# *Disputing Consent: The Role of Jury Directions in Victoria*

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***Abstract***

Judges' directions to juries in rape cases should perform an educative function by clarifying the law and establishing appropriate standards for sexual relations guided by sexual autonomy, communication and respect. Since the 1990s, rules governing jury directions have been substantially reformed in Victoria. While these reforms were designed to minimise outdated perceptions of rape and ensure consistency and clarity in their delivery, the complex nature of rape law has instead led to a set of convoluted and confusing jury directions. Not only has this placed unreasonable expectations on jurors to understand the meaning of consent and the fault element of this offence, but the high number of appeals and overturned convictions resulting from judicial misdirection indicates that the law is not achieving its primary goals. This article examines the jury directions on consent in Victoria and some of the key problems that have ensued. We argue that the confusion within the law has led to equally confusing jury directions, and this serves to compromise and undermine the purpose and achievements of rape law reform over the past two decades.

## Introduction

Consent, defined as the 'free agreement' to the sexual act, is a fundamental element of the offence of rape (*Crimes Act 1958* (Vic) s 36). In Victorian courts, in order to establish that a rape has occurred, the prosecution must prove beyond reasonable doubt that the accused intended to sexually penetrate the complainant without the complainant's consent, or while being aware that the complainant is not or might not be consenting, or while not giving any thought as to whether the complainant is or might not be consenting (*Crimes Act 1958* (Vic) s 38). However, due to persistent social and cultural preconceptions and the complexities surrounding the very definition of consent, proving the absence of consent to the required legal standard is extremely difficult (Finch and Munro 2005; Lonsway and Fitzgerald 1994; Taylor and Joudo 2005). This difficulty is further compounded by the myriad of obstacles rape victims face when coming into contact with the criminal justice system.[1]

In response to the disadvantages experienced by complainants in rape trials, the Victorian Law Reform Commission (VLRC) conducted several reviews of sexual offence legislation

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1 For example, difficulties in initially reporting the offence; difficulties experienced prior to and during the trial; and difficulties experienced post-trial in sentencing and appeals.

from the late 1980s until the mid-2000s (LRCV 1991; VLRC 2001, 2003, 2004).[2] These reviews identified the continuing failure of rape law in achieving convictions and balancing complainant and accused person's rights. In particular, the VLRC highlighted the ways in which the existing legislation and jury directions prioritised the accused person's belief that the victim consented, irrespective of the victim's experience or state of mind.

In their 2004 report, the VLRC supported legislative and procedural changes to improve just outcomes for complainants by proposing reforms that would substantially change the definition of consent, and offer a non-exhaustive list of the circumstances in which a person does not freely agree to a sexual act. This included amending the existing jury directions to reflect these changes, with the added intention of simplifying, clarifying and reducing the length of the directions. In submitting these recommendations, the VLRC noted that the jury directions on consent have the greatest potential to change legal approaches and outcomes in rape cases, given that consent is almost always the primary focus of fact finding in rape trials. In response, the Victorian Government enacted the *Crimes Amendment (Rape) Act 2007* (Vic), which revised the directions that judges must give jurors relating to consent, or the lack thereof, and the accused person's awareness of whether or not the complainant was not or might not be consenting (*Crimes Act 1958* (Vic) ss 37, 37AA, 37AAA).

The legislation was innovative in introducing a set of directions relating to the mental state or intentions of the accused, and how consent should be negotiated. In line with the VLRC recommendations, the changes were proposed as playing an educative role by 'clarifying the law and establishing standards of behaviour for sexual relations … based on principles of communication and respect' (VLRC 2003:328). While there is limited empirical research into the practical efficacy of these reforms,[3] drawing from recent case law and research into the broader area of sexual assault, this article examines the ways in which the amended legislation has been interpreted by the courts, and argues that such interpretation has produced limited consistency or clarity in the jury directions. We further argue that the complex, convoluted nature of the directions, combined with the shift in the definition of consent towards a communicative model, creates difficulties for jurors in comprehending the law, and this has also impacted on the ability of judges to identify what should be included in the directions. The complexities of the amended rape law are also reflected in the many court appeals, overturned convictions and re-trials ordered after the reforms, as well as the numerous amendments made to the application of the directions based on judicial interpretations. The most recent change, for example, responds to the Australian High Court's decision in *Getachew v The Queen* in March 2012, which replaces a previous Court of Appeal interpretation of the jury directions pertaining to an accused's belief and awareness of consent.

In examining some of the preliminary problems that have arisen in relation to jury directions in rape trials in Victoria, we argue that the complexities of the law and the subsequent complicated jury directions have implications that extend to reducing public and judicial confidence in the law (Farouque 2012), reducing reporting rates (Success Works Pty Ltd 2011), and ultimately forcing jurors to rely upon their preconceived ideas about rape and consent in making decisions. Furthermore, we argue that some of the decisions of the appeals courts (eg *Gordon v The Queen; Worsnop v The Queen*) send a message that men who rape women can continue to enjoy immunity from conviction in Victoria. Thus, the

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2 Please note the VLRC was known as the Law Reform Commission of Victoria (LRCV) until its re-development in 2001.

3 The Victorian Government has indicated that the Department of Justice will conduct a review of the operation of the jury directions (see Crawford 2011b). However, at the time of writing, no information on this proposed review is available.

directions appear to be achieving very little in the way of overcoming existing societal rape myths and the seemingly insurmountable obstacles that rape victims face in the criminal justice system.

In the sections below, we provide an overview of the key legislative and case law changes made to the Victorian jury directions to date.[4] We have chosen to focus our analysis on Victoria for three main reasons: first, the number of high profile, problematic appeal cases linked directly to these directions;[5] second, the public criticism of the directions by several renowned and experienced judges and justices (Neave 2012; Warren 2011; Weinberg 2011); and third, due to the formal nature of the directions in Victoria compared to other states and territories.[6] Despite this focus, the discussion draws upon cross-jurisdictional research and similar concerns that have emerged in the context of jury directions and rape laws across Australia. The analysis is also highly relevant to other Australian jurisdictions in light of the Australian Law Reform Commission's (ALRC) (2010:1174) recent recommendation that all states and territories implement jury directions on consent, mirroring the VLRC (2004) model.

## The jury directions

All Australian jurisdictions have legislation governing the offence of sexual assault,[7] also referred to as sexual intercourse without consent and rape.[8] While each jurisdiction differs slightly in governing these offences, a common component of all rape trials involves the judge providing a summary of the evidence and directing the jury 'in clear and comprehensible language' on the relevant rules of law (VLRC 2004:341). In Victoria, this requires the judge to summarise the evidence, detail the standard of proof, explain the elements of rape, and provide the relevant jury directions as set out in the *Crimes Act 1958* (Vic) ss 37, 37AA, 37AAA, 61, to assist the jury in establishing whether the prosecution proved beyond reasonable doubt that a rape occurred. Jury members are told that they must comply with the judge's directions about the law, but because it is their role to decide on the facts, they may accept or reject any comments the judge makes regarding the facts (VLRC 2004:341).

While jury directions are given at the conclusion of all criminal trials, outside the brief guidance on consent outlined in the *Criminal Code Act* (NT) s 192A,[9] Victoria is the only

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4 'To date' refers to the decisions of the Victorian Court of Appeal and the Australian High Court from 1 January 2007 to 30 April 2012.

5 See, for example, *Duwah v The Queen*; *Getachew v The Queen*; *Gordon v The Queen*; *Kormez v The Queen*; *LA v The Queen*; *Neal v The Queen*; *Roberts v The Queen*; *Sibanda v The Queen*; *Wignall v The Queen*; *Worsnop v The Queen*.

6 With the exception of the brief guidance offered in the *Criminal Code Act* (NT) s 192A in regards to explaining consent, Victoria is the only Australian jurisdiction that has legislated jury directions in rape cases.

7 For the purposes of this article, we will use the term 'rape' to refer to the crimes encompassed by the terms rape, sexual assault and sexual intercourse without consent.

8 *Criminal Code 1924* (Tas) s 2A, s 14A, s 185, s 127A; *Criminal Code Act* (NT) s 192; *Criminal Code Act 1899* (Qld) ss 347–352; *Criminal Code Compilation Act 1913* (WA) ss 319–331D; *Criminal Law (Consolidation) Act 1935* (SA) ss 46–61; *Crimes Act 1900* (ACT) ss 50–72; *Crimes Act 1900* (NSW) ss 61H–80AAA; *Crimes Act 1958* (Vic) ss 36–60AE.

9 This reads:

> In a relevant case the judge shall direct the jury that a person is not to be regarded as having consented to an act of sexual intercourse or to an act of gross indecency only because the person:
>
> (a) did not protest or physically resist;
>
> (b) did not sustain physical injury; or
>
> (c) had, on that or an earlier occasion, consented to:
>
> (i) sexual intercourse; or
>
> (ii) an act of gross indecency whether or not of the same type, with the accused.

Australian jurisdiction that has specified in legislation the directions judges must give to juries in relation to the complex offence of rape. Detailed guidance for judges relating to the directions are also located in the *Criminal Charge Book* (Vic), which is amended to comply with all relevant decisions made in Victoria's higher courts. All other jurisdictions either provide instructions in judicial guides,[10] most of which, barring South Australia, are publicly accessible, or judges are simply required to provide instructions based on the relevant case law (eg *Longman v The Queen*; *R v Murray*).

Judicial guides range from having very detailed instructions and being regularly updated (*Criminal Trial Courts Bench Book* (NSW); *District and Supreme Court Bench Book* (Qld)), to broader, non-specific instructions, for example, s 13.3.7 of the *Equality Before the Law Bench Book* (WA), which states that the judge should instruct the jury that 'they must try to avoid making stereotyped or false assumptions about the nature and impact of … sexual assault'.

Historically, jury directions were designed to protect the accused from unfair convictions (McSherry 1998). For example, prior to 1991, Victorian judges were obliged to give juries a 'corroboration warning' where there had been a long delay in the reporting of the rape (Wood 2007). Colloquially referred to as the *Longman* warning, judges were required to alert juries to the dangers of convicting accused persons on the complainant's uncorroborated testimony. The *Longman* warning continues to operate in a number of Australian jurisdictions, including Queensland, where jurors are told:

> The fairness of the trial (as the proper way to prove or challenge the accusation) has necessarily been impaired by the long delay. So I warn you that it would be dangerous to convict upon the complainant's testimony alone unless, after scrutinizing it with great care, considering the circumstances relevant to its evaluation, and paying heed to this warning, you are satisfied beyond reasonable doubt of its truth and accuracy. (*District and Supreme Court Bench Book* (Qld) s 65)

The *Longman* warning is problematic in rape cases because it serves to further entrench the myths that women fabricate allegations of rape and are unreliable witnesses (VLRC 2004). It also fails to take into account that complainants often delay reporting due to factors such as fear, uncertainty and shame (Weiss 2010).

In response to criticisms surrounding the operation of the jury directions, including those pertaining to the *Longman* warning (LRCV 1991), a new set of jury directions for rape trials was introduced in Victoria by the *Crimes (Rape) Act 1991* (Vic). These reforms attempted to ensure that both the complainant and the accused were treated fairly. The reforms also sought to clarify the contentious issue of consent; for example, requiring the judge to instruct the jury that failing to protest or physically resist the sexual act, and failing to obtain a physical injury during the act, did not mean the complainant was consenting (*Crimes Act 1958* (Vic) ss 37(b)(i), 37(b)(ii)). Similar changes to the definition of consent have been made across all Australian jurisdictions, however, only Victoria and the Northern Territory have legislated these changes in relation to jury directions.

In 2001, at the request of then Attorney-General Rob Hulls, the VLRC undertook a review of sexual offences legislation in Victoria. Specifically, the VLRC (2001:xxi) was tasked with considering whether the criminal justice system was 'sufficiently responsive to the needs of complainants in sexual offence cases and to make recommendations for any necessary

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[10] See for example, *Criminal Trial Courts Bench Book* (NSW) ss 5-1500–5-1645; *District and Supreme Court Bench Book* (Qld) ss 62–66; *Equality before the Law Bench Book* (WA) ss 10.3.5, 13.3.7; *Sexual Assault Handbook* (NSW) ss 3-000–3-1000.

changes'. The VLRC recommended significant changes to rape law in Victoria, ranging from improving police reactions and increasing the responsiveness of the criminal justice system, to further clarifying jury directions on consent (VLRC 2001, 2003, 2004). These recommendations led to significant amendments to Victoria's sexual offences legislation in 2006 and 2007 (*Crimes (Sexual Offences) Act 2006* (Vic); *Crimes (Sexual Offences) (Further Amendments) Act 2006* (Vic); *Crimes Amendment (Rape) Act 2007* (Vic)).

The VLRC *Final Report* was informed by an analysis of rape prosecutions between 2000 and 2002 in Victoria's County Court, and its evaluation of the clarity and length of the directions and how trial judges applied the mandatory jury directions on consent, belief in consent and delays in reporting. Overall, the VLRC (2004:36) found that jury directions were often not given or were given with elaborations that undermined the purpose of the 1991 legislation. These findings reflected those of the *Rape Law Reform Evaluation Project*, an extensive three-year review of the *Crimes (Rape) Act 1991* (Vic), which found that judges were giving directions about consent and delays with considerable variation and a discretion that was not anticipated by the legislation (Heenan and McKelvie 1997).[11]

The two main issues identified by the VLRC regarding the jury directions involved delayed reporting and consent.[12] Controversies abound in both areas, predominantly because jurors are expected to make sense of several competing factors (see Boniface 2005). The jury directions on consent, however, have proven to be more complex, particularly in light of the 2007 legislative amendments and the additional changes that have been required in response to numerous criminal appeals since 2010.

There were two key legislative amendments made to the jury directions on consent. The first focused on the complainant's consent or lack thereof, based on a communicative model of expressed consent. Thus, judges are now required to explain to juries that the absence of 'free agreement' includes the absence of active or spoken explicit consent. This is in addition to the existing requirement that the judge instruct the jury that they are not to regard a person as having 'freely agreed' to a sexual act just because they did not protest, physically resist, receive physical injuries or because on that, or another occasion, they had consented to a sexual act (whether or not of the same type) with the accused or another person (*Crimes Act 1958* (Vic) ss 37AAA, 38).

The second key amendment addressed the accused person's awareness that the complainant was not consenting or their awareness of the possibility that the complainant might not be consenting (the mens rea element of rape), including what steps the accused took to ascertain consent. Thus, the judge must now direct the jury that the accused is not entitled to a defence of honest yet mistaken belief if s/he did not take reasonable steps to find out if the complainant consented, and if s/he were reckless as to whether the complainant was consenting. For example, reckless rape would cover situations where the accused was aware of the possibility of non-consent (eg the complainant was asleep), or if the accused gave no thought or was indifferent to whether the complainant was consenting (eg if the accused did not take any steps to get consent) (see Smith 2008). Thus, if the accused's defence is based on a belief in consent, the judge must direct the jury to consider whether there was any evidence of that belief, whether that belief was reasonable in the

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11 This was predominantly due to the phrase 'in a relevant case' outlined in the *Crimes Act 1958* (Vic) s 37, which provided judges with the discretion to decide whether or not to direct the jury. The 2007 amendments to s 37 of the *Crimes Act 1958* (Vic) reduced the opportunity for such discretion to be exercised by removing 'in a relevant case' and replacing it with 'if relevant to the facts in issue'.

12 This article will focus on the issues pertaining to consent, rather than delayed reporting. For a discussion of the complexities pertaining to delayed reporting, see Boniface (2005).

relevant circumstances,[13] and whether the accused took any steps to determine whether the complainant was consenting (*Crimes Act 1958* (Vic) s 37AA).

### *Communicating consent*

The new directions represent a dramatic departure from the traditional notion of consent, where the responsibility fell on the complainant to make an assertive statement or action of resistance to communicate an absence of consent, with the exception of cases where the complainant was unable to express or resist, for example, if s/he was unconscious or drugged (Bronitt and McSherry 2010). The 'communicative model' of consent is based on 'an ideal of mutuality in emotional and physical gratification' (McSherry 1998:35). Under this model, if one person is seeking to have sex with another person, they must take steps to find out if that person is willing to have sex with them. Thus, if a person does not say or do anything, they are not consenting to the sexual act. As such, 'free agreement' or consent to a sexual act must be expressed, rather than implied (Bronitt and McSherry 2010:638).

The communicative model of consent is widely supported, predominantly for its potential to challenge the traditional rape myth surrounding the responsibility of the complainant to actively resist intercourse (see eg Bronitt and McSherry 2010; McSherry 1998; Pineau 1989). It also has the potential to re-educate the broader community on the importance of negotiating consent. However, the requirement that one's free agreement to the sexual act be expressed, rather than implied, has received criticism, largely on the basis that the communication requirement is not reflective of 'real life' sexual encounters (see eg Wiener 1983; Willis 2006). Thus, it is argued, the communicative model creates a possibility that an accused may be (wrongfully) convicted in situations where s/he could not reasonably have foreseen s/he was committing an offence (Willis 2006). This criticism was initially identified in Heenan and McKelvie's (1997:317) evaluation of the *Crimes (Rape) Act 1991* (Vic), with a defence practitioner equating the communicative model with a person having to effectively obtain written permission before engaging in a sexual act. A similar dissenting view was expressed by the Victorian Bar in their submission to the VLRC (2004:351) regarding the proposed changes to rape law to reflect a communicative model:

> It is not consistent with these values [of] … mutual respect and communication … to suggest that the fact that a person did not do or say anything to indicate free agreement to the sexual act is evidence that the act took place without that person's free agreement.

While acknowledging that a positive indication of consent does indeed challenge some traditional views of sexual interaction, the VLRC (2003:328) nonetheless stated that:

> [The] legislative endorsement of a "communicative model" of sexual relations was intended to deal with problematic social attitudes towards sexual practices that unfortunately persist. The jury direction performs an educative function by clarifying the law and establishing standards of behaviour for sexual relations.

The VLRC (2003:328) also highlighted the central aim of the positive indication requirement as being to 'dispel the enduring myth that a woman must show evidence of physical resistance to sexual advances in order to provide evidence of a lack of consent ... [and] to reduce the emphasis upon the victim's mind when determining consent'. In effect then, the VLRC sought to challenge the traditional focus on the complainant in regards to what they did to express non-consent, to instead shift attention towards the accused person's

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[13] The circumstances referred to in this instance draws from the list provided in s 36 of the *Crimes Act 1958* (Vic) relating to the definition of consent, including, but not limited to, the person being asleep, unconscious, or submitting due to fear, force, mistaken identity or unlawful detainment.

state of mind and what actions they took to gain consent. This supports the view of former New South Wales Attorney-General John Hatzistergos (2007:3880), who suggested that a non-communicative model of consent 'reflects archaic views about sexual activity [and] … fails to ensure a reasonable standard of care is taken to ascertain a person is consenting before embarking on potentially damaging behaviour'. However, it contradicts the traditionalist view that 'efforts to focus the attention of the jury upon subjects other than the state of mind of the complainant [when considering consent] must surely be problematic. That is, after all, precisely what consent, or the lack of it, are all about' (MCCOC 1999:265).

The contrasting perceptions of what constitutes consent, and whose state of mind should be the focus in assessing the existence of consent, highlights one of the central difficulties surrounding rape law reform, not only in the context of Victoria's jury directions, but more generally. In New South Wales, for example, the law states that 'a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse' (*Crimes Act 1900* (NSW) s 61HA(7)). However, the guidance provided to judges states that they should direct the jury that the absence of consent may be communicated by 'the offering of resistance' (*Criminal Trial Courts Bench Book* (NSW)). The guidance then goes on to note that judges should tell the jury that offering resistance 'is not necessary' due to the law in s 61HA(7). As a consequence, the directions given to the jury in New South Wales are not only inconsistent, but they arguably reinforce the myth that real victims typically 'resist' rape, which is impossible for sleeping or unconscious victims. Furthermore, it firmly places the jurors' focus back on the complainant, and what they did to actively demonstrate non-consent, as opposed to the accused's state of mind and what steps they took to reasonably ascertain consent.

Arguably then, the shift towards a communicative model of consent and the changes made to the jury directions specifically on consent in Victoria, provide an important avenue to challenge misconceptions and myths that jurors may rely upon when evaluating evidence in rape cases. Yet, questions must be asked as to whether this approach aligns with societal views on what constitutes 'real rape', and if not, how will such inconsistencies between juror perceptions and legislation be resolved? Moreover, it is important to consider the extent to which the law is capable of dismantling problematic notions and deep-seated stereotypes about seduction and resistance that continue to permeate the courtroom.

The likelihood of the directions performing an educative role has been substantially diminished in light of the Victorian Court of Appeal decision in *Gordon v The Queen* ('*Gordon*'). In *Gordon*, the Court effectively reversed the communicative model of consent by finding that the trial judge had erred in instructing the jury that 'a person seeking to sexually penetrate another person must satisfy themselves that that other person is consenting … It is not enough to assume consent' (at 11). The Court of Appeal further stated that the accused person's belief can be based on an assumption of consent and there is 'no requirement in law that a person who has sexual intercourse with another must satisfy himself that the other person is consenting' (*Gordon* at 12). The decision in *Gordon* was contrary to the statutory communicative model of consent contained within the legislation. Consequently, instead of re-educating the community, the decision sent out a mixed message about consent. As Larcombe (2011:710–11) acutely notes:

> Young women in particular believe that Victoria has a "positive" consent standard and that if they say or do nothing to indicate free agreement then any act of sexual penetration will take place without their agreement. They believe they enjoy legal protection of their sexual autonomy and that sexual penetration without consent is rape. They are mistaken. There is only rape in law if there is no possibility that the accused believed in consent.

It is these ambiguities and complexities in the law governing rape and consent that allow for such contrasting judicial interpretations to be made. As such, the practical application of the jury directions not only undermines the intended application of the amended legislation, but if the decision in *Gordon* is reflective of attitudes towards consent, they may even serve to perpetuate the very myths the law was designed to tackle.

## Consent, confusion and complexity

The complexities of the jury directions, and the subsequent difficulties that may arise in juror and community comprehension of the legislation, are a significant limitation of the law (Larcombe 2011; Warren 2011; Weinberg 2011). As noted in a 2011 evaluation of the Victorian sexual assault reforms, 'the complexity of the directions required to be given by County Court judges to juries continue to be a matter of concern for the court' (Success Works Pty Ltd 2011:108). The complexities of the directions means the jury are faced with 'a bewildering array of considerations [that are] highly technical and often inconsistent' (Courtin 2006:287), or what Victorian judicial participants in Najdovski-Terziovski, Clough and Ogloff's (2008:80) study refer to as 'the over intellectualisation of criminal law [whereby] … jurors may struggle … [and] do have difficulty with aspects of the law'. This view was similarly expressed by Victorian Court of Appeal President Chris Maxwell (cited in Farouque 2012) in relation to the jury directions on rape:

> The latticework of directions and warnings is beyond the comprehension of most jurors … We have trial judges complaining routinely that the Court of Appeal and High Court are burdening them with all these obligations – and a judge will say: "I am talking to the jury about some issue of proof and their eyes glaze over".

One of the implications that can arise from having convoluted jury directions and confusion over what constitutes consent and how consent should be expressed, is that jurors have an unreasonable expectation placed upon them to understand increasingly complex concepts. As such, jurors may inform their decisions based on what they can easily understand, and may resort back to their preconceptions about rape victims and consent (Finch and Munro 2005; Taylor 2007; Taylor and Joudo 2005). As Taylor (2007:3) notes, 'the divide between legal definitions and how juries interpret and make decisions about consent is large'. This is demonstrated by a 2010 New South Wales case, in which the accused was acquitted because the jury determined that the complainant could not have been raped while wearing skinny leg jeans on the basis that 'those kind of jeans can[not] be removed without any sort of collaboration' (Kontominas 2010).

The perplexing nature of the Victorian jury directions, combined with the confusion surrounding consent, may also be one of the contributing factors to increased acquittal rates. Prior to the introduction of the reforms, from June 2004 to June 2007, the conviction rate for rape in Victoria varied between 47% and 55% (Success Works Pty Ltd 2011:80). However by June 2010, this rate had dropped substantially to 38%, thereby indicating that after the reforms, an accused was 'almost twice as likely to be acquitted than convicted, compared with the approximate one to one ratio which existed across the previous five years' (Success Works Pty Ltd 2011:80).

While confusion permeates the jury directions on rape in other Australian jurisdictions,[14] significant concerns specific to the Victorian jury directions have arisen based on a series of

[14] For example, as noted by the New South Wales Law Reform Commission (NSWLRC) (2008:1.21), 'the judge needs to consider at least eight categories of directions, warnings and comments for inclusion in the

rape cases where convictions have been quashed by appeal courts on the basis that the trial judge misdirected the jury on the issue of consent. As noted by Victorian Court of Appeal President, Chris Maxwell (cited in Farouque 2012):

> The problem with overly complex directions is that you then get to the point where the trial judge fails to convey all of the subtleties of the directions. The conviction is probably quite sound but the accused, on appeal, can quite rightly say: "The judge didn't warn them that, they weren't able to do that and they aren't be [sic] able to do that … I may have lost my right to a fair trial".

In addition to creating a financial and resource burden on the court, an increase in rape appeals also causes immense emotional strain for the parties involved (NSW Standing Committee on Law and Justice 2002:[6.101]). It can also reduce public confidence in the law, which is recognised as a contributing factor to the already low numbers of rape reports (Success Works Pty Ltd 2011:37). Although arguably most problematic in Victoria, given the high number of criminal appeals initiated and pending each year (Supreme Court of Victoria 2012), an increase in appeals in rape trials attributed to judicial misdirection is evident in other Australian jurisdictions, also due to the complexities associated with rape law (Judicial Commission of NSW 2011). For example, in examining criminal appeals from 1 January 2001 to 30 June 2004, the Judicial Commission of NSW found that 51.5% of all criminal appeals arose from sexual assault trials, and 54% of the successful sexual assault appeals were due to judicial misdirection (cited in NSWLRC 2008:1.36). These findings are reflected in the NSW Judicial Commission's (2011:205) report examining conviction appeals from 1 January 2008 to 31 December 2010, whereby 53.8% of the 104 successful sexual assault appeals were due to the judge giving one or more misdirection/s.[15]

In Victoria, the 2012 annual report of the Supreme Court (2012) shows that 68.3% of appeals filed in the 2010–2011 period were criminal appeals. Specifically in relation to sexual assaults, of the 192 appeals heard from 1 January 2010 to 31 July 2010, 19% related to rape trials (Success Works Pty Ltd 2011:183). Additionally, between June 2010 and June 2011, it is estimated that at least 11 criminal appeals specifically related to arguments centring on consent (Crawford 2011a). Two of the most contentious appeals relating to consent are discussed below.

## *On appeal: Belief and awareness*

The first significant case to deal with the complications inherent to the Victorian jury directions, which also highlighted the complexities of the amended rape laws, was *Worsnop v The Queen* ('*Worsnop*'). In *Worsnop*, the Court of Appeal determined that the trial judge had erred in directing the jury that the accused may have *believed* the complainant was consenting, while at the same time being *aware* of the possibility that she was not consenting.[16] The Court held that as a matter of law, belief in consent is inconsistent with awareness of non-consent, and as such, if the accused believed the complainant was consenting, he could not at the same time have been aware that she might not have been

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summing-up, in addition to the standard directions given in criminal trials, and any further unreliable evidence warnings which may be required'.

15 In 80.4% of cases, one misdirection was identified; in 16.1%, two misdirections were identified; and in 3.6%, four misdirections were identified (Judicial Commission of NSW 2011:205). *Longman* misdirections were the most common at 46.4% (Judicial Commission of NSW 2011:205).

16 The trial judge directed the jury that: 'You might find that the accused believed the complainant was consenting, but still be satisfied, beyond reasonable doubt, that the accused was aware of the possibility that the complainant was not consenting' (cited in *Worsnop* at 22). For a critical discussion of three different types of recklessness that may satisfy the fault element in rape cases, see Smith (2008).

consenting. Although the error was not found to have resulted in a substantial miscarriage of justice, *Worsnop* established that a jury cannot convict an accused of rape if there is a reasonable possibility that the accused had an honest or mistaken belief that there was consent, no matter how unreasonable that belief might be (Larcombe 2011).

This decision contradicts the Explanatory Memorandum, which accompanied the Crimes Amendment (Rape) Bill 2007 (Vic). The Memorandum states that the mens rea element for the crime of rape is *awareness* of the possibility of non-consent, rather than the prosecution proving an absence of an honest or reasonable *belief* in consent. It further states that:

> The directions make it clear that evidence or an assertion of a belief in consent is to be taken into account when determining whether the prosecution has proven beyond a reasonable doubt that the accused was aware that the complainant might not be consenting. Evidence of, or an asserted belief in, consent, even if accepted by the jury, is not necessarily determinative of whether the prosecution has met this burden. (at 4)

The Memorandum clarifies this issue by stating that 'belief in consent and awareness of the possibility of an absence of consent are not mutually exclusive' (at 4), and a jury should convict an accused 'irrespective of whether they accept the evidence or assertion that the accused believed the complainant was consenting' (at 4), if the prosecution has satisfied the jury 'beyond a reasonable doubt that an accused person was aware that the complainant might not be consenting [and] if the jury are equally satisfied in relation to the other elements [of rape]' (at 4).

The inconsistency between *Worsnop* and the intention of the jury direction reforms was also identified by Justice Neave in *Sibanda v The Queen* ('*Sibanda*'):

> The decision in *Worsnop* demonstrates the need for legislative change to clarify and simplify the required *mens rea* for rape. The current provisions have failed to implement the recommendations made by the Victorian Law Reform Commission, which were intended to ensure that a person who sexually penetrates another person, whilst being aware that the latter is not or might not be consenting to penetration, is guilty of rape. (at 7)

Despite the inconsistencies between the intention of the law and the judicial interpretation of the law, due to the decision in *Worsnop*, subsequent convictions for rape were overturned by the Victorian Court of Appeal on the basis that trial judges failed to distinguish between awareness and belief.[17] For example, in *Neal v The Queen* ('*Neal*'), the main issue was whether the accused person's awareness of the complainant's state of intoxication meant that he was also aware that the complainant was not or might not be consenting. The Court determined, consistent with the decision in *Worsnop*, that a belief in consent negates the finding that the accused was aware of the possibility that the complainant was not or might not be consenting (*Neal* at 88). In other words, even though the accused might have been aware of a circumstance identified in the *Crimes Act 1958* (Vic) s 36 which renders a complainant incapable of consent, this awareness was negated by the accused person's belief, no matter how unreasonable, that the complainant was consenting.

The complexity of Victoria's rape law and the jury directions relating to the accused's awareness and belief was further demonstrated by the *Getachew* case — in particular, the directions given by the trial judge in *R v Getachew*, and the subsequent decisions of the Victorian Appeal Court in 2011 ('*Getachew 2011*') and the Australian High Court in 2012 ('*Getachew 2012*').

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[17] See for example, *Duwah v The Queen*; *Getachew v The Queen*; *Gordon v The Queen*; *Kormez v The Queen*; *LA v The Queen*; *Neal v The Queen*; *Roberts v The Queen*; *Sibanda v The Queen*.

In the original trial, the accused denied that any sexual intercourse, consensual or not, had occurred. The jury, however, found him guilty of one count of rape after hearing that the complainant had twice refused his sexual advances, and after falling asleep, awoke to find him sexually penetrating her. Under Victorian law, if the jury are satisfied that the accused penetrated the complainant, they need to also be satisfied that this occurred without the complainant's consent and with the accused being aware of, or not giving any thought to, this non-consent.[18] Thus, in directing the jury on this element, the trial judge in *R v Getachew* stated:

> This element will be satisfied if the prosecution can prove beyond reasonable doubt that the applicant was aware that the complainant was either asleep or unconscious or so affected by alcohol as to be incapable of freely agreeing or aware that she might be in one of those states. This element will also be satisfied if the prosecution can prove on any other basis arising from the evidence, that the accused was aware the complainant was or might not be consenting or freely agreeing to the sexual penetration. (cited in *Getachew 2011* at 16)

In light of this instruction, the defence lodged an appeal claiming that the directions conflated the complainant's lack of consent with the mens rea element, as established by *Worsnop*, on the basis that the trial judge:

> Import[ed] the s 36 state of deemed non-consent … concerning [being] asleep, into the definition of *mens rea*, and said to the jury if this accused was aware that the complainant was or might be asleep, then the fourth element – the *mens rea* part of the charge – would be proven. (*Getachew 2011* at 23)

In hearing this appeal, the Court of Appeal determined that there had been an error. In a two-to-one decision, a re-trial was ordered on the basis that the trial judge had erred in his instruction that the mens rea element was met if the jury concluded that the accused was aware that the complainant might have been asleep. The Court also found that the judge should have instructed the jury to consider the reasonableness of the accused's belief that the complainant had consented to the act. In his judgment, Buchanan JA noted that:

> The jury may have concluded that there was no protest by the complainant because she was asleep. Equally, if they had been properly instructed, the jury may have concluded that the [accused] thought that the complainant might have fallen asleep but accepted that it was a reasonable possibility that the [accused] believed that she had finally consented. (cited in *Getachew 2011* at 23)

The Court's decision was confusing because there was no evidence led that the accused had a belief that the complainant was consenting.[19] Therefore, it was unclear why the jury would have been required to assess the accused's state of mind in relation to his belief that the complainant was consenting, given his defence was that he had not sexually penetrated her. It was on this basis that the prosecution applied for special leave to the Australian High

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[18] In line with legislative and case law provisions, judges are guided to direct juries that before they can find an accused guilty of rape, they must be satisfied that the prosecution has proved, beyond reasonable doubt, four elements: (1) the accused sexually penetrated the complainant; (2) the accused did this intentionally; (3) the complainant did not consent to sexual penetration; and (4) the accused had one of three states of mind about the complainant's consent: (i) the accused was aware the complainant was not consenting; or (ii) the accused was aware that the complainant might not be consenting; or (iii) the accused was not giving any thought as to whether the complainant was not or might not be consenting (*Criminal Charge Book* (Vic); Warren 2011).

[19] By law, if evidence is led or an assertion is made that the accused believed the complainant was consenting to the act, the judge must then direct the jury to consider whether the prosecution had proved beyond reasonable doubt that the accused was aware that the complainant was not or might not have been consenting, taking into consideration any evidence of that belief, and whether that belief was reasonable in the circumstances (*Crimes Act 1958* (Vic) ss 36, 37(1), 37AA).

Court, and in March 2012, the High Court ruled that the trial judge was correct not to direct the jury on belief in consent. The Court of Appeal decision was thus overturned.

Significantly, in addition to overturning the Court of Appeal decision, the High Court altered the case law pertaining to awareness and belief established by *Worsnop* in an attempt to make this aspect of the law more reflective of the original intentions of the 2007 legislation. In particular, the High Court sought to re-focus the fault element of rape on the accused's awareness, rather than their belief in consent. In other words, the Court identified the fault element of rape as 'the accused being aware that the complainant was not, or might not be consenting, or the accused not giving any thought to whether the complainant was not, or might not be consenting' (*Getachew 2012* at 27). The Court further stated that 'belief in consent is not the controlling concept. It is relevant only so far as it sheds light on the accused's awareness that the complainant was not, or might not be consenting' (*Getachew 2012* at 23). This is because:

> An accused's belief that the complainant *may* have been consenting, even *probably was* consenting, is no answer to a charge of rape. It is no answer because each of those forms of belief demonstrates that the accused was aware that the complainant might not be consenting or, at least, did not turn his or her mind to whether the complainant might not be consenting. (*Getachew 2012* at 27)

The High Court decision thus confirms that awareness, not belief, is the mens rea element of rape. Belief in consent is still relevant in considering awareness because the two concepts are not mutually exclusive. This reflects the intentions of the legislation as outlined in the *Crimes Act 1958* (Vic) s 38(2), which prescribes the mental element for rape as the accused 'being aware that the person is not consenting or might not be consenting; or while not giving any thought as to whether the person is not consenting or might not be consenting'.

## *Awareness and belief: Still a lack of clarity?*

While the High Court's decision returns the mens rea element of rape to that intended by Parliament, the complexities and confusion associated with the mental element persists. The language of belief and awareness is likely to remain perplexing for jurors and indeed judges. For example, in the amended directions, the judge must direct the jury that:

> In considering whether the prosecution has proved that [the accused] was aware that [the complainant] was not consenting or might not have been consenting to the [act], you must consider any evidence that the accused believed that the complainant was consenting and whether that raises a doubt about whether s/he was aware that [the complainant] was not or might not be consenting. (*Criminal Charge Book* (Vic) s 7.3.1.1.2B)

The judge must then proceed to explain the difference between belief and awareness, with the option of using the example outlined in the *Criminal Charge Book* (Vic) to further clarify the difference:

> There is a difference between a belief, which [the accused] has asserted, and an awareness that [the complainant] was not or might not be consenting, which is what this element is about. There are different strengths of belief. At one end of the scale, I might have a belief as to something and the strength of that belief leaves no possibility for error. At the other end of the scale, I can have a belief as to something, while being aware that I might be mistaken. For example, I might believe that I put my keys on a hook when arriving home, while recognising the possibility that I did not do so. In order to prove this element of awareness, the prosecution must exclude the possibility that [the accused's] belief that [the complainant] was consenting was so strong that s/he did not entertain the possibility that s/he was mistaken. The prosecution will therefore prove this element if you are satisfied that even though [the accused] believed

> [the complainant] was consenting, he was still aware that s/he might not be consenting. (*Criminal Charge Book (*Vic) s 7.3.1.1.2B)

The complexities inherent in this guidance provided to judges highlights our contention that the jury directions on belief and awareness continue to be deeply confusing, despite the amendments resulting from the High Court decision.

The High Court also did not clarify whether an accused person's awareness that a s 36 circumstance existed is enough in itself to satisfy the fault element for rape. In other words, can an accused person be convicted because they were aware of the possibility of a s 36 circumstance, if they claim to have had a belief in consent? A similar concern has been linked to the 2007 amendments to the *Crimes Act 1900* (NSW) in New South Wales, in which s 61HA(6)(a) was altered to negate consent 'if the person has sexual intercourse while substantially intoxicated by alcohol or any drug'. Using the English case of *R v Bree* as a basis for their concerns, Dobinson and Townsley (2008:157) argue that how a jury makes a determination of whether the complainant is substantially intoxicated will 'ultimately depend on how they are directed'. They add:

> If the direction is not clear and/or adequate, it is possible that the jury … [will determine as they did] in *Bree* … that the victim did not consent simply because of her degree of intoxication and her subsequent statements that she did not consent, even though this was never communicated to the defendant. (Dobinson and Townsley 2008:157)

As a consequence, if an accused's awareness that a possible s 36 circumstance exists negates their belief that the complainant was consenting, this may, as argued by Dobinson and Townsley (2008:158), mean an 'extension of the law to catch people who might not otherwise be regarded as criminals'.

As Smith (2008) explains, awareness of the circumstances helps to establish the reasonableness of the accused's belief, which then helps to establish whether the accused was *aware* that the complainant was not or might not have been consenting. However, Smith (2008:1028) claims that 'the mere fact that the accused was aware of the possibility of a s 36 circumstance existing should not be sufficient to satisfy the fault element for rape'. This was the approach adopted by the Victorian Court of Appeal in *Neal*; namely that an accused person can be aware that a s 36 circumstance existed or might have existed (in this case, the complainant being intoxicated), and yet not be aware of the possibility that the complainant was not consenting.

Smith (2008) further argues, in line with s 37AA(ii) of the *Crimes Act 1958* (Vic), that this contradiction between awareness of a s 36 circumstance and awareness of non-consent can be resolved using the communicative model of consent; that is, whether the accused took any steps to determine whether the complainant was consenting. This accords with the intentions of the reforms, that '[w]here there is any doubt in the mind of the person instigating the sexual act, there is a responsibility upon that person to communicate with the other person in order to remove that doubt' (Hulls 2007:2858). However, how these different levels of awareness will be resolved in a court of law remains to be seen. More importantly, the ability of jurors and laypersons to understand these technical complexities is a matter of serious concern, undermining the educative function of rape law in Victoria.

## Conclusion

Despite the High Court's reinstatement of the statutory interpretation of the 2007 legislation on rape in Victoria, the complexities and ambiguities inherent within the jury directions, particularly in instructing the jury on the mens rea element of rape, continue to place an unreasonable expectation on jurors to understand the increasingly complex fault component in rape cases. As Supreme Court Chief Justice Warren (2011:3) notes, the law has led to jury directions which are 'replete with length, turgidity, complexity, and double, even multiple negatives'. Such concerns reflect those of Justice McHugh, who claims 'the more [complex] directions and warnings juries are given, the more likely it is that they will forget or misinterpret some directions or warnings' (*KRM v The Queen* at 234). These concerns were also identified in the NSWLRC (2008:1.23) report on jury directions, in which senior judges spoke of 'their frequent experience, as well as those of their fellow judges, of seeing the jurors with glazed eyes and blank faces as they give a series of directions and comments'. This situation is not uncommon in Victorian courts, as Court of Appeal Justice Weinberg notes, the average jury directions 'take hours if not days to deliver' (cited in Farouque 2012). Similarly, as Justice Neave (2012:10) of the Court of Appeal claims, 'directions are often very long … [the process] might go on for hours or even days [at which stage] comprehension fades, boredom sets in and people stop listening'.

Arguably then, the complexity of the Victorian jury directions is likely to reduce any educative function to reshape attitudes towards rape, as intended by the reforms. This is particularly so given the contradiction between s 37AAA of the *Crimes Act 1958* (Vic), which attempts to dismantle rape myths on the primary question of consent, and s 37AA of the *Crimes Act 1958* (Vic), which appears to simultaneously permit a defence built on an assumption of those myths. Perhaps most importantly, the confusion surrounding the jury directions on consent is also likely to further reduce the number of successful convictions for rape and ultimately discourage victims from engaging with the criminal justice system (Success Works Pty Ltd 2011). This is antithetical to the spirit and intention of the reforms to rape law in Victoria since the 1990s, including the 2007 reforms, which were designed to underscore sexual autonomy by projecting positive contemporary values that challenge rape mythologies, to highlight the necessity of negotiating consent, and to provide a way for the law to be explained to the jury 'in clear and comprehensible language' (VLRC 2004:341).

In response to some of the problems emerging in the application of the jury directions, Larcombe (2011) has argued for further law reform in order to reach the objectives of the 2007 legislation, and to ensure that an accused cannot be acquitted of rape because s/he had an unreasonable and mistaken belief in consent, even if s/he was aware that the complainant might not have been consenting. This view is shared by those working with the courts, including Victorian Court of Appeal's Justice Neave (cited in *Sibanda* at [7]), who has proposed legislative reform in order to 'clarify and simplify' the directions. Based on the arguments presented in this article, we very much support Neave and Larcombe's calls for further legislative reform.

The importance of having clear, unambiguous and socially acceptable jury directions in rape cases cannot be overstated. Both proponents and opponents of Victoria's rape law reforms would agree that clarity is paramount. However, as we have argued, rape law in Victoria has become increasingly complex and convoluted, which has led to equally perplexing jury directions. This has resulted in a spate of appeals with somewhat contradictory interpretations. It has reduced public and judicial confidence in the law, and overall it undermines the purpose and advances of Victorian rape law reforms. Whether law

reform can alter or shift deeply embedded misconceptions about rape and rape victims within and outside the courtroom remains to be seen. Nonetheless, it is imperative that rape law in Victoria be simplified and clarified to give effect to the intentions of the original legislation.

## Cases

*Duwah v The Queen* [2011] VSCA 262 (5 September 2011)

*Getachew v The Queen* [2011] VSCA 164 (2 June 2011)

*Getachew v The Queen* (2012) 286 ALR 196

*Gordon v The Queen* [2010] VSCA 207 (23 August 2010)

*Kormez v The Queen* [2011] VSCA 160 (3 June 2011)

*KRM v The Queen* (2001) 206 CLR 221

*LA v The Queen* [2011] VSCA 293 (28 September 2011)

*Longman v The Queen* (1989) 168 CLR 79

*Neal v The Queen* [2011] VSCA 172 (15 June 2011)

*R v Bree* [2007] 3 WLR 600

*R v Getachew* (Unreported, County Court of Victoria, Allen J, 27 November 2009)

*R v Murray* (1987) 11 NSWLR 12

*Roberts v The Queen* [2011] VSCA 162 (2 June 2011)

*Sibanda v The Queen* [2011] VSCA 285 (23 September 2011)

*Wignall v The Queen* [2010] VSCA 327 (29 November 2011)

*Worsnop v the Queen* [2010] VSCA 188 (28 July 2010)

## Legislation

*Crimes Act 1900* (ACT)

*Crimes Act 1900* (NSW)

*Crimes Act 1958* (Vic)

*Crimes Amendment (Rape) Act 2007* (Vic)

*Crimes (Rape) Act 1991* (Vic)

*Crimes (Sexual Offences) Act 2006* (Vic)

*Crimes (Sexual Offences) (Further Amendments) Act 2006* (Vic)

*Criminal Code 1924* (Tas)

*Criminal Code Act* (NT)

*Criminal Code Act 1899* (Qld)

*Criminal Code Compilation Act 1913* (WA)

*Criminal Law (Consolidation) Act 1935* (SA)

Explanatory Memorandum, Crimes Amendment (Rape) Bill 2007 (Vic)

## Judicial Guides

*Criminal Charge Book* (Vic)

*Criminal Trial Courts Bench Book* (NSW)

*District and Supreme Court Bench Book* (Qld)

*Equality before the Law Bench Book* (WA)

*Sexual Assault Handbook* (NSW)

## References

Australian Law Reform Commission (ALRC) (2010) *Family Violence: A National Legal Response*, Report No 114, ALRC, Sydney

Boniface D (2005) 'The Common Sense of Jurors vs The Wisdom of the Law: Judicial Directions and Warnings in Sexual Assault Trials', *University of New South Wales Law Journal* 28(1), 261–70

Bronitt S and McSherry B (2010) *Principles of Criminal Law*, Thomson Reuters, Pyrmont, NSW

Courtin J (2006) 'Judging the Judges: How the Victorian Court of Appeal is dealing with appeals against conviction in child sexual assault matters', *Current Issues in Criminal Justice* 18(2), 266–98

Crawford C (2011a) 'Call For Reform on Rape Laws in Victoria', *Herald Sun* (Melbourne), 1 August 2011 <http://www.heraldsun.com.au/news/victoria/call-for-reform-on-rape-laws-in-victoria/story-fn7x8me2-1226105571211>

Crawford C (2011b) 'Justice Experts Look to Reform Juries in a Review of Sentencing Laws', *Herald Sun* (Melbourne), 16 June 2011 <http://www.heraldsun.com.au/news/victoria/rape-laws-fury/story-fn7x8me2-1226075926343>

Dobinson I and Townsley L (2008) 'Sexual Assault Law Reform in NSW: Issues of Consent and Objective Fault', *Criminal Law Journal 32(3)*, 152–166

Farouque F (2012) 'Judge and Jury', *The Age* (Melbourne), 16 February 2012 <http://www.theage.com.au/victoria/judge-and-jury-20120215-1t6em.html>

Finch E and Munro V (2005) 'Juror Stereotypes and Blame Attribution in Rape Cases involving Intoxicants: The Findings of a Pilot Study', *British Journal of Criminology* 45(1), 25–38

Hatzistergos J (Attorney-General) (2007) New South Wales, *Parliamentary Debates*, Legislative Council (2007) Crimes Amendment (Consent Sexual Offences) Bill 2007: Second Reading, 7 November 2007 <http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LC20071107008?open&refNavID=HA3_1> 3584

Heenan M and McKelvie H (1997) *The Crimes (Rape) Act 1991: An Evaluation*, Victorian Department of Justice, Melbourne

Hulls R (Attorney-General) (2007) Victoria, *Parliamentary Debates*, Legislative Assembly 22 August 2007 <http://www.parliament.vic.gov.au/downloadhansard/pdf/Assembly/Jul-Dec%202007/Assembly%20Extract%2022%20August%202007%20from%20Book%2012.pdf> 2857–9

Judicial Commission of NSW (2011) *Conviction Appeals in New South Wales*, Research Monograph 35 <http://www.judcom.nsw.gov.au/publications/research-monographs-1/research-monograph-35>

Kontominas B (2010) 'Rape of Woman in Skinny Jeans "Not Possible"', *The Sydney Morning Herald* (online), 1 May 2010 <http://www.smh.com.au/nsw/rape-of-woman-in-skinny-jeans-not-possible-20100430-tzai.html>

Larcombe W (2011) '*Worsnop v The Queen:* Subjective Belief in Consent Prevails (Again) in Victoria's Rape Law', *Melbourne University Law Review* 35(2), 697–716

Law Reform Commission of Victoria (LRCV) (1991) *Rape: Reform of Law and Procedure*, Report No 43, September, LRCV, Melbourne

Lonsway K and Fitzgerald L (1994) 'Rape Myths: In Review *Psychology of Women Quarterly* 18(2), 133–64

McSherry B (1998) 'Constructing Lack of Consent' in Easteal P (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture*, Federation Press, Annandale, 26–40

Model Criminal Code Officers Committee of the Standing Committee of Attorneys General (MCCOC) (1999) *Report on the Sexual Offences Against the Person*, MCCOC, NSW

Najdovski-Terziovski E, Clough J and Ogloff J (2008) 'In Your Own Words: A Survey of Judicial Attitudes to Jury Communication', *Journal of Judicial Administration* 18(2), 65–84

Neave M (2012) 'Jury Directions in Criminal Trials: Legal Fiction or the Power of Magical Thinking', Paper presented at the Supreme and Federal Court Judges Conference, 23 January 2012 <http://www.supremecourt.vic.gov.au/resources/73194612-70f4-45b7-9aee-b50b0c776446/jury_directions_in_criminal_trials.pdf>

New South Wales Law Reform Commission (NSWLRC) (2008) *Consultation Paper 4 – Jury Directions* <http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cp04toc>

NSW Standing Committee on Law and Justice (2002) *Report on Child Sexual Assault Prosecutions*, A report for the NSW Legislative Council, Report 22, 13 November 2002 <http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/a94b470c615bd2e9ca256cf40021d981/$FILE/child%20sexual%20assault.pdf>

Pineau L (1989) 'Date Rape: A Feminist Analysis', *Law and Philosophy* 8(2), 217–43

Smith D (2008) 'Reckless Rape in Victoria', *Melbourne University Law Review* 32(3), 1007–29

Success Works Pty Ltd (2011) *Sexual Assault Reform Strategy: Final Evaluation* <http://www.justice.vic.gov.au/resources/7233cf34-6a2f-44ae-b3df-45dfc6c33c9d/sexualassaultreformstrategyfinalevaluationreportjanuary2011.pdf>

Supreme Court of Victoria (2012) *Annual Report 2010-11* <http://www.supremecourt.vic.gov.au/resources/6/4/64ea038049540e26a770b709a4d0815e/annual+report+2010-11+supreme+co urt+of+victoria.pdf>

Taylor N (2007) *Juror Attitudes and Biases in Sexual Assault Cases*, Trends and Issues in Criminal Justice No 344, Australian Institute of Criminology, Canberra

Taylor N and Joudo J (2005) *The Impact of Pre-Recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study*, Research and Public Policy Series No 68, Australian Institute of Criminology, Canberra

Victorian Law Reform Commission (VLRC) (2001) *Sexual Offences: Law and Procedure*, Discussion Paper, VLRC, Melbourne

Victorian Law Reform Commission (VLRC) (2003) *Sexual Offences: Interim Report*, VLRC, Melbourne

Victorian Law Reform Commission (VLRC) (2004) *Sexual Offences: Final Report*, VLRC, Melbourne

Warren M (2011) 'Making it Easier for Juries to be the Deciders of Fact', Paper presented at the Australian Institute of Judicial Administration (AIJA), Criminal Justice in Australia and New Zealand — Issues and Challenges for Judicial Administration Conference, Sydney, Australia, 8 September 2011 <http://www.aija.org.au/Criminal%20Justice%202011/Papers/Warren.pdf>

Weinberg M (2011) 'The Criminal Law – A "Mildly Vituperative" Critique', Peter Brett Memorial Lecture, Melbourne University Law School, Victoria, 10 August 2011 <http://www.austlii.edu.au/au/journals/VicJSchol/2011/21.pdf>

Weiss K (2010) 'Too Ashamed to Report: Deconstructing the Shame of Sexual Victimisation', *Feminist Criminology* 5(3), 286–310

Wiener RD (1983) 'Shifting the Communicative Burden: A Meaningful Consent Standard in Rape', *Harvard Women's Law Journal* 6, 143–62

Willis J (2006) 'Legislatively Mandated Jury Directions in Sexual Offence Cases', *Criminal Law Journal* 30(6), 357–72

Wood J (2007) 'Jury Directions', *Journal of Judicial Administration* 16(3), 151–64