

# Project 113 Sexual Offences Volume 1: Objectives, Consent and Mistake of Fact.

Supplementary Submission by Full Stop Australia to the Law Reform  
Commission of Western Australia  
12 May 2023



## Introduction

On 17 March 2023, Full Stop Australia (FSA) made a submission to *Discussion Paper Volume 1: Objectives, Consent and Mistake of Fact* (Volume 1) of the Law Reform Commission of Western Australia's (Commission) Project 113 Review of Sexual Offence Legislation (17 March submission).

The 17 March submission responds to questions on consent and mistake of fact in Volume 1. Due to time and resource constraints, the 17 March submission did not address the questions in Volume 1 on jury directions. This supplementary submission to Volume 1 addresses some of those additional questions – in particular, responses have been provided to questions 24-30, 34-35 and 38-39 of Volume 1. We have not responded to every question in Volume 1 due to time and resource limitations.

This submission was prepared by Emily Dale, Head of Advocacy, and Jacqueline Stark, Research Assistant. If you have any questions in relation to this submission, please do not hesitate to contact Emily Dale at [emilyd@fullstop.org.au](mailto:emilyd@fullstop.org.au).

## About FSA

FSA is an accredited, nationally focused, not-for-profit organisation which has been working in the field of sexual, domestic, and family violence since 1971. We perform the following functions:

- Provide expert and confidential telephone, online and face-to-face counselling to people of all genders who have experienced sexual, domestic, or family violence, and specialist help for their supporters and those experiencing vicarious trauma;
- Conduct best practice training and professional services to support frontline workers, government, the corporate and not-for-profit sector; and
- Advocate with governments, the media, and the community to prevent and put a full stop to sexual, domestic and family violence.

FSA draws upon the experiences of our trauma-specialist counsellors, as well as our clients and other survivor advocates in our [National Survivor Advocate Program](#), to advocate for victim focussed laws and consistent approaches to family, domestic and sexual violence nationally. As a national service, our advocacy work aims to support colleagues in each State and Territory who are working tirelessly on the ground to improve the lives of victim-survivors.

## Terminology

Throughout this submission, the term *sexual violence* is used as a broad descriptor for any unwanted acts of a sexual nature perpetrated by one or more persons against another. This term is used to emphasise the violent nature of all sexual offences and is not limited to those offences that involve physical force and/or injury.

## Chapter 6: Jury Directions

### Legislating Jury Directions

#### 24. Should Western Australia legislate jury directions for sexual offence trials? Why/why not?

FSA recommends legislating jury directions for sexual offence trials.

Jury directions play an essential role in guiding juries through complex legal concepts and ensuring that they make informed and fair decisions in criminal trials. In rape trials, these directions are particularly critical due to widespread misconceptions about sexual offences and enduring negative attitudes towards victims. For example:

- A lack of understanding of the range of trauma responses – for example, the commonness of “freeze” and “fawn” responses, which do not involve active resistance by a victim-survivor, the fact that trauma can affect recall, and the fact that some victim-survivors may not appear distressed while giving evidence about a traumatic event. A 2009 study found that jurors often drew negative inferences from a complainant’s failure to appear obviously distressed while testifying, to report the offence immediately or to fight back physically during the assault – even though these are common responses among genuine victims of sexual violence.<sup>1</sup>
- A lack of understanding of complex power imbalances underlying a person’s ability (or lack thereof) to consent and withdraw consent.<sup>2</sup> Research shows that misconceptions about consent can influence juror decision-making in sexual offence trials “to the detriment of a proper application of the law of consent;”<sup>3</sup>
- “Real rape” myths, which do not accord with sexual violence perpetrated in intimate partner relationships or by a person known to the survivor. Research shows that individual complainants whose experience departs from the archetype of “real rape” (where the perpetrator is a stranger, physical violence is used and the victim fights back) are less likely to be accepted by jurors as genuine;<sup>4</sup>
- The persistence of victim blaming; and
- Lack of sympathy for victims who don’t match “perfect victim” archetypes.

As the New Zealand Law Commission noted in its 2015 report, ‘The Justice Response to Victims of Sexual Violence,’ the prevalence of these misconceptions in sexual violence trials often inhibits the jury’s ability to perform its function, which is to apply combined common sense and life

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<sup>1</sup> L. Ellison and V. Munro, ‘Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials’ (2009) 49(3) *The British Journal of Criminology* 363, 363.

<sup>2</sup> Enhance Research, *Community Attitudes to Sexual Consent* (Women’s Safety and Justice Taskforce (Qld), 2022).

<sup>3</sup> New South Wales Law Reform Commission, *Consent in relation to Sexual Offences* (Report No 148, September 2020) [8.35].

<sup>4</sup> H. Gerger, H. Kley, G. Bohner, F. Siebler, ‘The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English’ (2007) 33(5) *Aggressive Behavior* 422, 423.

experience to ascertain the facts in a criminal case.<sup>5</sup> Research has found that jurors commonly rely on ignorant or biased assumptions when determining guilt in sexual violence matters. For example, a 2007 study conducted by the Australian Institute of Criminology revealed that:

*pre-existing juror attitudes about sexual assault not only influence their judgements about the credibility of the complainant and guilt of the accused, but also influence judgements more than the facts of the case presented and the manner in which the testimony is given.*<sup>6</sup>

FSA considers legislated jury directions would improve justice outcomes in sexual violence trials, as they would:

- Enable judicial officers to address common myths and misconceptions, reducing the likelihood of unjust outcomes;
- Provide greater consistency in judicial officers' handling of sexual violence trials, which would likely have the positive effect of increasing certainty of both process and outcomes; and
- Increase the confidence of victim-survivors and the general public regarding the way sexual violence trials are handled.

It is important that any legislated jury directions be drafted carefully, to avoid inadvertently reinforcing harmful stereotypes or rape myths. FSA requests the opportunity to be consulted further on the drafting of legislative amendments inserting jury directions. FSA also recommends that the Commission consult with other sexual violence organisations working in WA – including Women's Legal Service WA and the Centre for Women's Safety and Wellbeing – on legislative drafting.

### **Directions About Consent**

*25. Should there be a legislated jury direction about the meaning of consent in sexual offence cases and/or the circumstances in which a person does not consent? If so, what should that direction say? In what circumstances should it be given?*

FSA supports the implementation of a legislated jury direction about the meaning of consent, which explains the affirmative consent model,<sup>7</sup> including that:

- consent must be free and voluntary;
- consent requires a positive act of communication; and

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<sup>5</sup> New Zealand Law Commission, 'The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes', NZLC R136 (December 2015), 12

<sup>6</sup> N. Taylor and J. Joudo, 'The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: An experimental study', *Research and Public Policy Series* No 68 (Canberra: Australian Institute of Criminology, 2005).

<sup>7</sup> See Full Stop Australia's Initial Submission to Volume 1.

- consent may be withdrawn at any time by words or conduct, and sexual activity that occurs after consent has been withdrawn occurs without consent.

As set out in more detail below in response to question 38, FSA recommends such a direction be given at the outset of all sexual violence trials, and repeated during proceedings if there is a good reason for doing so, or a party to proceedings requests it be repeated and there is no good reason not to do so.

### Directions About Responses to Sexual Violence

*26. Should there be a legislated jury direction about the way in which people may respond to sexual violence? If so, what should that direction say? In what circumstances should it be given?*

FSA recommends introducing a legislated jury direction about the multitude of ways that people may respond to sexual violence.

We would support a legislated direction modelled off the following provision in New South Wales and Victorian law:<sup>8</sup>

- (a) there is no typical or normal response to non-consensual sexual activity, and*
- (b) people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything, and*
- (c) the jury must avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity.*

FSA considers that such a provision would help to address the ongoing dearth of understanding regarding normal trauma responses. Research shows that misconceptions about how a “real victim” would react to a sexual offence (for example, physical struggle or clearly expressing rejection) continue to adversely affect the assessment of complainants’ credibility in sexual assault trials.<sup>9</sup> In addition, despite significant evidence that “freeze” and “fawn” responses are normal reactions to sexual violence, cross-examination continues to raise a failure to resist to suggest that a complainant was consenting to sexual activity.<sup>10</sup> FSA considers it essential that jury

<sup>8</sup> See *Criminal Procedure Act 1986* (NSW) s 292B; *Jury Directions Act 2015* (Vic) s 47E.

<sup>9</sup> See Isla Callander, ‘Jury Directions in Rape Trials in Scotland’ (2016) 20 *Edinburgh Law Review* 76, 77; Kimberly Peterson, ‘Victim of villain?: The effects of rape culture and rape myths on justice for rape victims’ (2019) 53 *Valparaiso University Law Review* 467, 485-486; Louise Ellison and Vanessa E Munro, ‘Reacting to Rape: exploring jurors’ assessments of complainant credibility’ (2009) 49(2) *British Journal of Criminology* 202; Ellison and Munro, above n 1, 363; NSW Law Reform Commission, above n 3, [8.2].

<sup>10</sup> E McDonald and others, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) 277. See also J Horan and J Goodman-Delahunty, ‘Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned’ (2020) 43 *UNSW Law Journal* 707, 716; New South Wales Law Reform Commission, above n 3, [8.99]-[8.101].

directions address the reality that even if a victim does not physically resist, they may nonetheless not consent to sex.<sup>11</sup>

As set out in more detail below in response to question 38, FSA recommends such a direction be given at the outset of all sexual violence trials, and repeated during proceedings if there is a good reason for doing so, or a party to proceedings requests it be repeated and there is no good reason not to do so.

### **Directions About the Absence of Injury, Violence or Threat**

*27. Should there be a legislated jury direction about the absence of injury, violence or threat? If so, what should that direction say? In what circumstances should it be given?*

FSA recommends introducing a legislated jury direction which specifies that non-consensual sexual activity may have occurred even if the victim did not experience injury, physical violence or threat.

We would support a legislated direction modelled off the following provision in New South Wales and Victorian law:<sup>12</sup>

- (a) people who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence, and*
- (b) the absence of injury or violence, or threats of injury or violence, does not necessarily mean that a person is not telling the truth about an alleged sexual offence.*

Despite overwhelming evidence that non-consensual sexual activity may occur in a range of contexts and relationships, and regardless of whether there is injury or violence present, many persist in understanding rape as a stranger forcibly assaulting a woman in a deserted area, where, despite her physical and verbal resistance, she cannot stop the assault. As a result, juries are often influenced by the misconception that a “genuine victim” of sexual assault would experience physical injury.<sup>13</sup> Legislating a jury direction to correct that misconception will allow the law to better support victims who have not sustained injury but have nevertheless experienced non-consensual sexual violence, which accounts for a large proportion of cases.

As set out in more detail below in response to question 38, FSA recommends such a direction be given at the outset of all sexual violence trials, and repeated during proceedings if there is a good

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<sup>11</sup> Harrison Lee et al, 'The Effects of Victim Testimony Order and Judicial Education on Juror Decision-Making in Trials for Rape' (2022) *Psychology, Crime and Law* 1, 2.

<sup>12</sup> See *Criminal Procedure Act 1986* (NSW) s 292C; *Jury Directions Act 2015* (Vic) s 47D(b).

<sup>13</sup> Ellison and Munro, above n 1, 371–372; Ellison and Munro, above n 9, 206–207; Louise Ellison and Vanessa E Munro, 'Better the Devil you Know? 'Real Rape' Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17 *International Journal of Evidence and Proof* 299, 314–315.

reason for doing so, or a party to proceedings requests it be repeated and there is no good reason not to do so.

### **Directions About Other Sexual Activity**

*28. Should there be a legislated jury direction about the relevance of other sexual activities in which a person has engaged? If so, what should that direction say? In what circumstances should it be given?*

FSA recommends legislating a jury direction to clarify that, in considering whether a person consented to sexual activity, it is not relevant that they have engaged in other sexual activities in the past.

We would support a legislated direction modelled off the following provision in Victorian law:<sup>14</sup>

*People who do not consent to a sexual activity with a particular person on one occasion, may have, on one or more other occasions, engaged in or been involved in consensual sexual activity—*

- (a) with that person or another person, or*
- (b) of the same kind or a different kind.*

It is common for a victim to have consented to some sexual activity with the accused prior to sexual assault, or to have consented to participating in a different sexual activity with the accused at the time of the alleged assault.<sup>15</sup> This direction would make it clear that prior sexual activity is not relevant to whether a person consented to the sexual activity being considered in proceedings.

It would also address the persistence of victim blaming and negative stereotyping of victims who do not meet the “perfect victim” archetype, and remind jurors to consider only the facts of the case before them.

As set out in more detail below in response to question 38, FSA recommends such a direction be given at the outset of all sexual violence trials, and repeated during proceedings if there is a good reason for doing so, or a party to proceedings requests it be repeated and there is no good reason not to do so.

### **Directions About Personal Appearance and Irrelevant Conduct**

*29. Should there be a legislated jury direction about the assumptions that may not be drawn from the complainant’s personal appearance or conduct? If so, what should that direction say? In what circumstances should it be given?*

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<sup>14</sup> See *Jury Directions Act 2015* (Vic) s 47F.

<sup>15</sup> Harrison, above n 11, 4.

FSA supports introducing a legislated jury direction with the following elements, modelled off Victorian and NSW law:<sup>16</sup>

*It should not be assumed that a person consented to a sexual activity because the person—*

- (a) wore particular clothing or had a particular appearance, or*
- (b) consumed alcohol or another drug, or*
- (c) was present in a particular location, or*
- (d) acted flirtatiously.*

This direction would address dated and false narratives, which drive victim blaming and deny survivors justice.

As set out in more detail below in response to question 38, FSA recommends such a direction be given at the outset of all sexual violence trials, and repeated during proceedings if there is a good reason for doing so, or a party to proceedings requests it be repeated and there is no good reason not to do so.

### **Directions About the Relationship Between Perpetrators and Victim-Survivors**

*30. Should there be a legislated jury direction about the relationship between sexual offence perpetrators and people who experience sexual violence? If so, what should that direction say? In what circumstances should it be given?*

FSA supports the implementation of a legislated jury direction regarding existing relationships between perpetrators and victim-survivors. Such a direction could be modelled off the following provision in Victorian law:<sup>17</sup>

*Non-consensual sexual activity can occur between different kinds of people including –*

- (a) people who know one another, or*
- (b) people who are married to one another, or*
- (c) people who are in an established relationship with one another, or*
- (d) people who provide commercial sexual services and people for whose arousal or gratification such services are provided, or*
- (e) people of the same or different sexual orientations, or*
- (f) people of any gender identity, including people whose gender identity does not correspond to their designated sex at birth.*

Despite being the fact that 35% of women have experienced physical or sexual violence, or both, perpetrated by a man they know,<sup>18</sup> the myth that sexual offences are usually committed by

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<sup>16</sup> See *Criminal Procedure Act 1986* (NSW) s 292; *Jury Directions Act 2015* (Vic) s 47G.

<sup>17</sup> *Jury Directions Act 2015* (Vic) s 47H; see also *Criminal Procedure Act 1986* (NSW) s 292A.

<sup>18</sup> Australian Bureau of Statistics (2023). *Personal safety, Australia, 2021-2022*. Canberra, ACT: Author. Retrieved from: <https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release#sexual-violence>.



strangers persists. This jury direction would provide better protection to survivors of intimate partner sexual violence, and survivors who have otherwise experienced sexual violence perpetrated by someone known to them.

Additionally, FSA supports the inclusion of a legislated jury direction in relation to the continuation of a relationship after a sexual offence occurs, which could be modelled off the following Victorian provisions:<sup>19</sup>

- (a) some people who are subjected to a sexual act without their consent will never again contact the person who subjected them to the act, while others—*
  - (i) may continue a relationship with that person, or*
  - (ii) may otherwise continue to communicate with them, and*
- (b) there may be good reasons why a person who is subjected to a sexual act without their consent—*
  - (i) may continue a relationship with the person who subjected them to the act, or*
  - (ii) may otherwise continue to communicate with that person.*

As set out in more detail below in response to question 38, FSA recommends such a direction be given at the outset of all sexual violence trials, and repeated during proceedings if there is a good reason for doing so, or a party to proceedings requests it be repeated and there is no good reason not to do so.

### **Directions About Differences in the Complainant's Accounts**

*34. Should there be a legislated jury direction about differences in the complainant's accounts? If so, what should that direction say? In what circumstances should it be given?*

FSA would support introducing a legislated jury direction to make it clear that differences in a complainant's accounts do not necessarily point to a lack of credibility.

A common misconception in sexual offence cases is that complainants will always give full and consistent accounts of relevant events, remember all details of an offence and be consistent in their descriptions of it.<sup>20</sup> However, research shows that it is common for a complainant to recount their experience of a sexual offence differently at different times, because of the way they retain and recall memories, the context of the disclosure, or feelings of stress or embarrassment.<sup>21</sup> Disordered and fragmented memories are also common responses to trauma.

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<sup>19</sup> *Jury Directions Act 2015* (Vic) s 54H.

<sup>20</sup> Department of Justice and Regulation (Vic), Criminal Law Review, *Jury Directions: A JuryCentric Approach Part 2* (2017) 20; New South Wales Law Reform Commission, *Consent in relation to Sexual Offences* (Report No 148, September 2020) [8.15].

<sup>21</sup> *Ibid* [8.18].

Including a jury direction that specifically addresses differences in a complainant's accounts, reflecting the fact that inconsistencies in accounts in trials for sexual offences are common but do not necessarily mean that a complainant is fabricating their story, will help address this reality.

FSA supports the implementation of a legislated jury direction modelled off those given in New South Wales and Victoria:<sup>22</sup>

- (1) In circumstances to which this section applies, the Judge may direct the jury—*
- (a) that experience shows—*
    - (i) people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time, and*
    - (ii) trauma may affect people differently, including affecting how they recall events, and*
    - (iii) it is common for there to be differences in accounts of a sexual offence, and*
    - (iv) both truthful and untruthful accounts of a sexual offence may contain differences, and*
  - (b) that it is up to the jury to decide whether or not any differences in the complainant's account are important in assessing the complainant's truthfulness and reliability.*
- (2) In this section—difference in an account includes—*
- (a) a gap in the account, and*
  - (b) an inconsistency in the account, and*
  - (c) a difference between the account and another account.*

FSA recommends such a direction should be able to be given as the judge sees fit, at any time during a trial, and on more than one occasion during a trial if required. This is the position in NSW law.<sup>23</sup>

### **Complainant responses to giving evidence**

*35. Should there be a legislated jury direction about the ways in which complainants may respond to giving evidence? If so, what should that direction say? In what circumstances should it be given?*

FSA recommends introducing a jury direction that addresses bias against complainants who do not appear distressed when giving evidence.

As noted in Volume 1, there is ample evidence of complainants who appear calm or controlled in court being assessed as less credible than complainants who appear emotional, despite research that emotional demeanour is not a reliable indicator of honesty.

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<sup>22</sup> *Criminal Procedure Act 1986 (NSW) s 293A; Jury Directions Act 2015 (Vic) s 54D.*

<sup>23</sup> *Criminal Procedure Act 1986 (NSW) s 293A.*

FSA recommends modelling a legislated jury direction off the following provision in NSW law:<sup>24</sup>

- (a) trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence, but others may not, and*
- (b) the presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth about an alleged sexual offence.*

As set out in more detail below in response to question 38, FSA recommends such a direction be given at the outset of all sexual violence trials, and repeated during proceedings if there is a good reason for doing so, or a party to proceedings requests it be repeated and there is no good reason not to do so.

### **Timing of Directions**

*38. Should judges be required to give any directions at a specific time during the trial? If so, which directions should include a timing requirement? When should those directions be given?*

FSA considers that the required timing for each of the legislated jury directions recommended above (other than the direction recommended in response to Question 34, for which FSA has suggested alternative timing requirements above) should be:

- Directions must be given at the outset of every sexual offence trial; and
- Directions must be repeated during the sexual offence trial if there is a good reason to do so, or if a party to proceedings requests the direction be repeated and there is no good reason not to do so.

It is important that jury directions be given at the outset of proceedings in all sexual offence trials, as evidence shows that the potential for such directions to influence the outcome of a trial is dependent on their being given early. In a comparative study of 10 rape trials, which used the timing of jury direction as the key variable, early introduction of jury directions showed a higher conviction rate compared to when they were introduced later.<sup>25</sup> In 2004, the Victorian Law Reform Commission found that the timing of jury directions significantly impacts the jury's deliberation process, with directions delivered early being much more effective in combating misconceptions and myths about sexual assault.<sup>26</sup> Research has also found that in sexual violence trials, jury directions presented as part of a "lengthy judicial monologue, at the end of a days or weeks-long trial," are ineffective at enabling the jury to consider evidence through an alternative narrative

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<sup>24</sup> *Criminal Procedure Act 1986* (NSW) s 292D.

<sup>25</sup> Emma Henderson and Kirsty Duncanson, 'A little judicial direction: Can the use of jury directions challenge traditional consent narratives in rape trials?' (2016) 39(2) *UNSW Law Journal* 750, 759.

<sup>26</sup> Victorian Law Reform Commission (VLRC), *Sex Offences: Interim Report, Report No 78* (2004) Ch 7.

framework that is not based on existing misconceptions.<sup>27</sup> This shows that, once a jury has built a narrative based on misconceptions at the start of a trial, it is more difficult to dislodge this later in proceedings.

In addition to giving directions at the beginning of a trial, it may be necessary to remind jurors of relevant directions later in proceedings – for example, if the defence’s cross-examination inappropriately reinforces rape myths in a way that undermines jury directions given at the outset of proceedings. As noted in Volume 1, “repetition of jury directions helps jury comprehension.”<sup>28</sup> We have suggested that a provision governing the timing of such repeated directions be modelled off section 292(2) of the *Criminal Procedure Act 1986* (NSW).<sup>29</sup>

Although Volume 1 notes that “it does not seem that legislation would be required to permit Western Australian judges to give relevant directions earlier in the trial,” FSA recommends introducing a *requirement* that judges give relevant directions at the outset of a trial (rather than leaving this up to judicial discretion). This would ensure that harmful myths are addressed before they can influence jury members’ thinking and enhance the consistency of sexual violence trials.

### **Juror Education**

*39. Should jurors be provided with education specific to sexual offending? If so, what should be the content of such education? How and when should it be delivered?*

FSA would support jurors being provided with education specific to sexual offending prior to the commencement of trial. This could occur before jury directions on consent and sexual offending are given.

Pre-trial juror training should focus on undoing common rape myths and misconceptions relating to how victim-survivors respond to sexual violence. A list of some common myths and misconceptions, which FSA considers juror education should address, are set out above in response to Question 24 above.

Research shows that juror education prior to evidence being given in a trial assists the jury to revise underlying assumptions based on rape myths.<sup>30</sup> Studies have also shown that jurors who received education to undo misconceptions around consent and common rape myths prior to the

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<sup>27</sup> Kirsty Duncanson and Emma Henderson, ‘Narrative, Theatre, and the Disruptive Potential of Jury Directions in Rape Trials’ (2014) 22 *Feminist Legal Studies* 155, 172.

<sup>28</sup> Department of Justice and Regulation (Vic), Criminal Law Review, *Jury Directions: A Jury-Centric Approach* (Report, 2015) 9.

<sup>29</sup> Noting, however, that this provision deals with the giving of jury directions in the first instance. As set out above, FSA recommends that jury directions should be given in the first instance at the outset of proceedings – then repeated as required in the circumstances set out in s 292(2).

<sup>30</sup> Harrison, above n 11, 3.

commencement of a trial are more resistant to statements founded on myths and misconceptions being made by other jurors during deliberation.<sup>31</sup>

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<sup>31</sup> Ibid, 4-5.