Enhancing Safe Practice: A National Justice Forum on Sexual Assault

Banco Court, Supreme Court of New South Wales, 2 August 2024

The Hon Virginia Bell AC, SC

Let me start by observing that being the keynote speaker slated to speak at around 5:15pm on a Friday evening, in what some delegates might view as the interminable interval before the cocktail component of the opening session, is no small hurdle.

The Conference, organised by the AIJA, has been funded by the Commonwealth as part of the implementation of the National Plan to End Violence Against Women and Children. It is one initiative, using the language of the public service, to "enhance justice sector capacity" for the better support of complainants in their interaction with the criminal justice system. Speakers over the sessions tomorrow and on Sunday bring together a wealth of current expertise in the conduct of sexual offence proceedings, the recent reforms to the law of consent, the use of witness intermediaries, the pre-recording of evidence and the like. My perspective is distinctly less hands-on than these speakers, which is another hurdle for me. My perspective is that of having been an appellate judge for the last 22 years of my professional life, the first ten spent dealing with conviction appeals in sexual offence cases in the New South Wales Court of Criminal Appeal and the last 12 dealing with a smaller number of like appeals in the High Court.

It is a long time since I was involved in the conduct of a sexual offence trial. And at the appellate level, your perspective is confined to those prosecutions that have led to conviction. If I go back to the beginning of my career when I was a solicitor working in a community legal centre in the late 1970s, I have a clear recall of occasions on which I gave advice to complainants about the course of the criminal trial process. This was well before Witness Assistance Officers and sexual assault counsellors. It was when complainants would be summoned to attend the Darlinghurst Court house on a given date where they would sit in the corridor together with the relatives and friends of the accused waiting to be called. And when their name was finally called, they would walk into court not knowing which barrister was appearing for the defence and which for the crown. At the time crown prosecutors considered it a breach of professional ethics to confer with the complainant in advance of the trial. It was when the directions on consent informed the jury that "a woman's consent to intercourse may be hesitant, grudging or tearful" but it was nonetheless consent[1]. Over the course of my professional life I have been witness to the very considerable reforms both procedural and evidential that have served to make the experience of being a complainant in a sexual offence prosecution less harrowing.

Notwithstanding these admirable reforms, it remains the case that many sexual offences are not reported for reasons which continue to include the fear of speaking to the police and of giving evidence to a court. Those complainants who do come forward to the police and agree to give evidence commonly report dissatisfaction with the experience. The Standing Council of Attorneys-General, euphoniously referred to as 'SCAG,' has a Working Group on Criminal Justice Response to Sexual Assault. Among the priorities identified by the Working

[1] *Holman v The Queen* [1970] WAR 2, 6 per Jackson CJ.

Group is support for research to identify best practice. In its latest Annual Progress Report the Working Group refers to two studies conducted on the recommendation of the New South Wales Law Reform Commission (NSWLRC)[2] in this regard[3]: the first is the study of the experience of complainants of adult sexual offences in the District Court of New South Wales conducted by Professors Quilter and McNamara, which was published in August 2023 ("the Transcript Study")[4] and the second was study commissioned by the Bureau of Crime Statistics and Research based on interviews conducted with thirty-four complainants of sexual offences ("the Interview Study")[5]. The Report of the Interview Study is titled "this is my story. It's your case, but it's my story," a quotation from the interview of one of the complainants. It is a sentiment that a number of complainants expressed. Complainants were troubled that they were merely a witness in the prosecution's case, and that they lacked agency in its conduct. To some it seemed unfair that the accused had his own lawyer while, she, the complainant was unrepresented. In cases in which the accused elects not to give evidence the sense of unfairness felt by the complainant who may have been cross-examined at length is all the greater.

The sense that the criminal justice system is failing complainants in sexual offence cases has led to proposals including the need (i) to establish specialised sexual offence courts, (ii) to provide separate representation for complainants at the trial and (iii) for restorative justice options, which take the handling of a sexual assault allegation outside the criminal justice system.

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[2] NSWLR, *Consent in relation to sexual offences*, Report 148, September 2020.
[3] Standing Council of Attorneys-General, Working Group on Criminal Justice Reform, Annual Progress Report, December 2023, pp 21/2, Initiative 3.1.
[4] NSW Bureau of Crime Statistics and Research, Quilter, J and McNamara, L. *Experiences of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis*, Crime and Justice Bulletin, No 259, August 2023.
[5] KPMG and RMIT University, *"This is my story. It's your case but it's my story," Interview study: Exploring justice system experiences of complainants in sexual offence matters*, NSW Department of Communities and Justice, 31 July 2023.

I propose to briefly address these proposals and then to focus on one area within the existing framework of criminal justice in which it seems to me that it is presently within the court's power to make the experience of giving evidence less distressing for complainants.

I acknowledge that in some cases there is a constructive role for restorative justice, but I agree with the Victorian Law Reform Commission (the VLRC) that the availability of restorative justice options should not be considered by the police or the Director of Public Prosecutions when deciding to file charges or continue a prosecution[6]. Restorative justice options should supplement the administration of criminal justice as distinct from privatising it[7]. We cannot lose sight of the fact that offences of sexual violence are among the more serious offences in the criminal calendar and that the community as well as the complainant has an interest in their investigation and prosecution.

It needs to be acknowledged that there is a tension between affording the accused a fair trial and exposing the complainant to the distress of giving evidence. In the Interview Study complainants reported how distressing it had been to have defence counsel put to them that they had fabricated their account. The statistical improbability of the making of a false complaint says nothing about proof in a case in which the allegation is denied. In such a case the accused must have the opportunity to test the complainant's account of events. In any case in which the accused denies the sexual activity, or asserts that it was consensual, inevitably cross-examination will challenge the truthfulness and or accuracy of the complainant's account. More generally, the complainant will be

[6] Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences*, Report, September 2021, at 208 [9.144].
[7] Ibid at 208 [9.141].

required to recount details of unwanted intimate contact to a collection of strangers in a formal setting. It is likely to be an experience that is embarrassing and distressing even when the evidence is given from a remote location and in the presence of a trusted support person. The prosecution however must establish the elements of the offence and the accused through his legal representative must have the opportunity to test the evidence.

In a recently published book, it is argued that the increasing recognition of victims' rights, as human rights, has reached a stage in the United Kingdom in which the adversarial trial model can, and should, accommodate the separate representation of the complainant at the trial of a sexual offence[8]. It is not an idea that has taken hold in the Australian jurisdictions, save to the extent that in New South Wales a complainant may be legally represented on an application with respect to sexual counselling communications privilege. Separate representation for the complainant at the trial is an idea that if implemented would require re-thinking the assumptions on which our system of criminal justice is based. It is understandable that a complainant should think that it is her case against the accused, but it is important to explain why she (or he) is not a party to the prosecution. It is not a civil case in which the scales are in equipoise and in which an inference adverse to the defendant can be drawn in the event he (or she) elects not to give evidence[9]. The criminal standard of proof is designedly exacting and when faithfully applied means that jury may assess the complainant as a credible witness and yet still not be persuaded of guilt beyond reasonable doubt. It follows that to view the complainant as akin to a party as distinct from a witness in a prosecution brought by the state is to do her (or him) a disservice. It must be frustrating for the complainant to undergo

[8] Eds Killean, R; Dowds, E; McAlinden, A *Sexual Violence on Trial: Local and Comparative Perspectives*, (2023, Routledge) Ch 14 Killean, R Legal Representation for Sexual Assault Complainants.
[9] *Jones v Dunkel* (1959) 101 CLR 298 at 321 per Windeyer J.

cross-examination while the accused elects not to give evidence. Yet, just as it is difficult to justify having a lesser standard of proof for sexual offences, it is difficult to justify taking away the accused's right to silence[10] in the case of sexual offences as distinct from offences of murder, the malicious infliction of grievous bodily harm and the like.

Complainants in sexual cases should be thoroughly briefed on the nature of the criminal trial process and kept informed about each step in that process. The Interview Study reveals that commonly this does not occur. The importance of continuity of communication from investigation to the trial is a key finding. In cases in which the same detective was present from an early stage in the investigation and throughout the trial the complainant had a distinctly more positive experience of the criminal justice system. Continuity with Witness Assistance Officers, specialist counsellors and the solicitor from the Office of the Director of Public Prosecutions was equally important. Complainants reported frustration about the lack of communication from the Office of the Director of Public Prosecutions about steps in the case including decisions to accept a plea to a lesser offence in discharge of the indictment. While the discretion resides with the Director, it is unacceptable that the complainant is not informed of the decision in a timely way and the reasons for it.

In the Australian jurisdictions, to date we have not opted for specialist sexual offence courts but rather specialist lists for these offences have been established within the District and County courts. The VLRC considered the question of specialist courts and gave cogent reasons for recommending against this model[11]. These included (i) the cost and disruption to the existing trial court

[10] see *RPS v The Queen* (2000) 199 CLR 620; [2000] HCA 3; and *Azzopardi v The Queen* (2001) 205 CLR 50; [2001] HCA 25.
[11] VLRC, *Improving the Justice System Response to Sexual Offences*, Report September 2021, 394 at [18.34]-[18.35].

of carving out a sizeable portion of its criminal work and the difficulty of rolling-out specialised courts throughout the State, leading to 'postcode injustice'[12]. The VLRC found that the benefits of a specialist court do not come from its status as a separate court but from improved case management and quality training[13]. It is critical is that courts have the resources to bring on the trial of sexual offences in a timely way. A persistent and justified complaint is that delay in the listing of trials adds to the stress on the complainant whose life is on hold until the proceedings have been resolved. When SCAG addresses what more can be done to "enhance justice sector capacity" with respect to the prosecution of sexual offences, a first order priority must be adequate funding for the courts and to ensure staffing continuity from the investigating police through to the officers in the Office of the Director of Public Prosecutions.

Returning to the tension between the fair trial of the accused and appropriate protection of the complainant, I cannot do better than to quote Chief Justice Spigelman's observation that[14]:

> "[T]he principle of a fair trial has an inherent flexibility which enables it to adapt to changing circumstances. In particular, it enables the court to acknowledge fundamental changes in community expectations as to the requirements of a fair trial. What is regarded as fair, particularly in the context of a criminal trial, has always varied with changing social standards and circumstances."

We have long accepted that the fair trial of a person accused of a prescribed sexual offence is consistent with placing limitations on aspects of cross-examination. The absolute preclusion on adducing evidence, whether in

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[13] Ibid at 395 [18.37].
[14] Ed Castles, T. *Speeches of a Chief Justice: James Spigelman 1998 – 2008*, (2008, CS2N Publishing), "The Truth Can Cost Too Much: the Principle of a Fair Trial", at 76.

chief or in cross-examination, of a complainant's sexual reputation and the strict limitations on adducing evidence of sexual experience or lack thereof was initially inserted into the *Crimes Act* 1900 (NSW) as part of the package of reforms introduced by the *Crimes (Sexual Assault) Amendment Act* 1981 (NSW). The Transcripts Study suggests that these provisions are working as intended[15].

The Transcripts Study found that defence counsel generally were courteous in their demeanour and tone towards the complainant. However, the authors also reported examples of counsel moving between topics in a way that was confusing and whose questions in cross-examination were sarcastic, combative, belittling, judgmental and repetitive[16]. The Interview Study, which is necessarily more impressionistic, reported that multiple interview participants spoke at length about the confronting and humiliating nature of questions asked in cross-examination[17]. Interview participants included judicial officers, police, and lawyers. The authors quoted one judge who reported that defence counsels' approach to cross-examination can be, "… overly aggressive and [can have] a judgemental tone"[18].

What is concerning about these findings is that a question asked of a complainant on the trial of a sexual offence that is confusing, belittling or repetitive is inadmissible. The history in this respect bears repeating. As enacted, s 41 of the uniform evidence legislation conferred a discretion on the trial judge to disallow a question put to a witness in cross-examination that was misleading, unduly annoying, harassing, intimidating, offensive, oppressive, or repetitive. A difficulty with this broadly framed discretion was the reluctance of

[15] Transcripts Study fn 3 at 12.
[16] Transcripts Study fn 3 at 18.
[17] Interview Study fn 4 at 82.
[18] Interview Study fn 4 at 82.

judges schooled in the common law tradition of the adversarial trial to reject evidence on the judge's own motion. At common law it is for the parties to adduce or object to such evidence as they choose. It is not the function of the judge to step into the arena. Judges presiding at the trial of a sexual offence were likely to be cautious about exercising the discretion to reject a question that had not been objected to by the prosecutor lest it give rise to a successful ground of appeal[19].

In February 2003, Justice Wood, Chief Judge at Common Law, in a paper presented to a conference on contemporary issues in adult sexual assault trials, observed that the discretion to reject evidence under s 41 was seldom invoked. His Honour suggested that judges might fear that defence counsel would use the judge's intervention to advantage by attracting 'counter sympathy' for the accused who was perceived not to being given a fair run[20]. Following Wood CJ at CL'S presentation, the Court of Criminal Appeal endorsed exercise of the s 41 discretion in clear terms[21]:

> "[8] The difficulties encountered by complainants in sexual assault cases in the criminal justice system has been a focus of concern for several decades. Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of the accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance.
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> [13] The words of s 41 direct attention to the effect of questioning upon the witness. In a sexual assault matter, it is appropriate for the Court to consider the effect of cross-examination and of the trial experience upon a complainant when deciding whether cross-

[19] See *Wakeley v The Queen* (1990) 64 ALJR 321 at 325.
[20] J Wood, "*Sexual Assault and the Admission of Evidence*," paper presented at Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, 12 February 2003, at 30-31.
[21] *R v Ta* (2003) 57 NSWLR 444 at 446.

> examination is unduly harassing, offensive or oppressive. In the present case, that standard was clearly exceeded."

This firm reminder did not succeed in bringing about change in entrenched patterns of judicial behaviour. More than a year later, the New South Wales Adult Sexual Assault Interagency Committee reported that s 41 was underutilised and in need of amendment to impose greater restrictions on the tone and manner of questions that may be put to a complainant in cross-examination[22].

It was against this background that in 2005 the Parliament of New South Wales inserted s 275A in the *Criminal Procedure Act* 1986 (NSW). This provision imposed a duty on the trial judge to disallow questions asked in cross-examination, if the court was of the opinion that the question:

> (a) is misleading or confusing, or
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> (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
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> (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
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> (d) has no basis other than a sexist, racial, cultural or ethnic stereotype.

Importantly s 275A (5) provided that the duty imposed on the court applied whether or not an objection was raised to a particular question.

Not long after the introduction of s 275A the Australian Law Reform Commission (ALRC) together with the Law Reform Commission of New South Wales (NSWLRC) and the VLRC conducted a joint review of the operation of

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[22] NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004).

the uniform evidence legislation[23]. The Commissions found that application of the discretion under s 41 was patchy and inconsistent and that the provision was seldom invoked by judges[24]. There was a division of opinion between the VLRC and the NSWLRC about whether the Evidence Act should be amended to adopt the New South Wales model. The VLRC considered that it was up to the prosecution in a criminal trial to object to improper questioning. The VLRC feared that if the judge rejected questions of his or her own motion it might prejudice the jury by conveying the impression that the judge was 'protecting' the complainant from cross-examination.

The ALRC and the NSWLRC recommended that s 41 of the uniform evidence legislation should be amended to adopt the terms of s 275A of the *Criminal Procedure Act* 1986 (NSW). This recommendation was acted on and the Commonwealth, NSW, Tasmania, and ACT Evidence Acts now so provide. The amendment to the *Evidence Act* 1995 (NSW) was made in 2007. Section 41 was omitted and a new s 41 was inserted in these terms:

> (a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality, and
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> (b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject, and
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> (c) the context in which the question is put, including:
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> (i) the nature of the proceeding, and
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> (ii) in a criminal proceeding—the nature of the offence to which the proceeding relates, and

[23] Australian Law Reform Commission, *Uniform Evidence Law*, Report 102, December 2005.
[24] Ibid at 5.91.

> (iii) the relationship (if any) between the witness and any other party to the proceeding.
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> (3) A question is not a disallowable question merely because:
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> (a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness, or
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> (b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.
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> (4) A party may object to a question put to a witness on the ground that it is a disallowable question.
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> (5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.
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> (6) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.

Notwithstanding the evident object of imposing a statutory duty to reject improper questions in place of a broad discretion to do so, there still appears to be reluctance to apply the section according to its tenor. The Transcripts Study reported that, with some exceptions, limited use was made of s 41[25]. Perhaps, equally telling is that, while on occasions the High Court and the Court of Criminal Appeal have considered a ground contending that improper questions were put to the accused in cross-examination[26], I am not aware of any case in which the disallowance of questions under s 41 has been advanced as a ground of appeal.

Not all the features of cross-examination that are the subject of critical comment in the Transcript Study would appear to be disallowable questions under s 41. Moreover, the inclusion of the qualifier "unduly" in sub-s (1)(b) recognises that the accused must have the opportunity to test the prosecution

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[25] Transcript Study fn 3 at 29.
[26] *Libke v R* (2007) 230 CLR 559; [2007] HCA 30; *Skelton v R* [2015] NSWCCA 320.

case. It remains that the sarcastic, combative, belittling, judgmental and repetitive questions reported in the Transcripts Study would appear to have been disallowable. So, too, would questions that were unobjectionable but which were put in a manner or tone that is belittling, insulting or otherwise inappropriate[27]. Section 41 applies to cross-examination in both civil and criminal proceedings. In a criminal proceeding, in deciding whether a question must be disallowed the court is to take into account the nature of the offence to which the proceeding relates[28]. Applied consistently with its evident object, s 41 should be employed to ensure that complainants in sexual offence cases are not subject to offensive and repetitive cross-examination. One cannot rely on the prosecutor to take objection to disallowable questions. Prosecutors will often have forensic reasons for not doing so. For nearly 20 years the law has imposed a duty on New South Wales judges to protect complainants in sexual offence prosecutions from being subject to disallowable questions in cross-examination. If it is the case that judges are failing to act on that duty, there is an evident need for further judicial education on the subject.

Both studies draw attention to the frequency with which complainants are cross-examined to establish that they were intoxicated to some degree at the time of the assault. The Interview Study reported that many of the complainants experienced what they perceived to be a judgmental response in cases in which they had been intoxicated at the time of the assault. Cross-examination about the amount of alcohol the complainant consumed can be distressing and beside the point from the complainant's perspective – as one put it "I don't think drinking underage warrants being sexually assaulted"[29]. The Transcript study reported that it was surprising that there was little reliance by the prosecution on

[27] *Evidence Act* 1995 (NSW), s 41(1)(c).
[28] *Evidence Act* 1995 (NSW), s 41(2)(c)(ii).
[29] Interview Study fn 4 at 42.

substantial intoxication to negate consent even where the complainant's intoxication seemed quite severe[30].

Neither the Transcript Study nor the Interview Study included trials conducted under the affirmative consent provisions of the *Crimes Act* 1900 (NSW) which commenced on 1 June 2022[31]. Under the law as it stood at the time of the trials that were the subject of each study, evidence that a person was "substantially intoxicated by alcohol or drugs" was a ground for establishing that the person did not consent to a sexual activity[32]. The dangers for the defence of raising intoxication have been increased to some degree under the affirmative consent amendments. The law now provides that a person does not consent to a sexual activity if the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity[33]. While this provides arguably a stronger protection for complainants, in practical terms it is doubtful that in this respect the amendment will make a difference to the conduct of prosecutions. Proof that the degree of affectation by alcohol or another drug rendered the complainant incapable of consenting to the sexual activity remains a high bar.

The force of the law as it now stands is the provision that a person does not consent to a sexual activity if the person does not say or do anything to communicate consent to the sexual activity[34] taken with the provisions governing the accused's knowledge about consent including that a belief that the other person consents to sexual activity is not reasonable if the accused did not, within a reasonable time before or at the time of the sexual activity, say or

[30] Transcript Study fn 3 at 14.
[31] *Crimes Act* 1900) NSW), Pt 3 Div 10, Sub-div 1A.
[32] *Crimes Act* 1900 (NSW), s 61HE(8)(a).
[33] *Crimes Act* 1900 (NSW), s 61HJ (1) (c).
[34] *Crimes Act* 1900 (NSW), s 61HJ (1)(a).

do anything to find out whether the other person consents to the sexual activity[35]. Some lines of defence formerly explored in cross-examination of complainants in sexual offence cases would seem to have been effectively side-lined under the affirmative consent provisions of the *Crimes Act* 1900 (NSW). It will take some time to assess the full impact of these provisions.

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[35] *Crimes Act* 1900 (NSW), ss 61HK(1)(c) and (2).