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## Reforming the legal definition of rape in Victoria - what do stakeholders think?

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## Reforming the legal definition of rape in Victoria - what do stakeholders think?

### Abstract

Internationally and in Australia, rape law reforms in recent decades have had mixed outcomes. As a result, when the Victorian government began consulting on another round of major reforms in this area, the authors designed a qualitative research project to investigate whether a proposed change to the definition of rape is likely to clarify and simplify the law, as intended. This article draws on a series of semi-structured interviews with stakeholders who have extensive practice- or research-based expertise in criminal justice processing of rape cases. We analyse their perceptions and interpretations of a proposed definition of rape, which would require an absence of 'reasonable belief' in consent, and explore potential impacts and limits of this reform. Given that the investigated reform proposal has now been adopted, and will come into effect in July 2015, our findings provide unique insight into stakeholders' expectations of this latest reform of rape law in Victoria. Our findings suggest that this reform, like a number of its predecessors, may struggle to achieve its policy objectives.

### Keywords

stakeholders, do, victoria, rape, think, definition, reforming, legal

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# REFORMING THE LEGAL DEFINITION OF RAPE IN VICTORIA – WHAT DO STAKEHOLDERS THINK?

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*In common law jurisdictions internationally and in Australia, the mens rea for rape has been reformed in recent decades to modify the Morgan principle that an accused who genuinely believes in consent cannot be convicted of rape, no matter how unreasonable and mistaken that belief. In Victoria, Australia, legislative attempts to modify but not abrogate the Morgan principle have created considerable confusion and undue complexity. When the Victorian government began consulting on major reforms to the sexual offences provisions, the authors designed a qualitative research project to investigate perceptions of a proposal to introduce, as the fault element for rape, absence of reasonable belief in consent. This article reports the key themes from a series of semi-structured interviews with stakeholders who have extensive practice- or research-based expertise in criminal justice processing of rape cases. We investigated perceptions of the proposed definition of rape, anticipated interpretive issues, and expected benefits and limits of the ‘reasonable belief’ standard. Given that the investigated reform proposal has now been adopted, and came into effect in July 2015, our findings provide unique insight into stakeholders’ expectations of this latest reform of rape law in Victoria. Our findings suggest that it will be greeted cautiously and that it is expected, like a number of its predecessors, to introduce new ambiguities and complexities to the law of rape, while bringing only modest policy and practice benefits at best.*

## I INTRODUCTION

Internationally and in Australia, criminal provisions governing rape and sexual offences have been extensively reformed in recent decades.<sup>1</sup> While a principal objective has been to bring the

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<sup>1</sup> For a useful introduction to rape law reform internationally, see Clare McGlynn and Vanessa E Munro (eds) *Rethinking Rape Law: International and Comparative Perspectives* (Routledge-Cavendish, 2010). For an

law up to date with changed and changing attitudes about appropriate sexual conduct and communication, reforms have also aimed to increase the low reporting and conviction rates for sexual offences.<sup>2</sup> For both reasons, in common law jurisdictions, reform of the mens rea for rape has been at once a priority and an issue of particular contestation.<sup>3</sup> The landmark decision of the House of Lords in *DPP v Morgan*<sup>4</sup> drew public attention to the common law principle that a defendant's belief in consent would negate the mens rea for rape provided only that the belief was genuine or honestly held.<sup>5</sup> The *Morgan* principle was strongly criticised at the time, and subsequently, for inviting victim-blaming and encouraging problematic beliefs about women's sexuality.<sup>6</sup> Legislative provisions were eventually passed in New Zealand (1985),<sup>7</sup> in England and Wales (2003)<sup>8</sup> and New South Wales (2007)<sup>9</sup> stipulating that a (mistaken) belief in consent was only exculpatory if it was reasonable in the circumstances, or based on reasonable grounds. This brought these jurisdictions broadly into line with the law on rape in the criminal codes of Queensland,<sup>10</sup> Tasmania<sup>11</sup> and Western Australia,<sup>12</sup> which have long provided that a defence of mistaken belief in consent (a mistake of fact) will only succeed if the belief was both honest and reasonable.<sup>13</sup>

In Victoria, legislative reform of the mens rea for rape has been attempted incrementally. When rape became a statutory offence in Victoria from 1 January 1992,<sup>14</sup> the fault element of the new offence drew substantially on the common law formulation,<sup>15</sup> requiring the Crown to prove that the accused intentionally sexually penetrated the complainant while *being aware*

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overview and evaluation of rape law reform in Australian jurisdictions, see Kathleen Daly, *Conventional and Innovative Justice Responses to Sexual Violence* (Australian Institute of Family Studies, ACSSA Issues No 12, September 2011) <<http://www.aifs.gov.au/acssa/pubs/issue/i12/index.html>>.

<sup>2</sup> Daly, above n 1. See also Kathleen Daly and Brigitte Bouhours, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' (2010) 39 *Crime and Justice: An Annual Review of Research* 485; Elisabeth McDonald, 'From "Real Rape" to Real Justice? Reflections on the Efficacy of More Than 35 Years of Feminism, Activism and Law Reform' (2014) 45 *Victoria University of Wellington Law Review*, 487; Vanessa E Munro and Liz Kelly, 'A Vicious Cycle? Attrition and Convictions Patterns in Contemporary Rape Cases in England and Wales' in Miranda Horvath and Jennifer Brown (eds) *Rape: Challenging Contemporary Thinking* (Willan Publishing, 2009) 281.

<sup>3</sup> Anna Carline and Clare Gunby, "'How an Ordinary Jury Makes Sense of it is a Mystery": Barristers' Perspectives on Rape, Consent and the Sexual Offences Act 2003' (2011) 32 *Liverpool Law Review* 237, 246.

<sup>4</sup> *DPP v Morgan* [1976] AC 182 ('*Morgan*').

<sup>5</sup> In Victoria, this principle was articulated in *R v Flannery and Prendergast* [1969] VR 31, 33 (Winneke CJ, Little and Barber JJ), where the court held that an honest belief that the complainant was consenting was completely exculpatory because '[t]he existence of such a belief necessarily negatives an awareness that the woman was not consenting, or a realisation that she might not be.' It was affirmed by the Victorian Court of Appeal in *R v Saragozza* [1984] VR 187, 193 (Starke, Kaye and Brooking JJ).

<sup>6</sup> See, eg, James Faulkner, 'Mens Rea in Rape: *Morgan* and the Inadequacy of Subjectivism or Why No Should Not Mean Yes in the Eyes of the Law' (1991) 18 *Melbourne University Law Review* 60; Wendy Larcombe, 'Worsnop v The Queen: Subjective Belief in Consent Prevails (Again) in Victoria's Rape Law' (2011) 35 *Melbourne University Law Review* 697.

<sup>7</sup> See *Crimes Act 1961* (NZ) s 128(2).

<sup>8</sup> See *Sexual Offences Act 2003* (UK) s 3.

<sup>9</sup> See *Crimes Act 1900* (NSW) s 61HA (3).

<sup>10</sup> *Criminal Code 1899* (Qld) s 349.

<sup>11</sup> *Criminal Code Act 1924* (Tasmania) s 185.

<sup>12</sup> *Criminal Code Act 1913* (Western Australia) s 325.

<sup>13</sup> For a discussion of this defence see Thomas Crofts, 'Rape, The Mental Element and Consistency in the Codes' (2007) *QUT Law and Justice Journal* 1, 3-5.

<sup>14</sup> The *Crimes Rape Act 1991* (Vic) ('the 1991 Act').

<sup>15</sup> The mens rea of the common law offence of rape in Victoria was satisfied when the Crown proved 'either that the accused was aware that the woman was not consenting, or else realised that she might not be and determined to have intercourse with her whether she was consenting or not' - *R v Flannery and Prendergast* [1969] VR 31, 33.

*that the complainant was not consenting, or might not have been consenting.*<sup>16</sup> Under the common law, Victorian courts had determined that an honest belief in consent precludes conviction for rape because it ‘necessarily negatives an awareness that the woman was not consenting, or a realization that she might not be.’<sup>17</sup> Anticipating assertions of belief in consent, s 37(c) of the 1991 Act required the judge in relevant cases to direct the jury that ‘it must take into account whether [the claimed] belief was reasonable in all the relevant circumstances.’<sup>18</sup> The 1991 Act thereby established two concepts as central to the mens rea for rape: the fault element referred to the accused’s ‘awareness’ of non-consent, while the (mandatory) jury direction referred to the accused’s ‘belief’ in consent. This created understandable confusion for juries.<sup>19</sup>

The *Crimes Amendment (Rape) Act 2007* (Vic) attempted to resolve that confusion by introducing a more elaborate jury direction in s 37AA that described a claimed belief in consent as a factor for the jury’s consideration in determining the accused’s awareness of non-consent.<sup>20</sup> The Act’s drafters and supporters believed that this would make it clear that, under the statutory offence, the fault element for rape could be satisfied even if a jury found that the accused may have believed in consent: the question was whether the belief precluded awareness that the complainant was not consenting or might not be consenting.<sup>21</sup> County Court judges instructed juries along these lines for several years. In *Worsnop v The Queen*,<sup>22</sup> however, the Court of Appeal held that the 2007 amendments had not changed settled law in Victoria to the effect that a belief in consent *necessarily* negates an awareness that the complainant was not or might not have been consenting.<sup>23</sup> More than 15 convictions for rape were set aside on appeal following *Worsnop*,<sup>24</sup> because the jury had been instructed incorrectly (in the view of the Court of Appeal).

Additional convictions were overturned in 2011 on the basis of a separate error in the way trial judges had been directing juries on the mental element for rape.<sup>25</sup> The *Crimes Act 1958* (Vic) s 36 defines consent as ‘free agreement’ and provides a non-exhaustive list of circumstances in which a person does not freely agree to sexual penetration. In *Getachew*, the Court of Appeal held that the trial judge was in error in directing the jury that the mental element for rape would be satisfied if the prosecution proved beyond reasonable doubt that the applicant was aware

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<sup>16</sup> *Crimes (Rape) Act 1991* (Vic) s 38. In effect, the fault element required knowledge or a form of recklessness with regard to the complainant’s non-consent. Inadvertence – or failure to consider whether the complainant was consenting or not – was added as an alternative means of proving fault in 2007.

<sup>17</sup> *R v Flannery and Prendergast* [1969] VR 31, 33. This principle was affirmed by the Victorian Court of Appeal in *R v Saragozza* [1984] VR 187, 193 (Starke, Kaye and Brooking JJ).

<sup>18</sup> This direction was consistent with the so-called *Morgan* principle as the jury was required to consider whether a claimed belief in consent was reasonable in the circumstances in order to determine whether it was honestly held.

<sup>19</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 22 August 2007, 2858 (Rob Hulls).

<sup>20</sup> An alternative fault element was also introduced by the *Crimes Amendment (Rape) Act 2007* (Vic) so that rape could be proved when the accused did not give any thought to whether the complainant was not consenting or might not have been consenting. This ensures that inadvertence to the question of the complainant’s consent satisfies the fault element for rape, as recommended by the Victorian Law Reform Commission (VLRC), *Sexual Offences*, Final Report, Report No 78 (2004), 410-11.

<sup>21</sup> See Larcombe, above n 6, 701-3.

<sup>22</sup> *Worsnop v The Queen* (2010) 28 VR 187 (‘*Worsnop*’).

<sup>23</sup> *Ibid* 192-5, [21]-[34].

<sup>24</sup> Criminal Law Review, Department of Justice, Victoria (‘DOJ’), *Review of Sexual Offences: Consultation Paper* (Department of Justice, 2013) 1.

<sup>25</sup> *Roberts v The Queen* [2011] VSCA 162; *Neal v The Queen* [2011] VSCA 172; *Getachew v The Queen* [2011] VSCA 164 (2 June 2011) (‘*Getachew*’).

that the complainant might be asleep (a s 36 circumstance).<sup>26</sup> Buchanan JA (with whom Bongiorno JA agreed) maintained that the accused's awareness that the complainant might have been asleep did not preclude a mistaken belief that the complainant was awake and consenting to sex – on the basis that she had stopped objecting and resisting.<sup>27</sup> This decision, dubbed the 'sleep rape' case, sparked public outrage.<sup>28</sup> The Director of Public Prosecutions appealed the decision to the High Court who allowed the appeal and reinstated the conviction on the basis that, in the circumstances of the case, proof beyond reasonable doubt that the accused was aware that the complainant might have been asleep was sufficient to demonstrate that he was aware that the complainant might not have been consenting to the sexual act.<sup>29</sup>

Importantly, the High Court in *R v Getachew* also stated in obiter that the reasoning advanced in *Worsnop* was incorrect. The Court determined that 'belief in consent is not the controlling concept'<sup>30</sup> in the Victorian offence and whether a belief in consent precludes awareness that the complainant was not or might not have been consenting will depend on the degree of conviction with which the belief is held.<sup>31</sup> Consequently, a weaker level of belief – for example, a belief that the complainant *might* have been consenting or even *probably* was consenting – can co-exist with awareness that the complainant might not be consenting, and thus 'is no answer to a charge of rape'.<sup>32</sup> This obiter was affirmed by the Victorian Court of Appeal in *NT v The Queen*.<sup>33</sup> However, this rejection of the *Worsnop* reasoning did not end the numerous calls from judges, academics and rape service providers for legislative intervention to simplify and clarify the law related to the fault element for rape in Victoria.<sup>34</sup> To that end, the Victorian government began consulting on reform options in late 2013.<sup>35</sup>

Given the problems that dogged the 2007 amendments, the authors designed a qualitative research project to investigate stakeholders' perceptions of a reform proposal that would abandon the language of 'awareness' and introduce absence of 'reasonable belief' in consent as the fault element for rape in Victoria.<sup>36</sup> Previous empirical research has found that individual attitudes toward law reforms – and, in particular, resistance or opposition from legal and criminal justice personnel – are a key factor impeding the effective implementation of victim-focused rape reforms.<sup>37</sup> On this basis, our primary research question was: what are the attitudes and expectations of key stakeholders towards the introduction of an objective fault standard for rape in Victoria?

This article reports and discusses themes that emerged from a series of semi-structured interviews with 16 stakeholders who have extensive practice- or research-based expertise in criminal justice processing of rape cases. After providing further background on 'belief in

<sup>26</sup> *Getachew v The Queen* [2011] VSCA 164 (2 June 2011) [16].

<sup>27</sup> *Ibid* [25] (Buchanan JA). Lasry AJA disagreed on this point: [37]-[38].

<sup>28</sup> DOJ, above n 24, 2-3.

<sup>29</sup> *R v Getachew* [2012] HCA 10 (28 March 2012) [34] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>30</sup> *Ibid* [23].

<sup>31</sup> *Ibid* [27].

<sup>32</sup> *Ibid*. This decision is analysed at length in Kenneth J Arenson, 'The Queen v Getachew: Rethinking DPP v Morgan' (2013) 77 *Journal of Criminal Law* 151.

<sup>33</sup> [2012] VSCA 213 (6 September 2012).

<sup>34</sup> The calls for reform are detailed in DOJ, above n 24.

<sup>35</sup> *Ibid*.

<sup>36</sup> The research project has two components: stakeholder interviews and scenario-based focus group discussions. This article reports on the stakeholder interviews.

<sup>37</sup> See Nicole Bluett-Boyd and Bianca Fileborn, 'Victim/survivor-focused Justice Responses and Reforms to Criminal Court Practice: Implementation, Current Practice and Future Directions' *Australian Institute of Family Studies Research Report No 27* (Australian Government, April 2014) 40-42.

consent’ in rape law and our study methods, the article explores participants’ views on interpretation of the new provision, the proposed legislative guidance, and expected impacts and limits of the reform. We draw on the experiences of other jurisdictions that have adopted the ‘reasonable belief in consent’ standard to discuss key findings in the final section.

## II BACKGROUND: RAPE AND (UN)REASONABLE BELIEF IN CONSENT

As one commentator has noted, the 2007 amendments and s 37AA in particular succeeded in visiting ‘enormous confusion’ upon the law of rape in Victoria.<sup>38</sup> While the High Court has clarified certain issues in *R v Getachew*, that decision did not resolve all the problems associated with the fault element in Victoria’s current law. We note just three. First, the judge’s task in correctly instructing the jury on the mental element in a rape case remains unduly complex owing to the interactions between ‘awareness’ and ‘belief’. In particular, in cases where belief in consent is raised (in contrast to the facts in *Getachew* where it was not), it is unclear whether it will be an error if the jury is directed that the fault element will be satisfied if they find that the prosecution has demonstrated beyond reasonable doubt that the accused was aware of the existence of a s 36 (consent-negating) circumstance.<sup>39</sup>

Second, the jury’s task in a rape case – already unenviable – is only more complex, rather than less, following *Getachew*. The High Court’s clarification that a belief in consent will only be exculpatory if it was so strong that it precluded all awareness of the possibility of non-consent means that the jury must now consider and determine not only whether it was possible that the accused honestly believed in consent but, if so, they must determine the strength of conviction with which the belief was held and whether it was sufficiently strong so as to preclude all awareness of non-consent. Simply explaining this task is fraught. How the jury is to assess the existence and strength of a subjective belief, when the accused is not obliged to offer any evidence or explanation of that belief, is unknown.

Third, while the problematic relationship between ‘belief’ and ‘awareness’ has been outlined above, the Court of Appeal decisions in *Worsnop* and *Getachew* indicate that the relation between ‘honest’ and ‘reasonable’ belief in consent was also distorted by the 2007 amendments. The expanded s 37AA jury direction, introduced in 2007, requires the judge to direct the jury to consider whether the accused’s asserted belief in consent was reasonable in all the relevant circumstances, having regard to specified factors.<sup>40</sup> However, judges have been ‘balancing’ this required direction by telling juries that

...you must not find this [mental] element proved just because you decide that [name of the accused]’s alleged belief was unreasonable. A person may genuinely hold a belief despite it being unreasonable.<sup>41</sup>

<sup>38</sup> Kenneth J Arenson, ‘The Chaotic State of the Law of Rape in Victoria: A Mandate for Reform’ (2014) 78 *Journal of Criminal Law* 326, 329.

<sup>39</sup> The Victorian Court of Appeal took a rather novel approach to this question in *GC v The Queen* [2013] VSCA 139 (14 June 2013) (‘GC’), determining that any awareness of circumstances described in paragraphs (a) – (c) of s 36 will necessitate awareness that the complainant is not or might not be consenting, while awareness of circumstances in the other paragraphs is not so determinative. Arenson argues persuasively that the decision in *GC* demonstrates the ‘chaotic state’ of rape law in Victoria and the urgent need for ‘remedial legislation’, *ibid* 340.

<sup>40</sup> *Crimes Act 1958* (Vic) s 37AA. The structure of this direction has raised several interpretive issues – see, eg, Arenson *ibid*; Larcombe, above n 6.

<sup>41</sup> Judicial College of Victoria, *Victorian Criminal Charge Book* (2011) ch 7.3.1.1.2B, quoted in Larcombe, above n 6, 703.

In this way, the subjective standard of honest belief has been given substance by distinguishing and even dissociating it from reasonable belief. It was this line of reasoning – that paradoxically makes a belief in consent appear more genuine because it is unreasonable – that saw the Court of Appeal countenance the possibility that Tomas Getachew may have honestly believed that a recent acquaintance, who had rejected his sexual advances before she fell asleep, was later consenting to sexual penetration because she did not protest or resist. Similarly, in *GBD v The Queen*,<sup>42</sup> the Court of Appeal quashed convictions on the basis that a jury, properly instructed, might have found that it was possible the defendant had honestly believed in consent. The 41-year old applicant in *GBD* had sexually penetrated 14- and 15-year old complainants knowing that his friend had met the girls at a train station that afternoon and injected them with drugs for the purpose of ensuring their compliance.

Such decisions, and the associated statements of legal principle, profoundly undermine the affirmative concept of consent as ‘free agreement’. They also put Victoria’s fault element for rape well out of step with comparable jurisdictions. As noted above, New Zealand, England and Wales, New South Wales, Queensland, Tasmania and Western Australia all require that a belief in consent must be reasonable in the circumstances, or based on reasonable grounds. The policy trend is clear – a person who initiates sexual penetration without reasonable grounds for believing in the other person’s consent is not ‘morally innocent’ and should not escape liability for rape given the ease with which consent can be ascertained and the harm to the victim from proceeding without consent.<sup>43</sup>

What is less clear is whether, in practice, the ‘reasonable belief’ standard fulfils the policy objective of obliging a person to ascertain the free agreement of another person before initiating sexual penetration. Certainly, there is little evidence that it assists in overcoming some of the seemingly intractable problems associated with the prosecution of sexual offences. In England, for example, comprehensive reforms to sexual offences legislation, including the introduction of an objective fault standard, do not appear to have increased the conviction rate for rape or to have shifted the intense focus on the complainant’s actions as the basis for the accused’s claimed belief in consent.<sup>44</sup> In Queensland<sup>45</sup> and New Zealand<sup>46</sup> the possibility of a reasonable belief in consent has been found in circumstances that beggar such a belief, leading to calls for legislative intervention to limit the scope of the reasonable belief defence. For the same reasons, Tasmania<sup>47</sup> and Canada<sup>48</sup> have already legislated to require that the accused must have taken reasonable steps to ascertain the complainant’s consent in order to raise a defence of belief in consent.

It is in this context that we sought to investigate stakeholders’ attitudes to and expectations of a reform proposal that would introduce the reasonable belief standard in Victoria.

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<sup>42</sup> [2011] VSCA 437.

<sup>43</sup> See DOJ, above n 24, 38. As Andrew Ashworth explains, ‘[t]here are certain situations in which the risk of doing a serious wrong is so obvious that it is right for the law to impose a duty to take care to ascertain the facts before proceeding’ - Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 6<sup>th</sup> edition, 2009) 341. On this point, see also *He Kaw Teh v The Queen* (1985) 157 CLR 523, 578-9 (Brennan J).

<sup>44</sup> Carline and Gunby, above n 3, 238-9.

<sup>45</sup> See Jonathan Crowe, ‘Consent, Power and Mistake of Fact in Queensland Rape Law’ (2011) 23(1) *Bond Law Review* 21, 38-9.

<sup>46</sup> See Elisabeth McDonald and Yvette Tinsley, *From ‘Real Rape’ to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, 2011) 34.

<sup>47</sup> *Criminal Code Act 1924* (Tas) s 14A(1)(c).

<sup>48</sup> *Criminal Code 1985* (Canada) s 273.2(b).

### III METHODS

Ethics approval for the study methodology and interview schedule was obtained from the Human Research Ethics Committee at The University of Melbourne.<sup>49</sup> Study participants were recruited through direct invitation from the research team, or after being referred to the research team by a colleague. We sought in particular to recruit informants with practical experience of each stage of rape complaint handling, including sexual assault counsellors, health workers, police, prosecutors, defence counsel and judges. We also recruited academic researchers with experience in instigating or evaluating sexual offences law reforms. All participants were familiar with past reforms of sexual offences in Victoria and a number also had direct knowledge of rape provisions in other jurisdictions. Our 16 participants were drawn from the following sectors: defence bar (2), prosecution (3), judicial (2), medical (1), sexual assault victim/survivor services (5), academic (2), and police (1). It should be noted that the average length of time that participants had spent working in relevant sectors was 20 years and that a number of our participants had experience of previous sexual offences law reforms through a range of positions beyond their current roles.

The interviews took place at the participants' workplace, and were between 30-90 minutes long, with the average interview taking 50 minutes to complete. Respondents were provided in advance with a copy of interview questions and themes<sup>50</sup> and could choose not to answer any question or to address only selected topics. Interviews were audio-recorded with participants' consent, transcribed and analysed thematically<sup>51</sup> by the two primary investigators, Larcombe and Fileborn, who first coded the interview transcripts independently, and then compared codes to ensure agreement over emergent themes. The themes, sub-themes and findings were then further refined. This article discusses findings that emerged in relation to: the interpretation of 'reasonable' belief; legislative guidance; and potential impacts and limits of the reform.

### IV RESULTS

#### A *Interpreting 'Without Reasonable Belief'*

As outlined, previous rape law reforms in Victoria have not always been applied in practice in the ways that were intended or expected by the reform advocates. In that context, participants in the present study were asked how they thought a proposed reform to the definition of rape would be interpreted in Victoria. Under this proposal, it was explained, rape would be committed when A sexually penetrates B without B's consent and when A does not believe on reasonable grounds that B consents.<sup>52</sup> Our interest was in the fault element: absence of reasonable belief in consent.

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<sup>49</sup> HREC # 1442220.1

<sup>50</sup> The interview schedule was developed by the research team with valuable feedback and suggestions from members of the project Expert Advisory Group: Dr Stuart Ross, Dr Jacqueline Horan, Dr Antonia Quadara and Dr Chris Atmore.

<sup>51</sup> On qualitative data analysis methods, see David Silverman, *Interpreting Qualitative Data: A Guide to the Principles of Qualitative Research* (Sage, 4<sup>th</sup> edition, 2011) 57-86; Monique Hennink, Inge Hutter and Ajay Bailey, *Qualitative Research Methods* (Sage, 2011) 233-265.

<sup>52</sup> The reform option put out for consultation by the Department of Justice phrased the relevant fault element as A 'does not believe on reasonable grounds' that B consents. Presumably in response to submissions received and further consultation, by the time an exposure draft of the Bill was circulated to some of our participants the phrasing had changed to A 'does not reasonably believe' that B consents. In later interviews we presented the two phrasings as alternates. Our judicial participants noted that there is a technical legal difference between the

Participants identified a range of questions and interpretive issues that would need to be resolved before it could be known what the new standard meant in practice. Thus, while the reform was seen to be ‘focused on improving the system’ (SO16 Police) by making the law easier for lay people to understand, participants overwhelmingly indicated that ‘belief on reasonable grounds’ or ‘reasonable belief’ was an indeterminate concept, open to differential interpretation. The lack of clarity was seen to be exacerbated by the fact that the proposal did not specify whether the existence (or absence) of ‘reasonable grounds’ for a belief in consent was to be assessed from a community-based perspective or from the perspective of the individual defendant in the particular circumstances of the case: ‘...well, what’s reasonable? Whose standard is it?’ (SO13 Defence). For some, ‘reasonableness’ requires some ‘objectivity’ or general consensus in contrast to the wholly subjective test of ‘honest belief’: ‘it’s about a standard of reasonableness that everyone can accept, rather than his own stupid belief’ (SO2 Victim Services). However, other participants questioned whether there are consistent, generally-accepted community norms about what is ‘reasonable’ in the negotiation of sexual consent. In the experience of one participant, different ‘communities’ have different practices and expectations regarding sexual interaction (SO1 Victim Services). Another observed that, while ‘reasonable grounds’ is considered an objective test in criminal law theory, in practice, reasonable grounds for belief in sexual consent is ‘a huge grey area’ (SO11 Academic).

Determining whether particular circumstances would make a belief in consent reasonable was no less problematic as participants disagreed about the circumstances that would be relevant to such a determination. For one participant ‘the only reasonable ground [for believing in consent] is somebody says “yes”’ (SO1 Victim Services); however, others maintained that the context of an interaction and, in particular, the prior history of the relationship between the parties would need to be considered. One respondent expressed the view that in a marriage ‘it’s probably unlikely that the partners are going to be asking each other whether they want to have sex’ (SO13 Defence).

Given different expectations about how sexual interactions are negotiated, several participants were concerned that a complainant’s lack of protest or resistance may be cited by the accused as support for a reasonable belief in consent. They explained that a complainant’s failure to resist or to voice refusal may result from various factors – for example, because the complainant was heavily intoxicated, ‘frozen’ from fear, or otherwise strategically complying with an assailant’s demands. Our medical participant in particular was concerned that the ‘normal’ reaction of a rape victim who adopts the ‘coping mechanisms in crisis of freeze or surrender’ (SO15 Medical) may provide grounds for an accused’s reasonable belief in consent. Similarly, a participant working in victim services noted that in cases where there is a history of intimate partner violence, ‘she’s not going to be saying “no”, most of the time ... because it has not worked for her in the past’ (SO3 Victim Services). It was argued that lack of refusal or resistance in these cases should not provide grounds for a reasonable belief in consent.

While a majority of participants discussed the risk that a belief in consent may be considered reasonable (by some or in some contexts) ‘where a complainant makes no outward sign of opposition or resistance’ (SO7 Prosecution), most participants assumed that ‘reasonable’ belief could not be argued if the complainant had voiced their refusal. However, one judicial participant did anticipate such arguments:

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two phrasings, however they were the only participants to mention this. In our view, the variation in wording of the provision does not materially affect the themes and issues raised in the interviews.

The variations of the way communication is effected in a situation that might lead to sexual intercourse are so wide that it will I think be inevitable that some accused will say that there are occasions when no can be taken as yes. (SO10 Judicial)

As a result, it emerged that while affirmative communication is the basis of the definition of consent in Victorian rape law, circumstantial inference may dominate arguments about 'reasonable belief in consent'. One participant expected that this tension or conflict between the 'consent' and 'belief in consent' elements of the offence would confuse jury members:

...if you're a jury [member] and never had any sort of experience with the law and you were told you can take into account any factual circumstances that could lead him to believe in consent, and then later you're told "well if she wasn't physically protesting you can't take this into consideration, you can't take into consideration that she's had sex with him previously", but these are actual circumstances so why wouldn't they be [relevant to belief]? The two sections are counterintuitive, how would any jury ... make sense of that? (SO4 Victim Services)

Several participants questioned whether it would be possible to argue for a reasonable belief in consent in circumstances where consent is deemed legally impossible – such as when the complainant is asleep, in fear or so affected by drugs or alcohol as to be incapable of freely agreeing to sexual activity. A number suggested that a 'reasonable' belief in consent should not be possible in such circumstances. Further clarification was also requested on whether inadvertence – or failure to give any thought to whether the complainant was consenting – would preclude a reasonable belief in consent. Prosecutors and victim service providers argued that evidence that the accused failed to give any consideration to the issue of consent should be sufficient (in all circumstances) to prove that there was no reasonable belief in consent.

Participants also discussed which, if any, of the accused's attributes or characteristics should be taken into consideration in determining whether a belief in consent was reasonable given the facts of the case as the accused understood them to be. A number of participants expressed the view that the defendant's age and any cognitive impairment should be taken into consideration. However, a range of other variables were also explored including: degree of sexual experience, low IQ or mental capacity (not amounting to a cognitive impairment), mental health difficulties that may distort perception, and cultural background which may include a belief that women are consenting unless they actively resist. A majority of our participants suggested that no one, as yet, has clear answers to such questions, which would ultimately be determined by the courts.

Developing clarity in the legal meaning of 'reasonable belief' was expected to be a drawn out process involving extended legal argument through trials and appeals. A prosecutor anticipated that juries would have a lot of questions about 'what really is a reasonable belief?' (SO8 Prosecution) and a range of participants anticipated that it would be some years before judicial instructions were settled on the factors and circumstances that might make a belief in consent 'reasonable':

...so there's going to be a fight, and then it's going to be a problem for a judge: how is the judge going to direct the jury on this issue? Being the law, but also being particularly Victorian law, it will end up with a fight over what technical definition of reasonable grounds will the jury ... be given, whose reasonable grounds on what basis and all of that, but they'll spend a few years coming up with wording, and in the meantime appeals will succeed because the wording wasn't adequate ... These things take 2 or 3 years at best. (SO12 Academic)

During that process of resolving the legal meaning, a number of participants considered that the interpretive approaches that various actors in the criminal justice system would adopt *were* predictable. The majority of participants were of the view that the various professional actors in the criminal justice process would be likely to interpret ‘reasonable belief in consent’ through a professional or institutional ‘lens’:

I think that they would interpret on ‘reasonable grounds’ through the prism of their own beliefs, and through their own professional ethics as well. (SO3 Victim Services)

Some participants suggested that different actors would interpret the provisions strategically or opportunistically in order to advance their organisation’s or client’s interests. Thus, generally speaking, those who work alongside victim/survivors (such as counsellor/advocates, police and, to a lesser extent, prosecutors) were seen as likely to adopt and advocate for a narrow or strict interpretation of what constitutes ‘reasonable grounds for belief in consent’. Conversely, defence advocates and the judiciary were viewed as likely to adopt or press for a broad interpretation,<sup>53</sup> enabling a wider range of factors and considerations to constitute ‘reasonable grounds’ for belief in consent:

Many judges will take the most pro-defence position because it is the safest course to making yourself appeal proof. (SO6 Prosecution)

This suggests that the formation of divergent interpretations and applications of sexual offences legislation is inevitable, as professional groups involved in the criminal justice system seek to shape understandings and applications of legislative provisions in a way consistent with the priorities of their role. Participants generally accepted the formation of these divergent, role-based perspectives as being inevitable in an adversarial system.

Of greater concern to a number of participants was the reasoning that juries might apply in determining whether a belief in consent is ‘reasonable’ on a case-by-case basis. Juries were seen by a number of our informants as likely to bring a range of rape myths and misconceptions to bear on their determination:

They [jury members] think that victims look a certain way or might provoke or have asked for it in some way, by drinking too much or walking down the wrong alley. (SO15 Medical)

One participant noted that in applying rape myths and stereotypes, jury members may not be imposing their personal views so much as deferring to what they imagine others would think is reasonable:

When the jury sits there wondering: ‘well how do we know what is a reasonable ground, is it what we think is reasonable ... does it include things we don’t think are reasonable, but other people could think are reasonable?’ (SO12 Academic)

One participant (SO4 Victim Services) argued that the use of jury trials for sexual offences was inappropriate on the basis that jury members apply a range of rape myths and misconceptions to their reasoning, resulting in an unfair outcome or inappropriate acquittal. While the suggestion to move to judge-only trials for sexual offences was novel,<sup>54</sup> the view was

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<sup>53</sup> It should be noted that comments from the judicial participants in this study did not indicate they would adopt such an approach, while comments from the defence participants indicated that they would.

<sup>54</sup> This suggestion echoes calls in NZ to remove juries from sexual offence trials – see McDonald and Tinsley, above n 46, 277.

commonly expressed that jury members would bring a range of problematic assumptions to their decision-making if not provided with strict guidance.

## B *Guidance on 'Reasonable' Belief in Consent*

The reform option proposed by the Victorian Department of Justice included legislative guidance on the meaning of 'reasonable belief' to the effect that:

Whether a person has reasonable grounds for believing in consent depends on all the circumstances of the case including any steps that the person has taken to find out whether the other person consents. However, the accused's intoxicated state is *not* to be taken into consideration, where that state of intoxication was self-induced.<sup>55</sup>

We explored informants' views of the proposed guidance and asked if any additional guidance should be included in the legislation.

### 1 *Proposed Guidance*

Participants were divided in their views as to whether there was merit in providing legislative guidance to draw attention to the 'steps taken' by the accused, if any. For some, this was an important element of the reform as it drew attention to the accused's actions, not only the complainant's:

That squarely puts the onus on the accused and that's where it should be. Yes I think that's a very important, if not vital, part of the proposed package. (SO10 Judicial)

However others noted that directing juries to consider whether the accused took any steps to ascertain consent may be problematic given that there is no legal requirement to take any such steps:

I think what that provision does is desirably encourage consideration of the steps taken or not taken. On the other hand, steps are not required. (SO11 Academic)

Another participant argued that although there is no onus on the accused to have taken steps, the reform nonetheless provides 'a framework within which there needs to be a level of communication', and that this was an improvement on the current legislative provisions (SO16 Police). Defence practitioners tended to view this guidance as placing a (potentially) unfair onus on the accused. In this context, one participant suggested that judges should 'balance' their instructions to juries by emphasising that a belief in consent may be reasonable even when no steps are taken to find out whether the other person was consenting:

If we...take the scenario of at the moment they're told that just because a belief is...not reasonable, it can still be genuinely held. If we...extrapolate from that and say just because there were no steps taken, that may not automatically mean that it wasn't a reasonable belief, then that may help. (SO13 Defence)

Our participants were also cautious, for divergent reasons, about the directive not to consider the accused's state of self-induced intoxication when determining if there could be reasonable belief in consent. For some participants (and predominantly those with a victim-focused role),

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<sup>55</sup> This is a paraphrase of the key elements of the proposed jury guidance - see DOJ, above n 24, 45.

the proposed guidance was seen as a positive measure that would remove alcohol as a potential ‘excuse’ for offending.

The issue is: if you choose to get drunk then you should be responsible for your behaviour when you’re drunk. That’s it... if you get drunk you’re responsible. (SO1 Victim Services)

Again, however, defence practitioners viewed this provision as unfair, particularly as it was seen to treat the accused and the complainant differentially:

I think that’s incredibly unfair... especially in circumstances where we have two drunk people ... The law says you can assume that one person can’t consent because they’re drunk, but you’re not to take into account the fact that the other person possibly is not in any position to be reading those signals correctly. (SO13 Defence)

Other participants who were more supportive of the intent of the guidance were still cautious about how it might work in practice. For example, it was suggested that telling jury members not to consider something they saw as relevant conflicts with human psychology and so may create resistance (SO15 Medical). Another participant thought the directive would create confusion as it appears to contradict the instruction to consider all the circumstances of the case:

I think it’s also just ... confusing to be told: ‘here you are deciding whether someone’s guilty of a crime or not, let’s pretend they were sober’. I don’t know what a jury can make of that. (SO11 Academic)

## 2 *Additional Guidance?*

Participants expressed diverse views about the need for, or desirability of, additional guidance about ‘reasonable belief’. Some simply saw the legislative stipulation of jury instructions as being unnecessary, and even ‘insulting’ to the jury. Others warned against the introduction of jury directions on the basis that they may produce the same complications as arise currently and thus frustrate the reform’s aim to simplify the law:

I believe that criminal law should be kept as simple as possible. If we’re going to have trial by jury then we have to ensure that the questions we pose to the jury are fully understood and capable of being understood. What we have at the moment is not that. (SO9 Judicial)

For those who did see a need for further guidance, their comments centred on two issues: narrowing the grounds that might be argued to support a reasonable belief in consent, and the perceived need to educate jury members about common strategies used to effect rape as well as ‘normal’ victim responses to sexual assault.

Some participants advocated for highly prescriptive guidance on the circumstances or factors that *cannot* constitute ‘reasonable grounds’ for belief in consent, even if that were a long list:

...in the same way that our current *Crimes Act* says consent equals free agreement and it gives the list of factors [that vitiate consent] I think there should be something like that: ‘reasonable belief’ means... (SO7 Prosecution)

If you’re going to use reasonable grounds it needs to be spelled out exactly that this is not free consent: if she walks home alone, whatever she’s wearing, she’s had a couple to drink, you

know...It would be a huge list, it would have to be huge. They'd [jury members] have to have a copy of it in front of them. (SO4 Victim Services)

While a number of participants considered that factors such as the complainant's clothing, drinking, and participation in other consensual sexual acts should be deemed not relevant to belief in consent, others considered that such factors may still be relevant in particular cases.

As a result of the anticipated difficulties with jury directions, a number of participants discussed jury education as another means of counteracting common misconceptions about sexual violence and stereotypes of 'typical' victims and offenders. One participant recommended that juries be provided with a snapshot of 'the reality of rape' as established by decades of empirical research:

I'm interested...in the approach that's been taken in New Zealand where apparently they get a psychological expert in who isn't speaking to the facts of the case at all, but aims to inform the jury. I guess that's about trying to create a greater awareness of rape myths and what we actually know about rape. (SO11 Academic)

However, another participant was critical of the use of educators in jury trials primarily on the grounds that the information provided was unlikely to be 'impartial':

...it would be very hard to get a kind of objective educator, I mean are we going to choose somebody with a particular hobby horse to present a case, do we want to prejudice the jury one way or the other or do we want them in off the street using their experience of life? (SO9 Judicial)

As noted earlier, for some participants it was precisely the notion that jury members should rely only on their 'experience of life' in their decision-making processes that was problematic. Participants who work as victim/survivor advocates argued most strongly that members of the jury should be provided with education material about the modus operandi of perpetrators of sexual offences. A number also suggested that juries should be given information about the dynamics of family violence and rape in marriage so they could understand the range of 'normal' responses and why there may be lack of resistance or voiced refusal in such circumstances. Another participant, while supportive of jury education in principle, pointed out that 'we're probably better off putting some time and effort into educating the community at large rather than just trying to focus exclusively on jurors' (SO16 Police).

### C *Perceived Outcomes and Limits of the Proposed Reform*

Rape law reforms commonly aim to improve rape reporting and conviction rates as well as to set clear standards for sexual conduct. Participants were asked what they believed the overall outcomes and any limits of the proposed reform were likely to be, giving particular consideration to the experiences and decisions of defendants and complainants.

#### 1 *Outcomes*

Overall, participants did not expect the introduction of a fault standard for rape centred on 'reasonable belief in consent' to significantly change decision-making, justice processes or the outcomes of rape trials in Victoria. The fact that the 'reasonable belief' standard has been in operation in a number of Australian jurisdictions for decades was one consideration in this assessment:

I just don't think the evidence is in that making this kind of change has changed the face of rape prosecution in those jurisdictions where it has already happened. (SO11 Academic)

Participants were almost unanimous in the view that the proposed reforms would have little to no impact on victim/survivors and their engagement with the formal justice system. An exception to this was a Police participant, who believed that the reforms would assist the complainant 'assuming that this will result in positive outcomes where consent is an issue, where previously those positive outcomes haven't been there' (SO16 Police). It was not expected that the reform would impact reporting rates. At best, some participants suggested that the reforms might spur a short-lived spike in reporting, but that was largely attributed to the public awareness campaigns that were expected to run in conjunction with the reform, rather than the substance of the reform. Many participants suggested that the limited impact of the reforms on decisions to report was due to the minimal influence of a potential prosecution on victim/survivors' decision-making processes. Instead, a range of social, personal and emotional factors were identified as being more influential in the decision to report or not.

Similarly, virtually all participants considered that the reforms were unlikely to influence an accused's plea decision:

I...don't think it's going to have any impact on the rate of guilty pleas. If someone's saying it was consensual, they're going to say it's consensual regardless of what the definition is in terms of their state of mind. (SO13 Defence)

This participant noted that a range of extra-legal factors also influence the way a defendant pleads – for example, if a defendant had presented a certain version of events to their friends and family they were likely to stand by that to save face, regardless of how accurate it was. A police participant was slightly more hopeful on this point: 'I would like to think, gazing into my crystal ball, that what we'll see is potentially more guilty pleas so we'll actually ... spare the victims the difficulties with having to give evidence. I don't think that will be universal.' (SO16 Police).

A small number of participants suggested that the reform may change the way the defence is run at trial. For instance, it was suggested that 'they'll run straight consent cases', where it is argued that the complainant was in fact consenting, rather than conceding absence of consent but arguing reasonable belief nonetheless (SO2 Victim Services). Defence informants suggested that the reform may increase the likelihood that complainants would be cross-examined on matters such as their past sexual history as this may provide the grounds for the accused's belief in consent. However, a judicial participant took the view that rape shield provisions would prevent such cross-examination. Another participant considered that the grounds for a 'reasonable' belief would not vary significantly from those that are currently argued to support 'honest' belief in consent:

They'll raise all the usual reasons that they give right now for believing that there was consent or there could be consent, the person didn't react, the person initially was happy enough with things, the person had acted in a way throughout the evening that indicated that it was a possibility, the person had lots of opportunities to vocalise and didn't... there won't be any difference in the actual arguments made. (SO12 Academic)

There was disagreement about the potential impacts this reform may have on convictions, if any – filtered through the lens of professional role. Consequently, defence participants were

more likely than others to indicate that the reforms would potentially result in a higher number of convictions. In contrast, participants who worked in prosecutions and victim services tended to suggest that the proposed reform would not affect conviction rates, unless it was 'to get even fewer convictions' (SO3 Victim Services).

When considering appeals against conviction, the proposed reform received strong support from judicial participants who expected that the simplified fault element would assist in alleviating some of the difficulties in instructing juries posed by the current legislation:

In terms of the drafting and avoiding the problems that arose in cases like *Worsnop*...the new provisions will be an improvement, a significant improvement. (SO9 Judicial)

However, others anticipated that the vagueness of 'reasonableness' would 'add to the complexities of the judicial directions' (SO8 Prosecution) and the prospects of successful appeals:

Every change brings in a whole slew of things that the defence can challenge, and the opportunity for convictions to be overturned. (SO11 Academic)

I think for a period of five years no one is going to know what they're doing and so the next five years is going to be essentially a testing phase. (SO7 Prosecution)

While some participants focused exclusively on the legal outcomes of the proposed reform, others also commented on potential impacts in relation to community standards and messages about acceptable conduct. Participants from diverse sectors considered that the reform would set a more desirable standard for sexual conduct:

One would hope that community expectations of the relationships that might lead to sexual intercourse would change and that initiators would be more conscious of the need to ensure that there is genuine consent. (SO10 Judicial)

However, it was noted that the potential communicative value of the reform was conditional on it being promoted widely to the general community through a well-resourced media campaign.

One participant considered that this particular reform and its effect in removing honest (if unreasonable and mistaken) belief in consent as completely exonerating would be important for the experience of some complainants, as well as community confidence in the justice system. In this informant's experience, it is shameful that, under the current provisions, the accused can be acquitted even when it is accepted by all that the complainant did not consent:

Certainly for her as the rape complainant who's in there giving her evidence, and having to deal with hearing a defence barrister saying 'everybody accepts you didn't consent...everybody here knows, including him, that you were raped, it's that he just didn't mean it'... I don't know how she [the complainant] deals with that, I don't know how she comes to terms with that, and then loses on it...that he can still be acquitted because he just didn't think so at the time, for whatever stupid reason. I think that was a position that...I felt ashamed of when I saw that happen, for the very few women that I saw it happen for... So that won't happen to her ever again, I hope. (SO2 Victim Services)

## 2 *Limits*

Participants identified a range of perceived limitations of the proposed reform, indicating that it would not ‘resolve’ conflicting views regarding the definition and prosecution of rape, or end the calls for legislative reform. However, one of the limitations identified was in fact ‘reform fatigue’:

...we’ve changed our sex laws so many times and all it does is create further confusion. We need to...settle on something and work with what we’ve got...rather than keep changing and changing and changing. As much as I don’t like what we’ve got at the moment, I think this is probably going to be worse. (SO13 Defence)

For different reasons, a number of participants from the victim services sector were also sceptical of the focus on reforming legislation, arguing that legal culture and practice were now the main source of problems that victim/survivors experience in the criminal justice process. A police participant was an exception here, commenting that ‘I actually thought the way in which this piece of reform was approached was really good’ (SO16 Police).

Some participants identified principled or substantive limits to the present proposal, suggesting that this reform was not their preferred option. For example, one judicial participant (SO9 Judicial) argued that ‘intentional’ rape (where the accused acted with knowledge of lack of consent) should be distinguished from and punished more severely than ‘negligent’ rape (where there are no reasonable grounds for the accused’s belief in consent). For this participant, the failure to observe this distinction means that the proposed reform puts rape undesirably out of step with other criminal offences. Another participant, who strongly disagreed with ‘tiered’ offences, suggested that the distinction between intentional, reckless or negligent mental states should be ‘dealt with in a sentencing context’, rather than setting the standard for the offence of rape (SO2 Victim Services).

For others, changing the fault standard from ‘honest’ to ‘reasonable’ belief did not go far enough in moving the focus of rape prosecutions onto the accused’s actions and setting appropriate standards for sexual conduct. One participant (SO12 Academic) would have preferred that ‘failure to take reasonable steps’ was the test of liability, not lack of reasonable belief. Another participant argued that, rather than analysing the steps taken by the accused to ascertain consent, the fault element for rape should ‘focus on what steps he took to perpetrate this sexual assault’:

What did he actually do...not let’s guess what he believed at the time, but what did he actually do?...they [perpetrators] isolate the victim, they control the situation, they impose their own desires, so I would like to see the focus shift away from the victim and what she did to contribute, to working out if this guy has followed the modus operandi of a perpetrator. (SO3 Victim Services)

Finally, a defence advocate identified the need for reforms that create alternative, restorative justice responses for rape in some circumstances and for some complainants or defendants:

I’m a big proponent of the suggestions for reform of bringing in some kind of reconciliation process for sexual offences, in particular types of cases. So for example, historical matters and those where ... the family wants to remain as a unit and the only way they can do that is by a process of reconciliation, rather than by an adversarial process. ... I’d much prefer to see those kind of reforms rather than keep tinkering with the law. (SO13 Defence)

## V DISCUSSION

While our research with a small sample of stakeholders is exploratory, the findings from this study tentatively identify several challenges that may impact the implementation of the proposed reform in Victoria. These challenges may also arise if further rape law reform is proposed in comparable Australian and international jurisdictions. We draw on the experiences of implementing a reasonable belief in consent standard in other jurisdictions to contextualise our discussion here.

Our findings suggest that the introduction of an objective fault element for rape in Victoria may receive a cool to lukewarm reception among some key stakeholders. Defence barristers did not welcome further reform. Judges and police – those tasked with explaining the law to lay people – were most supportive of legislative reform in general and of the reasonable belief standard in particular, with some reservations. Victim service providers, prosecutors and academics were concerned that, in practice, there may be little difference between ‘reasonable’ and ‘honest’ belief in consent. More particularly, there was no consensus among our stakeholders on whether the proposed reform would resolve or increase confusion and uncertainty in understandings and administration of the law; whether it made a desirable or abhorrent policy change; and, among those who supported the policy underlying the reform, there was no agreement on whether the specific reform would improve the complainant’s experience of participating in the criminal justice process, or only add to the scrutiny at trial of her/his activities and actions without increasing the prospects of conviction.

Given these findings, it is evident that support for the selected reform proposal would need to be actively fostered among legal and criminal justice personnel – it could not be assumed. Building support for the reasonable belief standard will require acknowledgement and understanding of the very different reasons for some stakeholders’ reservations or cautions about the proposed reform. Where previous empirical research has identified conservatism and victim-blaming attitudes as prompting resistance to rape law reform on the part of legal and criminal justice personnel,<sup>56</sup> our participants’ lack of enthusiasm for an objective fault element was the result of diverse factors and considerations, with professional role evidently shaping views and reflecting the adversarial nature of the criminal justice system.

Participants’ experiences of previous rape law reforms in Victoria were also an important factor here. Our study identified a degree of reform fatigue, likely to be replicated in other common law jurisdictions where rape law has been amended relatively frequently. For some of our participants, that fatigue – and general apprehension about further law reform – was a response to the uncertainties and disruptions that legislative change entails. For others, the fatigue was a response to perceptions that previous reforms had not delivered on their objectives and policy promises, particularly with respect to improving victim/survivors’ experiences of the criminal justice process. In this context, it will be important to justify both the need for and the benefits likely to flow from further rape law reform.

Experience of the implementation and application of a reasonable belief standard in other jurisdictions suggests that some of our participants’ negative expectations of this reform proposal may not be realised in practice while others may well be. For example, although every law reform has workload implications for those tasked with implementing it, some of our participants’ concerns related to the administration of an objective fault standard for rape may be allayed by reference to the experience in England and Wales. A recent assessment of the

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<sup>56</sup> Bluett-Boyd and Fileborn, above n 37.

*Sexual Offences Act 2003* (UK) notes that the reasonable belief test was ‘quickly accepted’ as clear, concise and easy to apply.<sup>57</sup> It also notes that few appeal cases have featured reasonable belief in consent as an issue,<sup>58</sup> and that uncertainty concerning when a belief in consent would be reasonable for an accused with specific attributes or abilities has not obstructed the general operation of the test. Indeed, the test was in operation for ten years before the Court of Appeal had the opportunity to discuss the impact that an accused’s mental disorder might have on the ‘reasonableness’ of any belief in consent.<sup>59</sup>

On the other hand, expectations that a reasonable belief standard will not bring significant benefits for complainant-witnesses in Victoria appear to be realistic, based on the operation of the standard in other jurisdictions. In a qualitative study of English barristers’ perceptions of the objective fault element for rape, ‘it was generally considered that it was not difficult for a defendant to establish that his belief in consent was reasonable’,<sup>60</sup> based on complainant behaviour such as flirting, accompanying the accused into a bedroom, or failing to actively demonstrate lack of consent through protest and resistance.<sup>61</sup> In concluding that ‘the impact of the reformulated mens rea is by no means as dramatic as it could have been’<sup>62</sup> this study supports the views of our participants who question whether there will be a significant difference between ‘honest’ and ‘reasonable’ belief in practice. Experience in New Zealand<sup>63</sup> and Queensland<sup>64</sup> also suggests that ‘reasonable belief’ does little to shift the spotlight from the complainant’s behaviour, especially when they did not protest or resist the assault.<sup>65</sup> This is acknowledged to undermine the ‘communicative’ or affirmative consent framework that has been the basis of previous rape law reforms in Victoria and elsewhere.<sup>66</sup>

Anticipating that the proposed reform would not significantly change the conduct or outcomes of rape trials, a number of our participants suggested measures to restrict the scope of, or the grounds that might be argued to support, ‘reasonable belief’ in consent in Victoria. Some also recommended that the legislation create a positive obligation on the accused to take steps to ascertain consent. However, views were divided on the desirability of further specifying and limiting through legislation the circumstances that should, or should not, be taken into consideration in determining the ‘reasonableness’ of a belief in consent. There was a similar division of opinion about the desirability and merit of jury education to counter false

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<sup>57</sup> Catarina Sjölin, ‘Ten Years On: Consent Under the Sexual Offences Act 2003’ (2015) 79(1) *The Journal of Criminal Law* 20, 34.

<sup>58</sup> *Ibid* 33.

<sup>59</sup> *R v B (MA)* [2013] EWCA Crim 3. The Court held that a mental disorder resulting in delusions and irrational beliefs could not provide grounds for a ‘reasonable’ belief. It was acknowledged that future cases may find that other attributes or abilities may be relevant in determining whether an accused’s belief in consent was reasonable in the circumstances. See David W Selfe, ‘Rape: Mens Rea and Reasonable Belief’ (2013) 214 *Criminal Lawyer* 3.

<sup>60</sup> Carline and Gunby, above n 3, 248.

<sup>61</sup> *Ibid* 247-8.

<sup>62</sup> *Ibid* 248.

<sup>63</sup> See McDonald and Tinsley, above n 46.

<sup>64</sup> See Crowe, above n 45.

<sup>65</sup> This is of particular concern given that resistance or protest is not legally required to prove rape and, in practical terms, a lack of resistance or protest is often a ‘normal’ response to sexual assault.

<sup>66</sup> On the communicative or affirmative model of consent, see Sharon Cowan, ‘Choosing Freely: Theoretically Reframing the Concept of Consent’ in Rosemary Hunter and Sharon Cowan (eds), *Choice and Consent: Feminist Engagements with Law and Subjectivity* (Routledge-Cavendish, 2007) 91; Lise Gotell, ‘The Discursive Disappearance of Sexualised Violence: Feminist Law Reform, Judicial Resistance, and Neo-Liberal Sexual Citizenship’ in Dorothy E Chunn, Susan B Boyd and Hester Lessard (eds), *Reaction and Resistance: Feminism, Law and Social Change* (UBC Press, 2007) 127.

expectations and stereotyping in rape cases – perhaps given our participants’ experiences with mandatory jury directions in Victoria.<sup>67</sup>

On this point, experiences in other jurisdictions may be more reassuring. For example, presumptions stipulating that reasonable belief in consent will not be possible in certain circumstances have proven problematic in England and Wales and there is a persuasive call for their removal.<sup>68</sup> Similarly, stipulating that an accused must have taken reasonable steps to ascertain consent in order to succeed in raising reasonable belief in consent does not appear to have changed the conduct or outcomes of rape cases in Tasmania.<sup>69</sup> It is a different story in Canada, which also requires that the defendant must have taken reasonable steps, but that is because the Canadian Supreme Court has limited a mistaken belief to the immediate and affirmative communication of sexual consent.<sup>70</sup> Such an approach merits consideration and exploration in other jurisdictions. In the meantime, information on the experiences of other jurisdictions who have attempted to legislatively restrict the scope of reasonable belief in consent may assist in justifying the chosen reform option in Victoria to those who expect the concept of reasonable belief to be broadly interpreted in the defendant’s favour.

Given the experience of other jurisdictions, our findings suggest that the present reform proposal in Victoria is likely to fail to meet expectations if it is represented as a victim-focused reform rather than as a measure to improve administration and understanding of the law. Given past disappointments and negative experiences with rape law reform intended to make the criminal justice process ‘fairer’ for complainants, it is vital that politicians and government agencies enacting and implementing this and further rape law reform are realistic about the objectives, the expected benefits and the likely limits of the reforms. In short, the case needs to be made that the selected reform will actually deliver policy or practical gains in the processing and outcomes of rape cases. Further reform of rape laws claiming to meet victim/survivors’ needs and improve their experiences of the criminal justice process – when the legislative changes have little prospect of delivering on those promises in practice – can only disaffect both victim-advocates and defence practitioners.

## VI CONCLUSION

Victoria’s incremental approach to the modification of the *Morgan* principle has not worked. The attempt in 2007 to ‘clarify’ the mental element for rape through mandatory jury directions only increased the complexity of the judge’s and jury’s tasks. The interpretations of the relevant provisions developed by the Victorian Court of Appeal in *Worsnop* and *Getachew* were rejected by the High Court. The Victorian Department of Justice responded to calls to simplify and clarify the law by announcing a major review of sexual offences legislation. The authors anticipated the introduction of a ‘reasonable belief’ standard for rape, as currently applies in England and Wales, New Zealand, New South Wales, Queensland, Western Australia and Tasmania. The present study interviewed key stakeholders and practitioners involved in the

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<sup>67</sup> On the problems that have arisen through mandatory jury directions in Victoria see, especially, Asher Flynn and Nicola Henry, ‘Disputing Consent: The Role of Jury Directions in Victoria’ (2012) 24(2) *Current Issues in Criminal Justice* 167.

<sup>68</sup> Sjölin, above n 57, 29-33.

<sup>69</sup> See Helen Mary Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (PhD Thesis, University of Tasmania, June 2012) 199-204.

<sup>70</sup> *R v Ewanchuk* [1999] 1 SCR 330. For an excellent discussion of this decision see Elaine Craig, ‘Ten Years after Ewanchuk the Art of Seduction is Alive and Well: An Examination of The Mistaken Belief in Consent Defence’ (2009)13 *Canadian Criminal Law Review* 247.

criminal prosecution of rape cases to explore their expectations and views regarding the introduction of an objective fault standard for rape in Victoria.

Given that the investigated proposal was enacted by the Victorian parliament in November 2014,<sup>71</sup> and will come into effect in July 2015, our findings provide unique and timely insight into stakeholders' expectations of this latest rape law reform in Victoria.<sup>72</sup> While research with a sample of local experts is necessarily exploratory, our findings suggest that this reform will be greeted cautiously and that it is expected, like a number of its predecessors, to introduce new ambiguities and complexities to the law of rape. Divergent views were expressed about the merits and likely outcomes of the proposed reform, considering both administrative and policy objectives. For some participants, requiring 'reasonable' belief in consent was not expected to shift the focus at trial onto the accused's actions, especially as there is no requirement to take steps to ascertain consent. In this context, the reform was expected to make modest if any improvements to complainants' experiences of trial processes and outcomes. Assessments of the reasonable belief standard as it is applied in other jurisdictions tend to confirm such expectations.

We suggest that the implementation of this reform in Victoria, and of future rape law reforms in other jurisdictions, needs to acknowledge the diverse expectations and experiences of legal and criminal justice personnel; to justify the need for reform and the reform choices; and to be realistic about the potential benefits and limits of the proposed reform. Even when reform is widely perceived as necessary, the uncertainties that it inevitably introduces mean that support for implementation of the selected reform proposal needs to be fostered among legal and criminal justice personnel, not assumed. Otherwise, this latest rape law reform in Victoria risks contributing to and confirming expectations that rape law reform is disruptive for practitioners while it does little to deliver the claimed improvements and benefits for victim/survivors.

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<sup>71</sup> *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic).

<sup>72</sup> The insight provided by our research is particularly important given that submissions made in response to the DOJ Consultation Paper, above n 24, have not been made available to the public.