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Review of Sexual Offences: Submissions
Department of Justice
GPO Box 4356
Melbourne Vic 3001

By email: clr@justice.vic.gov.au

Liberty Victoria Submission: Review of Sexual Offences

1. Liberty Victoria welcomes the opportunity to make a submission to the Department of Justice regarding the Review of Sexual Offences. Thank you for the extension of time granted to make this submission.

Liberty Victoria

2. Liberty Victoria has a long and proud history of campaigning for civil liberties and human rights for more than 70 years. Officially known as the Victorian Council of Civil Liberties Inc, its lineage extends back to the Australian Council for Civil Liberties ("ACCL"). The ACCL was formed in Melbourne in 1936 and was determined to offer 'a means of expression to those people in all parties who believe that social progress may be achieved only in an atmosphere of liberty.' Brian Fitzpatrick was the ACCL's General Secretary for twenty-six years and helped to form the Victorian Council for Civil Liberties before his death in 1965.

3. Throughout its history, Liberty Victoria has defended the right of individuals and organisations to free speech, freedom of the press and of assembly, and freedom from discrimination on the grounds of race, religion or political belief. It has operated

in accord with the ACCL's original platform, working not only to defend existing civil liberties and oppose their limitation, but to campaign for the 'enlargement of these liberties.' We are now one of Australia's leading civil liberties organisations.

4. Liberty Victoria would particularly like to acknowledge Katharine Brown, Jessica Dawson-Field and Jessica Foster for their research and assistance in preparing the submission.

5. This submission will focus on the issues raised in Parts 3, 12 and 13 of the Consultation Paper with regard to the fault element for the offence of rape and the proposals for multiple offence charges and alleging multiple offences in the one charge.

6. The submission has been made in collaboration with the Criminal Bar Association ("CBA") of the Victorian Bar.

Part 3: Rape Offences

7. With regard to the matters raised in Part 3 of the consultation paper, Liberty Victoria joins with the CBA and submits as follows:

The Law of Rape

8. The law of rape is complex. In part that has been the product of continuous amendment to Part I of the *Crimes Act* 1958 ("the Act"), and legal practitioners and judicial officers working in an ever-changing legal landscape. In particular, the insertion and amendment of ss 35, 36, 37 37AAA, 37AA, 37A, and 37B of the Act, whilst undoubtedly well-intentioned, have created a significant level of complexity for trial judges when charging juries.

9. In that context, it is unsurprising that the Court of Appeal has found that some trials have been occasioned by error and consequently ordered re-trials.

10. However, the elements of rape provided by s 38(2) of the Act are not themselves unduly complicated. What does become a significant complicating factor is when a judicial officer must charge a jury on a factual situation without any basis in evidence

or assertion at trial. That was the situation in *Getachew v The Queen* [2011] VSCA 164. The accused man had claimed that there was no act of sexual penetration. The complainant had claimed she was asleep and awoke to being penetrated. The Court of Appeal held it was an error for jury not to be directed that the offender may have not been aware that the complainant was not consenting to the act of sexual penetration because she was asleep and did not protest.

11. However, the Court of Appeal judgment was overturned by the judgment of the High Court of Australia in *R v Getachew* (2012) 86 ALJR 397. Simply put, following the High Court judgment, complicated directions about belief in consent and awareness of the possibility of non-consent will not arise unless there is a foundation in evidence or assertion for such directions to be given. As emphasised by the High Court in *Getachew, per curiam,* at 404 [30], "[i]n a case where s 37AA is engaged, the directions required by that section must be given, In a case where s 37AA is not engaged, those directions must *not* be given".

12. There is a live question as to whether significant reform of the law of rape is needed following *Getachew*, at least until its impact on trials and appeals can be properly assessed.

13. Further, the introduction and effect of the *Jury Directions Act* 2013, and the capacity of judges to give integrated directions and the onus it places on Counsel to seek directions of law, further casts doubt on whether significant reform is needed until the impact of that reform can be assessed.

14. There remains an issue, as considered in *R v Worsnop* (2010) 28 VR 187, about whether an alleged offender can both believe a complainant is consenting and be aware of the possibility that the complainant is not consenting. That issue had given rise to significant complexity in judicial directions. However, as held in *Worsnop*, once a jury accepted the existence of a belief in consent, the Crown could not establish either that the accused was aware that the victim was not consenting or else that the victim might not be consenting.

15. It is submitted that *Worsnop* is correct as a matter of logic in light of the prosecution's standard of proof. It is difficult to think of a circumstance where a jury is satisfied that an accused person actively believed that a complainant is consenting, but the Crown could then prove, beyond reasonable doubt, that the accused person was simultaneously aware of a possibility of non-consent. Put the other way, if an accused person is aware of the possibility of non-consent, then they cannot properly be said to believe that the complainant is consenting. In any event, it is submitted that such a circumstance is likely to arise in a very small number of cases, which invariably turn on issues of credibility and reliability rather than philosophical issues as to whether belief in consent and the awareness of the possibility of non-consent can be contemporaneous.

16. Whilst there are areas of complexity, it should not be forgotten that many judicial errors over the last decade that have resulted in retrials have been through clear mistakes, such as regarding the objective reasonableness of an accused person's belief as being determinative of the fault element of rape; see further *R v Wilson* (2011) 33 VR 340; *R v Munday* (2003) 7 VR 423; *R v Zilm* (2006) 14 VR 11; and *R v Gose* (2009) 22 VR 150.

17. As emphasised by the High Court in *Getachew* at 403 [24]:

> …neither s 37AA nor any other relevant provision of the Crimes Act provided that an accused must be taken to be aware that the complainant might not be consenting unless the accused reasonably believed that the complainant was consenting. Rather, consideration of whether an accused's belief in consent was reasonable would bear upon whether the accused in fact held the belief.

The Desirability of Option 1

18. Of the options canvassed in the Consultation Paper, it is submitted that Option 1 is the preferable approach. That would result in the elements of rape being that:

    a) A has sexual intercourse with another person (B);
    b) A intends to have sexual intercourse with B;

c) B does not consent to A having sexual intercourse with him or her;

d) A:

i) knows that B is not consenting;

ii) knows that B might not be consenting; or

iii) does not give any thought to whether B is not consenting or might not be consenting.

19. The language of Option 1 is clear and precise. The change of language from awareness to knowledge is to be commended. Reasonableness remains a relevant consideration to assessing that state of mind, as are any consent-negating circumstances that may be present, but that does not result in a purely objective fault element being introduced for what is a very serious criminal offence.

20. It is submitted that this reform should be introduced prior to any further reform (such as that envisaged under Options 2 and 3), so that the impact of the clear language of Option 1, combined with the effect of *Getachew* and the *Jury Directions Act* 2013, can be properly assessed.

21. Liberty Victoria submits that criminal offences, and particularly serious criminal offences, should as a matter of principle have a subjective fault element (and with regard to rape, more than the subjective fault element of intending to engage in an act of sexual penetration). While there are exceptions to this principle in the criminal calendar, that is often in the circumstance of gross negligence, and not of itself a reason to further diminish the importance of subjective fault elements in the criminal law.

22. A purely objective fault element for rape (such as that contained in Options 2 and 3) may have unintended and undesirable consequences. The movement to objectivity shifts the focus of a trial from the subjective state of mind of the accused person to the behavior of the complainant judged by a "reasonable" person. That may well lead to cross-examination of complainants and submissions to the jury that focus on gendered and stereotypical concepts of the way that a complainant "should" behave and as to what a "reasonable person" would think. This was, in part, what led the United Kingdom Law Reform Commission in 1998 to note that:

> *[The objective standard] has been the source of endless, and continuing, difficulty in relation to provocation in homicide. Many cases in which provocation is raised occupy the same type of contested space as is occupied by rape namely intimate relations between the genders in extremis. There is no reason, therefore, to suppose that the same difficulties would not be encountered if the same concept were introduced in this context. Any proposal to reform the law should not lightly be made which carries the risk of making it more complex and unpredictable.*[1]

23. The problems with the law of provocation are well-documented and are what led Victoria to reform the law of homicide.

24. A purely objective standard also raises issues when non-representative juries are required to consider accused persons and complainants from different social-economic, social and cultural groups. This may be particularly so where there are aspects to the offender and/or complainant's life and/or relationship which are seen by the jury to be unreasonable, be that drug use, the manner of sexual activity, or the nature of the relationship. A jury may struggle to find that an accused person's belief in consent was reasonable when other aspects of that person's life or relationship are regarded as being unreasonable.

25. Option 3, and the creation of a lesser offence of sexual violation may well result in compromise verdicts, which is not in the interests of complainants or the wider community. It may be inconsistently applied by prosecutors in the resolution of matters. In light of the difference in maximum penalties, it creates a powerful incentive for accused persons who may have a defence at law to plead guilty to the lesser offence in order to minimise the prospects of a period of imprisonment.

Consent-Negativing Circumstances

26. With regard to the issue of consent-negativing circumstances, Liberty Victoria supports Option B. The jury should be directed that the existence of a consent-

[1] The Law Commission, Consent in Sex Offences: A report to the Home Office Sex Offences Review (1998).

negativing circumstance is relevant to the fault element of rape.

27. There is no reason why the Act should be silent on the significance of such circumstances (Option A), and the jury should receive appropriate direction about how such a circumstance is relevant to proof of the elements of rape, including the fault element.

28. However, that should not result in a rebuttable presumption being placed on an accused person (Option C), which would be a further diminution of the golden thread of the criminal law that the prosecution bears the onus of proving all elements beyond reasonable doubt. Depending on the standard of proof, it may also give rise to a situation where a jury has a reasonable doubt about whether an accused person knew that the complainant was not consenting, but because the accused did not rebut the presumption on balance, he or she is found guilty. That leads to the real potential for injustice.

Part 12: Multiple Offences Charge

29. Liberty Victoria has serious reservations about the creation of a Multiple Offences Charge (MOC). Liberty Victoria joins with the CBA and submits that the need has not been demonstrated for such a change to the legal landscape. Persons who are found guilty of individual offences, where the evidence is that the given offence is one of many incidents against the victim over a period of time, are already sentenced with their offending placed in its proper context.

30. The recent reforms to the law of uncharged acts and tendency and coincidence evidence, which will be further impacted by the proposed reforms to the *Jury Directions Act* 2013 (which if enacted would not require uncharged acts to be proven beyond reasonable doubt), further permit juries to consider criminal offending in its broader context. Further, judges are entitled to, and do, sentence offenders based on the overall context of their criminality.

31. However, accused persons are entitled to specificity when it comes to charges that carry the potential significant terms of imprisonment. Liberty Victoria submits that

the present offence of persistent sexual abuse of child under the age of 16, as provided by s 47A of the Crimes Act 1958, strikes an appropriate right balance in requiring specificity whilst also placing offending in its broader context..

32. The creation of an MOC is likely to add serious complexity in the charging of juries.

33. With respect, the Consultation Paper has not properly considered how MOCs will interact with tendency and coincidence evidence and uncharged acts. It will add another lawyer of complexity to an already complex legal landscape and will need to be tested in the Courts, which will create the additional potential for judicial error and re-trials.

34. Further, the comparison made in the discussion paper with *Giretti* counts for the offence of trafficking is apt to mislead. There has been significant jurisprudence with regard to *Giretti* counts over the last few years. For example, in both *Mustica v The Queen* (2011) 31 VR 367 and *Finn v The Queen* [2011] VSCA 273, the Court of Appeal held that where the Crown elect to charge an offence as a continuing offence, the mens rea of the offence (that the accused intended to conduct a "business" of trafficking in a given quantity of drugs) must exist at the outset of the offending and throughout the actus reus of the offence.

35. Does that mean the same issue will apply to MOCs? Will an offender have to be demonstrated to have intended to engage in a course of conduct of offending against a complainant from the outset of his offending? If so, that may be difficult to prove to the criminal standard. If not, then an important safeguard counterbalancing the duplicity inherent in such an indictment has been removed.

36. It is notable that under the proposed reform a MOC must be charged for each "category" of sexual offence. Accordingly, in trials involving allegations of wide-ranging conduct over a long period of time, there may be several different MOCs, each ranging over several years, or multiple MOCs, which then are themselves split into multiple further MOCs based on the different age of the victim during different periods of time. For example in an indictment there may be one MOC alleging vaginal

penetration, one alleging digital penetration, one alleging oral penetration, one alleging anal penetration, and one alleging indecent acts, each for when a complainant was under 16. There may then be five more MOCs for when the complainant was over 16.

37. It then appears that, under the recommended reform, a jury would not have to be unanimous about which individual episodes constituted the course of conduct for a given MOC offence. That creates a real potential for compromise and injustice. As will be discussed below under the heading of "Part 13: Simplifying Sexual Offence Trials", one of the clearest advantages of individual counts is that they reveal compromise and/or inconsistent verdicts. Where there is inconsistency or irrationality in jury decision-making it is of the utmost importance that be made transparent so that injustices can be remedied. The price of conflating multiple events under a single count, and then not requiring a jury to be unanimous about which events occurred under a given MOC, is that it will invariably result in an obfuscation of jury decision-making. That will inevitably conceal injustice in some cases.

38. Simply put, the case has not been made as to why such a foundational legal reform, with such potentially deleterious consequences, is justified.

Part 13: Simplifying Sexual Offence Trials

39. Liberty Victoria joins with the CBA in being strongly opposed to the charging of multiple offences in the one charge. That will cause miscarriages of justice.

40. The discussion paper (at p181) notes the judgment of *CJJ v The Queen* [2012] VSCA 196 ("*CJJ*"). In that case the alleged offender was alleged to have committed five offences. The Court of Appeal noted at [5]:

> The complainant gave evidence that the applicant then said that if she didn't have sex with him, he would get a knife from the kitchen and cut her throat. The applicant and the complainant then had a cup of tea or coffee in the lounge room. In the lounge room, the applicant picked up a fork and held it to the

complainant's neck in a threatening manner. The complainant and the applicant then returned to the bedroom and undressed. The complainant said that the applicant got on top of her and penetrated her vagina with his penis (count 1), that he then penetrated her vagina with his tongue (count 2), that he then moved behind the complainant and penetrated her vagina with his penis (count 3), that he attempted to penetrate her anus with a small vibrator (count 4) and then penetrated her vagina with his penis while she was on her back (count 5).

41. The discussion paper claims that one of the advantages of the proposed reform is that it in the case of *CJJ* it would have allowed Counts 1, 2 and 3, and possibly 5, to be joined in the one charge (page 181).

42. Under the proposed reform, the jury would then only need to be satisfied in relation to <u>one incident</u> within the alleged offence in order to find the alleged offender guilty. The jury would not have be unanimous as to that one incident, provided each juror was satisfied beyond reasonable doubt that one of the multiple incidents occurred. The jury would not disclose to the judge the process of reasoning to guilt, and it would be for the sentencing judge alone to determine the factual basis of the finding of guilt (p 183).

43. With respect, that recommendation and analysis completely misses the injustice that the Court of Appeal, and the Crown, agreed occurred in *CJJ*.

44. In *CJJ*, the Crown <u>conceded</u> that the jury verdicts were inconsistent. That is a high bar. As noted by the Court of Appeal at [10], pursuant to *MacKenzie v R* (1996) 190 CLR 348, 368 (Gaudron, Gummow and Kirby JJ), that requires that the different verdicts 'represent ... an affront to logic and common sense which is unacceptable and strongly suggest a compromise of the jury's duty'.

45. After a trial in the County Court, *CJJ* was found guilty on one count of rape (Count 3) and was acquitted on two further counts of rape (Counts 1 and 2) and a count of attempted rape (Count 4). At the conclusion of the Crown case, the jury was directed to return a verdict of not guilty on another count of rape (Count 5).

46. The problem with those verdicts was that there was no probative reason for the jury, based on the evidence of the complainant, who alleged she had been threatened from the outset, to find that there was a reasonable doubt as to guilt in relation to Counts 1 and 2 but not Count 3. As the Court of Appeal noted at [9] "The offences were part of a single episode. The Crown case was that all the offences occurred after the applicant threatened the complainant and that the complainant only submitted because she was in fear."

47. Accordingly, the jury verdict demonstrated compromise or irrationality.

48. However, under the proposed reform in the Consultation Paper, the transparency in jury decision making that was able to be remedied in *CJJ*, and which resulted in the acquittal of the accused person after a significant time spent in prison, is swept away.

49. Had Counts 1, 2 and 3 been charged as "multiple offences in the one charge", as recommended in the discussion paper, the jury in *CJJ* would have returned a guilty verdict to the single charge, and *CJJ* would have fallen to be sentenced for all 3 acts, unless the judge was somehow persuaded that the jury was not satisfied that the acts comprising Count 1 and 2 were made out. That is an impossible task in practice when there is no transparency in jury decision-making. Realistically, the sentencing judge would have sentenced *CJJ* on the basis that the jury were satisfied that the acts comprising Count 1, 2 and 3, but charged as a multiple offences in the one charge, were all made out.

50. There would then be no capacity to appeal on the basis of inconsistent or unreasonable verdicts, because there is would be not transparency in jury decision-making.

51. *CJJ*, while only one example, demonstrates the broader danger of the proposed reform. It is not in the interests of accused persons, complainants, or the wider community to have jury decision-making obfuscated.

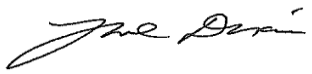
Conclusion

52. Thank you for the opportunity to make submissions on the Review of Sexual Offences. It is a wide-ranging review, and has the potential to have a long-lasting impact on criminal justice in the State of Victoria. However, Liberty Victoria submits that care needs to be taken to ensure that the proposals for reform, no matter how well-intentioned, do not increase the risk of injustice. In that context, Liberty Victoria would advocate a very cautious and selective evolution of the criminal law, especially until the impact of recent High Court of Australia authority (such as *Getachew*), Court of Appeal authority (such as *Reeves v The Queen* [2013] VSCA 31 on tendency evidence) and legislative reform (such as the *Jury Directions Act* 2013 and the further proposed amendments to that Act) begin to impact upon trial and appellate practice and an assessment can be made as to the rate of judicial and jury error and re-trials.

53. The past decades of reform to the law of sexual offences have demonstrated that adding ever greater complexity to an already very difficult jurisdiction can result in great injustice to accused persons, complainants, and less protection to the wider community through adding to the potential for judicial error and miscarriages of justice.

54. Liberty Victoria has a particular interest in the development of restorative justice measures that would improve access to just outcomes for complainants, offenders, and the wider community. To that end, we would value being consulted with regard to any proposals for law reform or with regard to any pilot project in that field.

55. Please contact the President of Liberty Victoria, Jane Dixon SC or the Vice-President of Liberty Victoria, Michael Stanton if we can provide any further information or assistance.



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