MEANINGS OF 'SEX' AND 'CONSENT'
The Persistence of Rape Myths in Victorian Rape Law

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Since the 1980s, laws regulating the meaning and interpretation of sexual consent have been substantially reformed across Australian and international jurisdictions. Of particular note in an Australian context are the significant changes to the definition of consent introduced in Victoria in 2006 and 2007, which were informed primarily by the Victorian Law Reform Commission's review of legislative provisions relating to sexual offences. In this article, we explore the persistence of traditional rape discourses in the courtroom following the 2007 Victorian reforms by examining meanings of 'sex' and 'consent' in a pilot sample of rape trials. Our analysis suggests that although deeply entrenched societal myths or discourses about rape continue to pervade Victorian courtrooms, there is some evidence of a shift towards a legal focus on the accused's state of mind, in addition to that of the victim-complainant. This shift, however, is only prominent in cases in which the accused testifies. In light of these preliminary findings, we suggest that further comparative analyses of the qualitative impact of law reform on discursive constructions of 'sex' and 'consent' in rape trials may provide alternative measures of the impact of rape law reform.

Across international jurisdictions, high levels of attrition in rape cases persist at each stage of the criminal justice process.[1] In Australia, victim surveys suggest that only 20 per cent of women who experience sexual assault report the matter to the police and, of these reports, between 15 and 20 per cent result in charges being laid.[2] Indeed, feminist legal scholarship has long decried the low reporting, prosecution and conviction rates for rape crimes, suggesting it is evidence of the failure of successive waves of rape law reform to increase conviction rates and ensure just outcomes for victim-survivors, particularly women.[3]

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1 Fitzgerald (2006); Heenan and Murray (2006); Kelly et al (2005); Larcombe (2011b); Office for Criminal Justice Reform (2006); Taylor (2007); Temkin and Krahe (2008); VLRC (2004).

2 Australian Bureau of Statistics (1996); Australian Bureau of Statistics (2006); Heenan and Murray (2006); Mouzos and Makkai (2004).

3 Larcombe (2011b).

The perceived failure of law reform to effect real change in the outcomes of both rape reporting and criminal trials has led some scholars to question whether women and law reformers should even engage with the criminal justice system in such cases.[4] Others, however, argue that feminist disengagement from rape law reform is not and cannot be a viable option,[5] and that it is important for feminist scholars to critically examine both quantitative and *qualitative* effectiveness measures of rape law reform.[6] Emerging scholarship suggests that qualitative measures such as victim-complainants' experiences of the trial process and evidence of societal shifts in understandings of rape may be significant indicators of the 'success' of law reform, beyond criminal justice outcomes alone.[7]

Over the past four decades, feminist scholars have been instrumental in exposing persistent gendered discourses surrounding so-called 'normal sex', 'real rape' and 'consent', which continue to influence perceptions of rape, victim-complainants and perpetrators, as well as members of the judiciary and jurors in their determinations in rape trials. Some scholars, for example, describe the ways in which courtroom discourse in rape trials commonly reinforces populist cultural understandings of aggressive and non-communicative sex as consensual.[8] Indeed, one of the stated aims of the Victorian Law Reform Commission (VLRC) in recommending changes to the law regarding rape trials in Victoria was to 'deal with problematic social attitudes towards sexual practices that unfortunately persist' and to 'dispel the enduring myth that a woman must show evidence of physical resistance in order to provide evidence of a lack of consent'.[9] In the context of another wave of significant rape law reforms,[10] it is timely to once again explore such myths and meanings in Victorian rape trials.

In this article, we analyse traditional discourses and rape myths through an examination of the meanings of 'sex' and 'consent' as constructed in a pilot sample of ten Victorian rape trials. The ten cases were identified from appellate reports throughout 2010 and 2011, after a search for all cases involving adult victim-complainants, where the judicial directions on consent or the accused's awareness of consent were at issue. This search identified a total of twelve eligible cases, although due to the

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4 See Graycar and Morgan (2005).

5 Munro (2007).

6 Larcombe (2011b).

7 Larcombe (2011b).

8 Larcombe (2005); Pineau (1989).

9 VLRC (2003), p 328.

10 In November 2013, the Victorian Department of Justice released a consultation paper, *Review of Sexual Offences: Consultation Paper*, seeking input on three proposed reform models to further clarify and uncomplicated sexual assault laws in Victoria. The paper has been prepared to 'enable the Victorian community to have its say in how to improve Victoria's sexual offence laws' (Victorian Department of Justice 2013). At the time of writing, submissions are still being sought, and there is no indication of when a further report or recommendations will be released.

confines of the pilot study and relevant judicial permissions, we obtained access to ten complete trial transcripts. The ten trials were commenced and finalised between 2008 and 2010.[11] In order to provide anonymity to the accused and victim-complainant, the case citations and all parties have been de-identified.

The trial transcripts were analysed employing a discursive method whereby we critically examined micro-linguistic courtroom 'conversations' within 'discernible contexts of social interaction' or 'discourses'.[12] As such, our analysis focuses on the examination and cross-examination of the victim-complainant, witnesses who were present prior to or following the rape and, when given, the testimony of the accused, in order to gain insight into broader multiple and shifting discourses that are extractable from these conversational, textual interactions.[13] In using the term 'discourse', we are referring to the different cultural understandings, assumptions, ideologies or presumed 'knowledges' that exist not only in written and verbal forms, but which are also expressed in the social practices and interactions of everyday life.[14] We understand discourse in a Foucauldian sense, as 'an instrument of and an effect of power, but also a hindrance, a stumbling block, a point of resistance and a starting point for an opposing strategy'.[15] Discourse analysis is well established within feminist and other social sciences research methodologies as a way of examining the 'meaning making' that occurs in both the form and function of the law and its application in legal proceedings.[16] According to John Conley and William O'Barr:

> Discourse analysis is the study of how such segments, or texts, are structured and how they are used in communication. In the context of law, discourse in the linguistic sense refers to the talk that constitutes courtroom testimony, closing arguments, lawyer-client interviews, arguments between disputants, mediation sessions, and the like.[17]

In particular, our analysis sought to identify the various ways in which contested meanings of 'sex', 'rape' and 'consent' are drawn upon and constructed at trial, in light of the communicative model of consent (see

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11 Many of the cases in our pilot sample and their appellate reports are directly relevant to the ongoing debate regarding both the legal interpretation and intentions of the 2007 reforms to the jury directions on consent: see Flynn and Henry (2012); Larcombe (2011a). These reforms were under review by the Department of Justice (State Government of Victoria) as this article went to press.

12 Holstein and Gubrium (2011), p 341.

13 The accused testified in five out of the ten pilot cases. It is not possible here to draw conclusions about whether the accused testifying played a role in determining the final outcome, though we suggest attention to such variables should be a focus in future comparative research.

14 Foucault (1978).

15 Foucault (1978), p 101.

16 See, for example, Ehrlich (2001); Larcombe (2005); Taylor (2004); Young (1998).

17 Conley and O'Barr (2005), p 7.

explanation below), and whether there have been any discernible shifts in these various discourses. In our analysis, we argue that discursive meanings and rape myths constructing 'real rape' – so often problematised in feminist legal scholarship – remain a persistent feature of Victorian rape trials, despite recent reforms. However, we also identify evidence of a shift in discursive constructions of 'sex' and 'consent' in our sample when the accused testified. This suggests a further and arguably progressive impact of the 2007 reforms, and demonstrates the urgent need for comparative analyses of the impact of rape law reform using qualitative measures of success. Before discussing our analysis, we provide further background to both the contested meanings and discourses that have previously been identified as influential in rape trials, as well as the recent context of law reform in Victoria.

Contested Meanings of Sex and Consent in Social, Legal and Feminist Discourses

Rape trials do not occur in a social and cultural vacuum. Rather than viewing trials as involving an impartial jury applying gender-neutral laws to the objective facts in a case, we align ourselves with other feminist researchers who argue that dominant societal and highly gendered discourses or meanings regarding 'sex,' 'rape' and 'consent' have long influenced the process and outcomes of rape trials.[18] In exploring the discursive meanings of sex, rape and consent in Victorian rape trials, we find it useful to begin our analysis by briefly foregrounding three related sites of discursive practice: social, legal and feminist discourses.

Social Discourses

Social constructions of 'real rape' have long been based on the scenario of an assault carried out by a stranger, and a victim-complainant actively resisting, usually with force or a strong verbal attack.[19] Captured in these societal discourses regarding 'real rape' are related assumptions of 'normal' and consensual sex, in which men's active sexual desire is situated against women's passive receptivity.[20] As the VLRC noted in its 1991 report, 'no matter what she says, if she lies there during the assault, and does not injure the assailant or sustain extensive physical injury herself, that is considered to be consistent with a woman's part in consensual relations'.[21] In this binary model of sexuality, women are understood to commonly offer 'token resistance' to sex that they secretly desire, in order to protect their sexual reputation. It is also expected that men might need to seduce or persuade women into sex, so may misinterpret women's resistance to sex as

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18 See Ellison and Munro (2009a); Estrich (1987); Larcombe (2005); Pineau (1989).

19 Christie (1986); Estrich (1987); Lievore (2005).

20 Holland et al (1998); Hollway (1984); Powell (2010).

21 LRCV (1991), pp 163–4.

part of the seduction script.[22] This gendered gap in sexual communication is further explored by Robin Wiener, who explains that 'both men and women are socialized to accept coercive sexuality as the norm in sexual behavior, [and] men often see extreme forms of this aggressive behavior as seduction, rather than rape'.[23]

Social constructions of 'real rape' are often embedded in persistent attitudes or beliefs about rape, victim-complainants and perpetrators that serve to trivialise, deny or justify the perpetration of sexual violence.[24] Rape myths are derived from sex role stereotyping, adversarial sexual beliefs, sexual conservatism and the acceptance of interpersonal violence. Victims, perpetrators, bystanders and jurors, as well as ordinary members of the community (males and females alike), can play a role in sustaining and perpetuating rape myths.[25] Indeed, the findings from a variety of recent Australian community attitude surveys demonstrate that many gendered discourses or myths about sex and rape continue to be reflected in general societal views.[26]

Predominantly, the social construction of rape myths results in blurred perceptions around what constitutes legal and illegal sexual activity, and this confusion largely revolves around the issue of consent. Societal discourse and myths about rape also have strong implications for juror decision-making, with much research finding that juries routinely draw on their own normative attitudes and assumptions regarding sex and rape in their deliberations.[27] Accordingly, the prevalence of rape myths within society may provide some explanation for the low attrition rates and the low levels of reporting of sexual offences.[28] As Karen Weiss argues, women may be ashamed to report rape due to 'cultural assumptions about how "good girls" should behave and how "bad girls" will be judged'.[29] In our analysis of trial transcripts below, we examine the extent to which these societal discourses have shifted within the institutional realm of law.

Legal Discourses

An appreciation of societal discursive meanings of rape has the potential for understanding not only juror decision-making and the low reporting and attrition rates of sexual offences, but also institutional and interpersonal responses to these crimes. Traditionally, rape was defined in law as the

22 See Frith and Kitzinger (1997); Muehlenhard (1988); Powell (2010).

23 Weiner (1983), p 81.

24 Burt (1980).

25 Finch and Munro (2005); LRCV (1991); Taylor and Joudo (2005); Waye (1992).

26 See Taylor and Mouzos (2006); VicHealth (2010).

27 Ellison and Munro (2009a, 2009b, 2010); Finch and Munro (2005); Taylor and Joudo (2005).

28 Taylor (2007); Weiss (2010).

29 Weiss (2010, p 293).

carnal knowledge of a woman 'against her will'.[30] The requirements of the crime were typically sexual penetration, use of force and physical resistance. In order for the accused to be convicted of rape, victims were expected to have exerted strong resistance with the requisite proof of sustained physical injury.[31] This emphasis on the victim-complainant's physical resistance and level of injury as providing proof of 'real rape' continues to be identified in research examining police and prosecutorial decision-making regarding how best to proceed with rape cases. Across Australian jurisdictions, Denise Lievore found that prosecutors were most likely to proceed with a rape case when the victim-complainant was injured, when the victim-complainant physically or verbally expressed non-consent, when the assault was severe (for example, if it involved a level of force or a weapon) and where the offender was a stranger.[32] On this basis, Lievore found that 87 per cent of cases that proceeded to court involved a threat, force or injury to the victim-complainant, or an offender who used a weapon; while in 87 per cent of the cases in which the prosecutor chose not to proceed, the perpetrator was known to the victim-complainant.[33] A similar pattern emerged in Melanie Heenan and Suellen Murray's examination of the Victoria Police Law Enforcement Assistance Program [LEAP] database, in which 850 reports of sexual assault offences that were made to the police in Victoria in the 2000–03 period were analysed. Heenan and Murray found that a charge was more likely to be laid when the victim-complainant was 'physically injured; medically examined; not influenced by alcohol or drugs at the time of the offence; subject to other offences alongside the rape; and raped by offenders well known to police for previous sexual offending'.[34]

In addition to social myths and stereotypes impacting on the law's response to rape, the defence of an 'honest, but mistaken belief in consent' – arguably a constructed myth in itself – has existed as a basis to challenge an allegation of rape since the 1970s in most Western jurisdictions, including Australia, the United States, the United Kingdom and Canada.[35] Not unsurprisingly, this defence reflects traditional notions of both male and female sexuality, and has enabled accused persons to claim they honestly believed that the victim-complainant consented to sex, regardless of how mistaken or unreasonable that belief may have been. This is because the defence protects an accused from a rape conviction if they are deemed to lack the requisite intent to satisfy the *mens rea* requirements of the crime.[36]

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30 Hale (1847), p 626.

31 Estrich (1987); Lonsway and Fitzgerald (1994); Heenan and Murray (2006); Lievore (2005).

32 Lievore (2005).

33 Lievore (2005).

34 Heenan and Murray (2006), p 5.

35 Australia (*R v Brown* 1975; *R v Maes* 1975; *R v McEwan* 1979; *R v Wozniak* 1977); the US (*People v Mayberry* 1975, California); the United Kingdom (*Director of Public Prosecutions (DPP) v Morgan*); and Canada (*Pappajohn v The Queen* 1980).

36 See Douglas (2007); Faulkner (1992); Larcombe (2011a).

As Wendy Larcombe further explains, one of the effects of gendered discourses on rape is to 'make it increasingly "reasonable" that an accused (or the criminal law) may not be able to know whether a complainant was consenting or not'.[37] Many scholars have similarly identified the continued influence of problematic gendered assumptions surrounding sex and consent in contemporary rape law, despite the introduction of feminist-inspired law reform.[38]

Feminist Discourses

Feminist discourses on rape have played a significant role in challenging both legal and social constructions of 'normal' sex, 'real rape' and the associated gendered assumptions regarding consent. Feminist legal philosopher Lois Pineau claims that 'what is really sexual assault is often mistaken for seduction'.[39] Catharine MacKinnon likewise argues that 'under law, rape … is not regarded as a crime when it looks like sex'.[40] Expanding on this idea, Pineau further argues that the negotiation of consent should be based on a concept of mutual active communication. She suggests that in sexual assault cases, if a person claims to have believed that the other person was consenting, instead of focusing on whether or not the victim-complainant used physical force to resist, the courts should focus on the measures *taken by the accused* to find out if the victim-complainant was consenting. Thus, before guilt can be determined, the court should actively seek out answers to questions such as how the accused knew the victim-complainant was consenting and what active measures the accused took to ascertain this consent.

Such feminist challenges to traditional conceptions of consent have subsequently led to the development of the 'communicative' or 'active' model of consent. The communicative model of consent is based on 'free agreement', characterised by mutual respect and communication, such as positive and encouraging responses from both parties; while the absence of communicative characteristics constitutes evidence of rape.[41] This model reverses the burden on the victim-complainant to resist or actively refuse the sexual advance, and instead focuses on the initiator of sex, and the steps they took to find out whether the other person was consenting.

The communicative model of consent has the potential to challenge traditional gendered discourses regarding normal sex and real rape, and to re-educate the broader community on what engaged participatory consent looks like.[42] But it is not without controversy. Some have argued that the requirement around active communication as the basis for consent fails to

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37 Larcombe (2005), p 28.

38 Ellison and Munro (2009a); Estrich (1987); Larcombe (2005); Pineau (1989).

39 Pineau (1989), p 217.

40 MacKinnon (1989), p 172.

41 Pineau (1989).

42 See Bronitt and McSherry (2010); McSherry (1998); Pineau (1989); Powell (2010).

reflect real-life sexual encounters, and that accused persons might be wrongfully convicted for rape when they could not reasonably have foreseen they were committing a crime.[43] As part of their evaluation of the *Crimes (Rape) Act 1991* (Vic), Melanie Heenan and Helen McKelvie conducted interviews with 48 legal practitioners, of whom almost 50 per cent expressed some concern about the validity and usefulness of the mandatory jury directions on 'free agreement' providing the basis for consent.[44] A submission from the Victorian Bar, for example, expressed concern with this model, arguing that it was not necessary to change the meaning of consent:

> We accept the proposition that the definition of consent should reflect contemporary values about sexual relationships, such as mutual respect and communication. But it is simply going too far – in the sense that it is not consistent with these values – 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.[45]

Despite these criticisms, variations of a communicative model of consent have been incorporated in legal definitions of consent in Australia, and in a minority of jurisdictions internationally, including New Zealand, England, Canada and Wales.

Recent Victorian Rape Law Reform

According to section 38 of the *Crimes Act 1958* (Vic), a person commits rape if:

> (a) he or she intentionally sexually penetrates another person without that person's consent –
>
> (i) while being aware that the person is not consenting or might not be consenting; or
>
> (ii) while not giving any thought to whether the person is consenting or might not be consenting …

Consent to a sexual act is defined as 'free agreement', and there are a number of conditions under which a person is held to be incapable of freely agreeing, including when there is force or fear of force, or while the person is asleep or unconscious.[46] In order to secure a conviction of rape in Victoria, the prosecutor must prove beyond reasonable doubt that the accused intended to sexually penetrate the victim-complainant without their consent, or while being aware that the victim-complainant was not or might not be

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43 For discussion of this model, see Heenan and McKelvie (1997); VLRC (2003). For a critique of Victorian rape law, see Arenson (2012); Willis (2006).

44 Heenan and McKelvie (1997).

45 Cited in VLRC (2004), p 351.

46 *Crimes Act 1958* (Vic), s 36.

consenting, or while not giving any thought as to whether the victim-complainant was not or might not be consenting.[47]

Significantly in Victoria, the inclusion of a communicative model of consent within the jury directions – the instructions given to the jury by the judge at the trial's conclusion to help guide their decision-making in line with the law – has sought to encapsulate the view that consent is not to be assumed by the absence of physical or verbal resistance, but rather through the accused actively seeking out a verbal or physical expression of consent. While the burden remains with the prosecutor to prove beyond reasonable doubt that the accused was aware that the victim-complainant was not, or might not be, consenting, the law states that an accused cannot be acquitted because they did not turn their mind to whether the victim-complainant was consenting. Therefore, if the relevant elements of the offence of rape have been established beyond reasonable doubt by the prosecutor (including the *mens rea* element of awareness), a jury may convict where the victim-complainant did not say or do anything to indicate free agreement to the sexual act and where there is no evidence of injury.

Prior to the 2007 reforms in Victoria, the common response of an accused to a rape charge was to argue that the victim-complainant had consented. On this basis, because the focus was almost exclusively on the victim-complainant's state of mind in relation to consent, there was very little to be gained by an accused giving evidence at trial, particularly given the risk that in so doing, they might be seen to concede to the possibility that the victim-complainant was in fact not consenting to the sexual act. Moreover, before 2007, the only legal guide for jurors in considering the state of mind of the accused (and only where belief had been raised as a fact in the case) was the jury direction required by section 37(1)(c) of the *Crimes Act 1958* (Vic), which stated that:

> In considering the accused's alleged belief that the complainant was consenting to the sexual act, it must take into account whether that belief was reasonable in all the relevant circumstances.[48]

The new jury directions have shifted the focus somewhat towards the accused person's state of mind and their shared responsibility for the negotiation of consent, as opposed to solely focusing on what the victim-complainant did or did not do to resist the sexual act.[49] The revised jury directions on the accused's awareness of consent now state that:

> If evidence is led or an assertion is made that the accused believed that the complainant was consenting to the sexual act, the judge must direct the jury that in considering whether the prosecutor has proved beyond reasonable doubt that the accused was aware that the complainant was not consenting or might not have been consenting, the jury must consider –

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47 *Crimes Act 1958* (Vic), s 38.

48 Repealed with effect from 1 January 2008.

49 VLRC (2003), p 328.

(a) any evidence of that belief; and

(b) *whether that belief was reasonable in all the relevant circumstances* having regard to –

(i) in the case of a proceeding in which the jury finds that a circumstance specified in section 36 exists in relation to the complainant, whether the accused was aware that that circumstance existed in relation to the complainant; and

(ii) *whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps;* and

(iii) any other relevant matters.[50]

While the Victorian legislation does attempt to shift traditional understandings of consent, in practice, there are a number of limitations to take into account.[51] In particular, while there may be greater scope for an accused to be cross-examined on what they consider to constitute free agreement, this may in turn encourage greater scrutiny of the victim-complainant's behaviour and demeanour, and in doing so reinforce problematic and sexist assumptions surrounding normative female sexuality. It is in the context of this recent reform in Victoria that we undertake a discursive analysis, focusing foremost on the meanings of 'sex', 'rape' and 'consent' as constructed in our pilot sample of rape trials.

Reconstructing Discourses of Sex and Consent in Victorian Rape Trials

'Free Agreement' and the Victim-Complainant

Due to the burden of proof in criminal law, and the fact that consent (as opposed to whether penetration occurred) is so often the central focus of a rape trial, it is not surprising that defence strategies tend to centre on the victim-complainant. In particular, such strategies typically attempt to highlight a lack of reliability and/or credibility on the part of the victim-complainant. In an adversarial context, this strategy can lead to an inherent power imbalance between a female witness and the defence lawyer, particularly within the cross-examination process – which, as Conley and

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50 *Crimes Act 1958* (Vic), s 37AAA, emphasis added.

51 As has been argued elsewhere, the impact of the jury directions upon the trial outcome is potentially limited for two key reasons. First, as the directions arise only at the end of the trial in the judge's charge to the jury, there is a basis to argue that the directions are somewhat of an 'empty gesture' (Henderson 2013). The extent to which the jury directions can really undo or interfere with already-confirmed understandings of the facts of a case, including those of 'real rape' and the meaning of consent, is questionable. Second, the jury directions – particularly those regarding the accused's awareness of consent – contain an increasingly complex and convoluted set of statements, which are potentially perplexing for jurors and judges alike (see Flynn and Henry 2012). Indeed, the convoluted nature of the directions has been recognised by the Victorian Supreme Court, the Victorian Department of Justice and the Judicial College of Victoria, which have called for further reform to clarify the directions: Weinberg (2012).

O'Barr maintain, has 'a poignancy in the rape context that is unmatched elsewhere'.[52] Defence techniques are typically designed to question credibility, raise questions of prior sexual behaviour (despite rules prohibiting this) and suggest complicity and deception.[53] Of significance in the context of this article, in raising this strategy, defence lawyers commonly attempt to place blame on the victim-complainant for the 'misunderstanding' regarding their level of consent. This can be achieved by suggesting that the victim-complainant did indeed consent, or act in a way that suggested they were consenting to the sexual act. In recommending changes to sexual assault laws in Victoria, the VLRC advocated that the changes would place a stronger focus on the accused as to 'what he [sic] considers constituted "free agreement"'.[54] Despite this intention, the focus on the behaviour and responses of the victim-complainant around the question of consent are clearly evident in the approaches that were adopted by the defence in all our case studies where the victim-complainant gave evidence in court.

In the case of *R v W*, the accused, who worked with the victim-complainant in an aged care facility, indecently assaulted the victim-complainant on a number of occasions, and at a later time, pushed her on to a bed and forced his penis into her mouth. During the trial, the defence repeatedly questioned the victim-complainant about her allegedly flirtatious behaviour towards the accused:

> Q: What I'm suggesting to you is that there was a flirting, sexual mischievous relationship going on between you … What I'm suggesting to you is that you were physically, and by words and by gestures, flirting with him?
> A: No, I'm sorry, I don't do that …
> Q: What I'm suggesting again is that there was a relationship, a mutual relationship, between you and [*W*] which was perhaps only of brief duration during your working time together which consisted of making eye contact, smiles and sexual joking together. What do you say about that?
> A: I don't have a sexual or mutual relationship …
> Q: Well, sexual in the sense of flirting in that sexual way …
> A: No, it's not a flirting relationship …

Using this line of questioning, the defence attempted to present the jury with a picture of a woman who had willingly engaged in inappropriate workplace behaviour by flirting and making sexual jokes with the offender. On this basis, the implication was raised that the victim-complainant was the kind of person to engage in workplace flirting; therefore she might very well have consented to sex in the workplace, or at the very least, her flirtatious behaviour would have led the offender to believe that she was consenting to the sexual act. Alison Young has described this type of questioning as a

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52 Conley and O'Barr (1998), p 32.

53 See Campbell et al. (2001); Frazier and Haney (1996).

54 VLRC (2003), p 328.

strategy of moral insinuation, where the defence attempts to 'impugn her [the victim-complainant's] character' and simultaneously 'imply consent'.[55]

Further to using this approach in cross-examining the victim-complainant, within eight of our ten trial transcripts, defence lawyers also attempted to draw on problematic dichotomies between the 'real rape' victim and the unchaste woman who later regretted her decision to engage in the sexual act. In *R v S* for example, this was achieved by focusing on the behaviour of the victim-complainant prior to the rape, in the questioning of any witnesses. In this case, the victim-complainant had been asleep after a night out drinking with a group of friends and awoke to find the accused raping her. In the trial, the defence repeatedly drew attention to the victim-complainant having danced in the flat in which the accused was present – along with up to nine other individuals – by reinforcing the insinuation that she was dancing 'for' the accused. In cross-examining various witnesses, the defence fixated on this idea, suggesting that a level of consent for the sexual act somehow followed naturally from this 'flirtatious' behaviour:

> Q: Would you agree with me that [the victim-complainant] was dancing around and in front of [*S*]?
> A: It's a small flat, so she was dancing near [*S*].
> Q: She was dancing near [*S*]?
> A: Yeah.

The focus on the dancing was also evident in the defence's cross-examination of the victim-complainant herself. In this line of questioning, the defence sought to imply that her actions were not only demonstrative of a woman wanting sex, but they provided evidence of her precipitating the rape by 'leading' the accused to believe sex was an option. This was inferred, based on her having been intoxicated and dancing within a 'close proximity' of the accused.

The type of questioning used in *R v S* and *R v W* highlights one of the potential limitations of the communicative model of consent. In having to establish the accused's state of mind as to an awareness of consent, it can allow the defence to place a stronger focus on the alleged sexualised actions of the female victim-complainant, thereby engaging in a process of victim-blaming, which works to perpetuate the problematic rape myths and stereotypes within the courtroom discourse.[56] As Larcombe argues, the problem with these and similar lines of questioning in rape trials is that it promotes a view that women can only have consented entirely or not at all.[57] There is no possibility that, for instance, a woman might be on friendly, even flirtatious terms with a man, yet still not consent to sex. There is no possibility that she might desire sex under some circumstances or at some points in time, but not at others. Any indication of sexual assertiveness or desire thus continues to be read as consent.

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55 Young (1998), p 451.

56 Bieneck and Krahe (2011).

57 Larcombe (2002, 2005).

In the case of *R v G*, the victim-complainant had attended a party and was camping overnight. After she retired to her swag, the accused entered and, ignoring her protests, proceeded to sexually penetrate her before leaving and returning to his own camping area. In the cross-examination of the victim-complainant, the defence adopted a different, but related strategy, which drew on problematic constructions of real rape. In this example, the defence attempted to suggest that the victim-complainant's initial attempts at resistance were not sufficient to indicate non-consent. Drawing on preconceived stereotypes of the ideal rape victim, the defence attempted to raise doubt about the validity and credibility of the victim-complainant's testimony on the basis that she did not respond in the way that a 'real rape' victim would:

Q: How hard did you push him?
A: As hard as I could.
Q: Did it have any effect?
A: No.
Q: You were trying to resist him?
A: Yes.
Q: You were trying to physically resist him?
A: Yes …
Q: Did you yell out a single word?
A: No.
Q: Why not?
A: I was scared.
Q: What were you scared of?
A: Scared that he would do something else …
Q: Effectively, you lay there on your back?
A: Yes.
Q: You didn't put your legs up?
A: No.
Q: You didn't put your arms up?
A: No.
Q: Once again, you didn't say anything?
A: No …
Q: But you didn't scream?
A: No, I froze.
Q. Would you say now that freezing in those circumstances was an irrational thing to do? … You didn't have any injuries?
A: Not that I can remember.

This excerpt from the cross-examination of the victim-complainant demonstrates an apparent strategy to challenge her reliability, by comparing her reaction to the rape with a preconceived 'real rape' scenario that is characterised by strong physical resistance and requisite physical injury. Despite the victim-complainant's testimony that she initially resisted, pushing the offender away before she 'froze', the suggestion put forth was

that her actions were 'irrational' – the implication being that her failure to resist was evidence that she had in fact consented.

The notion that the victim-complainant offers token resistance invokes the highly gendered discourse that her initial refusals cannot be taken as non-consent, but are rather attempts to protect her reputation. Such a discourse undermines the intentions of the Victorian law reforms in two ways. First, it subverts the definition of consent as informed by the communicative model, given the removal of physical injury or expressed non-consent being required to prove that a rape occurred. Second, it undermines the legislation since the focus of consent in the Victorian reforms is now on what steps, if any, the accused took to ascertain free agreement, as opposed to what steps the victim-complainant took to actively – physically and verbally – resist the accused.

A similar approach was adopted by the defence in the cross-examination of the victim-complainant in *R v R*, in which the victim-complainant's prior friendship with the accused, which included him having twice lived with her and having performed acts such as brushing her hair, was somehow indicative of her consenting to the sexual act in question. This allegation was made despite the victim-complainant claiming to have been asleep when the rape took place. In suggesting that the victim-complainant had knowledge that the accused had feelings for her, the defence sought to further imply that the rape was either consensual, or in some part the fault of the victim-complainant for knowing that the accused sexualised her in some form:

> Q: So when he moved in you were, effectively, what I suggest, good friends again?
> A: Well, there'd been a long distance between us seeing each other, but, yeah, we seemed to get along all right.
> Q: You knew that he had affections for you, I think, don't you? You knew when he moved in, although you were good friends, he always had an affection for you?
> A: Yes, I suppose he did, but he knew it was ill-founded.
> Q: No, I'm just asking you to agree or disagree with me that you knew that he had an affection for you?
> A: Yes, I knew …
> Q: In that time [that the accused first lived with you], he would rub your neck? …
> A: He did on occasion, yes.
> Q: He did a few times, didn't he, in March?
> A: Yeah, on occasion he did, yeah.
> Q: Sometimes he'd brush your hair as well? …
> A: Occasionally, yeah, while I was sitting up at the table or something.

Significantly – and this was a common feature of our sample cases – the focus in this cross-examination was not on whether the victim-complainant consented to sex, but rather what she did or did not do to encourage/ discourage the accused prior to the alleged rape occurring – including, in this case, her actions several months before the rape occurred. This view appears

to be based on two alternate models of female sexuality: one is based on a deceptive sexual assertiveness, such as flirting and other sexual cues; and the other on compliance and passivity, such as the expectation that a male must coax the female into sex.

Further to challenging the actions of the victim-complainant leading up to and during the rape, social discourses of normative female behaviour were also prevalent in relation to the victim-complainant's actions after the rape. Like the earlier excerpts from *R v W* and *R v G*, the defence relied upon a range of rape myths in *R v R*, despite there being no evidence of consent during the act itself:

> Q: I'm just asking you, did you have three or four drinks of wine the day after you say you'd been raped?
> A: The day after, yes, I did have a few, yes. I was very upset still.
> Q: Did you have three or four drinks the day after?
> A: Yes.
> Q: When did you start drinking the day after?
> A: About lunchtime.
> Q: While [*R*] was at your house?
> A: Yes …
> Q: You sat and drank three glasses of wine, did you, before your daughter got home?
> A: Yes …
> Q: That was whilst [*R*] was there?
> A: Yes, it was.
> Q: Sitting in the lounge room?
> A: He was in the lounge room. I was in the kitchen.
> Q: Drinking wine?
> A: Yes.

In addition to the repetitive focus on the victim-complainant drinking alcohol while the accused was still present in the house, the defence sought to further highlight her failure as a woman and a real rape victim, because she did not immediately phone the police or tell anyone what had occurred:

> Q: So your neighbour comes in, you're sitting around having chats for a little while, you say?
> A: Yeah.
> Q: In that time, you [indistinct] everything is normal. You're chatting away as if nothing happened?
> A: I wasn't saying much but …
> Q: You don't say to your neighbour, you know, 'I've just been raped [indistinct]'? … Why do you not say to your neighbour …?
> A: I didn't want to say …
> Q: I haven't finished my question, sorry. Why do you not say to [your neighbour], why do you not confront him [*R*] at that time when you've got the security of your neighbour standing there?

A: Because I wasn't going to involve anybody …
Q: You did not call the police at that stage anyway, did you?
A: No, not at that point.

The delay in the victim-complainant reporting the rape to the police and her actions in drinking alcohol and remaining in the house with the accused on the day following the rape were put forward by the defence as a relevant argument to suggest that a 'real rape' victim would not have behaved in this way. On this basis, the defence implied that her behaviour was indicative of having consented to the sexual act.

A similar approach was used in *R v S*, in which the failure of the victim-complainant to immediately declare that she had been raped, after awaking to find the accused raping her after a night out, was proposed by the defence as an indication that she had in fact consented to the sexual act, and was only concerned about protecting her reputation and preventing her boyfriend from discovering that she had been 'unfaithful'.

Q: I put to you that after sexual intercourse takes place that you go back to sleep?
A: No.
Q: What I then say to you is that what happens is that you are awakened by the noise that was coming from the bathroom of [a person present at the flat] calling out to [another person present at the flat]. What do you say to that?
A: No, I was awakened by [*S*] being inside of me.
Q: Was it the case, that you were concerned that [*S*] was boasting to his friends about having sex with you?
A: No.
Q: Is that what caused you to run out of the bedroom?
A: No.
Q: Is that what caused you to want to know where your boyfriend was and that you wanted to speak to him?
A: No.
Q: Did you want to say to him first, before he found out from someone else that sex had taken place between you and [*S*]?
A: No, I wanted to tell him that it was unconsented [sic].
Q: Do you accept that the people that you ran into, that you asked them where [your boyfriend] was?
A: Yes.
Q: And that was the first thing that you said, wasn't it?
A: Yes.
Q: You asked them where [your boyfriend] was before you said to them that you woke up, or that you were woken with [*S*] inside you, correct?
A: Yes.

The effect of these lines of questioning and strategies employed by the defence is that social discourses of what constitutes normative female sexuality and behaviour continue to infiltrate the courtroom discourse,

despite the introduction of the communicative model of consent in Victorian rape law. Thus, even after decades of law reform, our sample of rape trials suggests that these simplistic and out-dated notions of sex, consent and rape continue to be expressed, accepted and tolerated.

The Accused's 'Awareness of Consent'

One of the primary aims of the reforms to the jury directions on consent in Victoria was to more fairly balance the interests of the accused with those of the victim-complainant. Specifically, the reforms were designed to overcome the strong tendency of juries to disbelieve evidence given by victim-complainants, and the continuing failure of the law to achieve just outcomes in rape trials. One of the ways in which these aims may appear to be achieved is through the requirement on the jury to consider what steps, if any, the accused took to ascertain consent. This requirement has subsequently allowed the prosecutor to focus on the state of mind of the accused in the lead-up to and during the alleged rape, as opposed to the focus remaining only on the victim-complainant.

As mentioned earlier, it is relatively uncommon for the accused to testify in rape trials because the case most often relies upon establishing whether the victim-complainant consented, thus there is little to be gained from the accused giving evidence. However, in half of the trials we examined, the accused did actually testify. A notable feature of these cases was a shift in the discourse enabled by prosecutorial questioning of the accused. In particular, the prosecutor used a tactic of repeated questioning regarding the accused's cause for belief in the victim-complainant's consent, which was achieved regardless of whether the defence led evidence of belief in, rather than actual, consent. Accordingly, despite the reforms permitting the defence to construct a narrative of failed or token resistance on behalf of the victim-complainant – or indeed suggest that a prior flirtatious relationship was somehow indicative of consent (despite non-communication at the act itself) – the reformed jury directions have arguably given prosecutors some scope to construct a higher standard of communicative consent.

In describing his relationship with the victim-complainant at the aged care facility in *R v W*, for example, the accused testified as to how it shifted from being professional to sexual. On cross-examination, the prosecutor sought to challenge *W*'s claims that he 'knew' his sexual advances were wanted:

> Q: Did anything else occur of a flirtatious nature?
>
> A: There was flirtatious things happening but – yes, there was always flirtation. Like I said, we would walk around, we would be smiling at each other. She would be smiling at me, she would be leading me on. That was flirtatious. It was all consensual … Smiling and the way she would say – it wouldn't be specific and as I say she would be very sly in a way. She would say things in – I knew what she was getting at.
>
> Q: You say you knew what she was getting at. There was no physical contact between you and [the victim-complainant] until the first incident. Is that correct?
>
> A: That's right.

Q: No handholding?
A: No.
Q: No caressing?
A: No.

In this excerpt, the accused's responses failed to identify any active signs on the part of the victim-complainant that might indicate consent. Furthermore, by continuing with this focus on the accused's state of mind, the prosecutor was able to establish that *W* was unable to identify any active signs or conversations that indicated the consensual nature of past behaviour, or any indication of future wanted behaviour. Accordingly, any sign of a reasonable belief in consent was minimised by the examination.

Likewise in *R v S* and *R v R*, the prosecutor adopted a similar tactic of repetitive questioning when cross-examining the accused. In these two cases, the prosecutor sought to establish that there had been no sexual relationship or suggestion of a potential sexual relationship between the victim-complainants and the accuseds prior to the rapes, or in fact, any significant relationship between both accuseds and the victim-complainants in these cases. This can be seen in the following excerpt from *R v S* which involved the rape of the victim-complainant after a night out of drinking:

Q: Was there ever more than one text message sent to you by [the victim-complainant]?
A: Yes, there was.
Q: How much?
A: Don't remember.
Q: Two, ten, 100, 1000 …?
A: Maybe between one and ten.
Q: What were the contents of those messages?
A: I can't remember.
Q: Did she, for example, express terms of endearment to you during those text messages?
A: What do you mean?
Q: Did she express a physical or romantic interest in you in any of those text messages?
A: No.
Q: Did you express any physical or romantic interest in her by way of telephone calls or text messages?
A: No.
Q: So on the night [before the rape] … how many times had you actually spoken to this girl?
A: On the phone, I think two or three times, and on Facebook regularly …
Q: Did you want to have sex with her at that time [the night before the rape]?
A: No …
Q: When you went to the nightclub [the night before the rape], did you speak to her at all during that visit?
A: Yes, I did.

Q: On how many occasions or for how long?
A: We spoke numerous, like many times during the night.
Q: About what?
A: I don't remember the exact conversations.
Q: Was there any conversation about romance or physical attraction to each other?
A: No, there wasn't.

After establishing that there had not been any significant signs that the victim-complainant and the accused were likely to enter into a sexual relationship prior to the rape, the prosecutor focused the cross-examination on how the accused could have reasonably believed there was consent in light of these circumstances:

Q: Did you know that [the victim-complainant] was asleep in [the] bedroom?
A: I knew [the victim-complainant] had been in the bedroom. I didn't know she was asleep.
Q: And you two started talking, is that right?
A: Yes.
Q: What did you talk about?
A: I don't remember the conversation.
Q: This is a matter that has led you to being charged with rape. Do you tell this jury on your oath that you cannot remember what was said?
A: I don't remember the exact words.
Q: Excuse me, let me finish, if you will. Do you tell the jury on oath that you can't remember what you spoke about to this girl that you were about to have sex with?
A: Yes, I don't remember the words.
Q: How long did the conversation last?
A: A few minutes, one minute or less.
Q: You see, no conversation took place at all, did it?
A: There was.
Q: Can you give us any hint as to what was discussed?
A: It was flirting, basically.
Q: Flirting in what form? What was said?
A: I don't remember the words exactly to be honest.
Q: Forget the exact words. Tell us the general gist of what was said?
A: Just talking and, you know, intentions of having, that is basically what I'm talking about, flirting …
Q: But at the end of that minute or so, you had progressed the relationship so far that you knew you were going to have sex with this girl very shortly, didn't you?
A: Yes.
Q: How does one do that, [*S*], in a minute? Tell the members of the jury how it happens.

Similarly, in *R v S*, the prosecutor asked the accused to describe the lead-up to the rape:

Q: What happened to you when you followed [the victim-complainant] to her swag – you thought you'd take the opportunity that was there, didn't you?
A: Well, I thought it was an invitation when she knelt down.
Q: She hadn't done anything to provoke any relationship between you and her over the course of the night, had she?
A: Yes, she was flirting.
Q: What was she doing flirting?
A: She was rubbing her hand up the inner side of my thigh.
Q: You say she was flirting?
A: Mm.
Q: And you described that as involving her rubbing her hand on your knee?
A: Yes.
Q: Anything else?
A: Just talking. She was showing extra attention to me as [compared to] the previous years she has at school.
Q: You hardly knew her at school, isn't that right?
A: That's about right …
Q: What else did she do that in your mind indicated she was interested in you in the course of the evening?
A: Well, any question she had around the group it would relay ending up I would be the main communicator between the conversations.
Q: I didn't understand any of that, can you try and explain it for me?
A: She'd talk about – ask about my occupation, and show extra interest into my occupation, rather than [names two other males who were present at the party] …
Q: What did she ask you?
A: Just asked, what sort of – what sort of – what involves the job, what customers we supply for, just really detailed information.
Q: How long did that last for?
A: Oh, five, ten minutes.
Q: Yes, over how many hours?
A: About two to three …
Q: Any other contact stretched out over the course of the night that you'd like to tell us about?
A: Not that I can think of, no…

Further to highlighting the minimal nature of the physical and verbal interactions between the accused and the victim-complainant in this case, the prosecutor was also able to place the focus on the accused's state of mind regarding his actions during and after the act as a basis to suggest that this before and after-thought should have included some consideration of whether the victim-complainant was in fact consenting. The line of questioning adopted by the prosecutor in these cases in which the accused testified had the effect of disrupting traditional discourses of female availability or passive 'readiness' to accept male sexual advances; instead, we argue, it helped to construct a normative model of active negotiation and communication of consent.

While a shift in focus on the victim-complainant to the accused may be just one of many factors that contributes to securing a rape conviction at trial, what is of interest here is that this focus on the accused person's basis for believing there was consent can, and is, being questioned. It is also significant that the nature and content of this type of questioning can serve to disrupt the traditional focus on both 'force' and 'miscommunication' that is, as we have identified, highly persistent in rape trials. In a sense, it is the discourse of 'male sexual prowess', as Pineau describes it, that is also being undermined and deconstructed, as it becomes no longer enough for the accused to argue that they 'just knew' there was consent in the absence of active negotiation.[58]

Conclusion

The indications from our exploratory analysis of ten Victorian rape trials suggests that there may be some discernible shifts in the discourse on rape taking place since the introduction of the communicative model of consent. This model does appear to have enabled prosecutors, at least in a handful of cases, to shift focus to the accused person's awareness of consent, based on the steps that they took to ascertain that the victim-complainant was, or was not, consenting. However, discourses of victim blaming, sexualised ideals of femininity and stereotypical perceptions of what constitutes real rape and a real rape victim remain a persistent feature of Victorian rape trials, even after the recent reforms. It should also be mentioned that the Victorian reforms have not, thus far, delivered a substantial reduction in rape case attrition or conviction rates.

As this initial analysis has been undertaken based on a small sample of rape trials, there is a need for further analysis of a larger and broadly representative sample of acquittal and conviction cases. This will enable a consideration of whether the shifts we have described are more substantial and common, or merely a feature of a minority of trials. Moreover, it will enable analysis of whether there have been any discernible shifts in the broader discourses on rape, both within and outside the courtroom. Our analysis suggests that rape myths continue to dictate defence strategies and continue to be accepted by jurors and members of the judiciary. Accordingly, we suggest that an important task of feminist legal scholarship is to analyse the *qualitative* content and effects of rape law reform and its operation in courtroom discourse, in order to support, rather than give up on, future reform efforts.[59]

If the law not only acts as a powerful indication and reinforcement of ever-shifting socio-cultural norms and values, but is also as a reflection of broader societal discourses, then attention to the ways in which these discourses are shifting is a key way to evaluate the qualitative effect of law reform in this area. A discourse, according to Foucault, comprises 'variants and different effects – according to who is speaking, his [sic] position of power, the institutional context in which he happens to be situated', and is not simply a tool or effect of

58 Pineau (1989).

59 Larcombe (2011b).

power but, as stated in the introduction, is a 'stumbling-block, a point of resistance and a starting point for an opposing strategy'.[60] As we have demonstrated in this paper, problematic societal discourses on rape continue to powerfully influence the interactions and conversations within the courtroom context; however, to some extent, feminist-inspired rape law reform has challenged problematic conceptions of consent and 'real rape' through the introduction of a communicative model of consent based on ethical sexual practice. Moreover, victims and other legal actors contribute to the further shaping of these and other discourses. Of course, it is not easy maintaining the delicate balance between the rights of the accused and the rights of victims, and further meaningful dialogue on this issue is paramount to ensure that future rape law reform achieves the goals of social change, as well as justice for victims and accused persons.

Undoubtedly, consent remains the most controversial, complex and contested legal issue in rape cases, yet it is within a broader context of societal discourse, or the cultural meanings regarding 'real rape', 'consent' and 'normal sex', that legal determinations of what counts as free agreement, or a reasonable belief in consent, are made. As Murphy and colleagues acutely note, changes in community attitudes and knowledge must occur alongside any reform to sexual offences legislation.[61] The interface between law and other social spheres (such as education and policy) thus signifies a crucial area in urgent need of further attention in future research and intervention efforts.

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60 Foucault (1978), p 101.

61 Murphy et al (2013).

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Legislation

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