

REFORMS TO DEVELOPMENTS IN SEXUAL OFFENCES LAW

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INTRODUCTION

1. This paper provides an overview of recent legislative reforms in the area of sex offences law, and developments in the body of relevant case law from the Court of Appeal:
 - The *Crimes Amendment (Sexual Offences and Other Matters) Act 2014*;
 - *Velkoski v R* [2014] VSCA 121; and
 - *Rapson v R* [2014] VSCA 216; and
 - *Lancaster v R* [2014] VSCA 333.

THE CRIMES AMENDMENT (SEXUAL OFFENCES AND OTHER MATTERS) ACT 2014

Overview

2. The *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) (‘the CASOOMA’) gained royal assent on 21 October 2014.
3. Its purposes included to ‘reform the law relating to rape and sexual assault.’
4. The CASOOMA is divided into 8 Parts. Parts 2 to 7 deal with amendments to numerous Acts including:
 - the *Crimes Act 1958* (Part 2);
 - the *Criminal Procedure Act* (Part 3);
 - the *Sentencing Act 1991* (Part 4);
 - the *Jury Directions Act 2013* (Part 5); and
 - the *Summary Offences Act 1966* (Part 6).
5. The Act introduces a whole new Subdivision 8A into the *Crimes Act 1958* with new and amended definitions, new offences and yet another attempt by Parliament to address the issue of an accused’s belief in consent.¹ The Act also introduces new offences to the *Summary Offences Act 1966*.
6. Some provisions of the CASOOMA have already commenced their operation; others, including the sweeping changes to Subdivision 8A, are not due until 1 July 2015.

¹ See, generally, *R v Getachew* (2012) 248 CLR 22.

New Subdivision 8A of the *Crimes Act 1958* and associated provisions²

Section 4 of the CASOOMA: New Subdivision 8A

7. An entirely new Subdivision 8A of the *Crimes Act* will come into operation on 15 July 2015 (unless proclaimed earlier).
8. A comparison of the old and new provisions is contained in **Appendix 1** to this paper.
9. In summary, however, the new Act will effect the following changes:
 - a new fault element for rape and other Division 8A offences where consent is in issue: that 'A does not reasonably believe that B consents' to the act in question;
 - the definition of 'sexual penetration' will be widened to include continuation of penetration;
 - the expressions 'touching', 'sexual touching', and 'taking part in a sexual act' will be introduced and defined;
 - the circumstances in which a person is taken not to have consented to an act will be expanded to include a person's submission because of fear of harm to an animal; and a person's submission as a result of a mistaken belief that an act involving an animal is for veterinary, agricultural or scientific purposes;
 - the offence of 'sexual assault' will replace 'indecent assault'; and
 - new offences of 'sexual assault by compelling sexual touching'; 'assault with intent to commit a sexual offence', and 'threat to commit a sexual offence' will be introduced.

Section 7(3) of the CASOOMA sections 7(3) and 20: Jury directions on consent

10. For offences committed after 1 July 2015, the directions necessary in trials where consent and belief in consent are in issue will be contained in a new Part 14 of the *Jury Directions Act 2013*.
11. The directions currently given will continue for offences alleged to have been committed before 1 July 2015.

² This paper does not purport to cover every provision of CASOOMA.

12. Part 14 of the *Jury Directions Act 2013* will replace the current sections 37, 37AAA and 37AA of the *Crimes Act* for offences committed after 1 July 2015. A comparison of the old and new provisions is contained in **Appendix 2** to this paper.
13. In summary, the new directions largely mirror the existing directions in s 37AAA (subject to minor additions brought about by the new s 34C³ of the *Crimes Act 1958*).
14. But the directions will need to be requested by counsel.⁴
15. Similarly, counsel may also request that directions be given on reasonable belief in consent and, in particular, on the interaction between reasonable belief and the accused's knowledge of any of the matters informing the complainant's consent contained in s 34C, or on the effect of intoxication on the reasonableness or otherwise of the accused's belief.

Sections 11-14 of the CASOOMA – Course of Conduct Offences

16. From 1 July 2015, an accused will be able to be charged with a 'course of conduct charge',
17. An information alleging a 'course of conduct' offence will be preferred in the case of sex offences only with the consent of the Director of Public Prosecutions.⁵
18. A 'course of conduct charge' will be a charge alleging more than one incident of an offence. It will be available to prosecuting authorities for a wide range of State offences including:⁶
- sexual offences;
 - property offences including theft, obtaining property by deception, obtaining financial advantage by deception, false accounting, blackmail, handling stolen goods, and secret commission offences;
 - identity crimes;
 - money laundering offences;
 - offences relating to cheating at gambling; and
 - criminal damage offences perpetrated by computer.⁷

³ See *Crimes Amendment (Sexual Offences and Other Matters) Act 2014*, s 3.

⁴ *Jury Directions Act 2013*, s 11.

⁵ See new *Criminal Procedure Act 2009* schedule 1, clause 4A(12).

⁶ This list does not purport to be exhaustive: see *CASOOMA*, s13 and the corresponding provisions of the *Crimes Act 1958* for the full list.

⁷ *Ibid*, sch 1, cl 4A(1).

19. A 'course of conduct' charge will be considered a single charge⁸ – and will be available to prosecuting authorities both at trial or for summary contest, and in those proceedings that resolve into pleas.⁹

20. More than one incident of the same relevant offence may be included in a single charge if the following four criteria are met:¹⁰

(i) each incident constitutes an offence under the same provision;¹¹

(ii) in the case of a sexual offence, each incident must relate to the same complainant,

(iii) the alleged incidents take place on more than one occasion over a specified period; and

(iv) the incidents taken together amount to a course of conduct, having regard to their time, place or purpose and any other relevant matter.¹²

21. In the case of 'course of conduct' charges it will not be necessary for the prosecution to prove an incident of the offence with the same degree of specificity as to date, time, place, circumstances or occasion as would be necessary if the accused were charged with only one incident.¹³

22. Further, it will not be necessary for the prosecution to prove:

- a. any particular number of incidents of the offence;
- b. the dates, times, places, circumstances or occasions of the incidents;
- c. that there were distinctive features differentiating any of the incidents; or
- d. the general circumstances of any particular incident.¹⁴

Accordingly, a course of conduct may be proved by generalized evidence of what would typically or routinely occur, rather than by evidence which distinguishes between separate occasions.¹⁵

⁸ Ibid, sch 1, cl 4A(5).

⁹ Ibid, s64A, s181A and sch1, cl 4A.

¹⁰ Ibid, sch 1, cl 4A(2).

¹¹ Ibid, sch 1, cl 4A(3).

¹² Ibid, sch 1, cl 4A(8).

¹³ Ibid, sch 1, cl 4A(9).

¹⁴ Ibid, sch 1, cl 4A(10).

¹⁵ Cf *PPP v R* (2010) 27 VR 68.

23. It is not clear whether the new offences will attract the need for juries to be unanimously agreed on each of the component incidents alleged (see, for example, s 47A offences); or whether members of a jury can be satisfied of some or different incidents only, so long as all of them are satisfied that the conduct of the accused can amount to a course of conduct (see, for example, stalking). The latter is the more probable.
24. Similarly, it is far from clear how the trial of a 'course of conduct' charge will accommodate uncharged acts led in circumstantial proof of that charge.¹⁶
25. Further, a 'course of conduct' charge may be joined in an indictment with an alternative charge or charges.¹⁷ The alternative charge or charges may be for:
- a. an offence of the kind covered by the 'course of conduct' charge; and
 - b. alleged to have been committed within the period to which the course of conduct charge relates.
26. In circumstances where an indictment contains both a 'course of conduct' charge and one or more alternative charges, an acquittal on the 'course of conduct' charge will not also constitute an acquittal on the constituent alternative charge.¹⁸
27. In circumstances where an accused person is willing to plead guilty to a 'course of conduct' charge, but takes issue with the period alleged, ss 64A and 181A of the *Criminal Procedure Act* will respectively enable the Magistrates' Court and the County or Supreme Court to accept a plea to a charge only for the specified period.
28. Sentencing for a 'course of conduct' charge will be guided by a new s 5(2F) of the *Sentencing Act 1991* (inserted by the *CASOOMA*, s 17):
- a court will apply the same principles as those that obtain to sentencing for rolled-up counts;¹⁹ and
 - a court will be precluded from imposing impose a sentence that exceeds the maximum penalty prescribed for a relevant offence when charged as a single offence.²⁰

¹⁶ Or, relatedly, how it will accommodate the prosecution's intended reliance on tendency or coincidence reasoning.

¹⁷ *Crimes Amendment (Sexual Offences and Other Matters) Act 2014*, sch 1, cl 5(3).

¹⁸ *Ibid*, sch 1, cl 5(4)" see also *R v Jones* [2004] VSCA 68 at [12]-[13]; *R v Beary* (2004) 11 VR 15 at [11]-[14]

¹⁹ *Sentencing Act 1991*, s 5(2F)(a).

- However, where the 'course of conduct offence' is a sexual offence, an accused's guilt for a single offence will suffice to render that person a serious sexual offender for the purposes of s 6 of the *Sentencing Act 1991*.²¹

Exceptions to Child Pornography Offences – Section 8 of the CASOOMA

29. Section 8 of the *CASOOMA* came into force on 3 November 2014. Its scope is wide and its operation retrospective. It applies to proceedings commenced before, on or after 3 November 2014, irrespective of when the offence is alleged to have been committed; but not to proceedings in which a summary hearing or trial commenced before 3 November 2014.²²

30. It inserted a new s 70AAA into the *Crimes Act*, which provides various exceptions to child pornography offences for minors (persons under 18 years).²³

31. A minor is now exempt from having committed the offence of production of child pornography (s 68), procurement of a minor for child pornography (s 69) and possession of child pornography (s 70) if certain conditions are met in the case of each of the four exemptions:

- where the image depicts the minor alone or with an adult (s 70AAA(1));
- where the image depicts the minor with another minor and the image does not depict an act that is a criminal offence (s 70AAA(2));
- where the image depicts the minor who is a victim of a criminal offence depicted in the image (s 70AAA(3)); or
- the image does not depict the minor, but depicts another minor or minors (s 70AAA(4)).

32. The exemptions protect minors who produce, procure or possess images of child pornography, either of themselves or their peers.

²⁰ Ibid, s 5(2F)(b).

²¹ Ibid, s6B(2)(ac) inserted by *CASOOMA*, s18. This is consistent with the position of an accused who is found guilty or pleads guilty to a charge of persistent sexual abuse.

²² See transitional provisions, *CASOOMA*, s9(5) and (6).

²³ Similar exceptions have also been incorporated into the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* by the *CASOOMA*, s 28.

33. The provisions become complicated where more than one minor is depicted in the image, and there is no substitute for a careful reading of the provisions when deciding how to advise a client who is a minor and is charged with possession, procurement or production of child pornography.
34. The exemptions are welcome. They are necessary. But despite their apparent breadth, they do not go far enough. They leave unresolved the anomaly thrown up by the example of an adult who may lawfully engage in sexual intercourse with a minor, provided that minor is 16 years old or older, but may not possess or procure an image of that minor in circumstances where the image would, on its face, amount to child pornography.

New Offences Regarding Distribution and Threats to Distribute Intimate Images

35. On 3 November 2014, two new offences were inserted – by s 26 of the CASOOMA – into the *Summary Offences Act 1966*. The first proscribes the distribution of intimate images (s 41DA); the second, threats to distribute intimate images (s 41DB).
36. From 3 November 2014, it is an offence intentionally to distribute an intimate image of another person to a third party; or to threaten a person with distribution of an intimate image of that person or a third party where (in either cases) the distribution of the image is contrary to community standards of acceptable conduct.
37. These new offences can be committed by both minors and adults and were introduced for the purpose of addressing the serious harm caused by distribution or the threat of distribution of intimate images to a third party.²⁴
38. The phrases “intimate image”, and “community standards of acceptable conduct” are defined in section 40 of the *Summary Offences Act 1966*.
39. It should be noted that a defence of consent may be relied upon only in circumstances where the image is of an adult and that adult has expressly or impliedly consented, or could reasonably be considered to have expressly or impliedly consented, to both the fact and manner of the distribution.

Other Changes to Note

Section 5 of the CASOOMA: Removal of Marriage Exception

40. Section 5 of CASOOMA came into force on 22 October 2014.

41. It is no longer possible for a child under the age of 16 years to be legally married in Australia. No longer does *the fact* of marriage between an accused and a complainant provide an exception to the offences of sexual penetration of a child under 16, indecent act with a child under 16, and persistent sexual abuse of a child under 16.

42. However, an accused may still raise consent as a defence to the charge if the accused satisfies the court on the balance of probabilities that he or she believed on reasonable grounds that he or she was married to the complainant.

Section 6 of the CASOOMA: Jurisdictional Changes to Grooming Offence

43. Section 6 of the CASOOMA came into force on 22 October 2014, rendering the offence of grooming a child under the age of 16 years for sexual conduct, under s 49B of the *Crimes Act 1958*, made out even where an element of the offence occurs outside Victoria.

Section 10: Removal of Time Limits for Prosecution of Certain Historical Sexual Offences

44. Section 10 of the CASOOMA will insert a new s 7A into the *Criminal Procedure Act 2009*, removing the time limits on prosecuting certain historical sex offences (s7A(1)).²⁵

45. However, s 7A also provides safeguards not previously available: for example, the removal of a time limit does not apply to an offence if the conduct alleged would not constitute an offence under current laws (s7A(2)); and an accused facing prosecution for an historical offence may call in his or her aid a defence which is currently available for an equivalent current offences (s7A(3)).

46. For example, the time limits in s 47 of the *Crimes Act 1928* will be abolished.

²⁵

This section has not yet been proclaimed and accordingly is likely to come into force on 1 July 2015.

RECENT CASES

Tendency Evidence

47. Since the introduction of the *Evidence Act 2008* (Vic), the law regarding tendency and coincidence evidence has developed along divergent lines in Victoria and New South Wales. In Victoria, two relatively recent decisions of the Court of Appeal have sought to distill the principles applicable to tendency evidence: *Velkoski v R* [2014] VSCA 121 and *Rapson v R* [2014] VSCA 216.

48. A neat summary of those principles was set out by the Court in *Rapson* at [16]. The Court held that:

- similarities or commonalities now seem to be the touchstone of admissibility for tendency evidence in Victoria as well as coincidence evidence (*Velkoski* [82]; *Rapson* [16]);
- not all similarities will be relevant or be of sufficient weight to give the proposed tendency evidence significant probative value – for example in the ‘not so uncommon situations of parent and child, or teacher and pupil, some other features of similarity must be present’ (*Velkoski* [168]; *Rapson* [16]);²⁶ and
- dissimilarity in the nature of sexual act/s does not necessarily preclude the admissibility of tendency evidence if there is sufficient similarity between surrounding circumstances and vice versa (*Rapson* [17]-[18]).

Admissibility of DHS and Hospital Records Concerning a Complainant

49. In *Lancaster v R* [2014] VSCA 333 (Nettle JA, Redlich JA and Almond AJA) the applicant relevantly sought leave to appeal against conviction on the basis that the trial judge had:

- excluded records contained in files maintained by the DHS on the complainants
- excluded expert evidence relating to those records;
- refused applicant’s counsel leave under s 342 of the *Criminal Procedure Act 2009* to cross-examine a complainant on events disclosed in those records; and
- refused the applicant an unreliable witness warning under s 165 of the *Evidence Act 2008*, predicated upon the content of those records.

²⁶

This is consistent with the position taken in *PNJ v DPP* (2010) 27 VR 146, 151.

50. In summary it was held by the Court that:

- Clause 1 of Part 2 of the Dictionary in the *Evidence Act* contemplates activities engaged in or carried on by the DHS, other analogous social welfare agencies, hospitals, medical practices and kindred health care providers [14];
- documents in a file held by those or like organisations would amount to business records within the meaning of the *Evidence Act* [16];
- prima facie, individual patient records maintained by a hospital, doctor or other health care provider are business records of the activities carried on by the health care provider and therefore are business records even though they concern individual patients as opposed to the running of the hospital or health care provider's practice [19];
- records should not be excluded on the generalised basis that one or more of the entries in the record may be hearsay: rather, each entry should be considered individually to see whether it meets the threshold for admissibility imposed by s 69(2) of the *Evidence Act* [21];
- the phrase 'directly or indirectly' does not confine the business records exception to first and second-hand hearsay [24]; and
- it is enough to render the document admissible if it may be concluded that the representation was made by or on the basis of information supplied by someone who had personal knowledge of the fact within one of the alternative descriptions in s 6 9(2). So long as the nature and context of the recorded representation permits that inference to be drawn, the supplier of the information need not be identified [27].

CONCLUSION

51. This paper has sought to give a practical (rather than theoretical) overview of current and pending reforms to, and developments in, the law as it pertains to sex offences.

52. It remains to be seen whether the *CASOOMA* meets its stated aim of reforming the law relating to rape and sexual assault or whether it simply introduces yet another layer of complexity and uncertainty to an area of the law traditionally beset by both those features.