SUBMISSION TO VICTORIAN LAW REFORM COMMISSION 'IMPROVING THE RESPONSE OF THE JUSTICE SYSTEM TO SEXUAL OFFENCES'

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We thank the Victorian Law Reform Commission for the opportunity to respond to the terms of reference to the review, 'Improving the Response of the Justice System to Sexual Offences'. This submission is authored by Dr Rachael Burgin, Ms Bonnie Logan and Professor Jonathan Crowe on behalf of **Rape and Sexual Assault Research and Advocacy (RASARA)**. Below we respond to selected key themes outlined in the issues papers.

Communicative Consent

[1] Communicative consent refers to a standard of consent based on freely given and active agreement by all parties to a sexual act (see for example, Pineau 1989). Under a communicative approach to sexual consent, a person does not need to demonstrate that they are not consenting to a sexual act; there is no requirement that women yell out, resist or fight off the advances of the attacker (Burgin 2019b). Instead, the onus is on the person initiating sex to determine whether the other person(s) is consenting (Burgin & Flynn 2019). This requires that a person seeking consent from another takes active steps to determine that they have consent, thus shifting focus onto what actions the defendant took to ensure they had ongoing, active consent from the other party(ies) to engage in a sexual act (Burgin & Flynn 2019). Failure to do this could indicate that the act was not consensual (Bronitt and McSherry 2010).

[2] This approach garners widespread social, legal and political support (see for example, Craig 2009; Flynn & Henry 2012). In this context, communicative consent has been steadily

strengthened within the legislative framework of rape law in Victoria over the past few deacdes. For this reason, the jurisdiction provides an important case study for exploring the successes, challenges and potentials of a such a 'positive' consent standard (Burgin 2019a).

[3] Despite trends towards communicative consent laws across Australia, understandings of how this standard operates as law in rape trials are not well established. However, evidence of this translation was explored in a first of its kind study by Burgin (2019a). The study comprised a thematic analysis of a non-representative, random sample of rape trial transcripts heard in the Victorian County Court between 2008 and 2015. We draw on the findings of this study throughout the submission.

Enduring Problems in Victorian Law

[4] The move towards communicative consent signifies a shift in the discussion around rape and sexual violence, as well as concerning women's sexual autonomy (such as (re)constructing women as active sexual participants). However, reporting rates remain low, meaning the legislative and cultural shifts have not yet addressed the issues which prevent women from reporting their victimisation to the police. As Lievore (2003; 26) explains, for a woman to report her victimisation, she must first 'identify herself as a victim … and then be reasonably confident that others will also view her in this way'. Yet, even if a victim-survivor does identify the experience as rape, and feels victimised by that experience, they often do not report for a range of other documented reasons, including that they: may want to protect the defendant or maintain a relationship; may experience shame or embarrassment; may not want family or friends to know; may not know how to report (this disproportionately impacts culturally and linguistically diverse (CALD) victim-survivors or those living in rural or remote communities), or; may be financially or socially dependant on the defendant (for example, those whose visa status is dependent on the defendant) (see Lievore 2005; Taylor & Putt 2007; Willis 2011).

[5] Drawing on the findings of the study noted above, Burgin (2019a; 2019b) and Burgin & Flynn (2019) argue that in Victoria, rape myths continue to infiltrate rape trials, despite the introduction of communicative consent. This is facilitated by and through the law. Rape myths are 'prejudicial, stereotyped or false beliefs about rape, rape victims, and rapists' (Burt 1980, 217). In providing justifications for sexual violence, rape myths typically engage with narratives that support victim blaming, the pardoning of offenders and the minimisation of the

impacts of sexual violence on victim-survivors (Edwards et al. 2011). Some examples of these common rape myths, measured by representative attitudinal surveys of the Australian population, are that men cannot rape their wives, women enjoy being raped, women 'ask for it' by dressing in certain ways or that women lie about being raped (Webster et al. 2014).

[6] Burgin's study brought to light three key ways in which law reform efforts have failed in advancing feminist social interests. First, in constructing narratives of consent or non-consent, legal actors relied on perpetrator force, victim resistance and physical injury in ways that should have been eliminated by the introduction of a communicative consent standard (Burgin, 2019a; 2019b). Second, women's mundane and everyday behaviour was consistently (re)constructed as sexual or flirtatious, and thus as 'implying consent' to sex, in order to support a defence of reasonable belief' (Burgin 2019a; Burgin & Flynn 2019). And third, 'intoxication' or drug and alcohol use was relied on to discredit a woman's narrative and her credibility as a witness, and to argue that she was more likely to consent to sex (Burgin 2019a). These findings call into question the supposed success of law reforms in Victoria to date.

PERPETRATOR FORCE AND VICTIM RESISTANCE

[7] We have elsewhere traced the problematic roots of force and resistance in rape law within historic legal and social contexts (Burgin, 2019b; see also, Quilter 2015), and will refrain from a full exploration here. However, the historical context provides important understandings of the ways that narratives of perpetrator force and victim resistance endure. One such point can be made in the argument that force and resistance became central to the rape trial in response to 'concern over false allegations of rape [which have] long dominated the legal and social landscape as it relates to rape' (Burgin 2019b; 4; Brownmiller 1975). This also supported the onerous evidentiary standards, unique to rape law, that warned against convicting on women's 'uncorroborated' evidence alone (see Brownmiller 1975; Gavey 2005; Cossins 2010). The supposed danger was of course, that allegations of rape are easily made and difficult to defend against. Yet, evidence proves that this is far from true, reporting rates and prosecutions are consistently low (ABS, 2017).

[8] The endurance of narratives of perpetrator force and victim resistance was evidenced in an Australian study by Lievore (2004) exploring prosecutorial decision-making in rape cases. Leivore (2004) found that a case was more likely to proceed to trial or to be resolved by guilty plea where the victim-survivor actively resisted, and/or the accused was violent or used force

during the rape. As such, even in contemporary Australia, and despite formal legislative shifts away from expectations that a rape is a physical violence forced upon a resisting victim, these factors continue to permeate decision-making at the prosecutorial level.

[9] The social context has mirrored this reliance on an interplay between force and resistance. Rape myths have informed what society considers 'real rape' (Estrich 1987), and by extension, what constitutes 'normative' or appropriate sexual practice (Powell et al. 2013). In this context, dominant (hetero)sexual scripts construct men as active sexual actors, and women as passive, reluctant participants to sex (Gavey 2005). This alleged passivity has constructed the notion that women offer 'token resistance' to sex (Muehlenhard and McCoy 1991), thus normalising 'resistance, coercion and social pressure within sociocultural heterosexual scripts' (Burgin 2019b; 301). Resultantly, sexual 'coercion of women by men is positively eroticised' (Naffine 1994; 101).

[10] These narratives should be interrupted by a communicative standard of consent, however it is not the case in Victoria. Specifically, we argue that the law must place a positive obligation on sexual actors to 'take steps' to ascertain consent to sex. The current law in Victoria fails to proscribe this positive obligation on a person seeking sex, to take steps to ensure the other person(s) is consenting. This destabilises the effectiveness of provisions and directions which state that a person does not need to resist an attack, and of course, communicative consent law.

[11] In Victoria, rape law stipulates that evidence of victim resistance or injury is not required in order to prove that the rape took place. Yet, we have argued elsewhere (Burgin 2019b; Burgin and Flynn 2019; Burgin and Crowe 2020) that this is considerably undermined by the fault element to the crime of rape. The fault element is satisfied when the prosecution proves that the defendant had no 'reasonable belief' in consent. Reasonable belief is defined in *s 36A Crimes Act 1958* (Vic) as:

> *(1) Whether or not a person reasonably believes that another person is consenting to an act depends on the circumstances.*
>
> *(2) Without limiting subsection (1), the circumstances include any steps that the person has taken to find out whether the other person consents…*

This definition of reasonable belief does not place limits on the defence putting forward, nor the jury considering, evidence of a lack of resistance or injury as part of the 'circumstances' of the supposed reasonable belief.

In addition, there is no obligation on a person to take steps to ascertain the consent of another person. This is ensured by the inclusion of the phrase 'without limiting'. Accordingly, the provisions designed to protect against this type of questioning are undermined by the definition of 'reasonable belief' which allows accused persons to use a victim's non-resistance to argue they believed the victim-survivor was consenting.

Instead, in a rape trial, narratives of force and resistance continue to be drawn on by the defence in constructing a narrative of consent, or of reasonable belief in consent (Burgin, 2019a; 2019b). Burgin (2019a; 2019b) argued that this was achieved in three key ways: (1) the expectation that women 'perform' active resistance, (2) questioning the validity of resistance evidence, and (3) evidence of injury. These narratives relied on problematic rape myths including the myth that 'rape is impossible because it is easily avoided by the woman's resistance' (Schwendinger and Schwendinger, 1974: 19).

[12] In one case from Burgin's study, the judge instructed the jury mid-trial on the issue of resistance, because the prosecution had objected to the questions asked of the victim-survivor by the defence regarding whether she had 'said no' to the perpetrator. Though the judge noted that there was no requirement on the woman to 'say no', after a break, the judge gave the following direction to the jury:

> So, "the victim did not protest or physically resist the accused, the victim did not sustain physical injury." However, these are relevant facts for you to consider. *You must consider the action or lack of action of the victim*, together with all the surrounding circumstances in order to decide whether the prosecution has proven beyond reasonable doubt that the victim did not consent (Judge A, 157, emphasis added).

Here, the judge has determined that resistance (or 'lack of action') is relevant in the determination of whether the woman was consenting. This statement also establishes that resistance is a part of the circumstances, and thus can be considered in relation to a defence of reasonable belief, should they find that there was no consent. This is problematic, because it fails to challenge the myth that women will 'fight back', despite considerable evidence that

'freezing' is a common response to rape. The cumulative effect of this legislation works to undermine a communicative consent standard.

'IMPLIED CONSENT'

[13] The definition of reasonable belief discussed above also has other implications. As noted, this definition places no requirement or obligation on a person to take active steps to determine whether the other person is consenting. Accordingly, there is no requirement at law for a person to ensure that the other person is consenting to the act (Burgin & Flynn 2019). Instead, this definition of reasonable belief allows defendants to rely on women's mundane and common behaviour to support a 'reasonable' belief in consent. Yet, reasonableness under this approach relies on a male perspective of 'reasonableness' that aligns with socialised constructions of women as hyper-sexual (though, without an innate sexuality of their own), and women's behaviour is systematically reconstructed as implying consent to sex within the context of a rape trial (Burgin & Flynn 2019).

This endorses rape myths, such as that women want to be raped or 'ask for it' by dressing certain ways, or for giving 'mixed messages'. Yet, an assertion that 'messages' were 'mixed' should be considered an admission of guilt at law, since the defendant is confirming he acted on his own selection of the woman's behaviour (Burgin 2019b). This should undermine any claim of a 'reasonable' belief and indicate that the defendant knew or was aware that the woman might not have been consenting. In these circumstances, the defendant should be found guilty of the offence.

An example from Burgin and Flynn (2019) illustrates this. In *DPP v B (2009)*, the defence relied on the victim-survivor's "flirtatious" behaviour to establish reasonable belief. The victim-survivor, defendant, and some friends were camping. A short time after the victim-survivor went to her tent, the defendant approached, climbed in, and raped her. During cross-examination of the woman, the defence asked,

> *As the night wore on, you were flirting with [Defendant] weren't you? (At 99)*

When she refuted this, the defence referred to her "sitting on the arm of the [defendant's] chair" and "touching him" as evidence of flirting (at 99). The defence asked whether she had walked "hand in hand" with the defendant, creating "the invitation for [the Defendant] to get in [her

tent].” She denied this. The defence also attempted to establish this narrative through witness testimony. For example, one witness was asked,

> *Did you see anything over the course of the night, any indication you might have got of any flirting behaviour by [Victim-survivor] towards [Defendant]? (At 109)*

While this claim was refuted, the defence sought to create a pattern of flirtatious behaviour as evidence of the woman’s supposed implied consent to a later sexual act.

Contrary to typical practice, the defendant in this case gave evidence. This opportunity was used by the defence to further create an implied consent narrative:

> *Defence: Just in general terms, was there any interaction between yourself and [Victim-survivor] in the early hours of the morning when the group was getting down to that group of four?*
>
> *Defendant: Oh, there was playful banter, a little bit of flirting, her touching me [sic] knees and stuff like that.*
>
> . . .
>
> *Defence: You got up to go to bed, [Victim-survivor] followed, where did you go?*
>
> *Defendant: I went around behind the shed and I was holding—she was holding me [sic] hand, just being friendly and, of course, I’m a caring person . . . I make sure people get to bed before I put myself to bed.*
>
> . . .
>
> *Defence: Did she do anything when the two of you got to her [tent]?*
>
> *Defendant: When she knelt down, she kept hold of my hand.*
>
> *Defence: What did you understand by that?*
>
> *Defendant: I took that as an invitation to kneel down with her. (At 145–146)*

The defendant describes his version of events, including "kissing, hugging, embracing" (at 146), and suggests this was consent. When cross-examined, the defendant further articulates a flirting-as-consent narrative:

> *Prosecution: What happened to you when you followed [Victim-survivor] to her [tent], you thought you'd take the opportunity that was there, didn't you?*
>
> *Defendant: Well, I thought it was an invitation when she knelt down.*
>
> *Prosecution: Yes, and you're a bit like what Oscar Wilde said, you could resist anything but the temptation when you saw [Victim-survivor] there, isn't that right?*
>
> *Defendant: No.*
>
> *Prosecution: She hadn't done anything to provoke any relationship between you and her over the course of the night, had she?*
>
> *Defendant: Yes, she was flirting.*
>
> *Prosecution: What was she doing flirting?*
>
> *Defendant: She was rubbing her hand up the inner side of my thigh.*
>
> . . .
>
> *Prosecution: Anything else?*
>
> *Defendant: Just talking . . . (At 148–149)*

By his own evidence, the defendant's belief in consent was wholly tied to the victim-survivor's alleged "invitation" to "kneel down" next to her, and her "flirting," which he described as "just talking" and rubbing his leg. Even if accepting the defendant's account and agreeing the woman was flirting, this does not mean she wanted to have sex with him. The defendant does not at any time point to the actions or steps that he took to ascertain whether she was consenting. Instead, the narrative was exclusively built on her actions.

[13] A law based on communicative consent should redirect argument to focus on the defendant's actions in determining consent. It would be within the confines of the law for the prosecution to ask the defendant whether he took steps to ascertain consent (Burgin & Flynn

2019). However, under the current legislative framework, implied consent narratives are able to be put forward by the defence in seeking to establish that the defendant had a reasonable belief in consent. There is no requirement that a defendant demonstrate that they took any steps at all to ensure the other party(ies) was consenting.

SEXUAL HISTORY

[14] Sexual history evidence is relied upon by the defence despite the laws in place to restrict questioning on sexual history. In Victoria, these limitations are set out in *s 340 Criminal Procedure Act 2009* (Vic) which defines 'sexual history evidence' as 'evidence that relates to or tends to establish the fact' that the victim:

> *(a) was accustomed to engaging in sexual activities; or*
> *(b) had freely agreed to engage in sexual activity (other than that to which the charge relates) with the accused person or another person.*

[15] These restrictions of sexual history evidence are not total. The act continues by outlining the nature of the prohibitions, including that the court cannot allow evidence of or questioning on sexual history evidence in relation to: (1) the reputation of the victim-survivor, (2) the sexual activity of the victim-survivor, including both consensual and non-consensual acts, other than those related to the charges, and (3) the sexual history of the victim-survivor in order to argue that they are 'the type of person who is more likely to have consented to the sexual activity to which the charge related' (*ss 341-343 Criminal Procedure Act 2009* (Vic)). "The wording of this last provision is itself highly problematic, and indicative of the ways in which the law continues to embed sexist perspectives of women's sexuality" (Burgin 2019a, 107).

[15] Where a relationship exists between victim-survivor and defendant, the defence exploits this and its likely impact on juror perceptions by repeatedly referring to the sexual relationship (Burgin 2019a, 107). Victim-survivors are questioned on their behaviour before (and after) the act. This is despite a communicative standard of sexual consent being based on ongoing and clear consent. Thus, the actions of the victim-survivor in the hours, days and weeks before the rape are irrelevant to the defendant's claims of reasonable belief.

[16] For example, in *DPP v H (2012)*, a case explored by Burgin (2019a), the defence sought leave to question the victim-survivor on matters related to sexual history with the defendant. This was denied, because the judge determined it had no relevance to the matters at issue in the trial. However, leave was granted to allow limited questioning related to a dispute as to whether there had been consensual sex between the victim-survivor and defendant earlier in the day. In this case, the defendant claimed that he and the victim-survivor had sex that day, in contrast to the victim-survivor's assertion that they had sex three days earlier. The defence sought to use this dispute to discredit the victim-survivor as a witness. The defence attempted to situate the defendant's claims as fact, and then measure the victim-survivor's responses from this benchmark. While this line of questioning was meant to focus primarily on this dispute over the timing of their last consensual sexual encounter, the victim-survivor endured numerous questions that sit in stark contrast to the sexual history protection provisions. For example:

> *Defence: So, he was very keen for you to come to bed?*
>
> *Victim: Yes.*
>
> *Defence: All right, and you'd only been together what, three or four months?*
>
> *Victim: Yes, about that yeah.*
>
> *Defence: You'd had a physical relationship for about three or four months? ...*
>
> *Victim: That's correct.*
>
> *Defence: For three or four months or ---?*
>
> *Victim: Yes.*
>
> *Defence: --- not much longer?*
>
> *Victim: Um, yes, during the three, four months, yes.*
>
> *Defence: So, you had quite an active relationship?*
>
> *Victim: Yes.*
>
> *Defence: Despite the fact that you've got a couple of kids, or you had three kids around at that stage?*

Victim: Yes.

[17] The *Criminal Procedure Act 2009* (Vic) sets relatively wide scope for sexual history evidence to be permissible. In this case, the victim-survivor should not have had to endure being asked if she 'had quite an active relationship' with the defendant prior to the rape, with the strong indication being that they had an active *sexual* relationship, because it is irrelevant to whether the alleged rape occurred. No objection was made to this argument and it is questionable whether there would even be grounds upon which to make an objection under the current law because it does not (in itself) question her reputation in relation to chastity.

This questioning is in clear contrast to the communicative standard of consent. The victim-survivor should be protected from this type of questioning in (at least) two ways. First, the definition of consent as active and free agreement, and second, the sexual history provisions which protect against previous sexual encounters being used to argue that the victim-survivor is the 'type of person' who would consent to that type of sexual activity. Burgin argues "this questioning is problematic, and contrary to the law of communicative consent, since it is irrelevant whether the victim had previously had an 'active' relationship with the man who raped her. Yet, this evidence can now be used by the jury in determining whether a claimed belief in consent was reasonable" (Burgin 2019a, 109).

NON-CONSENSUAL CONDOM REMOVAL

[18] Non-consensual condom removal or "stealthing" refers to the practice where a man covertly removes or damages the condom during sexual intercourse, unbeknown to the female or male partner. As the law currently stands in Victoria, stealthing has not come before the scrutiny of the courts, is not expressly referenced in legislation, nor is it discussed often in academic literature (see however, Chesser & Zahra 2019; Brodsky 2017). The cases that have been undertaken in other jurisdictions cannot be applied to Victorian law and lack legislative equivalents (Logan & Burgin, forthcoming).

[19] Following Brodsky's (2017) arguments, the removal of a condom modifies the initial act that was consented to by compelling skin on skin contact which is a new form of touching, therefore it requires fresh consent. In addition, the associated risks and consequences of the act that were originally consented to are altered. If the victim-survivor was aware that the

intercourse would be taking place without the protection of a condom, they may have not consented to the act in the first instance.

[20] As highlighted by the NSW Law Reform Commission (2020), there are practical benefits that follow the express inclusion of stealthing in rape legislation. It has the ability to encourage people to report cases of stealthing to the police, assist police and prosecutors when deciding whether to investigate/prosecute cases involving stealthing and assist community education initiatives aimed at preventing stealthing (see also, Chesser & Zahra 2019).

[21] We submit that stealthing should be recognised as a circumstance in which a person does not consent to an act (*Crimes Act 1958* (Vic), *s 36(2)*). It should be recognised explicitly in existing consent legislation. For example;

Section 36 – Consent

> *(2) Circumstances in which a person does not consent to an act include, but are not limited to, the following—*
>
> > *(a) the person agrees to a sexual act subject to the other person(s) using a condom, which is then removed without the knowledge of the person.*

WITHDRAWAL OF CONSENT

[22] As explored above, communicative consent is based on the premise that all persons involved in a sexual interaction actively give consent. Thus, a person does not need to revoke consent, since consent is ongoing and performative under this standard. Accordingly, once someone stops giving consent, consent no longer exists. It follows that even during a sexual interaction in which consent is initially given, a person needs to continue to give consent to their sexual partner; they do not need to withdraw consent.

[23] We argue that language of withdrawal undermines the legislative commitment to communicative consent and does not reflect situations where a person might ‘freeze’ in the context of sexual violence (see Burgin & Crowe 2020 for discussion). Additionally, concerns would arise if the initiator of sex becomes aggressive or otherwise violent during a sexual act

that was initially consented to, or when a person began engaging in consensual acts, but later became unconscious or fell asleep. Under a communicative consent standard, the onus is on the initiator of sex to actively seek ongoing consent. There should be no requirement on a person to demonstrate non-consent at any time.

[24] The inclusion of provisions focused on withdrawal, as opposed to ongoing dialogues of consent, legitimise the argument that women who initially give consent then become responsible for any act occurring after that point. It may also lend credence to the idea that consent to one sexual act means consent to all other sexual activity. For these reasons, we recommend reform to *Crimes Act 1958* (Vic), s *36A (f)* and *Jury Directions Act 2015* (Vic), *s 46(3)(b*) to remove language of 'withdrawal'.

We thank the Commission for the opportunity to inform the review of the justice system's response to sexual offences, and welcome further discussions on the issues canvassed in this submission and the Commission's issues papers.

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