

TOPIC 1: SEXUAL OFFENCES

RAPE

Rape may be committed by a person of *either gender*, against a victim of *either gender*. Specific provisions in the *Crimes Act 1958* also address the situation where is *forced* to sexually penetrate an accused, themselves, a third person or an animal. In these provisions it is the **compelling/forcing** of another person that is criminalised, so a defendant can be liable even if the party sexually penetrated consents.

s. 37A- Objectives of Subdivisions 8A-8G

“The objectives are –

- (a) To uphold the *fundamental right of every person to make decisions about his or her sexual behaviour* and to choose to engage in sexual activity;
- (b) To *protect children and persons with a cognitive impairment* from sexual exploitation”.

Thus, sexual offences no longer focus merely on injury or violence, but rather on an individual’s right to sexual autonomy.

s. 37B – Guiding Principles

“It is the intention of Parliament that in interpreting and applying subdivisions (8A) to (8G), courts are to have regard to the fact that –

- (a) There is a *high incidence of sexual violence* within society; and
- (b) *Sexual offences are significantly underreported*; and
- (c) A significant number of sexual offences are committed *against women, children and other vulnerable persons including person with a cognitive impairment*; and
- (d) Sexual offenders are *commonly known to their victims*; and
- (e) Sexual offences often occur in circumstances where there is *unlikely to be any physical signs* of an offence having occurred”.

s. 38 – Rape

“(1) A person (A) commits an offence if –

- (a) **A intentionally sexually penetrates another person (B); and**
- (b) **B does not consent to the penetration; and**
- (c) **A does not reasonably believe that B consents to the penetration**

(2) A person who commits an offence against subsection (1) is liable to level 2 imprisonment (25 years maximum).

(3) **A person does not commit an offence against subsection (1) if the sexual penetration is done in the course of a procedure carried out in good faith for medical or hygienic purposes”**

AR ELEMENT 1: s. 37D – Sexual Penetration

“(1) A person (A) **sexually penetrates another person (B)** if –

- (a) A introduces (to any extent) a part of A’s body or an object into B’s vagina; or
- (b) A introduces (to any extent) a part of A’s body or an object into B’s anus; or
- (c) A introduces (to any extent) their penis into B’s mouth; or
- (d) A continues to keep the body part/object inserted.

(2) A person (A) **also sexually penetrates another person (B)** if –

- a) A causes another person B to penetrate B; or
- b) A causes B to take part in an act of bestiality.

(3) A person **sexually penetrates themselves** if –

- (a-b) (to any extent) a part of their body or an object into their own vagina/anus; or
- (c-d) continues to keep the body part/object inserted.

(4) **Sexual penetration of an animal;** (5) **Emission of semen is irrelevant.**

NOTE: The definition of s. 37D “sexual penetration” applies to ss. 38, 39, 42, 43 (i.e. only to offences under subdivision 8A of the Crimes Act). Sexual offences that fall outside of 8A do not fall under s. 37D *unless explicitly referred to*; otherwise, other offences fall under s. 35.

s. 39 – Rape by Compelling Sexual Penetration

“(1) A person (A) commits an offence if –

- (a) **A intentionally causes another person (B) to sexually penetrate – (i) A; (ii) or themselves; or (iii) a third person; (iv) or an animal; and**
- (b) **B does not consent to doing the act of sexual penetration; and**
- (c) **A does not reasonably believe that B consents to doing the act.**

(2) A person who commits an offence under subsection (1) is liable to level 2 imprisonment (25 years maximum).

(3) **A does not commit an offence against subsection (1) if –**

- (a) **The sexual penetration is of a person and is caused by A in the course of a procedure being carried out by A in good faith for medical or hygienic purposes; or**
- (b) **The sexual penetration is of an animal and is caused to be done by A in the course of a procedure being carried out by A in good faith for veterinary, agricultural or scientific research purposes”.**

AR ELEMENT 2: s. 34C – Without the Victim’s Consent

“(1)... **Consent** means **free agreement**.

- (2) Circumstances in which a person **does not consent to an act include, but are not limited to, the following** –
- The person submits to the act because of **force or the fear of force**, whether to that person or someone else;
 - The person submits to the act because of the **fear of harm** of any type, whether to that person or someone else or animal;
 - The person submits to the act because the is **unlawfully detained**;
 - The person is **asleep or unconscious**;
 - The person is so **affected by alcohol or another drug** as to be incapable of consenting to the act;
 - The person is **incapable of understanding the sexual nature** of the act;
 - The person is **mistaken about the sexual nature** of the act;
 - The person is **mistaken about the identity** of another person involved in the act;
 - The person **mistakenly believes the act is for medical or hygienic purposes**;
 - If the act involves an animal, the person **mistakenly believes the act is for veterinary, agricultural or scientific purposes**.
 - The person **does not say or do anything to indicate consent** to the act;
 - Having initially given consent to the act, the person later **withdraws consent to the act taking place or continuing**.

NOTE: The definition of ‘without the victim’s consent’ applies to all sexual offences, not merely those under subdivision 8A.

“Consent must be freely given, and acquiescence to intercourse by reason of any threat or duress may properly be regarded as negating consent for the purposes of the law of rape” (Perry J). The difference between submission and consent can be a fine line. Consensual ‘rougher than usual handling’ may not vitiate consent for the purposes of the law of rape, but consent induced by force, against the will of the victim, is always rape (**Question of Law (No. 1 of 1993)**)

s. 57 – Procuring Sexual Penetration by Threats or Fraud

“(1) A person must not by *threats or intimidation* procure a person to take part in an act of sexual penetration. Penalty: Level 5 imprisonment (10 years max).

(2) A person must not by *any fraudulent means* procure a person to take part in an act of sexual penetration.

Penalty: Level 6 imprisonment (5 years).

NOTE: s. 57 uses the s. 35 definition of ‘sexual penetration’ – not s. 34D.

Without Consent and Mistake about Sexual Nature/Purpose/Identity: A victim cannot allege rape where they understand and consent to both the sexual nature of the act, as well as the person they are consenting to sexual intercourse with – even if their consent was obtained by fraud and lack of disclosure as to who the person really is and what, if any, disease they are infected with (**R v Clarence (1889)**). “*Where there is fraud either as to the nature of the act itself, or the identity of the person who did the act, there can be no consent and the perpetrator is guilty of rape. But where the victim consents to sexual intercourse in return for a promise that he or she would be paid, when in fact the perpetrator does not intend to fulfil that promise, the existence of fraud on the perpetrator’s part does not mean there was a lack of consent, and the perpetrator is not guilty*”. Consent is not vitiated when the victim knows of the sexual nature of the act and with whom they are agreeing (**R v Linekar (1995)**). “*‘Carnal knowledge’ is the physical act of penetration; it is the consent to that which is in question; such a consent demands a knowledge of a) what is about to take place, b) the identity of the man, and c) the character of what he is doing. But once the consent is comprehended and actual, the inducing causes cannot destroy its reality and leave the man guilty of rape*”. Inducing causes like fraud as to marital status, occupation and the like are insufficient to vitiate consent because the woman/man knows that they are consenting to the actual act of intercourse (**Papadimitropoulos v R (1957)**). A victim’s consent is vitiated when they are mistaken as to either the identity of the accused or the sexual nature of the act (**R v Gallienne (1964)**). A victim’s consent to sexual penetration is not vitiated when the victim knows and agrees to the nature and character of the act, and knows the person acting – even if the person acting was performing the penetrating act solely for sexual gratification (**R v Mobilio (1991)**).

NOTE: s. 34C and its subsections may apply in each of the above cases today. Use updated legislation to refute Common Law argument.

Jury Directions Act 2015 s. 46 – Direction on Consent

“(1) The prosecution or defence counsel may request under section 12 that the trial judge direct the jury on consent (*jury directions are not automatically given; the prosecution or defence may request at their discretion. The new regime puts more responsibility on the prosecution and defence counsel to make requests, as opposed to old regime, where directions were automatically given*).

(2) In making a request referred to in subsection (1), the prosecution or defence counsel (as the case requires) must specify –

- In the case of a request for a direction on the **meaning of consent** – one or more of the directions set out in subsection (3); or
- In the case of a request for a direction on the **circumstances in which a person is taken not to have consented to an act** – one or more of the directions set out in subsection (4).

Note: Section 34C of the Crimes Act 1958 provides that consent means ‘free agreement’. That section also sets out circumstances in which a person has not consented to an act.

(3) For the purposes of subsection (2)(a), the prosecution or defence counsel may request that the trial judge –

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

(4) For the purposes of subsection (2)(b), the prosecution or defence counsel may request that the trial judge –

- Inform the jury of the relevant circumstances in which the law provides that a person does not consent to an act (*see s. 34C, Crimes Act*); or
- Direct the jury that if the jury is satisfied beyond reasonable doubt that a circumstances referred to in section 34C of the Crimes Act 1958 existed in relation to a person, the jury **MUST** find that the person did not consent to the act”.

s. 62 – Abrogation of Obsolete Rules of Law

“(1) The rule of law whereby a *male person under the age of 14 years is conclusively presumed to be impotent* is abrogated.

(2) 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 touching that is sexual (with or without aggravating circumstances) by another person.

(3) A reference in this section to ‘sexual penetration’ means sexual penetration as defined by section 35 or 37D (*of the Crimes Act*).

ATTEMPTS

An attempt is an incomplete/inchoate offence, including incitement (encouraging someone to commit an offence) and conspiracy (a certain type of planning to commit an offence). Attempts extend liability beyond actual completed acts to what the offender *tries* to do. Attempts are punishable for a number of reasons, including: a) To punish actions that have the potential to cause harm; b) to punish a morally blameworthy state of mind; c) to allow police to prevent harm before it occurs. From the **prosecution's view**, a wide range of attempts should be considered crimes. This is largely reflected under current Victorian law. However, from the **defence's perspective**, only actions which cause harm should be punishable.

THE OFFENCE – s. 321M:

“A person who attempts to commit an indictable offence is guilty of the indictable offence of attempting to commit that offence”.

NOTE: This section does not apply to attempting summary crime. Either a summary offence is completed or there is no crime at all.

Voluntary Desistance – A Defence?

If steps have already been taken that amount to conduct which is more than mere prep, is the accused still guilty if he/she belatedly desisted?

It is possible to have withdrawal from an attempt if it occurs at a stage before it can be said an attempt has been committed i.e. where conduct is ‘mere prep’. If withdrawal occurs afterwards i.e. after the ‘point of no return’, it is irrelevant; the attempted crime is already committed (*R v Page* (1933)).

CONDUCT CONSTITUTING AN ATTEMPT – AR

ELEMENTS:

s. 321N(1): “A person is not guilty of attempting to commit an offence unless the conduct of the person is –

- a) More than merely preparatory (prep) to the commission of the offence; and
- b) Immediately and not remotely connected with the commission of the offence”

*A link must be demonstrated between the defendant’s alleged conduct and the commission of the offence that is alleged the defendant is attempting to commit – **scope for counter-argument!***

‘More than merely preparatory/Immediately and not remotely connected’:

The point at which the defendant moves beyond prep and starts commission is generally indeterminate. There are therefore 2 main tests developed to determine what constitutes more than mere prep –

1) Last Act Test – requires the accused to have performed *all of the acts they needed to complete the offence* before the actual offence happens.

The Last Act test is satisfied if the accused does everything in his power to commit the offence, leaving nothing extra he/she could have done before it was actually committed (*Eagleton v R* (1885)).

R v Robinson (1915): Because the defendant was found out before a claim was put to the insurers, there was more he could have done before he committed his last act. Faking the burglary was not sufficiently proximate or immediately connected with the offence of obtaining money by false pretences.

2) Substantial Progress Test – the defendant’s conduct is sufficiently far along and sufficiently proximate to show they are trying to commit the offence. The defendant must have deliberately passed the point of no return in preparation to be guilty of an attempt (*DPP v Stonehouse* (1978)).

NOTE: Lord Edmund-Davies rejected the last act test, confirming the substantial progress/sufficiently proximate test is the sole test of whether acts are more than mere prep

CONDUCT CONSTITUTING AN ATTEMPT – MR

ELEMENTS:

s. 321N(2): “For a person to be guilty of attempting to commit an offence, the person must –

- a) Intend that the offence the subject of the attempt be committed; and
- b) Intend or believe that any fact or circumstance the existence of which is an element of the offence will exist at the time the offence is to take place”

*(a) – the offender must intend a) that an indictable offence be committed; b) to commit the principal offence and not some other offence; c) to perform the AR elements of the offence. Intention is required, which automatically precludes recklessness.

Recklessness and negligence are insufficient (Giorgianni v R (1985); *R v Mohan* (1976)).

(b) – requires the prosecution to prove BRD that the accused intended to perform the AR elements of the offence in question. Intention requires actual intention to bring about the intended result – an expectation that a particular result is probable is not enough*

DEFENCE: IMPOSSIBILITY

s. 321N(3): “A person may be guilty of attempting to commit an offence despite the existence of facts of which he or she is unaware which makes the commission of the offence attempted impossible”

Even if it is **factually impossible** to commit the full crime, the accused may **still be guilty of an attempt**. The evil intent can make an innocent act criminal (*Britten v Alpoget* (1987)). However, an attempt is not committed if the accused erroneously believed he/she was committing a crime.

The crime attempted must have been a real indictable offence, not an imagined crime. Thus, **legal impossibility** is a way to **avoid liability** for an offence

*As per *Donnelly*, there are six ways in which an attempt might or might not be completed:

- (i) When the D changes their mind before committing any act which amounts to an attempt. No point of no return = no attempt = voluntary desistance successful;
- (ii) When the D changes their mind but is too late to deny an attempt has been made.
- (iii) When the D is prevented by a secondary agent from completing the full AR of the crime (eg. police intervention). An attempt is made out.
- (iv) Where the D fails because of insufficiency, misjudgement or incompetence. Attempt made out.
- (v) **Factual Impossibility:** Where the D attempts a crime that would not on the facts have been committed had they known all facts they intended to carry out (eg. stabbing a corpse). Is an attempt.
- (vi) **Legal Impossibility:** Where conduct is not criminal, but is perceived to be so by the D (eg. attempted adultery). Not an attempt.