'A Critical Assessment of Consent to Sexual Intercourse: Is the Law at Odds with Current Realities?'

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I. Introduction

Consent forms a vital part of society as it underpins basic, day-to-day human interaction. Whether it be consenting to sexual intercourse or to medical treatment or engaging in a sport, consent is important. What counts as effective consent to sexual intercourse is an area that has evolved significantly over time, from an age when it was lawful for a husband to rape his wife, to the present day where consent is based on the communicative model of 'free agreement.'[1] Sexual offences and understandings of consent have proven to be topical in recent times, particularly since 2017 with the release of the Australian Human Rights Commission (AHRC) report *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities*[2] and the development of the #MeToo hashtag. These both highlight the continued prevalence of sexual offences in modern day society. This begs the question of whether law reforms such as the introduction of the 'communicative model of consent' in section 2A of the *Criminal Code* (Tas) (the *Criminal Code*) are thoroughly understood in society and whether some sexual offending may be attributed to a lack of understanding of what legal consent is.

This paper will seek to address these questions: firstly, by a historical analysis of consent reforms in Tasmania; secondly, by identifying various myths associated with sexual offences and consent, and thirdly, by assessing whether such myths are endorsed in practice. This will be achieved through an analysis of rape cases, with a focus on comments on passing sentence by Tasmanian Supreme Court judges, pre-existing jury studies and through an empirical Twitter analysis. The analysis of the cases is limited to cases where the accused was found guilty. However, despite this, it reveals that the accused was found guilty in circumstances that significantly challenge so-called rape myths. The results seem to contradict perceived understandings of a number of myths associated with rape and consent in society.

While this paints a promising picture with respect to understandings of consent, the analysis of pre-existing jury studies and Twitter highlights that some people in society are misinformed about consent. Accordingly, this paper then contends that the statutory definition of consent is at odds with what occurs in practice with respect to sexual intercourse. This showcases a limit with respect to law reform in the area of consent, as

[1] *Criminal Code 1924* (Tas) s 2A.
[2] Australian Human Rights Commission, *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* (2017).

changing the law itself has proved to be relatively ineffective in changing societal attitudes on consent. Finally, the paper argues that greater efforts are needed to ensure that the statutory definition of consent is more widely understood in society. It suggests that this could be achieved through an education campaign at universities and schools throughout Australia and changing media attitudes to prevent the endorsement of rape myths and victim blaming attitudes. Specifically, the use of vignettes in an education campaign to test participant's 'consent literacy' would be beneficial. This might be done by providing participants with a variety of scenarios in which they are required to decide whether or not consent, per section 2A exists.

II. The History of Consent in Tasmania

The definition of consent in the *Criminal Code* has undergone a number of amendments over the past three decades. In 1987, the definition of consent was amended to define consent as 'freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which the consent is given.' The definition was intended to reduce the focus in rape trials on the issue of consent, particularly by displacing the notion that absence of resistance could be interpreted as consent.[3] However, the new definition of consent failed to achieve its required objective, as an analysis of 33 rape and sexual assault trials found that in the majority of cases (70.5%), the defence argued that the victim had actually consented, particularly by reference to the victim's failure to resist the accused; their general passive response or lack of evidence of injury.[4] Unsurprisingly, the Task Force on Sexual Assault and Rape in Tasmania, established by the Rundle Government in 1995 thus recommended that section 2A be further amended to provide a definition of consent premised on 'free agreement', through positive words or conduct.[5] The new definition therefore sought to radically change the definition of consent with the desire to stop jurors, lawyers and judges being influenced by 'stereotypical views of sexual roles in their assessment of consent.'[6]

[3] Task Force on Sexual Assault and Rape, *Report of the Task Force on Sexual Assault and Rape in Tasmania (*1998) 1, 29.
[4] Ibid 29-30.
[5] Ibid 30.
[6] John Blackwood and Kate Warner, *Tasmanian Criminal Law Texts & Cases* (University of Tasmania Law Press, 4th ed, 2015) 744.

Following recommendations by the Task Force, section 2A was amended in 2004 and consent is presently defined as 'free agreement.' Section 2A(2) does not seek to limit the meaning of 'free agreement', but provides a number of circumstances in which a person does not freely agree – e.g. if the person 'does not say or do anything to communicate consent'[7] or 'agrees or submits because of a threat of any kind.'[8] The move to a positive standard of consent dictates that a person does not consent, unless they actively communicate, through either verbal or physical conduct.[9]

There is a great difference between a definition of consent based on capacity, as opposed to free agreement. The facts in *Parker v R*[10] help demonstrate this. In that case, the complainant had capacity to consent, yet could not be said to have freely agreed to sexual intercourse, as the accused had shown up at her house with a gun, assaulted her and had sexual intercourse with her while the gun was next to the bed. This scenario highlights the limits of a definition based on capacity, as a person with capacity to consent may still not freely agree to sexual intercourse.

The significant change in the definition sought to clarify what consent actually is, particularly in a legal context for jurors.[11] Whether the 2004 amendment has clarified the definition of consent is a moot point, as Gruber argues that references to 'free agreement' do not properly define consent and it is foreseeable that different people come to differing conclusions about how 'free agreement' operates in practice.[12] Gruber's argument however may not be applicable to section 2A, as the section includes a non-exhaustive list of situations that clarify when a person is not consenting. Section 2A should in fact be praised for providing a comprehensive list of circumstances that dictate when a person is not consenting, as not all Australian jurisdictions have followed suit. Western Australia (WA) legislation, for example, defines consent as 'freely and voluntarily given' and states that consent is not given if 'obtained by force, threat, intimidation, deceit or any fraudulent means.'[13] It is clear that

[7] *Criminal Code* (Tas) s 2A(2)(a).
[8] *Criminal Code* (Tas) s 2A(2)(c).
[9] Bianca Fileborn, 'Sexual Assault laws in Australia' (Australian Centre for the Study of Sexual Assault Resource Sheet, Australian Institute of Family Studies, February 2011) 1, 8.
[10] [1994] TASSC 94 (21 July 1994).
[11] Helen Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (PhD Thesis, University of Tasmania, 2012) 24.
[12] Aya Gruber, 'Consent Confusion' (2016) 38 *Cardozo Law Review* 415, 418.
[13] *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).

section 2A is much more extensive than the WA provision, which fails to mention that consent should be vitiated in circumstances of passivity. The WA provision has in fact faced scrutiny from philosophers, such as Gordon-Smith, who argue that the definition does not paint a clear picture of what non-consent is and can be regarded as 'deeply unhelpful.'[14]

III. Why is Consent Important?

It is imperative that citizens understand the legal notion of consent, so as to ensure that they avoid breaking the law. It sends a moral message, backed by the force of the law, that sexual intercourse without 'free agreement' is illegal. It is important that both potential offenders and potential victims understand consent, as a number of crimes and offences within the Tasmanian *Criminal Code* require the prosecution to prove absence of consent beyond reasonable doubt. For example, for the crime of rape, contained in section 185 of the *Criminal Code*, the prosecution is required to prove that the victim did not consent to sexual intercourse with the accused. It is vital that people in society understand what legal consent actually is, to ensure that they properly adhere to the law, or at least can choose to do so. If an individual fails to have a sufficient understanding of consent, there may be circumstances where they are unknowingly engaging in sexual intercourse without consent of the other party, risking allegations of rape or sexual assault.

The impact that sexual assault or sexual harassment can have on its victims is well documented. The AHRC report found that sexual assault and sexual harassment can affect victim's 'mental health, studies, career progression, social lives and relationships.'[15] To an extreme, mental health problems can result in self-harm or suicidal thoughts.[16] In an ideal society, where there is widespread understanding of what consent is, there would be fewer unintentional incidents of sexual assault and sexual harassment, which in turn would mean that there would be a smaller number of individuals who would suffer from the impacts of being a victim.

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[14] Eleanor Gordon Smith, *Why a clear definition of consent is key to effective sexual assault laws* (22 July 2015) ABC Radio National <http://www.abc.net.au/radionational/programs/philosopherszone/why-a-clear-definition-of-consent-is-key/6640420>.
[15] Australian Human Rights Commission, above n 2, 98.
[16] Ibid 99.

IV. How is Consent Interpreted?

The move to positive consent standards offered the prospect of an increase in prosecution of sexual offences. It was anticipated that in rape trials, the focus would shift away from whether the victim resisted the accused to whether the victim showed 'positive' signs of consent. However, despite the optimism about the operation of section 2A, this has not profoundly altered the course of rape trials, nor increased the conviction rates for sexual offences generally. The reporting rate of sexual offences has increased over time, yet this has not been matched by an increase in the average rate of conviction, as the conviction rate for sexual offences has conversely decreased over time. [17] These findings are supported by the Australian Institute of Family Studies, that notes that sexual assault is 'one of the most – if not the most' difficult offence to successfully prosecute and obtain a conviction for.[18]

This issue is not unique to Tasmania nor Australia, as other jurisdictions have similar statistics. For example, in England and Wales, extensive rape-law reform resulted in a significant increase of reporting of rape, however, the rate of conviction for rape remained stagnant.[19] This led to the conclusion that the law reform was 'ineffective' because of attitudes held in society about consent and rape. It is argued that the prevalence of rape myths in society can provide an explanation for why conviction rates did not similarly increase in line with increases in the reporting of sexual offences.[20]

The next section of the paper will discuss 'alleged' popular attitudes and beliefs in relation to consent and sexual offences, which it is argued are contrary both to affirmative consent standards enshrined in law and what actually occurs in the commission of sexual violence. These attitudes and beliefs will then be analysed: firstly, by comparing them to references to consent in comments on passing sentences in Tasmanian cases, secondly, through jury studies, and thirdly through a social media Twitter analysis to assess whether such attitudes and beliefs are actually held within society.

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[17] Australian Institute of Family Studies and Victoria Police, *Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners* (2017) 1, 3.
[18] Fileborn, above n 9, 1.
[19] Helen Reece, 'Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?' (2013) 33(3) *Oxford Journal of Legal Studies* 445, 445.
[20] Anastasia Powell et al, 'Meanings of 'Sex' and Consent': The Persistence of Rape Myths in Victorian Rape Law' (2013) 22(2) *Griffith Law Review* 456, 460.

i. Alleged Attitudes and Beliefs of Consent and Rape

The discussion that follows deals firstly, with rape myths and secondly, with victim blaming attitudes. The archetypical attitudes and beliefs towards consent and rape are alleged to be heavily influenced by what is commonly known as 'rape culture.'[21] This has been described as a phenomenon that attempts to 'normalise' sexual violence, at the expense of blaming the victim.[22] 'Rape myths' is a concept that falls under the umbrella of rape culture, as these myths attempt to suggest a narrative according to which 'real rape' is said to occur, which includes scrutiny of the victim's behaviour both before, during and after the event. For example, for 'real rape' to have occurred it should involve 'a stranger perpetrator, a public attack location, use of violence by the assailant and a show of physical resistance by the victim.'[23] In assessing whether or not a sexual interaction constitutes rape, rape myths dictate that it should be determined by reference to the victim's prior-sexual history, what the victim was wearing at the time of the incident, whether the victim was intoxicated or under the influence of drugs, whether the victim attempted to resist the accused and how the victim responded to the incident after.[24] These myths about how a 'real' victim behaves seek to place blame onto the 'unreal' victim, while exculpating the accused.

The most alarming aspect of rape myths, particularly by reference to what constitutes 'real rape,' is that a lot of the characteristics embodied in this concept simply are not true. For example, in most cases of rape the offender and the victim have a prior relationship and additional violence, (other than the violence that is required for the commission of rape itself) is rarely used.[25] Offenders usually have 'power over their victims and groom their victims into compliance' which in turn means that victims are unlikely to attempt to physically resist the accused and will therefore not sustain any injuries.[26] This is supported by two studies undertaken in the United States (US) and the United Kingdom (UK) respectively. In Minnesota, a study of 317 reported rape cases revealed that only 4% of victims sustained a physical injury, while in the UK 21% of victims from 400 reported cases of rape sustained a

[21] End Rape on Campus Australia, *Connecting the dots: Understanding sexual assault in university communities* (January 2017) 1, 3.
[22] Ibid.
[23] Louise Ellison and Vanessa E. Munro, 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study' (2010) 13(4) *New Criminal Law Review: An International and Interdisciplinary Journal* 781, 781.
[24] Kirsty Duncanson and Emma Henderson, 'Narrative, Theatre, and the Disruptive Potential of Jury Directions in Rape Trials' (2014) 22 *Feminist Legal Studies* 155, 156.
[25] Australian Institute of Family Studies and Victoria Police, above n 17, 6.
[26] Ibid.

physical injury.[27] Research also suggests that a natural survival instinct during the course of sexual violence is for the victim to 'freeze' and remain unresponsive.[28] This was confirmed in a 2014 case in the Australian Capital Territory, where a specialised doctor in medical and forensic sexual health testified that 'the freeze fright reaction has been documented in approximately half of all rape cases decade after decade since the 1970s.'[29] The above discussions highlight that physical injury is not the norm in rape cases and showcases the falseness of this rape myth.

A further concept embodied in 'rape myths' is the reporting of sexual offences. This myth stipulates that if a complainant was really sexual assaulted or raped, they would make a complaint to police immediately after the event.[30] There is however no 'normal' response to being the victim of sexual violence. An example of how courts have responded to expert psychological opinion on this point is comments by President Fitzgerald in *R v King*.[31] President Fitzgerald commented that the traumatic experience of sexual violence is likely to have an effect on different victims in different ways and their response to the incident is likely to vary accordingly.[32] It is therefore both inappropriate and outmoded to suggest that there is one typical response to sexual violence and if the victim does not follow this response their reliability should be doubted.

This is also related to another myth that rape is an over reported crime because a lot of people make false allegations or 'cry rape.'[33] It is argued that a proportion of allegations of rape are by 'malicious, calculating or disturbed' women who make false complaints after consenting to sex with 'unwitting men.'[34] The AHRC and the National Community Attitudes towards Violence Against Women Survey noted in their reports that approximately two in five people

[27] Mary Carr et al, 'Debunking three rape myths' (2014) 10(4) *Journal of Forensic Nursing* 127-225 and Genevieve Waterhouse, Ali Reynolds and Vincent Egan, 'Myths and legends: The reality of rape offences reported to a UK police force' (2016) 8(1) *The European Journal of Psychology Applied to Legal Context*, 1-10 as cited in Australian Institute of Family Studies and Victoria Police, above n 17, 6.
[28] End Rape on Campus Australia, above n 21, 7-8.
[29] Katrina Marson, 'Jury convinced by expert evidence on 'freeze fright' response in rape victims', *The Sydney Morning Herald* (online), 6 April 2014 <http://www.smh.com.au/comment/jury-convinced-by-expert-evidence-on-freeze-fright-response-in-rape-victims-20140406-zqrkd.html>.
[30] *Papakosmas v The Queen* (1999) 196 CLR 297, 320 [76].
[31] (1995) 78 A Crim R 53.
[32] Ibid 54.
[33] Sarah Croskery-Hewitt, 'Rethinking Sexual Consent: Voluntary Intoxication and Affirmative Consent to Sex' (2015) 26 *New Zealand Universities Law Review* 614, 616.
[34] Duncanson and Henderson, above n 24, 162.

believed that 'a lot of times women who say they were raped led the man on and later had regrets.'[35] Even though this is a common myth, research has suggested that false reporting in relation to sexual assault is actually 'relative low and in line with false reporting for other crimes.'[36] The Australian Institute of Family Studies and Victoria Police estimate that approximately 5% of rape allegations are false, which means the majority of reports made to police are not malicious rape allegations.[37]

It has been argued that the perpetuation of this myth has had negative consequences for victims of sexual offences as victims may decide against reporting the offence due to the fear that they may 'be met with disbelief and blame when they report the offence.'[38] To provide a practical example, in the AHRC report into sexual assault and sexual harassment at universities, 87% of students who claimed to have been sexually assaulted, did not make a report to police.[39] Of these students, 22% indicated that they chose not to report the matter because they were worried that they would not be believed.[40] The findings in the AHRC report into the experiences of university students are confirmed by other studies focused on the wider Australian society, one of which, for example, found that approximately 80% of victims of sexual violence choose not to engage with the criminal justice system.[41]

Despite the widely-accepted falsity of these rape myths, there are a number of studies that suggest that a portion of Australia's population agree with such myths. For example, Powell, referring to results from the National Community Attitudes Towards Violence Against Women 2013 Survey, argues that Australians should be concerned about the survey's findings that a surprising portion of Australians agreed with attitudes that both 'minimise and trivialise rape.'[42] The survey found that one in six Australians agreed that when 'women say

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[35] Australian Human Rights Commission, above n 2, 173 and VicHealth, *Australians' attitudes to violence against women. Findings from the 2013 National Community Attitudes towards Violence Against Women Survey* (2014) 1, 13.
[36] Australian Human Rights Commission, above n 2, 163.
[37] Australian Institute of Family Studies and Victoria Police, above n 17, 9.
[38] Ibid.
[39] Australian Human Rights Commission, above n 2, 118.
[40] Ibid 129.
[41] Wendy Larcombe, 'Rethinking Rape Law Reform: Challenges and Possibilities' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 143, 146.
[42] Anastasia Powell, *Rape culture: why our community attitudes to sexual violence matter* (17 September 2014) The Conversation <https://theconversation.com/rape-culture-why-our-community-attitudes-to-sexual-violence-matter-31750>.

no they mean yes', while one in ten believed that if a woman did not physically resist the accused, then it was not actually rape.[43] According to Powell, such views encourage a culture whereby individuals, organisations, universities and communities are less likely to respond to allegations of rape.[44] This discourages rape victims from coming forward, for fear that they will not be believed or taken seriously. These findings are also supported by *Our Watch* which conducted a survey on young people's attitudes and behaviours towards consent. One of the significant findings was that 25% of respondents thought it was normal for boys to pressure girls into having sex.[45]

Another aspect of rape culture is the phenomenon of 'victim blaming attitudes.' Such attitudes hold that 'the victim could somehow have prevented sexual assault or sexual harassment from happening to them or are to blame for it happening.'[46] Such attitudes seek to shift the blame from the perpetrator onto the victim. Victim blaming attitudes tend to revolve around the victim's behaviour either before or during the commission of the sexual offence. For example, focussing on what the victim was wearing; whether they were intoxicated or if they were walking alone late at night. This has also been referred to as the 'asking-for-it mentality'[47] that dictates if a girl was wearing a short dress and was intoxicated at a party that she is impliedly giving consent and is 'asking' for someone to sexually assault her. Submissions to the AHRC inquiry into sexual assault and harassment at Australian universities highlighted that victim-blaming attitudes are a 'commonly held attitude among students at universities.'[48] Some submissions to the AHRC noted that some people thought that sexual assault and harassment within a university setting was 'caused by the behaviour of female students' or by the way that they dressed.[49] This was a particularly disturbing finding, as it shows that some people seek to shift the blame from the perpetrator to the victim for experiencing sexual violence.

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[43] Ibid.
[44] Ibid.
[45] Our Watch, *The Line Campaign Evaluation: Wave 1 – Report. Summary of attitudes and behaviours of young people in relation to consent* (2016).
[46] Australian Human Rights Commission, above n 2, 161.
[47] Caroline Marcus, 'We're just as bad as India for blaming rape victims', *The Daily Telegraph* (online), 17 January 2013 <https://www.dailytelegraph.com.au/news/opinion/were-just-as-bad-as-india-for-blaming-rape-victims/news-story/86844fb3c6245a9bbdeb5aff2c95d4db?sv=f5d5f6e756cddbfa8f2df8f24edff077>.
[48] Australian Human Rights Commission, above n 2, 161.
[49] Ibid 162.

In relation to intoxication, it is clear that a portion of people in society are likely to blame a victim if they are intoxicated. In a survey conducted in 2013, 19% of respondents indicated that they 'would hold a woman responsible for her own rape is she was drunk or affected by drugs at that time.'[50] Henderson and Duncanson suggest that women complainants who consumed alcohol or drugs prior to the alleged sexual act have 'less chance of their claims being accepted.'[51] This is problematic as alcohol is involved in a significant number of sexual offences. One study found that out of 2,541 incidents, alcohol was involved in 60% of the incidents.[52] In fact, some perpetrators of sexual violence will use alcohol as a means of instigating sexual intercourse, as an intoxicated person will be more susceptible as a target of sexual violence, for instance if they are unconscious due to the level of alcohol they have consumed.

In the AHRC Report, it was noted in some submissions that engaging in sexual intercourse with an intoxicated person was ordinary practice, as some believed 'that sexual activity with a heavily intoxicated partner is normal and acceptable.'[53] This would appear to be contrary to the intention of section 2A(2)(h) of the *Criminal Code* that stipulates that consent is vitiated in circumstances where the victim is 'unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required.' However, the failure of prosecution arguments based on section 2A(2)(h) appears to suggest a high threshold for it to apply, insofar as consent will only be vitiated in circumstances where the victim is wholly incapacitated due to intoxication.

Some victim blaming attitudes also seek to question the victim's behaviour in the period leading up to the incident. For instance, if a woman walked home alone at 3am, was intoxicated and wearing a short dress, some people may seek to attribute blame to her if she was the victim of sexual violence. Such blame occurred in the case of Jill Meagher, who was raped and murdered walking home in Melbourne, as comments on social media questioned

[50] Emma Henderson and Kirsty Duncanson, 'A Little Judicial Discretion: Can the Use of Jury Directions Challenge Traditional Consent Narratives in Rape Trials?' (2016) 39(2) *UNSW Law Journal* 750, 770.
[51] Ibid.
[52] Mie-Louise Larsen, Marlene Hilden and Øjvind Lidegaard, 'Sexual assault: a descriptive study of 2500 female victims over a 10-year period' (2015) 122(4) *BJOG: An International Journal of Obstetrics and Gynaecology* 577-584 as cited in Australian Institute of Family Studies and Victoria Police, above n 17, 10.
[53] Australian Human Rights Commission, above n 2, 160.

why Jill declined her colleague's offer to walk home with her and why she was walking home alone late at night.[54] It is a striking, undeniable double standard that a man can walk home late at night drunk without facing extensive scrutiny if they become a victim of a crime, yet if a woman were to do the same, a significant portion of society may attribute blame to the victim.[55]

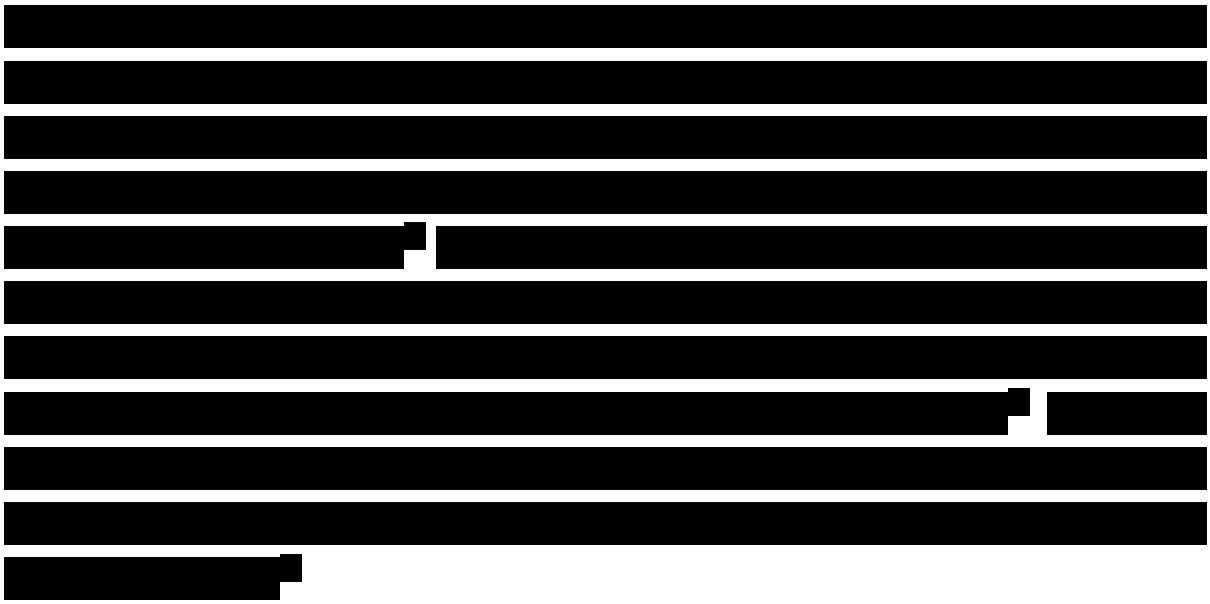
Victim blaming attitudes may play an important role in sexual offence cases in shaping juror opinion of the case and whether the accused is guilty and arguably such victim blaming attitudes are more frequent in sexual offences, than other criminal offences. A survey study, conducted by Bieneck and Krahé of 288 students who were asked to make ratings of victim and perpetrator blame with respect to rape and robbery supports this finding. Bieneck and Krahé found that more blame was attributed to the victim and less blame attributed to the perpetrator for rape cases, compared to cases of robbery.[56] The study also found that the victim's intoxication and prior relationship with the perpetrator operated differently in rape than it did in robbery. In the robbery cases, perpetrator blame was the same, regardless of the victim's intoxication or prior relationship with the perpetrator, however for rape, if the victim was intoxicated or known to the perpetrator, the victim was blamed more and the perpetrator less.[57] However, this study was conducted in Germany through a survey of students from the University of Potsdam. It would be informative to assess whether a survey of a similar kind in Australia would obtain the same results. In light of the earlier discussion and available statistics, a similar result could be anticipated.

The AHRC report into sexual assault and sexual harassment at Australian universities indicated that 51% of all university students reported that they were sexually harassed in 2016 and 6.9% of students reported that they were sexually assaulted in 2015-2016.[58] While data has not been obtained on this point, it would be an interesting study to ascertain whether the perpetrators of sexual violence were aware that the other person was not consenting and

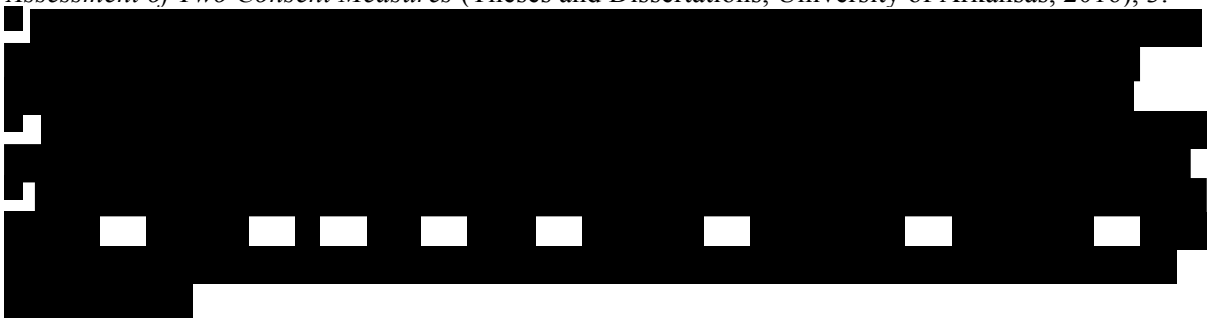
[54] Marcus, above n 47.
[55] Sian Norris, 'Stop blaming drunk rape victims and start teaching people about consent', *The Independent* (online), 5 June 2015 <http://www.independent.co.uk/voices/comment/stop-blaming-drunk-rape-victims-and-start-teaching-people-about-consent-10301185.html>.
[56] Steffen Bieneck and Barbara Krahè, 'Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is There a Double Standard' (2011) 26(9) *Journal of Interpersonal Violence* 1785, 1785.
[57] Ibid 1794.
[58] Australian Human Rights Commission, above n 2, 3.

that they were therefore committing sexual violence, an act contrary to law. Based on other studies, it could be argued that it would be reasonable to assume that not all of the perpetrators would be aware of the unlawfulness of their actions. For example, findings from *Our Watch* indicate that 73% of young people are confident that they know what to do to get consent prior to sexual activity.[59]

We must however allow for the very real possibility that a significant proportion is mistaken about legal consent. Therefore, an explanation for some instances of sexual violence could be that the perpetrator believed they knew what to do to obtain consent but were in fact unaware that the victim's behaviour indicated that they were not consenting. To provide an example, in the US, studies have shown that some college students believe that consent to sexual intercourse can be communicated ahead of time in social environments, such as at a bar or a house party and that would suffice.[60]



[59] Our Watch, above n 45.
[60] Kelley Rhoads, *Social Media and Perceptions of Sexual Consent: Development and Psychometric Assessment of Two Consent Measures* (Theses and Dissertations, University of Arkansas, 2016), 3.



While studies suggesting that 73% of young Australians are confident that they know how to obtain consent is promising, what would be beneficial to ascertain is what they interpret consent to mean. Other findings from *Our Watch* found that 60% of young people believe it is up to the girl to make clear if she does not want to engage in sexual intercourse.[64] This suggests that a portion of young people, who believe they know what to do to obtain consent, believe that the onus is on the girl to show her dissent to sexual intercourse. This is clearly not the intention behind the definition in section 2A, nor all other consent provisions throughout Australian jurisdictions, that do not require manifest dissent on behalf of the complainant. This raises serious doubt as to whether the way the 73% of young people interpret consent aligns with the statutory definition of consent.

ii. Are these Alleged Attitudes and Beliefs Enforced in Practice?

Case Analysis

This section will draw on an analysis of comments on passing sentence of eight selected sexual cases in the jurisdiction of Tasmania, from the period ranging 2013-2017. These cases were found on the Supreme Court sentencing database online by searching the terms 'rape' and 'sexual assault.' The selected cases were cherry-picked on the basis of the judge's respective comments on consent and alleged attitudes and myths associated with sexual offences. As such, I conducted a content analysis of the cases and the eight cases were chosen on the basis that they contained relevant comments. It was not within the scope of this paper to analyse every case systematically, so the cases chosen were designed merely to get a flavour of judge's comments on these issues.

Additionally, it should be noted that as these are comments on passing sentence, they are cases where the defendant was found guilty. Whilst beyond the scope of this paper, it would make for an interesting analysis to access cases where the defendant was acquitted and ascertain the factual circumstances upon which they were acquitted. On the whole, the comments on passing sentence were in line with the intention behind section 2A. This was unsurprising given that judges, with legal education and significant practical experience would be expected to apply the law without taking into account their own personal attitudes and beliefs about consent or sexual offences generally.

[64] Our Watch, above n 45.

a) Case Summaries

This section will provide a brief summary of the cases and any relevant comments on consent. In *State of Tasmania v Mac ("Mac")* the complainant, who was intoxicated, was raped by the defendant, during the course of which she lost and regained consciousness a number of times. The complainant started crying and told the defendant to stop, which he then did. Justice Brett stated that sexual intercourse occurred 'without her consent, and, at least at the start, her conscious knowledge.'[65] In a similar case of *State of Tasmania v Benjamin Steven Craig ("Craig"),* the defendant was found guilty of raping the complainant who was intoxicated. The defendant however was acquitted for two other sexual crimes, with Wood J noting that 'the issue on trial was consent' and the defendant was likely acquitted because the 'jury was not satisfied beyond reasonable doubt of lack of consent.'[66]

In *Mulholland v Tasmania ("Mulholland")* the complainant and the appellant met on an online dating site and arranged to meet up, at which time the appellant raped the complainant. In relation to consent, Pearce J stated that the 'appellant imposed his will on the complainant, despite her physical resistance and verbal protests.[67]' In somewhat similar circumstances in State *of Tasmania v Anthony Douglas Glass ("Glass")* the defendant and the complainant had arranged to meet at a hotel to do a photo shoot. Once the photo shoot had ended, the defendant asked the complainant whether she wanted to play around. The complainant said no, however sexual intercourse still occurred, during the course of which, the complainant said no and to stop 'very quietly.'

In *State Tasmania v DJK ("DJK")*, the defendant, a friend of the complainant, raped her whilst she pretended to be asleep. Similarly, in the cases of *State of Tasmania v MPB ("MPB")* and *State of Tasmania v LAP ("LAP")* the respective defendants were found guilty of raping their wife in circumstances of recent separation. In *MPB* the defendant held the complainant's face and wrists, whilst she was crying and struggling to get away. Justice Wood observed that the defendant persisted despite the complainant's distress and it was 'entirely obvious' to the defendant that the complainant was not consenting.[68] In *LAP* the defendant 'acted in the hope that his sexual advances may result in her consent but, realising

[65] *Tasmania v Mac* (comments on passing sentence, Brett J, 8 November 2017).
[66] *Tasmania v Craig* (comments on passing sentence, Wood J, 26 May 2016).
[67] *Mulholland v Tasmania* [2017] TASCCA 2 (14 March 2017) [12].
[68] *Tasmania v MPB* (comments on passing sentence, Wood J, 15 August 2017).

a risk that she did not consent, acted regardless.'[69] In *State of Tasmania v Reid ("Reid")* the accused pleaded guilty to forcibly abducting and raping the 12-year-old complainant.

b) Effect of Intoxication

In *Mac*, the judge made reference to comments that are the complete opposite of victim blaming attitudes held by some people in society.[70] It was noted at trial that the complainant's sister felt a strong sense of guilt for not intervening and preventing this crime from occurring. Justice Brett stated, however, that 'neither the complainant nor her sister should feel any guilt in relation to this matter. The crime was committed by you. Its consequences are your responsibility and not the responsibility of anyone else, and certainly not either of these women.'[71] This is contrary to victim blaming attitudes, as some people in society would seek to blame the complainant for being raped because she was intoxicated. Some people may also seek to blame the complainant's sister for not sleeping in the same room as her if she was so intoxicated.

While in *Mac* the complainant's intoxication did not affect the assessment of whether the complainant consented and ultimately the outcome of the trial, a different outcome occurred in *Craig* where the jury returned an unusual verdict. In that case, the defendant was acquitted for counts one and two. These counts involved the defendant placing the complainant's hand on his penis and then inserting his penis into her mouth. In response to this, the complainant refused by withdrawing her hand and mouth and telling the defendant she did not want to because she felt sick. While I did not have access to the evidence that was led at trial, the acquittal of the defendant for counts one and two is surprising as the evidence put forward in the comments on passing sentence would suggest that the complainant clearly was not consenting within the scope of section 2A. The complainant showed no signs of 'free agreement' and actually communicated to the defendant both verbally and physically that she was not consenting. It would appear Wood J would largely agree with this account, as she stated that the defendant 'was well aware of her [the complainant's] lack of interest in and rejection of his sexual conduct immediately beforehand.'[72]

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[69] *Tasmania v LAP* (comments on passing sentence, Pearce J, 19 September 2016).
[70] Submissions to the AHRC found that victim blaming is a commonly held attitude among university students: Australian Human Rights Commission, above n 2, 161.
[71] *Tasmania v Mac* (comments on passing sentence, Brett J, 8 November 2017).
[72] Ibid.

However, the jury returned a verdict of guilt for count three, which occurred after counts one and two where the defendant pulled down the complainant's jeans and underpants and had vaginal sexual intercourse with her. Her Honour noted that for this count there was 'supporting evidence of lack of consent' which likely contributed to the jury's finding of a lack of consent. This would appear to suggest that perhaps there was another person present who witnessed the third count and was able to testify to the effect that the complainant was not consenting. As there was no dispute on the facts about the physical act, it may be implied that the jury were unsatisfied with the complainant's account of events on counts 1 and 2. Potentially the complainant's intoxication made her a poor witness, which begs the question of whether the jury was influenced by her intoxication on the evening of the incident. Croskery-Hewitt would appear to support such a proposition as she notes that 'the presence of victim intoxication tends to negatively affect the chances of a successful prosecution due to the victim's diminished recall of events and negative stereotyping of the victim.'[73]

c) Presence of Additional Violence

As noted by Tennent J in *DJK,* 'in general terms the crime of rape is considered to be a crime of violence.'[74] However, the use of additional violence, over and above the use of violence necessary for the bodily violation involved in the commission of rape is uncommon. For example, the organisation End Rape on Campus Australia (EROC) found in their research that 'in very few cases was extreme physical force or violence used.'[75] Research suggests however that it is difficult to obtain a conviction in circumstances where 'no weapons or threats of physical violence were used.'[76] Cases that proceed to trial are therefore more likely to involve the use of violence, as the prosecution can be more confident that they will secure a conviction. This is contrary however to the cases analysed below, as in the majority of cases little to no additional violence was used by the defendant, thus demonstrating a conviction can be recorded in the absence of additional violence.

The presence of additional violence in one specific case, appeared to influence the trial judge's decision on the defendant's culpability for the crime. In *Glass,* Evans J stated that 'in general terms the complainant was gentle with the complainant. He was not violent and did

[73] Croskery-Hewitt, above n 33, 615.
[74] *Tasmania v DJK* (comments on passing sentence, Tennent J, 3 May 2017).
[75] End Rape on Campus Australia, above n 21, 7.
[76] Larcombe, above n 41, 146.

not threaten her.'[77] From one perspective, it would appear that Evans J is suggesting that the defendant should be less culpable for the crime because the complainant failed to resist him and the defendant was not physically violent. This would be an interesting interpretation of consent, as section 2A(2)(a) provides that passivity is sufficient to establish that there was no consent. However, from another perspective, maybe Evans J is simply referring to the complainant's lack of violence as a mitigating factor in sentencing, particularly compared with other forms of indecent assault and aggravated sexual assault where additional violence, beyond that required for the commission of the crime is involved.

In some of the other cases, comments of a similar nature to that of Evans J were expressed. In *Mulholland,* it was noted by Pearce J that 'some of the features of more serious examples of the crime of rape were not present in this case. There was little violence over and above the force necessary to commit the rape.'[78] Similarly, in *DJK* Tennent J noted that 'as to the rape found to have occurred by the jury, the event was short-lived. There was no use of violence or force.'[79] This suggests that perhaps the second interpretation of Evan J's judgment is correct. It showcases a trend in the comments that judges look at the degree of violence used as a mitigating or aggravating factor to take into account for the purpose of sentencing. This is supported by Warner's book *Sentencing in Tasmania,* where Warner noted that an important consideration in determining an appropriate sentence for the crime of rape is the amount of force used by the defendant.[80] As such, the use of a weapon is an aggravating circumstance that warrants the court imposing a harsher sentence.

d) Relationship Between the Parties

A surprising discovery in my analysis were the cases of *MPB* and *LAP* where two husbands were respectively found guilty of raping their wife, from whom they had recently separated. This was an unexpected finding, particularly as up until 1987 in Tasmania, the *Criminal Code* provided that the victim cannot be the wife of the perpetrator, thus providing immunity for husbands who raped their wives.[81] In cases where the complainant and the defendant have had a prior sexual relationship, it can be difficult to obtain a conviction as jury members may be influenced by their prior sexual relationship and may assume that consent is present unless

[77] *Tasmania v Glass* (comments on passing sentence, Evans J, 27 March 2013).
[78] *Mulholland v Tasmania* [2017] TASCCA 2 (14 March 2017).
[79] *Tasmania v DJK* (comments on passing sentence, Tennent J, 3 May 2017).
[80] Kate Warner, *Sentencing in Tasmania* (The Federation Press, 2nd ed, 2002) 303.
[81] Ibid 301.

the wife 'makes it abundantly clear … otherwise.'[82] However, as noted in *LAP* 'a prior sexual relationship between the two is not a mitigatory factor.' [83] These cases reinforce section 2A, that consent must be by 'free agreement' and can never be assumed, even in a husband-wife scenario.

In addition to the husband-wife cases, in most of the cases analysed the defendant was known to the complainant. For example, in both *DJK* and *Craig* the defendants were described as 'friends' of the complainant. This would appear to be contrary to the 'real rape' stereotype discussed in detail earlier, that assumes the existence of 'a stranger perpetrator, a public attack location, use of violence by the assailant and a show of physical resistance by the victim.'[84] Most of the cases analysed did not fit the criteria of the stereotype, as in many instances the defendant was known to the complainant; little violence was used and the incident occurred in a private setting. This suggests that in these cases, the jury was not influenced by societal attitudes that seek to create a stereotype of what the crime of rape involves.

e) Interpretation of Victim Impact Statements (VIS)

In the case of *Reid*, informative comments were made in the VIS with respect to rape myths. It was stated that the complainant has shown resilience as 'she felt that everyone believed her.'[85] This is a noteworthy statement, as it suggests that the complainant was worried that in coming forward about the incident, no one would believe her. The complainant's fears in this regard can be attributed to attitudes held by some people in society who believe that rape is an over-reported crime and that people make false allegations of rape. The complainant is not alone in her fear, as both national and international research suggests that one of the many reasons that sexual offences such as rape are under reported is due to fear that the victim will not be believed.[86]

The VIS also said that an additional reason why the complainant is doing well, despite being the victim of abduction and rape is because she remained anonymous. The statement noted

[82] Lynn Jamieson, 'The Social Construction of Consent Revisited' in Lisa Adkins and Vicki Merchant (eds), *Sexualising the Social: Power and the Organization of* Sexuality (Macmillan, 1996) 55, 58.
[83] *Tasmania v LAP* (comments on passing sentence, Pearce J, 19 September 2016).
[84] Ellison and Munro, above n 23, 781.
[85] *Tasmania v Reid* (comments on passing sentence, Escourt J, 5 September 2016).
[86] Australian Institute of Family Studies and Victoria Police, above n 17, 3.

that 'she has not been seen as a victim by the people who know her and that has been very important to her.'[87] This implies that the complainant may have been treated differently by her friends, peers and extended family if they were aware that she was the victim of this crime. This is significant as the incident occurred in Latrobe, a small community in the North-West of Tasmania. Remaining anonymous, particularly in a small community, may offer significant benefits. An anonymous individual, who is also a rape victim wrote an article for the *Australian Broadcasting Corporation* in which she described her experience of being a victim of rape as 'suffocating' after being the subject of bullying and harassment after the incident.[88] She was left feeling alienated and unsupported after being called a liar, slut and home-wrecker.[89] Fortunately the 12-year-old complainant in *Reid* has not had to deal with a similar experience, which may in fact explain why she has remained so resilient throughout this experience.

A final noteworthy remark made in the VIS was that 'the police force treated her extremely well and made her feel safe and trusted.'[90] It is a positive sign that the police treat victims of sexual offences in a good way, as this was not necessarily always the case. *The Report of the Task Force on Sexual Assault and Rape in Tasmania* in 1998 referred to a community survey that found that 77% of people believed that the legal system treats victims badly and that there are considerable difficulties for victims of sexual assault in approaching authorities.[91] This finding however would appear to be primarily directed to the legal system as a whole, including the court process which can be 're-traumatising and a significant deterrent for victims' from coming forward.[92] The complainant in this case however was very lucky in this respect, as the defendant pleaded guilty, so the complainant was not required to give evidence. Once again, this may be a further reason why the complainant has continued to remain positive throughout the ordeal she has experienced.

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[87] *Tasmania v Reid* (comments on passing sentence, Escourt J, 5 September 2016).
[88] Anonymous, *How the justice system lets sexual assault victims down* (3 September 2016) Australian Broadcasting Corporation News <http://www.abc.net.au/news/2016-09-02/brock-turner-justice-system-sexual-assault-victims/7801784>.
[89] Ibid.
[90] *Tasmania v Reid* (comments on passing sentence, Escourt J, 5 September 2016).
[91] Task Force on Sexual Assault and Rape, above n 3, 28 citing ANOP Research Services, *Community Attitudes to Violence Against Women OSW*, Canberra (July 1995).
[92] Anonymous, above n 88.

f) Problem of Attrition

While the analysis of these cases may paint a positive picture on the whole, it should be noted that in 2016, 23,050 victims of sexual assault reported the matter to police across Australia.[93] However, between 2016-2017 a conviction was only secured in 2,877 cases (12.48%).[94] In addition to this, it is well-known that sexual offences have a higher attrition rate compared to all other offence types.[95] According to the Crime Statistics Agency, less than half of all cases that are reported to police progress further than the police investigation stage.[96]

Only a small proportion of reports of sexual assault are likely to proceed to trial. This may be a result of a number of different factors, for example, if the complainant does not want the matter to go forward as they do not want to testify or if the prosecution decides to discontinue the case as per the Tasmania Office of the Director of Public Prosecutions *Prosecution Policy and Guidelines*.[97] Under these guidelines, the prosecution can only proceed with prosecution if they are satisfied based on the available, relevant and admissible evidence that there is a reasonable prospect of conviction.[98] As such, in a majority of cases, the decision whether or not to proceed with prosecution fundamentally comes down to the 'complainant's account and an assessment of the weight of any corroborating evidence.'[99] This may mean that if a complainant was intoxicated when the incident occurred, that it may be more difficult for the prosecution to proceed with the matter if it is the complainant's word against that of the defendant and there is a lack of additional evidence.

Prosecutors therefore encounter a number of difficulties in prosecuting sexual offences, particularly as such offences are usually committed in private, with little or no corroborating

[93] Australian Bureau of Statistics, 'Recorded Crime – Victims, Australia, 2016' Cat. No. 4510.0, Table 6 (6th July 2016) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4510.0Main+Features12016?OpenDocument>.
[94] Australian Bureau of Statics, 'Criminal Courts, Australia, 2016-17' Cat. No. 4513.0, Table 7 (28th February 2018) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4513.0~2016-17~Main%20Features~Key%20findings~1>.
[95] Melanie Millsteed and Cleave McDonald, 'Attrition of sexual offence incidents across the Victorian criminal justice system' (Crime Statistics Agency, February 2017) 1, 2.
[96] Ibid.
[97] Tasmania Office of the Director of Public Prosecution, *Prosecution Policy and Guidelines* (March 2017).
[98] *Criminal Code* (Tas) s 310(4).
[99] Tasmania Office of the Director of Public Prosecution, above n 97, 24.

evidence and in circumstances where it is one person's words against another.[100] According to Larcombe, in deciding whether or not to proceed the case to trial, prosecutors also take into consideration that some jurors will take into account rape myths and victim blaming attitudes.[101] To a degree, prosecutors may be accidentally endorsing rape myths by predominately proceeding to trial in cases where the traditional rape scenario requirements are present. However, interestingly enough, the cases discussed above involved factual scenarios that did not reflect rape myths.

A further potential explanation for high attrition rates can be explained by the differing thresholds required for charging a person compared to prosecuting a person. For example, Tasmania Police are permitted to charge a person provided they are satisfied that the required legal ingredients are present. By contrast, the standard required for the prosecution to proceed to trial is much higher, as it requires assessment of whether there is a reasonable prospect of conviction. This may therefore assist in explaining why a large number of cases do not proceed to trial.

g) Concluding Thoughts

The trends from analysing the comments suggest that Tasmania Supreme Court judges' comments are in line with the intention behind section 2A of the *Criminal Code*. For example, the complainant's intoxication, a lack of additional violence and a pre-existing relationship between the complainant and the defendant should not affect the assessment of whether there was 'free agreement' under section 2A. Such trends in the comments are important in showcasing what the law actually is and debunking myths on consent and rape.

Jury Analysis

The purpose of the jury analysis was to use jury studies as a mechanism to gauge public opinion towards consent and rape myths. The analysis focused on pre-existing mock jury studies, as it was not within the scope of this paper to conduct my own empirical mock jury study. Mock jury studies were chosen on the basis that it is not possible in Australia to survey

[100] Natalie Taylor and Jacqueline Joudo, 'The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: an experimental study' (Research and Public Policy Series No 68, Australian Institute of Criminology, 2005) 1, 2.
[101] Larcombe, above n 41, 148.

jurors directly, despite the fact that such a study would be highly beneficial and informative for ascertaining public understandings of consent and 'real' rape.

As noted by Dripps, 'although our laws now permit us to prosecute them, not until we are able to inform and educate the public – the men and women who serve on our juries – will we be able to convict more of the men who are guilty of acquaintance rape.'[102] While this quote is directed towards acquaintance rape, I believe that the quote can be applied more broadly to sexual offence trials in general. The quote suggests that jurors factor into their decision their own personal attitudes and beliefs in relation to consent and sexual offences. This quote still holds true in the 21st century and is of use in providing an explanation for why the conviction rate of sexual offences has not increased in line with increased reporting. This section will examine juror studies conducted by other academics to assess whether juries do in fact take into account personal attitudes and beliefs in assessing whether or not to find an accused guilty or not guilty in sexual offence trials.

In relation to consent, research undertaken by the AHRC suggests that consent remains a difficult concept for jurors to ascertain as 'jurors' pre-existing attitudes have been found to influence their judgments *more than* the facts of the case and the manner in which the evidence was given.'[103] This is confirmed by Taylor and Joudo who conducted a mock trial study of the effect of different forms of complainant testimony on jury outcomes. [104] Taylor and Joudo found that jurors encountered difficulty in understanding what 'consent' means, despite the fact that a definition of consent was explained to jurors by the judge.[105] Many questions which arose were: 'what is the point at which consent is given? What defines whether consent has not been given? At what point does "yes" become "no"?'[106] For example, in one jury group the debate centred on whether the complainant had implicitly

[102] Donald Dripps, 'After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault' (2008) 41 *Akron Law Review* 957, 972, citing Linda Fairstein, *Sexual Violence: Our War Against Rape* (Penguin Group, 1st ed, 1993) 136.
[103] Australian Human Rights Commission, *Family Violence – Improving Legal Frameworks* (June 2010) <https://www.alrc.gov.au/publications/16-sexual-offences/consent>.
[104] Taylor and Joudo, above n 100, iii.
[105] Ibid 61. The following definition of consent was provided to the jury: consent involves conscious and voluntary permission to engage in sexual intercourse. It can be given verbally, or expressed by actions. Similarly, absence of consent does not have to be in words; it also may be communicated in other ways. However, the law specifically provides that a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to sexual intercourse.
[106] Ibid.

consented to sexual intercourse by inviting the accused in the seminar room for sex and engaging in kissing and petting.

Some jurors argued that the complainant had consented to sex by inviting the accused in the seminar rooms, while others contended that regardless of this fact, if the complainant said no at the last moment that this was sufficient to establish that the complainant was not consenting.[107] The first interpretation is very concerning and aligns with 'rape myths' that are contrary to the statutory definition of consent, as such myths suggest that consent can be inferred from the complainant's conduct prior to the sexual intercourse. The latter interpretation, albeit more aligned with affirmative consent standards than the first, is still problematic as it implies that for the complainant to have demonstrated that she was not consenting that she must have said 'no.' This is contrary to affirmative consent standards, as explained to the mock jury as dissent to sexual intercourse can be communicated in alternative ways and verbal dissent is not a necessary requirement.[108]

A further key finding in Taylor and Joudo's study was the high number of jurors that believed rape myths.[109] This belief in rape myths resulted in jurors comparing the complainant to how a 'real' rape victim would behave before, during and after the event.[110] Jurors who held such beliefs therefore had an expectation on how the complainant should have behaved during the alleged incident, which influenced those jurors in how they interpreted the complainant's evidence and what probative weight they gave it.[111] Taylor and Joudo also observed that juror traits might be significant in jurors' assessment of whether or not an accused is guilty. For example, personal beliefs of the accused's guilt prior to jury deliberations were found to be 'significantly related to: higher levels of education; personal knowledge of sexual assault victims; more positive attitudes toward rape victims in general; higher perceptions of victim credibility; and low empathy with the accused.'[112]

Contrastingly, jurors who had positive attitudes towards the accused were 'correlated with a higher belief in his innocence, less favourable attitudes towards rape victims in general and a

[107] Ibid.
[108] Ibid.
[109] Ibid 59.
[110] Ibid.
[111] Ibid.
[112] Ibid 56.

stronger belief that the complainant had contributed to the incident through providing encouragement.'[113] This study highlights that rape myths do operate in practice, such as complainants contributing to the sexual assault by 'providing encouragement' to the accused and failing to resist him. What appears to be a positive factor in influencing jurors' view of potential guilt of the accused is personal knowledge of rape victims.

Ellison and Munro also conducted an important study whereby mock jurors were required to complete three questionnaires, as well as participating in a mock rape trial, which required participations to engage in deliberations to decide a verdict for the accused.[114] The results from the questionnaires and deliberations produced contrasting results. For example, 60-85% of jurors in the questionnaires strongly disagreed with statements endorsing rape myths that 'verbal and physical resistance, socio-sexual communication and a complainant's prior behaviour could explain or excuse rape.'[115] However, during jury deliberations in assessing the accused's guilt, discussions were centred around topics that the majority of jurors had in fact disagreed with. For example, a lot of juror discussions centred on whether the complainant had done enough to manifest her dissent to sexual intercourse.[116] While some jurors stayed true to the questionnaire findings that a lack verbal and physical resistance could not explain or excuse rape, many jurors expected the complainant to be more assertive in her dissent to sexual intercourse and questioned why the complainant failed to shout or tell the accused to stop.[117] Additionally, many jurors sought to exculpate the accused by arguing that the complainant's prior behaviour indicated her consent or willingness to engage in sexual intercourse, for example: accepting a lift home, inviting the accused's into her home, consuming alcohol and engaging in kissing and tentative body contact.[118]

These findings ultimately suggest that jurors' personal attitudes and beliefs may not necessarily endorse rape myths or victim blaming attitudes, but that it is 'other forces in trial proceedings'[119] that may influence jurors to consider rape myths in assessing the defendant's guilt. Henderson and Duncanson argue that 'other forces in trial proceedings' refers to the defence's case theory, which may influence jurors to consider rape myths in their

[113] Ibid x.
[114] Ellison and Munro, above n 23, 786.
[115] Duncanson and Henderson, above n 24, 160.
[116] Ellison and Munro, above n 23, 791.
[117] Ibid.
[118] Ibid.
[119] Duncanson and Henderson, above n 24, 160.

deliberations. In one of the cases assessed by Henderson and Duncanson, the defence's case theory heavily relied on a number of rape myths, including: the complainant's intoxication; that she would be more likely to consent to sexual activity because her career was as a model and actress and that she brought a false allegation of rape against the accused in order to seek attention from her former boyfriend.[120] The negative effect of defence counsel's case on influencing the jury is also supported by Fileborn, who argues that the defence in leading the case leads information that is 'appealing to a jury's belief in rape myths.'[121] It is therefore unsurprising that the jury is described as 'the weakest link in the criminal prosecution of sexual offences.'[122] This is premised on the above discussion which has demonstrated that some of the attrition in sexual offence cases can be attributed to jurors endorsing rape myths and victim blaming attitudes in their determination of a defendant's guilt.

Twitter Analysis

The method adopted to conduct the empirical Twitter analysis was to search the terms 'rape' and 'consent', through the advanced search tool in Twitter from a period ranging 06/04/2018-13/04/2018. The tweets were selectively chosen on the basis of their relevance and whether they supported the argument that public understandings of consent do not always align with the legal notion of consent. This methodology was chosen due to difficulties in obtaining a random collection of samples from one in ten Tweets as originally intended, as the results produced were not necessarily relevant, such as a discussion on a rape case in Nigeria and comments on 'stealthing.' It was therefore not the intention of this paper to employ a vigorous empirical Twitter analysis. It is acknowledged that the findings are limited in this respect, as the tweets are merely a snapshot of the available data on Twitter and were chosen subjectively.

From the tweets analysed, it was clear that some public understandings of consent were at odds with legal notions of consent. This was particularly the case with respect to intoxication, with one person tweeting 'if two really really [sic] drunk people have sex and the girl later on says it's rape because she couldn't consent, is it really rape?' Another tweet referenced the gender-biased view that a 'woman cannot consent to sex while drunk while a man can.' Another person also tweeted that they were shocked by the number of people 'who think that

[120] Henderson and Duncanson, above n 50, 753.
[121] Fileborn, above n 9, 8-9.
[122] Larcombe, above n 41, 148.

drunk sex without clear consent prior to being drunk isn't rape.' It is apparent that a number of people find it difficult to assess whether someone is consenting to sexual intercourse when either one, or both of the parties are intoxicated. This is problematic, particularly with respect to university students, as the AHRC received a number of submissions that highlighted the normality of having sexual intercourse while intoxicated, as well as men having sexual intercourse with women who were very intoxicated.[123] In relation to intoxication, the *Criminal Code* stipulates that a person does not freely agree to an act if the person is 'so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required.'[124] It may therefore be argued that perhaps this provision is not as well understood as it should be and training on consent would improve understandings surrounding intoxication and consent to sexual intercourse.

A further misunderstanding was whether verbal consent is required to give consent. For example, one person indicated that 'verbal consent is essential for it not to be rape.' This is a misinterpretation of section 2A, as consent means 'free agreement' and a person does not freely agree to an act if they do not 'say or do anything to communicate consent.'[125] Section 2A(2)(a) therefore suggests that a person could communicate their consent through positive evidence of conduct, for example, if the person kissed or touched the other person. Verbal consent, while desirable, is not necessarily required to satisfy the definition of consent in section 2A.

It was also clear that a number of people endorsed stereotypical 'rape myth' attitudes. One person had trouble in understanding rape in the context where the complainant and the accused were married, as they tweeted 'I wouldn't call it rape because consent isn't and can't be black and white in [the] relationship of marriage.' This highlights that some people in society find it difficult to make a finding of guilt for rape where the complainant and the accused are in a relationship, as some people believe other factors should be taken into account when assessing whether the complainant was consenting. In the same tweet, the person queried 'where are the safeguards for false prosecution?' Other tweeters also showed support for the myth that rape is a falsely reported crime with one person tweeting 'some victims give consent before the sexual activity and then later on change their mind and say it

[123] Australian Human Rights Commission, above n 2, 161.
[124] *Criminal Code* (Tas) s 2A(2)(h).
[125] *Criminal Code* (Tas) s 2A(2)(a).

was rape. That is a big problem.' Another person also tweeted 'most of the girls give consent, are specifically clear and then bam, after a while they accuse someone for a rape or something and deny that they ever gave consent.' As discussed earlier in the paper, such attitudes are damaging as they perpetuate the myth that rape is a falsely reported crime.

Unsurprisingly, in light of tweets of the above nature, some people commented on the need for reform and education on the subject of consent. One person re-tweeted 'people educated in the dynamics of consent are better equipped to recognise if consent is coerced or violated, in their own lives and those of others' and stated that consent 'is a conversation we need to learn to have as a society.' The need for education was clear through another tweet where a person tweeted 'I didn't even realize until weeks afterwards, in a mandatory workshop about consent and sexual assault with my sorority, that what had happened to me was rape, and there was a reason that I felt so gross and awful about the experience.' This therefore supports the proposition that education on consent is warranted, to ensure that it is widely understood in society.

V. Changing the Culture of Consent; Suggestions on Reform

The above discussion in this paper has highlighted two things. Firstly, that affirmative consent reforms in Australia, including Tasmania, have proved to be relatively ineffective as a catalyst for changing attitudes and beliefs in society. Secondly, that there is a need for further empirical research on understandings of statutory consent with respect to juries and public attitudes generally. The bulk of this paper has argued on the basis of current research, that it is attitudes and beliefs that shape understanding in society on what constitutes legally effective consent, as opposed to the statutory definition. This, in turn, means that understandings of consent and convictions of sexual offences will not increase until the population is sufficiently educated on what 'consent' actually means.[126] Unfortunately, the issue of understandings of consent is not a new area of discussion, as academics such as McSherry have written about this issue since the early 1990s. For example, McSherry queried in 1993 whether rape law reform in Victoria would be effective in changing social

[126] Reece, above n 19, 446.

attitudes.[127] This suggests that something else, in addition to the law, needs to be done to ensure that affirmative consent standards are thoroughly understood in society.

As put bluntly by Quilter, changing the law on consent and sexual offences 'while an important and tangible goal – does not fix the problem.'[128] The current social environment around sexual offences and consent may warrant more support for cultural change, particularly in light of the AHRC report and the #MeToo hashtag that has brought the issues of sexual violence and consent to the forefront. The global proliferation of the #MeToo hashtag recognises that the problem of sexual violence is 'broader than any one man'[129] and is not limited to any one country. The hashtag went viral in response to wide-spread allegations of sexual abuse in Hollywood by people in power, such as film producer Harvey Weinstein and has since been shared by millions of people, reflecting the alarming number of people who have been a victim to sexual violence.[130] The widespread proliferation of the hashtag demonstrates the desperate need for culture change. The next section of the paper will provide a number of suggestions on how changes in attitudes, beliefs and culture around consent and sexual offences could be achieved.

There is clearly ground to suggest that education on consent is warranted and that such education would be a beneficial tool in changing attitudes and beliefs. Both EROC and the AHRC have emphasised the role of universities in providing education on the statutory definition of consent as well as sexual violence to students and staff.[131] The AHRC found that education and campaigns, also known as 'primary prevention' are important tools in preventing sexual assault and sexual harassment and have been shown to successfully change behaviours.[132] It was stressed, however, that such education should be evidence-based and delivered by individuals and organisations with the appropriate expertise. Additionally, education should be ongoing, as one-off education campaigns are not as effective as ones that

[127] Bernadette McSherry, 'No! (means no?)' (1993) 18(1) *Alternative Law Journal* 27, 27.
[128] Julia Quilter, 'Re-Framing the Rape Trial: Insights from Critical Theory About the Limitations of Legislative Reform' (2011) 35 *The Australian Feminist Law Journal* 1, 5.
[129] Mia Sanders, 'Of course, #MeToo' *Green Left Organisation* (October 24 2017).
[130] Leigh Gilmore, 'He Said/She Said: Truth-Telling and #MeToo' (2017) 25 *University of Edinburg Postgraduate Journal of Culture and the Arts* 1, 1.
[131] See End Rape on Campus Australia, above n 21, 46 and Australian Human Rights Commission, above n 2, 174.
[132] Australian Human Rights Commission, above n 2, 174.

are continuously reinforced.[133] EROC, similarly to the AHRC recommended that Australian universities should implement evidence-based education about sexual assault and consent and suggested *The Full Stop Foundation's* 'Sex, Safety & Respect' program which is specifically designed for both university staff and students.[134] This program is evidence-based with a focus on areas that are predominantly misunderstood, such as: consent, verbal and non-verbal behaviour, alcohol and peer pressure and skills in disclosing sexual assault.[135]

A suggestion on how *The Full Stop Foundation* program could operate in practice would be to follow Cambridge and Oxford universities' lead by introducing the program as a compulsory workshop for all first-year students at university. These compulsory workshops were introduced following a similar finding to the AHRC of sexual violence within university settings in the UK.[136] *The Full Stop Foundation* program should also be continuously reinforced to students, which could be achieved by requiring students to attend follow up workshops each year after the initial workshop to maintain currency of their understanding on consent. Specifically, I think the use of vignettes, designed to test 'consent literacy' and challenge participant's understanding of consent have potential. This could be achieved in workshops which educate participants on consent and then provide a number of differing scenarios to participants which require them to identify whether or not consent, per section 2A exists. Understanding would be reinforced by requiring students to complete follow up exercises at six month intervals.

Such education would clearly be beneficial from a number of perspectives, one of which is that the workshops will be educating a number of students and staff who will, in the future, be called to sit on juries. As argued by Taylor and Juodo, educating potential jurors 'about the types of situations in which sexual assault commonly occurs, how victims commonly behave and react and why they behave and react the way they do would help to dispel some of the myths which exist in the public domain and which are brought into the courtroom by jurors.'[137] It would even be beneficial to introduce education on consent earlier than university, during high school when students are educated on sex. The use of videos such as

[133] Ibid.
[134] End Rape on Campus Australia, above n 21, 46.
[135] Australian Human Rights Commission, above n 2, 175.
[136] Tanya Serisier, *Lad culture of conquest targeted by new Oxbridge sexual consent workshops* (8 October 2014) The Conversation <https://theconversation.com/lad-culture-of-conquest-targeted-by-new-oxbridge-sexual-consent-workshops-32523>.
[137] Taylor and Joudo, above n 100, 60.

'tea consent'[138] offers an engaging way to convey the affirmative consent message in a straightforward and non-judgmental way. This particular video has been praised for its reach to a wider audience, as well as for its simplicity[139] although some have cautioned that consent is a lot more complicated than portrayed in the video.[140]

In light of these concerns, perhaps the video could be supplemented with a detailed explanation of section 2A of the *Criminal Code,* with a focus on particular sections that might confuse people. For example, an explanation of section 2A(2)(a) that passivity is insufficient to establish consent. Targeting people in society while they are young is undoubtedly a good idea, as they may have not yet been influenced by certain attitudes and beliefs on consent and sexual violence. Additionally, if the majority of a particular generation's opinion can be changed, then hopefully going forward they will teach their children to follow the same beliefs.

Education on consent and sexual violence could also be targeted to the wider society through an education campaign in the media. Such a campaign would be beneficial with respect to the public reach the media has, as well as the influence the media has in shaping public opinion. This is important considering that the Victorian Police argue that much of what the public knows about sexual crimes is gained through mainstream media.[141] Unfortunately, the media often endorses misconceptions about sexual violence, which promotes rape myths and victim blaming attitudes in society.[142] For example, a study was done where participants were exposed to newspaper articles that either endorsed or challenged rape myths.[143] The study found that participants who were exposed to articles endorsing rape myths were more likely to side with the defendant in a sexual assault case, than prior to their exposure of myth-endorsing articles.[144]

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[138] Blue Seat Studios, *Tea Consent* (12 May 2015) <https://www.youtube.com/watch?v=oQbei5JGiT8>.
[139] Samantha Pegg, *Sexual consent really isn't like a cup of tea – but at least we're talking about it* (20 November 2015) The Conversation <https://theconversation.com/sexual-consent-really-isnt-like-a-cup-of-tea-but-at-least-were-talking-about-it-50638>.
[140] Ibid.
[141] Australian Institute of Family Studies and Victoria Police, above n 17, 2.
[142] Ibid 5.
[143] Shannon O'Hara, 'Monsters, playboys, virgins and whores: Rape myths in the news media's coverage of sexual violence' (2012) 21(3) *Language and Literature* 247, 248.
[144] Ibid.

A recent example to demonstrate the media endorsing victim-blaming attitudes is the case of Tessa Sullivan who came forward to allege that her former boss, the Lord Mayor of Melbourne, Robert Doyle had sexually harassed her. *The Herald Sun* published an article on this which included texts from Sullivan to Doyle where Sullivan referred to Doyle as 'darl' and also sent him a photo of her at the beach in a bikini with her son, asking how the weather was in Melbourne.[145] Arguably the paper was insinuating that any relations between Sullivan and Doyle were consensual, as Sullivan manifested her interest by calling Doyle 'darl' and sending him a photo of her in a bikini. Sullivan alleged that the paper was trying to make it look as though 'she asked for it' and Sullivan is now considering commencing a defamation action against *The Herald Sun.*[146]

A number of people have complained about the paper's coverage of this case, predominantly as it discourages other victims from coming forward as the victim 'risks being personally discredited and publicly vilified in a widely read newspaper.'[147] What is even more concerning about this example is the fact that it occurred after the spread of the #MeToo hashtag and ultimately demonstrates the obstacles victims face in coming forward, particularly where the perpetrator is a senior and well-respected figure in society. The media could, therefore, play a positive role in shaping attitudes on consent and sexual violence, by writing articles on what statutory consent is and not endorsing rape myths or victim blaming attitudes.

Both EROC and the AHRC have made clear however, that any form of education on consent and sexual violence needs to avoid endorsing 'victim blaming attitudes.' EROC found that the standard approach at universities for sexual assault prevention campaigns is to target women and focus on ways women can safeguard or protect themselves.[148] For example, Governor Kate Warner noted that some university campaigns are centred on teaching students to 'not get raped' rather than 'not to rape.'[149] For example, the University of

[145] Gay Alcorn, *Robert Doyle's sexual harassment accuser attacks Herald Sun for 'victim blaming'* (5 March 2018) The Guardian <https://www.theguardian.com/australia-news/2018/mar/05/robert-doyles-sexual-harassment-accuser-attacks-herald-sun-for-victim-blaming>.
[146] Ibid.
[147] Ibid.
[148] End Rape on Campus Australia, above n 21, 23.
[149] Kate Warner, 'Official Opening of the Australasian Association of College and University Housing Officers' (Speech delivered at the Official Opening of the Australasian Association of College and University Housing Officers, Hotel Grand Chancellor, 9 May 2017) 5.

Canberra website warned students that 'being drunk or out of it on drugs … is the most common reason why young people end up having unwanted sex' while Wollongong University advised students 'to walk in groups of two or more after dark: stay in well lit areas and keep to well constructed paths; carry a personal alarm and be prepared to scream and shout if attacked.'[150] While there is a fine line between advising people to be cautious and blaming victims for becoming a victim of a crime, suggestions such as these effectively tell women to avoid certain behaviours, and if they fail to do so they become 'rapeable.'[151] It is therefore important that any form of education does not inadvertently endorse myths and victim-blaming, as it may discourage victims from coming forward if they did act contrary to the advice given and fundamentally places blame on the victim, where it should not lie.

The above suggestions are arguably easy to implement and are uncontroversial, particularly in light of other suggestions by academics such as Larcombe, who is an advocate for sexual offence trials to be heard by judge alone.[152] Larcombe suggests this on the basis that she perceives the jury to be the 'weakest link' in the prosecution of sexual offences and attributes much of the attrition in sexual offence cases to juries.[153] She argues that juries are made up of average people in society who, generally speaking, do not have a sound understanding of sexual offending or consent. This makes 'sexual offending ill-suited to jury determination.'[154] Larcombe's approach would appear to receive support from Henning, who referred to comments made by Justice Wright, a former judge of the Tasmanian Supreme Court. His Honour retired in 2000 and stated in his farewell address 'that he was fully convinced that juries return what he considered to be wrong verdicts in about twenty five per cent of all cases tried.'[155]

While His Honour was not specifically referring to sexual offences trials, Henning contends that 'there is empirical evidence in support of His Honour's conclusion that juries return wrong or questionable verdicts in a sizeable proportion of sexual offences trials.'[156] It should be noted that Henning and His Honour's comments were before the amendment to the

[150] Ibid.
[151] Ibid 6.
[152] Larcombe, above n 41, 148.
[153] Ibid.
[154] Ibid.
[155] Terese Henning, 'Beyond "Beyond Reasonable Doubt": Wrong Decisions in Sexual Offences Trials' (2000-2001) 15 *Australian Journal of Law and Society* 1, 1.
[156] Ibid 2.

consent provision in the *Criminal Code*, however data indicates that legislation introducing affirmative consent standards has not increased the conviction rate for sexual offences, thus making their comments still relevant and applicable today.[157] Additional advantages of introducing judge alone trials for sexual offences would be that judges are required to publish reasons for their decision which would explain why an accused was found guilty or not guilty and also having a judge alone may shorten the length of the trial, given that the parties could focus more directly on the evidence in dispute.[158]

VI. Conclusion

Since 2004, the Tasmanian *Criminal Code* has provided a clear definition of consent. The present issue is the disconnect between the text of the law and the operation of the law in practice. This paper has indicated that comments on passing sentence of Supreme Court judges in Tasmania are in line with the statutory definition of consent. However, empirical evidence indicates that the same cannot be said for the understanding of jurors and the public at large. While the non-legal notion of consent is broadly understood within society, the legal notion of consent to sexual intercourse appears to be misunderstood by some. As the AHRC report into university settings found, misunderstandings of consent, combined with the prevalence of rape myths and victim blaming attitudes is a problematic cultural issue in desperate need of change.

As stated by Sally Brown, a judge of the Family Court of Australia: 'legislation alone doesn't change culture, but it can be a powerful tool.'[159] This quote certainly holds true in relation to understandings of consent. It endorses the importance of the legislative statement but acknowledges that something in addition to the law is required to change attitudes towards consent to sexual intercourse in society. Education on the specifics of consent as defined in section 2A is therefore warranted and this paper has provided a number of suggestions on how the culture around consent can be changed, predominantly through educating university and school students on statutory 'affirmative consent.' Such education would also be beneficial in debunking problematic rape myths and victim blaming attitudes. Education

[157] Refer to footnote 17.
[158] Larcombe, above n 41, 149.
[159] McSherry, above n 127, 30 citing Victorian Law Reform Commission, *Rape: reform of law and procedure* (Appendixes to Interim Report), Report No 42 (1991) 170.

therefore has the potential to change the ‘negative cycle’ on misinformation about sexual offences, which may encourage more victims of sexual offences to come forward and report the matter and may also secure more deserved convictions.

There is no time better than the present to implement such education programs, particularly with the proliferation of the #MeToo hashtag which demonstrates the global problem of sexual assault and harassment. The #MeToo hashtag has empowered women to come forward, even when the perpetrator holds a senior position in society. This has created a more conducive environment and I am hopeful that if upcoming generations are educated on consent to sexual intercourse, they may live in an era where consent is a concept that is better understood. Perhaps later generations will reflect on this #MeToo era with astonishment because of the persistence of myths, attitudes and misunderstandings of consent that have prevailed for so long.