INTOXICATION EVIDENCE IN RAPE TRIALS IN THE COUNTY COURT OF VICTORIA: A QUALITATIVE STUDY

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Although long associated with incidents of sexual violence, evidence of alcohol and/or other drug ('AOD') consumption and intoxication continues to present challenges for the enforcement of rape laws and justice for victim-survivors. This article reports on the findings of a transcript analysis of 33 Victorian rape trials involving evidence of complainant and/or defendant intoxication. Statutory provisions designed to break the culturally-assumed nexus between intoxication and consent were rarely relied upon by the prosecution. Complainant intoxication evidence was more likely to be engaged by the defence to challenge the Crown's ability to prove the elements of rape, sometimes by invoking the intoxication/consent nexus, but more commonly by suggesting that the complainant's account lacked veracity because their recall was tainted by intoxication. Trials could have benefited from expert evidence on AOD effects, including with respect to cognitive functions like consent formation and memory.

I INTRODUCTION AND BACKGROUND

It is more than 40 years since the enactment of the *Crimes (Sexual Offences) Act 1980* (Vic), which marked the beginning of a sustained period of progressive legislative reforms – to varying degrees, in all Australian states and territories – to improve the quality of justice delivered to victims of sexual assault. After four decades of reforms, it is sobering to observe how low reporting and conviction rates remain; just 1 in every 10 sexual assaults in Australia is reported to police and,[1] of those rapes against adults reported to Victorian police, just 8% lead to a

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1 Australian Institute of Health and Welfare, *Sexual Assault in Australia* (Infocus Report No FDV 5, 28 August 2020) 5.

conviction.[2] Similar statistics have been noted internationally, giving rise to a large body of literature on the continued barriers to prosecutions resulting in convictions.[3] In Australia, one barrier that has received little attention is the nature and impact of intoxication evidence in rape trials, including the operation of provisions which purport to shape complainant and/or accused intoxication evidence.[4]

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2 Sarah Bright et al, 'Attrition of Sexual Offence Incidents through the Victorian Criminal Justice System: 2021 Update' (Research Paper, Crime Statistics Agency, September 2021) 2. See also David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 7th ed, 2020) 707.

3 See, eg, Denise Lievore, 'Prosecutorial Decisions in Adult Sexual Assault Cases' (Research Paper No 291, Trends & Issues in Crime and Criminal Justice, Australian Institute of Criminology, 2 January 2005); Wendy Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19(1) *Feminist Legal Studies* 27 <https://doi.org/10.1007/s10691-011-9169-2>; Liz Kelly, Jo Lovett and Linda Regan, 'A Gap or a Chasm? Attrition in Reported Rape Cases' (Research Study No 293, Home Office Research, Development and Statistics Directorate (UK), February 2005) <https://doi.org/10.1037/e669452007-001>; Jo Lovett and Liz Kelly, 'Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases in Eleven Countries' (Research Paper, Child & Woman Abuse Studies Unit, London Metropolitan University, May 2009); Cristine Rotenberg, 'From Arrest to Conviction: Court Outcomes of Police-Reported Sexual Assaults in Canada, 2009 to 2014' (Juristat No 85-002-X, Statistics Canada, 26 October 2017); Baroness Stern, *Report by Baroness Vivien Stern CBE of an Independent Review into How Rape Complaints Are Handled by Public Authorities in England and Wales* (Report, Government Equalities Office (UK) and Home Office (UK), 2010); Sue Triggs et al, 'Responding to Sexual Violence: Attrition in the New Zealand Criminal Justice System' (Research Report, Ministry of Women's Affairs (NZ), September 2009); Dame Elish Angiolini, *Report of the Independent Review into the Investigation and Prosecution of Rape in London* (Report, 30 April 2015); Lord Justice Clerk's Review Group, *Improving the Management of Sexual Offence Cases* (Final Report, Scottish Courts and Tribunals Service, March 2021); Lori Haskell and Melanie Randall, 'The Impact of Trauma on Adult Sexual Assault Victims' (Research Report Cat No J4-92/2019E-PDF, Department of Justice (Canada), 2019); Kathleen Daly and Brigitte Bouhours, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' (2010) 39(1) *Crime and Justice* 565 <https://doi.org/10.1086/657561>; Kimberly A Lonsway and Joanne Archambault, 'The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform' (2012) 18(2) *Violence against Women* 145 <https://doi.org/10.1177/1077801212440017>; Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008). The continued impact of rape myths has been the focus of a number of studies: see, eg, Jennifer Temkin, Jacqueline M Gray and Jastine Barrett, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) *Feminist Criminology* 205 <https://doi.org/10.1177/1557085116661627>; Olivia Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Palgrave Macmillan, 2018) <https://doi.org/10.1007/978-3-319-75674-5>; Elisabeth McDonald et al, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with Those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020); Fiona Leverick, 'What Do We Know about Rape Myths and Juror Decision Making?' (2020) 24(3) *International Journal of Evidence and Proof* 255 <https://doi.org/10.1177/1365712720923157>; Louise Ellison and Vanessa E Munro, 'Of "Normal Sex" and "Real Rape": Exploring the Use of Socio-sexual Scripts in (Mock) Jury Deliberation' (2009) 18(3) *Social and Legal Studies* 291 <https://doi.org/10.1177/0964663909339083>; Louise Ellison and Vanessa E Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) *British Journal of Criminology* 202 <https://doi.org/10.1093/bjc/azn077>; Rachael Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform' (2019) 59(2) *British Journal of Criminology* 296 <https://doi.org/10.1093/bjc/azy043>. See also Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen's University Press, 2018); Anne Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial* (Palgrave Macmillan, 2020) <https://doi.org/10.1057/978-1-137-32051-3>.

4 In New South Wales, the landmark *Heroines of Fortitude* report was the first study to identify questioning about alcohol and/or other drug ('AOD') use as a problematic feature of rape trials: Department for Women (NSW), *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault*

Alcohol and/or other drugs ('AOD') are involved in approximately 50% of sexual assaults in Australia.[5] There is evidence that sexual aggressors are more likely to target intoxicated victims.[6] Evidence that the complainant had been drinking or using drugs around the time of the offence is a powerful predictor of whether a matter proceeds through the criminal justice system.[7]

Within the courtroom, complainant intoxication can prompt numerous problematic responses: rape myths may be invoked that attribute blame to a person

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(Report, November 1996) ('*Heroines of Fortitude*'). It found 60% of complainants were cross-examined about drinking on the day of the offence and 44% about drinking/drug use habits: at 151. This was the third most common theme of questions after lying (84%) and lack of resistance (70%): at 151. However, this aspect of victims' experiences in criminal trials was not analysed in detail in *Heroines of Fortitude* and no specific recommendations were made. The Victorian Law Reform Commission's ('VLRC') *Sexual Offences* report briefly discussed selected instances in which a trial judge's directions appeared not to follow the approach to complainant intoxication evidence expected by section 36(d) of the *Crimes Act 1958* (Vic) ('*Crimes Act* (Vic)'), as at 1 January 2004, but no detailed or systematic analysis was undertaken, and the Commission's recommendations did not touch on this issue: Victorian Law Reform Commission, *Sexual Offences* (Final Report, July 2004) 353–4 [7.44]–[7.45]. A 2016 study by Henderson and Duncanson included examination of two cases in which there was evidence of complainant intoxication, and found that rape myths continue to exert influence despite Victoria's statutory provisions on consent and jury directions: Emma Henderson and Kirsty Duncanson, 'A Little Judicial Direction: Can Jury Directions Challenge Traditional Consent Narratives in Rape Trials?' (2016) 39(2) *University of New South Wales Law Journal* 750. See also Rachael Burgin, 'Communicating Consent: Narratives of Sexual Consent in Victorian Rape Trials' (PhD Thesis, Monash University, 2019) ('Communicating Consent'); 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 <https://doi.org/10.1080/10383441.2013.10854783> . In New Zealand, see Sarah Croskery-Hewitt, 'Rethinking Sexual Consent: Voluntary Intoxication and Affirmative Consent to Sex' (2015) 26(3) *New Zealand Universities Law Review* 614; McDonald et al (n 3) 257 ff. For studies from other overseas jurisdictions, see below nn 12–13.

5 Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia: Continuing the National Story 2019* (Report No FDV 3, 5 June 2019) 17 <https://doi.org/10.25816/5ebcc837fa7ea>. See also Statewide Steering Committee to Reduce Sexual Assault, 'Study of Reported Rapes in Victoria 2000–2003: Summary Research Report' (Research Report, Office of Women's Policy, Department for Victorian Communities, July 2006) 19 [78]–[79]. International studies have similarly estimated intoxication to be a factor in 40% to 75% of sexual assaults: Antonia Abbey et al, 'Review of Survey and Experimental Research That Examines the Relationship between Alcohol Consumption and Men's Sexual Aggression Perpetration' (2014) 15(4) *Trauma, Violence and Abuse* 265 <https://doi.org/10.1177/1524838014521031>; Kelly, Lovett and Regan (n 3) 80–1. See also Heather D Flowe and Anna Carline, 'Alcohol and Remembering Rape: Setting the Scene' in Heather D Flowe and Anna Carline (eds), *Alcohol and Remembering Rape: New Evidence for Practice* (Palgrave Pivot, 2021) 2 <https://doi.org/10.1007/978-3-030-67867-8>, which cites a figure of 75%.

6 Kathryn Graham et al, '"Blurred Lines?" Sexual Aggression and Barroom Culture' (2014) 38(5) *Alcoholism* 1416 <https://doi.org/10.1111/acer.12356>; Haley Clark and Antonia Quadara, 'Insights into Sexual Assault Perpetration: Giving Voice to Victim/Survivors' Knowledge' (Research Report No 18, Australian Institute of Family Studies, 2010) <https://doi.org/10.1037/e567102013-001>; Liz Wall and Antonia Quadara, 'Under the Influence? Considering the Role of Alcohol and Sexual Assault in Social Contexts' (ACSSA Issues No 18, Australian Centre for the Study of Sexual Assault, 2014).

7 Statewide Steering Committee to Reduce Sexual Assault (n 5); Kelly, Lovett and Regan (n 3); Denise Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (Report, Australian Institute of Criminology, June 2005); Denise Lievore, 'Victim Credibility in Adult Sexual Assault Cases' (Trends & Issues in Crime and Criminal Justice No 288, Australian Institute of Criminology, November 2004); Natalie Taylor, 'Juror Attitudes and Biases in Sexual Assault Cases' (Trends & Issues in Crime and Criminal Justice No 344, Australian Institute of Criminology, August 2007).

for having been intoxicated,[8] their intoxication may be used to infer that they consented to sexual acts,[9] and the reliability and credibility of their evidence may be doubted.[10] The common misconception that the greatest risk of intoxication-involved sexual assault comes from perpetrators who covertly 'spike' drinks works to the detriment of voluntarily intoxicated complainants.[11] International research, including mock jury and focus group studies,[12] have found that perpetrators are perceived as less responsible where their victim is intoxicated, and a double standard has been observed whereby a perpetrator's own intoxication tends to reduce the blame attributed to them.[13] These attitudes create something of a double bind for intoxicated persons – they are more likely to be victimised and less likely to be believed.

Legislative reforms in Victoria and other Australian jurisdictions have sought to overcome the tendency for complainant intoxication to operate as a barrier to rape prosecutions, and for an accused's self-induced intoxication to be used to avoid criminal responsibility.[14] In fact, a complainant's intoxication should assist in proving the elements of rape, as intoxication will vitiate consent where a person is 'so affected as to be incapable of consenting'.[15] Heavy complainant intoxication may also reduce the likelihood of a purported belief in their consent being deemed reasonable. However, there has been very limited Australian research into whether intoxication evidence is operating in a manner consistent with this legislative

8 Elena V Stepanova and Amy L Brown, 'Alcohol Priming and Attribution of Blame in an Acquaintance Rape Vignette' (2021) 36(3–4) *Journal of Interpersonal Violence* NP1537 <https://doi.org/10.1177/0886260517744762>; Yvette Tinsley, Claire Baylis and Warren Young, '"I Think She's Learnt Her Lesson": Juror Use of Cultural Misconceptions in Sexual Violence Trials' (2021) 52(2) *Victoria University of Wellington Law Review* 463 <https://doi.org/10.26686/vuwlr.v52i2.7128>.

9 See, eg, Antonia Abbey, 'Alcohol's Role in Sexual Violence Perpetration: Theoretical Explanations, Existing Evidence and Future Directions' (2011) 30(5) *Drug and Alcohol Review* 481, 484 <https://doi.org/10.1111/j.1465-3362.2011.00296.x>; Heather D Flowe and John Maltby, 'An Experimental Examination of Alcohol Consumption, Alcohol Expectancy, and Self-blame on Willingness to Report a Hypothetical Rape' (2018) 44(3) *Aggressive Behavior* 225, 226 <https://doi.org/10.1002/ab.21745>.

10 Anna Carline et al, 'A Review of Existing Interview Guidance' in Heather D Flowe and Anna Carline (eds), *Alcohol and Remembering Rape: New Evidence for Practice* (Palgrave Pivot, 2021) 71, 74; Burgin, 'Communicating Consent' (n 4) 188–206.

11 Laura Jane Anderson, Asher Flynn and Jennifer Lucinda Pilgrim, 'A Global Epidemiological Perspective on the Toxicology of Drug-Facilitated Sexual Assault: A Systematic Review' (2017) 47 *Journal of Forensic and Legal Medicine* 46, 46–7, 53–4 <http://dx.doi.org/10.1016/j.jflm.2017.02.005>.

12 Emily Finch and Vanessa E Munro, 'Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study' (2005) 45(1) *British Journal of Criminology* 25 <https://doi.org/10.1093/bjc/azh055>; Emily Finch and Vanessa E Munro, 'The Demon Drink and the Demonized Woman: Socio-sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants' (2007) 16(4) *Social and Legal Studies* 591 <https://doi.org/10.1177/0964663907082737>; Kirsty Osborn et al, 'Juror Decision Making in Acquaintance and Marital Rape: The Influence of Clothing, Alcohol, and Preexisting Stereotypical Attitudes' (2021) 36(5–6) *Journal of Interpersonal Violence* NP2675 <https://doi.org/10.1177/0886260518768566>; Clare Gunby, Anna Carline and Caryl Beynon, 'Regretting It After? Focus Group Perspectives on Alcohol Consumption, Nonconsensual Sex and False Allegations of Rape' (2012) 22(1) *Social and Legal Studies* 87, 95 <https://doi.org/10.1177/0964663912459293>; Flowe and Maltby (n 9).

13 Stepanova and Brown (n 8) NP1538.

14 *Crimes Act* (Vic) (n 4) s 36B.

15 Ibid s 36(2)(e).

intent.[16] Nor do we know how matters that are not prescribed by legislation are being addressed, such as how to assess 'intoxication' and 'capacity', and how intoxication evidence is engaged in assessments of witness credibility and reliability.

Research suggests that the relationship between intoxication and memory reliability is not straightforward. Intoxication due to AOD use can have widely varying effects on the encoding and recall of memory, depending heavily on the type or combination of drugs involved and the degree of intoxication. Alcohol is the drug that has been most widely researched in relation to its effects upon memory, and the available scientific literature broadly indicates that intoxication can impact upon the *completeness* of an individual's memory but does not appear to decrease the *correctness* (accuracy and reliability) of the information that is reported.[17] A recent study by Flowe et al specifically involved participants encoding a hypothetical rape scenario while they were either sober or alcohol-intoxicated. The authors reported that, while intoxication decreased the completeness of participants' recall, there were no alcohol-related effects on recall errors and no evidence that intoxicated women were more prone to incorporating misleading information into their statements.[18]

The primary aim of the study on which this article reports was to qualitatively analyse transcripts from a sample of Victorian rape trials to determine whether and how legislative reform has shifted the way that intoxication evidence is operative in rape trials. It explores three research questions:

1. What sorts of evidence of AOD effects have featured in trials?
2. What were the purposes for which intoxication evidence was engaged in trials?
3. Did the operation of intoxication evidence in trials align with the objectives of statutory reform?

Our larger ambition is to make a contribution to the important body of literature on whether rape law reform has been effective, and on identifying the limitations of statutory reform as a mechanism for producing change.[19] We aim to do so by

16 See above n 4. Research from overseas jurisdictions has tended to take the form of mock jury or focus group studies (see above n 12), but some transcript analysis or 'real' juror interview studies have been undertaken: see McDonald et al (n 3); Tinsley, Baylis and Young (n 8).

17 See Heather D Flowe et al, 'Impact of Alcohol on Memory: A Systematic Review' in Heather D Flowe and Anna Carline (eds) *Alcohol and Remembering Rape: New Evidence for Practice* (Palgrave Pivot, 2021) 33, 34; Theo Jores et al, 'A Meta-Analysis of the Effects of Acute Alcohol Intoxication on Witness Recall' (2019) 33(3) *Applied Cognitive Psychology* 334, 340 <https://doi.org/10.1002/acp.3533>. See also Lilian Kloft et al, 'Hazy Memories in the Courtroom: A Review of Alcohol and Other Drug Effects on False Memory and Suggestibility' (2021) 124 *Neuroscience and Biobehavioral Reviews* 291, 298 <https://doi.org/10.1016/j.neubiorev.2021.02.012>.

18 Heather D Flowe et al, 'An Experimental Examination of the Effects of Alcohol Consumption and Exposure to Misleading Postevent Information on Remembering a Hypothetical Rape Scenario' (2019) 33(3) *Applied Cognitive Psychology* 393, 405–6 <https://doi.org/10.1002/acp.3531>.

19 See, eg, Julia Quilter, 'Re-framing the Rape Trial: Insights From Critical Theory about the Limitations of Legislative Reform' (2011) 35(1) *Australian Feminist Law Journal* 23 <https://doi.org/10.1080/13200968.2011.10854458>; Elisabeth McDonald, 'From "Real Rape" to Real Justice? Reflections on the Efficacy of More than 35 Years of Feminism, Activism and Law Reform' (2014) 45(3) *Victoria University of Wellington Law Review* 487 <https://doi.org/10.26686/vuwlr.v45i3.4947>; Louise Ellison and Vanessa E Munro, 'Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process' (2016) 21(3)

filling another significant gap: the absence of empirical research in Australia on how rape/sexual assault trials operate. There has been no major study of rape trials transcripts since the landmark *Heroines of Fortitude* report more than 25 years ago,[20] a fact which sits incongruously alongside the enormous effort that has gone into statutory reform.

II STATUTORY PROVISIONS ON INTOXICATION

A Evidence That the Complainant Was Intoxicated

The barrier to justice for victims presented by intoxication was not a focus of attention during the first 'wave' of rape law reform in the 1980s.[21] However, in the 1990s, reformers/researchers began to pay more attention to the question of intoxication. Victoria was the first Australian state or territory to attempt to address the issue of intoxication evidence in rape trials. In 1991, the Victorian Parliament added a positive conception of consent to the laws governing rape, and the new provision included, for the first time in Australia, an express statement about the relevance of evidence of complainant intoxication. The *Crimes (Rape) Act 1991* (Vic) amended the *Crimes Act 1958* (Vic) ('*Crimes Act* (Vic)') to insert a definition of consent.[22] Relevantly, section 36 of the *Crimes Act* (Vic) provided that: 'Circumstances in which a person does not freely agree to an act include the following: … (d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing'. As was highlighted in the second reading speech to the amendment: 'Of particular importance is the element of consent … It means real and informed agreement, not the exploitation of a person who does not understand the sexual nature of an act, or who is incapacitated by a drug.'[23]

In its current form, section 36(2) of the *Crimes Act* (Vic) provides: 'Circumstances in which a person does not consent to an act include … (e) the person is so affected by alcohol or another drug as to be incapable of consenting to the act'.[24]

International Journal of Evidence and Proof 183 <https://doi.org/10.1177/1365712716655168>; Wendy Larcombe, 'Rethinking Rape Law Reform: Challenges & Possibilities' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (Australian National University Press, 2017) 143 <https://doi.org/10.22459/NDLA.09.2017.11>; Natalia Hanley et al, 'Improving the Law Reform Process: Opportunities for Empirical Qualitative Research?' (2016) 49(4) *Australia and New Zealand Journal of Criminology* 546, 560 <https://doi.org/10.1177/0004865815604195>.

20 *Heroines of Fortitude* (n 4).

21 For an overview of reform priorities, see Australian Women against Violence Alliance, 'Sexual Violence: Law Reform and Access to Justice' (Issues Paper, 17 May 2017) 12–13. See also Brown et al (n 2) 692–4.

22 For an overview of the history leading to the 1991 amendments, see David Brereton, '"Real Rape", Law Reform and the Role of Research: The Evolution of the Victorian *Crimes (Rape) Act 1991*' (1994) 27(1) *Australian and New Zealand Journal of Criminology* 74 <https://doi.org/10.1177/000486589402700110>.

23 Victoria, *Parliamentary Debates*, Legislative Assembly, 26 November 1991, 1999 (James Kennan, Attorney-General).

24 See also *Crimes Act* (Vic) (n 4) s 36(2)(f): 'the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act'. The *Justice Legislation Amendment (Sexual Offences and*

By the mid-2000s, New South Wales ('NSW') considered further statutory reform on the Victorian model of a legislated positive definition of consent, including identifying the complainant's intoxication as a vitiating factor.[25] Such a provision was added by the *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW). In its original form, intoxication was added as a factor that *may* vitiate consent using language which was different to the Victorian provision introduced in 1991: 'The grounds on which it may be established that a person does not consent to sexual intercourse include: (a) if the person has sexual intercourse while substantially intoxicated by alcohol or any drug'.[26] On 1 June 2022, the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) commenced,[27] which added a new subdivision to the *Crimes Act 1900* (NSW) ('*Crimes Act* (NSW)') addressing consent and knowledge of consent. The previous provision on complainant intoxication, section 61HE(8), has been replaced with a new formulation that resembles the current Victorian provision: 'A person does not consent to a sexual activity if … (c) the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity'.[28] This means that the findings of the current Victorian trial study that relate to the complainant intoxication statutory provision will be directly relevant in Australia's two most populous states, Victoria and NSW. Findings will also be of interest in other Australian states and territories, where different approaches have been adopted, including variations on the 'Victorian model'.[29]

Other Matters) Act 2022 (Vic) was passed in the Victorian Parliament on 30 August 2022, and received assent on 6 September 2022. This Act implements a number of the recommendations contained in the VLRC's report: Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) ('*Improving the Justice System*'). When the relevant parts of this Act commence (expected on 30 July 2023), sections 36(2)(e)–(f) of the *Crimes Act* (Vic) (n 4) will be replaced by identical provisions to be located in sections 36AA(1)(g)–(h).

25 Criminal Justice Sexual Offences Taskforce, Attorney General's Department (NSW), *Responding to Sexual Assault: The Way Forward* (Report, December 2005).

26 *Crimes Act 1900* (NSW) s 61HA(6)(a) ('*Crimes Act* (NSW)'), as inserted by the *Crimes Legislation (Consent – Sexual Assault Offences) Act 2007* (NSW), as amended by *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1.

27 This legislation was the centrepiece of the NSW Government's response to the NSW Law Reform Commission's report: New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020).

28 *Crimes Act* (NSW) (n 26) s 61HJ(1)(c).

29 Legislatures in the Australian Capital Territory ('ACT'), Northern Territory, South Australia and Tasmania have also added provisions on complainant intoxication to legislation on consent albeit using different statutory language: '[A] person does not consent to an act … if the person … is incapable of agreeing to the act because of intoxication': *Crimes Act 1900* (ACT) s 67(1)(g). '[A] person does not freely agree to an act if the person … is asleep, 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': *Criminal Code Act 1924* (Tas) sch 1 s 2A(2)(h) ('*Criminal Code* (Tas)'). 'Circumstances in which a person does not consent to sexual intercourse … include circumstances where … the person is asleep, unconscious or so affected by alcohol or another drug as to be incapable of freely agreeing': *Criminal Code Act 1983* (NT) sch 1 s 192(2)(c) ('*Criminal Code* (NT)'). '[A] person is taken not to freely and voluntarily agree to sexual activity if … the activity occurs while the person is intoxicated (whether by alcohol or any other substance or combination of substances) to the point of being incapable of freely and voluntarily agreeing to the activity': *Criminal Law Consolidation Act 1935* (SA) s 46(3)(d) ('*Criminal Act* (SA)'). In Western Australia and Queensland, statutory provisions on the meaning of consent/non-consent contain

In Victoria, the *Jury Directions Act 2015* (Vic) ('*Jury Directions Act*') is also part of the relevant legislative framework. Although this Act does not refer expressly to complainant intoxication, section 46 provides for a direction on consent, including the 'circumstances in which a person is taken not to have consented to an act' (ie, section 36(2) of the *Crimes Act* (Vic)).

B Evidence That the Accused Was Intoxicated

A parallel development has been the enactment of legislation which aims to limit the opportunity for *defendants* to raise *exculpatory* evidence of their own intoxication. In most jurisdictions this has been a statutory reform of general application, relevant to all offences,[30] although some jurisdictions have also enacted specific provisions applicable in sexual offence trials.[31] The Victorian approach more closely resembles the approach of the 'Code jurisdictions' than the 'common law jurisdictions' with which it is more routinely associated.[32]

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no reference to complainant intoxication: *Criminal Code Act Compilation Act 1913* (WA) s 319(2) ('*Criminal Code* (WA)'); *Criminal Code Act 1899* (Qld) sch 1 s 348 ('*Criminal Code* (Qld)'). In 2020, the Queensland Law Reform Commission considered whether section 348 of the *Criminal Code* (Qld) should be amended to include an express reference to situations where the complainant is affected by alcohol or another drug. The Commission concluded that no such change was required because such situations are already sufficiently addressed by the fact that section 348(1) requires that consent be given 'by a person *with the cognitive capacity* to give the consent' (emphasis added), and that this provision already 'allows evidence that the complainant was … affected by alcohol or drugs to be taken into account by a trier of fact when considering whether a complainant had the cognitive capacity to give consent': Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) vii [40], 122 [6.52]. In 2022, the Queensland Women's Safety and Justice Taskforce recommended that a provision on complainant intoxication *should* be added to the section 348(2) list of circumstances in which consent cannot be freely and voluntarily agreed, as part of an expanded list modelled on section 61HJ of the *Crimes Act* (NSW): Women's Safety and Justice Taskforce (Qld), *Hear Her Voice: Women and Girls' Experiences across the Criminal Justice System* (Report No 2, 2022) vol 1, 216 (Recommendation 43(b)) The Law Reform Commission of Western Australia is currently undertaking a review of sexual offence and consent laws, and a final report is due in July 2023: Law Reform Commission of Western Australia, 'Project 113: Sexual Offences', *Government of Western Australia* (Web Page, 8 December 2021) <https://www.wa.gov.au/government/publications/project-113-sexual-offences>; Law Reform Commission of Western Australia, 'Project 113: Sexual Offences Objectives, Consent and Mistake of Fact' (Discussion Paper, December 2022) vol 1, 15 [1.65].

30 See generally, Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2017) 283–8.

31 See, eg, *Crimes Act* (NSW) (n 26) s 61HK(5)(b), which expressly provides that regard *must not* be had to a defendant's self-induced intoxication when determining whether the fault element for sexual assault exists (ie, knowledge that the victim was not consenting). Note that this provision effectively duplicates Part 11A of the *Crimes Act* (NSW), given that sexual assault is not a crime of specific intent.

32 In Queensland, Western Australia, the ACT, Tasmania and the Northern Territory, the 'excuse' of mistake of fact is generally available. In Queensland, this is provided for by section 24(1) of the *Criminal Code* (Qld) (n 29): 'A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.' Until recently, the Act was silent regarding the relevance of self-induced intoxication, but case law had established that the defendant's intoxication may be relevant to whether the defendant's mistaken belief that the complainant was consenting was honest but is irrelevant to whether the mistake was reasonable: *R v Hopper* [1993] QCA 561, [9] (de Jersey CJ, McPherson and Pincus JJ); *R v O'Loughlin* [2011] QCA 123, [34] (Muir JA). This approach has now been codified for the purpose of sexual offences and mistake of fact in relation to consent. With the

An element of the offence of rape in Victoria is that the defendant does not 'reasonably believe' that the complainant is consenting.[33] In considering the effect of intoxication on the defendant's 'reasonable belief', section 36B of the *Crimes Act* (Vic) provides that:

> (1) In determining whether a person who is intoxicated has a reasonable belief at any time–
>
> (a) if the intoxication is self-induced, regard must be had to the standard of a reasonable person who is not intoxicated and who is otherwise in the same circumstances as that person at the relevant time; and
>
> (b) if the intoxication is not self-induced, regard must be had to the standard of a reasonable person who is intoxicated to the same extent as that person and who is in the same circumstances as that person at the relevant time.

This is repeated in the *Jury Directions Act*. Wherever the trial judge considers there are good reasons to give a direction on general assumptions not informing a reasonable belief in consent, section 47C(1)(f) requires the trial judge to inform the jury that:

> (a) a belief in consent based solely on a general assumption about the circumstances in which people consent to a sexual act (whether or not that assumption is informed by any particular culture, religion or other influence) is not a reasonable belief; and
>
> (b) if a belief in consent is based on a combination of matters including a general assumption of that kind, then, to the extent that it is based on that general assumption, it is not a reasonable belief.[34]

The Explanatory Memorandum to the Crimes Amendment (Sexual Offences) Bill 2016 (Vic) which inserted this provision noted that

> [t]hese directions are designed to make clear that stereotyping opinions about sexual behaviour are not to be taken into account when assessing the reasonableness of a belief in consent. An example is an assumption by an accused that the complainant was consenting to sex with him because she was dressed provocatively and got drunk with him.[35]

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commencement of the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* (Qld), section 348A now provides that, '[i]n deciding whether a belief of the person was reasonable, regard may not be had to the voluntary intoxication of the person caused by alcohol, a drug or another substance': *Criminal Code* (Qld) (n 29) sch 1 s 348A(3). See also *Criminal Code Act 2002* (ACT) s 33(3); *Criminal Code* (Tas) (n 29) sch 1 s 14A(1)(a); *Criminal Code* (NT) (n 29) sch 1 s 43AU(3). Western Australia has not legislated on the relevance of intoxication to the 'honest and reasonable mistake of fact' excuse under section 24 of the *Criminal Code* (WA) (n 29) but, as had been the case in Queensland, case law has established that for the purposes of section 24, intoxication, whether by alcohol or drugs, is irrelevant to the reasonableness of the belief of a defendant: *Aubertin v Western Australia* (2006) 33 WAR 87, 96 [44] (McLure JA); *Prazmo v Western Australia* [2009] WASCA 25, [21] (Miller JA). The *Criminal Act* (SA) (n 29) contains a provision on defendant intoxication that applies specifically to the offence of rape. Section 268(2) provides that if the objective elements of an alleged offence are established as against a defendant but the defendant's consciousness was (or may have been) impaired by self-induced intoxication to the point of criminal irresponsibility at the time of the alleged offence, the defendant is nevertheless to be convicted of the offence if the defendant would, if his or her conduct had been voluntary and intended, have been guilty of the offence.

33 *Crimes Act* (Vic) (n 4) s 38(1)(c).

34 *Jury Directions Act 2015* (Vic) ss 47C(1)(f), 47I ('*Jury Directions Act*').

35 Explanatory Memorandum, Crimes Amendment (Sexual Offences) Bill 2016 (Vic) 98.

III THIS STUDY'S RESEARCH DESIGN

A The Study Sample

As part of a larger project on intoxication evidence in rape trials,[36] this study analysed transcripts from 33 rape trials in the County Court of Victoria.[37] The data set was compiled by drawing on information in the public domain (appellate decisions, sentencing remarks), and communications with the Victorian Law Reform Commission ('VLRC'), and with the Victorian County Court, Office of Public Prosecutions and Victoria Legal Aid (conducted on our behalf by the VLRC).

The following inclusion criteria were applied:

1. Prosecution of a single defendant on a charge of rape (currently section 38 of the *Crimes Act* (Vic)), whether with or without other charges;
2. Tried in the County Court of Victoria after a plea of not guilty;
3. Trial conducted during the period 2013–20; and
4. Evidence of complainant and/or defendant intoxication (by alcohol and/or other drugs) at the time of the alleged offence.

The 33 trials in our data set took place between August 2013 and November 2020. Those trials related to conduct that occurred between January 1985 and October 2018. In all cases, the complainant was a woman[38] and the accused person was a man.[39]

In 22 of 33 cases, there was intoxication evidence in relation to both the complainant and the accused. In five cases there was evidence of complainant intoxication only. In six cases there was evidence of accused intoxication only. Twenty-one cases involved evidence of alcohol consumption only. Eleven cases involved the use of alcohol with another drug or drugs (variously, cannabis; methylamphetamine ('ice'); cocaine; ecstasy; and prescription drugs). In the remaining case the complainant was drugged with doxylamine.

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36 This project is funded by a grant under the Australian Research Council Discovery Project scheme (DP200100101): 'Intoxication Evidence in Rape Trials: A Double-Edged Sword?' (2020–23).

37 Approval for the collection and analysis of trial transcripts was granted by the University of Wollongong Human Research Ethics Committee (Approval 2020/376). The data set was also used for a study commissioned by the VLRC to support the Commission's project on 'Improving the Response of the Justice System to Sexual Offences'. The VLRC's final report was released in November 2021: see *Improving the Justice System* (n 24). See also Julia Quilter, Luke McNamara and Melissa Porter, 'The Most Persistent Rape Myth? A Qualitative Study of "Delay" in Complaint in Victorian Rape Trials' (2023) 35(1) *Current Issues in Criminal Justice* 4 <https://doi.org/10.1080/10345329.2022.20900 89>; Julia Quilter, Luke McNamara and Melissa Porter, 'Differences in Accounts and the "Lying" Complainant: A Qualitative Study of Rape Trials from Victoria, Australia' (2023) 73 *International Journal of Law, Crime and Justice* 100593: 1–16 <https://doi.org/10.1016/j.ijlcj.2023.100593>.

38 In one case (V25), there were two female complainants.

39 While rape complainants and defendants can be female or male, given the gender profile of the cases in this study's sample, in this article we have used she/her pronouns for complainants and he/him pronouns for the accused.

B Limitations

The sample is a non-representative sample. For reasons of project feasibility, it includes only a subset of the total number of trials conducted during the relevant period that would have met our case eligibility criteria. Also, reflecting the manner in which eligible cases were identified (that is, starting with conviction appeal judgments in the public domain), the sample is skewed towards cases in which the trial resulted in a finding of guilt. Our sample included 22 trials resulting in a guilty verdict on at least one charge of rape; nine trials with a not guilty verdict and two trials in which a verdict of acquittal was entered on appeal. As a small, non-representative sample,[40] we have no basis for assuming that the cases in our dataset are illustrative of how rape trials have been or are conducted in cases outside our data set.

It proved difficult to obtain complete transcripts of all parts of the trial. We obtained prosecution and defence closing addresses for only 4 of the 33 cases.[41] We obtained the trial judge's summing up and directions to the jury (the 'charge') in six cases.[42] We obtained the accused's police record of interview in only 2 out of 23 cases[43] in which the record of interview was played to the jury. The minimum requirement for inclusion in the data set for this project was that our transcript holding for the case included the complainant's cross-examination.[44]

In some trials, the evidence of the complainant (or occasionally, other witnesses) took the form of playing (typically, where the trial in our data set was a retrial) the recorded evidence from the earlier trial. In some such cases, we were provided with the full transcript from the occasion when the person originally gave evidence, rather than the edited version that formed part of the official court record at the trial we were analysing.

Another limitation arises from the nature of our source material. Transcripts (ie, words on a page/screen) are effective for communicating the words that are spoken in the courtroom (although they are imperfect in this respect), but they cannot communicate tone, emotion, mood, atmosphere, etc – all of which are important to the experience of complainants and other participants in a trial.[45]

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40 While the sample size is 'small' relative to the number of trials in the period, this study nevertheless represents the largest study of rape trial transcripts in Australia since the 1996 *Heroines of Fortitude* report: *Heroines of Fortitude* (n 4).

41 V21, V24, V25 and V32.

42 V7, V12, V17, V21, V24 and V25.

43 V17 and V19.

44 In one case (V6), we did not obtain the complainant's evidence-in-chief, which had been given in the form of a visual and audio recording of evidence, pursuant to *Criminal Procedure Act 2009* (Vic) ch 8 pt 8.2 div 5.

45 We also recognise that trial transcripts are only one data source relevant to understanding how and why rape trials are conducted in the way they are, and whether statutory law reforms have efficacy. Other important data sources, which we will be incorporating into our longer-term study, include the experiences and perspectives of counsel (prosecution and defence), and the case law produced by appellate courts.

C Confidentiality and De-identification

An important condition of ethics approval was the need to employ robust techniques for guaranteeing the anonymity of complainants, as well as defendants, judges, lawyers and witnesses. Confidentiality was also a requirement of the undertaking we made to the County Court of Victoria as a precondition to taking possession of trial transcripts. De-identification of transcripts at the earliest opportunity was a key part of this process. Transcripts were obtained from the County Court of Victoria by staff from the VLRC and securely delivered to us. All transcripts were de-identified upon receipt from the VLRC. De-identification involved the redaction from all pages of transcript the complainant's personal identifying information, information specific to the incident (such as location), and identifying information about defendants, witnesses, judges and lawyers. Each trial was given a unique alphanumeric code (eg, V1, V2, V3, etc). Participants in the trial were assigned a sub alphanumeric code (eg, V1C for the complainant in the first trial in our data set, or V7A for the accused in the seventh trial).[46]

Once de-identification was complete, the original transcripts were stored in a secure cloud server location. Only the redacted versions of the transcript were shared with and read by research team members, and subjected to analysis.

D Qualitative Analysis

De-identified trial transcripts were uploaded into the qualitative data analysis software package NVivo (version 12 plus). The larger projects' 85-item codebook,[47] including a number of codes relevant to the concerns of this article, included: forms of intoxication evidence; purposes for which intoxication evidence engaged; engagement of intoxication-related rape myths; questions asked in cross-examination (including about memory/recall); submissions by counsel and discussion between the trial judge and counsel on the need for *Jury Directions Act* directions (including on consent,[48] reasonable belief in consent,[49] and unreliable evidence).[50]

Transcripts were manually coded by one of the authors, using a process of deductive content analysis.[51] Each transcript file was read in full, with a determination made as to whether a passage should be assigned one or more of the predetermined codes. Notwithstanding its deductive nature, this process still involves an exercise in interpretation and judgment. Therefore, although not necessarily required for

46 In addition to complainant ('C') and accused ('A'), other abbreviations relevant to this article are: Trial Judge ('TJ'), Crown Prosecutor ('CP'), Defence Counsel ('DC'), general Crown witness ('GCW'), medical witness ('MW'), and location ('L').

47 The codebook was created in order to facilitate analysis of those aspects of the rape trial that were of interest and concern to the VLRC (see above n 24), as well as our Australian Research Council-funded study of intoxication evidence in rape trials: see above n 37.

48 *Jury Directions Act* (n 34) s 46.

49 Ibid s 47.

50 Ibid s 32.

51 See Andrea J Bingham and Patricia Witkowsky, 'Deductive and Inductive Approaches to Qualitative Data Analysis' in Charles Vanover, Paul Mihas and Johnny Saldaña (eds), *Analyzing and Interpreting Qualitative Data: After the Interview* (Sage Publications, 2021) 133 <https://doi.org/10.3102/1682697>.

qualitative analysis, in order to maximise consistency, we conducted an inter-coder consistency exercise to trial the codebook and our application of it.[52] This exercise (involving independent coding of the same trial transcript, followed by comparison and discussion) informed codebook refinement, and harmonisation of coder interpretations, before proceeding to code all available transcripts for the 33 cases.

In a qualitative study of this sort, coding was a means to an end. It was a way of capturing the presence or absence of selected anticipated features of rape trials (in the context of this article, including the forms of intoxication evidence engaged and purposes for which intoxication evidence was led). It then facilitated systematic analysis of those features, isolation of illustrative examples of the feature in question, and comparison across trials in the sample.

IV FINDINGS

A Evidence on AOD Effects

Consistent with the findings of our previous research based on analysis of *appellate* decisions,[53] we observed that intoxication evidence overwhelmingly took the form of self-assessment by the person whose AOD consumption was in issue, as well as assessment of the complainant by the accused (and vice versa), and third-party witness assessment. This was true of both complainant and defendant intoxication, although self-assessment evidence was less common for defendants, noting that in 19 of the 33 cases, the accused did not give evidence.[54]

One of the consequences of intoxication evidence being routinely provided in these ways is that it is typically imprecise with a heavy 'layperson' orientation. Unless they have the benefit of expert evidence on AOD effects, juries are often left to apply common sense or 'common knowledge'[55] to answer complex questions like: How intoxicated was the person? What does this mean for cognitive functions

52 See Cliodhna O'Connor and Helene Joffe, 'Intercoder Reliability in Qualitative Research: Debates and Practical Guidelines' (2020) 19 *International Journal of Qualitative Methods* 1–13, 2 <https://doi.org/10.1177/1609406919899220>.

53 Luke McNamara et al, 'Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects' (2017) 43(1) *Monash University Law Review* 148; Julia Quilter, Luke McNamara, and Melissa Porter, 'The Nature and Purpose of Complainant Intoxication Evidence in Rape Trials: A Study of Australian Appellate Court Decisions' (2022) 43(2) *Adelaide Law Review* 606 ('The Nature and Purpose of Complainant Intoxication Evidence in Rape Trials').

54 In 16 of the 19 trials in which the defendant did not give evidence, their police interview was played to the jury. We did not have access to transcripts of police interviews. It is possible in these cases that accused persons were asked questions about AOD consumption, how they felt at the time etc, so that self-assessment evidence may have been before the jury via the police interview recording.

55 See Julia Quilter and Luke McNamara, 'The Meaning of "Intoxication" in Australian Criminal Cases: Origins and Operation' (2018) 21(1) *New Criminal Law Review* 170 <https://doi.org/io.i525/ncr.2oi8.2l.I.I70>, discussing Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton University Press, 2003); Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford University Press, 2012) <https://doi.org/10.1093/acprof:oso/9780199698592.001.0001>.

related to elements of the crime charged (like consent formation) or the reliability of evidence (like memory)?

Noting that there was evidence of alcohol consumption in 29 of the 33 trials in this study, only a small number of cases involved blood alcohol concentration ('BAC') evidence. In several cases,[56] a blood (or urine) sample was taken from the complainant during a forensic medical examination, but the BAC result was zero – the sample having been taken several hours after the alleged rape. It is unlikely that BAC will ever be routinely available in rape trials because it requires the taking of a contemporaneous (or near contemporaneous) sample. However, one of the by-products of a biological detection test result is that it can be the catalyst for the calling of expert evidence on AOD effects.[57] This was a rare occurrence in the cases in this study, and was more likely to happen where the drugs in question were drugs other than alcohol.[58]

Even though all 33 cases in this study featured evidence of AOD consumption, only six of them featured expert evidence about AOD effects. Expert evidence was called in cases where:

- the complainant had consumed coffee served to her by the accused, which was (unknown to her) laced with doxylamine;[59]
- the complainant had consumed alcohol, antidepressant medication (fluoxetine) and diazepam;[60]
- the complainants had consumed benzodiazepines (Valium and Temazepam) and antidepressant medication (doxepin), given to them by the accused;[61]
- the accused had consumed methamphetamine and (perhaps) benzodiazepine (Xanax);[62]
- the accused was an alcoholic and consumed a very large amount of alcohol;[63] and
- the complainant and the accused had consumed methamphetamine.[64]

In the first mentioned case, a toxicology statement was available which contained the results of urine and blood samples from the complainant – which detected doxylamine, as well as codeine, morphine and paracetamol (consistent with having consumed Panadeine Forte), and no alcohol. This case was atypical not only because of the particular drugs detected, but because it was one of only a small number of cases in which the judge referred specifically to the challenge faced by the jury in interpreting intoxication evidence:

> TJ: Yes. But what does it all mean? Is there any evidence being placed before the jury as to what the particular drug is, the Doxylamine?

56 V1, V2, V9, and V21.
57 See Quilter and McNamara (n 55) 176–8.
58 Trial evidence included biological detection results for other drugs in a small number of cases: V2, V21, and V29.
59 V2.
60 V21.
61 V33.
62 V14.
63 V11.
64 V29.

> CP: No Your Honour.
>
> TJ: Why not? What are they going to make of that?
>
> CP: That there's a sedative found in urine.
>
> TJ: Well who says it's a sedative? I mean it is, but who says it is. They're not chemists. …
>
> TJ: Well you might have to call [a toxicologist] … I mean if this sort of material is being placed into … the hands of the jury, they're not toxicologists.[65]

A similar judicial intervention occurred in the following case:

> TJ: Is anybody giving any evidence about the Deptram and Diazepam and Valium and all the stuff? I mean …
>
> CP: An expert?
>
> TJ: Any expert evidence about it? I mean I think from my recollection of these cases that Diazepam and Valium are the same thing.
>
> CP: Yes.
>
> DC: They're from the same …
>
> TJ: We all know that, don't we?
>
> DC: We all know that, yes
>
> TJ: They [jurors] don't.
>
> CP: No.
>
> TJ: Unless they're all taking whatever she was taking at lunch time. We need perhaps something. I don't know if you're going to do it or not. …
>
> CP: Yes. No – yes.
>
> TJ: I don't know whether you considered it, but at the moment there's no proposal for any evidence about these drugs to be called? That's all I wanted to know.
>
> CP: There's not at the moment, but I'll think about what Your Honour has raised.[66]

In both these cases, a medical expert subsequently gave evidence about the nature and effects of the drugs in question.

In another case, the trial judge highlighted the need for the jury to be educated about the effects of 'ice':

> TJ: But at the end of the day … evidence as to the nature of ice is critical, because they don't know.
>
> CP: Yes.
>
> TJ: And a lot of people don't know … [An expert witness] can talk about the effects, generalised – what ice is and what generally the positives and negatives are – and everyone can make of it what they will, as I said before. I don't see that there's any issue with that. That – because the jury don't know that ice is methamphetamine and they wouldn't know what methamphetamine does to you.[67]

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65 V2. See also V29 and V33.

66 V33.

67 V29.

The doctor who conducted a medical examination of the complainant in this case gave evidence about the effects of ice:

> CP: Now, what – can you just describe for us the general effects of methylamphetamine or ice?
>
> MW: Well, I've said – well, as I've said before, it's a stimulant drug. It's a synthetic drug and it – it acts mainly in the brain and the nervous system by increasing the level of certain natural hormones or transmitter substances in the brain so that the brain becomes awash with these substances and becomes very stimulated and so the effect on the person is that they – you know, they feel like they're full of energy. Everything gets speeded up. The pulse goes up – the blood pressure. They begin to perspire. They can get the shakes. They feel terrific, sort of like being superman or superwoman. They don't think about the consequences of their actions. Everything is happening at 100 miles an hour. It – it can increase sexual desire and – and can affect decision-making and – and, you know, concentration and, you know, the way that people don't think about the consequences of things they do. And this can be quite a profound effect. People don't want to eat. They – you know, they don't need to sleep. They feel absolutely wonderful. And then after a while when they run out of energy the opposite happens and they get that rebound effect.
>
> CP: Can it lead to increased aggression in certain circumstances?
>
> MW: Yes, it can. It can – it can – it can sort of take the breaks off behaviour.[68]

In another case, where the complainant had consumed alcohol and an antidepressant, there was no expert evidence. Instead, during cross-examination of the complainant, defence counsel put to her a series of assertions:

> DC: And you understand that intoxication – heavy intoxication has some effects, including the following. It can affect the way you perceive things – it affects the way you see and hear and understand what's happening, is that fair to say?
>
> C: Yeah.
>
> DC: It can affect the way you remember things, because it can make things hard to remember?
>
> C: Yep.
>
> DC: Yes, and it can distort your memory?
>
> C: Yes, I agree.
>
> DC: It can – I think the term that's sometimes used is disinhibit you, but it can lead you to do things that you wouldn't do when you were sober?
>
> C: Yeah, that's true.
>
> DC: And when you're extremely intoxicated, you can even get to the point of doing things that you later – that you only learned later that you've actually done. Are you aware of that?
>
> C: Yep.
>
> DC: Yes. Have you experienced that?
>
> C: Not really, no.[69]

68 V29.
69 V12.

This series of questions was put without objection from the Crown or judicial intervention. That the questions were regarded as unremarkable illustrates the extent to which people (complainants, other witnesses, lawyers, judges, jurors) are assumed to have a body of 'common knowledge' about AOD drug effects, particularly when the drug is alcohol. There are two related issues. First, there is a question about the accuracy of the assertions contained in defence counsel's questions. Second, there is a question about the appropriateness of counsel effectively giving evidence (or making submissions) in this way. Even though the complainant, in this trial, agrees with the propositions as they are put to her, the fact that she ultimately says she has not experienced the effects said to be well-known, brings into question the stability of the foundation for treating them as common knowledge about AOD effects.

While expert evidence was more common in cases in this study that involved evidence about consumption of 'unfamiliar' drugs – even if a prompt from the trial judge was required – *alcohol* appeared to be treated as a drug where it could be assumed that jurors knew and understood its effects.

Only 2 of the 29 cases in this study that involved evidence of alcohol use featured expert evidence on alcohol intoxication effects – and these were unusual cases, raising issues on the phenomenon of 'alcoholic blackout',[70] and the combined effect of alcohol, an antidepressant drug and diazepam.[71] A possible explanation for the general absence of expert evidence about alcohol in the cases in this study is that there may have been sound forensic reasons why expert evidence was considered unnecessary. For example, evidence about the effects of alcohol (or other drug) intoxication on cognitive functions such as consent formation may have been considered superfluous given that in all but 2 of the 27 cases in this study that included *complainant* intoxication evidence, the Crown did not ultimately assert that the complainant was *incapable* of consenting, this being the relevant standard in section 36(2)(e) of the *Crimes Act* (Vic) (discussed below). However, in a number of cases in this study, the complainant's memory of events, given her intoxication, *was* in issue. Later in this article, we report on the general absence, in the trials in this study, of expert evidence on different aspects of memory and how they are (or are not) affected by alcohol (and other drugs), including substance-specific effects. Here we emphasise the point made in Part I of this article that there is a large body of scientific literature (and associated expertise) on the effects of alcohol – not only on memory, but also other cognitive functions, as well as motor functions.[72] As an expert said when giving evidence in one of our cases:

> MW: Of all the drugs and chemicals that people put into their bodies, there's probably been more research on alcohol than anything else. It's a very well understood substance. So the way alcohol behaves in the body and the way the body responds to alcohol is very well-known. There are lots of research projects, textbooks written about it and so forth.[73]

70 V11 (accused).
71 V21 (complainant).
72 See also Quilter and McNamara (n 55) 204–5.
73 V21.

We do not think it is safe to assume that alcohol effects are a matter of common knowledge that is already held by jurors (and judges) when they come to the trial. The following expert evidence is likely to have been valuable in a number of the cases in this study, not just the one at which it was presented:

> MW: You can do tests on people and measure individual effects of alcohol on just about every function of the brain and body that you can think of. So that includes things like reaction time, so you know, the time it takes people to react to things, it involves thinking, you know, whether people can make decisions in the same way when they drink alcohol as to when they don't, whether they're impulsive, you know, they can make decisions without thinking about the consequences much more readily if people drink.
>
> It can affect inhibition, so people will do things that they might not normally do when they've got alcohol in their system. It effects a lot of physical aspects such as movement and – reflexes I've mentioned. It can affect people's perception of things and how they interpret what's going on around them and how they can remember what's going on around them. It can affect people's ability to do many things at the same time. It's one of the reasons why there are laws about driving and alcohol, because you need to be able to do lots of things at the same time when you drive.
>
> It can affect decision-making and information processing, and it can also affect what we call motor control, that is the way that people's muscles are controlled. That's what makes people – you know, when they're drunk they become unsteady and they can't walk properly and they can't talk properly. That's one of the things that's the last to be affected. So when people drink early on it might affect their personality or their inhibitions or their decision-making or their thinking without necessarily making them look drunk. You know, they can still walk in a straight line and so on. Then as they drink more and more, more and more functions become affected. By the time they can't walk any more, then as I said before, that's one of the last things to be affected, so all the other things have been well and truly affected by the time a person gets to the stage where they can't move properly. So once a person has had enough alcohol not to be steady on their feet or to be able to talk properly, we can be sure that all the other things I've talked about are well and truly affected well before then.[74]

Particularly noteworthy is the insight here that, in terms of a person's level of intoxication, cognitive functions may be impaired *before* the point in time when motor functions are impaired. This is important because of how commonly a complainant's level of intoxication is assessed with reference to observable behaviours like walking, slurring words and texting on a phone (motor functions). By way of illustration, in one case in this study, defence counsel sought to challenge the Crown case that the complainant was highly intoxicated by referring to evidence that she was able to show someone photos on an 'old' mobile phone and roll a cigarette:

> DC: The first one of those is how she's got to show these photographs to Mr [V32A]. She doesn't just push the button on her iPhone, because remember she told you she had a Nokia and he had to push menu, he had to scroll down to gallery, push another button, up came the photos and then you had to start scrolling through them.

74 V21.

> All pretty hard to do if your fine motor skills are grossly impaired. Same with rolling a cigarette. You think about how hard that would be if you are 'extremely drunk', to use her words, to put the filter in the end.[75]

Cognitive functions, although not observable in the same way, are more directly relevant to the elements of rape, and the absence of consent in particular. Expert evidence about the relationship between intoxication and memory was rare, not only where the relevant drug was alcohol, but generally across cases in the study (and drug types). It was only observed in three cases.[76] This surprised us, particularly given that recall of events by complainants who were intoxicated at the time of the alleged rape was frequently in issue, and this sometimes prompted challenges to the reliability of the complainant's evidence. Before we turn to this specific issue, we will first examine how section 36(2)(e) of the *Crimes Act* (Vic) operated in the cases in this study.

B Section 36(2)(e): 'So Affected … as to Be Incapable of Consenting'

As discussed above, breaking the traditionally assumed nexus between complainant intoxication and consent has been a focus of statutory reform, reflected in section 36(2)(e) of the *Crimes Act* (Vic).[77] We were interested to observe how visible and influential section 36(2)(e) was in the trial's approach to proving the actus reus element of non-consent. It is important to note that in most cases we did not have the opportunity to examine transcripts of closing addresses, or jury charges. Therefore, our assessment of the 'visibility' of section 36(2)(e) was based mainly on our analysis of examination-in-chief, cross-examination and re-examination of witnesses and pre-closing/charge discussions between the trial judge and counsel about directions pursuant to section 12 of the *Jury Directions Act*.[78]

Given that 27 of the 33 trials in this study involved evidence of complainant intoxication (albeit, to varying degrees), we were surprised by how little visibility – and perceived applicability and relevance – section 36(2)(e) had in the trials we analysed. We found some evidence that section 36(2)(e) may have been perceived

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75 V32.

76 V21 is discussed above. In V11, there was expert evidence on the accused's ability to remember events in question, given his alcoholism and the likelihood that he was experiencing an 'alcoholic blackout' at the time. In V29, the doctor who conducted a medical examination of the complainant was asked whether ice use impacted memory:

> MW: [I]f they're awake – if they're conscious then they will be able to perceive things happening to them. They will actually know it's happening at the time. But it might affect the way that that – that current perception is transferred into long-term memory if they're very drowsy. …
>
> CP: But leaving aside – if the person is not in that rebound phase and they're not very drowsy or falling asleep methylamphetamine doesn't have any particular effect or doesn't have any harmful effect on a person's memory?
>
> MW: Well, again, it's hard to know for sure because it hasn't been researched but it's less likely to do that. If a person is awake they're awake and … they can perceive things and they should be able to remember them.

77 See also *Crimes Act* (Vic) (n 4) s 36(2)(f): 'the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act'.

78 Section 12 of the *Jury Directions Act* (n 34) requires the judge to engage in a discussion with counsel, after the close of evidence, about which directions should (and should not) be given.

by counsel and judges as only of potential relevance where there was evidence of extreme intoxication. This view is reflected in the following example. On the question of the complainant's intoxication, the judge asked the Crown prosecutor, in the course of jury direction discussions pursuant to section 12 of the *Jury Directions Act*, whether section 36(2)(e) was in play:

> TJ: How's the prosecution putting it?
>
> CP: It doesn't put it that highly.
>
> TJ: She doesn't [sic] paralytic when she leaves the [pub], is it, or whatever pub that was … I mean, I don't think she says 'I was so paralytic'.
>
> CP: No.
>
> TJ: 'I didn't know what I was doing'.
>
> CP: No, Your Honour. And she's – no, she's certainly not. I mean, she's talking to Ms [V16WCG1] on the phone, she's making sense. That's not relied on.[79]

In another case (where there was evidence that the complainant was, in her words, 'quite drunk' and that her estimated consumption was between 10 and 20 drinks over six hours):[80]

> TJ: I want counsel to turn their minds to the issue of intoxication and whether the evidence in this case is sufficient for a direction about going beyond agreement is free agreement, etcetera, and where the legislation states that a person in an intoxicated position is incapable of giving consent. That's my free hand, not what the legislation particularises it as, but is this such a case where on the evidence such a direction should be given?
>
> CP: If I may …
>
> TJ: I'm just raising it.
>
> CP: This was alluded to during the final directions hearing and my learned friend wanted me to clarify whether the Crown was seeking to rely on those [complainant intoxication] provisions …
>
> TJ: I didn't know that.
>
> CP: The agreement, I suppose it was, was that I would not seek to rely on the deemed non-consent provision.

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79 V16.

80 In this case (V28), cross-examination of the complainant included the following exchange:

> DC: So we know that you were drinking between 9 pm and 3 am before you met [V28A], yes?
>
> C: Yes.
>
> DC: Is it accurate to say you drank ten or more beers?
>
> C: Yes.
>
> DC: In that period?
>
> C: Yes. …
>
> DC: All right. Could it have been more than 15?
>
> C: Could have been? Not more than 20, that I'm probably definitely sure.
>
> DC: So less than 20?
>
> C: Yeah.

> TJ: I can understand that. She has quite a clear recollection of – well, almost all events, if not all events, so it would have been the subject of argument, Mr [V28CP].
>
> CP: Yes.[81]

It is important to recognise that, even though the complainant intoxication *statutory provision* was considered irrelevant in this case, it did not follow that the complainant's *intoxication* was irrelevant. The prelude to questions during complainant cross-examination about how many alcoholic drinks she had consumed was the following:

> DC: One of the problems for your memory …
>
> C: Yes.
>
> DC: … has been caused by you being drunk?
>
> C: Yes.
>
> DC: You agree with that?
>
> C: Yes.[82]

In this way, against the grain of the aspirations of provisions like section 36(2)(e), evidence of the complainant's intoxication is deployed not to strengthen the Crown's case but (by the defence) to challenge or weaken it. We return to this aspect of our findings below.

In only 2 of the 27 cases[83] in this study which involved complainant intoxication evidence did the Crown unambiguously seek to assert that the complainant was *incapable* of consenting, this being the relevant standard in section 36(2)(e) of the *Crimes Act* (Vic) (and its predecessor provisions).[84] Even in these cases, however, the Crown did not seek to prove the element of non-consent exclusively on the basis of the complainant's intoxication-related incapacity to consent, but pointed also to other conduct by the complainant that manifested her non-consent. In one of these cases, the defence submitted that this dual-track approach was untenable and that reliance on section 36(2)(e) must be 'all or nothing' – the complainant either lacked capacity or she did not. Ultimately, the trial judge did not accept this submission as the following excerpt from the judge's charge to the jury reveals:

> TJ: The law identifies a number of circumstances where the complainant is deemed or considered not to freely agree or consent to sexual penetration. These circumstances include where the person is so affected by alcohol, or another drug, as to be incapable of freely agreeing.

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81 Ibid.

82 Ibid.

83 V21 and V32.

84 For example, the identical section 34C(2)(e), that operated between 1 July 2015 and 30 June 2017. Prior to July 2015, the relevant provision was contained in section 36(d) of the *Crimes Act* (Vic) (n 4): 'Circumstances in which a person does not freely agree to an act include … the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing'. Note this provision, inserted by the *Crimes (Rape) Act 1991* (Vic), was a composite, covering matters that are the subject of discrete provisions in the current *Crimes Act* (Vic): ss 36(2)(d)–(e).

> If you are satisfied beyond reasonable doubt that this circumstance existed in relation to Ms [V21C] you must find that she was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting then this element will be proven.[85]

In another case, the Crown Prosecutor initially suggested that the jury could rely on this section, and the complainant's high level of intoxication, in determining whether the element of non-consent was proven. However, during late trial discussions about closings and the charge pursuant to section 12 of the *Jury Directions Act*, the trial judge counselled the Crown not to rely on section 36(2)(e) as a basis for establishing non-consent. The judge pointed out that this might be inconsistent with the complainant's account that she had consensual sex with her boyfriend shortly before the alleged rape, and there was 'no clarification of what she [the complainant] means really by intoxicated':

> TJ: So, I'm extremely uncomfortable with going to the jury on the basis that she was too intoxicated as to be incapable of consenting, given her own evidence on that point.
>
> CP: Yes, Your Honour. In my submission, the inference would be open based on the amount she had to drink.
>
> TJ: She was pretty unclear about that, she said five drinks at the [V4L1], 'Don't really remember', and then it was suggested to her on [V4DC] – that on the maths it was probably seven.
>
> CP: Seven.
>
> TJ: And then she was criticised for changing seven to five when really her evidence was, 'I don't remember.' And then, when she gets to the [V4L2] she says they continued to drink and dance but there's no real precision, he gives some precision, says four or five and then he stopped.
>
> CP: Four or five, yes.
>
> TJ: But we've got no evidence about what that means for those people.
>
> CP: We don't, but ten drinks approximately is – the jury might be able to infer it's a significant amount to drink.
>
> TJ: But a significant amount to drink is one thing.
>
> CP: Yes, Your Honour.
>
> TJ: Too intoxicated to be capable of consenting is another …[86]

Ultimately, the Crown was persuaded not to rely on section 36(2)(e), and to rely only on section 36(2)(d): a person does not consent if 'the person is asleep or unconscious'.

This case illustrates a pattern that we observed in a number of cases: a complainant's intoxication was most likely to be treated as a 'strength' of the Prosecution's case if the level of her intoxication was such as to render her asleep or unconscious at the time of the alleged rape. This was a common feature of the various fact scenarios in the trials we analysed. Typically, it was not the fact of the

85 V21.
86 V4.

complainant's intoxication *per se* that was relied on to assist the Crown to prove the element of non-consent. The influence of intoxication evidence was indirect. In 15 of the 33 cases in this study, the Crown's case was that the complainant was asleep (due to being heavily intoxicated or simply asleep) when the rape commenced.[87] Section 36(2)(e) is effectively redundant in such situations, because the list of 'non-consent' factors in section 36(2) already includes subsection (d): 'the person is asleep or unconscious'.[88]

C Contrary Purposes for Which Complainant Intoxication Engaged

Despite the policy underlying section 36(2)(e) – including breaking the assumed nexus between intoxication and consent, and removing (or reducing) the resulting barrier to proving non-consent – we observed that, in a number of trials, evidence of the complainant's intoxication was engaged by the defence as a Crown case *weakness*.

We observed defence counsel characterising evidence of the complainant's intoxication in three interrelated ways:

1. To suggest that the complainant was intoxicated but not so intoxicated as to be incapable of consent (ie, section 36(2)(e) has no application).
2. To suggest that the complainant was intoxicated, with intoxication producing disinhibition, which in turn contributed to consent.
3. To suggest that the complainant was intoxicated, that intoxication impaired memory and that, as a result, the complainant's account of events (including whether she consented) is unreliable.

A combined effect of the narrow scope of section 36(2)(e) and the potential for these defence strategies to be employed was a dynamic that we did not necessarily anticipate observing: cases in which the defence attempted to 'talk up' (and draw attention to) the extent of the complainant's intoxication, and the complainant (and the Crown) sought to resist this characterisation and 'play down' the complainant's level of intoxication. The following exchanges are illustrative:

> DC: Do you agree that the game involved sculling shots of vodka?
>
> C: I think we had one or two shots of vodka during the game, yes.
>
> DC: I suggest to you in fact that during the course of the game, the two of you managed to finish the bottle of vodka?
>
> C: No, I don't agree with that. …

87 This includes V33, a multi-charge and multi-complainant trial. One of the complainants was asleep or unconscious at the time of the rape.

88 Similar findings have been reported in recent studies from overseas jurisdictions. A recent study of rape trials in New Zealand noted with alarm that in 19 out of the 40 trials examined the complainant's evidence was that she was either very heavily intoxicated and/or asleep (as a result of intoxication) when the accused penetrated her, yet in 14 of these 19 cases (74%) the accused was acquitted of rape: McDonald et al (n 3) 256. In Canada, a recent review of case law concluded that 'no matter how severely intoxicated a woman was when the sexual contact occurred, courts are unlikely to find that she lacked capacity to consent unless she was unconscious': Elaine Craig, 'Sexual Assault and Intoxication: Defining (in)Capacity to Consent' (2020) 98(1) *Canadian Bar Review* 70, 70 (abstract).

DC: Now, you disagreed that the two of you finished the bottle of vodka. I need to ask you this anyway. Was it the case that you had more vodka to drink than [V18A]?

C: No.

DC: Do you agree that you were affected by the vodka that you drank?

C: I was tipsy, but I was still aware of my surroundings and everything that was going on.

DC: All right, well just to be clear, I'm not suggesting you were unaware of your surroundings, but I'm suggesting that the alcohol you drank was making it difficult for you to speak clearly?

C: No.

DC: And it was also making you a little unsteady on your feet?

C: I disagree.[89]

***

DC: Would you agree with this; that by that late stage, you were off your face?

C: I don't know. What is – what's the difference between drunk and off your face?

DC: Extremely drunk; I will put it that way?

C: I'd say quite drunk but maybe not extremely drunk.

DC: You could have been unsteady on your feet?

C: Perhaps, but I sway a lot anyway.

DC: And you would have been slurring your words?

C: I don't know if I actually was. I was getting quite upset.

DC: It's a possibility then that you were slurring your words?

C: Could have been but I hadn't notice that myself.[90]

In the following case, the Crown Prosecutor intervened during the accused's examination-in-chief in a manner which suggested a desire to downplay the extent of the complainant's intoxication:

DC: Now, in that [text] message [to the complainant], you raised the question of whether she was extremely drunk. I mean, on the night, what was your impression as to whether she was drunk, not drunk, half-drunk? What was your impression on the night?

A: She was, ah …

CP: Your Honour, I object to that question. His impression of her drunkenness is not relevant.

TJ: He can have a perception, I would have thought, of drunkenness, but it's not particularly helpful.

DC: I'm happy to move on, Your Honour.

TJ: It's not suggested that – no. I'll ask you to move on, thanks, Mr [V30DC1].[91]

89 V18.
90 V11. See also V10 and V27.
91 V30.

Where defence counsel emphasised the extent of the complainant's intoxication, sometimes this appeared to be designed to 'engage' the very assumed nexus between intoxication and consent section 36(2)(e) was designed to weaken:

> DC: Do you say at this stage you were so intoxicated that you probably weren't thinking straight?
>
> C: I don't understand what you mean by that.
>
> DC: You weren't making decisions and reasoning in the same way that you normally do?
>
> C: I don't think I was doing anything abnormal.
>
> DC: What about joining [V11A] on the bed? That would be abnormal?
>
> C: Yes. …
>
> DC: Isn't it possible that in your normal state, in your conscious mind, you wouldn't have done these things but in the state that you were in that night you might have?
>
> C: No, I wouldn't have done those things in a drunken state.
>
> DC: It's possible on this night that you did; that they occurred consensually?
>
> C: I dispute that.[92]

This questioning appears to be designed to support a version of the 'drunken consent, but still consent' line that has been a staple of rape trials for decades. We note that the words of section 36(2)(e) – which set a high bar ('so affected … as to be incapable of consent') – do nothing to interrupt this line.

In direct contrast to the practice just discussed – ie, defence suggestions that the complainant was *more* intoxicated than she says she was – in some trials, the defence attempted to suggest that the complainant was *less* intoxicated than she said. In the following case, where there was clear evidence that the complainant had fallen asleep as a result of her intoxication, the defence attempted to downplay her level of intoxication to support a position that she later woke from sleep and participated in consensual sex:

> DC: You appear from the CCTV to be functioning in a normal way?
>
> C: Looked to be normal, yes.
>
> DC: It wouldn't be, would it, that you're using alcohol as an excuse to cover your behaviour?
>
> C: It's not an excuse.
>
> DC: And that anything you don't want to answer you're going to say you don't remember or you were drunk?
>
> C: It's because I don't remember.
>
> DC: Do you say that you don't remember being introduced to the men at about 11:35?
>
> C: I don't – I don't remember it. It only – I only saw it on the CCTV.
>
> DC: You have no memory of having a conversation with them?

92 V11.

C: No.

DC: Because of the alcohol?

C: Because of the alcohol intoxication.[93]

This strategy was pursued, it would seem, because, notwithstanding evidence from later CCTV footage and several witnesses that the complainant was highly intoxicated, to the point of being unable to walk unassisted, vomiting and being put to sleep on a hotel room floor, the line being advanced by the defence was that, some hours later, the complainant had been woken from sleep by the accused and had consensual sex with him.

The contrast between these various illustrations highlights that intoxication evidence in the form in which it was most commonly present in the trials we examined – complainant self-assessment – was regarded as *malleable*, depending on the case line being advanced by the defence: capable of being *maximised* (via questioning or submissions that suggested the complainant was more intoxicated than she contended), or *minimised* (via questioning or submissions that suggested the complainant was more intoxicated than she contended).

D Credibility and Reliability

We observed a further risk that complainant intoxication evidence can pose to the Crown case: that the reliability of the strongest evidence of non-consent – the complainant's testimony – might be characterised as unreliable, due to her intoxication at the time.

The defence strategy of drawing attention to the complainant's intoxication to challenge her credibility, and the reliability of her evidence, was vividly illustrated by one of the rare cases for which we had access to the transcript of closing addresses. Defence counsel emphasised how critical the complainant's evidence was to the Crown's ability to make its case:

> She's the one that has to get all the way from innocent to beyond reasonable doubt. And my submission to you, ladies and gentlemen, is that she is simply not good enough. She can't do it. She cannot do it reliably enough to make that long, long journey all the way to guilt beyond reasonable doubt.
>
> Here's why. She's drunk a lot. She takes a breathalyser sometime the next morning after the police have arrived, we don't know what time. She was either just under or just over. So that's her evidence about her reading sometime during the morning when the police were there. She's had no dinner, no dinner she can remember, anyway. She's drunk two Wild Turkeys, bourbons and Coke of slightly indeterminate number, Wet Pussy shots, and at some stage a police officer in the morning records, '[V25C1] too drunk to make a statement'. So she is a very heavily intoxicated person throughout all this, and probably all the way out through that next morning as well.
>
> It's really important, because you're being asked to rely on her … And in my submission to you, it's incredibly difficult to trust someone who's that intoxicated. It's just not good enough. Certainly, Ms [V25C2] describes her as being drunk.[94]

93 V1. See also V32.

94 V25.

This passage is noteworthy in two ways. First (and noting that this was not a case in which the Crown attempted to assert that the complainant was so intoxicated as to be incapable of consent), it demonstrates how complainant intoxication can feature as an asserted *weakness* in the Crown case. Second, it illustrates a feature of how intoxication evidence commonly featured in cases in this study: in the absence of any expert evidence about AOD effects, and, in this instance, with non-expert commentary about the significance that the jury should attach to the complainant's intoxication.

Not only were cross-examination questions about the quality and accuracy of an intoxicated complainant's recall common, in some cases, the defence sought an 'unreliable evidence' direction under section 32 of the *Jury Directions Act*.[95] Section 32 provides that '[t]he prosecution or defence counsel may request … that the trial judge direct the jury on evidence of a kind that may be unreliable'. The fact of a person's intoxication is not expressly mentioned in the list of 'evidence of a kind that may be unreliable' outlined in section 31, but the list is not exhaustive. The *Victorian Criminal Charge Book* provides examples of unreliable evidence, including '[e]vidence of a witness who was alcohol or drug-affected at time of the events, whether voluntarily or by the alleged actions of the accused'.[96]

Given that we had access to the judge's charge to the jury in only a small number of cases, our discussion here is necessarily tentative; and because the sample for this study is not representative, we cannot comment on the frequency with which an unreliable evidence direction is requested in rape trials where there is evidence of complainant intoxication. However, in a number of cases in this study, defence counsel did request a jury direction to the effect that the complainant's evidence may be unreliable due to her intoxication.[97]

In the cases where a direction was requested, prosecutors did not generally resist. In one case, the Crown began to do so, submitting that 'evidence of the intoxication would seem, on first principles, to fall outside' the scope of section 32 of the *Jury Directions Act 2015* (Vic), but ultimately abandoned this position.[98] The trial judge appeared[99] to settle on the view that a direction of the sort sought by the defence should be given: '[W]ell, the jury are clearly going to want to focus on her state of intoxication. It'll be an important matter in assessing her credibility. They'll obviously see that as an issue of potential unreliability.'[100]

In some cases, the Crown Prosecutor attempted to confine the terms of the direction:

95 Previously *Evidence Act 2008* (Vic) s 165 ('*Evidence Act*').

96 Judicial College of Victoria, *Victorian Criminal Charge Book* (2007) [4.21.21] <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#4377.htm>, citing *R v Maple* [1999] VSCA 52; *Hudson v R* [2017] VSCA 122.

97 V12, V13, V18, V22, V25, V27, V29, and V32.

98 V13.

99 We did not have access to the transcript of the judge's charge in this case, and cannot confirm the inclusion or wording of a section 32 direction in this trial.

100 V13. In another case (V22), the judge ruled that a section 32 direction on the basis of the complainant's AOD consumption was not warranted in the circumstances of the case.

DC: The only other one I had is that I'd seek that Your Honour give an unreliable witness warning, based on the fact that – or the effect of intoxication on her memory.

TJ: It's necessary, I think, to just direct the jury as to the effect of alcohol. Sometimes alcohol can have a disinhibiting effect obviously. Other times it can render somebody incapable of acting appropriately both physically and mentally. The Crown's case here is that she was so intoxicated she was incapable of giving consent. Is there anything else?

CP: Excuse me, Your Honour, just on that, I would resist labelling her an unreliable witness, which I think my friend is getting close to asking Your Honour to do. We say the alcohol is a key part of the case and, on any view, even the accused's version, she is extremely drunk, but she's given evidence of what she can recall, and what she can recall clearly goes to the elements of the offence. To actually get close to labelling her an unreliable witness, in my submission, wouldn't be fair to her. …

TJ: Is all you're asking for, Mr [V32DC], a direction to make clear that the effect of alcohol may make someone's memory of events unreliable?

DC: Yes.

TJ: Mr [V32CP], it's really I think a direction as to the effect that alcohol may have on memory.[101]

***

TJ: So is your submission that if I'm to give the unreliable evidence direction, it should be confined to her being alcohol-affected?

CP: Yes it is – or intoxicated.

TJ: Intoxicated.

CP: Yes which could be …

TJ: That might be a better word.

CP: Because that might cover – well, that would cover the state she was in regardless of how she got there.

TJ: Yes.

CP: And it might have been, we just don't know, it might have been some impact with the Pristiq. That's my submission if Your Honour gives it.

TJ: All right, yes. I follow that.[102]

In this last mentioned case, the judge's charge to the jury included the following:

TJ: I must now warn you about the need for caution when considering [V12C]'s evidence.

I must give you this warning because the evidence [V12C] gave that she had consumed alcohol in combination with her Pristiq [antidepressant] medication and was highly intoxicated to the extent that she had vomited and then, on her evidence, fallen asleep.

My warning to you is as follows. It is the experience of the law that the evidence of a witness who is highly intoxicated may be unreliable. This unreliability can

101 V32.
102 V12.

> arise due to the effects heavy intoxication can have on a person's perceptions and recollections.
>
> The law says every jury must take this potential unreliability into account in determining whether you accept [V12C]'s evidence at all, and if you do accept it, in whole or in part, and then deciding what weight to give to that evidence.
>
> In considering the safety of relying on [V12C]'s evidence, you should have regard to any supporting evidence led in this trial that you accept, and by supporting evidence, I mean evidence from a source that is independent of [V12C] and that tends to show the truth of her evidence of the accused's guilt.[103]

In another case – the case, discussed above, in which defence counsel submitted in closing that 'it's incredibly difficult to trust someone who's that intoxicated' – the judge's charge included a similar warning:

> Reliability, that is another matter. I need to say a little bit more about this, because in this case you have heard evidence about a good deal of drinking going on during the course of that evening, and certainly each of Ms [V25C2] and Ms [V25C1] accepted that they had a fair bit to drink, both before the club and after they got to the club and, indeed, there was some alcohol, I think, in the car, and each of them, you may think, accepted that they were affected by alcohol to some degree or another. …
>
> I must warn you in relation to both Ms [V25C1] and Ms [V25C2], that it is the experience of the law that evidence that a witness is affected by alcohol gives rise to a real question about their reliability. They may be unreliable. That unreliability can arise as a result of the perceptions of the individual being affected by alcohol or the recollections of the witness being affected by alcohol. The law says that every jury must take those considerations, that potential unreliability caused by the alcohol into account when considering the evidence of those witnesses.
>
> You must take into account, in determining whether you accept the evidence of Ms [V25C1] and Ms [V25C2], the fact that they had taken on board a not insignificant quantity of alcohol that night. You have to take that into account in deciding whether you accept their evidence in whole or in part and in deciding what weight you give to that evidence.[104]

The proposition that a complainant's intoxication *may* impact on her recall of the alleged rape is uncontroversial. However, it would be preferable to approach the 'experience of the law' on this topic in a more nuanced way,[105] with greater cognisance of the scientific literature on AOD effects and memory.[106]

Thirty-two of the 33 trials in this study were jury trials, so we have no capacity to comment on how claims made by witnesses, counsel and judges about

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103 Ibid.

104 V25.

105 A more nuanced approach is also supported by Victorian Court of Appeal jurisprudence. In *Keogh v The Queen* [2018] VSCA 145, the Court held that the complainant's intoxication did not compel the jury to conclude that her evidence, regarding absence of consent, was unreliable: at [93]. In *Roberts v The Queen* (2012) A Crim R 452, 465 [52] (Tate JA), the Court recognised the difference between core issues and peripheral details:

> [W]hile it may be accepted that the intoxication of the complainant reduced her reliability on some of the details surrounding the offending, on the material aspects relating to the elements of rape and false imprisonment her evidence was firm. The inconsistencies alleged were largely peripheral to the offending. Under cross-examination, the complainant was resolute and unwavering that the appellant had penetrated her vaginally and that he had done so forcibly and without her consent.

106 See above nn 17–18.

intoxication, memory and reliability impacted on ultimate decision-making and trial outcomes. One trial was a judge-alone trial,[107] resulting in an acquittal, and the judge's reasons for decision offered a rare glimpse:

> On her account, Ms [V30C] consumed not less than eight spirit drinks over a number of hours from 5:30pm on 24 April into the early hours of 25 April.
>
> In his evidence, the accused stated that Ms [V30C] consumed two espresso martinis at [a bar] and about four spirits and mixed drinks at his flat. If this account is accurate, then the complainant consumed a range of between eight to eleven spirit drinks on this evening.
>
> I must be careful not to build assumptions into this estimate. I do not know the strength of the drinks consumed, the precise time over which they were consumed, or have any evidence as to the complainant's tolerance to alcohol.
>
> It is reasonable to observe however that it is not an insignificant amount of alcohol consumed and I can consider this evidence in conjunction with other aspects of the evidence.[108]

The judge went on to considers gaps in the complainant's recall of events and some inconsistencies in her account, before returning to her intoxication: 'These factors of having no recollection and of inconsistency may be explicable, at least in part by alcohol consumption.'[109]

E Defendant Intoxication, Reasonable Belief in Consent and the 'Sober' Reasonable Person

The current legislation provides that the relevant touchstone for assessing whether the accused had a reasonable belief in consent is 'a reasonable person who is not intoxicated' – ie, section 36B of the *Crimes Act* (Vic) and section 47 of the *Jury Directions Act* – was operative in 15 of the 33 cases in this study, being charges related to events on or after 1 July 2015.[110] In order for it to be possible for section 36B and section 47 to be engaged in these 15 trials, two conditions were required: evidence that the accused was intoxicated *and* a defence case focused on asserting a belief in consent. Noting that in only 8 of the 15 trials did the accused give evidence at trial, the 'no reasonable belief in consent' element of rape was rarely the subject of examination or cross-examination questions or answers.[111]

With the significant qualification that we did not have access to any of the closing addresses and only two of the charges for the post-2015 definition trials, our impression is that the 'no reasonable belief in consent' element of the definition of the offence was rarely in issue in the trials we analysed. In none of the 15 post-

107 V30. This trial was conducted by a judge alone during a period in 2020 when the County Court of Victoria suspended jury trials as a COVID-19 public health measure.

108 Ibid.

109 Ibid.

110 The amendments to the *Crimes Act* (Vic) made by the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) came into effect on 1 July 2015 and inserted section 37H, the predecessor to section 36B, which commenced on 1 July 2017. The *Jury Directions Act* commenced on 29 June 2015. The remaining 18 trials in the study's data set related to conduct alleged to have occurred before 1 July 2015.

111 V28 was one such instance.

2015 definition cases was the defence position based exclusively on challenging the Crown's ability to prove that the accused did not reasonably believe that the complainant was consenting. In each case, the focus was on one or both of the other (actus reus) elements of rape: asserting that the physical acts alleged never occurred at all and asserting that the complainant consented to the physical acts. If a reasonable belief in consent was asserted, it was asserted as a secondary defence line, behind an assertion that the complainant had consented. Thus, as has traditionally been the case in rape trials, the focus was heavily directed at the *complainant's* actions and state of mind (as to consent).

It follows that there were limited opportunities for sections 36B and 47 to be engaged, and overall they were not prominent in this study. However, they were discussed in some cases, though in a variety of ways. In one case defence counsel was keen to ensure that the jury was directed in such a way that they understood that the accused's intoxication was still relevant to his subjective belief:

> TJ: All right. We've already discussed the reasonable belief element in relation to self-induced intoxication. It's a relatively simple direction.
>
> DC: It is, Your Honour.
>
> TJ: Although relatively simple is one thing. Whether a jury understands it is another.
>
> DC: Yes. I just note the – and this also comes from the [*C*]*harge* [*B*]*ook*, 'When directing a jury on the relevance of the accused's intoxication it may be important to separate the effects of intoxication on whether the accused held a belief in consent and whether any such belief was reasonable. It's erroneous to conflate those issues.' So, clearly self-induced intoxication does bear upon reasonableness in that it's irrelevant when it's self-induced but it is part of the circumstances and part of subjective belief. So it still bears some relevance, as far as that is concerned.
>
> TJ: I mean we do have a problem with that as well because as high as we get is his description saying that he was drunk and we don't even know what that means.
>
> DC: Yes.
>
> TJ: Subject to what you say I would just give a direction along the lines as in the charge book, that in this case you've heard evidence that [V4A] was intoxicated at the time he inserted his penis into [V4C]'s vagina. If you find that he was intoxicated you must not take this into account when assessing [whether] his belief about consent to that penetration was reasonable and then the law requires you to consider what the beliefs of a reasonable person who was sober might have been.
>
> DC: Yes. I would request that there just be some comment about its relevance, whatever it may mean, whatever the jury do make of it to a subjective belief but it doesn't bear upon the issue of reasonableness.[112]

In a case previously discussed, the prosecutor initially attempted to resist the characterisation of the matter as one in which the Crown's ability to prove non-consent was the only 'battleground'.[113] It appears that one of the reasons for submitting that the element of 'no reasonable belief in consent' was also in issue

112 V4.
113 V9.

was that there was evidence in the accused's police interview that he was 'on his own words, highly intoxicated at the time'.[114]

In another case, the prosecutor pursued a different strategy on evidence of the accused's intoxication. The Crown sought a direction on reasonable belief in consent under section 47 of the *Jury Directions Act*, but, surprisingly, suggested that reference to subsection 47(3)(b)(i) – 'regard must be had to the standard of a reasonable person who is not intoxicated' – may not be required:

> TJ: You don't want the intoxication … ?
>
> CP: No. Well [s 47(3)(b)(i)], if the intoxication is self-induced, regard must be had to the standard of a reason[able person] – I don't seek that, no.
>
> TJ: Well there has been evidence about drinking, hasn't there?
>
> CP: There has, whether what intoxication means in that …
>
> TJ: … But don't you need 3(b)(i)?
>
> CP: Well the question is, whether he is intoxicated.
>
> TJ: Well, that's a matter for the jury. If they find that he was, don't I then need to tell them how to deal with it if they make that finding?
>
> CP: Yes.
>
> TJ: It's not a concession on the part of the Crown that he was intoxicated. But there is obvious evidence here that they'd been drinking, that they were throwing down vodka shots.
>
> CP: Yes, the Crown position is that he was – he had had enough alcohol to do things that may well be things he mightn't do sober.[115]

To this point in the discussion, the Crown's position appears to resemble some of the defence counsel approaches to *complainant* intoxication, discussed above. The Crown seeks to rely on evidence of the accused's intoxication for a particular purpose – to show disinhibition – but appears to perceive a risk that the jury might form the view that the accused was so intoxicated that he lacked the mens rea for rape. This suggests that evidence of the accused's intoxication was seen as both a strength and a potential weakness for the Crown. Ultimately, in this case, the prosecutor was persuaded by the trial judge that the section 47 direction must include a reference to 'the standard of a reasonable person who is not intoxicated', and that this could assist the Crown case:

> TJ: So you've got to have a [section] 47[(3)](b)(i) in this case, given the evidence of the drinking. Yes?
>
> CP: That's what's troubling me, Your Honour.
>
> TJ: But it's not a concession that he was intoxicated.
>
> CP: No, but I'm just thinking of the complicating issues by having that direction.
>
> TJ: Well the jury might think that if he was too intoxicated to know what he was doing, that that leads to an acquittal.

114 Ibid.
115 V18.

CP: That's right.

TJ: Well, … [section 47(3)(b)(i)] says that it doesn't … [I]t's open for a jury to find as a fact that he was affected by alcohol to the extent of being intoxicated, whatever that means, and therefore they should be directed that in assessing the reasonableness of his belief – which after all is one of the main things they're going to have to do, they should know that if the intoxication was self-induced – which here it clearly was – regard must be had to the standard of the reasonable person who is not intoxicated.

CP: Yes, yes. I … I …

TJ: All right? You agree with that?

CP: I do now, Your Honour.

TJ: Yes, all right, so [section] (3)(b)(i), yes?

V DISCUSSION

Although there was evidence of AOD consumption by the accused in a significant number of cases in this study (28 of 33), *accused* intoxication evidence did not loom large in many trials in this study. Even though it remains technically possible in Victoria (to a greater extent than in most other Australian jurisdictions)[116] for an accused person to rely on intoxication evidence as exculpatory, we saw little evidence of accused persons attempting to 'benefit' from their intoxication. It is important to recognise that this is only even possible where the trial focuses on the major *fault* element for rape – ie, the accused's state of mind and its reasonableness. As noted above, in the cases analysed in this study, the dominant focus was on the Crown's ability to prove the *conduct* elements: that the alleged sexual activity occurred, and that it occurred in the absence of consent from the complainant.

By contrast, *complainant* intoxication evidence was a dominant feature of the majority of the 27 trials that included evidence of AOD consumption by the complainant. It follows that most of what we have learned about intoxication evidence in Victorian rape trials emanates from this large subset of this study's full sample. Here, we offer six interrelated reflections on the findings presented above.

First, section 36(2)(e) of the *Crimes Act* (Vic) may be relatively ineffective as a mechanism for breaking the traditionally assumed nexus between intoxication and consent. We detected some evidence of reluctance on the part of prosecutors to rely on the legislation.[117] Contributing factors appear to include the high threshold set by

116 See above Part II(B).

117 In a future phase of the larger study of which this article is a part, we plan to undertake interviews with prosecutors and defence counsel with rape trial experience, in order to better understand the strategic choices that lawyers make about intoxication evidence in rape trials. A study that involved interviews with barristers who prosecute and defend rape cases in England and Wales found that intoxicated complainants' credibility was a leading concern in their case-building strategies: Anna Carline and Clare Gunby, 'The Legal Framework and Practitioner Perspectives on Alcohol and Rape' in Heather D Flowe and Anna Carline (eds), *Alcohol and Remembering Rape: New Evidence for Practice* (Palgrave Pivot, 2021) 21. Carline and Gunby further note that 'very few alcohol-related cases proceeded on the basis that the complainant had lost the capacity to consent', whilst 'barristers argued that cases in which the

the words of the statute ('*so affected* by alcohol or another drug as to be *incapable* of consenting' (emphasis added)), common imprecision about the extent of the complainant's intoxication, and the fact that trials typically do not feature expert evidence about the relationship between AOD effects and cognitive functions like consent formation. There was very little sense in the cases we analysed that the existence of section 36(2)(e) invites or encourages Crown prosecutors to actively and directly rely on evidence of the complainant's intoxication to prove the elements of rape, or that such evidence is perceived as a 'strength' of the Crown case. In fact, this study suggests that, despite attempts to shift the role played by complainant intoxication in rape trials, on balance, such evidence may still weaken rather than strengthen the Crown case. These findings are relevant not only in Victoria, but also in other jurisdictions where similar provisions have been adopted. They will be especially relevant in NSW, where the Parliament recently amended the complainant intoxication provision in the *Crimes Act* (NSW) to adopt the Victorian formulation: '[a] person does not consent to a sexual activity if … the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity'.[118]

Secondly, we have previously hypothesised that, despite the tenor of progressive reforms like the introduction of section 36(2)(e), complainant intoxication might remain something of a 'double-edged sword' in terms of its value as part of the Crown's case in a rape trial.[119] Our analysis of transcripts for this study suggests that it may be more common for complainant intoxication to have only a *single* edge – one that (still) tends to weaken the Crown case rather than strengthen it. Putting to one side those cases where the complainant was asleep or unconscious – which is already the subject of a discrete 'deemed' non-consent provision in section 36(2)(d) – in many cases in this study, the only way in which evidence of the complainant's intoxication was engaged was by the defence to challenge the Crown case. It was relied on to suggest disinhibition that was productive of consent and to raise doubt about the accuracy of the complainant's recall of events and, therefore, the reliability of her evidence. We did not observe the transformed rape trials to which statutory reforms like section 36(2)(e) were intended to contribute.

Thirdly, our findings suggest that architects of statutory reform may have under-appreciated that much of the damage done by complainant intoxication evidence is not to the Crown's ability to prove non-consent *per se*, but, indirectly, via challenges to the quality and reliability of the complainant's evidence. On

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complainant was very drunk are likely to involve extreme memory impairment, which would impact on the ability to build a case that would be likely to ensure a conviction': at 27. See also Clare Gunby, Anna Carline and Caryl Beynon, 'Alcohol-related Rape Cases: Barristers' Perspectives on the *Sexual Offences Act 2003* and Its Impact on Practice' (2010) 74(6) *Journal of Criminal Law* 579 <https://doi.org/10.1350/jcla.2010.74.6.670>; Anna Carline and Clare Gunby, '"How an Ordinary Jury Makes Sense of It Is a Mystery": Barristers' Perspectives on Rape, Consent and the *Sexual Offences Act 2003*' (2011) 32(3) *Liverpool Law Review* 237 <https://doi.org/10.1007/s10991-011-9100-6>.

118 *Crimes Act* (NSW) (n 26) s 61HJ(1)(c), as amended by *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) sch 1.

119 McNamara et al (n 53) 168–9; Quilter, McNamara and Porter, 'The Nature and Purpose of Complainant Intoxication Evidence in Rape Trials' (n 53).

this issue, prevailing evidence law, directions and practice tend to still embody unexamined assumptions about the relationship between intoxication, memory and reliability. This may not be the stuff of traditional rape myths – in the way that the culturally-assumed relationship between AOD consumption and consent to sex was and, to some extent, still is – but our findings suggest that it may nevertheless require attention and potential reform as part of the ongoing project of modernising rape trials.

Fourthly, there may be a connection between these continuing barriers to courtroom justice for victims of sexual violence and another of the study's findings: that evidence of the intoxication of the complainant and/or accused largely took the form of imprecise and colloquial self-assessment, with jurors very rarely having the benefit of medical/scientific expert evidence on AOD effects. One of the consequences of layperson self-assessment and definitional imprecision about intoxication, and reliance on 'common knowledge' (rather than scientific expertise) about the effects of alcohol in particular, is that it fosters the prevailing conventional wisdom: that intoxication equates to impaired memory, which in turn provides a basis for defence counsel to characterise the complainant's evidence as unreliable, and expect the jury to be directed accordingly.

Fifthly, rape trials featuring intoxication evidence would be better served if expert evidence on relevant AOD effects was more routinely adduced.[120] This applies not only to less 'familiar' drugs (like methamphetamine and benzodiazepines), but also to the drug that is most likely to feature in rape trial evidence: alcohol. Our findings suggest that it is especially important in relation to impacts on memory. The assumption that was evident in a number of trials in this study – that it is 'known' that intoxication reduces the reliability of a witness's evidence – does not align well with current research, nor does it recognise the wide variability of intoxication's impacts upon memory.

Finally, the recently enacted *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) amended the *Jury Directions Act*, adding a new direction to address misconceptions about a person's use of drugs and alcohol.[121] This change, as with all the recent statutory amendments based on the VLRC's recent recommendations,[122] should be assessed on its merits. Here, we simply observe that most of the ways in which complainant intoxication was engaged to challenge the Crown's case in trials in this study would be left untouched by such a direction.

120 The rules governing the admissibility of expert evidence (see, eg, *Evidence Act* (n 95) pt 3.3) are beyond the scope of this article, but, in general, they do not prevent the wider use in rape trials of expert opinion on AOD effects. See generally Jill Hunter et al, *The Trial: Principles, Process and Evidence* (Federation Press, 2nd ed, 2021) ch 12.

121 See *Jury Directions Act* s 47G(c): '[I]t should not be assumed that a person consented to a sexual act just because the person … drank alcohol or took any other drug'.

122 *Improving the Justice System* (n 24) 441.

VI CONCLUSION

On paper, Victorian rape laws have been dramatically improved over the course of the last four decades. Current provisions of the *Crimes Act* (Vic) that attempt to recast the relevance of intoxication evidence are a component of this 'modernisation' project. However, this study found limited evidence that the intended transformation of the courtroom has occurred. The most troubling finding was that evidence of complainant intoxication continues to be engaged to challenge the veracity of the rape allegation. The problematic assumed nexus between AOD consumption and consent – which has long confounded the achievement of justice for victims of sexual violence – appears to have been broken only at the extreme end of the spectrum: where the complainant was intoxicated to the point of unconsciousness. Short of this point, section 36(2)(e) was largely invisible, and complainant intoxication evidence was more likely to be engaged by the defence than the prosecution – whether directly, to suggest that ('drunken') consent was in fact present, or indirectly, to cast doubt on the accuracy of the complainant's account, given her 'impaired' memory and recall capacity. We conclude that one of the aspects of rape trials that remains to be modernised is the nature and quality of evidence about AOD effects on cognitive functions including memory. The 'experience of the law' about intoxication and evidence reliability appears out of step with the contemporary state of scientific knowledge, and this is operating to the detriment of courtroom justice for victims of sexual violence.