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Australian Law Reform Commission
By email: jrsv@alrc.gov.au

Re: Justice Responses to Sexual Violence

Thank you for the opportunity to make a submission to this important Inquiry. Our submission will focus on the following questions: 12, 17, 19, 20, 23, 24, 28, 29, 30, 32, 33, 37.

Background

In recent years we have collaborated on a series of empirical studies on the operation of sexual offence trials in Victoria and NSW. In 2020 we began a study of intoxication evidence in rape trials (funded by the Australian Research Council, DP200100101), which is ongoing. In 2021 we completed a report for the Victorian Law Reform Commission in relation to its inquiry into *Improving the Response of the Justice System to Sexual Offences*. In 2023 we completed a study into the experiences of complainants in adult sexual offence trials in NSW, commissioned by the NSW Department of Communities and Justice (NSW), which analysed transcripts from 75 sexual offence trials.

The opportunity to analyse transcripts from 108 sexual offence trials in Victoria and NSW has yielded what we consider to be valuable insights about the conduct of trials, and whether past reforms have produced their intended improvements.

We have also recently completed an international literature review on specialist courts and lists for sexual violence matters, along with measures for reducing delay and encouraging pre-trial finalisation of charges.

A full list of publications to date is provided at the end of this submission.

This submission is based on what we have learned from this collaborative research, together with past work undertaken by Professor Quilter, who has been researching and writing on sexual assault law reform since completing her PhD in 2000, titled 'Re-inventing rape: an analysis of legal, medical, feminist and governmental discourses'.

Question 12 – Special Measures

The special measures we observed being utilised in Victoria and NSW include:

- the use of alternative arrangements for giving evidence, most commonly in a remote location via CCTV;
- closed courts (*in camera*) during a complainant's evidence;
- a complainant's entitlement to a support person while giving evidence; and
- the protection of a complainant's identity through a statutory prohibition on publication.

Our research suggests that these special measures are generally working well. We note though it is important to ensure that court technology/infrastructure is fit for purpose. Amplification was

inadequate, at times, for complainants giving evidence in-person; for complainants giving evidence via CCTV, one bar table camera position in many courts meant that counsel had to 'swap positions' between examination-in-chief and cross-examination.

Closed court arrangements need to be diligently maintained noting that we observed instances in our studies of the arrangements either not being followed or being ineffective, with members of the public entering the courtroom. Further consideration should be given to judicial practices of exempting classes of persons from the closed court rule (e.g. the accused's partner or parents; lawyers/readers/students) which ultimately diminishes privacy for complainants. Consideration should be given to whether complainants ought to be informed and asked their views as to the presence of such persons. In our view, complainants should have a 'right' to know who is in the courtroom.

We are unaware of the availability of dedicated waiting areas for complainants and support persons in NSW/Victoria but believe this is an important measure to reduce re-traumatisation.

Perhaps unsurprisingly we observed variation in judicial handling of trials – questions of judicial 'style' and discretion are clearly important aspects of judicial independence. Nevertheless, we believe all judges should have access to high quality resources customised to their role (e.g. a Sexual Violence Bench Book) and a Judicial Communication Guide. This could contribute to the standardisation of best practice in trials to ensure complainant's experience is predictable, rather than subject to the personal style and skills of an individual judge. A Judicial Communication Guide could include 'formulas', among other things, for a judge's introductions and explanations of the process to the complainant and guidance in ensuring that complainants are, among other things, appropriately and accurately addressed by name.

We would also suggest consideration be given to a sexual violence witness protocol as is done in New Zealand's Sexual Violence Court Pilot. A well-written Complainant Guide would also be useful in reducing complainant stress in coming to court to give evidence.

Question 17 – Intermediary Schemes/Ground Rules Hearings

We support the wider use of intermediary schemes and ground rules hearings (GRHs). The latter are now mandatory for all sexual offence trials in Victoria, and other Australian jurisdictions should follow. We advocate for a robust GRH process, not only as an occasion to address important matters such as ensuring that questions are asked in an appropriate form and sequence, but also as a substantive process for pre-trial adjudication on the relevance and admissibility of proposed lines of questioning (especially those that engage 'rape myths') and the identification of which curative jury directions should be given and when. We address these matters further below (in our answers to Qs 19, 24 and 32).

Question 19 – Jury Directions to Counter Myths and Misconceptions

In recent years in Australia, curative jury directions have been seized on as a 'solution' to the prevalence and influence of rape myths in criminal trials.[1] It remains to be seen whether the faith that

[1] *Criminal Procedure Act 1986* (NSW) ('*CPA*), Pt 5, Div 1, Subdiv 3, as amended by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW).; *Jury Directions Act 2015* (Vic), Pt 5, Div 1A, Subdiv 3, as amended by the

Australian legislatures have recently placed in the power of jury directions to address 'misconceptions' or 'myths' in the sexual offence trial context is justified. We suggest that the development needs to be approached with caution, a commitment to operationalising (laudable) legislative sentiments, and follow-up evaluation.

It is important to recognise the (limited) nature of the change that is effected by the availability of 'corrective' jury directions that address 'rape myths', stereotypes and assumptions. Specifically (and arguably, paradoxically), they do not prohibit questions that engage the very myths and stereotypes which they are designed to correct. In this respect, they are very different to the prohibition model that governs sexual experience questioning and evidence.[2] However, they are clearly intended to be more than 'window dressing' that merely *performs* a challenge to myths and stereotypes without exerting influence on how trials are conducted. They are designed to reduce the risk that misconceptions operate "to the detriment of a proper application of the law of consent".[3] Jury directions should not be reserved for 'rote' inclusion in the judge's summing up for the jury at the end of the trial. They should be given at the relevant points throughout the trial, and not simply recited. For maximum impact, they should be integrated into the conduct of the trial in a more substantive way, including by actively linking them to the elements of the substantive law, and the facts of the case, to which they might relate. As noted above (in our response to Q 19) we think that GRHs will provide an excellent opportunity for the trial judge, with the assistance of counsel, to plan for optimal use of curative jury directions.

Question 20 – Other Reform Options

Many of the trials in our dataset raised questions in relation to the complainant's intoxication. The following inter-related issues arose in trials:

- complainant (and/or accused) intoxication evidence took the form of imprecise and colloquial self-assessment (how much was consumed, how the person 'felt', scales of 1 to 10);
- Notwithstanding the legislative attempt to break the traditional nexus between intoxication and consent, evidence that the complainant was intoxicated was often engaged by the defence to challenge the Crown case including arguments about complainant disinhibition, failing to remember consent, and false memory;
- jurors rarely had the benefit of medical/scientific expert evidence on the effects of alcohol or other drugs (AOD) and were told to use their common sense/knowledge in relation to determining complex issues such as the relationship between AOD consumption and consent formation, and the ways in which intoxication does (and does not) impact on memory and recall of events; and
- the claim that intoxication impedes memory – bringing into question the reliability of the complainant's evidence – tended to be asserted rather than substantiated with science-based evidence.

Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022 (Vic); *Evidence Act 1929* (SA) s 34N, as amended by the *Statutes Amendment (Stealthing and Consent) Act 2022* (SA); *Evidence Act 1977* (Qld), Pt 6B, Div 3, as amended by the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2023* (Qld).

[2] Such as under s 294CB of the *Criminal Procedure Act 1986* (NSW).

[3] Women's Legal Service, *Submission*, cited in NSW Law Reform Commission (NSWLRC), *Consent in Relation to Sexual Offences*, Report No 148 (September 2020), [8.35].

Consideration should be given to better guidance/education on questions of intoxication and memory.

We observed only one trial where counter-intuitive expert evidence featured (involving sexual violence in a domestic violence setting). Given the frequency with which rape myths were engaged, and the prevalence of assertions and implications that the complainant had not behaved in the manner 'expected' of rape victims, consideration should be given to more active use of this form of expert evidence.

Question 23 – Legislative Provisions to Protect Complainants During Cross-Examination

Improper Questions

The Issues Paper identified application of the rules governing 'improper questions' (e.g. like s 41 of the Uniform Evidence Act) as one of the ways in which a complainant's experience of cross-examination might be rendered less traumatising. In our transcript analysis research, we saw little evidence that s 41 (which operates in Victoria and NSW) is operating in ways that limit the topics on which complainants are cross-examined, or protects complainants from questions that reflect myths and stereotypes. While we did not often see egregiously inappropriate defence counsel questioning – of the sort that may have been common-place in the past – we did observe instances where defence counsel were sarcastic, combative, belittling and judgmental towards the complainant. It was common for complainants to be asked questions that were repetitive.

Crown objections were relatively rare, and tended to focus on the *form* in which questions were asked, rather than their content. Questions were rarely disallowed. Judicial intervention was more likely to take the approach of asking counsel to reframe a question or desist from excessive repetition. We observed a range of views and practices amongst different trial judges in terms of whether they were inclined to intervene and disallow questions, presumably reflecting different styles or interpretations of what constitutes an improper question that should be disallowed.

Sexual Experience Evidence

Questions about 'reputation' and experience have a long history in rape trials, underpinned by myths and stereotypes (including about 'promiscuity') and productive of significant distress and re-traumatisation for complainants. This is one of the few areas of sexual offence trial reform where the legislative approach has been to *prohibit* certain lines of questioning. For example, in NSW, questions on 'sexual reputation' are completely prohibited (*Criminal Procedure Act 1986* (NSW) s 294CB(2)) and questions on sexual experience are presumptively disallowed (s 294CB(3)) unless the trial judge determines that the evidence that is to be adduced falls within one of the statutory exceptions (s 294CB(4)).

In our research, we observed that, with some exceptions, the special rules governing sexual experience evidence were generally operating as intended (although the expectation of advance applications and rulings was not always met). We note that in many cases this resulted in counsel being allowed to ask at least some of questions about sexual experience. This suggests that the claim sometimes made, that 'rape shield laws' are excessively restrictive (particularly in NSW), may not be supported by the evidence.

Question 24 – Restricting Cross-Examination that Reflects Myths and Misconceptions

We support additional restrictions on cross-examination that reflects myths and stereotypes.

In both our Victorian and NSW studies, we observed that defence counsel were afforded extensive latitude to ask complainants about a wide variety of matters on which the relationship to a fact in issue was not necessarily obvious. This included matters that either directly or indirectly engaged myths and misconceptions, including about sexual activity, consent, character, credibility, and responses to sexual violence. On our assessment this approach (and the disinclination of prosecutors and/or judges to intervene) is underpinned by two aspects of evidence law. First, although trial judges can reject questions on a variety of grounds, including that they are designed to elicit irrelevant evidence (e.g. *Evidence Act 1995* (NSW), Pt 3.1), relevance is defined in s. 55 in "very broad language" (*R v Le* [2000] NSWCCA 49, [19]). Secondly, the cross-examination exception to the credibility rule, which permits questions on matters that "could substantially affect the assessment of the credibility of the witness" (e.g. *Evidence Act 1995* (NSW), s. 103(1)), appears to offer wide scope for defence counsel to ask broad-ranging questions of the complainant.

In the trials we analysed, topics regularly addressed during cross-examination included: i) aspects of the complainant's present or past life that were implicitly raised to reduce their credibility; ii) pre-event behaviour that was characterised as flirtatious (and said to be indicative of consent); and iii) post-event behaviour that was characterised as inconsistent with the "expected behaviour" of a victim of a sexual offence (and said to be indicative of fabrication).

We observed numerous instances where the complainant's behaviour, some considerable time before the alleged sexual offence (e.g. taking a photo with the accused at a 7 Eleven; 'liking' a number of the accused's Facebook statuses), was characterised as 'flirtatious', so as to lay a foundation that the subsequent sexual activity had been consensual. In our view, it was often the case that the asserted 'relevance' of the earlier behaviour relied heavily on an expansive myth-based and gendered construction of what qualifies as a display (by a woman) of sexual interest (towards a man).

In some of the trials we analysed, complainants were questioned about aspects of their past that appeared to us to be unrelated to the alleged sexual offence. This included aspects of personal history such as substance use and addiction, mental illness, criminal convictions and having had their children placed in out of home care. Such evidence was evoked as a basis for challenging the complainant's credibility and the honesty of her trial evidence. It was rare for the Crown to object or for the trial judge to 'reject' such questions.

In the following example, cross-examination *opened* in this way:

> Q. Can you see me madam?
>
> A. Yes I can.
>
> Q. 2017 wasn't a good year for you was it?
>
> A. No, it wasn't.
>
> Q. Your son … was taken off you by the Department of Family and Community Services on [day/month] 2017, is that correct?
>
> A. That's--
>
> Q. Because you were considered by the department of being incapable of looking after him, is that right?

On this occasion, the Crown did object, and defence counsel declined to press the specific question. Nevertheless, the possible effect was to immediately cast the complainant, in the eyes of some jurors, as of 'suspect' character. The very next question asked by defence counsel was as follows:

> Q. You see, in 2017 you had a serious drug addiction to cannabis, didn't you?
>
> A. I wouldn't say a serious drug addiction.

In our recent report on NSW sexual offence trials we concluded:

> Current interpretation of evidence laws of general application on *relevance* and *credibility* are not preventing complainants in sexual offence trials being asked questions that mobilise rape myths and engage conceptions of what a 'real rape' looks like. These practices are inconsistent with the trajectory of sexual offence law reform. Our findings suggest that a narrower category of relevant evidence (Evidence Act, ss. 55-56) and a more restrictive approach to the cross-examination exception to the "credibility rule" (Evidence Act, ss. 102-103) may be necessary. We recognise that in a context where the status quo involves wide parameters of admissible evidence available to the defence in a criminal trial *(Green (a pseudonym) v The Queen* [2015] VSCA 279, [34]), these are complex issues and reform would need to be approached with caution. However, our findings suggest that the cross-examination practices documented in this report will continue unless evidence admissibility rules are changed or applied differently. Without further change of the sort suggested here, complainants in sexual offence trials will continue to endure unfair and traumatising scrutiny, including routine accusations of fabrication. Existing restrictions on the admissibility of evidence about the complainant's sexual reputation or experience (CPA, s. 294CB) cannot be the only "brake" on the scope of cross-examination, and are no substitute for a wide-ranging and rigorous approach to scrutinising the *prior* issue of relevance. They may, however, be of assistance in framing a more discerning approach to regulating the subject matter of cross-examination of complainants in sexual offence trials …

In line with the objective of further reforms that 'promote just outcomes for people who have experienced sexual violence' (ALRC Issues Paper 49, p 1), we recommend that consideration be given to refining the rules of evidence on relevance and admissibility. Our research suggests that the prevalence and influence of myths and misconceptions in sexual offence trials will not be significantly reduced unless the myth/relevance nexus is broken. If the case for the 'relevance' of evidence that the defence seeks to adduce during cross-examination is underpinned by a myth or misconception, we submit that the evidence is by definition irrelevant, and the proposed question(s) should be disallowed.

Question 28 – Adequacy of Provisions for Protecting Complainant's Personal Information

In NSW a privilege in relation to sexual assault communications such as counselling records (*Criminal Procedure Act*, Pt 5, Div 2) applies. In our NSW study, where the protection was engaged, it appeared largely to operate well. We found that communications privilege can give rise to complex questions for the complainant, counsel and the court. We found that the Sexual Assault Communications Privilege legal representatives who appeared in these matters had high-level expertise in relation to the operation of the privilege and that such representation was important not only for the complainant but also for guiding the court through the process. Based on our study, we

suggest that complainants should be automatically entitled to be heard, advised and legally represented in relation to applications to admit their personal records.

Questions 29 & 30 – Complaint Evidence and Distress Evidence

Current rules on the admissibility of complaint evidence and distress evidence are well-intentioned in that they have been designed to *facilitate* sexual offence prosecutions (which traditionally might have floundered for lack of such evidence). Such evidence featured prominently in how the Crown case was presented in trials we analysed. We note that evidence of these types is underpinned by rape myths – that a 'genuine' victim complains immediately; that a 'genuine' victim is visibly distressed. Scientific knowledge on sexual violence trauma has discredited these ideas, appellate courts have pronounced that there is no 'expected' way a complainant should behave, and several jurisdictions have legislated curative jury directions to counter such myths when relied on by the defence (see our response to Q 19). If the larger reform agenda is to reduce the influence of myths and stereotypes on sexual offence trials, it is important that attention be paid to features of the Crown case as well as those of the defence case. Consideration should be given to whether complaint evidence and distress evidence have a place in contemporary sexual offence trials.

Question 32 – Other evidence issues

Text messages and social media evidence was regularly admitted in the trials we examined. We observed assumptions being made about the 'literal' meaning of such messages divorced from the contexts of their social production including the mores that may prevail within particular demographics. Complainants were regularly cross-examined about equivocal language used in such messages and the capacity for text messages to give rise to 'inconsistencies' in accounts. We note that recently the Victorian Court of Appeal has commented on this issue: see *Dwyer v The King* [2023] VSCA 85, [66].

Question 33 – Specialist Courts/Lists

Our examination of the international literature on this topic suggests that a Specialist Court/List can make an important contribution to reducing trial delay and moving towards a trauma-informed justice model within the confines of the conventional criminal justice system. We recommend that the Commission looks to the New Zealand's Sexual Violence Court Pilot and Southport Specialist Domestic and Family Violence Court (Queensland) to identify best practice features of a Specialist Court/List.

Question 37 – Encouraging Guilty Pleas

The desirability of facilitating early resolution of criminal charges without trial, by procedural measures and sentencing incentives that encourage guilty pleas is widely recognised. The Early Appropriate Guilty Plea (EAGP) Scheme in NSW is an example of such an initiative.

We are not aware of any public domain data or evaluations on how (informal or formal) early resolution/charge bargaining regimes and practices operate in sexual violence cases in Australia. Based on our review of the available literature, we recommend caution when considering the

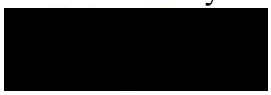
feasibility and applicability of such measures to sexual offence charges, and due consideration be given to whether they are consistent with trauma-informed best practice.

On one view, facilitated early resolution may yield real benefits, including for complainants. These include being relieved of the burden of undergoing examination and cross-examination at trial (if a guilty plea is entered); or, if the trials proceeds, a shorter, less traumatising period of examination and cross-examination, because some facts have been agreed and/or issues narrowed during pre-trial conferencing. On another, a plea bargaining-focused approach may carry too great a risk of failing to meet the expectations of complainants.

In addition, sexual violence cases have differences from many other criminal cases that mean that encouraging early guilty pleas may be neither feasible nor compatible with a trauma-informed approach. Defendants charged with sexual offences are less likely to plead guilty than defendants charged with non-sexual offences. The perception that 'word against word' cases are relatively weak, the long history of intense trial scrutiny of the complainant (including accusations of 'lying') and the continued availability of rape myths that work to the disadvantage of the complainant and the prosecution may all militate against guilty pleas. In addition, a jurisdiction's laws on sex offender registration and/or post-sentence detention or supervision, may act as a further disincentive for accused persons to plead guilty to sexual offence charges. In short, it should not be assumed that early resolution models will necessarily result in higher rates of guilty pleas to sexual offences. If plea negotiations result in the acceptance of a plea to a lesser non-sexual offence charge, there is a risk that the victim may be left dissatisfied – feeling that the gravity of the harm done to them has not been recognised.

We trust that our research-based responses to selected Issues Paper questions are of value to the Commission's work. If we can be of further assistance, please feel free to call on us.

Yours sincerely



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Recent publications:

J Quilter & L McNamara, 'Jury Directions in Sexual Offence Trials' (2024) *Judicial Officers' Bulletin* (forthcoming)

J Quilter & L McNamara, *Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis*. Crime and Justice Bulletin No. 259 (NSW Bureau of Crimes Statistics and Research, August 2023)

J Quilter, L McNamara and M 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* 4-26

J Quilter, L McNamara and M 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. https://doi.org/10.1016/j.ijlcj.2023.100593

J Quilter, L McNamara, M Porter and S Croskery-Hewitt, 'Intoxication Evidence in Rape Trials in the County Court of Victoria: A Qualitative Study' (2023) 46(2) *UNSWLJ* 579-614

J Quilter, L McNamara and M Porter, 'New Jury Directions for Sexual Offence Trials in NSW: The Importance of Timing' (2022) 46(3) *Criminal Law Journal* 138-150

J Quilter, L McNamara and M Porter, 'The Nature and Purpose of Complainant Intoxication Evidence in Rape Trials: A Study of Australian Appellate Court Decisions' (2023) 43(2) *Adelaide Law Review* 606-640

J Quilter and L McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts*. Report to the Victorian Law Reform Commission (August 2021)

Other publications:

J Quilter, 'Getting Consent "right": Sexual Assault Law Reform in New South Wales' (2020) 46(2) *Australian Feminist Law Journal* 225 DOI: https://doi.org/10.1080/13200968.2021.1930434

J Quilter, 'Rape Trials, medical texts and the threat of female speech' (2015) 19 *Law Text Culture* 231-270

J Quilter, 'Re-Framing the Rape Trial: Insights from Critical Theory About the Limitations of Legislative Reform' (2011) 35 *Australian Feminist Law Journal* 23-56