introduced by the 1980 amendments. As already indicated, rape and indecent assault may be committed with aggravating circumstances, as may attempted rape and assault with intent to rape. The aggravating circumstances which apply to all these offences are the following:

- immediately before or during or immediately after the commission of the offence, and at or in the vicinity of the place where the offence was committed, the offender inflicts serious personal violence upon the victim or another person;
- the offender has with him an offensive weapon;

- immediately before or during or immediately after the commission of the offence the offender does an act which is likely seriously and substantially to degrade or humiliate the victim; or
- the offender is aided or abetted by another person who is present immediately before or during or immediately after the commission of the offence at or in the vicinity of the place where the offence is or was committed.[102]

3.70 It has been suggested to the Commission that these provisions have introduced needless complexity into the law.[103] Not only have they increased the number of offences and thus the number of possible alternative verdicts but they also contain difficulties of interpretation and application. Aggravating circumstances cause difficulties in framing presentments, difficulties in interpretation and proof in court, longer and more expensive trials and greater trauma for victims.

3.71 The question which arises is whether the aggravating circumstances provisions are necessary. It appears that they are not. The purpose of these provisions was to deal more explicitly and severely with particular kinds of behaviour. But there are other ways of achieving the same end. In sentencing, a judge would take account of all the aggravating circumstances in the current offences. For a great many reasons sentencing is a difficult task for judges but taking into account the circumstances specified in section 46 (1) of the *Crimes Act* would be basic. If they were treated as matters relevant to sentence rather than separate ingredients of separate, substantive offences, potent sources of unnecessary complexity would thereby be removed from the law.

3.72 In a case where violence is inflicted in addition to the rape or indecent assault, the violence constitutes a separate offence in its own right. This means that, in addition to a charge of a sexual offence, a charge of injuring the victim would also be available. If an accused person were convicted of the offence of violence and the sexual offence, he or she would be exposed to separate sentences for each offence. In some cases, at least, part of the sentence imposed for one offence would be made concurrent with the sentence imposed for the other. However, it is very unlikely indeed that the separate convictions would not lead to an increase in the sum total of the penalty. It may even be that the separation of the offences would increase the effective length of sentences imposed.

3.73 The *Crimes Act* also confers on trial judges a power to record a conviction with 'aggravating circumstances' against a person who has not been convicted by the jury of such an offence but has a prior conviction for one of a specified list of sexual offences.[104] This is an inappropriate power for a judge to have. In our system, it is usually the jury, not the judge, which decides these things. It seems preferable to leave to the jury the decision as to the offence of which an offender is guilty.

102. Section 46 (1) *Crimes Act* 1958.
103. This point has been made strongly by County Court judges and members of the legal profession practising in criminal cases in the County Court.
104. Sections 46 (3), (4) and (5).

(iii) Alternative Verdicts

3.74 In criminal trials, particularly of sexual offences, the need to deal with alternative verdicts often presents considerable problems. The rationale for making provision for alternative verdicts is succinctly put by Heath and Hassett:

> In order to determine the nature of the counts to be contained in a presentment it is necessary to know what alternative verdicts may be returned in relation to any particular count. If a serious offence is charged and there is any possibility of the jury failing to be satisfied of the elements of that offence but perhaps being satisfied of the elements of a less serious charge, the latter must be specifically pleaded unless it is open to the jury on the more serious charge to return a verdict of guilty of the latter charge. If it is so open to the jury, and if the lesser charge is not included in the presentment, the jury would be required to simply acquit.[105]

3.75 Some provision must be made to allow for alternative verdicts. However, a balance must be achieved between the need to provide a sufficiently large net in which to catch offenders and the need to minimise the cost, length and complexity of trials. Section 425 of the *Crimes Act* deals with alternative verdicts for the core sexual offences.[106] Sections 425 (1) and (2) deal with the offences of rape and rape with aggravating circumstances. Those sections read as follows:

> (1) Where on the trial of a person charged with rape the jury are not satisfied that he is guilty of rape or of an attempt to commit rape but are satisfied that he is guilty of—
>
> (*a*) assault with intent to commit rape;
>
> (*b*) indecent assault;
>
> (*c*) assault of a child under the age of ten years with intent to take part in an act of sexual penetration;
>
> (*d*) assault of a person who is of or above the age of ten years but under the age of sixteeen years and to whom the accused is not married with intent to take part in an act of sexual penetration;
>
> (*e*) assault occasioning actual bodily harm; or
>
> (*f*) common assault—
>
> the jury may acquit the accused of rape and find him guilty of whichever of those offences they are satisfied he is guilty and he shall be liable to punishment accordingly.
>
> (2) Where on the trial of a person charged with rape with aggravating circumstances the jury are not satisfied that he is guilty of rape with

105. Heath, I. W. and Hassett, J. T. *Indictable Offences in Victoria*, Victorian Government Printer, 1983 p. 17.

106. Mention should be made of section 421 (2) of the *Crimes Act* which is a general section dealing with alternative verdicts in cases of trial on indictment or presentment, other than murder and treason. This section would appear not to be applicable to sexual offences because of the existence of section 425. If there is doubt about this the position should be clarified and any necessary changes made to the law.

aggravating circumstances or of an attempt to commit rape with aggravating circumstances but are satisfied that he is guilty of—

(*a*) assault with intent to commit rape with aggravating circumstances;

(*b*) indecent assault with aggravating circumstances; or

(*c*) any offence of which he may be found guilty on a charge of rape—

the jury may acquit the accused of rape with aggravating circumstances and find him guilty of whichever of those offences they are satisfied he is guilty and he shall be liable to punishment accordingly.

3.76 It takes only a casual glance at these provisions to suggest the difficulties which may be encountered in some rape trials, especially those involving a number of accused persons and a number of charges. On occasion, the cases become so complicated that it becomes necessary for the trial judge to assist the jury with an elaborate flow chart intended to act as a guide to the jury in attempting to find its way through a veritable labyrinth of legal and evidentiary detail. It has already been suggested that the aggravating circumstances provisions are unnecessary and have unduly complicated many trials. Their repeal would ease the alternative verdict problem. Section 425 (2) would cease to exist. That would still leave section 425 (1) which offers six alternative verdicts where a person has been tried for rape and found not guilty of rape or attempted rape. This seems to be an excessive number.

3.77 The alternatives listed in the section amount to indecent assaults and non-sexual assaults. On this basis, one way of easing the alternative verdict problem would be to provide for one alternative only—indecent assault. This means that if the only count on the presentment is rape and there is no conviction of rape or attempted rape the only statutory alternative would be indecent assault. Cutting down severely in this way on the number of alternatives available would surely do much to streamline the conduct of trials.

4. REFORMING THE LAW

4.1 Possibilities for reform of the law of 'allied offences' have been canvassed. Concrete suggestions have been made to alleviate some of the practical problems involved in the trial of sexual offences. This section of the paper is concerned with the major, substantive and structural aspects of the law.

SHOULD THERE BE A SPECIAL CATEGORY OF SEXUAL OFFENCES?

4.2 A threshold question concerns the appropriate broad structure for sexual offences. Recently, some individuals and groups have suggested that it may be counter-productive for the legal system to persist with separate legal categories for sexual offences. The gist of the argument is that non-consensual sexual behaviour constitutes an assault and could therefore be dealt with as assault under the law relating to non-sexual assaults. It is argued that many of the problems experienced in the reporting, the prosecution and the trial of sexual offences are caused by the explicitly sexual labelling of the offences and by a whole range of community attitudes and myths about sexuality and sexual offending which accompany that labelling process.

4.3 In England, the Sexual Law Reform Society[107] and the Howard League [108] have both adopted this approach. As the latter stated:

> Because the term 'sexual' amplifies the emotive content of the offence, and therefore the harm suffered, we believe it would be better for the law to deal with non-consensual sexual activities in exactly the same

107. See generally Grey, A. 'Sexual Law Reform Society Working Party Report' [1975] *The Criminal Law Review* pp. 323–335.
108. See generally the Report of a Howard League Working Party, *Unlawful Sex*, Waterlow, London, 1985.

way as it already deals with any other acts of violence fraud or undue influence.[109]

4.4 There must be some doubt from the standpoint of the victim, as to whether criminal proceedings would be less traumatic and humiliating as a result of removing the 'sexual' label from the offence. In some respects there might be reduction of trauma for the victim. However, a trial would still have to take place. The issues in the trial would presumably be the same. There would be similar public and media interest because of the sexual nature of the charge. There may even be greater curiosity generated in seeking to identify those assault cases which contain a sexual component. Victim interests aside, there is a serious question whether the community would be willing to abandon 'sexual' offences. As far as community attitudes are concerned, the crucial issue is how the community regards sex and sexual offending and what it sees as the appropriate response of the criminal law. A separate category of sexual offences is retained because the community regards it as important that a sexual attack should receive separate and special attention. For these reasons, the Commission's view is that the law should continue to deal with sexual offences on a separate footing from other offences against the person.

SHOULD THERE BE AN OFFENCE OF SEXUAL PENETRATION?

4.5 The next question is in what way sexual offences should be structured and categorised. It might be possible to define a single sexual offence extending from the merest sexual touching to the most extreme case of violent rape. There are two main arguments against that approach. First, the issue of penalty is a very important aspect of the criminal law. To present such a broad brush approach to sexual offending would deprive judges of legislative guidance in relation to sentencing. Second, it is objectionable as a matter of principle for the legislature to abandon its responsibility to distinguish one kind of sexual interference from another. For example, there is important denunciatory value in distinguishing a serious, act of non-consensual, sexual penetration from a slight, unwanted, sexual touching. To combine these in one offence would be bad from a policy point of view and would present considerable, practical problems for the courts.

4.6 There is a tradition in the law of rape of treating sexual penetration as a special and discrete phenomenon. In that sense, the 1980 amendments carried on the tradition. A major question for consideration by the Commission is whether that tradition of penetration should be preserved. The Commission has reached the provisional conclusion that it should. There is something important and distinctive about the sexual penetration of bodily orifices. The common law crime of rape was restricted to vaginal penetration by the penis. In 1980, rape became an offence involving various bodily orifices and the use of objects, as opposed simply to the penis. It also became a gender neutral offence. These changes would appear to have received community support. There have been no obvious signs of opposition.

109. *Unlawful Sex*, 1985 p. 123.

4.7 The main problem about the changes made in 1980 is that they left the law in a curious state. They increased the range of sexual penetration situations covered by the law of rape but did not extend coverage to all types of sexual penetration. If it is worthwhile to persist with the concept of sexual penetration, then both from the point of view of principle, and in terms of providing a useful, practical line of demarcation between different types of offences, the present law should be changed. The Commission's view is that if vaginal, anal and oral penetration by the penis, and vaginal and anal penetration by objects are included in the 'sexual penetration' offence, so should penetration of the vagina and anus by any part of the body of another person. And on the same general principle, as indicated earlier, cunnilingus should be included.[110]

WHAT OTHER TYPES OF SEXUAL OFFENCE SHOULD THERE BE?

4.8 There are forms of non-consensual, sexual behaviour which do not involve penetration. The classic example, of course, is some form of sexual touching, traditionally dealt with as an indecent assault. There should clearly continue to be an offence to cover these situations. It would be, as now, a lesser offence than the sexual penetration offence. If circumstances of physical violence were involved, these would be appropriately dealt with under the offences against the person provisions of the *Crimes Act*.

4.9 'Allied offences', other than indecent assault, are more problematic. There is scope for rationalisation of these offences, especially if one is prepared to regard and treat them not as sexual offences but as non-sexual offences against the person. Some of the possibilities were canvassed earlier. The Commission would welcome comment on whether it is important to maintain recognition of the sexual aspect of the behaviour covered by these offences.

SHOULD THERE BE A SCHEME OF GRADED SEXUAL ASSAULT?

4.10 The present law *is* a system of 'graded sexual assault'. It consists of four offences—rape with aggravating circumstances, rape, indecent assault with aggravating circumstances and indecent assault. A number of jurisdictions in Australia and overseas have produced new graded sexual offence laws with the idea of giving greater prominence to the element of violence.

4.11 The Commission has indicated its provisional view that the aggravating circumstances provisions should be repealed and that violence should be dealt with as a sentencing matter and by separate charges. This view reflects the need

110. Most cases of cunnilingus will not involve vaginal penetration. Nevertheless, cunnilingus should be included within the sexual penetration offence for three reasons: (1) it is generally regarded as the same kind of offence as fellatio, (2) it is often regarded as seriously as other behaviour included within the proposed offence, and (3) it is often associated with offences of sexual penetration.

to keep the sexual aspect of sexual offences in perspective. In this context, the following observations from a recent New Zealand Paper on rape are important:

> The stress upon the violent rather than the sexual component of the offence in determining its seriousness, especially in the New South Wales and Canadian models, is not in keeping with the way in which most victims described their rape experience in this study. They saw it as an act of extreme humiliation and degradation which was qualitatively different from other types of assaults. Victims who had been beaten felt that the act of sexual intercourse rather than the assault was the primary injury. Some felt that the beating and bruising they received assisted them in the criminal justice process, while the rape itself was not accorded the centrality it deserved. Any legislation highlighting the violent component of the offence at the expense of the sexual violation involved, would therefore seem to be at odds with the perception of many victims. As the Auckland Rape Crisis Centre pointed out, it would punish the associated physical violence and still ignore the violence of the rape.[111]

These observations are directed at schemes such as those of New South Wales and Canada which have gone further than Victoria in treating non-consensual sexual offences as offences of violence. They serve, however, as a timely reminder of the need to keep the sexual and violence components in proper perspective.

WHAT IS TO BE THE ROLE OF CONSENT?

4.12 To establish rape the Crown must prove absence of consent beyond reasonable doubt. Where a sexual penetration offence is alleged, a number of important issues arise in relation to consent:

- whether consent should remain an element of the offence, and if so, what happens in relation to the burden and standard of proof
- the meaning and scope of consent
- whether there should be legislation dealing with consent, and if so, in what form.

(i) Consent as an element of the offence

4.13 Some jurisdictions, for example, Michigan, have removed the necessity for the prosecution to prove that the victim did not consent. The prosecution has to establish the sexual act, together with the use of some violence or coercion by the accused, or the existence of one of a number of other circumstances. It is then a matter for the accused to plead consent as a defence to the charge. This

111. New Zealand *Discussion Paper*, 1983 (see note 12) p. 109.

approach, and a number of others modelled upon it, is based on the idea that, where violence and other forms of coercion are used to achieve submission to sexual contact, the prosecution should not be required to prove lack of consent.

4.14 For a small proportion of cases there is some attraction in this approach. However, the argument for adopting it as a general principle is weak. There are a number of factors involved. The first is a practical matter. There is a solid body of opinion indicating that consent cannot, and should not, be avoided as an element of the offence in sexual cases. Naffin has summed up the reasons for this:

> Except where rape is brutal, its only distinguishing feature—that which makes it different from lawful sexual intercourse—is the lack of willingness of the victim. This can be described in a number of ways, but whatever it is called, the facts of the crime, the key issues in the court-room and therefore the experience of the victim, remain the same. Both the prosecution and defence remain interested in determining whether the victim wanted to engage in sexual intercourse. The sort of evidence which will tend to prove that the accused 'forced' (or 'coerced') the victim to engage in intercourse, essentially will be the same as the evidence indicating whether or not the victim consented. Court-room tactics, and therefore the experience of the victim, are unlikely to vary with semantic changes to the law.[112]

The authors of the main empirical study of the Michigan law have confirmed that emphasis upon consent has not been avoided under the Michigan structure.[113] The second, practical, consideration is that only a small minority of sexual offences involve the infliction of actual physical injury.[114] Most involve the use of threats. A proposal to remove the necessity to establish lack of consent would only apply to a small minority of cases. Moreover, there would be considerable practical difficulties in defining the level of force or violence which would eliminate the need to prove absence of consent. Finally, it must be emphasised that the essential difference between 'rape' and lawful sexual intercourse *is* the absence of consent. For this reason absence of consent has traditionally been an element of the offence. The Commission believes that this should remain the case.

112. *Naffin Report,* 1984 p. 26.
113. See generally Marsh, J. C., Geist, A. and Caplan, N. *Rape and the Limits of Law Reform,* Auburn, Boston, 1982.
114. See, for example, West, D. J. 'Sexual Assaults: The Reality Behind the Statistics' (1980) 12 *The Australian Journal of Forensic Sciences* pp. 30-39. And, very recently, the New South Wales Bureau of Crime Statistics and Research, as part of a large-scale study to evaluate the New South Wales sex offence laws, has reported that about half of the complainants suffered negligible injuries or none at all. Of the remainder, approximately one third recorded only bruises, scratches or abrasions not requiring medical attention. (See Bureau of Crime Statistics and Research, *Crimes (Sexual Assault) Amendment Act, 1981 Monitoring and Evaluation; An Interim Report on the Characteristics of the Complainant, the Defendant and Offence,* Sydney, 1985). See also Loh, W. D. 'The Impact of the Common Law and Reform Rape Statutes on Prosecution: An Empirical Study' (1980) 55 *Washington Law Review* pp. 543-625.

(ii) The meaning and scope of consent

4.15 The question is whether 'consent' should be given a narrow, traditional meaning (in general, limited to situations of physical violence or the threat of it) or whether it should receive a broader, more natural, so-called 'ordinary' meaning. If the latter, it would encompass a variety of forms of pressure and coercion other than physical harm or threats of it. This aspect of consent is a most difficult issue. The narrow view of consent is likely to be unacceptable in today's community. There are any number of circumstances in which a person may be forced to submit to a sexual act by pressures other than physical ones. Some of these were highlighted earlier in the paper. Most of them may be covered by the present section 54 of the *Crimes Act*, dealing with procuring sexual penetration by threats or intimidation, but the real question is whether, as a matter of principle, they should be dealt with on the same basis as behaviour presently defined as rape. The fact that 'fraudulent rape' is an accepted concept gives support to the idea that they should.

4.16 It is the provisional view of the Commission that the concept of consent should not be restricted to circumstances of actual or threatened physical force. The issue of consent is one to be determined by a jury by examining the workings of the mind and the expression of the will of the particular complainant in the circumstances of the particular case. However, there is a crucial question concerning the sorts of circumstances which the prosecution would be able to rely on to persuade a judge in a 'marginal' case to leave the question of consent to a jury. This raises the question whether the courts should receive guidance from the legislature on the matter of consent.

(iii) Common law or legislation?

4.17 One approach is to leave the matter of consent to the common law. Another is to provide a general, statutory definition of the consent element. Examples of this approach are to be found in Canada, Western Australia and Tasmania. Even though couched in general terms, such a provision could establish clearly that absence of consent is not to be limited to cases of submission brought about by physical means. The major shortcoming of such an approach is that it would incorporate a number of concepts which themselves would be undefined and imprecise, for example, fraud, intimidation, coercion, and exercise of authority. If this technique were used, the courts would be substantially reliant upon the vagaries of the common law to interpret the statutory concepts. However, no legislative scheme can hope to cover all possibilities and contingencies.

4.18 An alternative is to list the circumstances which if established, would tend to negative any suggestion that there had been consent. The Commission does not favour this approach. Such an approach does not preclude detailed

examination of consent as an issue in the trial. In fact, the extensive listing of factual situations is likely to lead to even more detailed and searching analysis of the consent issue than is the case at present. This would lengthen trials and increase the discomfort of the trial experience for the complainant. It would also complicate the law enormously by providing a whole new range of concepts for lawyers to argue about and courts to interpret.

4.19 Despite difficulties with the general approach, the Commission believes that it would be worthwhile to produce a statutory provision. It would enshrine much of the the traditional common law approach. In addition, it would indicate very clearly that absence of consent is not limited to physical circumstances and is to be given a broad, natural meaning. The Commission is attracted to the approach adopted in the recent Western Australian legislation. The relevant section was set out earlier in the paper. It bears repetition here:[115]

> . . . "consent" means a consent freely and voluntarily given and, without in any way affecting or limiting the meaning otherwise attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deception or fraudulent means.

The Commission believes this general approach to the consent issue is appropriate but would add the words 'coercion' and 'harassment' to the Western Australian list. This would bring within the law a range of cases involving the use of unacceptable methods of bringing about sexual submission, especially methods involving a course of conduct rather than simply a specific incident. The Commission is interested in receiving submissions on this suggestion.

WHAT SHOULD THE MENTAL ELEMENT BE?

4.20 The Commission believes that the present law is correct and that the Crown should be required to prove beyond reasonable doubt either that the accused was aware that the complainant was not consenting or was aware of the possibility of lack of consent and proceeded regardless. To impose a requirement that the belief be reasonable would be unacceptable as a matter of principle. Nor should there be any change in the burden of proof in relation to the mental element. The Commission is not in favour of a lesser offence of so-called 'negligent rape' to cover situations where the accused has an honest but unreasonable belief in consent. Such an offence would be wrong in principle and would involve unwarranted complication of the law.

115. Section 8 *Acts Amendment (Sexual Assaults) Act* 1985.

SHOULD THE WORD 'RAPE' BE RETAINED?

4.21 There is an interesting mixture of views on this question. The offence of 'rape' and its terminology are of ancient origins.[116] However, as more and more jurisdictions redefine and restructure their sexual offence laws, and as part of that process, undo the concept of 'rape', there has been a strong tendency to revise the language as well. A large number of jurisdictions have ceased to use the label 'rape'.[117]

4.22 Some people believe the label 'rape' is so important that they would wish to apply it in the sexual offences context regardless of changes to the substantive law. Equally, there are those who would wish to remove the word 'rape' even if there were a reversion to the traditional, common law concept of the offence, that is, rape of a woman by a man vaginally by penile penetration.

4.23 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. It is claimed that removal of the label would inevitably detract from that image of the behaviour in the public mind, especially over a period of time. Application to a person of the label 'rapist' is a particularly effective and appropriate form of stigma.[118] Many women support this view. What benefits are to be derived from stigmatisation of this kind is another question.

4.24 The response to this argument is that 'rape' is an emotive term and is damaging to victims and the community. The word 'rape', with its emotional connotations, tends to produce excessively emotive responses to sex and violence. One effect is added trauma for victims and stigmatisation of victims, sometimes regardless of the outcome of the case. Proponents of this view, including many women, believe that we would have a far more sane and effective approach to dealing with sexual offences if the label were removed.

4.25 There is also a strong ideological string to this bow. As mentioned earlier in this paper, there is now a great deal of scholarly historical work available on the evolution of rape laws. Much of this work places the development of the law firmly in a political, economic and social context. It has been suggested that a key element in the evolution of the law of rape was the protection of women, not simply for their own sakes, but to protect a form of male property interest. There is evidence of an almost obsessive male concern with procreation and virginity, and with the threat of abduction of wives and daughters for sexual purposes. If there is some validity in this view, that would add support to the

116. Professor Colin Howard cites the remarks of two American commentators who have observed that, 'For 4,000 years, from the Code of Hammurabi to the present day, the law of rape has remained essentially the same. The basic elements of the crime have not changed in the least.' *Criminal Law,* 1982 p. 149.

117. In Australia, these jurisdictions are New South Wales, Western Australia, the Australian Capital Territory and the Northern Territory.

118. In support of the argument that removal of the label 'rape' tends to devalue the crime and the victim see Giacopassi, D. J. and Wilkinson, K. R. 'Rape and the Devalued Victim' (1985) 9 *Law and Human Behaviour* pp. 367–383. For an expression of the opposite point of view see Schwartz, M. D. and Clear, T. R. 'Toward a New Law on Rape' (1980) 26 *Crime and Delinquency* pp. 129–151.

proposition that in today's community, where the whole structure of society has changed, particularly as far as relationships between men and women are concerned, the use of the term 'rape' is anachronistic and inappropriate.

4.26 It is sometimes argued that the label should be retained because it is well understood and corresponds to a distinctive form of wrongdoing. There are a number of difficulties with this form of reasoning, not the least of which is that the substance of the offence has been revolutionised. Of course, retention of the label could still be defended on the basis that (*a*) the label 'rape' describes, generally speaking, the worst kinds of sexual abuse, and (*b*) that, in modern times, other kinds of behaviour are regarded as equally, if not more, serious. It is appropriate, therefore, to attach to them the opprobrium carried by the label 'rape'.

4.27 The latter argument tends to refute the argument that 'rape' should be retained because it is commonly understood. If it *is* commonly understood, it is probably understood to be an offence which is intended to protect women against a particular form of sexual abuse by men. In the light of the broader definition of rape brought about in 1980, it is highly likely that 'rape' is now a much *misunderstood* concept. It may be that an argument for retaining the terminology is also an argument for reverting to the common law concept. The Commission has already indicated its opposition to that proposal. On the contrary, it believes that the physical circumstances of the sexual penetration offence should be expanded beyond the changes made in 1980.

4.28 The only remaining arguments for the continued use of the word 'rape' concern the stigma attached to its use and the fact that the offence is still one of sexual penetration. Neither of these arguments carries great weight. Stigma is a dubious and intangible commodity. The seriousness of an offence should be judged by the penalties provided and the penalties actually imposed. It is anachronistic to perpetuate the use of the word 'rape' to describe a broad-based, sexual penetration offence, very different in nature and scope from the original crime. The word will no doubt live on for some time in common language but as a legal term it seems to have outlived its usefulness. The Naffin Inquiry in South Australia summed it up as follows:

> . . . The risks of weakening the impact of the law and of causing confusion by rejecting fixed and traditional notions of rape and sexual intercourse seem to be outweighed by the desire for a fresh approach to the law in this area. The present study reveals strong support for the growing trend towards an expanded definition of sexual intercourse and the formulation of new terms to describe the diversity of sexual violations now called rape.[119]

4.29 It is difficult to know which terminology would be appropriate. A number of labels have been suggested and used elsewhere, for example, 'sexual assault', 'sexual violation', 'sexual attack', 'sexual imposition' and 'sexual interference'. None of these terms is completely satisfactory. One option is to use the term 'sexual assault'. A consideration in relation to this is that assaults have all but been removed from the law governing non-sexual offences against the person in

119. *Naffin Report*, 1984 p.64.

Victoria.[120] At the least, however, they remain as alternative verdicts to sexual offences. It may be regarded as curious to introduce an old term to describe a new offence, where the old term has all but lost its currency. If, however, sexual offences continue to operate as a discrete body of criminal law, there is no reason why discrete concepts should not be used to describe them. If the penetration offence were called sexual assault it would be important to re-label the present offence of indecent assault.[121] The result would be two offences of sexual assault. These could most conveniently be distinguished by referring to them as categories, grades, or degrees of sexual assault. The Commission favours sexual assault category one and sexual assault category two.

120. See *Crimes (Amendment) Act* 1985. This Legislation introduces new concepts such as causing serious injury intentionally or recklessly, and conduct endangering life.

121. In England, the view has been expressed that the word 'indecent' is anachronistic. As a member of the Criminal Law Revision Committee dealing with sexual offences, Professor Glanville Williams argued that the term 'sexual assault' is more appropriate than 'indecent assault'. His view was not accepted by the Committee. (See *Working Paper on Sexual Offences,* H.M.S.O. London, 1980.)

5. CONCLUSION

GENERAL COMMENTS

5.1 The primary purpose of the law relating to non-consensual sexual behaviour is to protect the sexual autonomy and personal integrity of members of the community. The present law appears to cover the field of non-consensual sexual behaviour. The reason for concern lies not in its coverage but in other matters. At one level, these are matters of taxonomy and terminology. To describe them solely in that way, however, would be to trivialise an important set of substantive issues and questions. It is not simply a matter of classification and labelling. Questions concerning the criteria to be used in determining categories of offences, the ingredients of particular offences, and the relationships between these offences involve important policy questions. There are important practical issues at stake as well.

THE 1980 AMENDMENTS

5.2 The *Crimes (Sexual Offences) Act* 1980 brought major changes to sex offence laws. In general, the changes were highly desirable, especially the expansion of the physical circumstances of the offence of rape and the gender-neutralisation of the *Crimes Act* sexual offences. However, there is room for some further change. Not all the changes made in 1980 have been beneficial. The aggravating circumstances provisions have resulted in further complication of an already complicated area of the law. Not only are these provisions difficult to interpret and apply. They have also added to the problems caused by the

alternative verdict provisions of the Act. This has caused trials to become longer and more costly than they need be. In addition, the 1980 amendments did not deal with consent and the mental element, two essential ingredients of the present offence of rape. There has been much vigorous debate on an international and local level about these matters. The Commission has taken them up for discussion and possible reform.

CHANGES TO THE SUBSTANCE OF THE LAW

5.3 The Commission has provisionally concluded that the following changes should be made to the substantive law of rape and allied offences.

- While there should continue to be an offence involving sexual penetration, the physical circumstances of that offence should include the insertion of parts of the body as well as the penis. It should also include cunnilingus.
- The physical circumstances, the mental element and the consent aspect of the penetration offence should be defined by statute, the mental element in terms of the present common law and consent along the lines of the Western Australian provision, with the addition of the concepts of coercion and harassment.[122]
- The penetration offence should cease to be called rape and should be called sexual assault category one.
- The substance of the present offence of indecent assault should be preserved but the offence should be called sexual assault category two.
- The aggravating circumstances provisions of the *Crimes Act* relating to rape and indecent assault should be repealed and related provisions of the Act amended as a consequence.
- Sexual assault category two (the present indecent assault) should be the only statutory alternative verdict under a revised section 425 (1) of the *Crimes Act*.

5.4 These changes would reduce the major offences to two—a penetration and a non-penetration offence. This scheme would cover the field of non-consensual sexual behaviour and do it more simply than the present law. Repeal of the aggravating circumstances provisions and severe reduction in the number of alternative verdicts would ease many of the practical problems in conducting trials, without reducing the protection available to victims.

122. The existing law of rape is a combination of common law and statute. If concepts can be expressed in a clear, straightforward manner there is a good argument for incorporating more of the law into statutory form. There is considerable community interest in the criminal law and very great interest, especially among women, in the law relating to sexual offences. Provided it is clearly expressed the law is much more accessible to the community in statutory form than as part of the common law.

OTHER ISSUES UNDER CONSIDERATION

(i) Allied Offences

5.5 These are gap-filling provisions. Some overlap with other more major provisions, some only deal with sexual behaviour in an indirect way. If it is concluded that the sexual component of these offences is not vital, then offences such as administering drugs and abduction for sexual purposes could be dealt with as non-sexual offences. This would further simplify and streamline the law. The Commission is anxious to receive submissions as to what degree of rationalisation, if any, should occur in relation to 'allied offences'.

(ii) Sentencing

5.6 One aspect of rape and allied offences not dealt with in this paper is sentencing. The Commission is aware of a number of recent developments in relation to sentencing law. These include the establishment of a Committee of Inquiry into Sentencing under the Chairmanship of the Hon. Sir John Starke, Q.C. The Commission does not regard sentencing as a major aspect of its work. However, it is relevant where the content of offences is to be altered or new ones proposed. Under the present law, indecent assault, indecent assault with aggravating circumstances, rape and rape with aggravating circumstances carry respectively the following maximum terms of imprisonment: five, ten, ten and twenty years. Discussion of the appropriate maximum penalties for the main sexual offences involves at least two major issues. One is the question of how to determine penalty structures *within* the context of sexual offences. The other is the question of relativities. How are sexual offence penalties to be measured against existing maximum penalties for other serious criminal offences such as murder, manslaughter, armed robbery and drug offences and so on? The Commission suggests that the maximum penalty for the penetration offence be twenty years imprisonment and ten years for the non-penetration offence.

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