Duncanson Response to Submission 17

(Quilter and McNamara)

Thank you for the invitation to respond to submissions 17 (Quilter and McNamara), 43 (Liberty Victoria) and 73 (the Law Council Australia) for the Inquiry, Current and Proposed Sexual Consent laws in Australia. I am honoured to take up the opportunity of responding to Professors Julia Quilter and Luke McNamara's submission (17).

The work supporting Submission 17 is substantial and rigorous and builds on decades of research into sexual violence and more particularly the processing of rape complaints through trials. Quilter and McNamara's (Quilter 2021; Quilter and McNamara 2021; Quilter, McNamara and Porter 2022a; Quilter, McNamara and Porter 2022b) recent and thorough going study of sexual offence trials in Victoria and NSW documents what currently takes place in courtrooms and the impact of law reforms in Australia.

My responses below note where my research and expertise particularly corroborate Quilter and McNamara's submission, and I expand on some of their points using the work of Dr Emma Henderson and myself where it has enabled us to make further recommendations. I set out key observations and recommendations that I can endorse on the basis of my expertise.

1. The operation of consent laws in each jurisdiction

1. Quilter and McNamara's write that law reforms pertaining to the definition of consent as "free and voluntary agreement" and providing that "a person that says or does nothing *does not consent*" – are "largely ignored" during trial (p2). Cross-examination of complainants continue to seek evidence of active non-consent and defence council "attempt to infer consent on the basis of silence" (p2). These findings are consistent with mine and Dr Henderson's (2014; 2016) trial transcript analysis. We similarly observed these elements of the consent definition ignored in courtrooms and observed defence seeking to infer consent "on the basis of silence." Inferred consent in Victorian courtrooms has also been documented by Burgin and Flynn (2021).
2. Henderson and my findings from trial transcript analysis and barrister interviews (2018-2020) are also consistent with those of Quilter and McNamara on the point that prosecutors and judges largely ignored defence persistence in inferring consent on the basis of complainant behaviour and questioning the absence of explicit non-consent, despite reform (p4)**.** Of particular significance in our barrister interviews we found that prosecutors do not challenge defence use of inferred consent nor defence questioning of absent non-consent because they believe in rape myths and because they feel that to challenge rape myth use is not a neutral act, as such it is antithetical to their duty to the court:
    a. In our interviews most barristers who had prosecuted adult rape trials demonstrated rape myth belief. Almost all interviewed barristers expressed explicitly that reforms had "gone too far," making it difficult to reach acquittal.

This indicates some prosecutors may not challenge myth-based lines of questioning because they do not recognise them as myth. Our findings correspond with Temkin (2010) and Temkin and Krahe's (2008) English research, which concluded that prosecutors do not challenge rape myth use at trial because prosecutors either believed the myths or felt too inexperienced to make challenges.

b. All but one of the interviewed prosecuting barristers described disinclination to challenge rape myth use by defence, where they observed it, because they understand their duty is to the court. Prosecuting barristers repeatedly stated that they do not represent the complainant. They understand their duty to the court means they must remain "neutral" and to challenge a rape myth is not neutral.

3. Quilter and McNamara state: "the concept of 'relevance' that underpins the admission of all evidence is given such a wide interpretation in sexual offence trials such as to risk undermining progressive consent law reforms and perpetuating damaging stereotypes" (p4). This is consistent with the findings from our barrister interviews that barristers use rape myths and do not challenge rape myth use because of the way the concept of 'relevance' informs the admission of evidence:
    a. Barristers explicitly stated they introduced evidence that may be understood as introducing rape myths to trials. Their justifications included:
        i. the need to provide complainant motivation for making a false complaint;
        ii. That if there is evidence to support an argument which happens to be a rape myth, it is necessary to invoke the myth; and
        iii. that their duty to their clients required them to follow their clients' instructions, whether or not it relied on rape myths. Barristers regularly described themselves as "cogs in the machine" and thus that defence barristers are compelled to represent their clients' version of events, even if these involved rape myths.
    b. Almost all the barristers we interviewed demonstrated implicit belief in rape myths by articulating rape myths as unproblematic knowledge about sex and rape during the interview discussions. This was the case even when participants were able to accurately describe a range of rape myths when asked to do so.

    From our findings, many defence barristers use rape myths because they hold rape myth beliefs. Further defence barristers introduce evidence they know is likely to perpetuate damaging stereotypes and invoke rape myths. They know that such evidence can be challenged or excluded from a trial. However, they submit it due to their duty to their client as part of their "cog in the machine" status within the criminal justice process. Meanwhile, prosecutors do not challenge such evidence either due to their own rape myth belief or because they understand that such a challenge is antithetical to their duty to the court to be "neutral".

On the basis of the correlations between Quilter and McNamara's arguments and Henderson and my research, **I support Quilter and McNamara's proposal that "the operation of consent laws needs to be contextualised and assessed in conjunction with**

other evidence laws (and practices) that may exacerbate rape myths and undermine progressive law reform in relation to consent" (4).

Further than this, **Quilter and McNamara's findings and submission can be used to support mine and Henderson's submission (5) recommendation that law students and barristers be provided with curriculum inclusive of evidence-based knowledge about sexual violence.** Rather than presenting sexual violence education and training in terms of challenging or countering myths, we suggest that legal practitioners and students are presented with established knowledge about what constitutes sexual violence as the exploitation of power causing a range of harms. Curriculum should include information documenting how survivors respond in the moment and assault. We proposed that such education may go some way to ***changing the landscape of knowledge that has previously informed both defence and prosecuting council in sexual offence trials and thereby reduce the reliance on rape myths in sexual offence trial***. Importantly, ***what constitutes rape would no longer be a justifiable question to be ascertained during a trial*** or subjective belief. When barristers have been provided in their curriculum with established knowledge about sexual violence, **raising objections against myth use becomes an appropriate and *neutral duty to the court for prosecutors – removing extra-legal factors that are impeding legal process***.

2. The efficacy of jury directions about consent.

1. Quilter and McNamara state that "directions can be useful but it is important that they are used proactively and *at the time* of the evidence in question" (?)
    a. Henderson and I (2014; 2016) found that jury directions in all but one of the trial transcripts we analysed came too late in proceedings to counter the rape myths present in each trial. This is supported by further jury direction research and scholarship about narrative and audience consumption (Henderson and Duncanson 2014). Consumers process information by sorting it into a narrative. To do this they use already familiar narratives or "schema". The schema used by consumers is triggered by references to deeply familiar schema made very early in the delivery of the information through the presentation of pieces of evidence, word choice and styles of question. Once using a schema, consumers gather and organise the ensuing information as it aligns with the schema. Information that does not align *can* influence the processing of information, but is mostly rejected, ignored, or not heard. Accordingly, jury directions delivered after the invocation of a rape myth is too late to fully counter the influence of the rape myth on jury information processing.
    b. Additionally, the approach of **countering rape myths by "debunking"** – either by explaining an individual myth or countering it explicitly after it has been invoked – **often reaffirms the myth. Quilter and McNamara observe that the jury directions are weak, thus they do not firmly counter with evidence-based knowledge, but suggest that the myth raised** is "not always" or "may not" be true. Temkin (2010) found that if the phrasing or language of a jury direction is at all unclear or confusing it is likely to further reaffirm the rape myth it seeks to counter. The myth remains the dominant narrative in the minds of jurors.
    c. In contrast, in the only rape trial transcript analysed by Henderson and myself that reached conviction, the judge advised the prosecutor during the

pretrial hearing to avoid a particular line of argument. **The judge explained that the line of argument would invoke a specific rape myth which would then require the judge to use a specific jury direction**. The prosecutor followed this advice. Consequently, the judge **did not need to apply the jury direction** at the conclusion of the trial because **the rape myth had not been introduced** to the jury.

On the basis of our research, Henderson and I recommend that not only should jury directions be "used proactively and at the time of the evidence in question," but used proactively during pretrial hearings. This would help to exclude rape myths as obstructive extra-legal factors from sexual offence trials.

We further proposed that **each member of the jury be provided with a "bundle"** that includes established knowledge about what constitutes sexual violence as an exploitation of power causing a range of harms and survivor responses in the moment and following an assault. **Providing sexual violence information as established knowledge outside the trial space pre-empts the implementation of myth-based schemas within trials and aids the exclusion of rape myths as extra-legal factors so that the law can be applied as it has been intended through law reform over the last 30-40 years.**

2. Quilter and McNamara observed that "<u>just because a line of questioning might attract a *jury direction* …does not mean that the defence will not pursue the rape myth … that the direction is meant to counter [because] i) jury directions are … fairly weak [and] ii) their full power is often not deployed by Crowns and trial judges</u>" (p5). Quilter and McNamara's observation that jury directions are not preventing defence barristers from pursuing rape myths and that prosecutors and judges are not using jury directions to object or challenge them corresponds with Henderson and my findings from our trial transcript analysis and interviews with barristers. Similar observations have been made in England (Temkin 2010; Temkin and Krahé 2008).
    a. In our interviews, **most barristers who had prosecuted adult rape trials demonstrated rape myth belief**. Almost all interviewed barristers expressed explicitly that reforms had "gone too far," making it difficult to reach acquittal. This indicates some prosecutors may not challenge myth-based lines of questioning because they do not recognise them as myth. Our findings correspond with Temkin (2010) and Temkin and Krahe's (2008) English research, which concluded that prosecutors do not challenge rape myth use at trial because prosecutors either believe the myths or felt too inexperienced to make such a challenge.
    b. A number of **prosecuting barristers described reluctance to challenge rape myth** use by the defence because they understand their duty is to the court. They repeatedly stated that they do not represent the complainant. **They understand their duty to the court means they must remain "neutral" and to challenge a rape myth is not neutral.**

On the basis of my research, as it corresponds with Quilter and McNamara's submission pertaining to the weakness of jury directions, **I strongly recommend curriculum is developed and mandated for law students and barrister training that provides established knowledge about sexual violence** as the exploitation of power causing a range of harms, and information about how survivors respond in the moment of and following an assault.

Conclusion

Professors Quilter and McNamara's submission is based on evidence generated through rigorous and substantive research. On the basis of their research, my expertise in the field and my own research as it corresponds with Quilter and McNamara's findings, I strongly support Quilter and McNamara's submission.

Responding to Quilter and McNamara's findings I have included above recommendations from Henderson and my submission (Submission 5). I demonstrate how they address issues raised by Quilter and McNamara concerning the efficacy of jury directions, the education of law students and barrister training, and the provision of "bundles" to aid members of the jury in their work.

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Duncanson Response to Submission 43

Liberty Victoria

Thank you for the invitation to respond to submissions 17 (Quilter and McNamara), 43 (Liberty Victoria) and 73 (the Law Council Australia) for the Inquiry, Current and Proposed Sexual Consent laws in Australia. I am honoured to take up the opportunity of responding to Liberty Victoria's submission (43).

I confine my response to two specific points:

1. concern that affirmative consent law reform undermines legal principles (pp4-7; 17).
2. opposition to consent law reform on the basis that "young people" are made "vulnerable" to sexual offending and "likely to be disproportionately affected" by affirmative consent law reform (p17)

1. Concern that affirmative consent law reform undermines legal principles (pp4-7; 17).

A central concern of Liberty Victoria's submission is that affirmative consent law reform requires an accused person provide evidence that they took steps to obtain consent. This places a burden of proof with an accused person, which is counter to the legal principles: the presumption of innocence; the right to silence; and the right to a fair trial. Liberty Victoria state that "we must be alive to the dangers caused by removing or eroding fundamental protections of the criminal justice system for a purpose of increasing convictions" (4). They explain that many recent reforms "have challenged fundamental protections and principles of the criminal law for accused persons" (5) which "risks compromising the integrity of the justice system through increasing the prospects of substantial miscarriages of justice" (6).

These concerns were shared by both prosecuting and defence barristers in Henderson and my (2018-2020) barrister research. The presumption of innocence was expressed by barristers as essential to the integrity of the justice system. Correspondingly, it was important to the professional identity and sense of integrity for these legal practitioners. In some instances, the threat posed by sexual offence law reform to the presumption of innocence manifest in a diminished respect for sexual offence law by our participants. Barristers demonstrated frustration, anger, and disrespect for changes to sexual offence law which they felt undermined legal principle. Further still, barrister disaffection related to sexual offence law reform was discernibly connected to the sometimes deliberate, sometimes careless use of rape myths in rape trials, as described by the barristers.

Lawyers are the some of the most significant actors in the context of sexual offence trials, consequently it is imperative that any legal change in this field can be meaningfully and respectfully put into practice by them. **Barristers are integral to improving criminal justice outcomes for victim-survivors of sexual violence. This is a key reason to take very seriously Liberty Victoria's concern about the impact of law reform on legal principle**.

Responding positively to Liberty Victoria's assertion that any "reforms to the law of consent or to sexual offences more broadly, needs to ensure that the presumption of innocence … [is] protected" (p17) would help attain "buy in" from barristers and in this way see meaningful reform realised in court.

Following the recommendation of the Australian Law Council (submission 73) that all proposals are assessed with a view to protecting the presumption of innocence and the right to silence, I now present Henderson and my recommendations (Submission 5) as possible changes that withstand evaluation according to these legal principles while also pursuing better outcomes for victim-survivors of sexual violence.

I. Our first recommendation is that jury directions about rape myths be utilised before and throughout sexual offence trials rather than only at the conclusion of a trial. As outdated and false knowledge, rape myths exist as extra-legal factors undermining the operation of sexual offence law. The measure of implementing the spirit jury directions during pre-trial hearings promises to remedy the influence of these extra-legal factors so that the law can be applied in spirit intended by law reform.

   In the only rape trial transcript reaching conviction of the ten analysed by Henderson and myself (2014; 2016), the judge advised the prosecutor during the pretrial hearing to avoid a particular line of argument because it would invoke a specific rape myth which would then require the judge to use a specific jury direction. The prosecutor followed the judge's advice and the rape myth did not enter the trial. Consequently, the relevant jury direction was not required, the principles protecting the accused were maintained and the integrity of the legal process remained intact. There was also a better outcome for the complainant, whose experience of sexual violence was recognised in law with a conviction.

II. Henderson and I recommend providing a "bundle" to members of the jury which would include, amongst other things, evidence-based knowledge about sexual violence as an exploitation of power causing a range of harms, and information about victim-survivor responses in the moment and following an assault. By providing such information as established knowledge there would be a reduced reliance on rape myths. **Providing sexual violence information as established knowledge outside the trial space pre-empts the implementation of myth-based schemas within trials and aids the exclusion of rape myths as extra-legal factors. This would allow law to be applied as it has been intended through the 30-40 years of reform, without undermining the principles of presumed innocence or the right to silence and to a fair trial.**

III. Our third recommendation, mandating a trauma-informed curriculum for law students and practicing barristers including evidence-based knowledge about sexual violence, both pursues better outcomes for survivors and maintains legal principles. Providing established knowledge about sexual violence to undergraduates studying criminal law and practicing barristers creates a foundation of fact, removing questions of what constitutes rape and sexual assault as contentious from trials, thus also reducing a reliance on rape myths. Such curriculum can be delivered without

compromising legal principle, but rather supports legal principle by removing the extra-legal factors that are rape myths from trials.

This recommendation is based on Henderson and my findings that rape myth belief pervades barrister culture (2018-2020); that barristers receive no specialist training or professional development concerning sexual offences or providing established knowledge about sexual violence (2018-2020); and that the delivery of sexual offence law in law schools across Australia is compromised by academic time constraints and concerns about student wellbeing (2021-2022). Delivery of established knowledge about sexual violence is occasionally included in undergraduate law curriculum but is limited and compromised by time constraints (2021-2022).

In our interviews with barristers, Henderson and I found that over half of our barrister participants were not able to explain what constitutes a rape myth, while almost all articulated rape myths in conversation, without awareness that they were doing so. Several barristers stated that they had witnessed rape myths being used by other barristers during trials. None of the barristers participating in our study had undertaken any specialist training about sexual offences, sexual violence or rape myths, despite most of them listing themselves as available to work sexual offence cases.

Meanwhile, in our survey of criminal law teachers across all accredited law schools in Australia Henderson and I (2021-2022) found that the amount of teaching time dedicated to sexual offences has lessened over the last twenty years. Many schools have reduced face-to-face classwork due to time constraints and concerns about student mental health. Information about sexual offences is 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 accreditation requirements prevent teaching staff from communicating to students that sexual offences will not be examined, many participants to our survey indicated that there was a disinclination to assess sexual offences due to concerns about student mental health. Students can graduate from law school with minimal knowledge about sexual offences, and none about sexual violence.

Delivering trauma-informed curriculum that includes evidence-based knowledge about sexual violence potentially reduces barrister rape myth belief and reliance on rape myths in rape trials. Providing such information to undergraduates studying criminal law and practicing barristers creates a foundation of fact, removing questions of what constitutes rape and sexual assault as contentious from trials, thus also reducing a reliance on rape myths. This approach **pursues the intention of law reform to remove rape myths from courtrooms and obtain better outcomes for victim-survivors without compromising the principles of presumed innocence and the right to silence** that are of concern to Liberty Victoria and crucial to the professional identity of barristers.

Liberty Victoria's concerns about sexual offence law reforms threatening legal principle are shared amongst practicing barristers and may be informing barrister attitudes and performance during sexual offence trials. This means it is valuable to include these legal principles in the evaluation of proposed reforms. Henderson and my evidence-based recommendations (Submission 5) for change exemplify possible changes that pursue the removal of rape myths from trials and better outcomes for victim-survivors while maintaining the valued legal principles.

1. Opposition to law reform on the basis that young people are "likely to be disproportionately affected" by affirmative consent law reform (p17)

Liberty Victoria's opposition to communicative model of consent law reforms on the basis that young people are "likely to be disproportionately affected" should be rejected. The justification for opposing such reforms is ***not founded on evidence. Without evidence***, the justification is speculation and **relies on rape myths**.

The ***speculative*** claim that young people are "disproportionally affected" by communicative model of consent laws because they are exploring their sexuality and because sexual behaviour is complex **ignores established knowledge about sexual violence** including (but not limited to): **non-consensual penetration or sexual contact is an intentional act of violence that causes harm**; sexual violence is an exploitation of power (physical, economic, status, reputational, work-based, education-based …); **a common response to sexual violence is to freeze**, making it impossible for victims to articulate or perform commonly recognisable resistance; culturally, women are ignored when they say no; **consent is cannot be inferred from clothing choice or behaviour**; women **do *not*** commonly lie about sexual violence (approximately only 5% of rape complaints made to police are false); **sexual violence is most often perpetrated by someone known to the survivor**, **can be perpetrated without causing evidential physical injury**, and can be perpetrated by an otherwise apparently likable person.[1]

Without evidence to substantively demonstrate that young people are disproportionally affected by communicative model of consent laws due to the complexity of sexual behaviour and nascent sexuality, **Liberty Victoria's opposition to communicative model of consent laws is based on assumptions that are rape myths**. These myths include (but are not limited to): that instances of sexual violence are often actually misunderstandings between equal parties; that women are unclear about "what they want," particularly whether they are consenting or not to sexual contact and/or penetration; that consent can be inferred through behaviour and clothing; that women commonly lie about rape; that "real rape" involves physical violence evidenced by injury, is perpetrated by strangers, and is not perpetrated by men who seem like "good people."

[1] See for example: The Queensland Police facts sheet https://www.police.qld.gov.au/units/victims-of-crime/support-for-victims-of-crime/adult-sexual-assault/myths-and-facts-about; the Australian Institute of Criminology's report https://www.aic.gov.au/sites/default/files/2020-11/ti611_misconceptions_of_sexual_crimes_against_adult_victims.pdf; CASA House http://www.casahouse.com.au/index.php?page_id=155 ; Victoria Police: http://www.casahouse.com.au/index.php?page_id=155; The Australian Institute of Family Studies https://aifs.gov.au/resources/practice-guides/true-or-false-contested-terrain-false-allegations;

Liberty Victoria's opposition is extraordinary in its proposal that exception be made to usual legal provisions establishing the age of criminal responsibility and that ignorance of the law is not a defence when reforming law.

Ultimately, to make law reform on the basis of Liberty Victoria's opposition to communicative model of consent laws on the basis of assumptions that young people would be disproportionately affected due to the nuance of sexual behaviour and the exploration of sexuality sustain the influence of rape myths in sexual offence trials both by preventing reform pursuing the removal of rape myths from trials, and by shaping law with intention borne of rape myth.

Conclusion

Liberty Victoria represent significant concerns about law reform shared by lawyers practicing sexual offence law. For this reason, it is important to carefully consider their submission.

On the basis of my expertise as a criminologist specialising in sexual violence research and my research analysing sexual offence trials, jury decision making, legal education and barrister culture, I have responded to two key points in Liberty Victoria's submission. In acknowledging the importance of making law meaningful for practicians responsible for delivering law at trial, I have set out three possible changes that pursue better outcomes for victim-survivors of sexual violence while maintaining the legal principles of the presumption of innocence and right to silence by excluding the extra-legal factors that are rape myths from sexual offence trials.

I have also demonstrated that due to a lack of evidence and reliance on rape myth, Liberty Victoria's opposition to reform on the basis that communicative model of consent laws disproportionally affect young people because of early explorations of sexuality and sexual behaviour is nuanced, is dangerous and must be rejected.

References

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Duncanson Response to Submission 73

Law Council of Australia

Thank you for the invitation to respond to submissions 17, 43 and 73 for the Inquiry, Current and Proposed Sexual Consent laws in Australia. I am honoured to take up the opportunity of responding to the Law Council of Australia's submission (73).

The Law Council proposes eight principles for assessing changes to sexual offence law. It is important to critically evaluate these principles, not least because the Law Council is the preeminent body representing practicing lawyers across Australia. Legal practitioners hold important insights into legal process and the efficacy of law in action. However, they are also situated within the practice of law with very specific training. They do not necessarily have access to the broader landscape including evidence-based knowledge about sexual violence. Significantly, in Henderson and my research with barristers (2018-2020) we found that almost all the barristers interviewed held rape myth beliefs which they articulated as unproblematic logic during discussions about adult rape trials. Therefore, while lawyers – and thus also the Law Council's eight principles – can provide important contributions derived from experience-based expertise, these contributions must be considered within the broader context of evidence-based knowledge about sexual violence.

Further, because lawyers are the some of the most significant actors in sexual offence trials, it is imperative that any legal change in this field can be meaningfully and respectfully put into practice by them. In Henderson and my research, barristers expressed frustration, anger, and disrespect for previous changes to sexual offence law which they felt had "gone to far" and undermined legal principle at the expense of accused persons. Further still, barrister disaffection with sexual offence law reform was discernibly connected to sometimes deliberate and sometimes careless use of rape myths in rape trials. It is important to understand and consider the propositions presented by organisations representing legal practitioners such as the Law Council because of the critical role lawyers play in delivering law and their disaffection can result in non-compliance with reforms.

I confine my response to two of the Law Council's overarching principles proposed to inform the evaluation of sexual offence law reform:

Principle 2: the fundamental principles that underpin the criminal justice process, such as the presumption of innocence and right to silence, must be maintained (pp7, 17-19)**.**

Principle 5: consideration should be given to the vulnerable groups disproportionately impacted by implementation of communicative model of consent laws, including persons with disability and young persons (pp7, 16-18).

Principle 2: the fundamental principles that underpin the criminal justice process, such as the presumption of innocence and right to silence, must be maintained.

The Law Council states clearly that "[t]he rule of law requires maintaining the presumption of innocence as a fundamental principle underpinning the criminal justice system" (p18). They explain that central to the principle is that the onus or burden of evidence rests with the Crown (prosecution) to prove the guilt of the accused. The right to silence protects an accused person from having to give evidence. The Law Council state that recent consent reforms in NSW and Victoria "effectively impose an obligation on an accused person to give evidence to demonstrate what steps he or she took to ascertain consent … and unacceptably erode the presumption of innocence and the right to silence" (p19). The logic of the Law Council follows that the communicative model of consent law reform requiring that an accused demonstrate that they took steps to ascertain consent from the complainant is antithetical to presuming the accused is innocent until proven guilty; it places a burden of proof with the accused (to provide evidence that they took steps to ascertain consent); and it compels the accused to give evidence at trial.

The Law Council's Principle 2 echoes concerns expressed in Liberty Victoria's submission (Submission 43). Liberty Victoria write that "we must be alive to the dangers caused by removing or eroding fundamental protections of the criminal justice system for a purpose of increasing convictions" (p4). They explain that many recent reforms "have challenged fundamental protections and principles of the criminal law for accused persons" (p5) which "risks compromising the integrity of the justice system through increasing the prospects of substantial miscarriages of justice" (p6).

Barristers interviewed in mine and Henderson's research shared the Law Council's concerns. The presumption of innocence was expressed as essential to the integrity of the justice system. Correspondingly, it was important to barristers' professional identity and their sense of personal integrity. In some instances, the threat posed by sexual offence law reform to the presumption of innocence manifest in a diminished respect for this area of law. Barristers conveyed frustration, anger, and disrespect for changes to sexual offence law which they felt undermined this legal principle. Further still, barrister disaffection related to sexual offence law reform was discernibly connected to the sometimes deliberate, sometimes careless use of rape myths in rape trials described by the barristers.

Barristers are integral to improving criminal justice outcomes for victim-survivors of sexual violence. This is a key reason to take very seriously the Law Council's Principle 2 about the impact of law reform on legal principle.

Responding pro-actively to the Law Council's determination that the legal principle of the presumption of innocence be used as a guide in the assessment of proposed reforms (p18) would help attain "buy in" from barristers and in this way realise *meaningful* reform.

It is possible to make reform pursuant of better outcomes for victim-survivors of sexual violence that also takes seriously the concerns of barristers and the Law Council. To demonstrate this possibility, I present the recommendations submitted by Henderson and myself (Submission 5) as changes that maintain the legal principles while also pursuing

better outcomes. These recommendations seek to remove the extra-legal factors that are rape myths from sexual offence trials so that the law can be applied in the spirit of the past 40 years of sexual offence law reform.

I. Our first recommendation proposes that jury directions about rape myths be utilised before and throughout sexual offence trials rather than only at the conclusion. **As outdated and false knowledge, rape myths exist as extra-legal factors that undermine the operation of sexual offence law**. The measure of **implementing the spirit of jury directions during pre-trial hearings promises to remedy the influence of these extra-legal factors**.

   In the only rape trial that reached conviction of the transcripts analysed by Henderson and I (2014; 2016), the judge advised the prosecutor **during the pretrial hearing** to avoid a particular line of argument because it would invoke a specific rape myth which would then require the judge to use a specific jury direction. The prosecutor avoided that line of argument, and the related rape myth did not enter the trial. Consequently, the relevant jury direction was not required, the principles protecting the accused were maintained (the burden of proof remained with the Crown) and the integrity of the legal process remained intact. There was also a better outcome for the complainant, whose experience of sexual violence was recognised in law with a conviction.

II. Henderson and I recommend providing a "bundle" to members of the jury which includes, amongst other things, established knowledge about sexual violence as an exploitation of power causing a range of harms, and information about survivor responses to violence in the moment of and after an assault. We also suggest the bundle include support tools such as a decision tree, a schedule of evidence, the relevant legislation and jury directions. **All of these components assist jury members to engage more effectively with a trial, supporting their comprehension of law and the trial process, as well as keeping track of evidence and its relevance to the law.** Equipped with evidence-based knowledge about sexual violence, the question of what constitutes a sexual offence would no longer appear to be under scrutiny or a matter to be resolved by the jury, and thus there would be a reduced jury-reliance on rape myths. **Providing sexual violence information as established knowledge outside the trial space pre-empts the implementation of rape myths within trials and aids the exclusion of rape myths as extra-legal factors. Consequently, law could be applied as it has been intended through 40 years of reform, without undermining the presumption of innocence or the right to silence.**

III. Our third recommendation, **mandating trauma-informed curriculum for law students and practicing barristers including evidence-based knowledge about sexual violence, both pursues better outcomes for survivors and maintains legal principles**. Providing evidence-based knowledge about sexual violence to

undergraduates studying criminal law and practicing barristers as essential professional development creates a foundation of fact, **removing questions of what constitutes sexual offences from trials, thus reducing a reliance on rape myths**. Such curriculum can be delivered without compromising legal principle, but rather **supports legal principle by removing the extra-legal factors** that are rape myths from trials.

This recommendation is based on Henderson and my findings that rape myth belief pervades barrister culture (2018-2020); that barristers receive no specialist training or professional development pertaining to sexual offences or providing evidence-based knowledge about sexual violence (2018-2020); and that the delivery of sexual offence law in law schools across Australia is compromised by academic time constraints and concerns about student wellbeing (2021-2022). Delivery of evidence-based knowledge about sexual violence is occasionally included in undergraduate law curriculum but is limited and compromised by time constraints (2021-2022).

The amount of teaching time in Australian law schools dedicated to sexual offences has lessened over the last twenty years, with many criminal law teachers reporting 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 accreditation requirements prevent teaching staff from communicating to students that sexual offences will not be examined, many participants to our survey indicated that **there was a disinclination to assess sexual offences** due to concerns about student mental health. **Students graduate from law school with minimal knowledge about sexual offences, and less still about sexual violence**.

The correlations between barrister rape myth belief, limited teaching of critical content and evidence-based knowledge in law school, the use of rape myths in trials and the exceptionally low conviction rates for adult sexual offences suggest that the failure to provide law students and legal practitioners with evidence based knowledge about sexual violence increases their reliance on rape myths, maintaining the presence of false and outdated ideas as extra-legal factors in trials, thus obstructing the proper functioning of legal procedure.

Delivering trauma-informed curriculum that includes evidence-based knowledge about sexual violence potentially reduces barrister rape myth belief and reliance on rape myths in sexual offence trials. Providing evidence-based knowledge about sexual violence to undergraduates studying criminal law and practicing barristers creates a foundation of fact, removing questions of what constitutes sexual offences as contentious from trials, thus also reducing a reliance on rape myths. Such an approach **pursues the intention of law reform to remove rape myths from courtrooms and obtain better outcomes for victim-survivors *without compromising the principles of presumed innocence and the right to silence* that**

> **are crucial to the professional identity of barristers and desired by the Law Council as guiding principles for law reform**.

The Law Council's proposal that the legal principles of presumed innocence and right to silence be used as guiding principles in the evaluation of law reform shares concerns amongst barristers that recent law reforms undermine "fundamental principles underpinning law." These views inform barrister attitudes and performance in relation to sexual offence trials and barrister implementation of reforms to law. This means it is valuable to include the Law Council's Principle 2 in the evaluation of proposed reforms. Henderson and my evidence-based recommendations (Submission 5) exemplify possible changes that pursue the removal of rape myths from sexual offence trials and better outcomes for victim-survivors while maintaining legal principles integral to barrister professional identity and the integrity of law.

Principle 5: consideration should be given to the vulnerable groups disproportionately impacted by implementation of communicative model of consent laws, including persons … young persons.

I strongly oppose the Law Council's proposal that the evaluation of law reform is guided by the claim that "young persons" are "disproportionately impacted by implementation of communicative model of consent laws." (pp 7, 16-17, 18). The Law Council's Principle 5 is founded on incorrect use of statistical data and the speculative writing of Liberty Victoria (2022). The logic supporting the correlation the Law Council asserts between the number of young people sentenced for sex offences and the youthful exploration of sexuality together with the nuance of sexual behaviour is reliant on rape myths. **To use the Law Council's Principle 5 would maintain and entrench rape myths more deeply into sexual offence law and procedure.** I demonstrate each of my points of opposition below:

1. **The incorrect use of statistical data.**

The statistics used by the Law Council ***are not specific enough to support the Law Council's claim*** that a disproportionate number of young people are incarcerated for sexual offences due to issues of consent. More specifically, the ***category of offence used by the Law Council's sources is broad and includes numerous offences for which consent is not relevant*** to establishing guilt.

The Law Council cites data from the Australian Bureau of Statistics' (2022) report *Sexual Assault – Perpetrators*, which applies "Sexual Assault" broadly defined as provided below. The Australian Institute of Health and Welfare's (2020) report *Sexual Assault in Australia* (also cited by the Law Council) provides a very similar definition.

> Physical contact, or intent of contact, of a sexual nature directed towards another person where that person does not give consent, gives consent as a result of intimidation or deception, or consent is proscribed (i.e. the person is legally deemed incapable of giving consent because of youth,

> temporary/permanent (mental) incapacity or there is a familial relationship). This offence category is Australian and New Zealand Standard Offence Classification (ANZSOC) subdivision 031 within division 03 Sexual assault and related offences. (ABS 2022)

The above definition includes matters for which consent is not relevant in establishing guilt due to the age or mental capacity of the victim, or the familial relationship between victim and offender. Yet, these offences potentially constitute a substantial portion of the offences perpetrated by the offenders counted in the reports and quoted by the Law Council. For example, between 2010 and 2019, **64 per cent** of sentences delivered in Victoria for sexual offences *that fall within the above definition* were committed against children (Sentencing Advisory Council 2021). Due to Age of Consent laws, sexual contact or penetration of a person below sixteen years (or seventeen in Tasmania and South Australia) is unlawful whether that person consents or not. For this reason, the definition of consent and reforms to consent law are not relevant to these offences. Consequently, of the number quoted by the Law Council, at least 64% of the Victoria data contributing to that number is not relevant to the point being claimed by the Law Council. The failure of the Law Council to break down this data renders their use of the available statistics in error and their claim false.

The definition also includes assault with the intention to commit a sexual offence, threats to commit a sexual offence, and the intention of physical contact of a sexual nature. Most of these are heard summarily in Magistrates Courts without a jury. The consent issue in each is less vexed, if at all relevant, than in the strictly indictable offences that constitute non-consensual penetration of an adult.

In contrast, rape convictions in Victoria have dropped in real terms. While the rates of rape complaints recorded by police almost doubled between 2010 and 2019, the number of sentences delivered for adult rape remained steady (Sentencing Advisory Council 2021). Thus, the Sentencing Advisory Council document that for "most sex offences, the ratio of sentenced … to recorded … offences was about 1 in 5. **But for rape offences, the ratio was about 1 in 23**." While rape had the highest reporting rate of all the sex offences in Victoria in the ten-year period, it had the lowest number of sentences delivered.

In the Victorian context, **most of the sex offenders** contributing to those numbered in the Law Council's Principle 5 **were not subject to consent laws**. And in the case of the strictly indictable offence of rape, to which definitions of consent are critical, the number of enumerable offenders have dropped in comparison to the number of complaints recorded. **This decreases further the amount of data within the pool provided by the Law Council to substantiate their claim that any group of the counted offenders is disproportionately affected by *consent laws***.

It is not insignificant that **where the Law Council *does* provide a breakdown of statistics, the young people whom they understand are "vulnerable" to communicative model of consent laws are revealed to be mostly male** (17). That this breakdown of data appears in a footnote disguises the gendered nature of the Law Council's misuse of data. While in the main body of their submission the vulnerable group is ostensibly neutral "persons," the

footnote indicates that approximately 97% of sexual offenders are male (although they present it in less clear terms).

I use Victorian sentencing data to interrogate the statistics upon which the Law Council justify their proposal that the "vulnerability" of "young people" be used to guide sex offence law reform. The statistics used by the Law Council **are not specific enough to support the claim** of the Law Council **that the disproportionate number of young people incarcerated for sexual offences is due to issues of consent**. The Sentencing Advisory Council's data contradicts this claim by providing evidence that it is harder to reach conviction when consent is central to the decision juries have to make about the criminal responsibility of an accused person, whatever their age.

The Law Council's Principle 5 is supported by incorrect use of statistics and thus should be rejected.

2. Reliance on a Speculative Resource

The Law Council go on to cite a speculative claim made by Liberty Victoria in order to establish a connection between sex offender data and communicative models of consent laws. **Liberty Victoria provide no evidence** to substantiate this connection. **The connection made is speculative.** Further than this, **it is based on rape myth**.

Principle 5 of the Law Council's submission relies on speculation. On this basis the Principle should be rejected.

3. **The logic supporting Principle 5 is rape myth**.

Without evidence to substantively demonstrate that young men are disproportionately "vulnerable" to being found guilty of sex offending due to the "nuance of sexual behaviour" and nascent "explorations of sexuality," **the Law Council relies on rape myths** (p17)**.** This is particularly apparent when considering the gender breakdown of the "vulnerable group" (provided in a footnote by the Law Council) as approximately 97% male. While the logic of the principle relies on gendered assumptions about rape, it ignores strongly established knowledge about sexual violence.

The claim that young people (more exactly young men) are "vulnerable" to sexual offending because they are exploring their sexuality and sexual behaviour is nuanced **ignores evidence-based knowledge about sexual violence** including (but not limited to): **non-consensual penetration or sexual contact is an intentional act of violence that causes harm**; sexual violence is an exploitation of power (physical, economic, status, reputational, work-based, education-based …); **a common response to the threat of sexual violence is to freeze, making it impossible for victims to articulate or perform what is commonly recognisable as resistance**; women are ignored when they say no; **consent is cannot be inferred from clothing choice or behaviour**; women do not commonly lie to a court about sexual violence (less than approximately 6% of rape complaints to police are false); **sexual violence is most often perpetrated by someone known to the survivor**, can be perpetrated

without causing evidential physical injury, and can be perpetrated by an otherwise likable person (man).[1]

Instead, **the Law's Council's claim** that young people (more exactly young men) are "vulnerable" to sexual offending because they are exploring their sexuality and sexual behaviour is nuanced **relies on a host of rape myths**, including (but not limited to): that instances of sexual violence are often actually misunderstandings between equal parties; that women are unclear about "what they want," particularly whether they are consenting or not to sexual contact and/or penetration; that consent can be inferred through a person's behaviour and clothing; that women commonly lie about rape; that "real rape" involves physical violence evidenced by injury, is perpetrated by strangers, and is not perpetrated by men who seem to be "good."

The Law Council's Principle 5 is extra ordinary in its proposal that law reform is guided by exceptions made to the usual legal provisions establishing the age of criminal responsibility and that ignorance of the law is not a defence. It is imperative to recognise the gender of those the Law Council worry are disproportionately affected and the gendered context of the offences under inquiry when seeking to understand the logic of the Law Council's proposal to make exceptions to these legal principles. Justification for the proposed exceptions to age of criminal responsibility and ignorance of law provisions rely on rape myths.

To use the Law Council's Principle 5 to guide sexual offence law reform would be to use rape myth to evaluate reforms intended to remove rape myth from the legal processing of sexual offence complaints. This not only maintains the presence of rape myths in sexual offence trials, but potentially further embeds rape myth in the foundational principles of sexual offence law.

The Law Council's Principle 5 must be rejected.

Conclusion

The Law Council of Australia represent some of the most influential actors in the processing of sexual offence complaints on trial. For this reason, it is important to carefully consider their submission.

From my position of expertise as a criminologist specialising in sexual violence research and on the basis of my research analysing sexual offence trials, jury decision making, legal education and barrister culture, I have responded to of the principles proposed by the Law Council to be used in the evaluation of sexual offence law reform.

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[1] See for example: The Queensland Police facts sheet https://www.police.qld.gov.au/units/victims-of-crime/support-for-victims-of-crime/adult-sexual-assault/myths-and-facts-about; the Australian Institute of Criminology's report https://www.aic.gov.au/sites/default/files/2020-11/ti611_misconceptions_of_sexual_crimes_against_adult_victims.pdf; CASA House http://www.casahouse.com.au/index.php?page_id=155 ; Victoria Police: http://www.casahouse.com.au/index.php?page_id=155; The Australian Institute of Family Studies https://aifs.gov.au/resources/practice-guides/true-or-false-contested-terrain-false-allegations;

In acknowledging the importance of making law meaningful for practicians responsible for delivering law at trial, I have set out three possible changes that pursue better outcomes for victim-survivors of sexual violence while maintaining the legal principles of the presumption of innocence and right to silence by excluding the extra-legal factors that are rape myths from sexual offence trials.

I have also demonstrated that due to a lack of evidence and reliance on rape myth, the Law Council's Principle 5 – that law reform be guided by an assumption that young people are disproportionately affected by communicative model of consent laws - is dangerous and must be rejected.

Australian Bureau of Statistics (2 February 2022), Sexual Assault - Perpetrators, ABS Website, accessed 10 August 2023

Australian Institute of Health and Welfare (2020) Sexual assault in Australia, AIHW, Australian Government, accessed 11 August 2023.

Duncanson and Henderson, (2014) 'Narrative, Theatre, and the Disruptive Potential of Jury Directions in Rape Trials' 22(2) *Feminist Legal Studies* 155

Henderson and Duncanson (2016). "A Little Judicial Direction: Can the Use of Jury Directions Challenge Traditional Consent Narratives in Rape Trials?" *University of NSW Law Journal* 39(2)

Henderson, Emma and Kirsty Duncanson, (2018-2020) HEC18411 "What would a barrister to?

Henderson, Emma and Kirsty Duncanson, (2021-2022) HEC 21197 'Contextualising Sexual Offences in the Priestly Eleven"

Liberty Victoria, Submission, the Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022 (12 August 2022) 5 [17]]

Sentencing Advisory Council (2021) *Sex Offences in Victoria 2010-2019* Sentence Advisory Council, accessed 11 August 2023