Abstract: Although sexual assault is the most frequently charged offence in the New South Wales higher courts, it is characterised by high attrition rates before trial and low conviction rates at trial. The feedback effect of low conviction rates influences the type of sexual assault cases that prosecutors will take to trial. While insufficiency of evidence might account for low conviction rates, there is evidence that a pervasive scepticism, based on myths and misconceptions which favour the defence case ...
MISCONCEPTIONS OR EXPERT EVIDENCE IN CHILD SEXUAL ASSAULT TRIALS: ENHANCING JUSTICE AND JURORS’ ‘COMMON SENSE’

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ABSTRACT

Although sexual assault is the most frequently charged offence in the NSW higher courts, it is characterised by high attrition rates before trial and low conviction rates at trial. The feedback effect of low conviction rates influences the type of sexual assault cases that prosecutors will take to trial. While insufficiency of evidence might account for low conviction rates, there is evidence that a pervasive scepticism, based on myths and misconceptions which favour the defence case, influences jurors’ decisions. Expert evidence to counteract these misconceptions is one solution to educate jurors about the counterintuitive behaviours of child complainants. However, provisions under the Uniform Evidence Acts which would admit such evidence are rarely, if ever, utilised. In light of a number of empirical studies and the fair trial principle, this article examines the types and reliability of expert evidence that would be admissible in child sexual assault trials under the Uniform Evidence Acts in order to guide prosecutors about when they can tender this type of evidence more frequently.

Introduction

For over a decade, child sexual assault cases (CSA) have made up a significant proportion of all criminal trials in NSW which is Australia’s largest jurisdiction.¹ In 2008, the NSW

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Bureau of Crime Statistics and Research reported that in the NSW higher courts, the most frequently charged offence of all cases finalised was sexual assault, with sex offences against children constituting two-thirds (65.9%) of all sexual assault offences.\(^2\) For the years 2010 and 2011, the most frequently charged offence in the NSW higher courts by a factor of two was aggravated sexual assault, compared to break and enter, robbery and illicit drug offences, with sex offences against children constituting 62.3% of all sexual assault offences in 2011.\(^3\)

Despite the predominance of sexual assault cases in the courts, they are characterised by low reporting rates, high attrition rates and low conviction rates at trial,\(^4\) indicating that a sex offence is one of the most difficult crimes to investigate and prosecute. The difficulties with investigating and prosecuting CSA cases arise, in part, because:

\[
\text{[i]n no other type of case must a prosecutor put forward a child as the most important and, frequently, the only witness. In no other type of case are the alleged offenders as likely to be trusted family members or friends of family members.}\]

\(^5\)

In no other type of criminal case does the focus of the trial shift from the conduct of the accused person to the conduct of the victim by highlighting the victim’s misbehaviours,

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her delay in complaint, possible reasons for a false complaint and whether she resisted or screamed for help. If she is an adolescent, that focus may also, perversely, highlight her flirtatious behaviours at the time of the alleged assault and her sexual fantasies.6

It is likely that low conviction rates at trial influence the type of CSA cases that police and prosecutors will investigate and prosecute. Because CSA is the type of crime where forensic evidence is usually unavailable to prove the sexual act complained of, some believe that low conviction rates and high attrition rates are due to insufficiency of evidence to prove the case beyond reasonable doubt7 or false complaints.8

There is, however, an alternative argument. Because myths, prejudice and disbelief surround the reporting, investigation and prosecution of CSA9, a pervasive scepticism accounts for the reluctance of police to investigate some cases and prosecutors to proceed with others. Such scepticism also permeates the criminal trial, including the jury room. In other words, a review of the most recent literature on the misconceptions held by laypeople about CSA and children shows that, contrary to the ‘insights that decades of

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6 Although both males and females are victims of sexual assault, the female pronoun is used to reflect the fact that the vast majority of victims are female. For example, 85% of all victims who reported a sexual assault to the police during 2010 were female: Australian Bureau of Statistics, Recorded Crime, Victims, Australia 2010 (ABS Category Number 4510.0) (ABS, Canberra, 2011).
psychological research have yielded\textsuperscript{10}, many jurors are likely to make credibility assessments of complainants based on inaccurate information or a lack of information about the traumatic nature of CSA.

Based on their experience with the low probability of obtaining convictions, prosecutors rely on their anecdotal knowledge to determine the factors of a case that will influence jurors to acquit or convict\textsuperscript{11}, such as injury to the victim, use of a weapon and actual or threat of force, corroborative medical evidence and an emotional victim.\textsuperscript{12}

The relatively high dismissal and withdrawal rates of sex offence cases\textsuperscript{13} suggests that the cases that do proceed to court are those judged by prosecutors to have the best chance of resulting in a conviction. The fact that a majority of cases \textit{do not} indicates there is a fundamental problem with prosecuting these cases, particularly since CSA cases do not involve the difficult issue of proving lack of consent.


\textsuperscript{12} This can be seen from a comparison of the findings from Lieve D, \textit{Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study} (Office of the Status of Women, Canberra, 2004) and Ellison L and Munro VE, \textit{Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility} (2009) 49 \textit{British Journal of Criminology} 202. See also studies that have measured judges and investigators responses to different emotional states exhibited in victims’ testimony: Kaufman G, Drevland GCB, Wessel EO, Overskeid G and Magnusen S, \textit{The Importance of Being Earnest: Displayed Emotions and Witness Credibility} (2003) 17 \textit{Applied Cognitive Psychology} 21; Bollingmo GC, Wessel EO, Eilersten DE and Magnusen S, \textit{Credibility of the Emotional Witness: A Study of Ratings by Police Investigators} (2008) 14 \textit{Psychology, Crime and Law} 29. The focus of prosecutorial decisions has been partly empirically validated in a study which found that criminal proceedings were more likely to be instigated if there was less than a ten year gap between the offence and report to the police, ‘if the offence involved some aggravating factor’ and if the victim was older than ten years and ‘could be regarded as more credible’ (Fitzgerald, n 4 at 11). Another study found that the victim’s credibility, presence of injury, use of force/weapon and corroborating evidence affected police and court outcomes (Daly and Bouhours, n 4, p 615).

\textsuperscript{13} See Fitzgerald, n 4; Kelly L, Lovett J and Regan L, \textit{A Gap or Chasm? Attrition in Reported Rape Cases}, Home Office Research Study No. 293 (HMSO, London, 2005); Daly and Bouhours, n 4.
One feasible explanation for low conviction rates in CSA trials is the misconceptions and myths that jurors take into the jury room and which, empirical evidence shows, influence their decisions to convict or acquit. Expert evidence to counteract these misconceptions appears to be one available answer to the common situation where a defendant denies that the alleged sexual misconduct took place and there is little or no corroborating evidence to prove otherwise. In such a situation, the essential elements of the crime cannot be established by reference to the objective facts. Instead, jurors must base their decisions on assessments of the credibility of the complainant and the defendant (if he gives evidence). Where there are gaps in the evidence, several studies suggest that jurors fill them with ‘their own impressions, [speculations,] knowledge and experience of people and human affairs’.14

As discussed below, many jurors enter a courtroom with a range of misconceptions about CSA that favour the defence. While some fear that expert evidence about the typical reactions of children to sexual assault will prejudice the accused15, little has been written about wrongful acquittals in CSA cases. This article addresses that gap. Indeed, the studies discussed in this article show that misconceptions about CSA and victim behaviour negatively affect jury-eligible citizens’ assessments of complainant credibility and verdicts, thus favouring the accused in a CSA trial.

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14 Taylor, n 11 at 4.
How to overcome the scepticism about sexual assault victims in the jury room has been the subject of many inquiries, reports and articles. More recently, there has been a call to abandon the conventional criminal justice system for prosecuting sex offence cases by moving to a restorative justice model. Whether such an abandonment is warranted depends in part on whether traditional legal mechanisms, such as expert evidence and judicial directions, to reduce juror error are effective in educating jurors about the counterintuitive behaviours of child complainants, such as delayed complaint, and continued association with the defendant, as well as the reasons why injury is not a typical feature of CSA. If the problem lies with gaps in the evidence that are supplanted by jurors’ own intuitive beliefs and misconceptions, will educational expert testimony offer a way forward so that myths, misconceptions and jurors’ guesswork can be replaced with reliable expert evidence?

In Uniform Evidence Acts (UEA) jurisdictions it is now possible to call an expert witness under ss79(2) and 108C to give evidence in a CSA trial about child development and behaviour as well as the effects of CSA on victims. It appears, however, that these provisions are not only under-utilised, they are rarely, if ever, used.


17 Daly, n 16.

18 The Uniform Evidence Acts include Evidence Act 1995 (Cth); Evidence Act 2011 (ACT); Evidence Act 1995 (NSW); Evidence Act 2001 (Tas); Evidence Act 2008 (Vic).

After reviewing empirical studies that have examined the impact of admitting expert evidence in CSA trials, this article examines the particular type of expert evidence that would be admissible in CSA trials in UEA jurisdictions. This exposition highlights a critical issue of practice and the circumstances in which prosecutors can tender this type of evidence more frequently to address the entrenched problems associated with prosecuting child sex offences.

Myths and Misconceptions in the Jury Room

Before considering whether or not the admissibility of expert evidence will increase the number of CSA cases going to trial, it is necessary to review the type and extent of misconceptions held by jury-eligible citizens about CSA, since jurors are randomly selected for jury duty from the general community. The extent to which these misconceptions influence perceptions of complainant credibility and decisions to acquit or convict is the second issue discussed in this review.

Defence strategies employed in a CSA trial to undermine a complainant’s credibility reinforce the myths and misconceptions that are common in the general community about sexual assault.20 In a CSA trial, defence lawyers take advantage of the actual beliefs of either a majority or significant minority of jurors to tap into the ‘gender-based double

standard[s]21 about male and female behaviour, and doubts about children’s unreliability as witnesses.

These myths and misconceptions can be classified as either gender or victim stereotypes and are based on expectations about how a ‘good’ child or ‘good’ victim would behave. In relation to CSA they include beliefs that: delayed reporting is evidence of fabrication since a ‘real’ victim reports immediately22; inconsistencies in evidence represent evidence of fabrication23; children are easily manipulated into giving false reports24; retracting a complaint is evidence of lying25; children commonly lie about being sexually abused26; CSA can be detected by a medical examination27 and if a child continues to associate with the defendant that means the abuse did not happen.28

Since this list indicates there are a number of uninformed views about children and CSA within the general community, three main issues arise:

(1) to what extent do jury-eligible citizens adhere to these beliefs?

22 Ellison and Munro, n12; Ellison L and Munro VE, ‘Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials’ (2009) 49 British Journal of Criminology 363;
24 Cossins, n 9; Cossins A, Goodman-Delahunty J and O’Brien K, ‘Uncertainty and Misconceptions about Child Sexual Abuse: Implications for the Criminal Justice System’ (2009) 16 Psychiatry, Psychology & Law 435 who found that 29.7% of community volunteers endorsed, while 61.2% were uncertain about, the misconception: ‘children are sometimes led by an adult to report they have been sexually abused when they have not’.
25 Cossins, n 9.
26 Cossins, n 9.
27 Cossins, n 9.
28 Cossins, n 9.
(2) what influence do these beliefs have on credibility perceptions and verdict?

(3) to what extent can educational information provided during the trial correct these beliefs?

Empirical studies show that the consistency and credibility of evidence in sexual assault trials is significantly associated with real and mock jurors’ verdicts. In particular, jurors’ focus on credibility and consistency is likely to be influenced by a child’s counter-intuitive behaviours both during and after a sexual assault and by any inconsistencies between her statements pre-trial and in court. Both of these issues are well known to be the focus of defence counsel strategies in court.

Where there is no objective eyewitness or forensic evidence on which to base a decision, jurors’ credibility and consistency judgements are likely to influence their verdicts and to be based on the gender and victim stereotypes listed above. Characterised as ‘a series of oversimplified and rigid cognitive schemas’, these stereotypes switch the focus in a CSA trial from the conduct of the defendant to the conduct of the complainant.

While past research has shown that myths and misconceptions appear to prevent jury-eligible citizens from accepting human behaviours that run counter to the mythical,


victim stereotype\textsuperscript{32}, what degree of influence do these myths have today? A consistent research finding is that verdicts in sexual assault cases vary as a result of juror demographics\textsuperscript{33}, although case specific factors also affect jury decision-making.\textsuperscript{34} In fact, ‘[a]ttributions of blame … are affected to a significant degree’ by personal characteristics, with men endorsing ‘rape myths and other rape-supportive attitudes to a greater extent than women’\textsuperscript{35}.

In the CSA context, the type and extent of the misconceptions held by laypeople about children’s reliability as witnesses and their responses to CSA have been established in a number of studies.\textsuperscript{36} In demonstrating the centrality of a child’s credibility to jurors’ decision-making, the believability of a child’s story and her credibility are predictors of defendant guilt, although laypeople’s perceptions of credibility are moderated by their age, gender, education and misconceptions. In other words, people interpret what they see through their own subjective lenses, although CSA trials feature an added complicating


\textsuperscript{36} For a review of these studies see Cossins, n 9; Cossins et al, n 24.
factor due to the range of misconceptions that laypeople hold about children’s ability to give reliable evidence.

Juror gender exerts a significant main effect in that men are more sceptical than women about children’s claims of sexual abuse and rate children as less believable, less credible and less competent and more culpable for the abuse than do women. Compared to women, men give higher estimates of false reports by children, while ‘[w]omen tend to be more positive about children’s competence as witnesses, their ability to identify assailants, and their memory for trauma’. We also know that juror characteristics are related to the type of misconceptions they hold about CSA and children’s reliability as witnesses in that men are significantly more likely to endorse misconceptions about CSA than women.

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39 Quas et al., n 37.


41 Cossins et al, n 24; Crowley et al, n 38; Gabora et al, n 38; Goodman-Delahunty, et al, n 38.
The more positive views held by women about children’s claims of sexual abuse are evident in results that show that female jurors and jury-eligible citizens are more likely to convict in a simulated CSA trial, compared to their male counterparts, although these gender differences were stronger in individual pre-deliberation than post-deliberation verdicts. Coupled with the finding that some actual jurors in CSA trials do not consider the testimony of child complainants to be evidence, the influence of pre-existing attitudes jurors’ perceptions of credibility and verdict cannot be discounted as a factor in filling any gaps in the evidence adduced by the prosecution.

A recent Australian study on the misconceptions held by a large sample of jury-eligible citizens investigated their knowledge about children’s memory, reliability, suggestibility and responses to sexual abuse. On average, participants correctly answered only 40% of the 20 items contained in a questionnaire created for the study although they ‘held the most erroneous views about children’s ability to provide reliable and truthful accounts of their experiences’. The authors also found that a majority of participants were unsure about 35% of the questionnaire items and ‘reported high rates of uncertainty … [about] a number of statements that might affect a juror’s perception of a child’s credibility’. These included uncertainty about whether: a child would avoid the abuser; abused children show strong emotional reactions; a physical examination provides evidence of sexual

44 Crowley et al., n 38; Gabora et al., n 38; Golding et al., n 33.
46 Cossins et al, n 24.
47 Cossins et al, n 24 at 441.
abuse and non-leading; open-ended questions are likely to lead children to make false claims of sexual abuse.\textsuperscript{48}

This lack of awareness of children’s reactions to sexual abuse and children’s memory and reliability as witnesses\textsuperscript{49} influences mock jurors’ credibility assessments and verdicts. Gabora and colleagues found that the more jurors’ endorsed CSA misconceptions, the lower their ratings of complainant credibility, the higher their ratings of defendant credibility and the less likely they were to vote guilty.\textsuperscript{50} A more recent study by Goodman-Delahunty and colleagues yielded similar results in that endorsement of CSA misconceptions by mock jurors negatively impacted their ratings of complainant credibility and their verdicts in simulated CSA trials.\textsuperscript{51}

The impact of educational information on CSA misconceptions

A number of studies suggest that educational information presented by an expert witness can correct jurors’ CSA misconceptions. In a study of expert evidence which compared the impact of specific hypothetical expert evidence\textsuperscript{52} with standard educative expert evidence in a simulated rape trial, Brekke and Borgida found that deliberating mock jurors exposed to the specific hypothetical evidence rated the complainant as more

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\textsuperscript{48} Cossins et al, n 24 at 440, 442.
\textsuperscript{49} Cossins et al, n 24 at 441-442.
\textsuperscript{50} Gabora et al, n 38 at 117.
\textsuperscript{51} Goodman-Delahunt et al, n 38.
\textsuperscript{52} Specific hypothetical expert evidence about the impact of rape on victims was defined as standard educative evidence (which comprises a summary of the scientific literature about the effects of sexual assault) plus an additional component where the expert explicitly linked the scientific information with the behaviour displayed by the victim in the case under consideration. Educative and diagnostic evidence in the CSA context are discussed further later in the article.
credible, were less likely to believe she consented and were more likely to convict.\textsuperscript{53} These effects were found even though ‘jurors did not rate the expert as being particularly useful to them in reaching their verdicts’\textsuperscript{54}. Because jurors were less influenced by the standard educative testimony which was more abstract and unrelated to the facts of the case, the authors highlighted the importance of linking the scientific expert information to a victim’s behaviours.\textsuperscript{55} The study also demonstrated that jurors were not ‘passive’ accumulators of information but came to their task with already informed impressions.\textsuperscript{56} When the expert testimony was given before the complainant testified, it had a greater impact on trial outcomes compared with the same evidence presented after the complainant testified, although this impact was non-significant. Although further research is needed, this suggested that jurors’ cognitive framework is established early on in a trial and might be ‘resistant to later reinterpretation’ when expert evidence is presented after the complainant testifies.\textsuperscript{57} This finding was contrary to the assumption behind the traditional placement of judicial directions during the trial judge’s summing-up, namely that jurors only evaluate and interpret evidence at the end of the trial.

When Brekke and Borgida analysed mock jury deliberations, they found that juries who heard the specific hypothetical testimony did not identify or empathise more with the complainant and were ‘just as likely to express skepticism about [her] viewpoint’, compared with jurors in the no expert control condition.\textsuperscript{58} The specific hypothetical

\begin{thebibliography}{99}
\bibitem{Brekke and Borgida, 1988 at 377} Brekke and Borgida, n 53 at 377.
\bibitem{Brekke and Borgida, 1988 at 381} Brekke and Borgida, n 53 at 381.
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\end{thebibliography}
expert testimony also had no negative impact on the jury discussion of the defendant. But because lack of resistance by the victim was the dominant theme in jury discussions in the no expert control condition (15% of discussion time), it appears that the specific hypothetical testimony had the greatest impact on this issue since victim resistance constituted less than 2% of discussion time for juries exposed to this information.59

In another study on the impact of expert evidence, Gabora and colleagues found that both diagnostic (where the expert gives an opinion on the ultimate issue in the case, that is, whether or not the complainant was sexually abused) and standard educative expert evidence (where no such opinion is given) reduced mock jurors’ endorsement of CSA misconceptions, although neither type of expert testimony directly influenced credibility perceptions.60 The authors found that mock jurors voted guilty significantly more frequently in a simulated CSA trial when a diagnostic expert gave evidence for the prosecution (73%) compared to an educative expert (59%) or no expert (56%).61 This difference in conviction rates may have been due to the fact that the diagnostic expert related the significance of the research literature to the specific case, or gave an explicit opinion, based on a clinical examination, that the child had been sexually abused, or both.62 Overall, mock jurors who were exposed to expert evidence were less accepting of CSA misconceptions than jurors in the no-expert, control condition.63

59 Brekke and Borgida, n 53 at 382.
60 Gabora et al, n 38 at 117-118.
61 Gabora et al, n 38 at 111.
62 Gabora et al, n 38 at 117. Nonetheless, it is important to recognize that the diagnostic expert evidence contained a confounding variable, that is, this type of evidence contains both educative information as well as diagnostic information. This means that it is impossible to know which components of the diagnostic expert’s evidence influenced jurors’ verdicts.
63 Gabora et al, n 38 at 117-118.
Similarly, Crowley and colleagues found that the evidence of an educative expert enhanced jurors’ perceptions of the child’s memory and ability to monitor reality and reduced their perceptions of a child’s susceptibility to suggestion in simulated CSA trials.\(^{64}\) All of these topics were covered in the expert’s evidence but unlike the study by Gabora and colleagues, the expert did not give an opinion about whether the child had been sexually abused. Although the educative testimony enhanced jurors’ perceptions of the child’s reliability as a witness, the increase in convictions by those jurors exposed to such evidence was not significant.\(^{65}\) Thus, the authors found no relationship between increased credibility perceptions and verdict. 

Another study in which the effects of diagnostic and standard educative expert testimony were compared confirmed the findings of Gabora and colleagues that both types of expert evidence influenced mock jurors’ perceptions of a complainant’s credibility in a simulated CSA trial, although diagnostic evidence did so to a greater extent.\(^{66}\) Unexpectedly, the diagnostic evidence had the greatest impact when the child witness was less prepared as a witness and her demeanour was ‘congruent with the behaviour described by the expert witness’. This suggests that diagnostic evidence ‘sensitizes’ jurors to the type of behaviours associated with sexual abuse.\(^{67}\) Alternatively, these results are consistent with jurors’ perceptions of how a ‘good’ child victim would behave in court.

\(^{64}\) Gabora et al, n 38 at 97.

\(^{65}\) Gabora et al, n 38 100.


\(^{67}\) Kovera, Gresham, Borgida, Gray and Regan, n 66 at 188.
In fact, the importance of perceptions of the child’s credibility was highlighted in a study by Redlich and colleagues who found that the believability of the child was the strongest factor in directly predicting jurors’ pre-deliberation perceptions of defendant guilt.\textsuperscript{68} As suggested by Brekke and Borgida, it is likely that expert evidence moderates these credibility perceptions.

The importance of a child’s credibility to mock jurors’ verdicts was also established in two studies by Goodman-Delahunty and colleagues who found that not only can expert evidence ‘effectively dispel CSA misconceptions’\textsuperscript{69}, it can also affect mock jurors’ perceptions of complainant credibility and their verdicts. In their first study which compared the effectiveness of judicial directions with expert evidence\textsuperscript{70}, the authors ensured that their expert gave evidence which included reasons for the type of behaviours that children display as a result of CSA in order ‘to offer an alternative causal scheme’ to jurors own interpretations.\textsuperscript{71}

Results showed that both diagnostic and standard educative expert evidence was ‘equally effective at reducing CSA misconceptions’\textsuperscript{72}, while a judicial direction containing the same information as the expert testimony had a similar impact. When investigating the influence of the different types of educational interventions on credibility and verdict,


\textsuperscript{70} Goodman-Delahunty et al, n 38.

\textsuperscript{71} Maass A, Brigham J and West S, ‘Testifying on Eyewitness Reliability: Expert Advice is Not Always Persuasive’ (1985) 15\ Journal of Applied Social Psychology 207, 209; see also Brekke and Borgida, n 53.

\textsuperscript{72} Goodman-Delahunty et al, n 38, at 775; see also Goodman-Delahunty et al, n 69, at 207-208.
statistically significant differences emerged. Participants who received a judicial direction before the child’s evidence rated her as significantly more consistent, credible and able to distinguish fact from fantasy than jurors in the no judicial direction, control condition. Surprisingly, credibility ratings of the victim by participants who received the judicial direction in summation, or who were exposed to expert evidence did not differ significantly from ratings by participants in the control condition.73

Although no direct effect was found between the educational interventions and verdicts, mock jurors who endorsed fewer CSA misconceptions post-trial were significantly more likely to vote to convict than jurors who endorsed more CSA misconceptions post-trial. After controlling for these endorsements, complainant credibility was significantly related to verdict choice—for each unit increase in complainant credibility a juror was nine times more likely to render a guilty verdict.74 The authors concluded that:

a fairer playing field in CSA trials can be created by correcting juror misconceptions about children and [CSA] using available legal procedures such as expert evidence and judicial directions.75

While the use of such legal procedures might ‘encourage the police and prosecutors to send more CSA cases to trial’76, before they are likely to be routinely used, prosecutors in UEA jurisdictions will need to be confident that it is worth the time, effort and cost of calling an expert witness to testify in a CSA trial.

73 Goodman-Delahunty et al, n 38 at 777.
74 Goodman-Delahunty et al, n 38 at 778. Credibility was also found to be the mediating factor in their second study: Goodman-Delahunty et al, n 69 at 196.
75 Goodman-Delahunty et al, n 38 at 780.
76 Goodman-Delahunty et al, n 38 at 782.
Summary of the findings: the consequences for a fair trial

These studies show that CSA trials are weighted against complainants and in favour of acquittals because of the extent and influence of juror misconceptions, many of which are based on victim and gender stereotypes. However, educational information in the form of expert evidence (and judicial directions containing the same information) has been shown not only to reduce laypeople’s misconceptions but also to increase credibility perceptions of complainants which, in turn, has increased conviction rates in simulated sexual assault trials.

Where sufficient evidence does not exist to enable a jury to make an objective decision about a defendant’s culpability, jurors turn to the only other information they have—their own expectations and beliefs. Addressing laypeople’s reliance on these misconceptions would not only enhance the public’s faith in the criminal justice system, it would promote justice for victims in ways that are not presently possible. Based on the foregoing studies, the educational information should include information that is linked explicitly to the victim’s behaviours during and after the alleged sexual assault, although whether this information should be provided before or after a complainant testifies remains to be empirically tested.

While the admission of this type of evidence does raise the issue of fairness and prejudice to the accused, expert opinion evidence in CSA trials, admitted under s79(2) of the UEA will almost always be admitted for a credibility purpose (as permitted under s108C). The
High Court has observed that an accused is not prejudiced by the mere admissibility of
evidence against him or her:

prejudice does not arise simply from the tendency of admissible evidence to inculpate an
accused. It is unfair prejudice that is in question. [P]rejudice might arise because of a danger
that a jury may [mis]use the evidence . . . . If there is relevant prejudice of that kind, it lies in
the risk of improper use of the evidence, not in the inculpatory consequences of its proper use.
If it were otherwise, probative value would itself be prejudice. All admissible evidence which
supports a prosecution case is prejudicial to the accused in a colloquial sense; but that is not
the sense in which the term is used in the context of admissibility.77

Thus, ‘[e]vidence is not unfairly prejudicial merely because it makes it more likely that
the defendant will be convicted’78 and will only be unfairly prejudicial when ‘there is a
real risk that the evidence will be misused by the jury in some unfair way’.79 By contrast,
the risk that arises in a CSA trial is jurors’ likely misuse of their own misconceptions
when interpreting a child complainant’s evidence and her credibility. Classically, the
misuse of evidence by a jury arises with the admission of evidence of a defendant’s prior
convictions or prior criminal misconduct.80 The educational information presented by an
expert witness in a CSA trial is in a different category of evidence altogether with
safeguards embodied in ss79(2) and 108C, as discussed in detail later in this article.

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77 *Festa v R* (2001) 208 CLR 593 at [22], per Gleeson CJ; emphasis added.
78 *Papakosmas v R* (1999) 196 CLR 297 at [91], per McHugh J.
79 *R v BD* (1997) 94 A Crim R 131 at 139, per Hunt CJ at CL.
Types of expert evidence

If expert evidence is admitted for its credibility purpose (rather than to prove the facts in issue in the trial), what type of educational information is most suited to the adversarial trial process in UEA jurisdictions in Australia? While some courts in the USA admit expert evidence in sexual assault trials on certain issues to show that complainants suffer from rape trauma syndrome (RTS)\textsuperscript{81}, different rules of evidence and procedure in Australia mean that diagnostic expert evidence, in which an expert gives their opinion about whether or not the complainant has been sexually assaulted, is unlikely to be admissible for the reasons discussed below, even though this type of evidence was found by Kovera and colleagues to have the most impact on mock juror decision-making.

In considering the need to enhance the ability of jurors to interpret the behaviours of children who allege sexual abuse and to assess the reliability of their evidence, there are different types of expert evidence that could be admissible in an adversarial context. When the prosecution seeks to admit expert testimony in CSA trials, it is hoping to support the child’s evidence by providing ‘a [scientific] context against which a complainant’s account can be … assessed’\textsuperscript{82} and ‘a counterweight’\textsuperscript{83} to victim and gender stereotypes upon which jurors and defence lawyers rely. In other words, by countering jurors’ misconceptions, expert evidence is admitted to enhance the child’s credibility.


\textsuperscript{82} Ellison, n 16 at 257.

\textsuperscript{83} Ellison, n 16 at 259.
When tendering expert evidence, prosecutors need to ensure that experts only provide ‘information that is well supported by empirical data’.\(^{84}\) Although the types of expert evidence that may be admitted vary, those that may be relevant in a sexual assault trial include standard educative expert evidence (also known as general or social framework) and diagnostic expert evidence (also known as specific). In a CSA context, standard educative evidence would consist of ‘findings and conclusions from the scientific literature’ about the typical reactions of children who have been sexually assaulted.\(^{85}\) An educative expert could be a forensic, clinical or cognitive psychologist, or a sexual assault counsellor or social worker ‘whose expertise derives from training in empirical social scientific research’ about the responses of children to sexual assault.\(^{86}\)

Standard educative evidence is different from diagnostic evidence which includes both standard educative information \textit{and} an opinion about whether or not the complainant has been sexually assaulted. It also differs from specific hypothetical evidence which Brekke and Borgida define as an opinion about whether the complainant’s behaviour is typical of a sexual assault victim. In other words, standard educative evidence is distinguishable from practitioner or experienced-based diagnostic evidence which is usually given by a psychologist or psychiatrist whose practical expertise arises from treating victims of sexual assault and who has interviewed and/or treated the complainant.

\(^{84}\) Brekke and Borgida, n 53 at 383.
\(^{85}\) Quas et al, n 37 at 426.
\(^{86}\) Goodman-Delahunty et al, n 69 at 198.
Since some of the studies reviewed in this article raise questions about the effectiveness of standard educational versus diagnostic evidence, it is necessary to decide what type is best suited to the adversarial trial system. Several commentators consider that standard educative, rather than diagnostic evidence, would be admissible under existing rules of evidence. Ellison advocates the use of standard educative evidence since it ‘simply serves to inform jurors … about the normal and varied reactions of victims … [and] level[s] the evidentiary playing field’.

In this way, there is no risk of prejudice to the accused because there is no risk of the jury misusing the evidence against him or her since the educative evidence is about the child’s behaviours, not the prior or current conduct of the accused.

By way of contrast, a diagnostic expert opinion that a child has been abused ‘is likely to have a disproportionate effect on the jury’s decision-making because it usurps the role of the jury’ under the ultimate issue rule. It could also be misused by the jury, in the sense that, rather than arriving at a verdict by evaluating all the evidence in the trial, the jury merely adopts the opinion of the diagnostic expert. This cannot occur with educative evidence which merely serves to provide information against which a jury can re-evaluate their own misconceptions in assessing the child’s credibility.

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87 Ellison, n 16 at 256.
88 Cossins, n 9 at 160. The ultimate issue rule prevents the admission of expert opinion evidence which goes directly to the ultimate (or fact in) issue to be decided by the jury. Although it has been abolished in UEA jurisdictions (s80(a), Evidence Act 1995 (Cth); Evidence Act 2011 (ACT); Evidence Act 1995 (NSW); Evidence Act 2001 (Tas); Evidence Act 2008 (Vic)), a diagnostic opinion is likely to be the subject of a s135 or s137 application, discussed below.
For these reasons, educative expert evidence is more likely to be admissible and to survive challenges for exclusion by the defence in CSA trials. The major barrier to its admission is the credibility rule which prevents evidence from being admitted solely for the purpose of bolstering the credibility of a witness. However, this problem has recently been resolved in UEA jurisdictions.

**The opinion rule in UEA jurisdictions**

Five Australian jurisdictions have enacted what are known as the Uniform Evidence Acts (UEA) which includes a scheme for the admissibility of expert evidence in trials involving child witnesses, in particular victims of CSA.89

Under the UEA, a statutory formulation of the common law opinion rule is set out in s76: ‘Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed’. Although the rule under s76 is a strict exclusionary rule, several exceptions exist under ss77-79 of the UEA. Section 79(1) is an exception which permits the admission of expert evidence as long as the expert is appropriately qualified:

> If a person has specialised knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

Before the enactment of reforms to s79 and Part 3.7 of the UEA, discussed below, it was only possible to admit expert evidence under s79 if the evidence was relevant to a fact in

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89 Sections 79 and 108C, *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic); *Evidence Act 2011* (ACT).
issue and the terms of s79 were satisfied. Only in limited circumstances would expert evidence be admitted for a credibility purpose. The second limb of s79 has been interpreted widely in relation to what amounts to ‘training, study or experience’. However, the first limb, ‘specialised knowledge’ requires a court to determine whether a particular field of specialised knowledge exists:

there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert.

In addition, under s79 the facts on which the opinion is based must also be given in evidence and must constitute a ‘proper foundation’ for the opinion:

the expert’s opinion must explain how the field of ‘specialised knowledge’ in which the witness is expert by reason of ‘training, study or experience’, and on which the opinion is ‘wholly or substantially based’, applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit it is not possible to be sure whether the opinion is based wholly or substantially on the expert’s specialised knowledge.

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90 Since reforms to Part 3.7 of the UEA, if expert evidence is admitted for a credibility purpose, such evidence is admissible (ss55(2), 56) under a new credibility exception (ss102, 108C), discussed below.

91 For example, to re-establish the credibility of a witness during re-examination (ss39 and 108, Evidence Act 1995 (Cth); Evidence Act 1995 (NSW); Evidence Act 2001 (Tas); Evidence Act 2008 (Vic); Evidence Act 2011 (ACT)). See also s111 which enables the admission of an expert opinion about the character of a co-accused in certain circumstances.

92 The wording, ‘training, study or experience’ in s79(1) indicates that formal qualifications are not necessary for an expert to qualify under s79. For example, police officers may give opinions based on their experience in investigating certain crimes such as drug importation and road accidents: R v Blackwell (1996) 87 Crim R 289. A person can qualify as an ‘ad hoc’ expert based on specific expertise, such as language interpretation: R v Leung and Wong (1999) 47 NSWLR 405. The added requirement that an expert’s evidence be wholly or substantially based on their specialised knowledge has seen the development of case law which prevents experts from ranging outside their area of expertise: HG v R (1999) 197 CLR 414.

93 Makita (Australia) Pty Limited v Sprowles (2001) 52 NSWLR 705 at [41] per Heydon JA.

94 Makita, n 93. In Dasreef v Hawchar [2011] HCA 21 at [37], French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ affirmed the principles set out in Makita by Heydon J. Their Honours stated that although these requirements appear to be extensive, ‘that is not to say that [they] cannot be met in many, perhaps most, cases very quickly and easily’ because they will, in most cases, be satisfied ‘once
Because of these requirements, the reliability of educative evidence about the psychological impacts of sexual assault is enhanced because an educative expert is required to present the facts (data from a review of the scientific literature) on which her/his expert knowledge is based. Nonetheless, concerns by courts of appeal in both Australia and England have been expressed recently about the reliability of expert evidence adduced by the prosecution.95 In a final report on the topic, the UK Law Commission set out similar concerns that expert evidence is commonly admitted ‘without sufficient regard to whether or not it is sufficiently reliable to be considered by a jury’, particularly where it is unsupported by empirical evidence to ground the opinion given.96 Instead of the present laissez-faire approach to admitting expert evidence, the Commission recommended that a new ‘reliability-based admissibility test’ should be enacted for assessing the reliability of expert evidence tendered in a criminal trial.97

On close inspection, it appears this test is similar to the wording of the ‘test’ propounded in Makita quoted above. Arguably, many of the identified problems with expert evidence, as documented by the Law Commission, arise in relation to interpretations of scientific measurements and other data. By contrast, the purpose of standard educative evidence in a CSA trial is educative rather than interpretative in that it does not include an opinion about whether or not the victim has been sexually assaulted, as discussed below.

97 The Law Commission, n 96 at 8.
The credibility purpose of s79(2) evidence

One of the problems with admitting specialized knowledge about the impact of CSA under s79(1) is that it is doubtful such evidence would be relevant to the facts in issue in a sexual assault trial.\(^98\) Until recent amendments, if only admitted to bolster the credibility of the complainant, the credibility rule barred its admission since there was no relevant exception to the credibility rule.\(^99\)

After recommendations by three law reform commissions in 2005\(^100\), amendments to the UEA now permit the admission of expert opinion evidence about children’s behaviour and reactions to CSA for the purposes of bolstering the child’s credibility in CSA trials.\(^101\)

The rationale for these amendments was based on the view that:

expert opinion evidence on child development and behaviour … can in certain cases be important evidence in assisting the tribunal of fact to assess other evidence or to prevent inappropriate reasoning processes based on misconceived notions about children and their behaviour.\(^102\)

Although the Commissions believed that the existing s79 would allow the admission of such evidence, they believed that Australian courts would ‘continue to demonstrate a

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\(^{98}\) The ultimate or fact in issue in a CSA trial is whether or not the defendant committed the sexual act alleged.


\(^{100}\) ALRC, NSWLRC and VLRC, n 99 at 707-708.

\(^{101}\) Amendments to the UEA in the form of ss79(2) and 108C made it possible for expert evidence about a child’s response to sexual abuse to be admissible for a credibility purpose. As well, the ‘admission of such evidence is theoretically simplified by the abolition in s80 of the common knowledge rule’: ALRC, NSWLRC and VLRC, n 99 at [9.145].

\(^{102}\) ALRC, NSWLRC and VLRC, n 99 at [9.155].
reluctance to admit such evidence under s 79'.\(^\text{103}\) In other words, along with an amendment to s79, s108C was enacted to permit expert evidence about child development/behaviour to be admitted for a credibility purpose. The amendment to s79, sub-section (2), states:

(2) To avoid doubt, and without limiting subsection (1):

(a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse), and

(b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:

(i) the development and behaviour of children generally,

(ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.\(^\text{104}\)

There is no pre-condition under s79(2) (or s108C) that the defence must attack the credibility of the complainant before an expert opinion will be admissible under these provisions. In fact, the studies reviewed in this article show that a complainant’s credibility and her behaviours during and after an alleged sexual assault are under the spotlight from the beginning of a CSA trial by virtue of the myths and misconceptions held by the average layperson.

\(^{103}\) ALRC, NSWLRC and VLRC, n 98 at [9.156].

\(^{104}\) Section 79(2) commenced operation in 2008 in NSW and the ACT and in 2010 in Victoria. Tasmania had earlier incorporated a similar provision in its Evidence Act under s79A. This provision has been repealed and s79(2) enacted in its stead.
Although there is no case law which has interpreted s79(2), arguably, the wording of the provision means that it is limited to admitting standard educative, rather than diagnostic evidence since the focus of the provision is on ‘specialised knowledge’ of the general behaviour of children, rather than the complainant herself or a diagnostic opinion based on a consultation with her. Nonetheless, before s79(2) was enacted, a High Court case on the application of s79(1) in a CSA trial suggested that an expert will be able to not only provide a court with information about the development/behaviour of children who have been sexually abused (under s79(2)(b)(ii)), but also give her/his opinion about whether the child’s behaviour is consistent with having been sexually abused at the time alleged\textsuperscript{105}, something that falls short of an opinion that the complainant \textit{has} been abused. As long as an expert demonstrates ‘the scientific basis of [his or her] conclusion’\textsuperscript{106} it is likely that specific hypothetical expert evidence, as defined and used in Brekke’s and Borgida’s study discussed above, would be admissible for a credibility purpose under s79(2).

While s79(2) appears to provide a solution to the admissibility of expert evidence in CSA trials, the sting in the tail is contained in s108C of the UEA. This provision is the exception to the credibility rule which allows expert evidence admissible under s79(2) to be admitted for its credibility purpose (emphasis added):

1. The credibility rule does not apply to evidence given by a person concerning the credibility of another witness if:

\textsuperscript{105} \textit{HG} (1999) 197 CLR 414 at 428, per Gleeson CJ.
\textsuperscript{106} \textit{HG}, n 105 at 428, per Gleeson CJ.
(a) the person has specialised knowledge based on the person’s training, study or experience, and

(b) the evidence is evidence of an opinion of the person that:

(i) is wholly or substantially based on that knowledge, and

(ii) could *substantially* affect the assessment of the credibility of the witness, and

(c) the court *gives leave* to adduce the evidence.

(2) [This sub-section is identical to s79(2), above].

Since the enactment of ss79(2) and 108C, expert evidence about child development and behaviour is now admissible from suitably qualified experts to bolster the credibility of a child complainant. But s108C represents a narrow gateway because:

(i) the expert evidence has to *substantially* affect the credibility of the complainant in a CSA trial; and

(ii) the court must give leave.

The words ‘substantially affect’ are not defined under the UEA but appear in another exception to the credibility rule, s103. Case law on s103 indicates that the word, ‘substantial’ is a relatively high bar to overcome, in that the ‘proof value’ of the evidence needs to be strong\(^\text{107}\) and ‘it must have such potential to affect the jury’s assessment of the credit of the witness … that the credit of the witness cannot be determined adequately

without regard to it’.

It is likely that expert evidence about the psychological impact of CSA will affect a jury’s assessment of credibility as demonstrated in the studies discussed in this article. How judges apply the test in s108C(1)(b)(ii) will depend on what judges know about juror misconceptions and their influence on jury deliberations and verdicts.

Thus, the words ‘substantially affect’ will be open to different interpretations by different trial judges, meaning that even if experts were routinely called by the prosecution, the admissibility of their evidence would not be guaranteed. This lack of certainty is reinforced by the fact that expert evidence can only be adduced with the leave of the court which requires trial judges in UEA jurisdictions to consider all relevant matters under s192 of the UEA. In particular, defence counsel are likely to argue that an expert’s evidence should not be admissible because it would unduly lengthen the hearing (s192(2)(a)) and would be unfair to the defendant (s192(2)(b)). This leave requirement reinforces the view that the admissibility of expert evidence will be dependent on individual judges’ decisions under s192. Even if the expert evidence is found to be admissible under s108C, the defence is likely to make a s135 application to exclude the evidence on the grounds that it would be misleading or confusing to the jury (s135(b)), or a s137 application on the grounds that the probative value of the evidence is outweighed by the danger of unfair prejudice. Arguably, these issues are different considerations to those that must be taken into account under s192.

108 *R v Lodhi* [2006] NSWSC 670 at [18], per Whealy J. This case and those in the above footnote interpreted the former wording of s103, substantial probative value because the section was amended in 2008.

109 In *Dupas v R* [2012] VSCA 328 at [265], the Victorian Court of Appeal interpreted s108C to include the reliability of a witness’ evidence: ‘the credibility of a witness expressly includes the credibility of the evidence of the witness. And the express reference to a person’s ‘ability to observe or remember facts and events’ can only be a reference to reliability. In short, ‘credibility’ imports notions of both truthfulness and reliability’ (Warren CJ, Maxwell P, Nettle, Redlich and Bongiorno JJA).
Can judges be confident about the reliability of s79(2) evidence?

As discussed above, expert evidence adduced under s79(2) is unlikely to suffer from the same reliability problems as expert evidence adduced to prove the facts in issue in a criminal trial. Importantly, a majority of the High Court in Dasreef endorsed the principles in Makita for ensuring reliability. Indeed, the reliability of s79(2) evidence is even supported by the dissenting judgment of Heydon J in Dasreef who held that strict admissibility requirements were necessary for evidence adduced under s79 to prevent a risk of injustice to the accused.110

Comments about the risk of injustice were made in the context of Heydon J’s lament about the partiality of expert opinion witnesses ‘who will, for a fee, “bind their science in the direction from which their fee is coming”’111, and about the construction of new professions for the sole purpose of offering opinions in legal cases. In order to overcome the problems with such experts, Heydon J held that the ‘proof of assumption’ rule should apply to expert evidence admitted under s79.112 This rule is a ‘significant safeguard’113 because it ensures that the primary facts which form the basis of the expert’s evidence are made known before the expert’s evidence is held to be admissible, thus preventing experts from ‘pick[ing] and choos[ing] for themselves what aspects of the primary evidence they reject, what they accept, how they interpret it and what the court should find’.114

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110 Dasreef, n 94 at [59].
111 Dasreef n 94 at [56]; quoting Judge Posner.
112 Dasreef, n 94 at [108]. According to Heydon J this rule had not been abolished with the enactment of s79.
113 Dasreef, n 94 at [120].
114 Dasreef, n 94 at [65].
While Heydon J was concerned that expert evidence could be given with insufficient or no evidentiary basis to found the opinion, it is not possible for an educative expert opinion under s79(2) to have no evidentiary basis because its function in a CSA trial is to provide the primary facts upon which the jury will draw their own opinion. In fact, educative expert evidence is a manifestation of the proof of assumption rule. In reciting a summary of the scientific literature about children’s development and behaviour and the effects of CSA, an educative expert gives no actual opinion drawn from those primary facts. Once the jurors are apprised of the primary facts (under ss79(2) and 108C), they become ‘the expert’ by accepting or rejecting those facts to arrive at their own opinion about the complainant’s credibility. This means that the question in relation to educative evidence admitted under s79(2) is ‘not one of admissibility but one of weight’.115

If hypothetical educative evidence is admitted, the expert must still recite the primary facts (that is, the development and behavior of children generally, or of sexually abused children, specifically) in order to state whether the child’s behaviours/symptoms are consistent with that of a sexually abused child.

Even if a diagnostic opinion is tendered under s79(2), the primary facts on which it is based would be admitted as a matter of course because this is what the section mandates—s79(2) is a provision for the admission of information relating to the development and behavior of children generally, or of sexually abused children, specifically. In relation to identifying the specific symptoms supporting a diagnosis that a child was sexually abused, this is solved by reference to R v Ping [2006] 2 Qd R 69

115 Dasreef, n 94 at [83].
(quoted by Heydon J). In that case, the Queensland Court of Appeal stated that a clinical psychologist, who had interviewed the complainant, had to recount the facts on which his opinion was based:

[to do that he had to give in evidence the history he took from the complainant about his symptoms and what led up to them. ... [O]nce he had said what he understood the facts to be on which he formed his opinion that opinion could be provisionally admitted into evidence. If the facts were proved by someone who had knowledge of them, in this case the complainant, the opinion would be admitted unconditionally.\textsuperscript{116}

For all the above reasons, it would be redundant to describe s79(2) evidence as requiring an application of the proof of assumption rule since s79(2) is a gateway for the admission of the primary facts about children’s behaviour. To use Heydon J’s bridge metaphor\textsuperscript{117}, the primary facts given under s79(2) constitute one pillar of a bridge that is able to stand on its own whether or not an opinion about the complainant is then drawn from those facts. Educative evidence is unlike the type of expert evidence about which Heydon J was most concerned, that is, expert evidence admitted to prove a key fact in issue, such as breach of duty in \textit{Dasreef} or the actus reus in \textit{Gilham v R} [2012] NSWCCA 131 and \textit{Wood v R} [2012] NSWCCA 21. The type of expert evidence adduced in \textit{Wood}, for example, (an engineer’s experimental measurements of the distance a female body could be thrown by a man similar in build to the defendant) meant there was a risk that the jury would accept the expert’s opinion that the victim was thrown over a cliff ‘without careful

\begin{footnotesize}
\textsuperscript{116} [2006] 2 Qd R 69 at [43], per Chesterman J (with whom Williams and Jerrard JJA agreed); emphases added; quoted by Heydon J in \textit{Dasreef}, n 94 at [82].

\textsuperscript{117} \textit{Dasreef}, n 94 at [90]. Heydon J described the primary facts and the opinion drawn from them as two pillars of a bridge that could not stand on their own.
\end{footnotesize}
evaluation of the steps by which [the opinion] was reached'. 118 No such risk arises in relation to s79(2) evidence because the provision mandates the admission of primary facts about children’s behaviour, allowing the jury to evaluate those facts in arriving at their own opinion as to the complainant’s credibility.

The essential requirement for the admissibility of s79(2) evidence is that the expert has specialised knowledge, based on training, study or experience, to be able to interpret the psychological literature about children’s behaviour. This knowledge is easily spelt out at the beginning of the expert’s evidence. While Heydon J discussed the unsatisfactory consequences of the lack of a proper factual foundation for expert evidence 119, none of these consequences (such as an inability to assess whether the opinion is based wholly or substantially on the expert’s knowledge) apply to s79(2) evidence.

The practical applications of s79(2) evidence

It appears that the s79(2) evidence remains under-utilised in UEA jurisdictions as a result of the difficulties posed by s108C and prosecutors’ lack of knowledge about the importance of such evidence in correcting juror misconceptions. These problems show that law reform measures can result in very little change in practice, as was confirmed at a recent conference on prosecuting CSA cases in Australia. 120 In NSW, Australia’s largest

118 Dasreef, n 94 at [129].
119 Dasreef, n 94 at [101]. Court-appointed s79(2) experts would address Heydon J’s concerns about the partiality of experts who are paid a fee.
120 Donnelly and Huggett, n 19.
jurisdiction, there is not a single case where an expert witness has been called to give
evidence under s79(2) in a CSA trial.121

Various inquiries have consistently stated that law reform is needed to enable expert
evidence about the behavioural patterns of sexually abused children and child
development to be admitted in CSA trials.122 One report considered that providing jurors
with the necessary expert information was ‘vital to a just outcome of the trial’ because it
would enable jurors ‘to accurately assess the credibility of the complainant’s
allegation’.123

Three high-level inquiries have refuted the idea that to admit such evidence would be
unfairly prejudicial to the accused124 since expert testimony about the counterintuitive
behaviours of victims of sexual abuse is necessary ‘to restore a complainant’s credibility
from a debit balance because of jury misapprehension, back to a zero or neutral
balance’125, and would ‘establish a neutral playing ground’126, or ‘a level playing field, in
which misconceptions held by the jury were countered by specialist knowledge’127. In
other words, s108C ought to be interpreted in light of the rationale for its admission—that
expert evidence about child development/behaviour and the impact of sexual abuse will

121 Donnelly and Huggett, n 19.
122 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Seen and
Heard: Priority for Children in the Legal Process (ALRC & HREOC, Sydney, 1997) 32; Royal
Inquiry (The Government of the State of New South Wales,Sydney, 1997b), 1118; NSW Legislative
Council, n 7 at 123.
123 NSW Legislative Council, n 7 at 123.
124 See ss192(2)(b), 135(a) and 137 of the UEA.
125 New Zealand Law Commission, Evidence Code and Commentary (Report 55, Volume 2) (New Zealand
126 Royal Commission into the NSW Police Service, n 121 at 1118.
127 NSW Legislative Council, n 7 at 123.
always substantially affect the credibility of a child because of the extent and nature of the misconceptions held by a majority of jury-eligible citizens in Australia about children and sexual abuse.

**Conclusion: responding to objections to expert evidence**

This article began with the question, if low conviction rates in sexual assault trials are due to gaps in the evidence being supplanted by jurors’ reliance on victim and gender stereotypes, will educational expert testimony offer a practical way forward?

A review of the literature demonstrated that jury-eligible citizens rely on a range of misconceptions when assessing the credibility of child complainants, thus proving an urgent need for expert evidence to create a less biased and more informed context in which the allegations of a complainant are assessed.\(^{128}\) Indeed, the foregoing research supports the view that jurors, who are expected to bring their life experiences and ‘common sense’ into the jury room, will also rely on ‘their personal prejudices and stereotypical preconceptions’\(^{129}\) because the very subject matter of sexual assault elicits gender and victim stereotypes.

In relation to no other offence would the public and Parliaments be satisfied with the poor outcomes that characterise CSA cases. Not only do high attrition rates erode ‘the capacity of criminal sanctions for sexual offenders’\(^{130}\), so too low conviction rates mean that

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\(^{128}\) Goodman-Delahunty et al, n 69 at 197.

\(^{129}\) Ellison and Munro, n 12 at 214.

\(^{130}\) Fitzgerald, n 4 at 11.
defence counsel are justified in advising their clients to plead not guilty, while a not guilty finding is likely to encourage those who are guilty to re-offend.

In looking for a practical way forward, it is clear that standard educative evidence, which summarises the psychological impact of sexual assault on victims, is best suited to the adversarial context, but may also have an impact similar to that of diagnostic evidence in reducing jurors’ misconceptions in CSA trials. In fact, two studies showed that both types of expert evidence were equally effective at reducing CSA misconceptions, while a judicial direction containing the same information as the expert testimony had a similar impact.

Future debate should also consider whether a specially designed judicial direction is needed to enhance justice for victims of CSA. If prosecutors remain unwilling or unaware of how to utilise s79(2) more frequently in CSA trials, substitutes in the form of a judicial direction containing educative information about children and the impact of CSA, or a standard video tutorial played to jurors before a CSA trial, could be considered.

Nonetheless, there are several other objections to admitting expert evidence in CSA trials which must be addressed. For example, expert evidence is likely to prolong proceedings, increase costs to prosecuting authorities and legal aid fees as a result of longer trials. There might be insufficient experts to meet demand although prosecutors need to be aware that the range of experts who are qualified to give standard educative expert about CSA is broader than practitioner psychologists/psychiatrists and includes academic and
practising social workers, as well as psychologists from a range of specialities, such as forensic, clinical, developmental, cognitive, social and educational psychology. These problems could also be addressed by considering alternatives such as a standard video tutorial of an expert giving educative information\(^{131}\) which is shown to all jurors before the commencement of a CSA trial, or appropriate judicial directions.

Another potential objection is that the admission of expert evidence would inevitably result in a battle of competing prosecution and defence experts whose evidence might cancel out the effect of the other, leading to longer, more expensive trials with no obvious benefit and confusion within the jury, forcing jurors to choose between experts rather than weighing up the evidence.\(^{132}\) However, empirical support for this viewpoint is scant, and it is more speculative than evidence-based.\(^{133}\)

Some commentators also consider that expert evidence will merely serve to confuse the jury, although jury deliberation studies by Ellison and Munro in which mock jurors invented scenarios to explain behaviour that did not match their expectations suggest the converse\(^{134}\)—that jurors are already confused by the mismatch between actual complainant behaviours and gender and victim stereotypes. Expert evidence would reduce this type of speculation and resultant juror confusion.

\(^{131}\) Office for Criminal Justice Reform, n 16 at 17.

\(^{132}\) Office for Criminal Justice Reform, n 16 at 18.


\(^{134}\) Ellison and Munro, n 12, Ellison and Munro, n 22.
Another objection is that expert evidence will usurp the jury’s decision-making function which Ward defines as ‘a fear that the expert will be accorded an inappropriate degree of epistemic authority’. However, this is a risk with any expert evidence in any trial. Because the role of expert evidence is only to bolster credibility, ‘[t]here is no question of the expert “usurping the jury’s function”. The court is simply offering alternative explanations for specific behaviour … [which do] not supplant the jury’s assessment of credibility’. In other words, where an expert gives educative evidence, there is nothing to defer to since the expert gives no opinion about the credibility of the complainant or the ultimate issue in the trial. With the expert merely providing the jury with the primary facts about children’s behavior and reactions to sexual abuse, the jury becomes ‘the expert’ about the complainant’s credibility. Educative evidence is corrective in nature since without it laypeople will rely on their own expectations and beliefs to determine the believability of certain aspects of the complainant’s evidence (such as delayed complaint or lack of resistance).

In any case, reliability safeguards are inherent in s79(1) of the UEA because it ensures (i) there is an appropriate field of expertise in which the expert is qualified; (ii) the facts on which the opinion is based must be made known; and (iii) experts are prevented from straying outside their area of expertise. Not only that but s79(2) mandates the admission of the primary facts about children’s behaviour, allowing the jury to evaluate those facts in arriving at their own ‘expert’ opinion about the complainant’s credibility. Once the court is satisfied that the expert is appropriately qualified, the issue with s79(2) evidence

135 Ward, n 15 at 88; see also McDonald E and Tinsley Y, From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand (Victoria University Press, Wellington, 2011) p 364.
136 Ellison, n 16 at 258.
is not one of admissibility but weight. Together with cross-examination of the expert, these safeguards enable jurors to independently assess the reliability of the expert’s opinion. Any remaining doubt about the jury deferring to the expert’s opinion can be fixed by a standard judicial warning about how the jury should use the expert’s evidence and the weight to give it.137

Another objection is that expert evidence will bolster the complainant’s credibility. However, none would object to forensic evidence being admitted which supports a complainant’s evidence, for example, medical evidence of penetration, which also has a credibility bolstering effect. In fact, all evidence which corroborates a complainant’s evidence will bolster her credibility so that expert evidence will do no more than is already done by other evidence.138 The appropriate counterweight to the impact of witnesses’ corroborative evidence is cross-examination by the defence.

The science is quite clear that the most effective way to ensure justice for sexual assault victims and to prevent unjust acquittals is to ensure that jurors’ credibility assessments are informed by the specialized knowledge of suitably qualified experts. It is time for prosecutors in UEA jurisdictions to give the science a go.

137 ALRC, NSWLRC and VLRC, n 99 at [9.157].

138 In R v E [2011] EWCA 1690 at [14] Leveson LJ stated that the admission of a diagnostic opinion that the complainant suffered from a PTSD reaction which was consistent with extensive child abuse could have been ‘justified on the grounds that it provided evidence of psychological injury in exactly the same way as any doctor might give evidence of physical injury consistent with a particular allegation’.