

## Executive Summary

The *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (the Act) implements the first wave of legislative reforms coming out of the Victorian Law Reform Commission's 'Improving the Response of the Justice System to Sexual Offences' report. The first batch of reforms, concerning jury directions and the impact of legislative reforms where there is uncertainty about the date of an offence, commenced on 1 January 2023. The remaining reforms commence on 30 July 2023. This document provides an overview of the most significant of those remaining reforms. They can be divided into 6 topics:

- Consent reforms
- Image based sexual offences
- Confidential Communications
- Grounds rules hearings
- Cross-examination in committal hearings
- Transfer of summary offences

The consent reforms introduce the Government's promised 'affirmative consent' laws, and involve a rewrite of the consent, deemed non-consent and reasonable belief in consent provisions. Judicial officers will need to consider whether any of the new, or newly expanded, non-consent circumstances apply in their particular cases. Potentially the most significant reform in this topic is the replacement in *Crimes Act 1958* s 36A of the requirement to consider any steps the accused took to ascertain consent, with a statutory rule that a belief in consent is not reasonable unless, proximate to the relevant act, the accused said or did something to find out whether the other person consented.

The image based sexual offence reforms move the production, distributing and threatening to distribute intimate images offences from the *Summary Offences Act 1966* to the *Crimes Act 1958*. The maximum penalty of these three offences is increased to 3 years' imprisonment, and the offences are made indictable. The Act introduces tailored provisions on consent to produce or distribute images, and a process for the court to order that material containing intimate images be destroyed, even if the accused is acquitted.

Confidential communications reforms extend the confidential communications regime to cover health information concerning sexual offences, as well as introducing a prescriptive regime for notifying the relevant complainant, and giving them a right to be heard when deciding whether to grant leave.

Changes to ground rules hearings ensure that courts will hold ground rules hearings in all sexual offence cases where the complainant will give evidence, so as to minimise improper questioning and re-traumatisation.

Cross-examination in committal hearings reforms widen the class of witnesses for whom a magistrate must consider the additional matters listed in *Criminal Procedure Act 2009* (CPA 2009) s 124(5), and require the Court to give reasons when granting leave to cross-examine.

Finally, the transfer of summary offence provisions in the CPA 2009 are tidied up to resolve an anomaly which could see related summary offences detached from their associated indictable offences, when the Supreme Court exercises its power to control whether indictable matters are heard in the County Court or the Supreme Court.

As with any criminal law reform, careful attention to the relevant transitional provisions is essential.

The consent reforms only apply to conduct committed from 30 July 2023 onwards. No transitional provisions are specified for the image based sexual offence provisions, but, as new offences, the conventional position is that conduct up to 30 July 2023 is governed by the *Summary Offences Act 1966* provisions, while the *Crimes Act 1958* provisions apply from 30 July onwards.

The transitional provisions for the confidential communication reforms are convoluted, and require careful attention. The provisions create a starting proposition that the reforms apply to all proceedings, regardless of when the proceeding commenced, but then create two significant exceptions. First, the expansion of the regime to protected health information is nullified for proceedings commenced before 30 July 2023 by a provision that prevents any information in existing proceedings from being protected health information. Second, the provisions as in force before 30 July continue to apply to any ongoing applications for leave under s 32C, and evidence to which those ongoing applications relates. For this purpose, an application is ongoing if notice was given in accordance with s 32C(2) before 30 July, and the application had not been determined.

Changes to cross-examination in committal hearings apply from the commencement date, unless a committal mention hearing or a committal hearing has already commenced. Ground rules hearings changes apply to all trials commencing from 30 July 2023 onwards. Finally, the transfer of summary offence provisions apply immediately to all trials, regardless of when the proceeding commenced, or when the Supreme Court exercised its case transfer powers.

In the remainder of the document, more detailed information is provided on these 6 groups of reforms.

## Consent reforms

Part 2 of the Act makes a series of amendments to the consent and reasonable belief in consent provisions of the *Crimes Act 1958*.

First, *Crimes Act 1958* s 36 is replaced with new ss 36 and 36AA.

Section 36 will contain the definition of consent, which is changed from “free agreement” to “free and voluntary agreement”. In addition, subsections (2) and (3) contain some conditions in which “a person does not consent to an act just because...”. These “just because” conditions are equivalent to *Jury Directions Act 2015* ss 47E (absence of resistance) and 47F (consent to other sexual activities at other times or with other people).

Section 36AA(1) contains the deemed non-consent circumstances that were previously in s 36(2). These circumstances have been reordered and expanded. The new or significantly modified circumstances are:

- Recognition that consent vitiated due to force, harm or fear may arise from conduct that is not contemporaneous with the sexual act, and may be either a single incident or part of a pattern. Further, the new section contains an extensive example of what is meant by ‘harm’, which includes economic, financial, reputational and psychological harms, as well as harms to family, cultural and community relationships, harm to the person’s employment and sexual harassment (s 36AA(1)(b))
- A new circumstance of vitiated consent due to coercion or intimidation which is separate from the circumstance of vitiated consent due to force, harm or fear (s 36AA(1)(c))
- A new circumstance of vitiated consent due to the complainant’s will being overborne by abuse of a relationship of authority or trust (s 36AA(1)(e))

- A new note about a person being so affected by drugs or alcohol as to be incapable of withdrawing consent on when that circumstance might apply (s 36AA(1)(h))
- A new circumstance that a false or misleading representation that the person will pay for commercial sexual services is deemed non-consent, reversing *R v Linekar* [1995] 3 All ER 69. This false or misleading representation may be by words, conduct or omissions and may be explicit or implicit (s 36AA(1)(m), (2))
- A new circumstance to criminalise ‘stealthing’, where consent was contingent on an agreement that the other person use a condom and the other person intentionally removes, tampers with, or does not use, the condom, confirming the result reached in *DPP v Yeong* [2022] VSCA 179 (s 36AA(1)(o)).

Second, the Act adds an additional guiding principle in *Crimes Act 1958* s 37B(ab) –

to promote the principle that consent to an act is not to be assumed – that consent involves ongoing and mutual communication and decision-making between each person involved (that is, each person should seek the consent of each other person in a way and at a time that makes it clear whether they consent)

Third, the Act amends the provisions on reasonable belief in consent. Previously *Crimes Act 1958* s 36A stated:

- (1) Whether or not a person reasonably believes that another person is consenting to an act depends on the circumstances.
- (2) Without limiting subsection (1), the circumstances include any steps that the person has taken to find out whether the other person consents or, in the case of an offence against section 42(1), would consent to the act.

From 30 July 2023, s 36A will state:

- (1) Whether or not a person (A) reasonably believes that another person (B) is consenting to an act depends on the circumstances.

**Note**

See section 36B for the effect of intoxication on the standard to be applied in determining whether a person has a reasonable belief.

- (2) A's belief that B consents to an act is not reasonable if, within a reasonable time before or at the time the act takes place, A does not say or do anything to find out whether B consents to the act.
- (3) Subsection (2) does not apply if—
  - (a) A has a cognitive impairment or mental illness (other than the effects of intoxication that is self-induced within the meaning of section 36B); and
  - (b) that cognitive impairment or mental illness is a substantial cause of A not saying or doing anything to find out whether B consents to the act.
- (4) A bears the burden of proving on the balance of probabilities the matters referred to in subsection (3).

This change implements the government's commitment to legislate for affirmative consent. There are two parts to the change. First, whereas previously the question was whether the accused has taken any steps to find out whether the other person was consenting, the new test looks at whether the accused said or did anything to find out whether the other person was consenting. Second, the effect of this conduct is changed. Previously, it was a matter a jury was required to consider in deciding whether a belief is reasonable. Following the reforms, a belief cannot be reasonable unless the accused said or did something to find out whether the other person consented. Subsection (3) provides an exception to this legislative prerequisite where the accused has a cognitive impairment or mental illness which a substantial cause of the accused not saying or doing anything.

An equivalent change is made in *Crimes Act 1958 s 42*, which creates the offence of assault with intent to commit a sexual offence, following the removal of any reference to s 42 from s 36A.

## Image based sexual offences

Part 3 of the Act moves several of the intimate image offences from the *Summary Offences Act 1966* to the *Crimes Act 1958*. This responds to Recommendation 52 of the VLRC report.

The Act introduces three offences – producing an intimate image; distributing an intimate image; threatening to distribute an intimate image, each with a maximum penalty of 3 years imprisonment. It also introduces necessary definitions, and a process for disposing of intimate images even if the accused is not found guilty.

The production and distribution offences are in similar terms and contain four elements: production / distribution of an image; the image is an intimate image; the accused knows the image is an intimate image; production / distribution is contrary to community standards of acceptable conduct.

The production and distribution offences also contain exceptions. The first is common to both offences. The accused does not commit an offence if:

- the person depicted is not a child; and
- at the time of the production/distribution, the person consented to:
  - the accused producing/distributing the image; and
  - how the intimate image was produced/distributed.

The distribution offence contains an additional exception, which applies where:

- the person depicted is not a child
- the intimate image has previously been distributed in a place where members of the public had access
- the person depicted consented, or a reasonable person would believe they consented, to that previous distribution
- in all the circumstances a reasonable person would believe the person depicted consented to the distribution to which the charge relates.

This second exception replaces the provisions in the former *Summary Offences Act 1966 s 41DA(3)(b)* regarding implied consent or where the person could reasonably be considered to have expressly or impliedly consented.

For the purpose of the exceptions, the intimate image offences have their own consent and deemed non-consent provisions (*Crimes Act 1958* ss 53P and 53Q), rather than applying the sexual offence provisions in *Crimes Act 1958* ss 36 and 36AA. While there are similarities (including the requirement that the person must have said or done something to indicate consent to the production or distribution), the intimate image consent provisions are narrower than the sexual act consent provisions. For example, the intimate image consent provisions do not address the situation where the person is unlawfully detained, incapable of understanding the sexual nature of the images, mistaken about the sexual nature of the images, mistake about the identity of another person or mistakenly believes the images are for medical or hygienic purposes. Such matters may, instead, be relevant to whether production or distribution was contrary to community standards, which is governed by the new *Crimes Act 1958* s 53U, which is equivalent to the definition in *Summary Offences Act 1966* s 40.

Part 3 also introduces a process for the DPP or a police officer to apply to either the trial court or the Magistrates' Court for the destruction of seized material, even if the accused is not convicted. The primary test for ordering destruction is that the material contains intimate images and return of the material may result in the commission of an intimate image offence. There is a second test where electronic material is encrypted, and there are reasonable grounds to believe the electronic material contains an intimate image.

To protect the interests of young children, a person who was under 16 at the time of the alleged offence cannot be charged with an intimate image offence unless the DPP has given consent to the prosecution.

The drafting of exceptions as discrete matters is consistent with the design of other sexual offences introduced by the *Crimes Amendment (Sexual Offences) Act 2016*, which strictly separated elements, exceptions and defences. In accordance with conventional principle, once the accused meets the evidentiary onus for raising an exception, the onus will be on the prosecution to disprove the exception beyond reasonable doubt.

Despite the addition of intimate image offences to the definition of sexual offences in *CPA 2009* s 4, an amendment to *Sentencing Act 1991* s 5AA excludes intimate image offences from the operation of that provision. Section 5AA is the provision which prohibits a court from considering an offender's good character or lack of previous convictions if the court is satisfied that good character or lack of previous convictions was of assistance to the offender in the commission of the offence.

## Confidential communications

Recommendation 87 of the VLRC report called for the expansion of the confidential communication provisions to improve the process of giving notice to the complainant and extend the scheme to cover health information more broadly. This is implemented through Part 6 of the Act.

A new *Evidence (Miscellaneous Provisions) Act 1958* s 32BA creates a wide definition of protected health information, which is health information (within the meaning of the *Health Records Act 2001*) about a person "against whom – (i) that sexual offence is alleged to have been committed; or (ii) any other sexual offence has been committed or is alleged to have been committed", provided the person who recorded or collected the information did so in a professional information. Section 32E(b) continues to ensure that the confidential communications provisions do not prevent the production or adducing of evidence of information acquired by a registered medical practitioner (including communications made during the examination) of the protected person in relation to the commission or alleged commission of the offence.

Amendments to s 32C make clear that ‘protected health information’ is only subject to leave requirements in criminal proceedings. Next, the Act introduces separate provisions for notice and third party submissions for civil and criminal proceedings. These are similar to the existing s 32C(2)-(5), with the following differences.

1. In criminal proceedings, the obligation to notify the protected confider (now termed the protected person) is shifted from the informant to the ‘prosecuting party’ (s 32CD(1)).
2. The Act introduces detailed provisions on the information that must be given to the protected person, including their right to make submissions or a confidential statement and the availability of legal advice (s 32CD(3)-(4)).
3. A power for the court to waive the obligation to notify the protected person if they cannot be located, have consented to not being notified or if they have already been notified about the same information in the same proceeding (s 32CD(5)).
4. The protected person is given an automatic right to make submissions (rather than being dependent on receiving leave), including a right to give a confidential statement which must not be shared with the parties unless the court considers it is in the interests of justice to do so (s 32CE).

A further amendment to s 32D requires that the court must not grant leave in a criminal proceeding unless it is satisfied that either:

- the protected person is aware of the application and has had a reasonable opportunity to consider obtaining legal advice;
- the prosecuting party has taken all reasonable steps to locate the protected person, without success
- the protected person has consented in writing to not being notified about the application;
- the protected person has already been given notice in respect of the same information in the same proceeding (s 32D(1A)).

## Cross-examination in committal hearings reforms

Currently, CPA 2009 s 124(5) prescribes additional matters the Magistrates’ Court must consider before permitting cross-examination of a witness under 18 during a committal hearing.

Section 62 of the Act amends CPA 2009 s 124(5) and introduces a new (5A) to widen the class of witnesses for which the Court must have regard to those additional considerations to also include a person with a cognitive impairment and complainants in relation to charges for sexual offences or offences where the conduct constituting the offence consists of family violence within the meaning of the *Family Violence Protection Act 2008*.

Section 63 introduces a new CPA 2009 s 124A which requires the Court to give reasons for granting leave to cross-examine a witness in a committal proceeding. The reasons must include reference to the mandatory considerations from CPA 2009 ss 124(4) and (5). The existing requirement in CPA 2009 s 124(6) to identify the issues on which the witness may be cross-examined is transferred to the new CPA 2009 s 124A.

## Ground rules hearings

Division 4 of Part 5 of the Act makes several changes to the ground rules hearings provisions in the *CPA 2009*.

First, through an amendment to *CPA 2009* s 389A, the ground rules hearing provisions apply to all complainants in relation to a charge for a sexual offence. Previously, the provisions only applied to witnesses who were under 18 or who had a cognitive impairment. This is consistent with the further change to s 398B(3), which requires a court to hold a ground rules hearing whenever the complainant in relation to a charge for a sexual offence will be a witness.

Second, a new *CPA 2009* s 389AB explains what a ground rules hearing is. That is, it is a hearing which considers the communication, support and other needs of witnesses and decide how the proceeding will be conducted to fairly and effectively meet those needs. Previously, the purpose of ground rules hearings was left implicit in Part 8.2A of the *CPA 2009*.

These reforms are designed to implement Recommendation 84 of the VLRC Report, which called for amendments with the purpose of improving the quality of how complainants are questioned, reducing the incidence of improper or irrelevant questions, reducing the risk of re-traumatisation, and considering the needs and preferences of complainants.

## Transfer of summary offences

Division 7 of Part 5 of the Act makes some machinery changes to improve the consistency of the *CPA 2009* in relation to related summary offences.

*CPA 2009* s 145 requires the Magistrates' Court, on committal for trial, to transfer any summary offences related to the indictable offences to the trial court. *CPA 2009* s 167 then allowed the Supreme Court to intervene and direct that an indictment be transferred either to the Supreme Court, or the County Court. However, there was previously no corresponding power to transfer related summary offences so they would continue accompanying the indictment. The new *CPA 2009* s 241A corrects that oversight. When the Supreme Court makes an order under *CPA 2009* s 167, it may also make an order under *CPA 2009* s 241A to transfer the related summary offences to the same court which will hear the offences in the indictment.