

CASE NOTE

***WORSNOP v THE QUEEN\****

**SUBJECTIVE BELIEF IN CONSENT PREVAILS (AGAIN)  
IN VICTORIA'S RAPE LAW**

WENDY LARCOMBE<sup>†</sup>

*[The 2010 decision of the Victorian Court of Appeal in Worsnop v The Queen provides yet another example of rape law reform not achieving its intended effects. The Court held that a jury direction on the mental element of rape, introduced by the Crimes Amendment (Rape) Act 2007 (Vic), had not altered the law in the ways imagined by the Act's drafters and supporters. Specifically, Worsnop determined that a jury cannot convict for rape if they find there is a reasonable possibility that the accused held an honest belief in consent (however unreasonable or mistaken). On this point, the Court found that both the Bill's Explanatory Memorandum and the Victorian Criminal Charge Book were incorrect. This note argues that further statutory reform will now be required to ensure that the 'fault element' for rape in Victoria is brought into line with the communicative model of sexual relations enshrined in other sections of the Crimes Act 1958 (Vic).]*

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I INTRODUCTION

Rape laws in Australia and other common law countries have been reformed extensively in recent years to reflect changing standards and expectations regarding both sexual conduct and the appropriate treatment of sexual assault victims in criminal trials.<sup>1</sup>

\* (2010) 28 VR 187.

<sup>†</sup> BA, BLitt (Hons), LLB, Grad Dip Ed, PhD (Melb); Senior Lecturer, Melbourne Law School, The University of Melbourne.

<sup>1</sup> For an overview of sexual offences against adults in Australia, see Mary Heath, 'The Law and Sexual Offences against Adults in Australia' (Issues Paper No 4, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, June 2005). 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, 2010).

Particular attention has been addressed to instituting what has been called a ‘communicative model’ of sexuality,<sup>2</sup> to improving the experience of sexual assault complainants in the criminal justice process, and to redressing the under-reporting of sexual offences.<sup>3</sup> Moreover, as sexual assaults are significantly less likely than other comparable criminal offences to obtain convictions, reform efforts have also sought to address the significant ‘justice gap’ between rape reports and trial outcomes.<sup>4</sup> However, as a number of commentators have discussed, the objectives of statutory rape law reform have often been frustrated or not realised in their implementation.<sup>5</sup>

In Victoria, the 2010 decision of the Victorian Court of Appeal in *Worsnop v The Queen* (*‘Worsnop’*)<sup>6</sup> provides another example of rape law reform not achieving its intended effects. Specifically, the Court held that a jury direction on the ‘mental’ or ‘fault’ element for rape, introduced by the *Crimes Amendment (Rape) Act 2007* (Vic) (*‘the 2007 Act’*), had not altered the law in the ways imagined by the 2007 Act’s drafters and supporters. *Worsnop* determined that a jury cannot convict for rape if they find there is a reasonable possibility that the accused held an honest belief in consent (however unreasonable or mistaken). On this point, the Court found that both the Explanatory Memorandum accompanying the Crimes Amendment (Rape) Bill 2007 (Vic) and the *Victorian Criminal Charge Book* (*‘Criminal Charge Book’*)<sup>7</sup> were incorrect. Consequently,

<sup>2</sup> See, eg, McGlynn and Munro, above n 1, 210–13; Heath, above n 1, 22–3; Ilene Seidman and Susan Vickers, ‘The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform’ (2005) 38 *Suffolk University Law Review* 467, 484–90; 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 Sexualized 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.

<sup>3</sup> See Denise Lievore, ‘Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review’ (Review, Australian Institute of Criminology, 2003); Janet Phillips and Malcolm Park, ‘Measuring Domestic Violence and Sexual Assault against Women: A Review of the Literature and Statistics’ (E-Brief, Parliamentary Library, Parliament of Australia, 2006) <<http://www.aph.gov.au/library/intguide/sp/ViolenceAgainstWomen.htm>>.

<sup>4</sup> The conviction rate for rape is less than five per cent of reported cases in many Australian jurisdictions — lower than for all comparable criminal offences. See Karen Gelb, ‘Recidivism of Sex Offenders’ (Research Paper, Sentencing Advisory Council, Victoria, January 2007) 3–7; Mary Heath, ‘Lack of Conviction: A Proposal to Make Rape Illegal in South Australia’ (2007) 27 *Australian Feminist Law Journal* 175; Kathleen Daly and Brigitte Bouhours, ‘Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries’ (2009) 39 *Crime and Justice: A Review of Research* 565; Wendy Larcombe, ‘Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law’ (2011) 19 *Feminist Legal Studies* 27.

<sup>5</sup> See, eg, Susan M Armstrong, ‘Is Feminist Law Reform Flawed? Abstentionists & Sceptics’ (2004) 20 *Australian Feminist Law Journal* 43; Reg Graycar and Jenny Morgan, ‘Law Reform: What’s in It for Women?’ (2005) 23 *Windsor Yearbook of Access to Justice* 393; Mary Heath and Ngaire Naffine, ‘Men’s Needs and Women’s Desires: Feminist Dilemmas about Rape Law “Reform”’ (1994) 3 *Australian Feminist Law Journal* 30; Seidman and Vickers, above n 2; Gotell, above n 2; Victorian Law Reform Commission, *Sexual Offences*, Final Report, Report No 78 (2004) 88 (*‘VLRC Final Report’*).

<sup>6</sup> (2010) 28 VR 187.

<sup>7</sup> Judicial College of Victoria, *Victorian Criminal Charge Book* (2011) <<http://www.judicialcollege.vic.edu.au/publications/victorian-criminal-charge-book>>. The *Criminal Charge Book*, which

when the trial judge in *Worsnop* directed the jury in accordance with the *Criminal Charge Book*, an error in law was made. That error was found not to have resulted in a substantial miscarriage of justice in *Worsnop*, but in a number of subsequent decisions the error has been the basis of successful appeals against conviction.

The regrettable irony here is that the 2007 Act was designed to make jury directions in rape cases clearer and so reduce the likelihood of any error or appeal.<sup>8</sup> Not only has the legislation failed to achieve that objective; the result of the decision in *Worsnop* is that 'honest belief in consent' — however unreasonable, mistaken or unsupported by evidence — again prevails in rape cases in Victoria. Unless the prosecution can prove beyond reasonable doubt that there is no possibility that the accused believed in consent, the mental element for rape cannot be made out. Supporters of the 2007 Act had sought to change the law in this regard so that belief in consent did not automatically preclude conviction for rape. Further statutory reform will now be required, if only to give effect to the objectives of the 2007 Act. This case note argues, however, that the opportunity should be taken to reform the mental element of rape in Victoria more emphatically.

## II RAPE LAW REFORM IN VICTORIA

The Victorian Law Reform Commission ('VLRC') received a reference on 27 April 2001 to review legislative provisions relating to sexual offences in Victoria and to make recommendations 'to ensure the criminal justice system is responsive to the needs of complainants in sexual offence cases'.<sup>9</sup> The Commission's final report ('*VLRC Final Report*') was tabled in Parliament on 25 August 2004.<sup>10</sup> The report made 201 recommendations for changes to the law and legal procedures, including significant changes regarding the 'mental element' — the requisite state of mind of the accused to be proven by the prosecution — for rape. Many of the recommendations from the *VLRC Final Report* were adopted and implemented through the *Crimes (Sexual Offences) Act 2006 (Vic)*<sup>11</sup> and the *Crimes (Sexual Offences) (Further Amendment) Act 2006 (Vic)*.<sup>12</sup> However, the VLRC's recommendations regarding the mental element for rape were not

includes model jury directions and explanatory commentary or 'bench notes', is a free access, online resource for judges and lawyers published by the Judicial College of Victoria.

<sup>8</sup> See Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 2007, 3034 (Judith Maddigan), 3040 (George Seitz), 3045 (Jude Perera).

<sup>9</sup> Victorian Law Reform Commission, *Sexual Offences — Terms of Reference* (27 April 2001) <<http://www.lawreform.vic.gov.au/content/sexual-offences-terms-reference>>.

<sup>10</sup> *VLRC Final Report*, above n 5. See also Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Discussion Paper (2001) ('*VLRC Discussion Paper*'); Victorian Law Reform Commission, *Sexual Offences*, Interim Report (2003) ('*VLRC Interim Report*').

<sup>11</sup> This Act sought to improve the experience of child complainants and of complainants with a cognitive impairment.

<sup>12</sup> This Act sought to improve the experience of all adult complainants — for example, by making provision for all complainants in sexual offences trials to be able to give evidence via closed-circuit television if desired: *Crimes (Sexual Offences) (Further Amendment) Act 2006 (Vic)* s 6, inserting *Evidence Act 1958 (Vic)* s 37CAA.

implemented. Relevantly, the 2007 Act did not adopt the Commission's proposed reforms which would have restricted the circumstances in which an accused could raise (in defence) an honest belief in consent.<sup>13</sup>

The limited scope of the 2007 Act was to restructure, clarify and extend the jury directions on consent and the accused's awareness,<sup>14</sup> and to introduce as an alternative fault element the mental state of not giving any thought to whether the complainant was not consenting or might not have been consenting.<sup>15</sup> Consequently, for rape trials commencing in Victoria after 1 January 2008, the offence of rape retains four elements, each of which the prosecution has to prove beyond reasonable doubt. A person, A, commits rape if A sexually penetrates another person, B [element 1], if the penetration is intentional [element 2], if B is not consenting [element 3] and if either A is aware that B is not consenting or might not be consenting, or A gives no thought to the issue of consent [element 4].<sup>16</sup> The meaning of 'consent' is defined in the *Crimes Act 1958* (Vic) s 36 ('*Crimes Act*') as 'free agreement'. Section 36 also provides a non-exhaustive list of circumstances in which a person does not freely agree to an act of sexual penetration ('s 36 circumstances'). The specified circumstances include when the person submits to sexual penetration because of force or fear of harm, or where the person is 'asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing'.<sup>17</sup>

Following the 2007 Act, jury directions on consent are now provided in the *Crimes Act* s 37AAA. They include the instruction that if the jury finds beyond reasonable doubt that a s 36 circumstance exists, then they must find that the complainant was not consenting.<sup>18</sup> The jury will also be instructed in a relevant case that they are not to regard a person as having freely agreed to a sexual act just because that person did not protest, physically resist or sustain injury, or because that person agreed to engage in another sexual act with that person on that or an earlier occasion.<sup>19</sup> Importantly, in Victoria, juries must be instructed when relevant that

the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement ...<sup>20</sup>

<sup>13</sup> See *VLRC Final Report*, above n 5, ch 8.

<sup>14</sup> The new jury directions apply to trials that commenced after 1 January 2008: see s 2 of the 2007 Act.

<sup>15</sup> This alternative fault element was introduced to ensure that a person cannot avoid culpability for rape solely because they had not considered the issue of consent. The VLRC made this recommendation after the Court of Appeal in *R v Ev Costa* (Unreported, Victorian Court of Appeal, Phillips CJ, Callaway JA and Southwell AJA, 2 April 1996) held that there must be conscious advertence to the question of the complainant's consent in order to satisfy the requirement that the accused was aware that the complainant was not or might not have been consenting: see *VLRC Final Report*, above n 5, 410–11.

<sup>16</sup> *Crimes Act 1958* (Vic) s 38(2).

<sup>17</sup> *Ibid* ss 36(a)–(b), (d).

<sup>18</sup> *Ibid* s 37AAA(c).

<sup>19</sup> *Ibid* s 37AAA(e).

<sup>20</sup> *Ibid* s 37AAA(d).

These provisions institute a communicative model of sexuality, also called an affirmative or positive consent standard, under which it is expected that a person who consents to particular sexual acts will communicate that consent, directly or indirectly. As a consequence, if consent is not communicated, the legislation makes it clear that non-consent should be assumed.

New jury directions on the accused's awareness, contained in s 37AA, came into effect on 1 January 2008. If the accused asserts or leads evidence that they honestly believed the complainant was consenting, then the s 37AA jury direction must be given. The direction reiterates that the relevant fault element for rape is *awareness* that the complainant was not or might not have been consenting to the act. The direction relates a claimed belief in consent to that element (rather than to the element of non-consent) by directing the jury that

in considering whether the prosecution 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 —

- (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 [precluding free agreement] 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.<sup>21</sup>

A judge *must* give a s 37AA direction on the accused's awareness when relevant to the facts in issue in the proceeding; must *not* give a s 37AA direction when not relevant to the facts in issue; and, if the direction is given, must relate it both to the facts in issue in the proceeding and also to the elements of the offence to which the direction relates.<sup>22</sup> An error of law will thus occur if the direction is not given when relevant, or is given when not relevant. In *Worsnop* however, the error arose from the substantive terms of the direction.

The supporters and drafters of the 2007 Act believed that the new s 37AA jury direction clarified the relation between, on the one hand, an accused's awareness that the other person might not be consenting and, on the other hand, a claimed belief in consent. As explained by the Attorney-General, Rob Hulls, in his second reading speech, the fact that juries were instructed about 'awareness' as the fault element for rape and then given a direction, in relevant cases, about the

<sup>21</sup> Ibid s 37AA. Note that, according to the *Criminal Charge Book*, above n 7, ch 7.3.B.1 [40] ('Bench Notes: Consent and Awareness of Non-Consent'), "other relevant matters" under s 37AA(b)(iii) may include a discussion of the impact of the accused's intoxication on his or her capacity to interpret the complainant's words or conduct'.

<sup>22</sup> *Crimes Act* s 37.

accused's 'belief' 'has caused confusion'.<sup>23</sup> The Crimes Amendment (Rape) Bill 2007 (Vic) aimed to clarify the instructions to juries on this issue. Specifically, the Explanatory Memorandum confirmed that the requisite fault element for rape was awareness of the possibility of non-consent, rather than absence of an honest belief in consent. The Memorandum continued:

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

That is to say, belief in consent and awareness of the possibility of an absence of consent are not mutually exclusive. In circumstances where the prosecution has satisfied the jury beyond a reasonable doubt that an accused person was aware that the complainant might not be consenting, if the jury are equally satisfied in relation to the other elements, then they should convict irrespective of whether they accept the evidence or assertion that the accused believed the complainant was consenting.<sup>24</sup>

In short, it was explained that a claimed belief in consent was not itself determinative. Rather, 'belief' was a factor for the jury to consider in deciding whether the prosecution had proven that the accused was aware that the complainant was not or might not have been consenting.

In subsequent debate on the Bill, the Member for Essendon, Judith Maddigan, expanded on this objective of the reform:

The bill seeks to address the confusion caused by the terms 'belief in consent' and 'awareness of lack of consent'. Trying to define the difference between those terms is quite difficult and obviously has been for the people drawing up the bill. Whilst there are many ways to describe 'belief' and 'awareness', 'belief' is essentially a state of mind which can exist both when supported by evidence and without any evidence to support it. On the other hand, 'awareness' is more akin to perception, observation or consciousness.<sup>25</sup>

Appreciating this difference, it can be understood that a person can hold a belief concurrently with an awareness of the possibility that the reality is otherwise. The example given by the Member for Essendon to illustrate this situation was the potential for a devout Elvis Presley fan to believe that Elvis is still alive, while at the same time being aware of the possibility that Elvis is in fact dead.<sup>26</sup> With this understanding, for supporters of the Bill it was a significant step that awareness of the possibility of non-consent was to be determinative of fault, rather than belief in consent. 'Belief in consent' would now only be a factor to consider in deciding the question of awareness: had the claimed belief in fact precluded all awareness of the possibility of non-consent? If not, a jury could

<sup>23</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 22 August 2007, 2858 (Rob Hulls).

<sup>24</sup> Explanatory Memorandum, Crimes Amendment (Rape) Bill 2007 (Vic) 4.

<sup>25</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 2007, 3034 (Judith Maddigan).

<sup>26</sup> *Ibid.*

accept that an accused believed the complainant was consenting and yet find that the prosecution had met its burden of proving that the accused would nonetheless have been aware of the possibility of non-consent.

According to the Victorian Court of Appeal in *Worsnop*, however, those responsible for the passage and drafting of the 2007 Act were incorrect: as a matter of law, the Court held, belief in consent necessarily precludes any awareness of the possibility of non-consent.

### III THE *WORSNOP* DECISION

Matthew Leslie Worsnop was tried in the County Court of Victoria and found guilty by majority verdict of stalking, two counts of indecent assault, and rape. He appealed against both the convictions and the sentence. The Court of Appeal granted the application for leave to appeal against the rape conviction and held that the trial judge erred in directing the jury that Worsnop could be guilty of rape even if they found that he believed the complainant was consenting. The appeal was dismissed, however, on the basis that no substantial miscarriage of justice had occurred as a result of the misdirection. The appeal against sentence on the grounds of manifest excess was allowed, and the applicant was re-sentenced to a total of 3 years and 11 months' imprisonment.

Importantly, as indicated above, the Court of Appeal found that s 37AA, introduced by the 2007 Act, did not change the law in the way imagined by its proponents and as described by the Explanatory Memorandum.<sup>27</sup> Relevantly, the Explanatory Memorandum posited that '[e]vidence of, or an asserted belief in, consent, even if accepted by the jury, is not necessarily determinative' of the question of the accused's awareness of non-consent, since 'belief in consent and awareness of the possibility of an absence of consent are not mutually exclusive.'<sup>28</sup> The *Criminal Charge Book*, in its model jury instructions and judges' bench notes, echoed this understanding of the effect of the legislation.<sup>29</sup> The trial judge in *Worsnop* reproduced the *Criminal Charge Book* instruction in directing the jury that

[y]ou might find that the accused believed the complainant was consenting, but still be satisfied, beyond reasonable doubt, that the accused was aware of the possibility that the complainant was not consenting.<sup>30</sup>

The Court of Appeal held that this statement constituted an error of law such that the jury was misdirected.<sup>31</sup>

The lead judgment by Ashley JA, with which Buchanan JA and Beach AJA agreed, held that under Victorian law the existence of belief in consent *necessarily* negatives an awareness that the complainant was not consenting or might not be consenting to sexual penetration. The Court found that statutory reforms of

<sup>27</sup> *Worsnop* (2010) 28 VR 187, 195 [34] (Ashley JA, Buchanan JA and Beach AJA agreeing).

<sup>28</sup> Explanatory Memorandum, Crimes Amendment (Rape) Bill 2007 (Vic) 4.

<sup>29</sup> *Criminal Charge Book*, above n 7, ch 7.3.B.1 [43].

<sup>30</sup> *Worsnop* (2010) 28 VR 187, 192 [20] (Ashley JA) (emphasis altered).

<sup>31</sup> *Ibid* 192–5 [21]–[34].

rape law since 1980 had not displaced, but only codified, earlier case law which established that

[w]here there is absence of consent an accused's belief, albeit mistaken in fact, that the woman was consenting to the act of intercourse ... necessarily negatives an awareness that the woman was not consenting, or a realization that she might not be ...<sup>32</sup>

The House of Lords decision in *Director of Public Prosecutions v Morgan*<sup>33</sup> and the later Victorian Full Court decision in *R v Saragozza*<sup>34</sup> affirmed the proposition that 'a man who believes that the woman is consenting cannot be guilty of the offence [of rape]', no matter how unreasonable that belief may be.<sup>35</sup> The Explanatory Memorandum and the resulting *Criminal Charge Book* direction were thus incorrect in claiming that belief in consent and awareness of non-consent need not be mutually exclusive. The Court of Appeal held that s 37AA had not changed the law in this regard because '[i]t would have taken clear words to establish some new and less favourable position from the standpoint of an accused person.'<sup>36</sup> In the Court's view, given that the new s 37AA did not explicitly say that 'a belief in consent, if held, is not determinative against the Crown'<sup>37</sup> (and the Crown's efforts to establish awareness of non-consent), such an interpretation should not be adopted. As the 2007 Act has thus not changed the law on this point, it was an error of law to direct the jury that 'belief' and 'awareness' could coexist. Indeed, a jury *cannot* convict if they find that there is a reasonable possibility that the accused believed in consent.<sup>38</sup>

Although the Court in *Worsnop* found that, in the circumstances of that case, no substantial miscarriage of justice had occurred as a result of the jury misdirection, subsequent cases applying *Worsnop* have seen rape convictions quashed. The Court of Appeal has now applied *Worsnop* to overturn convictions in at least seven cases on the basis that the trial outcomes may have been different if the juries had been correctly instructed that an accused's belief in consent precludes

<sup>32</sup> *R v Flannery* [1969] VR 31, 33 (Winneke CJ for Winneke CJ, Little and Barber JJ), quoted in *ibid* 193 [25].

<sup>33</sup> [1976] AC 182.

<sup>34</sup> [1984] VR 187.

<sup>35</sup> *Ibid* 193 (Starke, Kaye and Brooking JJ), quoted in *Worsnop* (2010) 28 VR 187, 193 [27] (Ashley JA).

<sup>36</sup> *Worsnop* (2010) 28 VR 187, 195 [34] (Ashley JA).

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid* 196 [35]–[36].



awareness of non-consent.<sup>39</sup> It can be expected that further appeals will arise from cases in which the faulty direction has been given.<sup>40</sup>

Judgment was delivered in *Worsnop* on 28 July 2010. On 29 July, a notice was posted on the website of the *Criminal Charge Book* advising that the 'belief in consent' direction had been disapproved by the Court of Appeal.<sup>41</sup> A revised charge was published on 6 August. Further minor amendments were made to the charge on 18 August, 4 November and 26 November. As advised on 18 August 2010, '[t]he "belief in consent" direction remains a work-in-progress.'<sup>42</sup> By 26 November 2010, the *Criminal Charge Book* provided that, in relevant cases, juries should be directed that:

First, you must consider any evidence that the accused believed that the complainant was consenting. ... The law says that a belief in consent is inconsistent with the states of mind that the prosecution must prove here. So if you find that there is a reasonable possibility that the accused believed that the complainant was consenting, the prosecution will have failed to prove this [fault] element.

Second, it is not for the accused to prove that s/he believed that the complainant was consenting. Instead, it is for the prosecution to prove beyond reasonable doubt that the accused did not believe that the complainant was consenting. ...

If, upon consideration of all the evidence, you find that the prosecution has proven, beyond reasonable doubt, that [name of accused] did not believe that [name of complainant] was consenting, and you are satisfied that [name of accused] was aware that [name of complainant] was not consenting, or was aware that [name of complainant] might not be consenting, or was not giving any thought to whether [name of complainant] was not or might not be consenting, then this [fault] element will be met.<sup>43</sup>

As this formulation of the direction makes clear, the prosecution must now first prove beyond reasonable doubt that there was not a reasonable possibility that the accused honestly believed that the complainant was consenting. Only once such a belief has been disproved need the jury go on to consider whether the prosecution has proven beyond reasonable doubt that the accused was aware of the possibility of non-consent.

<sup>39</sup> See *Gordon v The Queen* [2010] VSCA 207 (23 August 2010); *Wignall v The Queen* [2010] VSCA 327 (29 November 2010); *Roberts v The Queen* [2011] VSCA 162 (2 June 2011); *Walker v The Queen* [2011] VSCA 160 (3 June 2011); *Neal v The Queen* [2011] VSCA 172 (15 June 2011); *Duwah v The Queen* [2011] VSCA 262 (5 September 2011); *LA v The Queen* [2011] VSCA 293 (28 September 2011). In *Sibanda v The Queen* [2011] VSCA 285 (23 September 2011) [66] (Sifris AJA, Nettle and Neave JJA agreeing), as in *Worsnop*, the Court held that although there had been an error in the jury instructions this had not resulted in a substantial miscarriage of justice.

<sup>40</sup> This note was submitted to the *Melbourne University Law Review* on 21 January 2011 and accepted for publication on 18 July 2011. It was updated prior to typesetting to consider cases decided before 1 October 2011. However, the appeals will not end there: as the *Criminal Charge Book* is widely used, the faulty direction is likely to have been given in a significant number of rape cases heard between 1 January 2008 and 29 July 2010 in which the s 37AA direction was required.

<sup>41</sup> *Criminal Charge Book*, above n 7, 'Previous Notices: 29 July 2010'.

<sup>42</sup> *Ibid* 'Previous Notices: 18 August 2010'.

<sup>43</sup> *Ibid* ch 7.3.1.1.2B ('Charge: Rape (Post-1/1/08 Offence and Trial)') (emphasis altered).

The introduction of s 37AA has thus amended the mental element of rape — but in unintended ways. Rather than making a claimed belief in consent subordinate to the question of the accused’s awareness, ‘belief’ now takes a renewed priority. And, indeed, as discussed next, in recent decisions the subjective nature of ‘belief in consent’ has also gained renewed emphasis.

#### IV AFTER *WORSNOP*

Following *Worsnop*, and the identification of error in the assumed relation between the accused’s awareness and belief in consent, subsequent appeal cases have found other errors in jury directions based on s 37AA. As indicated above, s 37AA requires that the jury consider whether an accused’s belief in consent was reasonable in the circumstances. In this task, they are to have particular regard to any steps taken by the accused to ascertain consent<sup>44</sup> and to whether the accused was aware that a s 36 circumstance existed.<sup>45</sup>

However, the failure to take any steps to ascertain whether the complainant was consenting will not preclude an honest belief in consent — under s 37AA, it can only speak to the reasonableness of that belief. In *Gordon v The Queen* (‘*Gordon*’),<sup>46</sup> the Court of Appeal found that the trial judge had not only given the incorrect *Worsnop* direction; the judge was also in error in directing the jury that ‘a person seeking to sexually penetrate another person must satisfy themselves that that other person is consenting ... it is not enough to assume consent.’<sup>47</sup> The Court held that this instruction was incorrect as a statement of law and went on to stipulate that an accused’s belief in consent *can* be based entirely on an assumption and need have no basis in the conduct of either the accused or the complainant:

There is no requirement in law that a person who has sexual intercourse with another must satisfy himself that the other person is consenting. If the Crown fails to exclude beyond reasonable doubt a belief in consent based upon an assumption, that is enough to avail the accused.<sup>48</sup>

*Gordon* thus provides authority for the proposition that the Crown will be unable to establish the requisite mental element for rape if the jury finds that it is possible that the accused believed as a result of an assumption, however mistaken or unreasonable, that the complainant was consenting to sexual penetration.

Similarly, in each of *Roberts v The Queen* (‘*Roberts*’),<sup>49</sup> *Neal v The Queen* (‘*Neal*’)<sup>50</sup> and *Getachew v The Queen* (‘*Getachew*’),<sup>51</sup> all decided in June 2011, the Court of Appeal held that it was an error in law for the trial judge to have

<sup>44</sup> *Crimes Act* s 37AA(b)(ii).

<sup>45</sup> *Ibid* s 37AA(b)(i).

<sup>46</sup> [2010] VSCA 207 (23 August 2010).

<sup>47</sup> *Ibid* [11] (Buchanan JA, Warren CJ and Mandie JA agreeing).

<sup>48</sup> *Ibid* [12].

<sup>49</sup> [2011] VSCA 162 (2 June 2011).

<sup>50</sup> [2011] VSCA 172 (15 June 2011).

<sup>51</sup> [2011] VSCA 164 (2 June 2011).

instructed the jury that the mental element for rape would be made out if they were satisfied beyond reasonable doubt that the accused was aware of the existence of a s 36 circumstance. It will be recalled that a person is not able to freely agree to an act of sexual penetration when a s 36 circumstance exists. In each case the Court emphasised that the structure of the s 37AA jury direction establishes that the accused's awareness of a s 36 circumstance is only a factor for the jury to consider in deciding whether the claimed belief in consent was reasonable in the circumstances.<sup>52</sup> However, even then, the 'reasonableness' or 'unreasonableness' of the accused's belief is itself only a guide to whether or not it was held.<sup>53</sup> The law requires only that a belief in consent be honestly or actually held, not that it be reasonable or accurate. It is thus an error to equate awareness of a s 36 circumstance with awareness of non-consent, since awareness of a s 36 circumstance does not preclude a mistaken belief in consent and, post-*Worsnop*, such a belief precludes awareness of non-consent.

In *Getachew*, moreover, it was held that even awareness of the existence of a s 36 circumstance could be displaced by an honest belief that the circumstance did not exist:

The jury could be satisfied that the applicant was aware of this possibility [that the complainant was asleep] but at the same time think that it was a reasonable possibility that the applicant believed the complainant was awake.<sup>54</sup>

Furthermore, Buchanan JA concluded that it was possible to infer that the accused may have believed that the complainant was consenting after she stopped objecting and resisting (in her account, because she fell asleep):

The jury may have concluded that there was no protest by the complainant because she was asleep. Equally, if they had been properly instructed, the jury may have concluded that the applicant thought that the complainant might have fallen asleep but accepted that it was a reasonable possibility that the applicant believed that she had finally consented.<sup>55</sup>

Belief in consent was not argued at trial in *Getachew*. The accused did not speak in his police interview and stood mute at trial. The main issue in dispute at trial was whether penetration had occurred at all. It is by no means clear that the 2007 Act intended that henceforth the prosecution would have to disprove belief in consent in all cases (even when it was not argued at trial), in addition to proving that the accused was aware that the complainant was not or might not be consenting.

It is also unlikely that the 2007 Act's supporters and drafters intended that an accused's awareness of a s 36 circumstance would be discounted in the way that

<sup>52</sup> *Roberts* [2011] VSCA 162 (2 June 2011) [32] (Bongiorno JA, Buchanan JA and Lasry AJA agreeing); *Neal* [2011] VSCA 172 (15 June 2011) [79] (Nettle, Redlich and Kyrou JJA); *ibid* [23] (Buchanan JA, Bongiorno JA and Lasry AJA agreeing).

<sup>53</sup> *Roberts* [2011] VSCA 162 (2 June 2011) [32] (Bongiorno JA, Buchanan JA and Lasry AJA agreeing); *Neal* [2011] VSCA 172 (15 June 2011) [79] (Nettle, Redlich and Kyrou JJA).

<sup>54</sup> [2011] VSCA 164 (2 June 2011) [23] (Buchanan JA).

<sup>55</sup> *Ibid* [25]. Lasry AJA disagreed on this point: at [37]–[38]. Leave to appeal in this case has now been granted by the High Court.

it now is, owing to the structure of the s 37AA jury direction. It is certain that the 2007 Act was not intended to produce continual revision of the *Criminal Charge Book*, which has again been revised following the decisions in *Getachew*, *Neal* and *Roberts*. The instructions on 'Belief in Consent' were amended again on 28 July 2011 to add the following caution:

Finally, you must not find this [mental] element proved just because you decide that [name of accused]'s alleged belief was unreasonable. A person may genuinely hold a belief *despite it being unreasonable*. Whether the accused's alleged belief was reasonable or unreasonable is *no more than a guide* to help you decide whether or not the accused held that belief.<sup>56</sup>

The jury directions on consent and awareness as formulated in the 2007 Act were intended to reduce confusion and reduce errors. In that regard, the legislation has failed profoundly. Is further reform now warranted?

#### V FURTHER REFORM?

It is sometimes argued that reform of the mental element for rape is not needed because 'belief in consent' is argued in only a small number of cases.<sup>57</sup> Consequently, the reform would have little practical impact, while incurring the transitional costs associated with any reform of criminal law.<sup>58</sup> However, given that the prosecution must currently prove beyond reasonable doubt that the accused did not honestly believe that the complainant was consenting as a precondition for proving the mental element, it is not possible to distinguish between 'straight consent' and 'honest belief' cases.<sup>59</sup>

The facts of *Worsnop* demonstrate the force of this point. This was a straight 'consent' case in the sense that the jury were presented with two conflicting accounts of the events that were the subject of the rape charge. Worsnop admitted sexually penetrating the complainant ('TH') by putting his penis in her mouth but claimed the penetration was consensual. He gave evidence that there was a background of 'sexually charged conduct' between himself and the complainant, both employees of a nursing home.<sup>60</sup> He claimed, for example, that TH said to him that she loved sex and asked him whether he had been with an Asian woman. His evidence was that he had initiated the sexual contact, 'but that TH had by her acts and words plainly consented to it.'<sup>61</sup> In contrast, according to TH's evidence, the rape was one of a series of distressing and non-consensual sexual assaults that occurred in the workplace. The events that were the subject

<sup>56</sup> *Criminal Charge Book*, above n 7, ch 7.3.1.1.2B ('Charge: Rape (Post-1/1/08 Offence and Trial)') (emphasis in original).

<sup>57</sup> This argument is noted in *VLRC Interim Report*, above n 10, 338–9 [7.91] and *VLRC Final Report*, above n 5, 413–15 [8.21]–[8.25].

<sup>58</sup> This issue was raised in parliamentary debate on the Crimes Amendment (Rape) Bill 2007 (Vic): see Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 2007, 3030 (Robert Clark).

<sup>59</sup> *VLRC Final Report*, above n 5, 414 [8.22].

<sup>60</sup> *Worsnop* (2010) 28 VR 187, 191 [17] (Ashley JA).

<sup>61</sup> *Ibid.*

of the rape charge took place while TH, a registered nurse, was attending a patient. 'The applicant came in, pushed her down onto the patient's bed, said that his penis was very hard, asked her to suck it, and pushed it into her mouth.'<sup>62</sup> As determined by the Court of Appeal, 'her account of the various incidents could not possibly have suggested consent on her part to what the applicant did.'<sup>63</sup>

There was no argument about honest belief at trial, only consent. The issue of the accused's honest belief in consent only arose by implication: Worsnop gave evidence of actual consent by TH from which it could be inferred that he believed TH was consenting.<sup>64</sup> Consequently, the jury's view on whether that belief was honestly held would depend on their assessment of the credibility of his evidence. As Ashley JA summarised,

the belief of the applicant was entirely dependent upon the reliability of the evidence which he gave. On the complainant's account, if it was accepted, there was no prospect of the applicant having a belief in consent. Neither the applicant nor his counsel advanced such a proposition at trial. The applicant, indeed, really gave no evidence about belief. Rather, he gave evidence about consent in fact, from which a belief in consent might be extrapolated. Belief, in the event, was a sideshow to the only issue which was raised with respect to the count of rape — that is, whether there was consent in fact. There, two starkly different accounts were given.<sup>65</sup>

Evidently, the jury accepted the evidence of the complainant and rejected that of the accused — hence, there could be no miscarriage of justice as a result of the misdirection in relation to honest belief. However, the point to note here is that the s 37AA direction is not discretionary: it is *only* to be given in cases where 'evidence is led or an assertion is made that the accused believed that the complainant was consenting' and where relevant to the facts in issue in the proceeding.<sup>66</sup> Although the Court of Appeal considered that '[b]elief, in the event, was a sideshow to the only issue which was raised ... consent in fact',<sup>67</sup> there was no suggestion in this case that the direction was improperly given because it was not relevant to the facts in issue or because there had been no evidence led or assertion made about honest belief.

On the basis of *Worsnop*, we can conclude that an assertion of belief in consent can be inferred from an assertion of consent, such that it is not improper to give the s 37AA direction even when the only real issue at trial is 'consent in fact'.<sup>68</sup>

<sup>62</sup> Ibid 191 [12].

<sup>63</sup> Ibid 191 [17].

<sup>64</sup> See *ibid* 196 n 15; see also at 191–2 [20], where the trial judge's charge is reproduced.

<sup>65</sup> *Ibid* [40] (citations omitted).

<sup>66</sup> *Crimes Act* s 37AA. See also ss 37(1)–(2).

<sup>67</sup> *Worsnop* (2010) 28 VR 187, 196 [40] (Ashley JA).

<sup>68</sup> But see *Jabir v The Queen* [2010] VSCA 342 (15 December 2010), where it was argued on appeal that the jury should have been given a s 37AA direction and that, in giving that direction, the judge should have directed the jury to the evidence of facts which may have provided a foundation for the accused's belief in consent. The Court of Appeal rejected this argument (and the appeal), saying that 'a jury will only need to consider the reasonableness of the accused's belief where the issue is surrounded by ambiguity but not where the competing accounts are that consent was clearly and unequivocally refused or clearly and unequivocally given': at [51] (Redlich, Mandie and Bongiorno JJA).

In these circumstances, any distinction between ‘honest belief’ cases and ‘straight consent’ cases remains highly dubious. Consequently, any reform of the law on ‘honest belief’ can be expected to have significant practical impact on the conduct of rape trials in Victoria generally and on appeals arising from them.

In these circumstances, should legislation now be drafted to give effect to the intention of the 2007 Act? As the Court in *Worsnop* directed, such legislation would need to provide explicitly that an honest but mistaken belief in consent ‘is not determinative against the Crown’ and the Crown’s efforts to establish awareness of non-consent.<sup>69</sup> However, the disadvantage of the 2007 reform strategy was that it retained the two standards of the mental element — ‘awareness’ and ‘belief’ — and sought simply to ‘clarify’ (or reform) the relation between them. The very failure of the reform attempt indicates the underlying difficulty with retaining two different concepts at the centre of the mental element. Even a successful attempt to reform the relation between ‘awareness’ and ‘belief’ is thus likely only to reduce, but not to avoid, the potential confusion that results from the existence and interaction of the two concepts.

In any event, clarification of the relation between ‘awareness’ and ‘belief’ will leave unresolved the concerns that have arisen recently in relation to the accused’s awareness of a s 36 circumstance and the standard of ‘honest’ belief. While the Court of Appeal is correct that the jury directions in the cases reviewed above were technically in error, what is most striking about these recent decisions is the extent to which the attempt to articulate how someone might form or hold an unreasonable and mistaken belief in consent relies on a *negative* definition of consent. When considering the accused’s belief, these cases make it clear that ‘consent’ does not mean ‘free agreement’ but rather failure to resist or protest — and, according to Buchanan JA, even resistance can be overcome by persistence.<sup>70</sup> Consent can be assumed until or unless proven otherwise.<sup>71</sup> It need have no objective basis or grounds, and there is no obligation even to ascertain whether consent exists or not.<sup>72</sup> Further, a belief in consent can prevail even in circumstances where law has deemed that consent is not possible — where the victim was asleep or unconscious,<sup>73</sup> or so affected by drugs as to be unaware of what acts were taking place.<sup>74</sup> However ‘positive’ or ‘affirmative’ the definition of consent in s 36 and the jury directions on consent in s 37AAA, those provisions hold no sway against the entirely negative and anachronistic understanding of ‘consent’ that currently prevails in the ‘belief in consent’ mental element for rape.

This is a serious problem. Young women in particular believe that Victoria has a ‘positive’ consent standard and that if they say or do nothing to indicate free

<sup>69</sup> *Worsnop* (2010) 28 VR 187, 195 [34] (Ashley JA).

<sup>70</sup> *Getachew* [2011] VSCA 164 (2 June 2011) [25].

<sup>71</sup> *Gordon* [2010] VSCA 207 (23 August 2010) [12] (Buchanan JA, Warren CJ and Mandie JA agreeing).

<sup>72</sup> *Ibid.*

<sup>73</sup> *Getachew* [2011] VSCA 164 (2 June 2011) [25] (Buchanan JA); *Roberts* [2011] VSCA 162 (2 June 2011) [32] (Bongiorno JA, Buchanan JA and Lasry AJA agreeing).

<sup>74</sup> *Neal* [2011] VSCA 172 (15 June 2011) [80] (Nettle and Redlich JJA and Kyrou AJA).

agreement then any act of sexual penetration will take place without their agreement.<sup>75</sup> They believe they enjoy legal protection of their sexual autonomy and that sexual penetration without consent is rape.<sup>76</sup> They are mistaken. There is only rape in law if there is no possibility that the accused believed in consent. While that belief can be entirely mistaken and unreasonable — indeed, while a subjective standard is given substance by being distinguished from a reasonable standard — there is no legal protection of sexual autonomy in Victoria. The ‘right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity’<sup>77</sup> — the stated objective of the sexual offences provisions in the *Crimes Act* — is currently unenforceable. Women who trust in the ‘consent’ provisions of the Act are being misled.

The standard of honest belief in consent also has a negative impact on the complainant’s experience of participation in a criminal trial. Not only is the communicative model of consent contradicted by the current mental element, but ‘rape shield’ provisions which attempt to restrict evidence about the complainant’s prior sexual history (with either the accused or others) are also undermined while the accused is able to elicit such evidence as a basis for the accused’s honest, if unreasonable, belief in consent on the occasion in question.<sup>78</sup> Other aspects of the complainant’s conduct that are not relevant to the issue of consent (for example, if she didn’t protest or offer physical resistance) will also be closely scrutinised in order to test whether her conduct may nonetheless have contributed to the accused’s honest but mistaken belief that the complainant was consenting. Such questioning can cause complainants unnecessary distress.<sup>79</sup>

Reform is now needed to deliver on the promise of an affirmative or communicative consent standard. Ten years on, it is thus time to confront again the question posed by the VLRC in 2001: ‘Should it continue to be the law [in Victoria] that a person with an honest but unreasonable belief that the complainant has consented to penetration cannot be convicted of rape?’<sup>80</sup>

## VI OPTIONS FOR REFORM

In 2011, the answer to that question must surely be a resounding ‘no’. Immunity should no longer be provided for an accused whose belief in consent is the result only of distorted views of female sexuality; or false assumptions about sexual entitlement; or a mistake as to the law of consent; or a state of self-induced intoxication that precludes awareness of the other person’s non-consent.

<sup>75</sup> See *Crimes Act* s 37AAA(d).

<sup>76</sup> This claim is based on my experience over the past four years teaching rape law to students at Melbourne Law School, The University of Melbourne.

<sup>77</sup> *Crimes Act* s 37A(a).

<sup>78</sup> *VLRC Final Report*, above n 5, 412–13 [8.16]–[8.17].

<sup>79</sup> See Victoria, *Parliamentary Debates*, Legislative Assembly, 19 September 2007, 3128 (Rob Hulls), quoting from a letter in support of the Crimes Amendment (Rape) Bill 2007 (Vic) from the Victorian Centres Against Sexual Assault: ‘We have all had clients extremely disappointed with the legal system when the defendant has argued consent in circumstances that no reasonable person would have seen as valid.’

<sup>80</sup> *VLRC Discussion Paper*, above n 10, 67.

The serious consequences of sexual assault require a higher standard. As the VLRC argued in 2004, a higher standard of care than honest but unreasonable belief in consent should apply in sexual circumstances because the cost of ensuring consent is minimal compared with the risk.<sup>81</sup> Serious harm can easily be avoided by legally requiring that a person who seeks to sexually penetrate another takes reasonable steps to ascertain that the other person freely agrees. As the communicative model of consent has attempted to explain, it is not appropriate to engage in sexual penetration *assuming* consent and only desist once lack of consent has been forcefully communicated.<sup>82</sup> Under the communicative model of sexual conduct, if affirmative consent has not been communicated, the initiator of sexual penetration is expected before proceeding to take reasonable steps to ascertain whether the other person is consenting.<sup>83</sup>

That expectation, and the communicative model of consent more generally, can be given effect in a range of legislative forms. For example, a number of domestic and international jurisdictions, including Western Australia, Tasmania, Queensland, the United Kingdom and New Zealand, have now reformed their rape laws to institute an ‘objective’ fault element.<sup>84</sup> In these jurisdictions, the accused can only rely on an honest belief in consent if that belief was also ‘reasonable’. This is variously framed as a defence of ‘honest and reasonable belief’, or as an element of the offence so that the prosecution must prove that the accused did not believe on reasonable grounds that the complainant was consenting.<sup>85</sup> In the United Kingdom, for example, the mental element for rape is established if the prosecution proves beyond reasonable doubt that A did not ‘reasonably believe’ that B was consenting.<sup>86</sup> The legislation provides further that ‘[w]hether a belief is reasonable is to be determined having regard to all the

<sup>81</sup> *VLRC Final Report*, above n 5, 413 [8.18].

<sup>82</sup> This view was echoed in parliamentary debate on the Crimes Amendment (Rape) Bill 2007 (Vic). Robert Hudson, for example, spoke in support of the Bill, saying:

I think [reform] is overdue, because today the community expects that when someone is intending to engage in a sexual act with another person they will do everything they can to ensure that the other person is freely agreeing to engage in that act. Where there is any doubt at all, the onus or responsibility is on the perpetrator to communicate with the other person in order to remove any doubt. They need to establish whether or not it is consensual. That is why these amendments are very important.

Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 2007, 3050 (Robert Hudson).

<sup>83</sup> See *VLRC Final Report*, above n 5, 413 [8.18]: ‘The Commission believes that the law should encourage the initiator of sexual activity to take responsibility for ascertaining the wishes of the other person. When weighed against the serious harm of rape, such a simple step could hardly be said to be onerous.’

<sup>84</sup> See *Criminal Code Act Compilation Act 1913* (WA) sch (*The Criminal Code*) ss 325 (‘sexual penetration without consent’), 326 (‘aggravated sexual penetration without consent’), 24 (‘mistake of fact’); *Criminal Code Act 1924* (Tas) ss 185 (‘rape’), 14 (‘mistake of fact’), 14A (‘mistake as to consent in certain sexual offences’); *Criminal Code Act 1899* (Qld) ss 349 (‘rape’), 24 (‘mistake of fact’); *Sexual Offences Act 2003* (UK) c 42, s 1 (‘rape’); *Crimes Act 1961* (NZ) s 128 (‘sexual violation defined’).

<sup>85</sup> See *VLRC Interim Report*, above n 10, 344–7 [7.102]–[7.108].

<sup>86</sup> *Sexual Offences Act 2003* (UK) c 42, s 1(1)(c).



circumstances, including any steps A has taken to ascertain whether B consents.<sup>87</sup>

In 2004, the VLRC did not recommend that Victoria adopt a 'reasonable' standard for belief, as this would have been a significant departure from the current, wholly subjective standard. Instead, the Commission recommended a compromise option that recognised and attempted to balance the competing views on this issue.<sup>88</sup> That compromise allowed for a mixed subjective/objective standard, modelled on the Canadian approach. Under the proposed model, a subjective defence of honest belief in consent would be retained, but the defence would only be presented for a jury's consideration when a judge had determined that there was sufficient evidence to give it an 'air of reality'.<sup>89</sup> Further, it would not be available when the accused did not take reasonable steps to ascertain consent, or when one or more of the s 36 circumstances precluding consent existed and the accused was aware of that circumstance at the time. Finally, the requirement that the judge must direct the jury in a relevant case to consider whether the accused's belief was reasonable in all the circumstances was to be retained. However, under the proposed model, the jury was not to have regard to any state of self-intoxication when considering whether the accused had taken reasonable steps 'in the circumstances'.<sup>90</sup>

Either the requirement that a claimed belief in consent be 'reasonable' or the hybrid proposal developed by the VLRC in 2004 would afford a significant advance on the protection afforded to sexual autonomy by current rape law in Victoria. However, each of these models has strengths and weaknesses. A standard of 'reasonable belief', such as adopted in the United Kingdom, has the merit of simplicity. It is likely to reduce confusion and to make instruction of the jury far more straightforward than is the case currently. Community legal education is also simplified: a person commits rape if they (intentionally) sexually penetrate another person without consent and without reasonably believing in consent. Its chief drawback is the fierce opposition it is likely to face from the sectors of the Victorian legal community that are still ardently committed to retaining a subjective mental element for rape.

The VLRC's hybrid proposal was carefully crafted in 2004 to strike a compromise between 'subjectivists' on the one hand and, on the other, those seeking stronger protection for sexual autonomy. The VLRC's compromise recommendation was the result of a principled and extensive process of community consultation and research. As might be expected, the arguments in favour of and against a subjective fault element for rape, as well as those in favour of and against an objective fault element for rape, were the starting point for the VLRC in developing options for Victoria on this issue.<sup>91</sup> There are irreconcilable differences of view in Victoria on the issue of subjective versus objective fault standards for

<sup>87</sup> *Ibid* s 1(2).

<sup>88</sup> *VLRC Final Report*, above n 5, 422–39 [8.37]–[8.80].

<sup>89</sup> *Ibid* 423–4 [8.38]–[8.39].

<sup>90</sup> *Ibid* 422 (recommendation 174).

<sup>91</sup> *Ibid* 419–21 [8.32]–[8.36].

rape.<sup>92</sup> A workable compromise may be all that can be achieved and, for this reason, the Commission's recommendations merit revisiting, acknowledging that the inherent complexity of the model has the potential to perpetuate confusion, error and jury misdirection.

Nothing could be worse, however, than the current state of the mental element for rape in Victoria.

## VII CONCLUSION

As a result of the decision in *Worsnop*, Victorian juries will be directed in future rape cases that, in order to satisfy the fault element of the offence when an accused turned their mind to the issue of consent,<sup>93</sup> the prosecution must prove beyond reasonable doubt that there was no reasonable possibility that the accused believed that the complainant was consenting. This is now a necessary precondition for proving the mental element — that the accused was aware that the complainant was not or might not have been consenting. Furthermore, while the jury will be directed to consider the reasonableness of any asserted belief of the accused, they will also be directed that reasonableness is only a guide to consider when determining whether the belief was genuinely held. They will be reminded that the law does not require a belief in consent to be reasonable and that a person can hold a genuine belief despite it being unreasonable.

Following *Gordon*, they may also be directed that the accused's belief can be based entirely on an assumption and that '[t]here is no requirement in law that a person who has sexual intercourse with another must satisfy himself that the other person is consenting.'<sup>94</sup> Thus, while the jury will be directed to consider whether the accused took reasonable steps to ascertain consent, they will also be instructed that failure to take such steps does not preclude the accused from holding an honest, if unreasonable or mistaken, belief in consent. Similarly, they will be instructed in relevant cases to consider whether the accused was aware that a s 36 circumstance existed, making free agreement impossible. However, again, following *Roberts, Neal* and *Getachew*, the jury will be instructed that even if the accused was aware of the circumstance, this only goes to the reasonableness of their belief in consent; it does not preclude the accused from believing in consent.

Finally, the jury will be instructed that, if they find that the prosecution has not excluded the possibility that the accused believed the complainant was consenting, they cannot convict.<sup>95</sup> Following *Worsnop*, this is so notwithstanding other evidence that would indicate to a jury that the accused must nonetheless have been aware of the possibility that the complainant was not consenting. The Court

<sup>92</sup> Indeed, rape law reform generally is one of the most politically contested topics in criminal law, with a number of entrenched interest groups and perspectives, such that any reform is the result of political compromise.

<sup>93</sup> Failure by an accused to give any thought to whether the person is not consenting or might not be consenting is now an alternate fault element for rape in Victoria: *Crimes Act* s 38(2)(a)(ii).

<sup>94</sup> *Gordon* [2010] VSCA 207 (23 August 2010) [12] (Buchanan JA).

<sup>95</sup> See *Criminal Charge Book*, above n 7, ch 7.3.B.1 [47] ('Bench Notes: Consent and Awareness of Non-Consent').

of Appeal has determined that it is not for the jury to decide whether, as a question of fact, the accused's belief in consent precluded any awareness of the possibility that the complainant might not have been consenting. As a matter of law, honest belief precludes such awareness. The effect of *Worsnop* is thus to maintain the law in its pre-reform state such that subjective belief in consent precludes conviction. In this respect, the law has been unaltered by the past 40 years of rape law reform and decisions from the late 1960s are still authoritative. However, the *Worsnop* ruling may have inadvertently strengthened the requirement for the prosecution to disprove belief in consent, such that the prosecution must do so in all rape cases, not only when such belief is claimed directly.

Under current Victorian law, the onus now rests with the complainant not only to communicate non-consent but also to do so in such a way that the accused could not possibly maintain any assumption or belief in consent, however unreasonable or mistaken. This is not consistent with the communicative model of responsible sexual conduct given effect in the 'consent' provisions of the *Crimes Act*. The communicative model of consent, which would seek to place the onus to ascertain consent on the initiator of sexual penetration, may be written across the face of the Victorian legislation but it is severely undermined by the case law on the accused's mental state. The latter reinstates a 'negative' model of consent and betrays women's belief in their right to sexual autonomy. It does not reflect international best practice on sexual offences and it does not promote respectful treatment of sexual assault complainants in criminal proceedings.

Further rape law reform is now needed in Victoria — if only so that the objectives of the 2007 Act are to be realised and a person is not to be acquitted of rape solely because they held an unreasonable and mistaken belief in consent in circumstances when they must nonetheless have been aware that the complainant might not have been consenting. As is evident from *Worsnop*, Parliament will need to be explicit if it seeks to effect this change to current law so that 'awareness' and 'belief' are not legally deemed to be mutually exclusive. However, as is equally evident from *Worsnop*, jury directions that seek to clarify the relation between 'awareness' and 'belief' in Victoria's rape law are unlikely to resolve the persistent confusion created by the two standards. The law on the mental element for rape in Victoria would remain unnecessarily complex and inherently confusing for juries.

For these reasons, the better option is for the Victorian Parliament to now reform the mental element for rape, rather than only the jury directions. It is recommended here that reform should ensure that an argument of 'belief in consent' is only available to a defendant when it is based on reasonable grounds, including any steps taken to ascertain consent. It should not be available when a s 36 circumstance exists and the accused was aware of that circumstance. While *Worsnop* marks another instance of law reform objectives and expectations being frustrated in their implementation, the appeals and retrials that will inevitably follow this decision should not be cause to abandon efforts to effectively reform

the mental element of rape in Victoria. Instead, this decision should prompt further, and more emphatic, law reform.