

## CHAPTER 7

### SEXUAL COERCION AND EXPLOITATION

#### *The structure of offences of sexual coercion and exploitation*

**7.1** The Penal Code contains offences of both sexual coercion, involving sexual interaction without consent, and sexual exploitation, in which advantage is taken of the vulnerabilities of children or disabled persons. In addition, incest is an offence under s 95 regardless of whether there was coercion or exploitation.

**7.2** There are two offences of sexual coercion:

- an offence of 'sexual intercourse without consent' involving sexual penetration of another person's body, which is subject to very severe penalties. The offence is punishable by up to life imprisonment: ss 90 - 91; and
- a lesser offence of committing an 'act of indecency without consent', which applies to some other forms of sexual interaction. carrying lower penalties.

**7.3** Prior to 2006, the Penal Code used the old common law terminology of 'rape' and 'indecent assault'. The offence of rape historically was restricted to the penetration of a woman's vulva or vagina by a penis, so that it could only be committed by a male offender upon a female victim. The Penal Code (Amendment) Act 2006 retained the distinction between two levels of offence but abolished the old terminology and redrew the boundaries of the two offences through an expanded definition of sexual intercourse.

**7.4** Analogous to offences of sexual coercion are offences relating to sexual exploitation of children or of persons with disabilities who are presumed to be unable to give meaningful consent or whose consent is otherwise viewed as questionable. See the offences under the Penal Code:

- sexual intercourse with a child under 18 who is under care or protection, s 96;
- sexual intercourse with a child under the age of 13, s 97(1);
- sexual intercourse with a child under 15 but of or over the age of 13 years old, s 97(b);
- sexual intercourse with a child under 15 in circumstances of aggravation, including a victim with serious physical or intellectual disability, s 97A;
- act of indecency with a young person under the age of 15, s 98A.

#### *'Sexual intercourse' and 'indecent act'*

**7.5** 'Sexual intercourse' is defined in s 89A to cover various forms of sexual penetration:

**“sexual intercourse”** means any of the following:

- (a) the penetration, to any extent, of the genitalia or anus of a person by any part of the body of another person, except if that penetration is carried out for a lawful medical purpose or is otherwise authorised by law; or
- (b) the penetration, to any extent, of the genitalia or anus of a person by an object manipulated by another person, except if that penetration is carried out for a lawful medical purpose or is otherwise authorised by law; or
- (c) the introduction of any part of the penis of a person into the mouth of another person; or
- (d) the licking, sucking or kissing, to any extent of the vulva, vagina, penis, or anus of a person; or
- (e) the continuation of sexual intercourse as defined in paragraph (a), (b), (c), or (d); or
- (f) the causing, or permitting of a person to perform any of the activities defined in paragraph (a), (b), (c) or (d) upon the body of the person who caused or permitted the activity.

Defined in this way, ‘sexual intercourse’ in Vanuatu includes what are sometimes called ‘anal rape’, ‘oral rape’, ‘digital rape’ and ‘rape by object’. The offence of sexual intercourse without consent can be committed not only by a male person against a female but also by a male person against another male, and in some of its forms by a female person against a male or against another female.

**7.6** Moreover, s 89A(f) enables the offence to be committed not only by someone who personally engages in a prohibited activity but also someone who coerces another to perform a prohibited activity upon himself or herself.

**7.7** Similarly, the offence of ‘indecent act without consent’ need not involve an assault upon the body of another person, although an assault will commonly occur. Section 98 provides:

‘A person must not commit an act of indecency on, or in the presence of, another person ...’

In addition to an assault, s 98 could apply to coercing the witnessing of an act of indecency or, arguably, to coercing the performance of such an act. This broadens the offence in comparison to the old offence of indecent assault. However, in another respect, the offence is narrower than the old offence of indecent assault. The wide scope of the s 90 offence relating to sexual intercourse takes in some forms of sexual penetration that traditionally would have constituted indecent assault rather than rape.

**7.8** The term ‘act of indecency’ is not defined in the Vanuatu Code. However, there is a statutory definition in the Solomon Islands Penal Code s 136B(1):

In this Part, “**indecent act**” means an act of a sexual nature..., other than sexual intercourse, which a reasonable person would consider to be contrary to community standards of decency.

This definition echoes the common law in insisting that indecent conduct be sexual in character and that the characterisation of the act is a matter of community standards.

**7.9** At common law ‘indecent’ does not have a precise or fixed meaning. Rather, its meaning depends on prevailing community standards. In *Drago v R* (1992) 8 WAR 488 (WCCA), it was said that indecency simply means conduct that is ‘unbecoming or offensive to common propriety’. However, in *R v McBride* [2008] QCA 412, the Queensland Court of Appeal called for greater specificity and endorsed the view that indecency requires an element of ‘moral turpitude’, acting in a ‘base or shameful manner’, or even ‘lewdness’. Otherwise, it was said, the scope of the offence would be too wide. In *R v Chase* [1987] 2 SCR 293, it was said that the Canadian offence of sexual assault (which is equivalent to indecent assault) is an assault committed in circumstances that violate the sexual integrity of the victim and there is no requirement for any particular part of the body to be involved. On this approach, the ‘indecent’ character of conduct could conceivably come from the accompanying words or surrounding circumstances rather than from the character of the physical conduct itself.

**7.10** The indecent character of conduct has therefore traditionally been determined objectively, by reference to how the recipient might be expected to characterise it rather than how the assailant might do so. Generally, fault elements for offences of indecency do not encompass awareness of normative standards. In *Atera v Republic* [2006] KICA 11 at [5], it was said:

To establish an indecent assault, the prosecution must prove beyond reasonable doubt that the accused intended to commit an indecent assault, that is an intentional assault accompanied by circumstances of indecency – *R v Court* [1989] AC 28.

Nor does an offence of indecency necessarily require a sexual motivation or purpose: see *R v Court* [1989] AC 28. Nevertheless, it has also been said that the purpose accompanying the act can affect how it is ultimately characterised. An outwardly innocent act may be indecent because of its purpose; conversely, an innocent purpose may legitimise conduct that would otherwise be questionable. Motivation or purpose is, however, only one variable and it is not determinative. Conduct indecent on its face remains so whatever the purpose which accompanied it.

### ***Lack of consent***

**7.11** The offences of sexual coercion require either lack of consent to the interaction or an induced expression of consent that is treated as invalid. The offences of both sexual intercourse without consent under 90 and indecent act without consent under s 98 use the same formula respecting lack of consent. The offence is committed when the conduct occurs:

- (a) without that person's consent; or
- (b) with that person's consent if the consent is obtained:
  - (i) by force; or
  - (ii) by means of threats of intimidation of any kind; or
  - (iii) by fear of bodily harm; or
  - (iv) by means of false representations as to the nature of the act; or
  - (v) in the case of a married person, by impersonating that person's husband or wife; or
  - (vi) by the effects of alcohol or drugs; or
  - (vii) because of the physical or mental incapacity of that person.

In effect, an expression of consent induced by one of the proscribed means is treated as no consent at all.

**7.12** Physical submission by itself is clearly not consent: see the express statements of this principle in Samoa Crimes Act s 51(1)(a); Solomon Islands Penal Code s 136A(3); *Case Stated by DPP (No 1 of 1993)* (1993) 66 A Crim R 259 at 265, 278, 282 (SACCA). Consent is a mental act. However, difficult questions are yet to be resolved about the relationship between consent and states of mind such as acquiescence and tolerance.

**7.13** Consent may be implied or tacit as well as expressed: see *Horan v Ferguson* [1994] QCA 375; [1995] 2 Qd R 490. The boundaries of implied consent may be problematic in cases where physical advances are made with the intention or hope of persuading the other person to agree to sexual interaction. Nevertheless, there is no special licence to engage in acts of persuasion, even as between regular sexual partners: see *Case Stated by DPP (No 1 of 1993)* (1993) 66 A Crim R 259 at 266-267, 282 (SACCA).

**7.14** It is generally sufficient for liability that lack of consent occurs at any time in an interaction. Even when consent is given to sexual interaction, it may still be withdrawn. If sexual interaction continues after consent has been revoked, there is no consent and an offence is committed: SI s 138B(2)(k). Moreover, supervening unconsciousness causes an inability to consent: *Saibu v R* (1993) 10 WAR 279. Nevertheless, it has been suggested that an initial denial of consent may be vitiated by a subsequent change of mind. In *R v Redgard* [1956] St R Qd 1, it was said that a preliminary non-consensual act and a subsequent consensual act may be so

connected that they should be regarded as forming 'one transaction'. The grant of consent is then taken to characterise the whole transaction.

**7.15** Sections 90 and 98 use a traditional formula which has been rejected in some recent legislation in other jurisdictions. There are two major problems with the traditional formula. First, the wording may distort the reality of consent to sexual interaction. 'Consent' is a state of mind. Therefore, a person who is induced by force or threats to utter words or gestures of consent does not truly consent. Secondly, the list of proscribed means is very restricted. It includes neither the abuse of positions of authority or trust nor false representations other than those specified. A false representation 'as to the nature of the act' has traditionally been understood to be confined to a representation that the act was something other than a sexual act. For example, it could be a representation that a sexual act was a form of medical treatment: see, for example, *Tebounaba v R* [1999] SBCA 5.

**7.16** A different approach has been adopted in some recent legislation in other jurisdictions. 'Consent has been broadly defined to mean *'free and voluntary agreement'*: see, for example, Fiji Crimes Act s 206(1); Samoa Crimes Act s 49; Solomon Islands Penal Code s 138A(1); Queensland Criminal Code s 348(1). The test is mental not physical. For greater certainty, the new model includes list of scenarios which are *not* included in the concept of consent. For example, the Solomon Islands Penal Code s 138A(2) specifies for greater certainty a number of scenarios which are *not* included in the concept of consent:

Circumstances in which a person does not consent to an act include circumstances where:

- (a) the person submits because of force, fear of force, or fear of harm of any type, to himself or herself or another person; or
- (b) the person submits because he or she is unlawfully detained; or
- (c) the person is asleep, unconscious or so affected by alcohol or another drug as to be incapable of freely agreeing; or
- (d) the person is incapable of understanding the nature of the act; or
- (e) the person is mistaken about the nature of the act or the identity of the other person; or
- (f) the person mistakenly believes that the act is for medical or hygienic purposes; or
- (g) the person mistakenly believes that the act will be beneficial to his or her physical, psychological, social or spiritual wellbeing; or
- (h) the person submits out of respect or fear due to another person's position of authority, trust or responsibility; or
- (i) the person submits because of threats to shame, degrade or humiliate

- the person or another person; or
- (j) the person submits because of a false representation as to the nature or purpose of the act; or
- (k) the person withdraws consent during the act after initially consenting to it.

These scenarios fall into three groups:

- Fear on the part of a person expressing consent or intimidation by an offender: (a); (b); (h); (i).
- Incapacity of the person to give meaningful consent: (c); (d).
- Mistake by a person expressing consent or misrepresentation by an offender: (e); (f); (g); (j).

Nevertheless, these are only examples. They do not limit the generality of the test of 'free and voluntary agreement' which has found appeal in many jurisdictions.

**7.17** In *Public Prosecutor v Jack* [2013] VUSC 81, Spear J spoke of the concept of intent in the Vanuatu Code s 90 in terms similar to those in much modern legislation elsewhere:

Consent...in this offence means a true consent. That is, consent given voluntarily by someone who understands the nature and quality of the sexual act and who is able to make a rational and free decision about it.

It is perhaps debatable whether this approach fits with the structure of ss 90 and 98, because it would make s 90(b) and s 98(b) surplusage. The matter should be resolved by a statutory amendment.

### ***Fault elements***

**7.18** No fault elements are specified in ss 90 and 98. In principle, intention or recklessness respecting the conduct is required by virtue of the general provision in the Penal Code s 6. Admittedly, there may be cases in which physical contact alleged to be indecent was unintentional. But the conduct will be intentional in most cases of sexual contact and effectively in all cases of sexual penetration. It is difficult to conceive of cases where sexual intercourse would be other than intentional.

**7.19** When issues arise respecting the fault elements of offences of sexual coercion, it is usually because the defendant claims a belief that consent was present even though this belief was a mistake. An accused person might claim to have believed that there was consent even though there was not, or believed that an expression of consent

had not been obtained by force, threats, intimidation, fear, or any of the kinds of false representation specified in the Code. In such cases, resort could only be made to the defence of reasonable mistake of fact under the Penal Code s 12. To meet the conditions for this defence, there would have to be evidence that the defendant turned their mind to the issue of consent and formed a positive belief that there was consent and that it was not obtained in one of the proscribed ways. Furthermore, this belief would have to be judged objectively reasonable under the circumstances. See **4.37-4.43**.

### ***Offences of sexual exploitation***

**7.20** Lack of consent is not an element of a range of offences relating to sexual activity with children. The rationale for these offences is presumably that the victims are unable to give meaningful consent or that consent has been obtained through exploiting a vulnerability. However, lack of consent is not an element which the prosecution must prove. Indeed, the offences under ss 96 and 97 expressly provide that consent by the child is not a defence.

**7.21** Section 96 makes it an offence to have or to attempt sexual intercourse with a child under 18 who is not the person's spouse and is under care or protection, with penal liability of 10 years imprisonment. Care or protection is defined in a cumbersome way. It involves (a) a stepchild or foster child living with the person as a member of the person's family or (b) any other child living with the person as a member of the family and being under the person's care or protection. The offence does not appear to apply to a biological child, but intercourse with a child would constitute an offence of incest under s 95.

**7.22** Section 97 covers two offences:

- s 97(1) makes it an offence to have sexual intercourse with any child under the age of 13, with penal liability of 14 years' imprisonment;
- s 97(2) makes it an offence to have sexual intercourse with any child under the age of 15 but of or over the age of 13, with penal liability of 5 years' imprisonment.

Section 97(3) excludes not only a defence of consent but also a defence of belief that the child was over the age in question. The latter exclusion removes the defence of reasonable mistake of fact under s 12.

**7.23** Most jurisdictions with two offences for different age-groups exclude any defence of mistake about the age of a child in the younger group. Presumably this is because it is considered that a child under 13 would not look 15 or older, so that an

offence would be committed in any event: an offence under s 97(2) in the context of Vanuatu. Some other jurisdictions, however, do allow a defence of reasonable mistake with respect to the age of a child in the older group, in some instances with the burden of proof reversed. Vanuatu is unusual in making no allowance at all for mistakes about age, however reasonable. The impact of this might not be troubling when the offender is substantially older than the victim and should perhaps be aware of skating on thin ice. However, it might be considered harsh to exclude a defence of reasonable mistake even where the offender and the victim are close in age. Interestingly, the defence was not excluded when the s 98A offence of indecent act with a young person was introduced in 2006: see below, **7.25**.

**7.24** Section 97A makes it an offence to have sexual intercourse with a child under 15 in circumstances of aggravation, with penal liability increased to imprisonment for life. 'Circumstances of aggravation' are defined under s 97A(2) to mean circumstances in which:

- (a) at the time of, or immediately before or after, the commission of the offence, the alleged offender maliciously inflicts actual bodily harm on the alleged victim or any other person who is present or nearby; or
- (b) at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument; or
- (c) the alleged offender is in the company of another person or persons; or
- (d) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged victim has a serious physical disability; or
- (f) the alleged victim has a serious intellectual disability.

It is curious that disability is expressly mentioned only in the context of an age-related offence. Many jurisdictions make it an offence to have or attempt to have sexual intercourse with any intellectually impaired person. Vanuatu does at least make 'physical or mental incapacity' a factor that negates consent for the purposes of the s 90 offence of sexual intercourse without consent.

**7.25** Section 98A makes it an offence to commit an act of indecency on or in the presence of another person under the age of 15, with liability to imprisonment for 10 years. This parallels the s 98 offence of act of indecency without consent. Where the



other person is under 15, s 98A removes the requirement for lack of consent. On the scope of 'act of indecency': see the analysis of s 98 above, **7.8-7.10**. Unlike the s 97 offence of sexual intercourse with a child under 15, s 98A does not eliminate the defence of reasonable mistake of fact under the Code s 12.

### ***Alternative verdicts***

**7.26** Section 101E provides that the offences relating to indecent acts are alternative verdicts on charges of any of the offences relating to sexual intercourse. Thus, if the court on a charge of s 91, 96, 97, or 97A is not satisfied beyond reasonable doubt that sexual intercourse occurred, there can still be a conviction under s 98 or 98A if the elements of either of those offences are established.