**Australian Law Reform Commission: Justice Responses to Sexual Violence Inquiry**
**Response to Issues Paper Questions 19, 20, 24.**
Dr Emma Henderson & Dr Kirsty Duncanson, La Trobe University.

**Question 19** *What is your view about the usefulness of jury directions in countering myths and misconceptions described by the research discussed above? Do you have a view on whether the jury directions in your jurisdiction are sufficient? Could they be more extensive? How are the directions in Victoria under the Jury Directions Act 2015 (Vic) working in practice? Can they be improved?*

In our research we found that jury directions in their current form and the way that they are implemented in Victoria are not useful for countering myths and misconceptions (Duncanson and Henderson 2014; Henderson and Duncanson 2016). This is because they come too late in a trial to counter the influence of myths on the way that juries hear and process evidence. We recommend that jury directions are utilised in the pre-trial process and throughout each trial to exclude myths wherever possible, to provide evidence-based information that pre-emptively counters misconceptions and to challenge myths if they are introduced, as soon as they are introduced.

Delivering jury directions at the conclusion of a trial is too late to effectively counter myths and misconceptions that have already been introduced. This is because myths and misconceptions exist as ubiquitous narratives in our society which we use to render comprehensible the abundant information that surrounds us. In contrast, evidence is provided without clear narrative order during a trial. Consequently, juries must quickly identify a relevant narrative with which to make sense of the disordered information. In this process they prioritise information that conforms with their chosen narrative, while potentially forgetting or ignoring non-compliant information. Research has shown that juries will speculate wildly to make inconsistent evidence comply with the narrative they have chosen to use (Ellison and Munro 2009).

Due to the ubiquity of rape myths in broader culture, and their persistence in sexual offence trials, rape myths are readily available to jurors very early in the trial process. By the time jury directions are traditionally delivered, the evidence has already been processed by members of the jury to support the chosen myth narrative. Non-compliant evidence is potentially already forgotten. It is too late for juries to reassess evidence and consider an alternative interpretation.

In contrast, we found that when jury directions were used during pretrial hearings to advise counsel, rape myth use during the trial was limited (Duncanson and Henderson 2014; Henderson and Duncanson 2016). In a study of ten Victorian rape trials, only one trial resulted in a conviction. In this case the judge advised prosecution and defence counsel during the pretrial hearing to avoid particular lines of argument on the basis that doing so would invoke specific rape myths prohibited by the jury directions. As a result, both prosecution and defence counsel avoided those lines of argument, and the related rape myths did not enter the trial. In factually similar cases, where the judge does not use the jury directions to advise counsel before or during the trial, rape myths are far more prominent and acquittals are the norm. **On the basis of this research, we recommend that jury directions about rape myths be utilised before and throughout sexual offence trials rather than only at the conclusion.**

**Question 20** *Do you have a view about the other recommendations that have been made (educative videos, mixed juries, judge-alone trials, and education and training)? Do you have other ideas for reform based on research which suggests the evidence of complainants is assessed according to myths and misconceptions about memory and responsive behaviour?*

Recommendations have been made that appeal judges, trial judges, prosecutors, defence counsel, and police should receive education about the circulation of myths about memory and responsive behaviour of complainants in the trial (*Issues Paper* [68]). We strongly agree that much more needs to be done to educate those involved in the delivery of sexual offence trials about the nature and effect of myths in sexual offence trials, and also provided with evidence-based information about sexual violence more generally.

Our research into barrister training and education indicated that many barristers do not have sufficient knowledge about sexual violence, and lack critical awareness of the existence of myths in rape trials and their own role in circulating those myths.[1] Formal legal education fails to provide law graduates with evidence-based knowledge about sexual violence or critical perspectives concerning the processing of sexual offence complaints. Meanwhile, barrister training through mentorship and "on your feet" learning socializes junior barristers into customary ways of running cases and using arguments that implicitly rely on rape myths.

The responses to our survey of Australian criminal law teachers indicate that multiple factors impede delivery of evidence-based information about sexual violence and critical scholarship of sexual offence law and legal process. These include reduced amount of time available to deliver synchronous, in-class content. Reduced class time affects the capacity of teachers to deliver complex and contextual elements of law. Due to real concerns about student wellbeing and the potential of sexual offence curriculum triggering trauma, many criminal law teachers reported relocating material online, for self-directed learning. Although the Priestly 11 requires that students must expect sexual offences to be examined, participants reported avoiding examining sexual offence law. Our findings suggest it is possible that many Australian law students can graduate without knowing sexual offence law, let alone critical scholarship about how the law is applied or information about sexual violence.

All of the barristers we interviewed confirmed that they received no specialized training about delivering sexual offence cases. They described doing their first sexual offence trials with 'no formal training', 'absolutely no training' and as 'going in cold.' The training they did describe involved mentoring and 'on your feet' learning. The mentoring involves asking questions and taking advice from more experienced barristers. In this way, barristers learn strategies for delivering cases as they have been delivered by barristers before them, rather than learning new methods. There is a danger this mentoring uncritically transmits rape myths.

Without an explicit curriculum covering evidence-based knowledge about sexual violence and critical scholarship about legal processes and rape myths, barristers are not provided with accurate information to challenge the knowledge and strategies passed down to them through the strong culture of mentorship at the Bar. Additionally, learning "on your feet" inculcates rape myths as case strategy and necessary arguments for fulfilling their duty to their clients. Each of these education and training related components function to hinder barrister

[1] La Trobe University HEC18411; La Trobe University HEC 21197

understanding of sexual violence and rape myths and contributes to their continued use of rape myths in sexual offence trials.

**To counter barrister belief and use of rape myths we recommend that trauma informed specialist curriculum delivering evidence-based information about sexual violence, critical understandings of rape myths and critical scholarship concerning rape trials, is mandated for barristers and as part of criminal law undergraduate and postgraduate education.**

Our research also suggests that those involved in sexual offence trials are at real risk of vicarious trauma.[2] This has implications for the use of rape myths in rape trials. We observed evidence of vicarious trauma amongst the barristers that we interviewed.

This correlates with research documenting vicarious trauma as a significant issue for barristers (Bulbulia et al, 2015). The symptoms of vicarious trauma include changes in cognitive schemas including pessimism, cynicism and emotional numbing. It is possible that barristers suffering from vicarious trauma may be more likely to deploy rape myths in trials without being aware of it, or despite contrary personal beliefs. In our interviews, barristers described feeling compelled to make arguments that they did not personally believe, because of the professional obligation to follow client instructions. We observed barristers cynically deploying strategies which would advance rape myth circulation in the trial, even as they claimed that the use of rape myths would be counter-productive/was prohibited in the trial. Unrecognised vicarious trauma in trial barristers is potentially contributing the maintenance of rape myths in trials. **A strategy aimed at myth reduction in sexual offence trials should incorporate education on the recognition and mitigation of vicarious trauma for barristers and judges.**

In relation to the suggestion (*ALRC Issues Paper* [68]) that an educative video be played to jury panels prior to trial about memory and responsive behaviour research, we agree that evidence provided to the jury before the trial, is a useful strategy. We have argued elsewhere that one strategy for more effective jury direction delivery is the provision of a 'bundle' to members of the jury which includes contextual information about sexual violence and its effects (Duncanson and Henderson 2022)**. We recommend that the educative video be part of a bundle of support materials.** These materials would assist jury members to engage more effectively with a trial, supporting their comprehension of law and the trial process – including issues pertaining to memory and responsive behaviour. Equipped with evidence-based knowledge about sexual violence, memory and trauma, 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.

[2] La Trobe University HEC 18411.

**Question 24** *Should cross-examination that reflects myths and misconceptions about sexual violence, such as the belief that a 'rape victim' would be expected to complain at the first reasonable opportunity be restricted on the ground that it is irrelevant or on any other ground?*

Research has demonstrated that restricting the use of evidence after it has been presented to the jury is much less effective than preventing it from being presented to the jury in the first place. Jurors rely on already-existing narrative schemas to make sense of evidence presented in the trial, and once a piece of evidence has been sorted into a juror's chosen narrative schema it is difficult to dislodge. Asking a juror to prioritise a piece of evidence they have already discarded in their narrative sorting process is an even more difficult task (Duncanson and Henderson 2014). For these reasons, cross-examination based on rape myths or misconceptions should, as far as possible, be prevented. In our research, we saw the positive difference this can make. In one of the trials in our sample, the judge used the logic behind the jury directions to prevent the defence from cross-examining the complainant about a rape myth-promoting event from her past (Henderson and Duncanson 2016) ). While all of the other trials in our sample (adult contemporary rape trials in the Victorian County Court over a 24 month period) resulted in acquittals, in this one trial where the Judge took a more active approach to the jury directions, the case resulted in a conviction. A striking comparison can be made to another trial in our sample, where despite highly similar facts, a very different trajectory played out after the judge allowed the introduction of myth-promoting evidence and cross examination, and the jury directions were only referred to when charging the jury.

The harm is caused not only by the introduction of the rape-myth promoting evidence into the trial, but also by the judge reinforcing the myth when attempting to counter it during the jury directions phase of the trial. This is because in order to counter a myth, the myth must first be rearticulated, which inadvertantly reinforces the myth and makes it even more difficult for the listener to process contradictory information.

In summary, narrative schemas operate in such a way that it is very difficult for a juror to dislodge a myth-triggering fact once it has been sorted into a narrative schema, no matter how carefully a judge warns or admonishes at the conclusion of the trial. **Thus we recommend that an important step is the introduction of a process (such a voir dire), following examination in chief, where the judge and counsel confer to ensure that the subsequent cross examination will not invoke rape myths.**

This is doubly important given that our research also suggests that many barristers have limited understanding of rape myths, very little or no training in the context of sexual violence, and that in practice they often call on rape myths while being unaware they are doing so.[3] We interviewed Victorian barristers with rape trial experience in 2020-21. Most of the barristers we spoke with expressed certainty that rape myths were no longer relevant in trial work and believed that judges or jurors would be so hostile to rape myths that attempts to use them would be counter-productive. However, most of those same barristers were unable to accurately explain what a rape myth was, and gave examples of rape myths in operation in trials without realising that is what they were. Many of the barristers we spoke with deliberately deployed rape myths (whether or not they understood this to be the case),

[3] La Trobe University HEC 18411

insisting that it was their job to follow certain strategies – either because the client specifically asked them to follow that path, or because the evidence led them there.

**The second step we suggest is that jurors be provided with a bundle of relevant information about sexual violence, the existence of rape myths and relevant jury directions, at the start of the trial, which they can refer to throughout the trial.** This bundle would reinforce the intention behind the jury directions by challenging jurors to reorganise pre-existing narrative schemas at the outset of the trial. (Duncanson and Henderson 2022)

In conclusion, exclusion of rape myths within the trial on the grounds of relevance is important but it has to happen before the material is brought before the jury. Once it has been admitted into evidence, it is too late to expect the jury to be able to disregard it in their deliberations.


Bulbulia, Jenny, Jean Quigley and Timothy Trimble, (2015) 'Impact of Vicarious Trauma On Barristers Practicing Criminal Law: An Armoury of Resilience' *Cork Journal of Applied Psychology* 33.

Duncanson, Kirsty and Emma Henderson (2014) "Narrative, Theatre and the Disruptive Potential of Jury Directions in Rape Trials" *Feminist Legal Studies* vol 22 pp155-174.

Duncanson, Kirsty and Emma Henderson 2022 "Interpellation by Design: Could Court Buildings Influence Jury Decision Making" in Duncanson, Kirsty and Emma Henderson (eds) *Court Architecture, Design and Social Justice* Routledge pp107-139

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

Henderson, Emma and Kirsty Duncanson (2016) "A Little Judicial Direction: Can the use of jury directions challenge traditional consent narratives in rape trials?" *University of New South Wales Law Journal* 39 (2) pp750-778.