CURRENT AND PROPOSED SEXUAL CONSENT LAWS IN AUSTRALIA

Recommendations

The three main recommendations of the following submission are:

1) Create a training regime for jurists, lawyers and judges to undertake prior to adult sexual assault cases being heard based on the 'Justice Shouldn't Hurt Child Sexual Assault' training.

2) Refine the adversarial cross-examination process to protect victims (accusers) from intimidating, inflammatory, imaginative, or vexing interrogation.

3) Give judges the right to remedy any questionable examination (or testimony) through notice to counsel, or instructions to juries (through further elucidations or instructions to disregard).

Preamble

This submission does not represent any other individual or organisation. I am not a lawyer, I have no legal training, and nothing in the submission should be considered 'professional' opinion. Nevertheless, I make the submission for the committee's interest and with reference to earlier investigations into a part of the Australian justice system which appears to need strengthening to ensure fairness and relevance to contemporary concepts of ethics, morality and justice extend from consent laws into the court of law.

My submission concentrates on the fourth term of reference:

> d. how consent laws impact survivor experience of the justice system;

although it may, at points, be relevant to the fifth term of reference:

> e. the efficacy of jury directions about consent.

It will focus on three areas only: non-adversarial cross-examination of victims; the presumption of witness strength; and the contemporary effectiveness of the jury system.

NON-ADVERSARIAL CROSS-EXAMINATION OF VICTIMS

The Australian Law Reform Commission has stressed the 'unbreakable link between professional skills, professional ethics and professional responsibilities'[1] Yet, in sexual assault cases (for brevity I will generalise these are male defendant / female accuser) the traditional mode of defence is attack, most often without respect for responsible, ethical behaviour toward witnesses.

The reform of law as with the reform of almost all social edifice is best viewed as a slinky 'walking' down a set of stairs in a game of 'catch-up'. As with most social edifices, justice will often appear anachronistic when compared to certain contemporary social mores. This is as it should be. Justice and its legal systems, from national constitutions to magistrates courts, should be based on precedent and should be conservative in judgement. Failure to be such will lead to a loss of belief in the propriety of any justice system.

[1] http://www.austlii.edu.au/au/journals/DeakinLRev/2009/2.pdf)

The second half of 2022 saw the matter of R v Bruce Lehrmann heard in the ACT Supreme Court. The crown alleged Bruce Lehrmann had raped Brittany Higgins in 2019 after the two shared a taxi to Parliament House following a night out with colleagues in the capital. There is no need to revisit the story but it was fairly reported in the Sydney Morning Herald in October 2022.[2] The Lehrmann trial was caught in the middle of the slinky marching down the stairs.

The Judge noted at the beginning of the trial:

> The present case is different because the author of the impugned remarks will be a key witness in the trial. The central issue in the trial, it is now clear, will be the credibility of the complainant and whether her allegation of sexual assault can be believed. It is not uncommon in such matters for the defence to explore in cross-examination the way in which a complaint unfolded as the central basis for making submissions to the jury as to whether the complaint should be believed.
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> The irony in all of this is that the important debate as to whether there are shortcomings in the way in which the courts are able to deliver justice in sexual assault cases, to complainants and accused persons alike, has evolved into a form of discussion which, at this moment in time, is the single biggest impediment to achieving just that.[3]

On the 5th of May, 2022, the ACT Legislative Assembly passed reforms of the sexual consent laws in the ACT. Attorney-General Shane Rattenbury said, "No longer are we presuming that a person is consenting unless they indicate they are not." [4]

The ACT, was not alone in consent reforms. The same year in New South Wales it was noted:

> Juries will be explicitly reminded sexual assault can occur between acquaintances and people who are married or in a relationship, that it is not always accompanied by violence or physical injury, and there is no “normal” response to being sexual assaulted. It’s the first-time specific directions are being given for an offence in NSW.[5]

Lehrmann's barrister, Steven Whybrow SC, didn't get the memo. As described in the *Australian Financial Review,* the cross-examination was intimidating, inflammatory, imaginative, designed to be vexing, to upset the witness.

> "The defence launched an onslaught against Higgins’ credibility, including picking apart inconsistencies including how long she kept the white dress she wore that night in a bag under her bed. Whybrow said Higgins used doctors’ appointments she never attended to make people believe she was raped.
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> "Whybrow suggested she had gone into Reynolds’ office of her own accord, removed her dress and either fell asleep or passed out on the couch.
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> "Whybrow suggested Higgins faced an “embarrassing situation” after learning that a security guard had found her naked. The barrister asserted that Higgins did what was necessary to make people believe she had been assaulted. ..."You are so incorrect.”

[2] https://www.smh.com.au/politics/federal/judge-gets-straight-to-the-point-in-trial-of-bruce-lehrmann-20221004-p5bn6i.html
[3] https://www.courts.act.gov.au/__data/assets/pdf_file/0019/2023309/Lehrmann-No-3.pdf
[4] https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releasees
[5] https://lsj.com.au/articles/a-question-of-consent/

> Higgins said. “I don’t know if you’ve ever gone through a trauma before, but confronting it head-on with professionals is a really difficult thing to do.”
>
> "Whybrow homed in on the book deal Higgins secured in March 2021 about her experiences in parliament which he posed as a $325,000 reason for her to push on with her complaint."[6]

The cross-examination broke the bounds of civility. In Lexicology, Avinash Singh from Astor Legal describes the various techniques used by the defence legal team including a common cross-examination technique used by criminal lawyers known as ‘closing the gates’, whereby a witness is led into making a statement which can be demonstrably proven to be false:

"She was then taken to her interview with federal police where she said Lehrmann attempted to kiss her before 22 March 2019. She said the attempted kiss would have occurred during a sitting week, and on a Wednesday, because “that’s when we went out as a team”. However, it was revealed that there was no sitting week between March 2 and 26, 2019 forcing a concession from Ms Higgins that, “I don’t know if I should have been so definitive.”[7]

It was suggested that Higgins did not go to the doctor because she had not had sex with anyone to which she responded, “Nothing you are saying right now is true … and it’s deeply insulting”.[8]

ACT Director of Public Prosecutions Shane Drumgold said Higgins had faced “a level of personal attack” that he’d not seen in 20 years working in the legal profession.[9]

The 2014 publication, *Non-adversarial Justice* (Frieberg et al) discusses 'practices such as therapeutic jurisprudence, restorative justice, preventive law, creative problem solving, holistic law, appropriate or alternative dispute resolution, collaborative law, problem-oriented courts, diversion programs, indigenous courts, coroners courts and managerial and administrative procedures'.[10] I presume the book is being considered and hope the authors, together or singly, contribute to the current investigation though submission or through amicable arrangements.

Alternative dispute resolution and non-adversarial cross-examination are sometimes conflated in legal theory. I do not think such conflation is wise in instances of sexual assault allegations. Sexual consent and assault is not is not an area where alternative dispute resolution such as mediation would be appropriate. The violence and result of the act is indisputable and the remedy must be greater than a handshake across a table. However, the heightened emotions and grief on the part of the accuser in a sexual assault case requires a 'gentler' touch from the legal teams of both parties.

THE PRESUMPTION OF WITNESS STRENGTH

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6 https://www.afr.com/politics/federal/the-lehrmann-trial-two-versions-of-the-truth-20221021-p5brqr

7 https://www.lexology.com/library/detail.aspx?g=47276513-933b-4f5f-a6f5-8eed42c152cf

8 https://www.lexology.com/library/detail.aspx?g=47276513-933b-4f5f-a6f5-8eed42c152cf

9 https://lsj.com.au/articles/unpacking-the-bruce-lehrmann-trial/

1010 *Non-adversarial Justice* (Frieberg et al)

> Danforth: Is it possible, child, that the spirits you have seen are illusion only, some deception that may cross your mind when—
> Abigail: Why, this—this—is a base question, sir.
> Danforth: Child, I would have you consider it—
> Abigail: I have been hurt, Mr. Danforth; I have seen my blood runnin' out! I have been near to murdered every day because I done my duty pointing out the Devil's people—and this is my reward? To be mistrusted, denied, questioned like a—
> Arthur Miller, *The Crucible*

It has been noted for some time that the adversarial process is flawed when it comes to children and sexual assault survivors. For example, in 2010, the Australian Law Reform Commission stated in a report on family violence

> Cross-examination is a feature of the adversarial process and is designed, among other things, to allow the defence to confront and undermine the prosecution's case by exposing deficiencies in a witness' testimony, including the complainant's testimony. Under the common law, the uniform Evidence Acts and other legislation, limitations have been placed on inappropriate and offensive questioning under cross-examination. It has been argued, however, that the effect of these provisions in practice has not provided a sufficient degree of protection for complainants in sexual assault proceedings.[11]

In the unfortunately named 'inquisitorial' system (widely used in Europe) the judge is given the ability to intercede in the proceedings, indeed to indicate a need for further discovery when required. Once satisfied enough evidence is at hand to undertake a reasonable deliberation.

In cases where there is a power imbalance (e.g. gender, race, age) or the prospect of abuse of process it would be appropriate for a judge not just to adjudicate between competing adversaries (barristers) but to address instances of sophistry.

The adversarial system is so entrenched in English speaking countries there is little point in even broaching a change. However, the judge should be granted more leeway to intervene for the sake of procedural fairness and to. protect witnesses from gamesmanship and morally questionable courtroom tactics. As a judge in the United Kingdom remarked:

> It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be

[11] https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/28-other-trial-processes-3/cross-examination-2/

> unattractive, but any other approach leads to uncertainty and potentially real unfairness.'[12]

THE CONTEMPORARY EFFECTIVENESS OF THE JURY SYSTEM.

> "The vaccine for the vice of pre-judgment is to empower the jury by giving appropriate directions reminding them that they are uniquely placed to determine the case and directing them to disregard the views of others, who will not have heard all of the evidence."[13]

The theatre of a court entreats the barrister to perform for judge, jury and public. A standard tactic of the adversarial system is to render the accuser (the victim) the defendant though rhetorical devises to question the authority and legitimacy of the accuser. The defence barrister proceeds to ensnare the accuser into assertations that are disprovable, therefore tainting the rest of the accusers testimony. A skit from Fry and Laurie takes the ballyragging of a witness to extremes; however, its humour comes not from absurdity but from satire. (https://www.youtube.com/watch?v=SVRODdXVI3Q)

The jury system has always been prone to abuse. In the *Apology of Socrates*, Plato describes Socrates' understanding of the manipulation of the jury system through the utilisation of absence of evidence of innocence as evidence of guilt. In denying he is a professional teacher, Socrates opens the door for Meletus to question his testimony:

> Here perhaps, one of you might interrupt me and say: "But what is it you do, Socrates? How is it you have been misrepresented like this? Surely all this talk and gossip about you would never have arisen if you had confined yourself to ordinary activities, but only if your behaviour was abnormal Give us the explanation, if you do not want us to draw our own conclusions.'[14]

While the jury system was always prone to corruption, the belief in the innocence of prejudice on the part of the jury has recently seen the mitigation of hegemonic prejudice such as racism, sexism, classism and ageism replaced with a potentially greater problem. This is a kind of ochlocracy based on social media, conspiracy theories and cynicism fed by pod-casts, cable news, contrarian conservativism backed with resources from Google and Wikipedia. The jury system is in danger of being mortally wounded by over-information.

The Lehrmann trial was thrown out in October 2022 due to a juror bringing non-testimonial evidence into the jury room. While a retrial date was set for February 2023, on 2 December 2022, the ACT Director of Public Prosecutions Shane Drumgold announced the retrial would be thrown out:

> "I have recently received compelling evidence from two independent medical experts that the ongoing trauma associated with this prosecution presents a significant and unacceptable risk to the life of the complainant," said Drumgold.[15]

If the life of the complainant is deemed at risk, procedure has been abused and the process as a whole is flawed. The system must become more gentle, more respectful and the judge should be allowed more freedom to adjudicate. Juries and barristers need special training

[12] https://www.lawgazette.co.uk/legal-updates/the-adversarial-system-and-prejudice-/5112763.article
[13] https://www.courts.act.gov.au/__data/assets/pdf_file/0019/2023309/Lehrmann-No-3.pdf
[14] Plato, *The Last Days of Socrates,* Penguin, 1969, p.43.
[15] https://lsj.com.au/articles/unpacking-the-bruce-lehrmann-trial/

prior to commencement of the trial. A version of the 'Justice Shouldn't Hurt' training could be made available for adult victims.[16]

This concludes my submission.

[16] https://www.change.org/p/justice-shouldn-t-hurt-child-sexual-offence-evidence-pilot-scheme-to-be-made-permanent