JCV – MANAGING SEXUAL OFFENCES CASES

28TH JUNE 2024

Session 4 – Power and Responsibility in the courtroom

12.45 - 1pm **[Slides 1 and 2] The evolving justice system – Chief Judge Kidd**[1]

1 - 2.15pm **[Slide 2] Skills and Strategies for managing a trauma-informed court – Deputy Chief Judge M. Sexton**

Overview

The timing of this presentation is apposite, given the release this week by the Australian Bureau of Statistics of reporting rates for sexual assault[2]. The reporting rate is the highest in 31 years, which I think is when collection of the statistics began. So are there more sexual offences, or are people more willing to report? If the latter, are we as judicial officers, contributing to that increased willingness by the way cases are conducted in our courts, implementing the many reforms that have been made?

Through the lens of the Chief Judge's address just delivered[3], let's consider how we exercise our power to implement those

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1 "*An Evolving Justice System",* Chief Judge Peter Kidd, speech delivered at the Judicial College of Victoria's event, *Managing Sexual Offences Cases,* on 28 June 2024.

2 Sexual offending in Australia 2021–22 | Australian Institute of Criminology (aic.gov.au)

3 Note 1.

reforms and to demonstrate our dual responsibility to the accused and complainants in sex offence cases.

In sexual offence cases, the effects of trauma are likely to impact on the principal prosecution witness in varying degrees, and must be anticipated and managed.

To conduct a trauma informed hearing does NOT involve an assumption that the accused is guilty, or as the Chief Judge has discussed[4], that the complainant must be believed or disbelieved; it merely requires recognition of the position of the witness from their perspective.

Even use of the word 'managing', as in the title of this session, can be misunderstood by a complainant.

'Managing' the effects of trauma on a complainant encompasses the range of things we as judicial officers want to know in advance so that arrangements can be made to secure the best evidence from the witness. And that is not promoting their interests above that of the accused's right to a fair trial or ignoring the presumption of innocence.

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[4] Note 1.

Arrangements to secure 'best evidence' are a fundamental recognition that fairness requires a fair hearing to all involved in the proceeding[5]. Further, such arrangements for complainants are merely levelling the playing field, that is, bringing the complainant, particularly, vulnerable witnesses, up to the same 'neutral' level[6] as a starting point, as for any other witness, including the accused as a witness. And of course, these arrangements for sexual offence complainants are underpinned by specific legislation enacted for that very purpose since 2005 – almost 20 years ago.

The use of the word 'complainant' can also be misunderstood by the principal prosecution witness in a sexual offences case. As the Chief Judge pointed out, judicial officers understand why in a criminal case, the complainant is not called the victim until the accused is found guilty.

In my view, use of the terms 'complainant', 'witness' or 'victim' are all impersonal. One way to avoid all this potential misunderstanding is to always refer to them by their name. It also shows some respect. I try to always call participants by their name, even in rulings. If I choose to use initials or a

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5 *Attorney-General's Reference (No 3 of 1999)* [2001] 2 AC 91, [118] (Lord Steyn), cited in "*An Evolving Justice System",* Chief Judge Peter Kidd, speech delivered at the Judicial College of Victoria's event, *Managing Sexual Offences Cases,* on 28 June 2024.

6 See *Lehrmann v Network Ten Pty Limited (Trial Judgment)* [2024] FCA 369, [113].

pseudonym in delivering, I always explain that, and why, at the outset.

In sexual offences cases, the complainant is often vulnerable for many reasons. Under the Oxford Dictionary definition of vulnerability ("exposed to the possibility of being attacked or harmed either physically or emotionally") there would rarely be a complainant witness who is **not** in that position. And then there are vulnerable witnesses as that term is defined in the *Criminal Procedure Act* (CPA).

I acknowledge that fairness, vulnerability and special arrangements are important in other cases involving interpersonal violence, but we are today focussing on sexual offences.

Apart from considerations of fairness to all involved in a sexual offences case, what else does the notion of the fair hearing of a sexual offences cases incorporate in 2024?

A clue is in the title, which is also one of the aims of today's program: **Developing Skills and Strategies for managing a trauma-informed court.**

What does a trauma-informed court look like?

[Slide 3] Research[7] has ascertained that sexual assault 'victim survivors' have certain 'justice needs' or expectations:

- Support and advocacy
- Information
- Participation
- Voice
- Validation
- Accountability

When the victim survivor is also a complainant in a sexual offence case, there is clearly some difficulty in the justice system meeting all of those expectations, or doing so in a trauma informed way. The Chief Judge referred to the tensions that may exist between the architecture of a contested criminal hearing and the justice needs of a complainant[8].

Let's look briefly at each of those expectations in turn.

Support and advocacy While formal support has been available to complainants for decades through the OPP Witness Assistance Service and Child and Youth Witness Service, there is no access

7 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences Report,* 2021.

8 Note 1.

to an advocate during the main hearing. However, the justice need for advocacy has been partially met – or at least made available - in the context of applications for release of confidential communications, as outlined by Judge Chambers in this morning's session[9].

Information Providing information about their rights, the court system and the processing of their case is within the remit of the OPP who have a Victims' Policy. There are also rights conferred under the *Victims Charter Act 2006.*

In none of those areas - support, advocacy and information - does a judicial officer have any role. However, providing information to a complainant witness is within the power of us as judicial officers where possible and appropriate; for example, giving an explanation for a delay in a hearing, or at least expressing an understanding or acknowledgment that the delay will affect them. (Conducting a trauma informed yet fair hearing would mean acknowledging the effect of the delay on the accused separately, when the complainant is not in the hearing.)

Participation and Voice are also tricky in a contested hearing. Those aspects are defined in the research in a way that seeks to

[9] Session 2 (Part B): Confidential Communications and Protected Health Information delivered at the Judicial College of Victoria's event, *Managing Sexual Offences Cases,* on 28 June 2024.

give the complainant agency and decide how they want to participate. This includes telling their experience in their own words and in full, rather than the shortened version derived in cross examination, often lacking in context from their perspective.

However, these particular justice needs can be more easily accommodated in a plea hearing, with the opportunity for the court to be more flexible in receiving Victim Impact Statements. That is also the opportunity for the complainant to be informed that they are believed (Validation) and that there has been Accountability in the accused being found, or entering a plea of, guilty. I'll come back to these aspects later.

While judicial officers cannot meet these expectations in full, keeping them in mind and activating them where possible promotes the conduct of a trauma informed hearing.

Let us return to consider how we exercise our power and demonstrate our dual responsibility to the accused and complainants in sexual offence cases: in particular, the responsibility to ensure that a hearing is conducted in accordance with the law.

Decades of research has shown that in a number of significant areas, juries have likely been deciding cases on the basis of erroneous reasoning. Research with mock jurors has shown that their decision-making is often based on rape myths and misconceptions as well as victim stereotypes. [10]

It is also a common understanding that in the past many lawyers engaged in forms of erroneous reasoning[11], and that flowed through to their decision making, both as counsel and as judicial officers.

Jurors base their decisions on the evidence, but if there is a gap in the evidence, they will use their 'common sense' – which we tell them to use - but which involves their 'world knowledge' of similar events.

They do not maliciously or even intentionally seek to rely on myths and misconceptions, but if there is a gap in the evidence presented to them, they will fill in those gaps with their knowledge of what are described as 'story' structures.

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10 See for example, "The effect of trauma education judicial instructions on decisions about complainant credibility in rape trials.", Faye T. Nitschke, Blake McKimmie, Eric J. Vanman, *Psychology, Public Policy, and Law, February 2023.*

11 "Stereotypes in the Courtroom", Blake McKimmie, Ch. 14, *New Directions for Law in Australia, Essays in Contemporary Law Reform, (2017),* Eds. Ron Levy, Molly O'Brien, Simon Rice, Pauline Ridge, Margaret Thornton*; AWK v Tasmania* [2024] TASCCA5, [276] – [280], [318].

The Australian Institute of Family Studies (AIFS) has recently produced a Fact Sheet[12] based on the full paper prepared in combination with Victoria Police in 2017[13].

The AIFS will soon release updated research on the understanding of sexual violence by members of the public – from which juries are drawn. It is concerning that despite the efforts within the justice system, many of the same effects of misconceptions remain. These will inevitably form the basis of some jurors' 'world knowledge' and 'story structures' in the absence of evidence. Of course, based on the ABS figures of reporting of sexual assault, we can expect some jurors will have lived experience of sexual assault as victims to counter the misconceptions in the jury room, but we know that many people seek to be excused from serving as jurors on sexual offences cases for the very reason that, as victims, the subject matter will cause them distress or prevent their impartiality, or both.

"Rape myths are false notions about what is 'real' sexual violence and who are 'real' victims"[14].

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12 Fact Sheet: Challenging misconceptions about sexual offending, Victoria Police; Australian Institute of Family Studies - respectatwork.gov.au/Resource Hub.

13 "Challenging misconceptions about sexual offending: Creating an evidence based resource for police and legal practitioners" - respectatwork.gov.au/Resource Hub.

14 "The Trauma - Informed Court: Specialist Approaches to Managing Sexual Offence Proceedings – Part 1", Vicki Lowik, Amanda-Jane George, Masahiro Suzuki, Nichola Corbett-Jarvis, *Journal of Judicial Administration Vol 33, No 1, 0328.*

"Because victim stereotypes are mistaken" - but genuine - "beliefs about how 'real' rape complainants behave, education has broad policy support to help jurors rely less on stereotypes in their decisions."[15]

That education can take the form of expert evidence and judicial directions. I say 'and' rather than 'or', because there is nothing in the legislative provisions for either method of education for triers of fact that says they are mutually exclusive. That is, in my view, you could have both expert evidence and judicial directions in a sexual offences case.

As you know, Parliament has recognised the decades of research and since 2013 has passed legislation that seeks to correct mistaken reasoning in certain areas through judicial directions, resulting in the *Jury Directions Act 2015 (JDA).*

I understand that Judge Chambers this morning canvassed the sections of the JDA including those which deal with correcting or educating decision-makers about *genuine beliefs that are mistaken* in the area of sexual assault[16]. If I am directing a jury I would never use the terms 'myths' and 'misconceptions' so I am going to use that phrase now – genuine but mistaken belief.

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15 Note 10.

16 Recent developments in sexual offences – Session 2 (Part A) delivered at the Judicial College of Victoria's event, *Managing Sexual Offences Cases,* on 28 June 2024.

[Slides 4 - 7] Just as a summary, these directions include some that are designed to provide accurate information to correct genuine but mistaken beliefs about sexual assault.

If you look at the AIFS Fact Sheet[17], it is heartening to realise that of the 15 commonly held genuine but mistaken beliefs, all but two are either wholly or partly the subject of an educative judicial direction in the JDA. Those two not covered are the (perceived but inaccurate) belief of a high rate of false allegations[18], and the belief that the choice of victim is based on them being a young attractive person, not on their vulnerability, access and opportunity as perceived by the alleged offender. Those genuine but mistaken beliefs, plus other judicial directions that I class as partly addressing misconceptions, would benefit from being the subject of expert evidence.

Remember that the directions in the Charge Book are guides. You can use your own voice, re-word to suit your own voice and the case you are hearing, and to act in your dual responsibility to ensure a fair hearing by giving directions that are requested or necessary, but doing so in a trauma-informed way. The complainant may not be present during your delivery of a ruling

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17 Note 8.

18 There is no evidence that many women make vexatious reports of sexual offices, The rate of false allegations of sexual offences is very low. A range of studies show approximately 5% of rape allegations are proven false – AIFS Fact Sheet Note 8.

or directions, (although they are entitled to be unless you direct otherwise[19]), but they may obtain transcript or hear feedback on what you have said about their evidence. So it is a useful exercise in conducting a trauma-informed court to always speak as if they are present.

So for example, I never refer to a 'delay' in complaining or reporting to police. It is so loaded and such a pejorative term. I always say 'the passage of time that has passed'.

One direction that I have included on slide 5 (asterisk) is the direction on 'honest but erroneous memory', with which I have a great deal of difficulty as it conflicts with the research on memory.

It is not a direction specifically in the JDA, except by reference to evidence that may be unreliable in s32. Nor is it specifically removed from Victorian law. It is the last remaining vestige of *Longman*[20] in Victoria, the aspect of 'dangerous to convict' arising from that case having been removed by the JDA.

Thus, for some time in Victoria, the possibility of unreliability cannot derive merely from the time that has passed. The

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19 *Victims Charter Act* 2006.

20 [1989] HCA 60; 168 CLR 79.

possibility of unreliability that remains from *Longman* is said to be derived where a lengthy passage of time before reporting raises the risk that 'false recollections will have been converted into honestly and strongly held beliefs'[21]. I am not alone in doubting the validity of this assumption; there are a number of appellate judges in NSW who have expressed this view as well as querying whether such a direction is mandated by authority.[22]

I won't have time to fully outline why I consider it conflicts with the research but when I deal with memory and other authorities, you will get the drift.

I turn next to discuss the use of expert evidence in sexual offences cases.

[Slide 8] Section 108C *Evidence Act* 2008 (EA) – goes to credibility, as an exception to the credibility rule, by considering the impact of sexual abuse on children.

[Slide 9] Section 388 *Criminal Procedure Act* 2009 (CPA) – permits evidence of the nature of sexual offences and factors that may affect behaviour of a victim, including contributing to a passage of time before a report is made (that is, "delay").

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21 Judicial College of Victoria, *Criminal Charge Book* 4.8.3 [15].

22 Judicial College of Victoria, *Criminal Charge Book* 4.8.3 [20] – [21].

[Slide 10] Use of expert evidence on these aspects, including memory, started off well in Victoria in the years immediately following the introduction of both sections in the different legislation. However, it did not last, and is now rarely even raised for our consideration to be ruled upon.[23]

I find it extraordinary that these highly relevant sections have not been utilised as intended in sexual offence cases in Victoria. In New Zealand for example, the only question for judicial officers about what is described as 'counterintuitive evidence' is when in the trial it will be led, that is, before or after the complainant's evidence. Its admissibility and utility is a given.[24]

Having this type of evidence before a trier of fact validates the experience of the complainant and meets one of their expectations, thereby promoting a trauma-informed hearing. That this evidence relevant to the complainant's credibility is permitted by two pieces of legislation means that this validation can exist alongside the presumption of innocence and fairness to

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23 There was a trial heard in the County Court in 2021, where expert evidence concerning counterintuitive behaviour by alleged victims subject to sexual and family violence was led by the prosecution (over objection) with the trial judge in the ruling distinguishing *Jacobs* [2019] VSCA 285. There was no interlocutory appeal on this ruling nor appeal against conviction.

24 'The legitimacy of using judicial directions …and/or expert evidence to counter fact finders' erroneous beliefs or assumptions in sexual offences cases' was confirmed by the Supreme Court of New Zealand in *DH (SC 9/2014) v R* [2015] NZSC 35 - "Chapter 1. Responding to misconceptions: The law reform response" - Responding to misconceptions *about* sexual offending, Example directions for judges and lawyers, Te Kura Kaiwhakawa Institute of Judicial Studies, New Zealand, 2023. (Emphasis in original)

the accused. Courts are criticised for being out of touch and ruling out what is thought by members of the public to be relevant. But if it is not put before us for consideration, what can we do? I have some thoughts on that, which I will come to later.

It has taken a judge in a defamation trial in 2024 to bring parties in Australia to the point of having 'alleged counterintuitive evidence' as agreed facts, and incidentally making criminal judges and magistrates look a bit old-fashioned, as if we didn't know this material exists. See *Lehrmann v Network Ten Pty Limited (Trial Judgment)* [2024] FCA 369, [112]-[121].

As Lee J pointed out at [113], Network Ten initially served purported expert evidence which was not proposed to be adduced in support of a submission that it was probable Ms Higgins was telling the truth, nor that her behaviour following the alleged rape rendered it more or less likely that the assault had occurred as alleged. Rather, the opinion evidence was said to support the proposition that any counterintuitive behaviour relied upon by Mr Lehrmann was of neutral significance.[25]

This is levelling the playing field that I described at the outset. While such evidence is relevant to, and in the words of section

[25] See also New Zealand Law Reform Commission, *Evidence: Evidence Code and Commentary* (Report No 5, 1999) vol 2, 67 [C110]-[C111]; *MA* [2013] VSCA 20, [22] (Osborn JA).

108C *Evidence Act,* could substantially affect the assessment of, the credibility of the witness, it does so not by heightening their credibility, but bringing it back to neutral by removing the negative connotations that myths and misconceptions bring, which inaccurately lower the complainant's credibility.

Incidentally, this was not the view taken of this type of evidence in the case of *Jacobs*[26], the last of the Victorian cases mentioned on Slide 10. The expert evidence was held to be irrelevant and inadmissible on the basis that the defence had not put in issue the complainant's credibility by raising counterintuitive behaviour, thus in the Court's view, not passing the threshold relevance question in section 55 EA, and making consideration of s108C EA and s388 CPA redundant. The Court rejected the prosecution submission that despite counterintuitive behaviour not being raised by defence, the expert evidence was relevant and admissible to preclude the jury from acting on misconceptions drawn from the complainant's conduct and her culture. The Court concluded that to accept such a submission would have 'extraordinary consequences' such as evidence of the kind proposed being "admissible in a very large number of criminal trials in this State involving sexual offences."[27]

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26 [2019] VSCA 285, [61] – [73]; see Note 23 also.

27 Note 26, [74].

Further, that case seemed to suggest that if the complainant gave evidence about why they had behaved in a certain way, that made the expert evidence irrelevant, especially if the expert gave more reasons for that behaviour based on their research and knowledge than the complainant had given (reasons of which a complainant is unlikely to be aware). This case, together with budgetary considerations, may have been the reason why we have hardly seen expert evidence in Victoria over the last decade.

[Slides 11-12] show the ten points that were agreed facts on memory admitted by Lee J in *Lehrmann*.

[Slide 13] But wait, there's more. There were agreed facts as to the impact of acute alcohol intoxication (emphasis added in quote).

[Slide 14] And more….concerning the use of evidence of alcohol consumption that Lee J accepted from a review of cases suggests has historically been used to impede rather than support the prosecution case (emphasis added in quote).

[Slides 15-16] With respect to treatment of memory, criminal courts in other jurisdictions are also ahead of Victoria.

Query why this observation of Wood J in *AWK*[28] does not apply at the trial level? Why is a trial judge not obliged to point out to counsel that memory is a field of expertise and specialised knowledge and that counsel may be propounding erroneous beliefs?

Perhaps Martin AJ in the same appeal is indicating that this can happen[29]: [Slide 17]

Neither the court as trier of fact nor the jury are permitted to engage in speculation, and erroneous speculation at that. Yet that is what counsel for the accused invariably invites in sexual offences cases, confident in the knowledge that, in Victoria, the prosecution will not lead evidence of the true state of scientific knowledge about memory.

One notable exception is *Papazoglou No.2*[30], where in response to a foreshadowed and wide-ranging attack by the defence on the credibility and reliability of one of two complainants in a joint trial, including the calling of an expert witness by the defence, the prosecution did call their own expert. However, this trial was more than a decade ago!

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28 [2024] TASCCA 5, [280], Wood J.
29 Note 28, [319], Martin AJ.
30 [2014] VSCA 194.

Returning to, and applying the reasoning in *AWK*, it seems at least at appellate level, judicial notice can be taken that memory is a field of expertise and specialised knowledge and if counsel propounds erroneous beliefs, the court can use its own "wealth of experience demonstrating the fallacy underlying the[se] outdated concepts"[31] to stop counsel doing so.

For trial judges and judicial fact-finders, in directing the jury or ourselves, while being careful not to reverse the onus of proof, at the very least it can be pointed out that there is no evidence in the case to support the (usually) defence contentions regarding memory. As noted, this lack of evidence regarding contentions about memory applies equally to erroneous prosecution submissions.

Law reform reports have referred to ways of bringing this memory and other expert evidence forward[32] and I anticipate more reports in future will do so too[33]. In the meantime, if you have the opportunity in an early directions hearing, **be bold** and ask the parties if there is any reason why relevant agreed facts on memory such as in *Lehrmann*, or other topics where submissions are going to be made, cannot be part of the case. At

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31 Note 29.

32 Note 7.

33 For example, the Australian Law Reform Commission (ALRC) has been asked to inquire into justice responses to sexual violence in Australia. The ALRC has been asked to provide its final report to the Federal Attorney-General by 22 January 2025.

least it gets the conversation started, and may even generate some action by the OPP to bring this agreed material into the prosecution case if they do not have to call an expert witness.

The lack of use of this vast body of potential evidence in Victorian courts is a matter of great unfairness to complainants and severely compromises the ability to have a trauma-informed court. In NSW, things have been seen differently, at least at the appellate level.

[Slide 18] There have been a number of recent cases in NSW where expert evidence has been led. Interestingly, the issue at trial level has been more about the same expert called by the prosecution in each case. A number of District Court judges rejected the expert's evidence and these rulings did not go on appeal. However, those rulings were referred to in the Court of Criminal Appeal in *Aziz*[34], where the findings differed from those of the District Court with respect to the admissibility of the expert's evidence. Also interestingly, the Victorian decision of *MA*[35] was considered in that case to have a number of salient passages (that do not seem generally to have provided the basis for ongoing use of such evidence in Victoria).

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34 [2022] NSWCCA 76
35 [2013] VSCA 20

The latest of the NSW cases (*BQ*[36]) was on appeal in the High Court and heard in May 2024. So there may be some significant development in the law soon at the highest level that may provide further impetus to the consideration of using expert evidence in Victoria.

In the meantime, if there is no expert evidence or agreed facts, how can you direct the jury or yourself accurately, in accordance with the body of research that we know exists, and have a trauma-informed approach?

[Slide 19]

Directions Even if you do not have a specific direction on topic, in the JDA or at common law, you can be creative with your general direction about not acting on assumptions and speculation not based on evidence and which may be inaccurate.

Judicial notice *AJ*[37] is not available online for some reason, although it is referred to in *BQ*. It was heard while Beech-Jones J was still Chief Justice at Common Law of the NSW Court of Criminal Appeal before his elevation to the High Court (where he presumably sat on *BQ*).

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36 [2023] NSWCCA 34

37 [2022] NSWCCA 136

Although I have not been able to access and read *AJ*, I understand that his Honour may have considered that jury directions might be preferable to expert evidence but I do not know any more than that. *BQ* may provide more insight when it is handed down in the High Court. There is a body of research that has considered that choice of directions versus expert evidence[38], which time prevents me from mentioning here, but it is equivocal. I return to an earlier point: they are not mutually exclusive in my view. Assuming they are consistent in their content, both judicial directions and expert evidence could be before a jury.

Lehrmann[39] I have already discussed.

Fennell[40] was a murder case and involved dubious identification evidence regarding the murder weapon. This quote is, like in *AWK*, referring to an appellate court taking things into account. But my remarks about how to utilise that knowledge apply here too. This is a very strong statement from the High Court.

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38 See for example: "Enhancing the Credibility of Complainants in Child Sexual Assault Trials: the Effect of Expert Evidence and Judicial Directions", Jane Goodman-Delahunty, Annie Cossins, and Kate O'Brien, *Behavioural Sciences and the Law, (2010)*; "Greater Knowledge Enhances Complainant Credibility and Increases Jury Convictions for Child Sexual Assault", Jane Goodman-Delahunty, Natalie Martschuk, Eunro Lee, and Annie Cossins, *Frontiers in Psychology, (2021).*

39 *Lehrmann v Network Ten Pty Limited (Trial Judgment)* [2024] FCA 369

40 [2019] HCA 37, [81])Kiefel CJ, Keane, Nettle, Gordon and Edelmann JJ)

[Slide 20] And there is legislative power in the *Evidence Act:* section 144 provides for use of common knowledge where proof is not required; and (not included on the slide) section 177 provides for certificates of expert evidence.

Apart from the JDA, there are other legislative provisions which provide practical mechanisms to combat mistaken beliefs about sexual offences being aired in the courtroom and stop inappropriate questioning.

[Slide 21] Applying those legislative tools preserves procedural fairness to both the accused and complainant at the same time.

But it is not just the fact of application of these tools, it's how and when you apply them that will best enable you to manage a fair hearing in a trauma informed way.

[Slide 22] How: with clarity, courtesy, conciseness and common sense.

When: It depends! But for example, directions aimed at countering misconceptions must be delivered to juries as early as possible and as often as needed. Research[41] shows that

[41] McKimmie, (Note 10); "Enhancing the Credibility of Complainants in Child Sexual Assault Trials: the Effect of Expert Evidence and Judicial Directions", Jane Goodman-Delahunty, Annie Cossins, and Kate O'Brien, *Behavioural Sciences and the Law, (2010)*; "Simplification of Jury Directions Project - A Report to the Jury Directions Advisory Group"

directions before, and repeated contemporaneously with, the complainant's evidence avoids the jury using the 'mental shortcuts' and 'story' structures based on their genuine but mistaken beliefs to evaluate the evidence and draw inferences.

Exploring the how and when (and also the what)

Pre-hearing/before any evidence is called

In Magistrates' and County Court, directions hearings should highlight the applications that need to be decided before the hearing starts.

For example, an application to question the complainant concerning some aspect of their sexual history must be made either 7 or 14 days before the hearing, depending on what type of hearing it is. There is an interests of justice test if time has expired.

The longstanding existence of the prohibition on sexual reputation evidence and questions, and the need for leave to question about sexual activity combats the stereotype that a person who has engaged in sexual activity with others will be

(August 2012), supremecourt.vic.gov.au; "Improving the Justice System Response to Sexual Offences: Report", Victorian Law Reform Commission, Ch. 20 (2021); "Filling in the (gendered) gaps: How observers frame claims of sexual assault", Eva Mulder, Alice Kirsten Bosma, *International Review of Victimology 2022 28(2) 215-234*

more likely to consent generally, and on the occasion in question in the trial.

You will be familiar with the requirements for the application and the test to be met, but note that the scheme is from ss341 - 352 CPA and you should not confine yourself unduly to the 'main' sections.

For example, there is one section that I read in a new light in preparation for this session - s348. The application can be heard in the presence of the complainant unless the accused requests their absence. So if it is a late application and the complainant is present at the hearing, and remains so for the application, there is a golden opportunity for them to be informed as to what is being sought, and your reasons for granting leave or not. It would certainly focus the minds of all present on using careful language in submissions and in your reasons – a trauma informed court.

One aspect of interest, when there is any concern expressed about the provision of proposed questions in writing for a Ground Rules Hearing, it is worth pointing out that applications to ask questions about a complainant's sexual history has had that requirement for decades.

A recent case on section 342 is *Cooper v R*[42]. It concerned the 'relevance' of the proposed questioning, and was held not to be so, and 'certainly not substantially' so. There is also very useful commentary in the JCV Criminal Proceedings Manual.

Note for Commonwealth offences, there is a Commonwealth scheme for leave to be granted before questioning about sexual history.

<u>During evidence at the contested hearing</u>

Before the contested hearing, there may be applications to exclude evidence on the basis of irrelevance. However, these usually pop up without notice during evidence, and so I will deal with s55 relevance in that context.

Section 41 – improper questions and section 55 - relevance

Do politely enquire of counsel what the relevance is if it seems peripheral. If they say, it is based on instructions and integral to the defence, and that seems unlikely to you, have the discussion in the absence of the jury. Otherwise, let them proceed but be ready to jump in if it goes near the line. Sometimes it is relevant, but not well phrased. Experienced counsel can (generally) re-

42 [2023] VSCA 67, [17]-[40], (Priest, McLeish and Kennedy JJA).

phrase on their feet. If necessary, and with struggling counsel, have the discussion in the absence of the jury.

This is another example of where you can manage things in a trauma informed way. Gently let the witness know that the question does need to be asked even if it seems irrelevant to them.

If it is absolutely outrageous, such as in the examples from cases[43] in the paper you received in your participant packs, of course rule it out immediately. Try not to berate counsel in front of the jury. But definitely let them know exactly how you see that questioning at the first opportunity in the jury's absence. I give them fair warning in the jury's absence that next time my admonition will be in front of the jury and that usually works. So does 'the look' from the Bench.

Other extremely useful sections for a trauma informed court, especially for vulnerable witnesses

[Slides 23-24]

[43] *Murillo* [2020] VSCA 68, [107]-[109]; *Libke* (2007) 230 CLR 559, [127], (Heydon J); *Werden* [2015] VSCA 72, [128], (Priest JA); *Forsyth* [2013] ACTSC 174, [52].

Plea hearings – acknowledging victims and facilitating their participation in a trauma informed way

Discussion - what do YOU do?

Victim Impact Statements (VIS)

Division 1C of Part 3 *Sentencing Act* contains ten sections; be across all of them. For example, while s8L(3) provides for the court to rule as inadmissible the whole or any part of a VIS, the following sub-sections - (4), (5), and (6) - provide for a court to approach inadmissible material in a trauma informed way. My own practice is to indicate that I will not rely on any matter that is inadmissible and where that is obvious (such as reference by the victim to more allegations of offending than has been the subject of the case) counsel is invariably comfortable with that. There is no need to go through and pick the VIS to pieces – especially in the presence of the complainant.

There have been occasions where victims have been cross examined and the impact on them of the proven/admitted crimes has been found by the court to be less than was asserted. That is an example of sections 8O and 8P in practice. However, this process can still be, and should be, approached in a trauma informed way.

Note the greater potential for meeting the ‘justice needs’ of a complainant in a plea hearing: information, participation, voice, validation and accountability.

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