Submission to the Legal and Constitutional Affairs References Committee

Current and proposed sexual consent laws in Australia

2 March 2023

These recommendations are submitted by Dr Kirsty Duncanson, School of Humanities and Sciences, and Dr Emma Henderson, School of Law, La Trobe University. We have focused on two of the reference points ((e) The efficacy of jury directions, and (g) Other matters)) making three recommendations based on our research expertise in the area of rape trials. Our recommendations are:

1. Jury directions about rape myths should be utilised before and throughout sexual offence trials rather than only at the conclusion of the trial.
2. Members of the jury should be provided with an information "bundle" or "pack" at the start of sexual offence trials.
3. The creation of a national trauma-informed curriculum for law schools and professional development for barristers, about the wider context of sexual violence and sexual offending

e) the efficacy of jury directions about consent;

Recommendation: jury directions about rape myths should be utilised before and throughout sexual offence trials rather than only at the conclusion of the trial.

In our research looking at the efficacy of jury directions in rape trials, we examined the literature surrounding jury directions in rape cases, and went on to analyse the use of jury directions in ten rape trials conducted in the Victorian County Court in 2010.[1] We found that by design, most often the jury directions are ineffective at their stated aim of combating rape myths and leading to more just outcomes in rape trials. Only when the jury directions were used 'off label' (during pre-trial hearings and throughout the trial instead of only during the final charge to the jury) was there an outcome that suggested the jury directions had been effective.[2] We believe that there are several important contributing factors to the ineffectiveness of the jury directions in combatting rape myths.

As we have argued elsewhere, asking jurors to 're-organise' the evidence they have heard during the trial at the end of the trial following the judge's summing up, goes against what we know about the way that human beings process information. Listeners deploy implicit strategies in order to organise and make sense of complicated, disordered and emotionally challenging information. In particular, listeners use pre-existing schemas or narratives,

[1] See Powell et al, 'Meanings of 'Sex' and 'Consent': The Persistence of Rape Myths in Victorian Rape Law', (2013) 22(2) *Griffith Law Review* 456; Emma Henderson & Kirsty Duncanson, 'A Little Judicial Direction: Can the use of Jury Directions Challenge Traditional Consent Narratives in Rape Trials?' (2016) 39(2) *UNSW Law Journal* 718*;* Kirsty Duncanson and Emma Henderson, 'Narrative, Theatre and the Potential Interruptive Value of Jury Directions for Rape Trials in Victoria, Australia' (2014) 22(2) *Feminist Legal Studies* 155.
[2] Henderson and Duncanson (2016) (n 1).

triggered by the information they see or hear, to construct narratives to aid their comprehension and memory of that information.[3] The order of information delivery is crucial to this process, because once a schema or narrative has been triggered, non-compliant information is forgotten or reconfigured to 'fit.' For instance, in one research project where a faux jury were questioned about their decision to acquit an accused, one juror had constructed a convincing but entirely false narrative to explain away bruising on a complainant's throat. The evidence about bruising did not fit with that juror's already existing schema about the facts of the case, and at the end of the trial the juror was convinced the complainant had been on a rollercoaster ride.[4] Further, research shows that jurors place greater authority on the information they hear first in the trial:[5] in a conventional rape trial, the jury hear the rape myth first, and the refutation of it at the end during the Judge's charge. A jury direction coming at the end of the trial is not be sufficient to undo this ordering of information – the jury have already sorted, discarded and forgotten any evidence that does not accord with their theory of the case.

By contrast, in one of the cases we analysed, many of the rape myths which might normally be expected to overwhelm the trial were inhibited by the Judge's use of direction-influenced decisions about key pieces of evidence discussed at the pre-trial hearing and then excluded from the trial itself.[6] In this trial, the jury directions given at the end of the trial had much less work to do, because negative narratives had had much less emphasis within the trial itself. At the heart of our argument is the theory that the potential effectiveness of jury directions in rape cases depends on the way the legislative intention behind them is utilised *throughout* the trial, and not merely at the end.

Essentially we have argued that jury directions given at the conclusion of the trial come too late in the piece to disrupt problematic narratives. Our hypothesis is that in order to successfully transform rape trials in the way that the legislators and reformers seem to have intended, jury directions need to be given much greater prominence within the trial. It is possible that if used in the early stages of decision-making, at pre-trial hearings and in evidentiary rulings throughout the trial, jury directions aimed at dispelling rape myths may help prosecution and defence counsel to move away from a continued tendency to rely on myths at trial.[7] It also seems likely that a judicial direction to the jury *before* the airing of evidence which is likely to have the effect of triggering rape myth schemas, would be much more likely to reduce the impact of narratives based on myths.

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[3] Richard Sherwin, 'Law Frames: Historical Truth and Narrative Necessity in a Criminal Case' (1994) 47 *Stanford Law Review* 39, 50.

[4] Louise Ellison and Vanessa Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49 *The British Journal of Criminology* 202, 208.

[5] Jennifer Temkin, '"And Always Keep A-hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom' (2010) 13 *New Criminal Law Review* 710, 719.

[6] Henderson and Duncanson (2016) (n 1).

[7] In interviews with barristers (HEC18411; What Would a Barrister Do (2019-2020) we found evidence of widely-held acceptance of rape myths in both defence and prosecution barristers , and the frequent use of rape myths at trial.

The VLRC canvassed the idea of moving the jury directions earlier in the trial in its report *Improving the Justice System Response to Sexual Offences (2021).*[8] After examining the position taken by the NSWLRC, where it was recommended that judges should be able to repeat directions at any time in the trial,[9] and reforms in England and Wales, the VLRC stated that jury directions should be given before or during the evidence, and that judges should be able to repeat them at any time in the trial.[10]

We propose that jury directions in sexual offence trials in Australia should be utilised throughout the trial, with particular emphasis on pro-active use by the judge during the pre-trial phase, and whenever rape-myth triggering evidence occurs during the trial.

Recommendation: Members of the jury should be provided with an information "bundle" or "pack" at the start of sexual offence trials.

From our research we know that juries struggle to process the information that they are provided with during trials.[11] This can lead to jurors relying on rape myths to help hear, organise and recall crucial parts of the evidence.[12]

At the Old Bailey, England, each juror receives an information 'bundle', containing a compendium of trial evidence, designed to aid jurors in information-seeking and processing.[13]

We propose that at the start of the trial, each member of the jury in a sexual offence trial be provided with a schedule of evidence, a copy of relevant jury directions as decided by the judge and parties during pre-trial hearings, decision-making tools such as a "question tree" aligned with the relevant legislation, and note pad and pen.

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[8] Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences Final Report* (September 2021) chapter 20.

[9] Ibid, at 20.53

[10] Ibid, at Recommendation 79 a – c.

[11] Kirsty Duncanson and Emma Henderson, 'Interpolation by Design: Do Court Buildings influence Jury Decision-making?' in K Duncanson & E Henderson (eds), *Justice Building: Courthouse Design and Social Justice* (Routledge, 2021).

[12] Ibid.

[13] Nancy Marder, 'Two Weeks at the Old Bailey: Jury Lessons from England' (2011) 86(2) *Chicago-Kent Law Review* 537, 548; Duncanson and Henderson (n X)

h) any other relevant matters.

Recommendation: The creation of a national trauma-informed curriculum for law schools and professional development for barristers, about the wider context of sexual violence and sexual offending

On the basis of research we have conducted with barristers and law schools, we understand that a persistent impediment to achieving justice for adult sexual offence complainants is the implicit belief in rape myths held by both defence and prosecuting barristers.[14] Barrister rape myth belief is enabled by the lack of comprehensive and critical content provided by law school curriculum and delivery, and the lack of specialist professional training for practicing barristers. We propose that a possible solution is to require law school curriculum to include information about sexual violence that pre-emptively counters rape myths, delivered using trauma-informed curriculum. We also propose that barristers are motivated to complete ongoing, trauma-informed specialist professional development. A well-designed trauma informed curriculum would have the added benefit of reducing vicarious trauma amongst barristers.

In interviews with Victorian barristers practising in the area of adult sexual offence cases we found evidence of widely held rape myth acceptance and the extensive use of rape myths at trials. Many of the barristers we interviewed struggled to accurately define 'rape myth' or explain what might constitute a rape myth. Most barrister participants articulated rape myths during the interviews without awareness that they were doing so. Several described implementing rape myths as strategy during trials and several reported witnessing rape myths used by other barristers during trials. Belief in rape myths was shared by both defence and prosecuting barristers. Our findings suggest that rape myth beliefs are extensively held by barristers and used at trial either deliberately or without awareness that they are doing so.

In this research we found that none of the barristers we interviewed had received training, specialised education or professional development designed to counter rape myths.

In addition to our barrister interview research, we conducted a survey of criminal law teaching staff at all 32 accredited law schools across Australia. The purpose of our research was to discover what content concerning sexual offences and sexual violence is delivered by law schools, how it is delivered and assessed, and if this has changed across time. We found that the amount of teaching time dedicated to sexual offences has diminished over twenty years, with many schools reducing the amount of face to face classwork due to time constraints and concerns about student mental health. Information about sexual offences is most often made available to students as online content to be accessed at student convenience, or in seminars with optional attendance. Whilst some schools previously delivered critical content about sexual offences and information about sexual violence, this has also been reduced in recent years for similar reasons. Finally, while teaching staff are

[14] Emma Henderson and Kirsty Duncanson, HEC18411 "What would a barrister to? (2018-2020); Kirsty Duncanson and Emma Henderson, HEC 21197 'Contextualising Sexual Offences in the Priestly Eleven" (2021-2022).

unable to communicate to students that sexual offences will not be examined due to accreditation requirements, many participants indicated that there was a disinclination to assess sexual offences due to concerns about student mental health.

Our findings indicate that knowledge about sexual offences held by most graduates of Australian law schools is reliant on self-directed learning in anticipation of exams that may or may not address sexual offence law. Generally, it appears that students are not adequately supported to learn about sexual violence or critiques of sexual offence law that might counter rape myth belief. Additionally, the capacity of teaching staff to develop curriculum that might support safe (non-triggering) learning about sexual offences and sexual violence is limited by time constraints, workload issues and research focused bench marking.

This means that Australian law graduates are provided with minimal knowledge about sexual offences and sexual violence during their law school education. This enables students to graduate and pursue work as barristers with unchallenged, commonly held rape myths.

Research conducted in England found that when barristers hold rape myth beliefs they were more likely to use them during trials when working defence, and as prosecuting counsel they were less likely to challenge the use of rape myths, even when specific rape myths are prohibited.[15]

We propose:

1. A national curriculum be developed that addresses the broader context of sexual violence and sexual offending throughout Australian law schools.

2. The Curriculum should be trauma-informed and delivered in a manner that encourages students to engage with the content.

3. That appropriate a trauma-informed professional education curriculum be developed to support barristers in identifying, challenging and avoiding the use of rape myths in trials.

4. A coordinated state-based programme to encourage barristers to complete the curriculum discussed above.

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27 February 2023

[15] Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing 2008).