

Lady Dorrian Review Governance Group: Enhancing the Quality of Jury Involvement Working Group Report

November 2022

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Purpose

This report provides the Governance Group with an overview of the recommendations arising from the Enhancing the Quality of Jury Involvement Working Group's consideration of aspects of Recommendation 4(a) of the Lady Dorrian Review).

Part 1: background

The Governance Group was established to bring together partners from across the justice system to champion shared ownership of, and consider approaches to, implementing the recommendations of the Lady Dorrian Review on a cross-sector basis. In order to fulfil this remit, the Governance Group established a number of short life working groups to undertake detailed consideration of specific recommendations or aspects of recommendations contained within the Review. Among these was a Working Group specifically established to consider Recommendation 4(a) of the Review:

“(a) Myths and preconceptions. A pilot programme should be developed to communicate information to juries regarding certain common rape myths and stereotypes, possibly in the form of a video, drawing upon the research findings referred to in the report, and the equivalent pilot programme commenced in England and Wales. In the meantime the current statutory directions to address rape stereotypes and myths should continue to be utilised whenever appropriate.”

The Governance Group acknowledged from the outset that the implementation of a pilot programme intended to challenge rape myths and preconceptions among juries would ultimately be a matter for the Lord President/Lord Justice General and those who would otherwise assist the judiciary with such a task. The decision to establish a working group consisting of key stakeholders from across the justice sector was seen as a useful means of introducing different perspectives to considerations on how to challenge rape myth adherence among juries effectively but without impacting on the rights of the accused through focussed discussion on discrete elements concerned with developing and implementing a pilot.

The Working Group comprised representatives from seven separate organisations/institutions¹, to provide the perspective of and insights from their respective parts of the justice system. This included representation from the Judicial Institute for Scotland, given its role in developing and implementing resources for the judiciary.

¹ Six were drawn from the membership of the Governance Group- the Scottish Government, the SCTS, COPFS, Faculty of Advocates, Law Society of Scotland, Rape Crisis, with the Group being joined by members of the Judicial Institute for Scotland.

The Working Group ultimately agreed a Terms of Reference setting out the parameters of its remit, which explicitly recognised the role others would play in the implementation of any pilot programme. The Terms of Reference had a particular focus on how the Working Group could provide a meaningful contribution to the further consideration and development of a pilot programme along the lines of that set out in the Lady Dorrian Review. Crucially, the Working Group's remit did not encompass revisiting the merits of the recommendation as set out in the Lady Dorrian Review on the basis that a robust evidence-base existed which demonstrated that certain rape myths existed among jurors and that there was a need to address these. The full Terms of Reference and Membership of the Working Group is included at Annex A.

This paper sets out the views expressed and insights provided by members in meetings of and correspondence within the Working Group. It also incorporates information from Professor Cheryl Thomas KC and separately from Professor James Chalmers, Professor Fiona Leverick and Professor Vanessa Munro all of whom are leading academics in the field of jury research and who kindly gave up their time to share their vast knowledge and experience with the Working Group. Members would like to put on record their sincere thanks to all of them. An overview of some of the key insights that were provided to the Working Group across two different sessions can be found at Annex B. Given Professor Thomas's research is ongoing we have avoided making reference to unpublished/unattributed material within this report.

The conclusions and recommendations set out in this paper reflect where there is broad consensus among members on the issues discussed but the paper also identifies in so far as possible where differing views or perspectives were expressed.

Working Group approach

Following its establishment by the Governance Group on 28 February 2022, the Working Group (the Group) met on eight separate occasions, principally by remote means although one meeting was held using a hybrid model with some members attending in person and others virtually. Members received papers in advance to inform and frame discussions. Significant progress was also achieved outside formal meetings through ongoing dialogue among members.

Discussion at initial meetings ultimately resulted in overall agreement that to make best use of members' expertise and in the context of finite resources the Group should focus its deliberations on the three discrete areas identified in the Review as needing specific consideration before the implementation of any pilot programme, namely:

- the type of communication that could be adopted in the pilot
- the form of communication that could be adopted (including the possible sources the text from which it could be drawn)
- when the communication should be conveyed to a juror

In doing this, the Group proceeded on the basis that the rape myths identified at paragraph 5.56 of the Lady Dorrian Review should form the initial basis of any pilot programme given that these had been identified following extensive consideration by the Lady Dorrian Review Group utilising evidence from the University College

London and from the Scottish Jury Research Programme and review. These myths are that:

- a person, and perhaps in particular a woman, who is sexually assaulted will always fight back, scream or shout for help;
- a sexual assault would be immediately reported;
- a genuine rape victim will always show emotion in the aftermath or on giving evidence; and
- that false accusations are commonly made.

The Group also proceeded on the basis that the logistics of any pilot programme, notably its timing and duration would be determined by those ultimately responsible for its implementation and therefore did not require further exploration or consideration by the Group. It should, however, be noted that some members of the Working Group expressed significant concerns about the inclusion of jury instructions challenging the preconception that false accusations are commonly made. These members suggested this could undermine the right to a fair trial.

Guiding principles

Notwithstanding the conclusion at the outset of the Group's discussions that a research base on the need to address rape myths already existed and did not require to be revisited, it became clear that for a small number of the Group there was still concern with the progression of the recommendation in principle. The concern being that even introducing the concept of rape myths in the manner suggested in the recommendation had the potential to bring to the attention of jurors issues that would never have been within their consideration otherwise and potentially impact the accused's right to a fair trial. If it was to proceed it required to be handled with some care, with appropriate judicial oversight. It was agreed that to assist in addressing those concerns the Group could adopt guiding principles to consider during its deliberations and in making any recommendations, namely:

- to consider and avoid the entrenchment of myths in so far as that was possible and practicable
- that it was important to keep in mind the right to a fair trial and the presumption of innocence and any communication to the jury would have to ensure that the presumption of innocence was not eroded
- the importance of judicial discretion

Part 2: consideration and discussion

Reflecting on the inputs from the academics, and considering the material available to them which included copies of the current statutory directions, the Jury Manual and the Written directions currently provided to jurors (extracts reproduced at Annex C), the Working Group went on to consider and attempt to reach conclusions on the following issues:

- form of communicating rape myths to juries
- who should be responsible for communicating rape myths to juries
- when in the trial process information should be communicated
- content of jury instructions

- the possible source for which the text/terms explaining the rape myths could be drawn from

A summary of key aspects of the Group's deliberations and associated conclusions in respect of each heading follows. In making its recommendations the Group takes full cognisance of the fact that implementation of any future pilot programme is for others to take forward but hopes its recommendations will assist development of that pilot.

Form of communicating rape myths to juries

As the Lady Dorrian Review acknowledged (at 5.55) there is no conclusive research on the best method of communicating information to jurors and there are differing views on the most effective way of communicating rape myth matters to a jury. With specific reference to research being undertaken in England and Wales, led by Professor Thomas, the Dorrian Review suggested that further consideration be given to the use of a video for the purposes of educating jurors in Scotland on rape myths in particular. In delivering against its remit, the Group did, however, consider a number of different mechanisms for challenging rape myths among jurors to arrive at a conclusion on the most effective in its view. In doing so, the Group drew on insights from the academics mentioned above who had agreed to share their knowledge and the extent of any additional research base available on the subject.

On the issue of using a video to instruct juries on rape myths, the Group heard that there was limited evidence to support the effectiveness of using a video to convey information to juries at this juncture. The Group noted that progression of the research referenced in the Lady Dorrian Review which used a video to challenge rape myths among mock jurors had been delayed due to the pandemic and so the Group was unable to draw on any insights from that study about the effectiveness of video as a medium for jury instruction. Furthermore challenges were also identified in discussions as to the use of a video within the context of the Scottish court system including the fact that opening statements are not traditionally used in Scotland. The majority view of the Group was therefore that it could not recommend the use of a video as a means of challenging rape myths among jurors at this juncture given that it was an untested form of media. The Group did, however, note that discussions around the use of video to convey information to juries was evolving, particularly in the context of the ongoing research by Professor Thomas. One member of the group felt consideration should be given to producing an educational video, which could then be tested through research. The research could test both a judge and psychologist with expertise in trauma delivering the information, to ascertain how members of the public responded to both. The member felt that this would enable the development of an evidence base to consider if either was appropriate to include in a pilot. There was no agreement in the group on this.

In considering other potential methods and forms of media the pilot programme could use the academics drew attention to studies demonstrating that written instructions have proven to be an effective means of conveying information to jurors across a variety of different contexts which indicate that written instructions aid comprehension and support greater retention of information among jurors. Research referenced by them indicated that giving instructions to jurors orally as well as in writing to jurors was found to be even more effective.

As the Lady Dorrian Review referenced, the use of a combination of oral and written instructions already has precedent in Scotland's criminal courts. Since July 2020 all jurors in Scotland have been provided with written directions at the start of the trial which are read out by the trial judge and provided in hard copy to jurors alongside a note of their duties and responsibilities. Both practitioner members of the Group and the Judicial Institute, which is responsible for reviewing and updating the written directions on an ongoing basis, were of the view that the written directions had been working well and were well received by juries.

On the basis of the above the Group therefore felt that information provided to juries as part of a pilot programme should be conveyed through a combination of oral and written directions. Given that the evidence base isn't currently available to determine the effectiveness of video as means of challenging rape myths among jurors, the Group further proposes that the use of a video is kept under review.

Form of communicating rape myths to juries recommendations

The Working Group recommended that:

- the communication in any future pilot programme should be in both written and oral form, akin to and drawing from the experience of written directions and oral introductions which currently feature in High Court trials
- consideration of the use of video as a form of communication in addition to, or as a supplement to written and oral directions, should be revisited once further research becomes available on its potential use, particularly the findings of the ongoing project by the University College London and Professor Cheryl Thomas KC

Who should be responsible for communicating rape myths to jurors

The Group further discussed where responsibility should lie for addressing jurors on the matter of rape myths and in doing so identified two potential groups that could deliver information challenging rape myths orally to jurors in relevant cases, notably individuals with professional expertise, such as psychologists with expertise in trauma responses or a judge.

Initially some members of the Group felt the use of those with professional expertise either by addressing the jury live in court or via a pre-recorded video might be preferential. The research highlighted to the Group by Professor Chalmers et al indicated that there was limited evidence as to the effectiveness of this. Furthermore the use of experts to address jurors would also introduce a number of practical challenges. In particular, the Group queried who would determine what qualifications someone would need to hold to be called an expert for these purposes. It also had the potential, depending on how the pilot was implemented, to create a 'rape myth' expert industry. From a practical perspective the ability for a defined number of experts to assist and support the increasing volume of sexual offence cases, was unlikely to be manageable/sustainable if they were to appear live in every case. Using a multitude of experts would add complexity and the potential for greater uncertainty.

The view of Professor Thomas KC had been that judges were best placed to address jurors on the subject, and this was the method adopted in her ongoing

research. From the Group's perspective such an approach retained key elements of current practice, structure and format known to jurors- namely oral directions from a judge and written directions via handouts. It had the clear benefit of not introducing an untested format, presenter or otherwise unknown variable to jurors. This may be of particular importance for any subsequent evaluation of the pilot programme undertaken. The majority of the Group were therefore of the view that judges should convey any information pertinent to the ultimate pilot programme to jurors.

Who should be responsible for communicating rape myths to jurors recommendations

In considering the communication of oral instructions to juries on rape myths in any future pilot programme, the Working Group recommended that these are delivered by the trial judge.

Content and timing of jury instructions

During initial discussions on the question of when during the trial process information on rape myths should be communicated to juries the Group determined that this could not be considered in isolation from the question of what should be included within the content of those instructions. The interdependency between these two aspects of the Group's considerations was driven by differing views within the Group on whether jury instructions should be generalised or tailored to the specifics of individual cases which, given the nature of some of the rape myths identified in the Review, may impact on the point in trial proceedings information can be given to jurors.

The key challenge identified by the Working Group regarding the content of information on rape myths was whether these should take the form of general educational instructions for juries on rape myths or whether these should be case-specific with only those rape myths pertinent to the evidence led at trial featuring in the instructions. In considering at what point in proceedings information should be conveyed to jurors as well as the content of those instructions, the Group identified the options discussed below. All three options proceed on the basis that there will be some form of intervention at the start of the trial in written and oral form by the trial judge. They do not seek to impinge upon judicial discretion generally. They do not seek to change the approach currently taken by the judiciary to the address the jury after the conclusion of evidence and submissions, an address known as 'the charge'. The form and content of the charge will remain a matter for the trial judge.

Option 1: generalised jury instructions

This option is predicated on a general set of written and oral directions addressing all four of the rape myths identified in the Review, communicated to juries in all cases involving a rape at the start of the trial irrespective of whether all or indeed any of the rape myths are applicable to the circumstances of an individual case. These instructions would provide educational context for juries to support them in their decision-making and would be provided in writing and also delivered orally to jurors by the trial judge before evidence is led from the first witness or any joint minute is read. This would be done alongside and at the time the general written directions referenced earlier were provided to jurors.

Some Group members interpreted the recommendation as proposing that general educational information should be provided to jurors addressing the four rape myths and false assumptions identified in the Lady Dorrian Review. This was on the basis that the Review had been clear, following consideration of the information before it², that myths existed and that they had to be addressed. These members further felt that instructions should therefore be uniform, conveying the same information in the same way to jurors in cases at the start of the trial with the important safeguard being that the decision on whether to instruct juries on rape myths should remain at the discretion of the trial judge. It was highlighted during the Group's session with Professor Chalmers et al that a generalised jury education approach had been introduced in other jurisdictions therefore providing a model and precedent to follow. Other jurisdictions had recommended that a similar approach be taken, with steps ongoing.³

In determining when in the trial process it would be most beneficial to convey information on rape myths to juries, members drew attention to research referenced by Professors Chalmers et al which demonstrated that rape myths could begin to shape jury decision-making from the beginning of the trial process indicating that for those jurors that held these preconceptions, rape myths were likely to influence the lens through which they viewed evidence led at trial. As such, those members in support of generalised information on rape myths felt that this should be communicated at the beginning of the trial process to maximise their effectiveness.

Those members opposed to this approach submitted that using generalised instructions at the beginning of the trial without specific reference and consideration of the facts would inevitably introduce considerations irrelevant to the specifics of individual cases which they believed to be at odds with the position set out in a recent decision of the High Court sitting as an appellate division⁴⁵. Concerns were also raised regarding the provision of information to juries on the demeanour of the complainant as a witness prior to their evidence being heard at trial with some members suggesting that this could potentially influence jury perceptions of the complainant to the extent that it risked undermining an accused's right to a fair trial. It was however acknowledged that jurors are already addressed (in current written directions which are reproduced at Annex C) on issues of demeanour and specifically advised to be careful about how much they can draw from the way a person presents, neutralising concerns to some extent.

Option 2: case specific jury instructions achieved via proactive management by the parties

This option proposes the use of the generalised instructions discussed at option 1 as a starting point which are then tailored and expanded or reduced (as required) to suit

² See paras 5.30 to 5.53 of the LJC Review Report. Namely the research findings (many of which were unpublished at the time they were presented to the Review Group), of University College London Post discharge interviews with Jurors led by Professor Cheryl Thomas KC, and 2019 Large Scale Mock Jury study in Scotland led by Professors Chalmers, Munro and Leverick.

³ The Review by Sir John Gillen's Review into the law and procedures in serious sexual offences in Northern Ireland published in May 2019 recommends the introduction of generalised Jury Instructions in serious sexual offence cases. The Gillen Review is accessible [here](#).

⁴ *Hattie v HM Advocate* [2022] HCJAC 13

⁵ *W v HMA* 2022 SCCR 109

the specifics of individual cases. No two cases would have the same directions. The specific content of the jury instructions to be given at the start of the trial would be identified by the parties in advance of and discussed during the Preliminary Hearing based on the evidence parties intend to lead at trial. Where the evidence that parties intend to lead changes after the Preliminary Hearing but before the trial the Court will require to be made aware of this by the relevant party to enable it to amend the instructions as required. Should the direction of questioning change in the course of live questioning at trial it would be open to one or other of the parties to make a motion seeking excusal of the jury and for representations to be made on the need for an oral direction on the rape myths to take place at that juncture. The final decision on what, if any, further direction should be made would be for the trial judge. Those members in favour of adopting a case specific method of providing information to juries intended to tackle rape myths highlighted that this approach would avoid introducing considerations that were irrelevant to the specifics of the case and suggested it would align with the recent judgment made by the High Court as regarding the provision of information to juries referred to above. These members further highlighted that this would avoid a situation whereby information was provided to juries on complainer demeanour before their evidence had been heard at trial which, as highlighted above, some of the Group felt had the potential to have a prejudicial impact. To achieve its aims this method required sufficient preparation and consideration by the parties of their case and the evidence to be led both in advance of the Preliminary Hearing with the need for ongoing review.

One key concern and challenge members identified with this approach was the inevitable disparity and lack of consistency in how information on the 4 rape myths are provided across different cases; as well as the anticipated additional resources required of all parties to develop case-specific instructions which would place an additional burden on an already pressured court system.

Option 3

As with Option 1 this approach is predicated on a standardised set of jury instructions intended to address the four rape myths identified within the Lady Dorrian Review, with a presumption that this will be provided to the jury at the outset of the trial. In this model, parties would have to proactively make representations and explain why one or more of the rape myths need not be communicated to the jury and therefore should be removed from the instructions, or alternatively why revision(s) to the directions might be necessary to address the particular facts and circumstances of the case.

The final decision on the exclusion of any, and the form of the directions to be given at the outset would be a matter for the trial judge. As with Option 2, should the direction of evidence change in the course of live questioning at trial representations can be made on the need for an oral direction to take place regarding any of the rape myths made or not previously communicated to the jury to correct or clarify matters. The content of the instructions on individual rape myths should remain consistent in so far as possible and only change insofar as a decision is made not to communicate information on one or more of the rape myths to the jury or when the parties have evidence why the terms require to be amended.

This approach was put forward as a compromise between Options 1 and 2 recognising the divergence of opinion that existed among members of the Group by seeking to address the concerns raised on these options. While it was acknowledged that this option did not mitigate all of the concerns raised, a majority of Group members supported this approach on the basis that it would:

- ensure information could be conveyed to jurors at the outset of the trial in the preferred form of written and oral direction
- embed greater consistency in how rape myths are communicated to jurors
- enable some tailoring of jury instructions to the specifics of individual cases where communicating specific rape myths was felt to be inappropriate or irrelevant

It should be noted, however, that some members of the Group did not agree that Option 3 should be the approach adopted on the basis that instructions would largely be given to jurors ahead of trial which some members felt could have a prejudicial impact on jury deliberations. As such the recommendations made by the Group in this regard not unanimous.

Content and timing of jury instructions recommendations

In considering the content of instructions and when in the trial process these should be communicated to juries, the Working Group in majority recommends the following:

- a standardised set of written jury instructions is produced that provides information to jurors on the four rape myths identified by the Lady Dorrian Review
- there should be a presumption that these instructions are given to jurors in writing and in oral form by the trial judge at the outset of trials involving rape although it should remain at the discretion of the trial judge as to whether this information is conveyed to the jury
- parties may make representations to the judge at the Preliminary Hearing about the content of the jury instructions and can seek amendment of the instructions through the removal of information or revisal on one or more of the rape myths
- should the direction of evidence change prior to or in the course of live questioning at trial, representations by any of the parties can be made to the court on the need for a direction to take place regarding any of the rape myths communicated or not previously communicated to the jury. The ultimate decision on what, if any further direction, will remain that of the trial judge
- the content of the charge to be given to the jury after conclusion of evidence and submissions will, in particular, remain the subject of discretion for the trial judge
- the current statutory directions contained at sections 288DA and 288DB of the 1995 Act will remain and be used, in so far as applicable, by the trial judge

Part 3: potential source of jury instructions

The Group recognised from the outset of its deliberations that those implementing the pilot programme would need to prepare appropriate text which adequately

addressed the four rape myths identified within the review but did not inadvertently entrench or over-complicate matters for jurors. The Group acknowledged, however, that drafting and preparation of the final text was for others to progress.

Some members indicated that in preparing the text on rape myths, the organisation responsible for developing the instructions should consider the following:

- Consider implications of language used - The language used within the instructions should avoid inadvertently influencing jurors on the guilt or innocence of the accused. Specifically, the instructions should not presuppose that a rape has taken place.
- Use plain English - They should be written so that they can be understood by someone with language comprehension equivalent to an 11- 12 year old.
- Instructions should be educational - The instructions should be high level, drawing attention to the fact that rape myths exist and should avoid providing specific detail on how rape myths may manifest themselves.

As a minimum there required to be consideration and reflection on the terms of the current statutory directions in terms of sections 288DA and 288DB of the Criminal Procedure (Scotland) Act 1995 and the terms of the charge (via the jury manual-reproduced at **Annex C**) that was currently given to jurors, with others suggesting the current wording could be adapted. Support for that could be seen at para 5.54 where the Lady Dorrian Review indicated the terms of the direction concerning lack of resistance should now be adopted generally.

Potential source of jury instructions recommendations

In developing the content of jury instructions intended to convey information on rape myths to jurors, those responsible for developing these should consider the following:

- that language used should avoid inadvertently influencing jurors on the guilt or innocence of the accused
- instructions should be accessible and written so as to understood by someone with language comprehension equivalent to an 11- 12 year old
- instructions should be drafted so that they are high level and educational avoiding any detail of how rape myths may manifest themselves
- Those responsible for drafting the instructions should refer to the terms of the current statutory directions set out at sections 288DA and 288DB of the Criminal Procedure (Scotland) Act 1995

Part 4: Working Group recommendations

Following full and frank consideration on the issues associated with instructing juries on rape myths for a pilot programme that it was considering, and taking cognisance of the fact that others will be responsible for the pilot programme's implement the Working Group makes the following recommendations:

- that the communication in any future pilot programme should take the form of both written and oral directions, akin to and drawing from the experience of written directions and oral introductions which currently feature in High Court trials

- consideration of the use of video as a form of communication in addition to, or as a supplement to written and oral directions as currently recommended, should be revisited once further research becomes available on its potential use, particularly the findings of the ongoing project by the University College London and Professor Cheryl Thomas KC
- oral instructions to juries on rape myths in any future pilot programme should be delivered by the trial judge
- a standardised set of written jury instructions is produced that provides information to jurors on the four rape myths identified by the Lady Dorrian Review
- there should be a presumption that these instructions are given to jurors in writing and in oral form by the trial judge at the outset of trials involving rape although it should remain at the discretion of the trial judge as to whether this information is conveyed to the jury
- parties may make representations to the trial judge at the Preliminary Hearing about the content of the jury instructions and can seek amendment of the instructions through the removal of information or revision on one or more of the rape myths;
- should the direction of evidence change prior to or in the course of live questioning at trial, representations by any of the parties can be made to the court on the need for a direction to take place regarding any of the rape myths communicated or not previously communicated to the jury. The ultimate decision on what, if any further direction, will remain that of the trial judge
- the content of the charge to be given to the jury after conclusion of evidence and submissions will, in particular, remain the subject of discretion for the trial judge; and
- the current statutory directions contained at sections 288DA and 288DB of the 1995 Act will remain and be used, in so far as applicable, by the trial judge.
- the language used should avoid inadvertently influencing jurors on the guilt or innocence of the accused
- instructions should be accessible and written so as to be understood by someone with language comprehension equivalent to an 11- 12 year old
- instructions should be drafted so that they are high level and educational, avoiding any detail of how rape myths may manifest themselves
- those responsible for drafting the instructions should refer to the terms of the current statutory directions set out at sections 288DA and 288DB of the Criminal Procedure (Scotland) Act 1995



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The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-80525-238-2 (web only)

Published by The Scottish Government, November 2022

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS1196863 (11/22)

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