

# Judging rape: Public attitudes and sentencing

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This article discusses public attitudes towards sexual assault, sentencing, perceptions of seriousness and the influence of myths and stereotypes. Community attitudes towards offence seriousness and sentencing impact on sentencing practices in various ways: directly, because judges themselves are members of the community, and indirectly, because community attitudes influence and shape policy, and because they may play a role in jurors' decisions to convict (La Free, 1989), the decision to take a case to trial (Buddie & Miller, 2001), police decisions to charge and investigate a case (Frazier & Haney, 1996), attrition (Harris & Grace 1999; Kingsnorth, MacIntosh, & Wentworth 1999; Lievore, 2005; Stanko 1982), interpersonal reactions towards victims and offenders, decisions to report, and victims' own interpretations of an offence (Burt, 1980, 1991). Public concerns surrounding perceived leniency of sentences for sexual offenders are presented in this article together with an overview of recent developments in sentencing policy around Australia and statistics on current sentencing practice. Attitudes towards sexual assault and the role that rape myths play in judgments of offence seriousness and sentencing are then considered. Finally, a small study that I conducted in 2002 (Clark, 2002) which examined the extent to which rape myths may influence evaluations of rape seriousness and sentencing is presented.

## Sentencing reform

In recent years, public concern over the sentencing outcomes for several high-profile sexual assault cases (such the 2000–2001 gang rapes in Bankstown and other south-western suburbs of Sydney) has been expressed in the media. Within popular media discourse, this has been represented as a need to “get tough” on rape (see, for example, Carr, 2001; “Our community”, 2001; “PM backs rape sentence”, 2001). The extent to which tougher sentencing legislation alone adequately addresses the problem is, however, questionable. In conjunction with debate around enforcing tougher sentencing strategies, it is necessary to consider the attitudes that shape conventional understandings of what constitutes “seriousness” in sexual offences.

Within the media there has been widespread criticism directed at judges for handing down sentences regarded as too lenient and for their apparent failure to take sexual assault seriously. For example, in early 2006, Victoria's *Herald Sun* reported findings that 91% of survey respondents thought that criminals are let off lightly and 92% believed that judges did not represent the community in their decisions (cited in Freiberg, 2006). Importantly, it should be highlighted that although some public criticisms of sentencing are well founded, others reflect a misunderstanding of what the criminal justice system can or ought to do (Freiberg, 2006, p.8). To bridge the discrepancy between low levels of faith in the judiciary and confusion around sentencing practice, some states have taken positive steps by setting up independent advisory councils and supervisory bodies, for example the Sentencing Advisory Council of Victoria and the NSW Sentencing Council and the Judicial Commission of NSW.

Nonetheless, the apparent community discontent with sentencing practices has been the impetus for the introduction of a range of sentencing reform proposals and legislative changes for throughout Australia. Among these are: provisions for indefinite or continued detainment of “serious” sexual offenders considered an ongoing risk to the community at the completion of their sentence in Queensland, New South Wales and Western Australia (and discussion of introducing a similar policy in Victoria); the ability to hand down disproportionately long sentences for offenders classified as “serious sexual offenders” in Victoria; the provision in NSW for “sexual assault in company” following

a series of high profile gang rapes; the introduction of and continued debate around statutory minimum sentences and standard non-parole periods; automatic registration of offenders convicted of some classes of sexual offences; the introduction of guideline judgements; an inquiry into whether to endorse judicial-jury consultations for sentencing in NSW; and consideration that is being given to the abolition of suspended sentences altogether (see Freiberg, 2005, for a discussion of Australian sentencing practices).

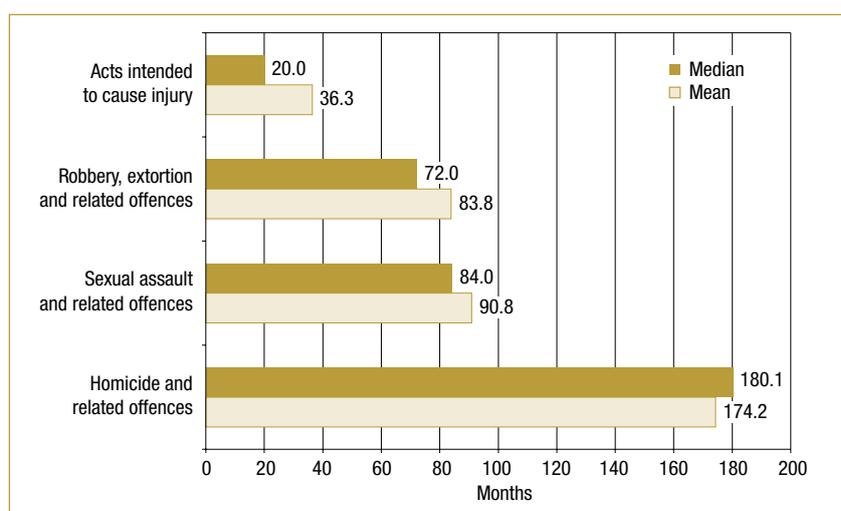
## Sentencing practices for sexual assault: What are they?

Before entering into a discussion on the problems with sentencing practices, it is helpful to consider the current situation. Generally, when considering other “serious” offences (such as robbery, homicide and intentionally causing injury), sentences for sexual offences appear comparable both in terms of the statutory maximum and average length handed down to convicted offenders.

Although sentencing legislation and practices vary across states, in comparison to other “serious” offences, the statutory maximum sentence for rape is among the longest. In Victoria, for example, the statutory maximum sentence for rape is 25 years. This is less than that of murder and drug trafficking (for which an offender may receive life imprisonment), is equivalent to aggravated robbery, and is higher than the maximum sentence for all other violent offences, such as intentionally causing serious injury and manslaughter (both hold statutory maximums of 20 years) (*Sentencing Act 1991* (Vic.)).

However, there is considerable discrepancy between statutory maximums and actual sentences handed down. Thus, statutory maximums do not reveal much about actual sentencing practices. Average sentencing lengths offer a more accurate picture of sentencing practices. Average aggregate sentencing lengths for the year 2005 are displayed in Figure 1 below.

**Figure 1: Aggregate sentence length (months) for prisoners sentenced in Australia 2006 by most serious offence**



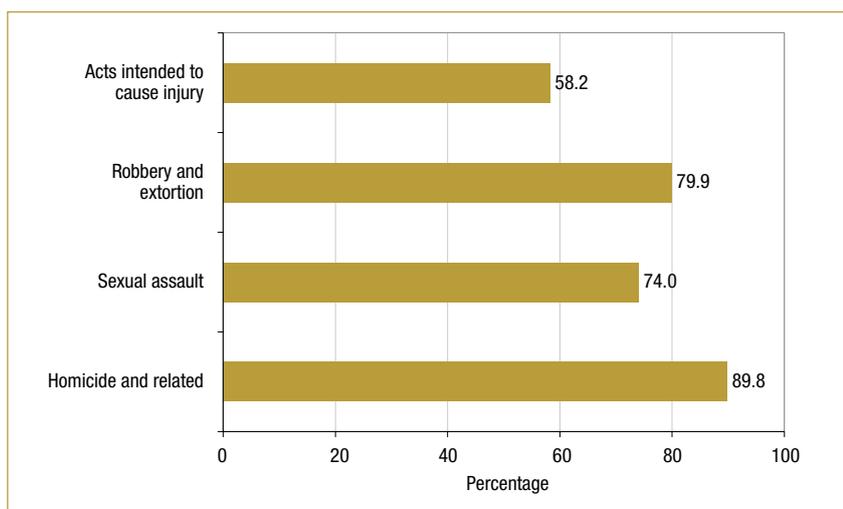
Source: Australian Bureau of Statistics [ABS] (2006)

With an average of 7.6 years (90.8 months), sentences for sexual offences (as the primary offence) are among the longest, positioned below homicide and related at 14.5 years (174.2 months), and just above robbery and extortion at 7.0 years (83.8 months) and acts intended to cause injury at 3.0 years (36.3 months).

Statistics also indicate that the majority of sexual assault defendants proven guilty receive custodial sentences. See Figure 2 on page 19.

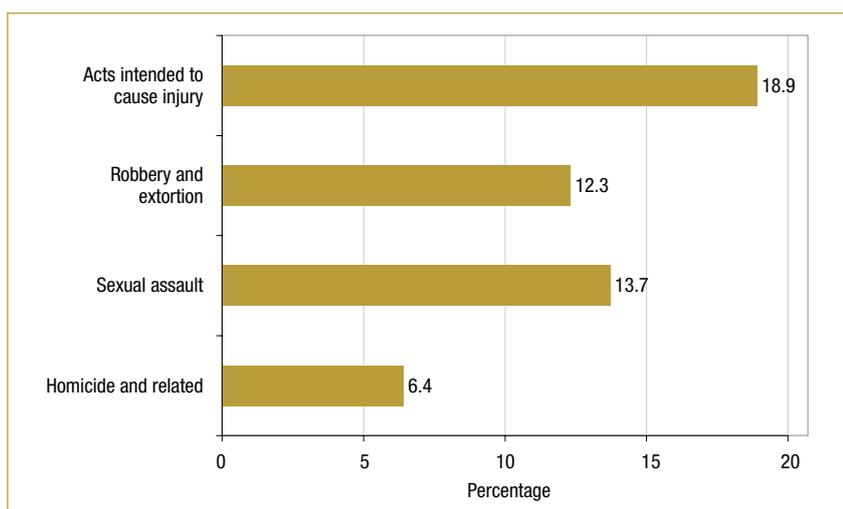
“A suspended sentence is a prison term which is suspended subject to the condition of good behaviour (such as not to commit another offence) for a set period” (Sentencing Advisory Council, 2007). Suspended sentences are not included in Figure 2, although notably do fall under the category of “custodial sentence” in most Australian jurisdictions. Figure 3 shows the proportion of sexual assault defendants found guilty in Australian higher courts that received suspended sentences.

**Figure 2: Proportion of higher court defendants proven guilty in Australia 2004–2005 who received a custodial sentence (excludes suspended sentences)**



Source: ABS (2006)

**Figure 3: Proportion of higher court defendants proven guilty in Australia 2004–2005 who received a suspended sentence**



Source: ABS (2006)

The proportion of suspended sentences handed down to defendants proven guilty of sexual offences—and offences in general—varies considerably across jurisdictions. South Australia, for example, has reportedly higher rates of suspended sentences; 30% of sexual assault offenders proven guilty received suspended sentences in the period 2004–2005, but this higher rate of suspended sentences also extended to other categories of crimes. The differences across states and territories may be attributable to a combination of factors such as differing definitions of the crimes, sentencing options available, different sentencing practices, legislative differences and political climates.

Recently, some jurisdictions have been considering the abolition of suspended sentences altogether. One problem with suspended sentences lies in the disjuncture between judicial and community perceptions of whether it is a harsh sanction. Judges may see it as harsh as a conviction because it is permanently recorded against the offender’s name and because the consequences for re-offending are grave (a term of imprisonment is usually reinstated). In the context of sexual offences, the use of suspended sentences as a sanction raises a number of concerns. Sexual offences have low reporting rates (ABS, 1996), low rates of charging and high attrition (Stubbs, 2003; Cook, David, & Grant, 2001),

and this coupled with evidence that re-offending rates are relatively high (Chung, O'Leary, & Hand, 2006; Vandiver, 2006; and NSW Department of Community Services, 2005) means that the likelihood of undetected re-offending may be higher than in other categories of offences. This point is relevant to the debate on the abolition of suspended sentences for sexual offences, as is the kinds of cases to which suspended sentences are applied.

Overall, this statistical overview of sentencing outcomes is limited in what it can tell us about the how the seriousness of sexual assault is reflected in sentencing practice. As stated above, sexual assault is grossly under-reported, and rates of attrition far exceed that of other crimes (Law Reform Commission of Victoria, 1991); cases that result in conviction reflect only a portion of offences committed. The kinds of cases that are reported and those that are filtered out of the system are not homogeneous, rather the fraction of cases that are brought to the attention of the authorities are select and research suggests that they do not necessarily reflect the spectrum of cases that occur (Stubbs, 2003; Victorian Law Reform Commission, 2003; Victorian Community Council Against Violence, 1991). Research indicates that victim, offender, situational, interpersonal and cultural factors all influence the likelihood of criminal justice engagement, the processing of cases and attrition (see, for example, Heath, 2005). An implication of this is that sexual assaults involving strangers are reported more often, while cases of intra-familial abuse are grossly under-reported.

It is for these reasons that Warner (2005) argues that, "prevailing notions of sexuality and conventional sexual behaviour shape sentencing outcomes for rape and sexual offences as much as they shape other components of the criminal justice system... At the sentencing stage, as at all stages of the criminal process, it is clear that stranger rape is the paradigm of serious or real rape" (p. 243). Sexual assault cases that are processed and that receive stronger penalties generally reflect a stereotypical typology of what constitutes "real rape", while assaults involving acquaintances and family members maintain higher rates of attrition and continue to constitute a disproportionately large proportion of suspended sentences (Lievore, 2004; Frazier & Haney, 1996).

What is not apparent in offence comparison statistics, and what is missing in community and media concerns that sexual assault is not being taken seriously, is the way in which the seriousness of sexual assault is understood. While drawing attention to the problem, current media accounts of high profile cases may deflect the issue of taking sexual assault seriously onto a general "law and order" debate and, at the same time, reinforce stereotypes of what constitutes "sexual assault". As such, the support given to harsher sentences may not actually reflect a shift in perceptions of sexual assault seriousness.

## Attitudes towards rape, myths and sentencing

Public concern appears to express support for sexual violence to be taken seriously; however, the general community's perception of sexual assault as a heinous offence deserving harsh punishment may be conditional. Specifically, while there seems to be a great deal of agreement about the fact that rape is a serious crime that must be punished, at the same time there is a great deal of disagreement about how serious particular rape offences are (La Free, 1989, p. 236). Classic understandings based on stereotypes exclude most rapes from the category of "real" or "serious" rape (Estrich, 1987), thus minimising and trivialising the seriousness of nearly all sexual assaults.

Applied to sentencing, the combination of broad discretionary powers over the assignment of sentences and the use of subjective evaluations to determine relevant factors to scale seriousness and sentencing severity can become problematic in cases of sexual assault. This is because judges may draw on myths and stereotypes when weighting the gravity of the offence(s). Indeed, myths still permeate sentencing manuals; consider, for example, the following three clauses extracted from the current *Victorian Sentencing Manual* (Judicial College of Victoria, 2005):

**24.6.2.3: Relationship between offender and victim**—where a husband/wife, de-facto relationship exists, the court may consider the consequences of the rape may be less grave than in the case of a victim raped by a stranger.

**24.6.2.11: Conduct of victim prior to the offence**—The sentencer is entitled to take into account the conduct of the victim prior to the crime. That conduct may render the

offender's actions more or less serious. The sentencer must proceed on the basis that where absence of consent is an element, the plea of guilty or jury verdict has established that element. Foolish behaviour or unintentional provocation, or risk taking does not necessarily justify a reduced sentence.

**24.6.2.12: Victim a prostitute**—Where the victim of rape is a prostitute, the victim's sexual experience may be relevant to sentence ... the prostitute's experience may tend to reduce the weight commonly given to rape cases to the "reaction of revulsion" of the "chaste woman" to the "forcible act of sexual intercourse" ... where the victim is a prostitute, the elements of "shame" and "defilement" may (on the facts) be missing or diminished, and the offence will thus lack a circumstance of aggravation.

Such explicit comments in a guide for judges' sentencing decisions demonstrate that judicial bodies may still have difficulty coming to terms with contemporary understandings of rape and redressing rape myths that have been continually contradicted by empirical research. While the level of trauma caused by rape varies greatly among individuals, there is no evidence to suggest that victims who are acquainted with the offender are generally less affected than those who are not (Koss, Dinero, Siebel, & Cox, 1988), nor that sex workers are less harmed than victims who are not sex workers (Falk, Wang, Carlson, & Siegal, 2001). The Manual's unsubstantiated statement proposes that cases involving "unchaste" victims could be considered less serious. Clause 24.6.2.11 demonstrates that the judiciary are still being guided to consider the possibility that women may be "asking to be raped" by their behaviour, and to use their own discretion to determine whether to factor "foolish behaviour or unintentional provocation, or risk taking" into judgments of sentencing severity.

Despite media reports that the community does not feel that the judiciary consider their views when handing down sentences, when judges provide sentencing explanations they frequently refer to the consideration of the community (although this does not necessarily mean that they are reflecting upon *actual* community attitudes) (Walker, Hough, & Lewis, 1988). Research also suggests that the public's expectations of sentences can influence judges' decisions (see, for example, D'Arcy, 1996).

There have been few empirical studies into the role of myths in functioning to reduce people's perceptions of seriousness and how this relates to perceptions of appropriate sentencing. However, the small study I conducted examined the extent to which rape myths may influence evaluations of rape seriousness and sentencing (Clark, 2002). The study compared differences in judgements of rape seriousness and self-determined sentences in classic rape scenarios to cases that challenge the stereotype. As many factors as possible were controlled for; the inclusion of rape myths was the only variable, thus enabling an examination of the interaction of myths about rape, perceived seriousness and sentencing practice.

## Overview of the judging rape study

The study investigated the role that rape myths play in perceptions of rape seriousness and sentencing. The sample comprised 61 adults—males and females—who were presented with four hypothetical rape scenarios that differed in content only in relation to rape-myths. Each scenario presented included a classic version (reflecting common or accepted understandings of rape) and a non-classic version of the same incident, so there were eight scenarios altogether. The nature and duration of the act (for example, the level of planning involved, the means used to subdue the victim, the victim's and offender's ages, reported harm done to the victim and the number of prior convictions of the offender) remained the same for each of the four classic and non-classic pairs of scenarios. The scenarios were half a page in length and described a single incident of rape perpetrated by an adult male on an adult female, of which the accused had been found guilty. Scenario 1 included a combination of stereotypes associated with blaming women, excusing men and justifying acquaintance rape (so the "classic" version involved the stranger, described the victim as a small woman who physically resisted and contacted the police immediately following the assault, while the "non-classic" version involved an ex-partner, described the victim as a large woman who did not physically resist to the same extent and delayed contacting the police for some time after the assault). Scenario 2 focused particularly on "acquaintance-justifying" myths (for example, the classic version included a stranger, and the

non-classic involved a boyfriend). Scenario 3 focused on “male-excusing myths” (for example, the classic version described the offender as a “nice guy” from a good Australian family who was sexually frustrated, and the non-classic version described the offender as weird, hot-tempered and of Middle-Eastern ethnicity). Scenario 4 focused particularly on differences in “women-blaming” myths (for example, the classic version included that the victim had not consumed alcohol, was on her way home from work and wearing a suit and jacket, while the non-classic scenario included that the victim was as out clubbing and drinking and wearing a short skirt).

Participants were required to evaluate the scenarios by indicating the level of blame and responsibility they believe should be allocated to the offender and to the victim for each offence; distinguishing whether they considered a range of factors to be aggravating, mitigating or irrelevant to the judgment of offence seriousness; and, finally, to sentence the offender. Responses given in cases reflecting stereotypical understandings of rape were compared to cases that challenged stereotypical rape scenarios. The small non-randomised sample restricts the generalisability of the study. Nonetheless, the matched-subjects design employed by the study enables accurate comparisons between responses that can be directly attributable to the use of stereotypes and myths.

## Main findings

### Evaluations of seriousness

Nearly all participants (98%) considered myth factors—such as those relating to the victim’s dress, behaviour, chastity and alcohol consumption, as well as prior acquaintance and the offender’s social status—as relevant in determining the seriousness of any particular offence. However, most did not consider all myths relevant in any given scenario. Participants tended to nominate factors that reflected classical understandings of rape (for example, if the offender was a stranger) as aggravating the level of offence seriousness. Participants tended to nominate factors that challenged stereotypical notions of what constitutes rape, (for example, if the victim was so-called “provocatively” dressed or if the offender was an acquaintance) as mitigating the level of offence seriousness. Specifically, women-blaming, offender-excusing and acquaintance-justifying myths were found to act to reduce the perceived seriousness of rape. Differences achieved a considerably high level of statistical significance.

### Blame and responsibility

Participants were asked to assign a level of blame and responsibility to offenders and to victims in each scenario on a seven-point scale (a score of one indicating “not at all to blame” and a score of seven indicating “totally to blame”). Participants consistently assigned higher levels of blame and responsibility to the offender than to the victim, irrespective of whether or not the scenario reflected a classic rape scenario. The average (mean) level of blame and responsibility are displayed in Figure 4 (on p. 23).

As illustrated in the graph, the range of blame and responsibility ascribed to offenders was generally high for *all* scenarios; however, offenders were consistently ascribed less blame and responsibility in non-classic scenarios than classic scenarios. Comparably, although the level of blame and responsibility allocated to victims was relatively low in all scenarios, more blame and responsibility was given to victims in non-classic scenarios than classic scenarios. Differences between classic and non-classic versions achieved a considerably high level of statistical significance.

### Sentencing

Participants consistently referred to myths in determining sentence severity. Imprisonment was clearly the most frequently chosen sanction for offenders in every given scenario, regardless of whether it diverged from the classic rape scenario. However, the proportion of participants who nominated imprisonment was consistently higher in cases that reflected classical rape scenarios than those that challenged the stereotype. The proportions are displayed in Figure 5.

Alternatives to imprisonment—including suspended sentences, community treatment orders, intensive correction orders, fines, discharge, dismissals and adjournments—were more frequently

Figure 4: Allocation of blame and responsibility (on seven-point scale) to victim and offender for each scenario

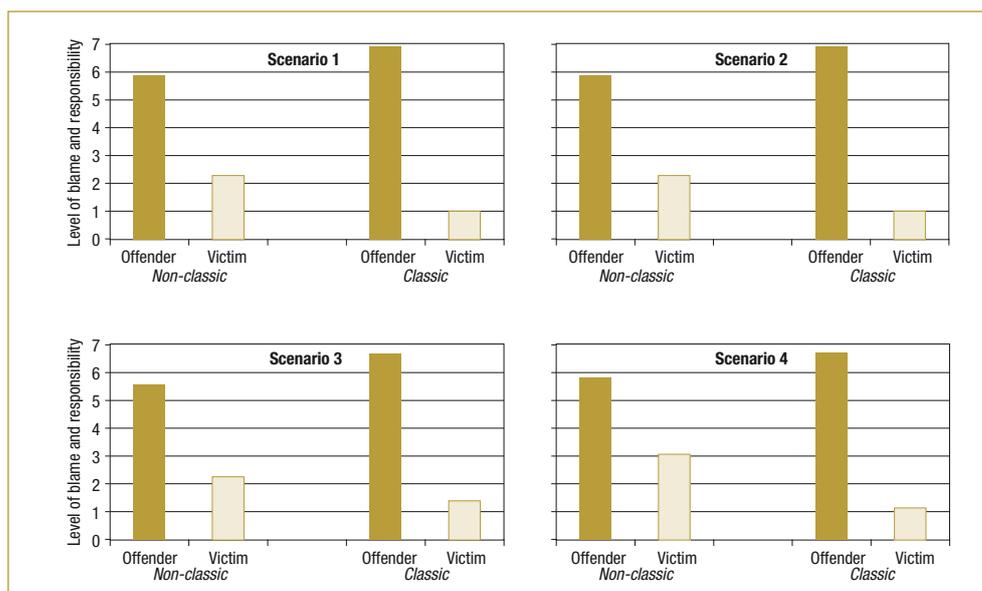
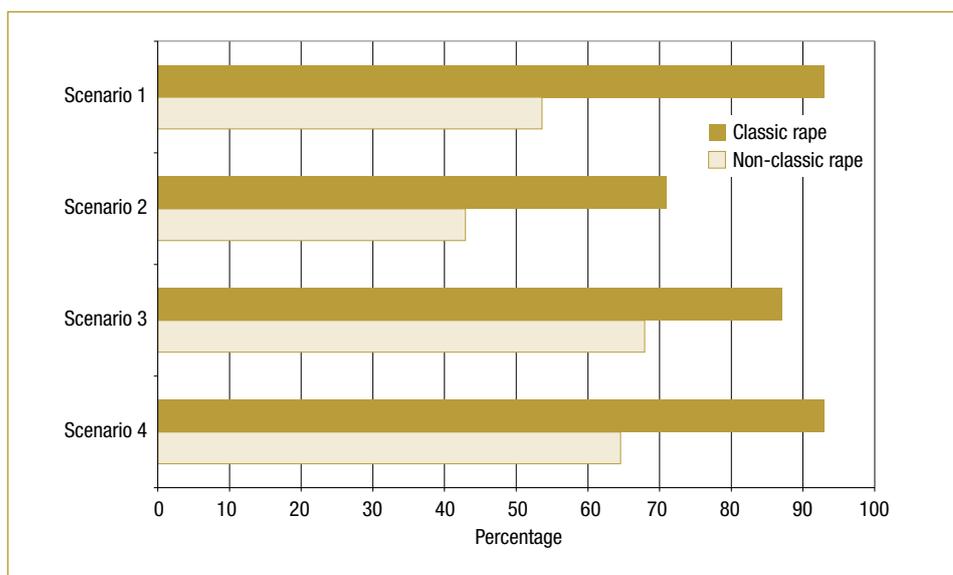


Figure 5: Proportion of participants who nominated imprisonment to be the most appropriate sanction for the offender in the four scenarios



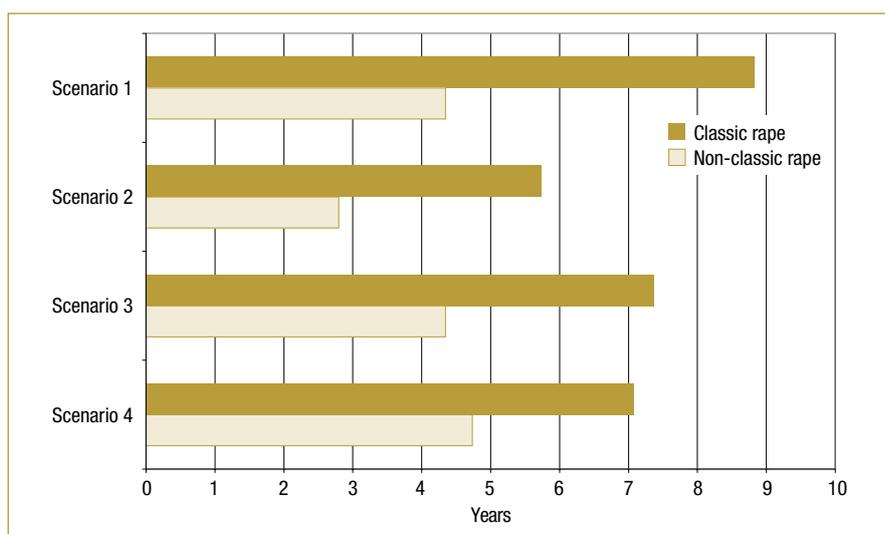
allocated to offenders in scenarios that deviated from the classic rape scenarios. Discharges, dismissals, adjournments and fines were not nominated as appropriate sentences for offenders in any scenarios that reflected classic rape stereotypes.

Mean sentence lengths allocated to offenders were consistently higher in scenarios that reflected stereotypes. The differences in sentencing lengths nominated as appropriate to offenders in each scenario is displayed in Figure 6 on page 24.

Offenders in classic rape scenarios were allocated significantly longer sentences than in corresponding scenarios that challenged the stereotype. Differences received a high level of statistical significance.

Together, the data on sentencing sanctions and lengths indicate that myths did influence participants' perceptions of appropriate sentencing severity.

Figure 6: Average (mean) sentence length in years imposed upon offenders by participants in the four rape scenarios



## Summary

More needs to be done to ensure that sexual assault is considered serious, that myths and stereotypes are not used to justify reductions in grading the gravity of an offence or influencing sentencing severity, and that “seriousness” is understood to include various experiences of sexual violence. The findings of the small study show how rape myths can function directly to influence perceptions of offence seriousness, blame and responsibility and sentencing appropriateness. The study found that when scenarios included non-classic elements (for example, when the offender was known to the victim), attributions of blame to victims were higher, and sentences nominated as appropriate were less severe. Warner (2005) advocates that courts should use the opportunity to dispel myths and stereotypes rather than endorse them. Work still needs to be done to promote this approach. A shift in attitudes, both within the community, and the judiciary (who should be playing a pro-active role, rather than reinforcing myths) should be included in debates on treating sexual assault seriously. A critical element of achieving appropriate sentences for cases of sexual assault is not the introduction of more punitive measures per se, but the reshaping of understandings of seriousness and incorporating these into sentencing practices.

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