ENHANCING SAFE PRACTICE
NATIONAL JUSTICE FORUM ON SEXUAL ASSAULT

SUPREME COURT OF NEW SOUTH WALES
BANCO COURT
2 - 4 AUGUST 2024

Session 1 :

Overview of process in relation to sexual assault complaints

Before and after trial – locating the trial process as part of the broader ecosystem

You have just heard from the perspective of counsel appearing on behalf of the person accused of a sexual offence and from the perspective of the person making allegations of a sexual offence.

I will speak about how a trial judge can manage the competing interests and expectations, while protecting the rights the participants have and ensuring a fair trial.

A fair trial is a fundamental and unassailable requirement of our criminal justice system, and that ensuring a fair trial is the primary role of a trial judge.

But it is how the competing interests, expectations and rights are managed and balanced that is key to enhancing safe practice

while ensuring a fair trial. The balance will likely be different in every trial; the approach, however, should be the same.

Fairness

In an English case decided in the House of Lords in 2001, it was said that '[t]here must be fairness to all sides. …It involves taking into account the position of the accused, the victim, and his or her family, and the public.'[1]

Even longer ago, in 1992, Justice Gaudron in the High Court said that 'notions of fairness are inevitably bound up with prevailing social values.'[2]

Reforms to the justice system

In locating the trial process as part of the broader ecosystem, that is, the community in which the trial takes place, the ecosystem is defined by the prevailing social values.

Historically the criminal justice system in Australia has not paid sufficient attention to the complainant's experience during a sex offence trial. However, the social values prevailing over the last 20 years or so have informed the debate that has led to the many

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1 *Attorney-General's Reference (No 3 of 1999)* [2001] 2 AC 91, [118] (Lord Steyn), cited in a speech delivered by Chief Judge Peter Kidd of the County Court of Victoria at the Judicial College of Victoria's event, Managing Sexual Offence Cases, on 28 June 2024.

2 *Dietrich v The Queen* (1992) 177 CLR 292, [4] (Gaudron J), cited in a speech delivered by Chief Judge Peter Kidd of the County Court of Victoria at the Judicial College of Victoria's event, Managing Sexual Offence Cases, on 28 June 2024.

reforms to the trial process for sexual offences enacted by parliaments across the jurisdictions of Australia.

Those reforms have been achieved without derogation of the rights of an accused person. The process has been made fairer for complainants, but this has not made the process unfair for an accused.

Currently, there are six further reviews of the justice system response to sexual offences underway in Australia: one national, and five in the States or Territories.

Expectations of the justice system

Victims have expectations of justice driven by many things, including their experience of the justice system, as described by the Commissioner for Victims' Rights.

Those 'running' a criminal trial – the lawyers and the judge – can have an impact on the complainant's experience of the justice system.

Before a trial, during investigation and the early stages of a prosecution, a complainant expects to receive information and support. These expectations fall squarely in the province of the

police and the prosecuting authority, and are outside the control of the judge.

But once the trial is under the direct management of the trial judge, there are some things that a judge can do to meet some of a complainant's expectations and manage what will always be a difficult process for a complainant.

The process is difficult, even with the best will in the world by the other participants. That is because the right an accused has to test the evidence means that inevitably the evidence of a complainant will come under scrutiny.

Even where cross-examination is done respectfully and appropriately – as it should be – the questioning necessarily represents a testing of the truthfulness and accuracy of a complainant. That challenge of itself can be distressing.

It is vital for a complainant to receive information about the trial process, and support during and after it. At the very least, a complainant needs to know what to expect, which is, again, in the province of the police and the prosecution.

A complainant needs to be informed that they will not get to tell their story from start to finish, nor in their own words; whether

in their statements to police, or in the trial, what they say is in response to questions. This is despite the *Uniform Evidence Act,* in jurisdictions where it applies, providing in section 29 that a witness may be questioned in any way a party thinks fit as directed by the court, and may give evidence in narrative form.

You will hear in Session 3 about initiatives in sexual assault trials. I will not steal their thunder by speaking of system-wide initiatives in Victoria in this session. Instead, I will refer to some approaches that I have undertaken over the years, that I believe enhance safe practice and which would now come under the description of being 'trauma-informed'.[3]

Given the sort of commentary that often arises when one uses that term, I need to state the following: conducting a trauma-informed hearing does NOT involve an assumption by a judicial officer that the accused is guilty, nor that the complainant must be believed; it merely requires recognition of the position of the witness from their perspective.

Safe practice

So what do I do in an attempt to make a difficult process a safer practice for complainants to experience?

[3] victims-crime-courtroom-guide-judicial-officers (judicialcollege.vic.edu.au)

The first is very basic, but absolutely essential: I ensure that the complainant's needs have been ascertained and necessary arrangements have been made. Making arrangements to enable them to give their best evidence provides fundamental recognition of the requirement of a fair hearing to all involved in the proceeding.

Next, I ensure that all participants in the trial process are treated with respect. I refer to each participant by name. I do not allow counsel to use terms that pretend to be polite but in reality are demeaning, such as calling a woman "Madam" or a man by his family name without "Mr".

It is also important, and another form of respect, to use the correct gender and pronunciation of names. Many jurisdictions have protocols to ascertain these in advance.

Next, providing information to a complainant during a trial is within the power of judges where possible and appropriate. One example is where a hearing is to be adjourned during or just before their evidence; I bring the complainant into the hearing (remotely unless they have chosen to give evidence in court) and give a brief explanation where possible and acknowledge that the adjournment - of any length - will affect them.

Next, I am mindful that while a complainant may not be present in court, they may later obtain transcript or hear feedback on what I have said about their evidence in rulings or discussion with counsel or instructions to the jury. So it is a useful exercise in enhancing safe practice to always speak as if they were present, explaining in easily understood terms (which is also beneficial to an accused) why evidence is ruled in or out, or why a submission that there is no case to answer is being upheld or not, giving reasons based on the evidence. It is no part of our judicial function to engage in commentary.

Another example of enhancing safe practice: I never refer to a 'delay' or 'failure' to complain or report to police[4]. These terms have been used for so long – at least 50 years - that lawyers no longer recognise that they are such pejorative terms in the ears of a complainant. Even more so when the law recognises the good reasons that may exist for no complaint[5]. Instead, I always say 'the passage of time that has passed'.

Another area where a judicial officer can ensure a fair trial takes place, in accordance with the rules of evidence is in disallowing 'improper questions'.

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4 While the rules attributed to *Longman* [1989] HCA 60; (1989) 168 CLR 79; *Kilby* [1973] HCA 30; (1973) 129 CLR 460; and *Crofts* [1996] HCA 22; (1996) 186 CLR 427 have been abolished by the *Jury Directions Act (Vic) 2015*, the Act still uses the language of 'delay in' or 'lack of' complaint – see section 52 *Jury Directions Act (Vic) 2015*.

5 Section 52(4) *Jury Directions Act (Vic) 2015*

Under the *Uniform Evidence Act* it is mandatory for a judge to disallow improper questions as defined in the legislation. A judge is not fulfilling their mandated obligations if they wait for objections where the question is improper.

Where the question is relevant and 'proper', but to a non-lawyer, and in particular to a complainant, may seem totally irrelevant and designed only to upset them, I gently let the witness know that the question does need to be asked even if it seems irrelevant to them, and that they do need to answer. As I am known for jumping on improper questions from a great height, the complainant will likely have seen that happen already during their evidence and may more readily accept the need to answer the difficult but appropriate and properly framed question as adjudged by me.

The Honourable Virgina Bell in her keynote speech referred to the 'weaker' section 41 legislation in Victoria compared to that in other Uniform Evidence Act jurisdictions. I agree with respect to the wording, but I have no problem in using even this 'weaker' version to its fullest extent.

Next, at the time that a victim can tell the court of the impact the proven or admitted crime has had on them, the court has the

opportunity to be more flexible in the method of receiving that information than in receiving evidence elicited by a party. Although permissible to edit a victim impact statement, consider approaching inadmissible material in a trauma-informed way. I tell counsel that I will not rely on any matter that is inadmissible, and only rarely is discussion required. Avoid going through and picking the impact statement to pieces – especially in the presence of the victim.

The complainant is not called the victim in court until the accused is found guilty by verdict or by their plea. (Another thing complainants should be told in advance). However, by changing the language at the point of sentencing from 'complainant' to 'victim', a judge can validate their experience of sexual assault. The victim can also be told in sentencing remarks that they have been believed, as admitted by the accused or found beyond reasonable doubt by a jury to have occurred in the way alleged. This validates the victim's experience to the extent of the proven crime, and meets their need for accountability in the accused being found, or entering a plea of, guilty.

I also look at and speak directly to the victim in that part of my sentencing remarks that speaks of the impact of the crime on them.

Other ways to enhance safe practice

There are other ways a trial judge can balance the dual responsibility to the accused and the complainant in these cases.

I noted in the Introduction that an ecosystem is not a healthy one unless each component is functioning and enabled by the others to perform that function.

While the prevailing social values in the community have enabled reform, it could be said that the social values of the jury representing the community have not kept pace. Decades of research has shown jury decisions in sex offence trials have likely been based on erroneous reasoning.[6] Jurors do not maliciously or even intentionally seek to rely on myths and misconceptions about sexual assault, but if there is a gap in the evidence presented to them, they will likely fill those gaps with false notions about what is 'real' sexual violence and who are 'real' victims[7], and victim stereotypes, which are mistaken - but genuine - beliefs about how 'real' rape complainants behave[8], including mistaken beliefs about how memory works.

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6 See for example, "The effect of trauma education judicial instructions on decisions about complainant credibility in rape trials.", Faye T. Nitschke, Blake McKimmie, Eric J. Vanman, *Psychology, Public Policy, and Law, February 2023.*

7 "The Trauma - Informed Court: Specialist Approaches to Managing Sexual Offence Proceedings – Part 1", Vicki Lowik, Amanda-Jane George, Masahiro Suzuki, Nichola Corbett-Jarvis, *Journal of Judicial Administration Vol 33, No 1, 0328.*

8 Note 6.

On the basis of recently released ABS figures of 40.11 sexual offenders per 100,000 population and the highest reporting rate in the 31 years of collection of these statistics, the jury is likely to include people who have been victims of a sexual offence. We might expect some jurors with that lived experience to counter the misconceptions in the jury room, but we know that many such people seek to be excused from serving as jurors on sexual offence cases, for obvious understandable reasons. Even if on a jury, there would be an understandable reluctance to take on other jurors on these misconceptions if it meant revealing their own abuse.

The Australian Institute of Family Studies (AIFS) recently produced a Fact Sheet[9] based on the full paper they prepared in combination with Victoria Police in 2017[10] on "Challenging Misconceptions". The Institute will soon release updated research on the understanding of sexual violence by members of the public – the broader ecosystem from which juries are drawn. From what I understand of the updated research, despite the efforts within the justice system since 2017, many of the same misconceptions remain.

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[9] Fact sheet: Challenging misconceptions about sexual offending | Respect@Work respectatwork.gov.au)

[10] Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners | Respect@Work (respectatwork.gov.au).

Bur expert evidence and judicial directions can provide the jury with accurate information about memory or correct mistaken beliefs. There is a body of research that has considered the utility of each[11] in informing the jury, but it is equivocal as to which best meets the need. But there is no reason why both means should not be used.

In Victoria, where the *Jury Directions Act*[12] provides for educative judicial directions on certain aspects, it is heartening to realise that of the 15 commonly held genuine but mistaken beliefs listed in the AIFS Fact Sheet, all but two are either wholly or partly covered. But those not covered are crucial.

I will just mention one: the (perceived but inaccurate) belief of a high rate of false allegations[13]. A range of studies show approximately 5% of rape allegations are <u>proven</u> false. A finding of not guilty does not prove a sexual allegation is false. It simply means that it was not proven beyond reasonable doubt. Judges do not tell juries any of this. Not even when defence counsel make the erroneous claim about the rate of false reports.

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11 See for example: "Enhancing the Credibility of Complainants in Child Sexual Assault Trials: the Effect of Expert Evidence and Judicial Directions", Jane Goodman-Delahunty, Annie Cossins, and Kate O'Brien, *Behavioural Sciences and the Law, (2010)*; "Greater Knowledge Enhances Complainant Credibility and Increases Jury Convictions for Child Sexual Assault", Jane Goodman-Delahunty, Natalie Martschuk, Eunro Lee, and Annie Cossins, *Frontiers in Psychology, (2021).*

12 *Jury Directions Act (Vic) 2015*.

13 Note 10.

Even without legislated jury directions correcting particular mistaken beliefs, expert evidence can be led, or agreed, or even potentially be the subject of judicial notice[14] that balances the reality of sexual offences against submissions that may be made by some defence lawyers based on false notions.

It has taken a judge in a well-known defamation trial - not a criminal trial - to bring to national attention the point of having 'alleged counterintuitive evidence', and do so as agreed facts, on the basis of the decades of uncontroversial research.[15]

I know that there is a decision pending in the High Court from a NSW case that may provide some impetus in all jurisdictions for prosecuting authorities to adduce expert evidence[16].

Based on what was said in the Tasmanian Supreme Court Court of Appeal decision in *AWK*[17], in my view it can and should be pointed out by trial judges to counsel (both prosecution and defence) that memory is a field of expertise and specialised knowledge and counsel should be aware they may be propounding erroneous beliefs about memory in their

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14 *Fennell v R* [2019] HCA 37, [81]; *AJ (Decision Restricted)* [2022] NSWCCA 136; *Lehrmann v Network Ten Pty Limited (Trial Judgment)* [2024] FCA 369, [120].

15 *Lehrmann,* [112]-[121].

16 BQ [2023] NSWCCA 34

17 [2024] TASCCA 5, [276] –[280] (Wood J); [318] – [319] Martin AJ.

submissions. We have the author of that judgment with us at this conference.

There is no reason why this should not occur where other mistaken beliefs are propounded by counsel. Based on decades of research, responses to sexual offending is a field of expertise and specialised knowledge and counsel should be aware they may be propounding erroneous beliefs.

If counsel persists, extrapolating from *AWK,* trial judges should remind the jury that they cannot act on speculation and to be aware that there is no expert opinion before them to support arguments made by counsel about memory or behaviour of a complainant which are areas of expertise.

Other possible means of getting the results of reams of memory and sex offence research into the trial without the need for experts or directions, are through the *Uniform Evidence Act* or similar legislation providing for certificates of expert evidence[18], or providing that proof is not required for matters of common knowledge including by reference to a document the authority of which cannot reasonably be questioned, where a judge may

[18] Section 177 *Evidence Act (Vic) 2008.*

acquire that knowledge in any way they see fit, and where the jury is to take knowledge of that kind into account[19].

Some of these suggestions may seem bold, but none of them are ground-breaking. All of them are do-able within our system of criminal justice. While judges cannot meet justice expectations of complainants in full, keeping these options in mind and activating them where possible enhances safe practice for the complainant while preserving the fair trial for the accused.

As Lord Thomas, Lord Chief Justice of England and Wales from 2013-2017 said, **"it is the bold who properly set the boundaries of the possible**."[20]

Deputy Chief Judge Meryl Sexton
County Court of Victoria.

19 Section 144 *Evidence Act (Vic) 2008.*
20 "Re-Shaping Justice", delivered 3 March 2014 to the organisation "Justice".