

## Appendix 1

### AN ANALYSIS OF RAPE PROSECUTION OUTCOMES AND RELATIONSHIP BETWEEN COMPLAINANT AND ACCUSED

#### OVERVIEW

In order to analyse whether or not the relationship between complainant and accused affects the outcome of a rape case, the Commission tracked all matters for the two year period 1997/8–1998/9 in which there was at least one charge of rape at initiation. The analysis was restricted only to the matters which reached trial (whether on rape offences or other sexual offences or both). There were a total of 134 such matters identified in the designated period.<sup>1286</sup> The Commission had intended to analyse the relationship between delay<sup>1287</sup> and outcome, but this was not possible due to inconsistencies in the way PRISM data had been entered by the solicitors responsible for each file.<sup>1288</sup>

As a result of the small sample size, no statistically significant results were obtained, however it appears that:

- Family members (excluding partners) are least likely to be convicted of rape compared with other relationship types.<sup>1289</sup>
- Strangers or accused who met the complainant the same day are more often acquitted when compared with other relationship types.<sup>1290</sup>

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1286 For a breakdown of these matters see Table 2.

1287 'Delay' here refers to the delay between initiation and hearing.

1288 Some solicitors had entered 'initiation date' as the date of offence rather than the date of charge; others had entered it correctly.

1289 See Table 3.

1290 See Table 3.

- When the accused and complainant are current or former spouses/de factos, it is more likely that the accused will receive a rape conviction than a non-rape conviction as compared with other relationships.<sup>1291</sup>

## METHODOLOGY

The Commission data was largely collected from the Office of Public Prosecutions PRISM database records of rape matters. The only data collected from the actual files themselves was data about the relationship between complainant and accused. The Commission data collection recorded only the ultimate outcome for each accused. Any changes in offences over the prosecution process, such as rape charges being dropped in favour of non-rape charges, were not recorded.

The relationship between complainant and accused was coded according to the following categories:

- Not applicable
- Stranger
- Met same day
- Acquaintance/ second order acquaintance/ neighbour
- Colleague/ fellow student
- Friend
- Family friend
- Former/ current boy/ girlfriend
- Former/ current spouse/ de facto
- Immediate family member, other relative, in-law
- Employer/ employee
- Other authority relationship
- Sex worker/ client
- Co-resident
- Co-inmate/ co-patient
- Other

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1291 See Table 4.

- Parent/ step-parent/ child
- Not know

There were a number of matters in which there were multiple complainants:

**TABLE 1: MULTIPLE COMPLAINANTS**

		Number of Complainants (Categories)					
		One	Two	3-5	4-6	7 or more	Total
		Count	Count	Count	Count	Count	Count
Rape trial outcome	CC Convicted rape	24	0	3	1	0	28
	CC Convicted non-rape	26	1	5	0	2	34
	CC Acquittal / Directed acquittal	59	5	2	0	1	67
	CC No evidence led	2	0	0	0	0	2
	Permanent Stay	1	1	0	0	0	2
	Total	112	7	10	1	3	133

Thus, there were 112 matters in which there was only one complainant, 7 matters in which there were two complainants and so on. There was one matter in which the number of complainants was unknown.

There were also some matters where there was more than one accused. The statistical analysis does not take into account multiple complainants or accused. In

these cases, only the relationship between the primary accused and complainant was analysed.

**TABLE 2: TRIAL OUTCOMES FOR MATTERS WHICH BEGAN WITH AT LEAST ONE RAPE CHARGE**

<b>Trial Outcome</b>	<b>Count</b>	<b>Column %</b>
CC Convicted rape	29	21.6%
CC Convicted non-rape	34	25.4%
CC Acquitted/directed acquittal	67	50%
CC No evidence led	2	1.5%
Permanent stay	2	1.5%
<b>TOTAL</b>	<b>134</b>	<b>100%</b>

**TABLE 3: RESULTS FOR RELATIONSHIP CATEGORIES COMBINATION 1**

		Relationship Categories Combination 1									
		Stranger / met same day		Acquaint / friend / co-resident / neighbour / employer		Partner (spouse / boy-girl friend & includes former)		Family member		Total	
Rape trial outcome		Count	Column %	Count	Column %	Count	Column %	Count	Column %	Count	Column %
CC Convicted rape		5	27.8%	16	22.2%	7	28.0%	1	5.3%	29	21.6%
CC Convicted non-rape		1	5.6%	21	29.2%	5	20.0%	7	36.8%	34	25.4%
CC Acquittal / Directed acquittal		11	61.1%	34	47.2%	13	52.0%	9	47.4%	67	50.0%
CC No evidence led		0	.0%	1	1.4%	0	.0%	1	5.3%	2	1.5%
Permanent Stay		1	5.6%	0	.0%	0	.0%	1	5.3%	2	1.5%
<b>Total</b>		<b>18</b>	<b>100.0%</b>	<b>72</b>	<b>100.0%</b>	<b>25</b>	<b>100.0%</b>	<b>19</b>	<b>100.0%</b>	<b>134</b>	<b>100.0%</b>

**TABLE 4: RESULTS FOR RELATIONSHIP CATEGORIES COMBINATION 2**

		Relationship Categories (Partner vs Other)					
		Partner (current & former)		Other relationship		Total	
		Count	Column %	Count	Column %	Count	Column %
Rape trial outcome	CC Convicted rape	10	32.3%	19	18.4%	29	21.6%
	CC Convicted non-rape	5	16.1%	29	28.2%	34	25.4%
	CC Acquittal / Directed acquittal	16	51.6%	51	49.5%	67	50.0%
	CC No evidence led	0	.0%	2	1.9%	2	1.5%
	Permanent Stay	0	.0%	2	1.9%	2	1.5%
	<b>Total</b>	<b>31</b>	<b>100.0%</b>	<b>103</b>	<b>100.0%</b>	<b>134</b>	<b>100.0%</b>

## Appendix 2

### RECOMMENDATIONS FROM INDIGENOUS AND NESB GROUPS

#### 'FROM SHAME TO PRIDE' REPORT ON ACCESS TO SEXUAL ASSAULT SERVICES FOR INDIGENOUS PEOPLE

By Elizabeth Hoffman House and CASA House

1. That the From Shame to Pride Project endorses the Recommendations made at the Indigenous Forum on Sexual Assault. These Recommendations portray the views and aims of the Victorian Indigenous Communities.
2. The Indigenous State-wide Steering Committee on Sexual Assault be resourced to conduct its work over the next 2 years.
3. That Governments' recognise the immediate crisis faced by Aboriginal communities, families and workers in the field and provide funding to Aboriginal Communities for long term sustainable programs. This should also include funds to debrief and supervise workers dealing with traumatic experiences.
4. The development of an Indigenous State-wide Data System that accurately measures the levels of sexual and family violence and captures the type of support and services required. It is suggested that the Data System be made available across all Aboriginal Program areas and should include the legal services.
5. Aboriginal agencies develop and implement in-house data collection that accurately records the number of clients that they are unable to support and the types of issues they are facing. This would assist them to present accurate information on the number of clients they turn away.
6. That Aboriginal communities be adequately resourced and supported in the ongoing development of strategies; that enables them an opportunity to self determine the manner in which they address family violence and sexual violence within their respective communities.

7. That Victoria Police and Aboriginal Communities examine their relationships within their respective communities and explore mechanisms that improve their relationships particularly in the areas of family and sexual violence.
8. That Victoria Police examine the issue of non-reporting of sexual and family violence crimes as a component of the Victorian Police Steering Committees on Family Violence and Sexual Assault and develop strategies that increase the reporting of these crimes.
9. That Aboriginal Agencies be supported and resourced in the development of partnerships, protocols and MOUS that increase access to services and enhance the delivery of programs for victim survivors of family and sexual violence.
10. That the Family Court of Australia undertake cross-cultural training, provide culturally appropriate information and examine the possibility of the employment of an Indigenous Liaison Officer whose primary role would be to establish/improve relationships between Aboriginal agencies and the Family Court of Australia.
11. Similarly, the Magistrates' Courts should also undertake cross-cultural training particularly in the area of family and sexual violence.
12. The establishment of an Aboriginal Children's Hand Over Supervision Centre as a priority; particularly to begin to address the issues associated with the number of Aboriginal children who have come to the attention of Child Protection and the number of children involved in Family Court disputes involving family and sexual violence. This will require consultation with the Victorian Aboriginal Child Care Agency.
13. Funding bodies need to recognise that Aboriginal people do not have the same opportunities to disassociate themselves from the issues within their communities and hence, funding bodies need to consider the provisions of supervision, debriefing and access to adequate cultural training opportunities.
14. That CASAs further examine the development of partnerships and joint initiatives with Aboriginal organisations that increase access to their services.
15. That all CASA counsellor/advocates develop their awareness around the barriers that prevent Aboriginal people from accessing their services and develop their cultural awareness skills to assist them in enhancing the services they provide.

***INDIGENOUS FORUM ON SEXUAL ASSAULT RECOMMENDATIONS:***

1. To establish an Indigenous State-wide Sexual Assault Steering Committee.
2. For the newly established Steering Committee to feed into the broader State-wide Steering Committee on Sexual Assault.
3. To develop and deliver 'Responding to Sexual Assault' training to Aboriginal community members/workers.
4. To develop and distribute a Community Family Violence/Sexual Assault Resource Guide.
5. To develop a State-wide Sexual Assault Policy and Procedures Manual to ensure both a co-ordinated approach and set of practice standards throughout Victoria.
6. To facilitate a Men's Forum on Sexual Assault.
7. Undertake Community controlled research and data collection on sexual assault to inform and support requests for funding the development/evaluation of appropriate services.
8. To establish an Indigenous 'Helpline' for information/referral relating to Family Violence/Sexual Assault.
9. To develop and deliver (through broad range of media including Community radio, newspapers, kits) a Sexual Assault State-wide awareness/safety campaign.

***RECOMMENDATIONS FROM NESB FORUM***

1. Any community education strategy to increase awareness and understanding of issues involving sexual offences in NESB communities must take the following principles into account:
  - a. Any education or response strategy involving a particular community or communities must take place in the context of a long term, focused commitment to addressing the issue within that community.
  - b. Responses must be appropriate to the particular community: Diverse communities require diverse strategies.
  - c. Responses should be multi-level, flexible and creative.

- d. Any strategy or response must be grounded in an understanding of the various ways the concept of “family” is understood in different communities.
  - e. Strategies directed at refugee communities must be formulated with an understanding of the experience of being a refugee and how this impacts on culture.
  - f. It is necessary to combine direct and indirect responses to the issue of sexual offences.
  - g. It is necessary to take culture into account but not to use cultural difference as an excuse for a lesser or no response.
  - h. It is necessary to remember the limitations of translation – not all terms are capable of translation and translation alone is not an adequate way to account for cultural differences in understanding.
  - i. It is desirable to bear in mind the capacity of responses to serve a community development role and not to create narrowly focused strategies.
  - j. When a strategy is effective and generates increased awareness of the problem of sexual assault, it is important to provide adequate support services to respond to the increased need for services.
  - k. There must be a commitment to change that is meaningful and not tokenistic.
2. It is necessary to ensure that cultural awareness training for the legal community is of a high standard and relevant so that they can respond adequately to the needs of diverse communities.
  3. Immigration status is relevant to these issues – if reporting is encouraged, there will be implications for women and their families’ immigration status. It is necessary to provide education for relevant services and immigration workers around this issue.
  4. There should be community education about the Australian law regarding sexual offences and family violence provided for immigrants before their arrival in Australia.
  5. It is important to direct education at men as well as women. The idea of a men’s referral service should be explored.

## Appendix 3

### COURT OF APPEAL DECISIONS: SEVERANCE OF COUNTS

The following table contains all Victorian Court of Appeal cases that could be identified where severance was an issue in sexual offence cases involving multiple complainants. The cases were identified in two ways. An electronic search of all Court of Appeal judgements between 1998 and 2003 containing the word 'severance' was conducted. Several additional cases were also identified by the OPP. It is acknowledged that this list is not exhaustive.

TABLE 5: COURT OF APPEAL SEVERANCE DECISIONS

Name of case	No. of original counts at trial	No. of original complainants	Severance ordered by County Court?	Did Court of Appeal hold evidence was cross-admissible?	Result: Was the trial ruling re severance upheld in Court of Appeal? <sup>1292</sup>
<i>R v TJB</i> [1998] 4 VR 621	24	3	No	No <sup>2</sup>	See note below <sup>1293</sup>
<i>R v KRA</i> [1999] 2 VR 708	8 re 2 compls, unknown re 3 <sup>rd</sup> .	3	Yes—partial severance. 2 matters heard together, third severed.	No—Court agreed with trial judge that it didn't need to be for the charges to be joined.	Yes

1292 Where the County Court ordered partial severance, the Court of Appeal may have agreed that further severance was not required, or may have also commented on the appropriateness of the original severance.

1293 *R v TJB* was the first Court of Appeal decision to consider the effect of s 372(3AA)-(3AC). The decision was handed down in conjunction with *R v Best*, a decision concerning the admissibility of propensity evidence under the new section 398A. The two decisions must be read together. In *R v TJB* the trial judge had ruled that evidence in relation to each complainant was not mutually admissible. The Court of Appeal was prepared to accept this ruling as correct for the purposes of deciding the appeal and ordering a retrial; however, the Court noted (at p.634) that:

- if at the retrial the evidence was considered to be mutually admissible under s 398A, the counts would not be severed;
- if the evidence was not considered to be mutually admissible, it would be within the discretion of the judge hearing the retrial to sever the counts.

Name of case	No. of original counts at trial	No. of original complainants	Severance ordered by County Court?	Did Court of Appeal hold evidence was cross-admissible?	Result: Was the trial ruling re severance upheld in Court of Appeal? <sup>1292</sup>
<i>R v D</i> [1999] VSCA 148	14	5	Yes—partial severance. 3 matters heard together, and other 2 heard together.	Cross-admissibility not in issue. <sup>1294</sup>	Yes
<i>R v GAE</i> [2000] 1 VR 198	28	3	No	Some	Yes
<i>R v Mitchell</i> [2000] VSCA 54	30	10	Yes—partial severance. 9 matters heard together, 10 <sup>th</sup> severed.	Yes	Yes (Does not refer to any recent law – decided on 1991 case DPP v P <sup>1295</sup> re striking similarity)
<i>R v Rainsford</i> [2000] VSCA 157	3	3	Yes—partial severance. 2 matters heard together, 3 <sup>rd</sup> severed. <sup>1296</sup>	Yes	Yes
<i>R v M.N.G.</i> [2002] VSCA 7	8	2	Yes, trials severed on basis of ‘prejudice’.	Yes <sup>1297</sup>	Court did not rule on severance as it had already been granted.
<i>R v Glennon</i> <sup>1298</sup>	1. 29	1. 6	Yes—partial severance.	1. Yes	1. Yes

1294 The accused had argued that the judge should have exercised his over-riding discretion to sever, because there was no underlying unity and because of the possible prejudice of hearing all matters together. The Court of Appeal agreed with the trial judge that there was underlying unity, and the probative value of the evidence exceeded its prejudicial effect.

1295 *DPP v P* [1991] 2 AC 447.

1296 See para. 4.174 for discussion of this case.

1297 This case involved offending against two sisters. The defence made application at trial for severance, and it was granted on the basis that the offending against sister one was much more serious than against sister two, and it would prejudice the accused’s defence for sister one’s evidence to be heard in the trial for sister two. However, the trial judge allowed sister two to give evidence at the sister one’s trial, which was heard first. The appeal was from the trial involving sister one, and the Court of Appeal upheld the trial judge’s ruling on admissibility on the basis of the new legislation and *R v Best* and *R v TJB*.

Name of case	No. of original counts at trial	No. of original complainants	Severance ordered by County Court?	Did Court of Appeal hold evidence was cross-admissible?	Result: Was the trial ruling re severance upheld in Court of Appeal? <sup>1292</sup>
[2001] VSCA 17	2. 10 3. 26	2. 5 3. 4	Matters split into 3 time periods.	2. No formal ruling re cross-admissibility 3. Yes	2. No <sup>1299</sup> 3. Appeal lodged but not yet heard
<i>R v PJO</i> [2001] VSCA 213	25	6	Yes—partial severance. 5 matters heard together, 6 <sup>th</sup> severed.	Yes, for 5 of the complainants, no for the 6th	Yes <sup>1300</sup>
<i>R v A.L.P.</i> [2002] VSCA 210	18	4	No	Yes	Yes
<i>R v Neicho</i> [2003] VSCA 38	5	2	No	No, but ruled that prejudice to accused could be overcome by directions to jury.	Appeal on other grounds
<i>R v Papamitrou</i> [2004] VSCA 12	15	6	No	Yes	Yes <sup>1301</sup>

1298 When this matter was first brought to trial, it was on 65 counts pertaining to 15 complainants. The accused sought severance of all matters so there would be 15 separate trials. This was refused by the trial judge. The OPP proposed to sever the original presentment so as to have 3 trials, dividing the offences up into 3 time periods. The trial judge accepted that proposal, and each of the 3 trials trial then proceeded one after another. Glennon appealed against conviction in relation to the first two trials, and those appeals were heard together. At the time of publication the third appeal had not yet been heard.

1299 The Court of Appeal held that the 5th complainant's matter should have been severed, that it was 'dangerous' to receive that evidence in the trial 'partly because of its anomalous character and partly because the defence could not reveal to the jury that she was (one of the other complainant's) sister.'—see para 157.

1300 The case involved offences against the daughter of the defendant, and 5 of his wife's sisters. The matters relating to his daughter were severed at trial by the judge, after application by the defendant to sever all matters. The appeal was on the basis that counts in relation to the sisters should also have been severed. The Court of Appeal found that the evidence in relation to offences against those complainants was mutually admissible, and therefore it was correct not to sever those counts.

1301 See paras 4.174–78.

## Appendix 4

**TABLE 6: VITIATING FACTORS REFERRED TO IN CONSENT DIRECTIONS**

Trial No.	Vitiating factor relevant to case – section number	Type of factor	Judge directed on factor/s?
1	s. 36(a)	force or fear of	Yes
3	s. 36(a), (b)	force/harm or fear of	Yes
4	s. 36(a), (b)	force/harm or fear of	Yes
5	s. 36(d)	intoxication – alc.	Yes
7	s. 36(d)	intoxication – alc./drugs	Yes
9	s. 36(a), (b)	force or fear of	No
11	s. 36(d)	asleep	No
12	s. 36(d)	intoxication – alc.	No
14	s. 36(d)	intoxication – alc./drugs	No
15	s. 36(d)	intoxication – alc.	No
22	s. 36(a), (b)	force or fear of	No
23	s. 36(d)	unconscious, intoxication – alc./drugs	Yes
24	s. 36(d)	asleep, intoxication – alc./drugs	Yes

## Appendix 5

**TABLE 7: LENGTH OF CHARGES**

Trial No.	Day 1 - pages	Day 2 - pages	Total pages	Estimated time in minutes
1	68	48	116	193
2	38	-	38	63
3	55	-	55	92
4	93	-	93	155
5	29	44	73	122
6	49	-	49	82
7	75	32	107	178
8	45	-	45	75
9	28	15	43	72
10	49	-	49	82
11	34	10	44	73
12	22	13	35	58
13	20	-	20	33
14	18	-	18	30
15	25	-	25	42
16	61	20	81	135
17	50	-	50	83
18	75	-	75	125
19	154	-	154	257
20	31	-	31	52
21	37	-	37	62
22	51	53	104	173
23	80	-	80	133
24	27	-	27	45

## Appendix 6

### COURT OF APPEAL DECISIONS: LONGMAN WARNINGS

TABLE 8: LONGMAN WARNINGS 2001—COURT OF APPEAL

Name of case	Adult or child complainant?	<i>Longman</i> warning given?	If given, was the warning considered adequate?	Notes
<i>R v Glennon</i> [2001] VSCA 17	Child	Yes	Yes	
<i>R v GEC</i> [2001] VSCA 146	Child (at trial adult)	Yes	Yes	Appeal succeeded on another ground relating to <i>Jones v Dunkel</i> inferences.

TABLE 9: LONGMAN WARNINGS 2002—COURT OF APPEAL

Name of case	Adult or child complainant?	<i>Longman</i> warning given?	If given, was the warning considered adequate?	Notes
<i>R v Aden</i> [2002] VSCA 79	Adult	No		<i>Longman</i> warning not required because no delay and whilst there were inconsistencies in the complainant's evidence, they were not of a kind requiring a <i>Longman</i> warning.
<i>R v Salter</i>	Adult	No		<i>Longman</i> warning

Name of case	Adult or child complainant?	<i>Longman</i> warning given?	If given, was the warning considered adequate?	Notes
[2002] VSCA 128				should have been given. Trial judge erred in that the warning given not emphatic enough.
<i>R v Alexander; R v McKenzie</i> [2002] VSCA 183	Child	Yes	NA	The Longman warning itself (which was not given in relation to delay but rather coupled with a direction on corroboration) was not subject to appeal. Applicant argued that judge should have given a <i>Kilby</i> warning re the delay. Held: such warning should have been given (due to delay and age of complainant) however failure to give it did not cause any substantial miscarriage of trial.
<i>R v MWL</i> [2002] VSCA 221	Child	Yes	No	Trial judge erred in not adequately acquainting the jury with the danger created by the delay: miscarriage of justice. The <i>Longman</i> warning given by the trial judge was diluted from one of the danger of convicting the applicant to ‘a

Name of case	Adult or child complainant?	<i>Longman</i> warning given?	If given, was the warning considered adequate?	Notes
				somewhat vague statement' of delay creating a potential for error.
<i>R v FVK</i> [2002] VSCA 225	Child	Yes	Yes	Although not a "model" Longman warning, it was sufficient to ensure a fair trial for the applicant.

TABLE 10: LONGMAN WARNINGS 2003—COURT OF APPEAL

Name of case	Adult or child complainant?	<i>Longman</i> warning given?	If given, was the warning considered adequate?	Notes
<i>R v GTN</i> [2003] VSCA 38	Child	No		Longman warning not required because no substantial delay (delay was at most 16 months).
<i>R v Knigge</i> [2003] VR 181	Child	No		Although the lack of <i>Longman</i> warning formed one ground of the appeal, no decision was made in regards to whether there was a need for a <i>Longman</i> warning. Appeal succeeded on other grounds - retrial ordered.
<i>R v GAM</i> [2003] VSCA 185	Child	No		No requirement on the trial judge to give

Name of case	Adult or child complainant?	<i>Longman</i> warning given?	If given, was the warning considered adequate?	Notes
				a <i>Longman</i> warning because no such warning was called for by counsel and the circumstances of the case did not require the trial judge to give one.
<i>R v TWK</i> [2003] VSCA 225	Child	Yes	No	Longman warning given not adequate because did not follow the wording of the High Court in <i>Longman</i> . (28 or 29 year delay)
<i>R v WEB</i> [2003] VSCA 205	Child	Yes	No	Not sufficiently emphatic (a delay of between 6 and 14 years).
<i>R v O'Neill</i> [2003] VSCA 204	Child	Yes	Yes	An appropriate Longman warning was given.

## Appendix 7

### **PROPOSED MODEL JURY CHARGE FOR RAPE (WHERE CONSENT IS IN ISSUE AND THE DEFENCE OF HONEST BELIEF IN CONSENT HAS BEEN SUCCESSFULLY RAISED)**

[Assumes that the judge has already directed the jury on the meaning of important legal concepts such as ‘beyond reasonable doubt’, direct and circumstantial evidence, inferences, etc]

The law says that a person is guilty of rape if he intentionally sexually penetrates another person without that person’s consent. For you to find Mr Y guilty, the prosecution must prove to you beyond reasonable doubt that there was intentional sexual penetration and that Ms X did not consent to the penetration. In this case there is no dispute that there was intentional sexual penetration. There is, however, dispute over consent. Ms X has given evidence that she did not consent. Mr Y says that she did.

It is a defence to a charge of rape that the accused honestly believed that the complainant had given her consent to the sexual act in question. The accused has raised this defence. The prosecution must therefore also satisfy you beyond reasonable doubt that the accused did not believe the complainant consented.

You will remember that the defence does not have to prove anything. The prosecution must prove its case beyond reasonable doubt. So, to find Mr Y guilty of rape, the prosecution must satisfy you beyond reasonable doubt of two things:

- that Ms X did not consent; and
- that Mr Y did not honestly believe that she had consented. When you consider Mr Y’s belief—and when you consider whether or not that belief was honest—you will need to consider some laws which provide that, in certain circumstances, Mr Y’s belief cannot be honest. I will discuss those laws in a few minutes.

**First, in relation to Ms X's consent.**

If you conclude that in fact Ms X consented, then of course you must find Mr Y “not guilty”. Also, you must find him “not guilty” if you have a reasonable doubt as to whether Ms X consented or not. You will recall that Ms X gave evidence that...[briefly summarise the complainant's evidence on consent]. Mr Y gave evidence that...[briefly summarise the accused's evidence on consent].

**Secondly, in relation to the defence of honest belief in consent.**

Even if you are satisfied beyond reasonable doubt that Ms X did not consent, that alone is not enough to find Mr Y guilty because Mr Y has raised the defence of honest belief in consent. To find him guilty, you must also be satisfied beyond reasonable doubt that Mr Y did not honestly believe Ms X had consented.

The accused's case is that he honestly believed that the complainant had consented to sexual intercourse. The prosecution case is that he did not. The prosecution says that the only inference reasonably open on the evidence is that the accused must have known that the complainant did not consent. What did the complainant tell you? [Briefly summarise the complainant's evidence in this regard] The defence says....[Briefly summarise the accused's evidence to support his assertion of an honest belief in consent]

You must here compare the accounts given by the complainant and the accused. If you have no reasonable doubt about the accuracy of the complainant's evidence, then you must find the accused guilty.

10.53 The law says that in certain circumstances a person cannot honestly believe that someone else is consenting to sexual penetration. So, because of that law, you must find that the defence of honest belief fails if you are satisfied of any one or more of the following [direct jury only on those that are relevant according to the evidence]:

- (1) Mr Y did not take reasonable steps, in the circumstances known to him at the time, to find out whether or not Ms X was consenting;
- (2) Mr Y did not turn his mind to the possibility that Ms X was not or may not be consenting;
- (3) Mr Y was aware of the existence of circumstances which the law regards as having prevented Ms X from giving her free consent. There are 7 of those sets of circumstances.

**Let us consider what is meant by ‘reasonable steps’**

The law says that you cannot form an honest belief that the person with whom you anticipate having sexual intercourse has given his or her consent without some reason for believing that. A belief simply is not honest unless it is based on solid evidence. A mere hope or expectation that the other person is consenting is not enough. Similarly, silence or passive acquiescence cannot be taken to mean that the person is consenting. There must be some positive indication from the other person, whether that be by word or gesture, that she is consenting to sexual intercourse. So, if a person thinks that his companion’s conduct is ambiguous or unclear, his duty is to stop any further sexual activity or get clarification on the issue of consent before continuing.

If a person has indicated that she does not want to participate in sexual contact, the other person must stop all sexual contact until he knows that she has truly changed her mind. He cannot rely on a lapse of time or the other person’s failure to say anything to show that there has been a change of heart and that consent now exists.

How then can he know that the complainant has had a change of heart and has given her consent? He must take reasonable steps to discover the true position. What is reasonable will depend on the circumstances of each case. You will recall that the prosecution argues that Mr Y did not take reasonable steps to find out if Ms X was consenting...[briefly summarise the prosecution arguments in relation to reasonable steps]. And the defence argues.....[briefly summarise the prosecution arguments in relation to reasonable steps].

[Direct jury on the following only if self-induced intoxication on the part of the accused is relevant] In deciding on what steps were required of the accused in the circumstances known to him, the law says that you must not consider any evidence of the accused’s self-induced intoxication. In other words, the ‘reasonable steps’ required of a drunken accused are exactly the same ‘reasonable steps’ required of a sober person in the same circumstances.

To summarise the position here: the defence of honest belief in consent must fail if the prosecution has satisfied you that the accused did not take reasonable steps, in the circumstances known to him at the time, to ascertain that the complainant was consenting.

**What does it mean to say that someone did not turn their mind to the possibility that the other person was not consenting?**

The law says that you cannot form an honest belief if you do not turn your mind to the question of whether the other person is consenting. How can you have an honest belief that the person with whom you are having sexual intercourse has consented to it if you have never even considered the possibility that she has not? If you find that Mr Y did not even consider the question of whether or not Ms X was consenting to sexual intercourse with him, his defence of honest belief in consent must fail.

**Let us consider the sets of circumstances that are relevant to this case in which the law says that Ms X cannot have given her free consent.**

Those sets of circumstances are [direct jury only on those that are relevant]:

- First, if Ms X submitted and consented because of force, or a fear of force, to her or to someone else.
- Secondly, if Ms X submitted and consented because of the fear of harm of any type to her or to someone else.
- Thirdly, if Ms X submitted and consented because she was unlawfully detained.
- Fourthly, if Ms X was asleep, or unconscious, or so affected by alcohol or any other drug that she was incapable of freely agreeing.
- Fifthly, if Ms X was incapable of understanding the sexual nature of the act.
- Sixthly, if Ms X was mistaken about the sexual nature of the act or the identity of the other participant in it.
- Seventhly, if Ms X mistakenly believed that the act was for medical or hygienic purposes.

If you are satisfied that any one or more of those circumstances was the case, and that Mr Y was aware of the existence of those circumstances, then Mr Y's belief cannot have been honest and the defence of honest belief in consent must fail.

So, to sum up, if you have a reasonable doubt about whether Ms X consented or not, then you must find Mr Y "not guilty". Also, if you believe that Ms X did not consent, but—even so—you think that it is reasonably possible that Mr Y may have honestly believed that she had consented—within the meaning of the laws I have just described to you—then you must also find Mr Y "not guilty".

If, on the other hand, you are satisfied beyond reasonable doubt that Ms X did not consent and also that Mr Y did not honestly believe that she consented, then you must find Mr Y “guilty”.

## Appendix 8

### LIST OF SUBMISSIONS RECEIVED

No	Date received	Name	Affiliation
1	18 June 03	Robert Rofe AM & Joan Rofe	
2	18 June 03	Professor C R Williams	Faculty of Law, Monash University
3	24 June 03	<b>CONFIDENTIAL</b>	
4	30 June 03	Simon Gillespie-Jones	Barrister
5	1 July 03	Sheree Wolfe	Mildura Senior College
6	27 June 03	Katie Elliott	
7	30 June 03	Brian Coe (PART <b>CONFIDENTIAL</b> )	Emile Zola Society
8	1 July 03	Lisa Hannan	Magistrates Court of Victoria
9	1 July 03	<b>CONFIDENTIAL</b>	
10	18 July 03	Lloyd Davies	
11	31 July 03	Lisa Cox	Children's Protection Society Inc.
12	26 Aug 03	Paula Grogan	Youth Affairs Council Of Victoria

No	Date received	Name	Affiliation
13	26 Aug 03	Nell Ellis	Glastonbury Child and Family Services
14	28 Aug 03	Michelle Earle	Eastern Victims Assistance Program
15	24 Aug 03	Heather Ambrose	
16	25 Aug 03	Pam O'Neill	Barwon CASA
17	29 Aug 03	M.C &R.K Honor	
18	29 Aug 03	<b>CONFIDENTIAL</b>	
19	1 Sept 03	Judy Flanagan	CASA - Bendigo
20	1 Sept 03	Jenni Southwell	DVIRC
21	1 Sept 03	Joanne Sheehan	Mallee Sexual Assault Unit
22	1 Sept 03	Mary Amiridis	Vic Community Council Against Violence
23	1 Sept 03	Mrs R Beard	
24	29 Aug 03	Helen Wilson	Violence Against Women Intergrated Partnership
25	29 Aug 03	Sarah Lindenmayer	UnitingCare Victoria & Tasmania
26	31 Aug 03	Carolyn Worth	South Eastern CASA
27	30 Aug 03	Sarah Crookes	CASA House
28	2 Sept 03	Julie Beales	Gatehouse Centre - RCH
29	29 Aug 03	Helen Wilson	South Western CASA

No	Date received	Name	Affiliation
30	9 Sept 03		VOICES
31	3 Sept 03	Phil Grano	Office of the Public Advocate
32	5 Sept 03	Deb Bryant	West CASA
33	8 Sept 03	Lieut- Colonel Ian Hamilton	The Salvation Army
34	3 Sept 03	Kathleen Mohekey	
35	12 Sept 03	Elizabeth Newnham	
36	9 Sept 03	Jennifer Grylls	
37	17Sept 03	Dr.S. Taylor, Ms C&K Trusler	Children Of Phoenix Foundation
38	22 Sept 03	Dr Diane Sisley	Equal Opportunity Commission Victoria
39	22 Sept 03	Judge Neesham	County Court
40	25 Sept 03	Jonathon Goodfellow	Disability Discrimination Legal Service
41	30 Sept 03	Joe Tucci	Australian Childhood Foundation
42	14 Oct 03	Reg Marron	Criminal Bar Association
43	16 Oct 03	Det Sen Constable Pixie Fuhrmeister	Sexual Crimes Squad, Victoria Police
44	29 Oct 03	Patricia Faulkner	Department of Human Services
45	31 Oct 03	Nola Martin	

No	Date received	Name	Affiliation
46	25 Sept 03	<b>CONFIDENTIAL</b>	
47	25 Sept 03	Debbie Kirkwood	The Federation of Community Legal Centres
48	26 Nov 03	Ross Nankivell	The Victorian Bar
49	11 Dec 03	Judge Graham Anderson	County Court of Victoria
50	18 Dec 03	Grace McAllister	Australian False Memory Association Inc.
51	18 Dec 03	Marg D'Arcy	Victorian CASA Forum
52	6 Jan 04	Judge Roland Williams	County Court of Victoria
53	29 Jan 04	Nerelle Searles	
54	24 Feb 04	Tony Parsons	Victoria Legal Aid
55	19 Apr 04	Rowan Payne ( <b>CONFIDENTIAL</b> )	
56	2 March 04	Annie Davie	Witness Assistance Service

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