Preliminary Submission to the Law Reform Commission (NSW) reference on 'consent in relation to sexual assault offences'

by

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The problem of consent and sexual assault is longstanding, and the terms of the public debates about the legal approach to sexual assault have been with us for many decades in Australia as well as in overseas jurisdictions. This preliminary submission recommends that the Commission consider ways in which a legal standard of consent can be given a lesser role and value in the current NSW legislation regarding sexual assault. We think that this provides a productive way to respond to the public debates that have taken place recently.

As a practical matter, our submission sets out a reformed definition of sexual assault for NSW, one that has no need of section 61HA.

The starting point of our recommended definition is that the crime of sexual assault is a crime whose distinctive feature in law and in the community is that the accused (usually male) causes sexual harm to socially vulnerable members of the community (primarily women and children, but also members of the LGBTQI communities). As such, what must be prohibited by the legal characterisation of the offence is the *causing of sexual harm* by an accused.

If this is the starting point, then, there is no reason in doctrine, policy or practice why a legislative definition of sexual assault must turn on a standard of consent. Serious assaults do not require proof that the victim did not consent, nor do they require proof that the accused knew that the victim was not consenting. And those who are accused of a serious assault are not provided with a defence of consent. Sexual assault is a serious assault, and the same legal approach can be and should be taken to its definition, prohibition and proof. In such an approach, section 61HA of the Crimes Act 1900 (NSW) is not needed: if consent is not a legislative element of the offence of sexual assault then there is no need to define consent (as agreement, or something else), no need to define what counts as knowledge about such consent, and no need to specify the circumstances from which the legal institution infers the existence or absence of consent. We acknowledge that much time has been spent on creating and refining the

current standard of consent, yet we would emphasise that sexual assault is a *serious* offence against the person, so it should be defined as such and in line with other serious interpersonal crimes.

How then would a serious offence of sexual assault be defined for use in NSW? The key elements would be injury or serious injury to the victim, and intention or recklessness or negligence as to the causing of such injury. It would look like this:

> **Sexual assault: causing serious injury with sexual intercourse**
>
> A person who
>
> (a) engages in sexual intercourse with another person, and
> (b) causes serious injury to that other person,
> (c) with the intention of causing injury or with recklessness as to causing injury
>
> is guilty of the offence of sexual assault.

We make a number of brief remarks about this proposed legislative definition.

1. The above legislative proposal is a definition. It does not promise to solve the problems that arise at the level of forensic proof during the police investigation, the committal or the trial. Not all of the problems of forensic proof are addressed by a definition, any definition. The reformed definition is directed at changing the legislative framing of forensic conduct.

2. Like the current definition of sexual assault in the Crimes Act 1900 (NSW), it provides the basic offence which could then be varied for less serious forms of sexual assault (such as indecent assault) or aggravated versions of the offence.

3. In many respects, the emphasis on consent in the current definition of sexual assault makes the offence an anomaly in the modern legislative structure of offences against the person. The modern structure is one in which the definition and forensic proof of the legal elements is governed by a legal focus upon the combination of *harmful consequences caused* by the actions of the accused, and the *mental attitude of the accused to the causing* of those harmful consequences. The reformed definition above uses this modern structure in all its clarity and simplicity.

4. The mental element of the reformed definition is *attached to the injury caused by the accused*; it is not linked to the sexual intercourse, nor to the presence or absence of the victim's consent to that sexual

intercourse. What must be intended is the injury to the victim, or at least the accused must be reckless as to causing such injury. This resolves many of the practical and cultural problems that arise from an excessive focus in current law on whether or not the victim consented, and on whether or not the accused believed, knew or was reckless as to consent.

5. The physical element simply requires proof of injury and the accused's causative relation to the occurrence of the injury. Causation is clear in contemporary law and provides a sufficient standard in this context since the actions of the accused do not have to be the only cause of the victim's injury. Such injury can be defined in a number of ways: we would not limit it to physical injury, but also extend it to injury to mental well-being, whether permanent or temporary. There may also be need, in the opinion of the Commission, to include adverse economic consequences. Defining injury seems a simpler and clearer task than defining consent (as agreement) or knowledge about such consent.

6. The reformed definition maintains the presumption of innocence. The presumption of innocence protects the accused, as in other offences against the person. The added benefit of the reformed definition is that it maintains the presumption for the accused while simultaneously recognising the sexual harm suffered by the victim. It does not restrict the rights of the accused, and at the same time recognises the formal rights of and substantive harm to the victim.

These brief remarks draw on more extensive work we have done in our scholarship and research, as well as our previous contributions to law reform. They are elaborated in the material listed below.

We commend the proposed definition and its implications for the standard of consent to the Law Reform Commission (NSW) in its deliberations on the laws of consent in sexual assault.

References:

Rush, Peter and Young, A. (2002) Submission to Victorian Law Reform Commission, invited by Chair of the Victorian Law Reform Commission, in response to its reference on Sexual Offences: Criminal Law and Procedure (2002). Attached to this NSW submission as an Appendix.

Victorian Law Reform Commission (2003) *Sexual Offences: Criminal Law and Procedure, Interim Report* Ch. 7. For extensive discussion of our joint submission to the Victorian Law Reform Commission reference on 'sexual offences'.

Rush, Peter and Young, Alison (1997) Submission to the Australian Model Criminal Code Officers' Committee (MCCOC/SCAG) on its discussion paper on the law of sexual offences, (1997).

Rush, Peter and Young, Alison (1997) "A Crime of Consequence and A Failure of Legal Imagination: The Sexual Offences of the Model Criminal Code" *Australian Feminist Law Journal*, vol 9 pp 100-133. Publication based on our submission to MCCOC.

MCCOC/SCAG in its *Final Report: Chapter 5: Sexual Offences Against the Person, May 1999*, at pp 27-29. For discussion of our joint submission to MCCOC in respect of its discussion paper on 'sexual offences'.

Young, Alison (1998) "The Wasteland of the Law, the Wordless Song of the Victim" 22(2) *Melbourne University Law Review* 442. Analysing the conduct and language of rape trials in Victorian courts, with specific reference to the examination of rape victims.

Included: Appendix

Peter D Rush,
on behalf of Peter Rush and Alison Young

Appendix to Rush and Young Preliminary Submission

Submission to Victorian Law Reform Commission Reference on Sexual Offences: Law and Procedure, 2001/2

by

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and
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10 January 2002

1. This submission sets out a reformed definition of the serious sexual offence which we call rape. This definition of rape can then be used to develop a definition of the lesser offence of 'sexual assault' (akin to the current 'indecent assault'). These reformed definitions do not use a standard of consent and, as such, any evidence attempting to prove the presence or absence of consent to the sexual penetration or to the sexual touching is inadmissible on the grounds of irrelevance.

Our recommended definition of rape was initially presented as a submission to MCCOC, and was published and explained in "A Crime of Consequence and a Failure of Legal Imagination: the sexual offences of the model criminal code" (1997) 9 *Australian Feminist Law Journal* 100-133. The initial version of the definition is set out on p 106 of that article and then developed. Subsequent to the publication of our submission, one of us (Associate Professor Alison Young) has also undertaken detailed research into the actual operation of rape trials in Victorian courts (during 1997). This has been published as A. Young (1998) "The Waste Land of the Law, The Wordless Song of the Rape Victim" 22(2) *Melbourne University Law Review* 442.

We have not resiled from the fundamentals of the approach we set out in our submission to MCCOC. However, in this current submission to VLRC, we have provided:

- a legislative definition of rape (slightly revised from our MCCOC submission);
- an explanation of the structure and elements of that definition of rape;
- a legislative definition of 'injury' for the purposes of our definition of rape (as requested by Marcia Neave at our meeting at the VLRC with Marcia Neave, Stephen Farrow and Sangeetha Chandraskeran on 03 January 2002);
- a legislative statement (along the lines of directions to counsel) of the required relevance of evidence in sexual offences cases.

2. This submission also sets out a proposed legislative statement of relevant evidence in sexual offence committals and trials. This is designed to *buttress and support* the objective of our reformed definition – namely, to focus the legal process in sexual offence cases on the behaviour and mentality of the accused. It could also be used to control the admissibility and use of evidence

where the definition continues to use a consent standard (in that context it functions to control the relevance of evidence as to consent).

3. A structure of sexual offences legislation

The structure of sexual offences legislation which we envisage is as follows.

Sexual offences fall into two broad categories of legal definition: general sexual offences and sexual offences against victims with a specified status (e.g. children, people with impaired mental functioning, and so on).

The general sexual offences are currently of two types – rape and indecent assault. The definition of these offences provide the model for the definitions of the remaining sexual offences.

Our concern in this submission is with the general sexual offences. All sexual offences are sexual assaults. We thus construct a legislative structure in which there are two levels of harm prohibited: the lowest level of harm being that minimally necessary to constitute a sexual offence, and a more serious level of harm which constitutes the most serious sexual offence.

Corresponding to these two levels of harm, we thus construct two offences. One is called 'sexual assault' - it defines and prohibits the lowest level of sexual harm. Another is called 'rape' and it defines and prohibits the most serious form of sexual assault under the rubric of 'causing injury with sexual penetration'.

This submission does not explicitly address the numerous problems associated with the current legislation defining and prohibiting the sexual offences with and against children and people with impaired mental functioning. However, we would note that if our recommended definitions and legislative structure is taken up, then there is a strong argument to suggest (by comparison with the law of other non-fatal offences in Victoria) that there is no need to retain *specific* offences prohibiting sexual relations with children and other vulnerable groups in the community.

LEGISLATIVE DEFINITIONS OF SEXUAL OFFENCES

4. As noted, the crime of rape is a sexual assault and, more specifically, a *serious* sexual assault. Our definition of rape will be explored most fully in this submission. However, in paras 18 ff of this submission, we set out and briefly explain the basic sexual offence of 'sexual assault' (designed to vary and replace the current 'indecent assault' definition).

5. The starting point of our recommended definitions is that the crimes of rape and of sexual or indecent assault are crimes whose distinctive feature is that the accused (usually male) causes *sexual harm* to socially vulnerable members of the community (primarily women and children, but also gay and lesbian people). What must be prohibited, then, is *the causing of sexual harm*.

How then to frame that prohibition in a legislative definition for use in Victoria? The current definition prohibits sexual penetration and indecent touching in circumstances where the victim does not consent and the accused intends non-consensual sexual penetration or touching. In short, the current legislative definition of rape and of indecent assault does not prohibit the causing of sexual harm – and so ignores the harm experienced and suffered by the victim.

Our recommended definition does not focus the prohibition on the *circumstances* of the sexual relation, but on the consequences of the accused's act(s). A legal definition which seeks to prohibit the causing of sexual harm should focus the prohibition on the consequences of the conduct of the accused and the mentality of the accused towards the prohibited consequences.

We take as a model the legal definitions of most of the current offences against the person in Victoria – namely, the common law definitions of homicide and specifically intentional and reckless murder; the legislative definitions of causing injury or serious injury in the non-fatal offences of the Crimes Act 1958 (Vic), and so on. After all, sexual offences are first and foremost offences against the person.

Our recommendation thus removes the crimes of rape and indecent assault from their status as a legislative *anomaly* and firmly places them within a modern legislative structure of offences against the person. That structure is one in which the definition creates and prohibits what, in shorthand, we call a consequential crime: the modern legislative structure of offences against the person is one in which the definition and the forensic proof of the definitional elements is governed by a legal focus upon the combination of the *harmful consequences* caused by the actions of the accused and the *mental attitude* of the accused to the causing of the harmful consequences. The legislative definition recommended and set out below must thus be interpreted and read in the light of this structure (and not in the light of the existing structure and its governing assumptions of consent).

With such a definitional structure in place, many of the problems currently experienced with the legal process by victims of sexual offences would be lessened and the documented excesses of the legal process would be severely curtailed.

But we would emphasise at the very outset that a legislative definition simply frames and establishes what is possible within the legal process of police investigation, committal hearing and trial. The present definition is expansive in what it makes possible; our recommended definition is less expansive. It however does not restrict the rights of the accused – such as the presumption of innocence (given that our definition is modelled on the other definitions of offences against the person, such a criticism would entail also claiming that the current law of homicide and of assault overturns the presumption of innocence).

6. In sum, the legal definition of the sexual offences (rape and sexual or indecent assault) in Victoria should prohibit the causing of sexual harm by the accused to socially vulnerable members of the community. In order to achieve this, the definition should be modelled on and be in accordance with

the definitional structure of the existing offences against the person (such as murder and 'causing injury' offences). Such a definitional structure is governed by and focussed upon (a) the harmful consequences caused by the acts of the accused and (b) the subjective state of mind of the accused regarding the prohibited harmful consequences.

A LEGISLATIVE DEFINITION OF RAPE

7. As such, the legislative definition of the serious sexual offence of rape that we recommend is as follows:

Rape: Causing injury with sexual penetration

A person who

(d) sexually penetrates another person, and
(e) causes injury to that other person
(f) with the intention of causing harm or with recklessness as to causing injury

is guilty of the offence of rape.

8. This legislative definition requires that, before a person can be convicted of the crime of rape, the prosecution must prove four elements beyond reasonable doubt – namely,

- voluntary sexual penetration by the accused of the complainant
- injury by the complainant
- the acts of the accused caused of the complainant's injury
- intention or recklessness as to causing injury

It does *not* require the prosecution to prove that there was a lack of consent by the victim to the sexual penetration. And it does *not* enable or permit the defence to argue that the accused believed that the victim was consenting to sexual penetration (such a belief is irrelevant to proof of the elements of the recommended definition).

Rather the recommended definition means that the main legal inquiries during pre-trial and trial practices will be directed towards proving the causation and mental elements. This is the case in ordinary trials for other offences against the person. In the context of rape prosecutions, however, there may be additional difficulties in proving the harm caused (injury) but these are not insuperable difficulties (they do not seem to cause much problem for causing injury prosecutions under sections 16, 17. 18 & 24 of the current Crimes Act).

9. Voluntary Sexual Penetration

While proof of sexual penetration is necessary under our recommended definition, sexual penetration is not the harm being prohibited by the definition. Sexual penetration simply has two functions in the definition. One function – which it will have in all cases – is that it provides the specific *sexual context* in which the causing of injury takes place and from which the meaning of the injury derives. A second function – which will not occur in all cases – is that the sexual penetration may be alleged to be the *means* by which the prohibited harm was caused (this function is thus a causal function and is discussed under the element of causation below).

The more general point of emphasis is that sexual penetration should not be thought of as that which distinguishes between criminal and non-criminal activity in the context of sexual relations.

9.1 Voluntariness

In the ordinary and typical case, this element will cause little if any difficulty (the current practice discloses little explicit dispute about this element in the usual prosecution and defence of rape).

It would however exclude situations where the accused sexually penetrates under the compulsion of another. Some specification of this issue of compulsion along the lines of the 'compelling sexual penetration' provisions in s 38(3) & (4) of the Crimes Act 1958 (Vic) *may* be necessary. Or it could be treated as a distinct and supplementary or supporting offence.

9.2 Sexual Penetration

The definition of this element could be modelled on the definition of sexual penetration currently contained in s 15 of the Crimes Act 1958 (Vic). Since we are not recommending any dramatic change to that definition, we do not address it in this submission in any detail. We simply note the following points:

- The judicial practice of referring to different forms of sexual penetration by shorthand terms should not continue. The use of phrases like 'oral rape' and 'digital rape' have the effect of suggesting that these are somehow lesser activities or injuries than penile penetration of the vagina. For appellate recognition of this, see the remarks of Ormiston JA in *R v Lomax (Kenneth Edward)* [1998] 1 VR 551 (especially at 559), and its description by Tadgell J in *Gysberts* [1998] VSCA 7 at para 5.

  This could be rectified by inserting a prohibition (in the current s 37 on jury directions or in the definition of sexual penetration in the current s 35) against the mention of these and cognate terms by the judge when directing the jury as to the meaning of 'sexual penetration'.

- The legal meaning of 'sexual penetration' and of 'vagina' may depend on how the hymen and its breaking is interpreted. The legal approach to the meaning of the hymen needs to be addressed. The problems are clearly spelt out in N. Puren (1995) "Hymeneal Acts" 5 *Australian Feminist Law Journal* 15.

- The 'gender-neutrality' of the definition may create some disjunction between formal definition and empirical reality. We note here that, as a matter of empirical reality, the crime of rape is overwhelmingly a

heterosexual and masculine phenomenon: it is a matter of heterosexual men raping vulnerable members of the community (women, gay men, and children). How this empirical reality is dealt with in a legislative definition is a difficult question but we see no other way than to maintain a formal gender-neutrality. Subversions in legal practice of formal gender-neutrality cannot, we suspect, be controlled completely by a substantive *definition*; evidential and procedural and educational programmes would also be necessary. But the definition should not be ignored.

10. Injury

At the outset, we stated that our concern was to construct a definition of rape which prohibits the causing of sexual harm to socially vulnerable groups in the Australian and Victorian community.

The sexual harm that we are concerned to prohibit in the definition of rape should encompass physical harm, psychological harm and economic harm. These three types of harm should be included in the definition of injury. They are however quite expansive and thus will need to be specified further. A legislated definition of injury will be required for the purposes of our recommended definition of the crime of rape. We thus recommend the following legislative definition.

Definition of injury in the crime of rape

1. For the purposes of the definition of rape, 'injury' occurs where the victim experiences bodily injury, injury to mental well-being or adverse economic consequences, whether permanent or temporary.

(a) A person's experience of bodily injury may include becoming unconscious, suffering pain, being disfigured, infection with a recognised disease, involuntary consumption of drugs or alcohol, or any significant impairment of bodily functioning.

(b) A person's experience of injury to mental well-being may include significant emotional harm, persistent impairment of ordinary mental functioning, recognisable clinical conditions, but does not include distress grief or anger except as indicators of significant injury to mental well-being.

(c) A person's experience of adverse economic consequences may include significant detriment to the person's financial position, or potential loss of employment or promotion.

(d) The victim's experience of injury is caused by the acts of the accused when the acts of the accused substantially, albeit not solely, contribute to the experience by the victim of injury.

In addition to our earlier remarks, the following comments provide brief explications and guidance as to the meaning of this definition. They are not exhaustive but indicative.

11. As noted earlier, we envisage a legislative scheme in which there are two levels of sexual harm. The lowest level of harm would simply be referred to as 'harm' and would be covered by a crime of 'sexual assault' (a redefined version of the current indecent assault: see paras 18 and following of this submission). The second and more serious level of harm would be 'injury'. It represents a more serious kind of harm: at the very least it covers harms included in the definition of 'injury' in s 15 of the current Crimes Act and/or the harms covered by the current definition of 'actual bodily harm' in the current common law of England.

Where the harm suffered by the victim is serious (that is, amounts to what is now called 'serious injury' or 'grievous bodily harm'), then this is a matter affecting sentence. It does not require a distinct crime with its own definition.

12. As in the current law of non-fatal offences against the person, the meaning of injury is determined by its specification as a *consequence* of the accused's actions. It is *not* a *circumstance* attending the actions of the accused. (This was the function of 'violence' in the reform of rape into sexual assault in the 1970s in Michigan and in the 1980s in NSW. 'Violence' in these legislative schemes is not the same in reference or in function as 'injury' in our recommended scheme. For further discussion of this distinction ,see our MCCOC submission cited in para 1 above.)

13. Illustrations of harms included in the definition of Injury

The definition of injury is inclusive but not exhaustive. Here we give some illustrations of what we envisage by each category within our definition of injury.

13.1 *Bodily Injury*. This is fairly straightforward and takes up some of the terminology in s 15 of the current Victorian Crimes Act. Disfigurement is included to acknowledge situations in which a relatively minor wound or lesion nevertheless leaves lasting physical scars. Becoming infected with a disease is sometimes a side-effect of rape, and communication of disease has been increasingly recognised as an aspect of non-sexual offences against the person (e.g. s 19A). A victim's consumption of drugs or alcohol (for example, rohypnol, barbiturates, temazepam, heroin, 'spiked drinks') caused by the accused is included to confirm what is accepted medical knowledge – namely, that drugs and alcohol have dramatic bodily effects (it is not included as a question of incapacity to consent, lack of consent being irrelevant in our definition). It is also included because of the increasing use of drugs and alcohol at parties and entertainment venues as a means of obtaining sex (see CASA study "The Right to Party Safely" in 2001). Significant impairment of bodily function is a recognisable catch-all phrase for criminal lawyers in the field of non-fatal offences against the person; and 'significant' is used to indicate that injury is a higher level of harm than what would be required in 'sexual assault' (formerly indecent assault) where the harm suffered would be akin for our purposes to that encompassed by common assault.

13.2 *Injury to Mental Well-Being*. It is accepted legal practice in non-fatal offences to include significant emotional harm within the term 'bodily harm' (see especially the current common law in England). Such harm is not limited to 'hysteria'. Rather it expands to and includes many of the items which we

have listed in our definition and separated out into a discrete paragraph (para b). Our inclusion of harm to mental well-being within the definition of injury also acknowledges the accounts by victim/survivors of the harm they have suffered in rape.

Some of the concrete and actual harms that would be captured by this category include: flashbacks, inability to sleep, loss of appetite, (we note that the latter two are part of the clinical definition of depression), inability to form or sustain long-term interpersonal relationships (sometimes with the effect of inability to hold down a job), recognised clinical conditions (such as post-traumatic stress disorder), anxiety attacks, and so on. Many more can be found in the records of victim-impact statements.

Pregnancy as a result of the rape (including its possible termination or carrying to term) could fall into either or both bodily injury and injury to mental well-being.

Distress, grief or anger *on their own* are excluded but would be covered by the definition of 'harm' in the lesser sexual offence of sexual assault (which replaces indecent assault). Distress, grief or anger *as aspects of* significant harm to mental well-being could however satisfy our definition of injury (for example, when anger is so considerable as to impair ordinary mental functioning, or when grief is part of melancholia or depression resulting from the acts of the accused).

13.3 *Adverse economic consequences*. Here we are primarily envisaging cases where rape occurs in the work environment. For example, an employer who threatens another with loss of employment in order to engage in sex with that person causes economic injury to the victim (rather than removes their ability to consent, at least under our definition). Actual or threatened loss of promotion prospects and/or income would also fall under this heading. At the limit, and we think not necessarily excluded under our definition, is the long-term loss of employment capabilities (as reported by and documented about many victim-survivors).

13.4 Paragraph (d) of our definition merely emphasises that the question of injury is linked to proof of causation and specifies the test of causation as being 'substantial cause'. See our discussion of causation below.

14. These categories – bodily injury, injury to mental well-being, and adverse economic consequences – are not mutually exclusive. It is likely that the injury suffered by the victim in an individual case would include injuries listed under at least two of these categories.

15. Proof of injury would be adduced by expert medical testimony and/or expert psychological and psychiatric testimony, and/or the testimony of the complainant, and/or testimony by the complainant's family members, friends, co-workers. It could also be adduced from the statements of the accused (either to the police or in oral testimony). The testimony of doctors and psychologists and psychiatrists should not be privileged to such an extent that such testimony becomes a de facto requirement of proof in the ordinary case. Our definition does not require, nor would we like to see, the expert psychologisation of the fact of rape.

16. Proof of injury would no doubt entail some of the committal and/or trial focussing on the complainant. Given that such a focus in current formal law and legal process is the reason for much of the trauma experienced by complainants, this may be of concern to some.

Our response to this concern is twofold:

16.1 One, we should not expect that committal and trial processes for sexual offences will ever be pleasant or happy experiences – for the complainant (let alone the legal profession). The legal profession does a disservice to survivors of rape and sexual assault if they hold out the promise of a reconciliation in the legal process. Our concern and expectation should be to lessen the trauma experienced by complainants; to make it *less awful* than the legal process currently is.

It is made less awful by transforming the legal process's approach to the complainant's experience from a focus on her consent to a focus on the nature and degree of the injury suffered by her.

16.2 Two, as survivors of rape and sexual assault have communicated to us, they would rather testify about and defend their account of the harm suffered (injury) than be subjected to cross-examination which asserts and insinuates that they wanted sex. It is better to have defence counsel arguing over how much the complainant was harmed rather than arguing that she was a willing participant in the sexual penetration or sexual touching.

17. Causation

The element of causation does not seem to be of much concern in the prosecution and trial of other offences against the person. We would not expect it to be of much concern in the prosecution and trial of sexual offences – except in the most *exceptional and extraordinary* cases. However, by way of explication, we make a number of comments.

17.1 Two legal scenarios of causation.

Our recommended definition creates two possible legal scenarios:

- *either* the prosecution will allege that the *act(s) of sexual penetration* caused the injury,
- *or* the prosecution will allege that sexual penetration took place and that *other acts* of the accused caused the injury.

Either scenario – or a combination of the two scenarios - would be sufficient to establish the causal element in our definition.

The first scenario recognises that the harm of rape is often *caused by* the actual penetration *itself*. As it was recently put by the Tasmanian Supreme Court in *R v Evans* (1999) 8 Tas R 325: "an act of penetration is itself an act of violence". The act of sexual penetration may result in the tearing of the vaginal wall or other physical injuries associated with forceful sexual penetration. Perhaps less straightforward in law but no less important, it needs to be recognised that for some people sexual penetration itself is emotionally traumatic. Thus, in some cases, sexual penetration (whether violent or not) is the cause of emotional trauma. In short, in the first kind of

legal scenario, it is the act of sexual penetration by the accused which is alleged to be the substantial cause of the injury suffered by the victim.

In the second scenario, the act(s) of sexual penetration by the accused must be proved but not as a causal matter. Rather the prosecution will allege that *other acts by the accused* were the substantial cause of the harm suffered by the victim. As such, the causal inquiry is *not* whether the act of sexual penetration caused the injury; the causal inquiry *is whether acts by the accused* - other than the act(s) of sexual penetration - *caused the injury*. This causal inquiry is familiar to criminal lawyers from the practice in the basic non-fatal offences ('causing injury/serious injury' in s 16, 17, 18, 24 of the current Victorian Crimes Act).

For this reason, the causal inquiry in this second legal scenario should be straightforward. To briefly illustrate: we envisage such other causative acts may include one or some of the following: biting, punching, stabbing (or more generally, the presence or use of weapons), dragging the complainant across a rough surface with the consequence of substantial breaking of the skin and bruising, or extreme verbal abuse or threats of violence to the complainant or to the complainant's immediate social and familial circle. The 'other acts' should not be (and are not limited by our recommended definition) to the acts of the stereotypical stranger-rapist.

A final point to note is that, for the purposes of our definition, it is the conjunction of the sexual penetration by the accused and the injurious acts by the accused which constitutes the sexual harm suffered by the victim (and it is this *sexual* harm that qualitatively distinguishes the offence of rape and sexual assault from the other non-fatal offences against the person). This conjunction may be specified as a causal conjunction (as in the first legal scenario above) or as a contextual conjunction (as in the second scenario above where the sexual penetration does not have a causative role to play in the prohibition and proof of the crime).

17.2 The Test of Causation: the accused is the focus, not the complainant

In criminal trials, the causal inquiry in the ordinary prosecution for an offence against the person involves asking whether the behaviour of the accused was the substantial cause of the harm (death, injury, serious injury, etc). This substantial cause test should be maintained and used as the test of causation in our recommended definition. We have included it as the test of causation in para (d) of our recommended definition of injury (see para 10). This works well enough in non-sexual situations; the sexuality of the situation does not change this or create additional difficulties.

We would also stress that, as emphasised in the High Court (see especially *Royall* and *McAuliffe*) and the Victorian Supreme Court (see *Evans & Gardiner (No 2)* amongst others), the inquiry into causal liability in criminal trials must be firmly focussed on whether or not *the accused* caused the prohibited harm.

It is only in the most exceptional and abnormal of cases that the behaviour of third parties or the state of mind of the victim would become relevant to the causal question. But the question is always: did *the accused* cause the prohibited harm?.

No doubt defence lawyers may want to suggest that the injury suffered was not caused by the acts of the accused but by previous events which had a traumatic impact on the complainant. The effect is to assert that there has been a competing cause of the injury to the complainant and that the competing cause is so overwhelming as to render the acts of the accused merely part of the setting in which the competing cause brought about the injury (to use the judicial language of *Hallett*). We would stress that this is only available in exceptional cases. Moreover, the decision as to whether or not there is in fact a competing cause and whether or not the acts of the accused were never an operating and substantial cause is a decision for the jury. Furthermore, as the appellate cases on causation involving intervening acts of third parties and victims indicate, such arguments are rarely successful and accepted by the jury. It should also be remembered that the accused must 'take his victim as he finds her' – both in bodily and mental aspects (the 'whole person' as *Blaue* puts it).

17.3 Causation and Consent: a red herring

If the emphasis on the acts of the accused is maintained (and it should be to ensure practical consistency across the offences against the person), then it should only be in the *exceptional and abnormal* cases that the belief of the rape complainant could become relevant to the question did the accused cause the injury suffered by the complainant.

But even in these cases, the language of consent is something of a red-herring since it would have to be consent to injury and not consent to sexual penetration or sexual touching. In order to be relevant, it is not simply any belief by the rape complainant: it could not be consent by the complainant to the sexual penetration since the prohibited harm is injury not sexual penetration. It would have to be consent to injury.

Once this is acknowledged, then the consent argument is excluded if one is to remain consistent with current law in the non-fatal offences against the person. Current law accepts that consent by the victim to a level of harm above that required by common assault does not preclude criminal liability for causing injury (see *Brown* and *Wilson* primarily, although there is a policy exception but not a defence in relation to boxing and other sporting activities.). Thus, in the committal or trial situation, it would be difficult or impossible for defence counsel to argue that the complainant consented to her injuries.

In short, any attempt to suggest that the consent of the complainant is relevant to the causal inquiry is a red-herring and should not be permitted by the legal institution and the VLRC.

17.4 Maintaining the Accused's Rights: the presumption of Innocence

All legal definitions are subject to limits. A central limit is that created by the presumption of innocence. This is as it should be. We are assuming that it is not the aim of law reform to create a legal process which results in a 100% conviction rate for those committed and tried for rape.

The presumption of innocence requires that all the elements of the definition of rape be proved beyond a reasonable doubt. This means that some of the

problems encountered with our recommended definition are attributable to the need to prove the element not to the statement of the definition itself. Again, this is as it should be.

Nevertheless, we do note that our recommended definition will not result in the prosecution, trial and conviction of all rapists. However, at the same time, we are convinced that more rapists will be prosecuted and convicted under our definition than under the current Victorian definition (and under any of the minor changes suggested in the discussion paper of the VLRC). We are convinced of this because of the higher conviction rates in non-fatal offences (our definition being modelled on the definition of such offences) and because of the shift of focus at committal and trial from the consent of the victim to the behaviour and mentality of the accused.

Finally, we stress once again that we have achieved all of these advances in definition while maintaining the presumption of innocence and without reversing the burden of proof.

18. Intention or Recklessness

The definition requires that the prosecution prove either that the accused intentionally caused injury to the complainant or recklessly caused injury to the complainant. If intention cannot be proved, then proof of recklessness is sufficient.

Our recommended definition follows the accepted and current practice in defining other offences against the person. It provides two alternative mental elements (intention or recklessness), it regards them as subjective states of mind, and it attaches those mental elements to the consequences of the accused's actions.

We propose only two alternative mental states: either intention or recklessness. We do not recommend an offence which regards negligence as a sufficient mental element for the crime of rape.

The mental state is a fully subjective standard: it is what the accused intends or foresees which is examined, and not an objective element or combination of subjective and objective mental element.

Furthermore, under our recommended definition, the accused (or defence counsel) will not be able to argue in exoneration of his actions that he honestly believed that the complainant was consenting (this is so whether the test is 'honest and reasonable belief' or 'honest belief on reasonable grounds'). The honest belief issue has no relevance in our recommended definition, in the same way that it has no relevance in the definitions of the basic fatal and non-fatal offences. [In fact, we think it is arguable that anybody who makes such a claim is actually admitting at least recklessness to injury rather than denying the mental element. But it is sufficient to note here that the claim is irrelevant. We have explained this irrelevance at greater length in our MCCOC submission cited in para 1 above.]

The mental state is an intention or recklessness as to the *consequences* (injury) of the accused's actions; it is not *an* intention to do the acts which

cause the consequences. This is consistent with current Victorian law on the non-fatal offences (albeit not with South Australian common law of assault).

It is still possible that an accused might suggest that 'I never meant to injure; I only intended to have sex'. We have dealt with this kind of argument at length in our MCCOC submission. It should simply be noted here that this line of argument could be interpreted as evidence in support of a prosecution claim that the accused was reckless as to the injury caused.

Finally, in most instances, such states of mind are proved in forensic contexts by reading them off the actual acts of the accused and the manner in which the accused behaved at the time. The mentality of the accused is not determined by reference to the behaviour and beliefs of the victim (as is currently the forensic situation made possible by the current definition and requirement of lack of consent or honest belief in the presence of consent). In short, once again both as a matter of formal definition and of proof of the formal elements, the focus of the legal process will be on the behaviour and mentality *of the accused*.

A LEGISLATIVE DEFINITION OF INDECENT ASSAULT: SEXUAL ASSAULT

19. We regard rape as the most serious type of sexual assault. There is therefore a need to define and prohibit a lesser type of sexual assault.

The legislative schema we propose is one in which the basic sexual offence is called 'sexual assault' and then 'rape' becomes, in a sense, an aggravated form of that basic sexual offence.

The basic sexual offence of 'sexual assault' would be a *consequential* crime along the lines of our definition of rape above: it prohibits the causing of sexual harm. But there would be two main differences in specifying the offence.The two main differences in definition are: (a) instead of sexual penetration there would be a requirement of sexual touching and (b) the consequential harm would be reduced from 'injury' and specified as 'harm'.

20. Hence, our recommended definition is as follows.

Sexual assault: causing harm with sexual touching

A person who

(a) sexually touches another person, and
(b) causes harm to that other person
(c) with the intention of causing harm or recklessness as to causing harm

is guilty of the offence of sexual assault

21. Rather than exhaustively explain the structure and the way we envisage each of the elements of the definition to operate, we can simply note that much of

our explanations of our definition of rape also explain this definition of sexual assault. The following thus provides some clarification of this definition and stresses a number of differences from the definition of rape.

22. This definition of sexual assault is designed to create a *basic* sexual offence. It is basic in two senses. First, it is basic in the sense that it specifies the *minimum* level of sexual harm prohibited by the criminal law as an indictable sexual offence. Second, it is basic in the sense that rape is defined in the same way but operates in a sense as an 'aggravated' form of the basic offence.

23. Our definition of sexual assault would replace the current crime of indecent assault.

24. The current law of indecent assault has all the problems associated with consent in the current law of rape. Our definition of 'sexual assault' does not necessarily entail issues of consent to sexual touching.

25. We have changed the name from indecent assault to sexual assault for two main reasons. First, the current law of indecent assault has specified that the term indecency refers primarily to sexual activity (and not to any other kind of activity). Second, given this reduction of indecency to sexuality, then it is more accurate to call the offence 'sexual assault' and, in doing so, it communicates the nature of the harm prohibited by the offence.

26. What constitutes the sexual harm of the crime is specified as 'sexual touching'. This is coincident with most reformed definitions of indecent assault. In accordance with the common law, we would specify the 'sexual touching' as requiring proof that the accused touched sexual body parts (either directly or through clothing). Such sexual body parts have been identified by the common law (see *Harkin* and *Court*) as breasts and buttocks of a female, the penis of a male, and the external genitalia of a woman (where such touching falls short of the sexual penetration required for rape). A definition to this effect could be included, with some refinement of the specification of what constitutes 'sexual touching'.

27. What constitutes 'sexual touching' is not to be identified by some reference to the standards of right-thinking people. This standard is used in the current test of indecency in indecent assault. In our definition, it will be unnecessary. Rather, 'sexual touching' will be specifically limited to legally identified body-parts (see para 26 above); and cannot be expanded by reference to some fluid standard of 'right-thinking'.

28. The remaining element that needs some brief mention is the requirement that the acts of the accused cause harm to the complainant.

First, the acts of the accused said to be the causal acts can be either the 'sexual touching' or acts 'other than' the sexual touching. This is the same as the approach to causation under our definition of rape.

Second, the harm suffered by the complainant should be defined by the legislation. As our comments on our definition of injury have indicated, we regard 'harm' as defining a lower level of harm than the concept of 'injury'. It would also cover bodily harm, emotional harm, and economic harm – but

where our definition of injury specified these as 'significant' harms, here in the definition of 'sexual assault' the harm caused would not be significant.

Third, the harm suffered could be either actual or threatened. This is along the lines of the current common law definition of common assault (and applied in the definition of assault for indecent assault) – namely, it prohibits physical contact and acts creating the apprehension of contact.

RELEVANT EVIDENCE: DIRECTIONS TO COUNSEL

29. This is the final part of our submission and the legislative scheme which we envisage. Our formal definitions of the crimes of rape and sexual assault should be supported and buttressed by a range of evidential and procedural arrangements. These arrangements should have two primary objectives – lessening the trauma experienced by the complainant during the legal process, and guaranteeing that only relevant evidence is admissible in the committal and trial proceedings.

30. There are a number of such evidential and procedural arrangements that could be introduced. We suggest one which is not suggested by the VLRC in its discussion paper and which we briefly mentioned in our discussions with the VLRC on 03 January 2002. The suggestion concerns restricting evidence to relevant.

We stress that the purpose of this suggestion is to buttress and support the objective of our recommended definitions of rape and sexual assault – namely, to provide an explicit statement of the evidential requirements so that the committal and trial of sexual offences is focussed upon the acts and mentality of the accused.

31. A range of evidential arrangements have been specifically introduced for the regulation of sexual offence cases. Many of these have been unsuccessful. But we think some headway can be made by focussing upon the basic requirement of the law of evidence – namely, that in order to be admissible, evidence must be relevant evidence.

From our detailed study of rape trials and appeals (even critical commentary on such trials and appeals), we have been struck by the fact that what is regarded as relevant evidence is actually not relevant evidence. (This slippage is often facilitated by the fact that the definition of the sexual offence requires proof of lack of consent.)

Given this, we think it is necessary to legislatively specify the requirement of relevance – both generally and tailored specifically for legal proceedings regarding sexual offences. Hence the following proposal.

32. We envisage that the following would be legislated and placed in that part of the Victorian Crimes Act immediately after the definitions of rape and sexual assault.

1. Evidence admissible at committal or trial must be evidence directly relevant to proving the elements of the sexual offence charged (rape and sexual assault). Evidence will only be relevant if it directly relates to the circumstances *immediately prior to or during* the event which is the subject of the charge.

2. Evidence will not be directly relevant to proof of the crime charged and hence not admissible in a court of law if it relates to the following matters:

(a) The kind of clothing worn by and manner of dressing by the complainant;

(b) The voluntary consumption of alcohol or drugs by the complainant;

(c) The place of residence of the complainant;

(d) The kind of employment held by the complainant;

(e) The marital status of the complainant

(f) The use of prescription medicine by the complainant which has been prescribed by a doctor for the complainant

(g) The ethnicity, sexual orientation and gender of the complainant

(h) The sexual experience of the complainant, before or after the event the subject of the charge.

3. (a) If counsel wish to introduce evidence relating to any of the matters listed in section 2, they must make a written application to the judge or magistrate for permission to do so.

(b) Permission can only be given if, in the opinion of the judge or magistrate, the evidence is directly relevant to proof of the elements of the crime charged.

(c) The permission must state in writing and in detail the reasons that the judge or magistrate regards the evidence as directly relevant.

The following comments provide some brief explication of the proposed legislation. Examples of evidence (and their insinuations) are all talk from committals, trials and appeals that we have studied.

33. General Matters

The recommended legislation restricts all evidence in sexual offence cases to being directly relevant to proof of the crime charged; it cannot be circumstantially relevant, nor can it be irrelevant.

This seems necessary to focus the attention of counsel, judiciary and jury on the elements of the crime charged. In a sense, it is framed here as legislative section the function of which is analogous to section 37 of the current Victorian Crimes Act – whereas section 37 tells the jury how to approach the verdict without preconceived and stereotypical notions, our recommended legislation tells counsel and the judiciary and the jury what counts as relevant evidence.

34. **Section 1: Timing**. Questions about being at a club, party or social gathering earlier in the evening are irrelevant to whether or not after the party a rape took place. They are however typically asked in current trials (quite often as evidence insinuating consent). Evidence should be confined strictly to questions relating to the time of sexual penetration and to the time of the acts causing injury/harm.

This has the important additional benefit of reducing the length of the cross-examination of the complainant. In current trials this is extensive and traumatic. Providing a strict temporal focus to the evidence should significantly decrease the trauma arising from the length of the cross-examination.

35. **Section 2(a)** It is relevant to ask questions about the fact of removal of items of clothing (and the manner and timing of such removal) but not to ask questions about the nature of the clothing worn by the complainant.

For example: the fact of removal of underclothes in a forcible manner is evidence relevant to the proof of the elements of the offence but examination of the complainant which asks if she wore a thong or lacy underwear or see-through underwear is irrelevant.

For example, the fact of removal of a top garment worn by the complainant is relevant but examination of the complainant as to its colour or fabric is irrelevant. Hence, questions as to the transparency of the top garment (see-through used to insinuate eroticism) or as to the fact that it is leather (used to insinuate 'kinkiness') or as to it being black or red (used to insinuate 'naughtiness') would be prohibited as irrelevant.

36. **Section 2(b)**. The fact that the complainant voluntarily consumed drugs and/or alcohol at some time before the time of sexual penetration and time of acts causing injury is irrelevant to the elements of rape or sexual assault. (They would also be irrelevant if the definition of rape used a standard of consent.). Hence, our section 2 (b) is designed to prevent such evidence about such matters being introduced.

Questions about whether the complainant had been smoking earlier in the day, or how many drinks had been consumed are to be prohibited. Questions about clothing and alcohol and presence at an earlier social event (hence questions prohibited under our sections 1 and 2(a) and 2(b) are frequently used in combination in current trials to suggest that the complainant is a 'good time girl' and was not raped. This cannot be a relevant line of questioning under our definition. Good time girls get injured too and it is injury that has to be proved.

37. **Section 2(c)**. Questions about living in a hostel or being homeless are often used to suggest that the complainant meets a lot of men and thus was not raped (the buried but legible insinuation being that the complainant is a 'slut'). Again, place of residence could have no relevance to whether or not the complainant was injured, let alone to whether or not the accused caused injury and the accused intended or was reckless as to causing injury. (It also has no legal relevance under the current law to whether or not the complainant did not consent.)

38. **Section 2(d)**. This section prohibits, for example, examination of a complainant designed to elicit the fact that the complainant works as a barmaid (and hence must meet a lot of men, and so the insinuation continues) is irrelevant to proof of the elements of the charge.

This section would not prohibit evidence relating to *place* of employment (provided such evidence is directly relevant to proof of the charge).

For example, examination of witness designed to prove that the element of penetration (or touching) and the element of injury (economic harm) could require an examination that elicits that the sexual penetration took place in the complainant's office at work and that the accused was the manager of the workplace. However, witness examination designed to introduce the fact the office and workplace is one for the sale of sexual paraphenalia (toys and such like) could not be relevant to proof of the charge.

Similarly, examination of witnesses (or complainant) designed to elicit the fact that the complainant is a sex-worker (table top dancer, or masseur, or street prostitute, and so on) could not be relevant to proof of the charge.

39. **Section 2 (e)**. This section is designed to prevent the use of witness examination to introduce the fact that the complainant is single or been married several times. Such a prohibition prevents the spurious insinuation (often used in current practice) of 'sexual promiscuity'. It would also prevent any suggestion that, if you are married, the degree of injury must be less.

40. **Section 2(f)**. In current practice, counsel often introduce evidence that the complainant uses Valium or Prozac or drugs prescribed for schizophrenics (for example) to suggest and insinuate that the complainant was more likely to have consented. Such insinuations are spurious and such evidence is irrelevant. On our reformed definition, it is also irrelevant - the voluntary consumption of prescribed drugs, legal or illicit drugs, by the complainant is not relevant to proof of the charge and evidence relating to such matters are prohibited by this section.

41. **Section 2 (g)**. This subsection should be self-evident by now.

42. **Section 2(h)**. This subsection in effect spells out the impact of section 1 on evidence as to sexual experience. It prohibits any mention of the sexual experience of the complainant – *both before* the acts of rape (usually called sexual history evidence) *and after* the acts of rape but before the committal or trial. Such evidence is routinely presented in trials under the existing law. Often this is in breach of the prohibition on sexual history evidence. In addition, the evidence is irrelevant to the issue of consent (and hence breaches the general requirement of relevance).

As an example of the ease with which evidence of sexual history evidence is said to be permissible, consider the example in para 8.72 of the VLRC Discussion Paper, 2001. There it is suggested that a complainant's prior sexual experience with the accused is relevant and admissible if the complainant 'claimed that they had never met the accused'. In such a case, defence counsel should be permitted to dispute this claim by the complainant with a view to casting doubt on the credibility of the complainant's entire story. But defence counsel should *not* be permitted to do so by reference to sexual experience – it is more credible and easier to substantiate that the

complainant had been seen with the accused by friends of the accused, or that they were seen together in a café by a waiter (in such scenarios third parties can testify as to a prior meeting). In short, a denial of a prior meeting can only be disputed by a claim of a prior meeting (not a prior *sexual* relationship); a claim having nothing to do with sex cannot be disputed by a claim about sex.

Under our definition, evidence of the complainant's sexual experience could not be relevant and as such is not admissible. Section 2(h) states this clearly.

43. **Section 3**. Relevant evidence focused upon the time of the accused's causative acts should be the only evidence admissible in sexual offence trials. Relevance should be strictly interpreted. As such, sections 1 and 2 of our evidence legislation could be absolute. However, we have included section 3 as a way of regulating any residual discretion that may be said to exist and to require counsel and the judiciary to be self-conscious in their use of evidence.

We would expect and hope that section 3 would only be required in the most exceptional cases (and perhaps most often by the prosecution) and that the magistrate or judge could only grant written and reasoned permission in only the most exceptional of exceptional cases.

OTHER EVIDENTIAL OR PROCEDURAL ARRANGEMENTS

44. As noted earlier, there are are a range of other procedural arrangements. We briefly note some of those which we think would be apposite given our recommended offence definitions and the above relevance legislation. They are apposite because I think they would support a new legal culture developing around the legal processes involved in sexual offences.

44. **A Sexual Court**. The establishment of a dedicated court for the committal and trial of sexual offences would strongly encourage expertise in this area of the law and a legal profession more sensitive to the problems of sexual offence cases and legal processes.

This court would be staff by judicial personnel from the County Court or Supreme Court (not the Magistrates' Court). Such personnel would be required to go on gender-awareness courses and so on. There would also be a range of other requirements attached to the judicial and legal personnel.

45. **Judicial Directions to the Jury**. We would strongly recommend that the judicial directions to the jury be tightly controlled. Specifically, we recommend the following two procedures:

(a) when directing the jury, the judge should be prohibited from providing a summary of the evidence of the facts. Such evidence has been heard by the jury and had it presented by opposing counsel.

(b) The judge should be required to present a written summary of the definitional elements which the jury must find proven, and of the prosecution and defence arguments in relation to each element. (Drafts of the latter for use by the judge could be presented by

opposing counsel to the judge at the end of their closing addresses to the jury.)