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Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis

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AIM

To investigate the experience of complainants in sexual offence trials in the District Court of NSW in relation to the operation of legislative and privacy protections, examination-in-chief and cross-examination approaches, prosecution responses, judicial interventions, rules of evidence and jury directions.

METHOD

Transcripts from 75 sexual offence trials finalised in the District Court of NSW between 2014 and 2020 (involving 302 charges) were subjected to qualitative content analysis. Transcripts were deductively coded using NVivo 12+ and a codebook that contained a pre-defined set of nodes and sub-nodes that sought to capture noteworthy features of trial practice. These included: compliance with special trial arrangements and evidentiary rules; opportunities for the complainant's voice to be heard; the questioning and other practices of prosecutors and defence counsel; the interaction of the trial judge with counsel, complainants and other witnesses; the visibility and nature of "rape myths" in questioning and submissions; and the use of jury directions. Coded data were thematically analysed using the project's aims and the stated objectives of statutory reforms as touchstones.

RESULTS

Many of the procedural statutory reforms introduced since the 1980s in NSW to improve complainant experience in sexual offence trials were operating as intended, including closed court arrangements (with some exceptions), the opportunity for complainants to give evidence via CCTV from a remote location and access to a support person. However, the substantive conduct of sexual offence trials continued to feature a number of practices previously identified as contributing to negative complainant experiences and outcomes. Trials displayed a continuing strong focus on the conduct of the complainant, and whether they had consented, with less attention paid to the accused's knowledge in relation to consent. Rape myths and stereotypes, and purported attributes of "real rape" were regularly relied upon by both the prosecution and the defence. This included cross-examination based on expectations of immediate complaint and complete and consistent recall of events, and

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questioning and closing submissions that accused the complainant of fabrication and lying for an ulterior purpose. Complainants who were intoxicated at the time of the alleged offences faced additional scrutiny, including suggestions of "drunken consent" and unreliability based on impaired recall. The strict rules on the admissibility of sexual experience evidence were, with some exceptions, followed, but defence counsel were otherwise afforded wide latitude to question the complainant on a range of topics, including prior flirtatious behaviour and aspects of the complainant's past said to be relevant to credibility. The availability of corrective statutory jury directions designed specifically for sexual offence trials had little discernible influence on the pursuit of traditional lines of cross-examination, and at times these directions were in tension with other directions routinely given by judges in criminal trials.

CONCLUSION

The study found only limited evidence that the practice of sexual offence trials has been improved by statutory reform. Greater improvement in the experience of complainants will require change to entrenched trial practices and narratives that are out of step with the spirit of the statutory reforms that began in the 1980s.

KEYWORDS

sexual offences | legislative reform | trial practice | rape myths and stereotypes | complainant experience

INTRODUCTION

It is more than 40 years since the enactment of the *Crimes (Sexual Assault) Amendment Act 1981* (NSW), a statute that marked the beginning of a sustained period of legislative reforms in NSW designed to improve the delivery of justice to victims of sexual violence (Brown et al., 2020). The 1981 reforms were followed by four subsequent waves of major reform in: 1989 (*Crimes (Amendment) Act 1989* (NSW)); 2007 (*Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW)); 2018 *(Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW)); and 2021 *(Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW)). There have also been multiple specific legislative changes to aspects of trial procedure and evidence (e.g. *Criminal Procedure Amendment (Sexual Offence Evidence) Act 2003 (*NSW), to prevent complainant[1] cross-examination by an unrepresented accused, and *Criminal Procedure Amendment (Evidence) Act 2005* (NSW), to remove the need for a complainant to give evidence a second time in the event of a re-trial).

These amendments collectively have re-shaped the laws relating to the prosecution of sexual offences including via amendments to: substantive offence definitions (specifically, broader definitions of sexual intercourse, expansive explanations of consent, changes to fault elements); criminal procedure and evidentiary rules, with the aim of addressing the influence of rape myths (e.g. removing mandatory corroboration warnings, directions on delay in reporting, directions on differences in complainant evidence); and protecting victims from systems abuse (e.g. *rape shield* laws which restrict the use of sexual reputation and history evidence, and provision for evidence to be given by alternative means such as audio-visual link).

Research on impact of reform

Despite this four decade history of progressive legislative reform aiming to modernise sexual offence laws in NSW, sexual offence case attrition rates remain high, and conviction rates are still low – in NSW and Australia generally (Bright et al., 2021; Fitzgerald, 2006; NSW Bureau of Crime Statistics and Research (BOCSAR), 2019; NSW Law Reform Commission (NSWLRC), 2020). Rates of reporting have increased since the 1980s but remain low (ABS, 2023; Goh & Ramsay, 2021). In Australia, in 2021-22, it was estimated that only 16% of adults who had experienced sexual violence in the last 12 months contacted police (ABS, 2023, Table 32c).

Even where complainants do report, attrition rates at all decision-making points in the system are high, influenced by investigation and charge decisions by police and prosecutors (Daly & Bouhours, 2010; NSWLRC, 2020; Office for National Statistics (UK), 2018; Ting et al., 2020; Triggs et al., 2009). For cases that do proceed, conviction rates are low. For example, in NSW, of 886 sexual assault and aggravated sexual assault charges between July 2018 and June 2019, 36% had a guilty verdict (NSWLRC, 2020, pp. 20-21, as amended by NSWLRC, 2021). A Judicial Commission of NSW study found that sexual assault convictions are the most likely criminal convictions to be appealed, accounting for one-quarter of all conviction appeals and one-third of all successful conviction appeals. In only 55% of successful appeals where a new trial was ordered did the prosecution decide to proceed to retrial, with some or all of the charges (Donnelly, Johns & Poletti, 2011, pp. 198, 218-19). Similar patterns have been identified in other countries, including New Zealand, Canada, the United Kingdom, Ireland and Germany (e.g. Daly & Bouhours, 2010; Lovett & Kelly, 2009; Office for National Statistics (UK), 2018; Rotenberg, 2017; Tonna-Barthet & Hunter Blair, 2020; Triggs et al., 2009).

The adequacy of the criminal justice system's response to sexual offences is still heavily – and rightly – criticised (e.g. Australian Women Against Violence Alliance (AWAVA), 2017; Daly & Bouhours, 2010; Haskell & Randall, 2019; McDonald, 2020; Smith, 2018). Complainants continue to report negative experiences of having participated in the criminal trial process (Campbell et al., in press; Cossins, 2020; NSWLRC, 2020; Victorian Law Reform Commission (VLRC), 2021).

1 Throughout this report we use the terminology complainant (rather than, for instance victim or victim-survivor) as this is how the Court refers to her/him/them.

Numerous studies in Australia and other jurisdictions have identified the preponderance of "rape myths" in criminal trials as a continuing cause of the failure to deliver justice to complainants (Angiolini, 2015; Australian Institute of Family Studies, 2017; Ellison & Munro, 2009; Haskell & Randall, 2019; Leverick, 2020; McDonald, 2020; Smith, 2018). A significant amount of work has long reflected on the fact that changing the *law* does not necessarily change *practice* (Adler, 1982; McDonald, 2020; Quilter, 2011; Smart, 1989). Research has found that in courtrooms legal actors, particularly defence lawyers, mobilise discriminatory gender norms and actively resist the potential of progressive reforms, including updated definitions of consent (Craig, 2018; Funnell et al., 2019; McDonald, 2020; Quilter, 2021; Zyderfelt et al., 2017). Many of the myths and stereotypes that research suggests are still operative in trials relate to how closely the rape approximates what Estrich (1987) called "real rape", where the act is perpetrated by a stranger; is committed in a public place; results in injuries or involves a weapon. This is in spite of the fact that most rapes do not occur under these circumstances (Wall & Quadara, 2014) and the extensive progressive legislative reforms aimed at eroding these myths (Burgin, 2019; Daly & Bouhours, 2010; Larcombe, 2011; McDonald, 2014, 2020; Mason & Monaghan, 2019; Munro, 2023; Powell et al., 2013; Quilter, 2011; Temkin et al., 2018).

Literature that documents discontent with the effectiveness of the criminal justice system's response to sexual violence is voluminous, but precisely what is going on in courtrooms has been less-well studied. A number of studies have been undertaken in overseas jurisdictions (e.g. Carline, Gunby & Murray, 2020; Daly, 2021; McDonald, 2020, 2022, 2023; Smith, 2018; Temkin, Gray & Barrett, 2018). Australian empirical studies of how legislative amendments are operationalised in sexual offence trials have been relatively rare (Burgin, 2018, 2019; Henderson & Duncanson, 2016; Powell et al., 2013; Quilter, 2011), particularly in the last two decades in NSW.

NSW BOCSAR 1980s studies

Early evaluations of the NSW statutory reforms (enacted in 1981, 1989) demonstrated the chasm between the aims of legislative reform and practice. The operation of the 1981 sexual assault amendments were monitored by BOCSAR with findings presented in a series of reports (NSW BOCSAR, 1985a, 1985b, 1987). These studies examined transcripts of all rape and sexual assault offences entering committal in two separate 18-month periods. The first period involved all charges of rape or attempted rape in the 18 months immediately before the 1981 reforms and the second period covered sexual assault categories 1-3 or attempt under the Crimes (Sexual Assault) Amendment Act in the 18 months following the reforms. These reports make interesting reading today in that they show evidence of improvements that have not been maintained over time (e.g. a decrease of 14.2% in acquittals, leading to a conviction rate under the 1981 provisions of 82.7%).

NSW Heroines of Fortitude report

The effect of the 1989 and earlier reforms on the experience of complainants as witnesses in the criminal justice system was extensively evaluated by the NSW Department for Women in *Heroines of Fortitude: The experience of women in court as victims of sexual assault* (1996). This report studied 150 sexual assault trials and sentencing hearings heard in the NSW District Court over 12 months (May 1994-April 1995). The report found that while legislative reforms were designed to protect complainants giving evidence in proceedings, as the name of the report suggests, in practice complainants were not so protected. The credibility of complainants was regularly attacked during cross-examination by questions and themes which relied on rape myths/stereotypes. A significant proportion of complainants were cross-examined about:

- lying (82%);
- making false reports based on ulterior motives (52%);
- behaving in a sexually provocative manner (57%);
- drinking on the day (59%);
- the way they were dressed (42%); and
- why they were in the location where contact with the accused occurred (43%) (NSW Department for Women, 1996).

NSW since the mid-1990s

Only a modest statutory review was done after the third wave of major reform – when the Crimes Amendment (Consent – Sexual Assault Offences) Act added to the *Crimes Act 1900* (NSW) an express definition of consent and provided an expanded list of circumstances that negate consent (NSW Department of Attorney General & Justice, 2013). In fact, there has not been another significant evaluation of the practices of NSW criminal trials in adult sexual offences since the 1996 *Heroines of Fortitude* report (NSWLRC, 2020).

The current study

Against this background, one of the recommendations of the NSWLRC's 2020 report on *Consent in Relation to Sexual Offences* was that "The NSW Department of Communities and Justice should fund research about the experiences of complainants of sexual offences in the NSW criminal justice system" (NSWLRC, 2020, p. 201, Rec 10.3). The present study was commissioned as part of the NSW Government's implementation of this recommendation (NSW Government, 2021). Specifically, we were asked to complete a transcript analysis of a selection of sexual offence trials in the District Court of NSW.

The aim of this commissioned study is to understand the experiences of complainants in the conduct of a sexual offence trial, with a particular view to examining issues such as cross-examination approaches, prosecution responses and judicial questioning/directions. We were asked to address the following research questions:

- What is the experience of complainants of sexual offences in the conduct of the trial?
- Are legislative and privacy protections for the complainant adhered to in the conduct of sexual offence trials? Do these protections offer sufficient support?
- What are some of the common themes in the cross-examination of complainants?
- Do lawyers and judges comply with rules of evidence? Which rules are/are not complied with?
- What support mechanisms are offered to and/or used by complainants (e.g. giving evidence by CCTV, being assisted by a support person)?
- Are there any improvements that could be made – both to law and procedure – to improve the complainant experience?

This was a retrospective study of sexual offence trials finalised between 2014 and 2020, and so does not address the impact of legislative changes introduced in response to the NSWLRC's report on *Consent in Relation to Sexual Offences* (2020): that is, the Crimes Legislation Amendment (Sexual Consent Reforms) Act (*the 2022 reforms*), which commenced on 1 June 2022, and which amended the Crimes Act and the *Criminal Procedure Act 1986* (NSW) (CPA).

METHOD

Data

The data used for this report were transcripts from 75 criminal trials obtained from the NSW District Court. The 75 trials were drawn from a list (provided by BOCSAR) of 741 adult sexual offence[2] trials (involving 2,197 charges) finalised in the NSW District Court between 2014 and 2020. We did not attempt to create a representative sample.[3] Rather we applied purposive (criterion) sampling[4] to ensure sample diversity and inclusion with respect to: the sexual offences/charges involved (not limited to sexual assault, but also other adult sexual offences, such as aggravated sexual assault, indecent assault,[5] and sexual intercourse with a person with a cognitive impairment); trial outcome (guilty of one or more charges or not guilty); jury trials and judge alone trials; location of trial; female and male complainants; and Aboriginal and non-Aboriginal complainants.[6]

The final sample of 75 trials included the following:

- most trials were finalised in 2019 (33 trials), 2018 (12) and 2017 (17), with smaller numbers in 2016 (7), 2015 (4), 2014 (1) and 2020 (1);
- trials took place in the following locations: Sydney Downing Centre (27), Sydney west (14), regional NSW (19), circuit courts in NSW (15);
- 69 jury trials and six judge-alone trials;
- 68 were first trials, three were subsequent trials after the first trial did not reach a verdict, and four were retrials after appeal;
- all trials involved a male accused, with a male co-accused in two cases, and a female co-accused in one case;
- in 72 trials there was a single complainant, and in three trials there were two complainants;
- in five trials the complainant was male;
- in six trials the complainant was identified as an Aboriginal person;[7]
- in six trials the complainant was identified as having a cognitive impairment;
- in two trials the complainant was identified as being a sex worker.

Ethics approval and confidentiality measures

The project was approved by the University of Wollongong Human Research Ethics Committee (HREC)[8] on 11 October 2021.

2 We have used the term adult sexual offence to distinguish the subset of sexual offences with which this study is concerned from child sexual offences, where the age of the victim is an element of the offence. Note that adult sexual offences can be prosecuted in instances where the alleged victim is less than 18 years of age. The sample for this study included some such trials (see Table 1).
3 The two primary reasons for this decision were that: i) representativeness would have required a larger sample than was feasible, given the assigned time-frame for this project; and ii) the list provided by BOCSAR did not contain all the details that would be required to attempt a representative sample.
4 This involved reviewing the available information contained in the list provided by BOCSAR and ensuring that the trials selected for the study sample contained the sought-after diversity. Where possible, we chose the number of trials for the sample that roughly reflected the proportion of the total number of trials in the list provided by BOCSAR that featured the relevant variable. This exercise was undertaken before we received any trial transcripts. This meant that the contents of trial transcripts had no influence on the creation of the study sample.
5 No trials in the review period involved charges for the new statutory offences of sexual touching (ss. 61KC-61KD, replacing indecent assault) and sexual act (ss. 61KE-61KF, replacing act of indecency) which commenced operation on 1 December 2018.
6 So that part of the sample could also be used for our related study of intoxication evidence in rape trials funded by an ARC Discovery Project (DP200100101) we also took into account whether trials featured evidence of alcohol and/or other drug use by the complainant and/or accused.
7 This may underestimate the number of complainants who were Aboriginal or Torres Strait Islander persons because this personal information about the complainant was not always discernible from the transcript.
8 HREC approval on 11 October 2021 took the form of an amendment to Application 2020/376, being the original ethics approval for the allied project on intoxication evidence in rape trials (DP200100101).

Key conditions of ethics approval included the use of a secure method for transfer and storage of trial transcripts, and measures to ensure that the anonymity of complainants and other trial participants was maintained. De-identification of transcripts at the earliest opportunity was a key part of this process. Transcripts were obtained from the NSW District Court by staff from BOCSAR and securely delivered to us. De-identification involved the redaction from all pages of transcript the complainant's personal identifying information, information specific to the incident (such as location), and identifying information about defendants, witnesses, judges and lawyers. Once de-identification was completed, the original transcripts were stored in a secure cloud server location. Only the redacted versions of the transcript were shared with and read by research team members, and subjected to analysis.

Each trial was given a unique alphanumeric code (N1, N2, N3 etc). Participants in the trial were assigned a sub-alphanumeric code (e.g. N1C for the complainant in the first trial in our data set; or N7A for the accused in the seventh trial).[9]

Qualitative analysis and coding

Data was qualitatively analysed using *deductive coding* (Bingham & Witkowsky, 2021). This involved applying a pre-defined set of nodes and sub-nodes based on the aims and research questions of the project, and our knowledge of the multiple legislative provisions which are intended to frame sexual offence trials in NSW, particularly those introduced to improve the complainant's experience. Our initial draft codebook also benefited from a similar study we undertook, analysing rape trial transcripts from the County Court of Victoria (Quilter et al., 2023; Quilter, McNamara & Porter, 2023a, 2023b). The draft codebook was further refined based on feedback from the BOCSAR Research Advisory Group[10] before being imported into the qualitative data analysis software package NVivo (version 12 plus).

De-identified trial transcripts were uploaded into NVivo. Transcripts were manually coded by a member of the research team. Each transcript file was read in full, with a determination made as to whether a passage should be assigned one or more of the pre-determined codes. Notwithstanding its deductive nature, this process still involves an exercise in interpretation and judgment. Therefore, in order to maximise accuracy we conducted an inter-coder consistency exercise (O'Connor & Joffe, 2020) to trial the codebook and our application of it. This exercise (involving independent coding of the same trial transcript, followed by comparison and discussion) informed codebook refinement, and harmonisation of coder interpretations, before proceeding to code all available transcripts for the 75 trials in the sample.

In a qualitative study of this sort, coding is a means to an end. It is a way of capturing the presence or absence of selected anticipated features of rape trials. It facilitates systematic analysis of those features, isolation of illustrative examples of the feature in question, and comparison across trials in the sample.

We also used the NVivo classifications facility to record basic descriptive information about each trial, such as court location, gender of trial participants, number and type of sexual offence charges, relationship between complainant and accused, setting in which alleged sexual offences occurred, mode by which the complainant gave evidence, whether support person present and whether DNA evidence was admitted.

The transcript length for trials ranged from 106 to 1,063 pages (an average of 418 pages per trial). In total we read, coded and analysed approximately 31,367 pages of sexual offence trial transcripts.

9 In addition to C = complainant and A = accused, other abbreviations relevant to this report are: TJ = Trial Judge, CP = Crown Prosecutor, DC = Defence Counsel.

10 BOCSAR convened a Research Advisory Panel to guide the establishment and design of a broad program of research investigating adult sexual offence complainants' experiences with the NSW criminal justice system. The current study was part of this program of work.

Limitations

It proved difficult to obtain a transcript for all 75 trials that was complete – defined for the purposes of this study as inclusive of counsel's opening remarks, all oral evidence, counsel's closing addresses and the trial judge's summing up.[11] Ultimately, in 49 of the 75 trials we had a complete trial transcript. In 10 trials we were missing the opening addresses of counsel, in three trials we were missing the closing addresses of counsel and in six trials we were missing the trial judge's summing up. We had the complainant's courtroom evidence for all 75 trials, and the accused's courtroom evidence for all trials in which they gave evidence.

Transcript incompleteness – along with the fact that demographic and other information in which we were interested was not always apparent from the transcripts that we did have (e.g. age of complainant) – contributed to some trial features being recorded as unknown for some cases.

As we relied on a small non-representative sample, we have limited basis for assuming that the cases in our data set are illustrative of how sexual offence trials have been or are conducted in cases outside our data set. Trial transcripts are only one data source relevant to understanding how and why rape trials are conducted in the way they are, and whether statutory law reforms have efficacy. Other important data sources include the experiences reported by complainants, the perspectives of counsel (prosecution and defence) and judges, the case law produced by appellate courts, as well as jury studies.

RESULTS

Descriptive statistics

Most complainants (71%) were aged 15-29 years (see Table 1).

Table 1. Complainant age at time of alleged offence[a]

Age range	Number of complainants
Under 16	2
16-19	25
20-24	12
25-29	9
30-34	5
35-39	4
40-49	6
50+	3
Unknown	12
Total	**78**

[a] The 75 trials in this study included three trials in which there were two complainants (producing a total of 78 complainants).

Seventy-two per cent of the sexual offences were alleged to have occurred in a residential setting (e.g. complainant's home, accused's home, hotel room) (see Table 2). In 67% of trials there was evidence of alcohol and/or other drug (AOD) use by the complainant with some degree of intoxication, ranging from modest to extreme. Thirty trials involved evidence of alcohol use only, 15 involved alcohol and other

11 For our purposes a complete transcript did not require transcript of the trial judge's opening remarks to the jury (although these were received in 44 of the trials), or the transcript of the recorded interview with the complainant by police or a transcript of the accused's ERISP (Electronically Recorded Interview of Suspected Person) where played. In relation to the complainant's interview and the accused's ERISP, neither of these transcripts were able to be provided in any of the trials. We also acknowledge that in some trials there may have been pre-trial arguments at an earlier date for which we did not receive transcript.

drugs, and five involved other drugs only.[12] In 91% of trials the accused was known to the complainant in some way, prior to the alleged offence (see Table 2).

In the majority of trials (60%) the complainant made a report to the police within 24 hours of the alleged offence, and in 81% of cases the police complaint was made within a week (see Table 2).

Table 2. Characteristics of alleged offence

	Number of trials (n=75)
Location of alleged offence	
Private residential	54
Public place	10
Workplace	3
Taxi/Uber vehicle	3
Other vehicle	2
Licensed premises	3
Relationship of accused to complainant	
Casual acquaintance	25
Intimate partner	14
Friend	8
Family member	6
Ex-partner	5
Stranger	4
Taxi/Uber driver	3
Co-worker	3
Carer	2
Flatmate	1
Employer	1
Health professional	1
Client (of sex worker)	1
Coach/teacher	1
Time from alleged event to police complaint	
Less than 24 hours	45
24-48 hrs	7
3-7 days	9
1-4 weeks	3
1-3 months	3
3-12 months	6
1-5 years	1
5+ years	1

Trials

The 75 trials involved 302 charges. The number of charges per trial ranged from one to 16. Overall, the largest number of charges were for sexual assault (141), aggravated sexual assault (37) and indecent assault (54). In some trials the accused was charged with sexual offences and non-sexual offences (e.g. assault occasioning actual bodily harm). In 30 trials (40% of total study sample) the accused was convicted of at least one sexual offence. In 39 trials (52%) the accused was found not guilty on all charges. In six trials (8%) the accused was convicted only of a non-sexual offence charge (e.g. common assault).

12 Given the small sample size and the manner in which the sample for this study was constructed (see note 3, 4, 6), the proportion of sexual offence trials that featured evidence of AOD use should not necessarily be seen as indicative of NSW sexual offence trials generally. Note, however, that it is estimated that AOD are involved in approximately 50% of sexual assaults in Australia (Australian Institute of Health and Welfare, 2019, p. 17) and international studies have estimated a rate of 75% (Flowe & Carline, 2021, p. 2).

Seventy-five per cent of trials were presided over by a male judge, and 25% by a female judge. Fifty-seven per cent of Crown prosecutors were men and 43% were women. Sixty-eight per cent of defence counsel were men and 32% were women.

The median number of days for which the complainant gave evidence was two days. Fifteen complainants were required on only one day. Seven complainants spent four days or more giving evidence. For one complainant, examination-in-chief, cross-examination and re-examination occurred over eight days. The accused gave evidence in 56% of trials.

Support and protections for complainants

Over 40 years of progressive legislative reform has led to a range of protections and supports designed to improve the experience of complainants in giving evidence in sexual offence trials. Many of these (referred to in this report as *general protections*) operate in the majority of sexual offences trials, including closed courts (*in camera*) during a complainant's evidence (CPA, s. 291), the use of alternative arrangements for giving evidence, most commonly in a remote location via CCTV (CPA, s. 294B[13]), complainants' entitlement to a support person while giving evidence (CPA, s. 294C), and the protection of a complainant's identity through a statutory prohibition on publication (Crimes Act, s. 578A). In addition, *specific protections* may operate if applicable in a particular trial, such as complainants not being personally cross-examined by an accused (CPA, s. 294A), prohibitions on the use of sexual reputation/experience evidence (CPA, s. 294CB), privilege in relation to sexual assault communications (CPA, Pt 5, Div 2), provisions relating to the re-use of evidence in retrials (CPA, Pt 5, Divs 3-4) and protections for the giving of evidence by vulnerable witnesses (CPA, Pt 6). The extent to which these protections were employed in the trials in our sample is discussed in the following sections.

General protections

Our study found that courts were generally closed during a complainant's evidence, the prohibition on identifying the complainant was adhered to in all but one trial, three-quarters of complainants gave evidence in a remote location via CCTV (with access to relevant exhibits and documents) and in the majority of cases the complainant had a support person. Audio-visual technical arrangements generally worked well, although amplification was sometimes inadequate for complainants giving evidence in-person, and, where the complainant was giving evidence via CCTV, the availability of only one bar table camera position in many courts meant that counsel had to "swap positions" between examination-in-chief and cross-examination.

Given that general protections in sexual offence proceedings have been in operation for more than two decades,[14] we were surprised to observe some exceptions to expected practice.

- *Court closure*: In seven trials the procedure for closing the court[15] was either not followed or was ineffective, with members of the public entering the courtroom. Furthermore, in 21 trials we found that classes of individuals were exempted from the closed court rule (e.g. the accused's partner or parents; lawyers/readers/students), diminishing privacy for complainants. In one case the judge problematically justified the inclusion of the accused's current partner on the basis of a need for "equilibrium" in relation to the provision of support persons. On occasion the reason the court was not completely closed was because the accused was permitted to have a support person on the

13 To avoid confusion, references to the CPA are to current provisions and section numbers, noting that some relevant provisions were renumbered by the 2022 reforms (i.e. after the review period for this study).

14 The prohibition on publication was introduced in 1987 with the insertion of s. 578A into the Crimes Act *(Crimes (Personal and Family Violence) Amendment Act 1987* (NSW), Sch 3, [11]); closed court arrangements were introduced in 1999 for prescribed sexual offences *(Crimes Legislation Amendment (Sentencing) Act 1999* (NSW), Sch 2, [31]); alternative arrangements for giving evidence by way of remote location and CCTV was introduced in 2004 *(Criminal Procedure Amendment (Sexual Offence Evidence) Act 2004* (NSW), Sch 1); and entitlement to a support person was introduced in 2005 *(Criminal Further Amendment (Evidence) Act 2005* (NSW), Sch 1, [18]).

15 The usual procedure is for the "closed court" to be announced by the trial judge or a court officer and a "closed court" sign hung outside the entrance to the courtroom.

basis that they were a juvenile or had a disability,[16] or because media were exempted under CPA, s. 291C.

- *Support persons*: Despite the complainant being entitled to a support person under s. 248C of the CPA, we observed occasions where the Crown made application for such a support person and the judge treated this as a matter for objections[17] and potential ruling. There was one instance where the judge expressed concern over the choice of the support person (the complainant's counsellor) on the basis of past experience with a counsellor over-stepping the role and advising the complainant.
- *Prohibition on publication*: While the prohibition was applied in almost all cases in the study, in some cases there appeared to be confusion (by judge and counsel) as to its legal basis, perhaps exacerbated by the common practice of referring to "non-publication orders", which is misleading in relation to sexual offence proceedings. The operation of s. 578A of the Crimes Act[18] means there is an automatic prohibition on the publication of the complainant's name or anything that is likely to identify the complainant; no order is required, and there is no role for the *Court Suppression and Non-Publication Orders Act 2010* (NSW) to play.[19]

Specific protections

Most of the specific protections available to complainants operated only rarely in our study with the exception of restrictions on sexual reputation/experience evidence: one trial involved a court appointed person cross-examining the complainant; in four trials sexual communications privilege was engaged; in seven trials all or part of the recorded evidence of the complainant from the first trial was admitted; and in three trials a vulnerable complainant's police interview was pre-recorded and was played as part of the evidence-in-chief and the remainder of evidence-in-chief was given remotely. The most common specific protection that featured in trials in this study was the restriction on sexual experience evidence. Such evidence was admitted in half of the trials. We make four observations in relation to these specific protections.

First, where sexual communication privilege was engaged, the protections appeared largely to operate well, with the complainant legally represented and applications resolved favourably to the complainant.

Secondly, we observed instances where legislative provisions regarding appropriate support for vulnerable complainants were operating very effectively, including the use of witness intermediaries and ground rules hearings. However, practice in this regard was not uniform across the data set, and we observed trials in which appropriate arrangements for a complainant with a cognitive impairment did not appear to have been put in place.

Thirdly, the use of recorded evidence in retrials appears to be meeting the policy objective of reducing trauma to complainants in having to give evidence *again* in a retrial. However, we observed some instances where technological difficulties confounded attempts to play the disc from the first trial (though these were eventually overcome), and others where the sound quality was sub-optimal, which created listening challenges for the judge, lawyers and jurors. We also observed an extreme instance of failing to respect the legitimacy of the protection afforded to complainants by the recorded evidence format. In this

16 Under CPA, s. 306ZK a *vulnerable person* (i.e. "a child or a cognitively impaired person" (s. 306M) "who gives evidence in a proceeding to which this section applies is entitled to choose a person whom the vulnerable person would like to have present near him or her when giving evidence". This provision extends to an accused person: s. 306ZK(6).

17 This was despite the restrictive nature of such possible objections in s. 294C(4):
An accused person is not entitled to object to the suitability of the person or persons chosen by a complainant to be with the complainant when giving evidence, and the court is not to disallow the complainant's choice of person or persons on its own motion, unless the complainant's choice is likely to prejudice the accused person's right to a fair trial (for example, because the person chosen by the complainant is a witness or potential witness in the proceedings).

18 Section 578A(2) states:
A person shall not publish any matter which identifies the complainant in prescribed sexual offence proceedings or any matter which is likely to lead to the identification of the complainant.
Penalty: In the case of an individual—50 penalty units or imprisonment for 6 months, or both; in the case of a corporation—500 penalty units.

19 See *Carrington v R* [2021] NSWCCA 257, [8]-[9]; and *A Lawyer (a pseudonym) v Director of Public Prosecutions NSW; Nationwide News Pty Limited v A Lawyer (a pseudonym)* [2020] NSWSC 1713, [26]: "The proposition that identification of the appellant may lead to non-compliance with s. 578A(2) was not pressed in this Court. It is not necessary to consider it further except to say that s. 578A of the Crimes Act continues to apply independently of any order that might be made under s. 7 of the Act."

case the judge invited the jury to consider the fact that the complainant's evidence took the form of the playing of a recording from an earlier trial as a weakness in the Crown's case:

> Of course, you may take into account that you have not seen the complainant personally. It may be the witnesses' demeanour or behaviour while giving the evidence, particularly during cross-examination, may have been able to assist you in determining whether you accept the evidence of the witness beyond reasonable doubt. Whether, in some way, the absence of the witness deprives you of some assistance in evaluating the evidence is really a matter for speculation. If, however, you feel in some way that you have been deprived of that assistance, then it is a matter that you take into account in determining whether the Crown has proved its case beyond reasonable doubt.

Finally, despite the complete prohibition on sexual *reputation* evidence it was raised in three trials. In two of these, it was ruled inadmissible. In the third, there was an objection to a question asked (and it was not pressed by the defence). Sexual *experience* evidence was raised in at least half of the trials (38 trials) in the study.[20] We found that generally there was compliance with the expected legislative procedures including an application by Crown or Defence to raise the material, submissions and a ruling recording the nature and scope of the evidence (CPA, s. 294CB(8)). Noting that best practice involves pre-trial determination of the admissibility of sexual experience evidence, we observed trials in which there was no application before a sexual experience question was asked, including instances of Crown non-compliance. In such cases, counsel usually objected to the question asked, or the Judge intervened, and the matter was addressed in the absence of the jury. While our assessment is that, generally, the legislative procedures on sexual experience evidence were being followed in the trials in this study, we did not find evidence to substantiate the claim that NSW rape shield laws[21] (currently CPA, s. 294CB; previously CPA, s. 293 and Crimes Act, s. 409B) are too restrictive. It was often the case that counsel were permitted to ask all or most of their preferred questions because the evidence to be adduced was assessed as falling within one of the statutory *gateways*.[22] This is noteworthy in the context of ongoing arguments over whether these laws risk an unfair trial, and may require legislative amendment to provide for a residual court discretion to admit evidence (see *Jackmain (a pseudonym) v R* [2020] NSWCCA 150).

Crown case

General courtesy and "form" of examination-in-chief

We found that the Crown was generally sensitive to the complainant's needs while giving evidence including being responsive to complainant distress and the need for breaks. Learning a complainant's full name should be a basic courtesy, and so it was concerning that one Crown found the complainant's Eastern European surname too difficult to pronounce and so referred to her simply by her first name. In another, the Crown struggled to pronounce the complainant's Māori name, and appeared to avoid using her name during questioning.[23]

It is known that providing details of sexual acts and body parts in front of strangers is challenging for complainants when giving evidence (McDonald, 2020, pp. 90-91). We observed instances of Crown prosecutor sensitivity to this, by foreshadowing such questions with an advance apology or a statement like "I know this is very personal". However, in some instances the Crown was determined to require the complainant to use formal terminology for anatomy or sex acts which were not always understood or used by the complainant (e.g. ejaculate versus cum, penis versus dick, oral sex versus giving head). At other times, the Crown required the complainant to provide a level of specificity about sexual acts that appeared irrelevant to the charges. Such particularity had the capacity to cause complainant distress.

20 We did not always have full transcripts of pre-trial arguments and rulings for all trials, and so sexual experience evidence may have been raised in additional trials of which we were unaware.
21 Rape shield laws is a phrase that is widely used to refer to statutory regimes that shield the complainant from irrelevant questions about their sexual reputation or experience (see, e.g., NSW Department for Women, 1996, p. 223; Australian Law Reform Commission, 2005, [20.11]).
22 Gateways (or gates) is a commonly used reference to statutory exceptions to a general restriction on the admissibility of sexual experience evidence such as those contained in CPA, s. 294CB(4)(a)-(f). See, e.g., Brown et al. 2020, p. 729; Law Commission (UK), 2023, p. 143.
23 In the same case the trial judge also appeared to avoid the complainant's name, and referred to her on one occasion as "the lady".

In terms of the form of examination-in-chief, there were no instances where the court made an order allowing the complainant to give evidence in narrative form (*Evidence Act 1995* (NSW), s. 29(2)).[24] However, in a number of trials the complainant was given the opportunity to provide evidence in response to a series of open-ended questions (e.g. "What happened then?" "What happened next?" "So what happened?" "and then?"). This afforded the complainant latitude to tell their story in "their voice". In such trials, there were no (or few) objections by defence counsel. By contrast, where the Crown adopted a step-by-step style-question/answer format, the complainant was at times unable to recall and likely to respond "I don't remember":

> CP: Again we will take that step by step. You remember meeting up with three boys. Do you remember how you met them?
>
> C: No, I don't.

Noting the restrictions on leading questions (Evidence Act, s. 37), we found little signposting by the Crown in relation to movement to different topics of examination-in-chief or that the evidence-in-chief was nearly concluded.

Features of the Crown case

It is important to acknowledge at the outset the overriding duty of prosecutors to ensure a fair trial, and the responsibility to adduce all relevant evidence (NSW Office of the Director of Public Prosecutions, 2021, [2.2]-[2.3]). Nonetheless, it is noteworthy that, in the trials in this study, the Crown case generally followed a formulaic approach. This often included types of evidence which, on our assessment, were not necessary or valuable (even if admissible because considered *relevant* as that concept is usually interpreted and understood (Evidence Act, s. 55; discussed below)). For example:

- **DNA/forensic evidence and medical evidence:** These forms of evidence were regularly adduced (68% of trials and 71% of trials respectively), even though the accused's identity was typically not in issue, and sexual intercourse was often conceded. On the issue of consent, medical evidence was generally recognised to be equivocal/neutral including where injuries were present, the following statement from a Crown prosecutor being representative: "The doctor could not comment on whether or not the injuries around the anus were caused by consensual penetration". We acknowledge that the Crown may choose to adduce medical evidence even if it is neutral in order to counter speculation by the jury, noting that "a jury will usually expect a complainant to be medically examined" (*KE v R* [2021] NSWCCA 119, [112] (N Adams J)). However, we also note a line of NSWCCA authority in support of the proposition that "the calling of inconclusive medical evidence is undesirable and should be avoided if defence counsel will agree to make no comment on the Crown's failure to call the doctor" (*Adams v R* [2018] NSWCCA 303, [101] (Campbell J)).
- **CCTV footage, text messages:** CCTV footage was included in 35% of cases despite its tangential relevance given it usually depicted events prior to the sexual assault (with some notable exceptions where CCTV footage captured the acts constituting the alleged sexual offence). Text messages, routinely accessed during police investigations via Cellebrite technology, were commonly admitted (67%) as were social media posts (41%). We recognise that in some cases such evidence may be relevant to contextualising the allegation or proving an offence element (such as the accused's knowledge of non-consent). What we are drawing attention to here is the apparently routine inclusion of such evidence, including in instances where its relevance was unclear.

24 We note that the *Heroines of Fortitude* report made a similar finding almost 30 years ago, and recommended that greater use of the narrative form option be promoted (NSW Department of Women, 1996, pp. 141, 147).

- **Clothing:** We were surprised to see a strong focus by the Crown on the attire of the complainant (including details of underwear) which had little or no relevance. In one instance the complainant was asked 27 questions by the Crown about what she was wearing (a "onesie leopard print"), and when it was removed by the accused (in the car in the alleyway). This focus runs the risk of embedding attire *as relevant* (including as a focus for cross-examination), and additionally has capacity to distress and confuse the complainant:

  CP: Once you got to the alleyway, is that what you're saying----

  C: Yes.

  CP: --your clothing came off?

  C: Yes.

  CP: I'm asking you just to restrict yourself to before then. Were you fully clothed up until you arrived at the alleyway?

  C: Hold on one second.

  CP: Sorry, you don't understand the question?

  C: No, I don't.

Intoxication evidence

Given the high number of cases in our study involving complainant intoxication (67%), it was surprising that there was little reliance by the Crown on *substantial intoxication* to negate consent,[25] even where the complainant's intoxication seemed quite severe. Intoxication evidence was sometimes relied on to explain why the complainant failed to behave like a real rape victim (discussed below), such as a failure to physically resist. It was rare for the Crown to give a strong counter-narrative concerning intoxication (such as by highlighting the complainant's vulnerability and the accused's predatory behaviour), and in some cases the Crown reinforced "victim-blaming" lines of reasoning similar to the defence (e.g. going to a particular location such as a park or getting into a car with the accused).

We observed little precision in how intoxication by alcohol was assessed. It was usually left to the jury's common knowledge to determine the level and significance of the complainant's intoxication. Expert evidence tended to be led only in relation to drugs other than alcohol, and was more likely to be engaged by the defence to question the complainant's memory (and reliability as a witness) than to assist the Crown case. Each of these findings is consistent with our previous research on intoxication evidence (McNamara et al., 2017; Quilter et al., 2023; Quilter & McNamara, 2018; Quilter, McNamara & Porter, 2023c).[26]

Real rape attributes

The Crown case typically relied on evidence of immediate complaint (73% of trials), corroborative/supportive evidence (85%), complainant distress (81%), consistency of complainant accounts (37%), a strong focus on the complainant's verbal or physical resistance (67%) and the presence of injuries (56%). Many of these aspects are referred to as rape myths because they enliven expectations that the "true complainant" will act in a particular way. Legislative amendment to substantive offence definitions and educative directions to the jury have attempted to combat these myths. The NSW Court of Criminal Appeal has also cautioned against "imposing rigid stereotypical expectations upon complainants in sexual assault matters as to how they *should* behave" (*Harper v R* [2022] NSWCCA 211, [118] (Button J)). In the same case N Adams J observed (at [184], [192]):

> This court has repeatedly observed, in the context of a ground of appeal asserting that a guilty verdict(s) in a sexual assault trial is unreasonable, that it is not helpful to invite this court to make any assumptions as to how a victim of sexual assault might behave in given circumstances. …

25 At the time of the trials in this study, the Crimes Act stated that evidence that a person was "substantially intoxicated by alcohol or any drugs" may vitiate consent (former s. 61HE(8)(a)). This provision was amended by the 2022 reforms: s. 61HJ(1)(c) now provides that a person does not consent where "the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity".

26 Analysis of intoxication evidence in the trials in this study is ongoing, as part of the ARC funded study, I*ntoxication Evidence in Rape Trials: A Double-Edged Sword?* (DP200100101).

> It seems necessary to observe yet again that the criminal law has moved on from a time when sexual assault trials were overlaid with antiquated stereotypes about how a victim is supposed to behave. The court is not assisted by reliance upon such arguments in a ground contending that a sexual assault conviction is unreasonable.

A line of NSWCCA authority to this effect goes back at least a decade (e.g. *Tonari v R* [2013] NSWCCA 232, [192]; see the cases discussed in *Harper v R* [2022] NSWCCA 211, [183]-[192]; also *Nguyen v R* [2022] NSWCCA 126).Yet, such stereotypes and assumptions featured prominently in the Crown cases in our trials. We discuss four of the more common of these here.

Resistance

While the legislative definition of consent has been transformed from a focus on the complainant's resistance (and injuries) to that of *free and voluntary agreement* (a communicative model of consent), we found little evidence that such change was operative in trials. The Crown rarely focused on this definition aside from a cursory statement in opening/closing addresses that the legal definition of consent means free and voluntary agreement. Where agreement featured in examination-in-chief it was to ask a short question such as "Q. Did you agree to have sex with him?" to which an equally short answer was provided: "A. No." It was less common for the Crown to reject assumptions that the complainant must physically or verbally resist and there were only rare exceptions where the Crown focused on agreement in a substantive way. The following closing address statement is one such good practice example:

> The Crown says [the complainant] was very clear about her lack of willingness to have sexual contact with [the accused], but it comes back to are you satisfied whether there was an agreement. Okay. She doesn't have to say no. She doesn't have to fight him off. She doesn't have to physically resist him. The question for you to determine is whether she did, in fact, agree, and very clearly, the Crown says to you, she did not agree.

In the majority of cases the Crown elicited evidence from the complainant of resistance. This included verbal resistance, such as saying "no" or "stop", crying out, screaming, crying, including having done so on multiple occasions (in one case the complainant, "at least 20 times or more" told the accused she did not want to have sex with him). It also included questions that elicited evidence of physical resistance – such as pushing, biting, scratching, kicking, struggling, fighting back. An examination-in-chief focus on resistance is not necessarily problematic if this is how a complainant's evidence unfolds. Nevertheless, given the Crown's overarching responsibility to frame the Crown case, we make three observations.

First, with Crown questions heavily focused on what the complainant was *doing*, very little attention was paid to what, for example, the complainant was thinking or feeling or what communication had (or had not) occurred in relation to agreement to engage in sexual activity. In one illustrative trial, the complainant was attempting to explain that at that point in time she was trying to memorise the accused's car licence plate number, but the significance of this appeared to be lost because the Crown's questions were focused on eliciting evidence of resistance.

Secondly, the language used by the Crown to frame questions to the complainant (and in opening and closings) relied heavily on the "old" language of resistance (resist, struggle, fight back and, in some cases, the old common law language of "against her will"). This further sediments assumptions about how the true complainant should respond with potential to undermine progressive law reform and is contrary to NSWCCA authority.

Finally, at times the Crown's questions to the complainant *implied* more could have been done to resist:

> CP: At any point did you yell or try and hit him or anything like that?
>
> C: No, I did try push him away but every time I did raise my voice or try hit him he would have - his temper would escalate.

*

> CP: … did you continue the whole time, or was there a point where you did not … resist?
>
> A: Resist. By the end I couldn't physically resist. I didn't have the physical strength to keep resisting physically.

While the complainant is here afforded an opportunity to explain their response, such questions entrench assumptions that non-consent should be demonstrated through resistance, and, worse, risk conveying (to the complainant and to the jury) that they did not act as a "true victim" would have.

Complainant distress

Depending on the circumstances, evidence of distress may support the complaint if it implicates the accused and is reasonably explicable only on the basis of the sexual assault having occurred (*R v Gulliford* [2004] NSWCCA 338, [151]; *R v Grattan* [2005] NSWCCA 306, [123]). It is perhaps, therefore, unsurprising that in many trials in this study the Crown led evidence from a variety of witnesses (friends, family, ambulance officers, police, medical experts, text and other social media messages, and combinations of such) that within a proximate time to the alleged sexual offence, the complainant was distressed. Evidence was typically elicited from the witnesses about the complainant's demeanour with common adjectives used to describe the complainant being: crying, sobbing, upset, anxious, distressed, distraught, frazzled, dishevelled, shaking, traumatised, scared, frightened, terrified, bewildered, shocked, shut off, confused, hyperventilating, nervous, shaky, sombre, serious, embarrassed. Without suggesting such witnesses were mistaken in their observations of the complainant, there is a remarkable consistency in such descriptions which has the capacity to reinforce stereotypes of the normal or expected response to non-consensual sexual activity. It raises questions too in relation to cases where such evidence is not available. We note that both NSWCCA authority (discussed above), and the 2022 reforms which introduced new jury directions for sexual offence trials (including CPA, s. 292B), emphasise that there is no typical or "normal" response to non-consensual sexual intercourse.

Immediate complaint

Given that complaint evidence can be used (as an exception to the hearsay rule) to prove that the offence occurred *and* to enhance the complainant's credibility (Evidence Act, s. 66(2); *WS v R* [2023] NSWCCA 52, [31]; *SB v R* [2020] NSWCCA 207; *Papakosmas v The Queen* (1999) 196 CLR 297), it is perhaps not surprising that, where available, the Crown heavily relied upon such evidence. Complaint evidence came from a wide variety of sources including friends, siblings, parents, relatives, text or other social media messages, police, 000 calls, ambulance officers, medical examiners, as well as combinations of such. There are downsides to the prominence accorded by the Crown to such evidence including that it: entrenches the notion that the true complainant will immediately complain; provides the defence with the capacity to cross-examine the complainant and witnesses as to immediacy, dispute consistency and whether the complaint was made to the "right person" (see below); and, finally, has the capacity to undermine the educative effect of jury directions in relation to lack of complaint (CPA, s. 294; discussed below). We note that this potential was particularly present in how the Crown framed the importance of such evidence in opening and closing addresses. For example (in closing):

> So you principally rely upon the evidence of [the complainant], but you also rely upon the fact that she makes complaint about this matter, and she makes it swiftly. This is not a situation where the complainant comes in weeks or even days after the allegation and makes complaint about something. She immediately makes complaint about the matter. She still bore the injuries that had been inflicted upon her during her alleged ordeal, and she is emotional and distressed.

Supportive (or corroborative) evidence

Given that sexual offence cases are often referred to as "word-on-word" cases (i.e. the only available evidence comes from the complainant and accused), and historically a strong warning was required to be given to the jury about the dangers of convicting on the uncorroborated evidence of the complainant (discussed below), it is notable that in 85% of trials in this study other supportive evidence was led by

the Crown. The Crown relied on a variety of sources including evidence of: complaint,[27] distress, medical injuries, photographs (commonly of injury), DNA and other forensic evidence, text (or other social media) messages to/from the complainant and accused and others, 000 calls, (occasionally) eye-witnesses, CCTV, doctor and police reports. Given the long history of assuming complainants lie about sexual assault (Banet-Weiser, 2021; Estrich, 1987; Quilter, 2015), it is also unsurprising that the Crown often emphasised such evidence in closing addresses. For example:

> Now, importantly, members of the jury, the complainant's evidence doesn't stand alone, and the Crown urges you to take into account the other evidence in the trial that supports her. Firstly, you have the evidence of what the complainant told other witnesses after the offences occurred. … Now, the complainant is also supported, you might think to a strong degree, to a very strong degree by the physical evidence in the case and that is her observable injuries …

In drawing attention to these features of the Crown case in trials in this study, we are not suggesting that prosecutors have actively sought to engage rape myths or conceptions of real rape. We acknowledge that the prosecutor in a trial may consider the evidence relevant to facts in issue, or may reasonably anticipate that the defence will attempt to do so. However, in a context where the prominence of real rape attributes was a notable feature of trials in this study, it is important to recognise that this was not simply a product of defence strategy and lines of cross-examination (matters to which we turn later in this report).

Challenging rape myths

We observed that Crown prosecutors also played a role in *challenging* rape myths – one or more rape myths were challenged at some point in the majority of trials in this study (69%). This was done typically where evidence was not available to support a correlating real rape attribute (e.g. resistance, immediate complaint). The most common myths challenged were the expectation of: consistent accounts; resistance and presence of physical injuries; immediate complaint; and the complainant having generally behaved in the manner expected of a "genuine rape victim". Sometimes such challenges were made during examination-in-chief by allowing the complainant to provide an explanation (e.g. Q. "Why [didn't you say anything]?" A. "I was shocked. I'd never experienced anything like that in my life") or through another witness (e.g. doctors were frequently asked about the absence of injuries: A: "Even if you have a sexual assault, there doesn't have to be any evidence of injury"). More commonly, this was done through the Crown's closing address such as in the following address designed to counter differences in the complainant's accounts:

> One of the things you'd, no doubt, know is that human memories are not perfect and they don't operate like a video camera and it's not CSI and we can't wind back the camera and see everything in high definition and know exactly what happened, but just because human memory doesn't work perfectly, doesn't mean she cannot know what happened in the past. So, just for example, I've outlined to you what [the complainant] said and what other people remember her saying. It's not word perfect, but neither is a human memory capable of remembering exactly what someone said in a period of distress sometime ago and, as I said, just because things aren't remembered perfectly doesn't mean we cannot know what happened in the past …

While these challenges may provide the jury with reasons for the apparent deviation from the "expected conduct", they do little to challenge the basis of the myth, which is assumed by the question and the need for explanation. It also has the potential to reinforce the myth as the normative or expected behaviour – it is just that *this* specific case provides a justifiable exception.

27 We note that although it is routinely adduced to strengthen the Crown case by supporting the complainant's allegation, there is some debate about whether complaint evidence is strictly supportive evidence. In *WS v R* [2023] NSWCCA 52, [35], Beech-Jones J observed that complaint evidence is "independent" evidence only in the sense that it "is also evidence of the events in question and that it has been given on an independent or separate occasion to the oral evidence adduced in the trial".

Given the significant reliance by defence in trials in this study on the suggestion that the complainant was lying (see below), it is notable that the Crown did sometimes attempt to scrutinise the suggestion of fabrication (or false complaint). Usually this was done in a closing address by appealing to the irrationality of the asserted motive. For example:

> Now, it might be suggested to you that [the complainant] made up these allegations because the accused was demanding a medical report in relation to a termination. You might ask yourself how would making this false report to the police about such serious matters change what the accused was asking her for, or hide that fact becoming known. [The complainant] said she was very offended and saddened by the accused's demands.

Alternatively, the assertion might be challenged in closing by highlighting the improbability of the complainant maintaining such a complex fabrication. For example:

> The proposition that might ultimately be put to you is this woman is so unreliable and so vengeful and so prone to - well, flat-out making up outrageous untruths, that she then proceeded to go to the university where she made a complaint and a disclosure to … a trained clinical psychologist. You might think that she tricked her into thinking she was truly distressed. She then went to hospital and had an intimate examination. She went to police, collected her clothes, did all of those things to generate a false complaint and I suggest, ladies and gentlemen, you just simply wouldn't come to that conclusion.

While such interventions may well be important in the context of a specific trial (i.e. providing an explanation to the jury or countering defence submissions), they do little to address the long-held and entrenched assumption that women lie about rape and that rape is an "easy" allegation to make. Furthermore, it is possible that by mounting a fact-specific "logical" rebuttal *on this occasion,* the Crown may be seen to be giving credence to the underlying general assumption that women tend to lie about sexual violence, thereby reinforcing the enduring myth.

Features of the cross-examination of complainants

The manner in which complainants are cross-examined in sexual offence trials has been a strong focus of previous research that has identified it as the most traumatic (and adversarial) phase of the trial for complainants (e.g., Cossins, 2020, Ch. 8; Ellison, 1998; McDonald, 2023, Ch. 6; Zydervelt et al., 2017). Attention has been drawn to the emphasis that is placed on: discrediting the complainant and their account; examination techniques designed to control the witness' answers; and the use of "leading and suggestive questions" to communicate directly with the jury (Cossins, 2020, pp. 355-356; citing Caruso, 2012; and Henderson, 2014). Against this background, our analysis of transcripts of complainant cross-examination during trials in this study highlights noteworthy features of contemporary sexual offence trial practice in NSW.

Formalities and style

Defence counsel were generally courteous in their demeanour and tone towards the complainant, in some cases, inquiring as to their preferred name, inviting them to call for a break if they need one. Especially noteworthy, even if few in number, were the instances where counsel adopted the good practice of breaking down the series of questions into topics and signalling this to the complainant. These may seem like small considerations, but they can be important to the complainant's experience, and play a part in reducing their level of anxiety about giving evidence. Unfortunately, we also saw examples of counsel doing the opposite – such as by opening with a very confronting first question (or series of questions) that appeared to be designed to "rattle" the complainant (and/or immediately put their character at centre-stage of the trial), or by moving between topics in a manner that was non-chronological or otherwise confusing. In some cases, defence counsel were sarcastic, combative, belittling and judgmental towards the complainant, and asked questions that were repetitive.

These divergent practices evoke a theme we address several times in this report: considerable variation in how a sexual offence trial is conducted. It is likely that the unpredictability of what complainants may encounter continues to be a significant contributor to complainant anxiety and distress when confronting the ordeal of giving evidence in court.

Compliance with the rule in *Browne v Dunn*

One of the paradoxes of complainant cross-examination in relation to sexual offences is that it is also a phase of the trial when the *accused's* version of events is considered – in the form of questions/assertions put to the complainant by defence counsel in conformity with the rule in *Browne v Dunn.*[28] This phase of cross-examination questioning can be both confusing and upsetting for the complainant, especially when handled with ambiguity and imprecision. We observed a range of defence counsel practices from clear and well sign-posted questioning at one end of the spectrum, to unfair "ambush"-style questioning at the other.

A good practice we observed in a number of trials was for defence counsel to preface the commencement of *Browne v Dunn* questioning with an explanation of its unique format. A common version we observed:

> I want to suggest some things to you, … and I want you to tell me whether you agree or not, okay?

The following preface was strengthened, in our assessment, by express reference to the fact that defence counsel would be putting to the complainant the accused's version of events:

> First I'm going to take you through some of your evidence that you gave yesterday and *I'm going to take you through what the accused also say happened.* The propositions I'm going to put to you will largely require a yes or no answer. (emphasis added)

The invitation to "agree or disagree" with a proposition or submission is not necessarily sufficient in all circumstances – such as where the complainant has no (or impaired) memory of the facts submitted, or regards them as something that could never have happened – points that were well made by one complainant:

> I just have an issue with using the word "disagree". Like, that implies some sort of recollection. But if there's no recollection, like, and I say, "disagree", then I'm saying that I disagree to a statement, because that's the event that happened. Do you understand what I'm trying to say?

The complainant pointed out that the proffered solution – a third option of "I don't recall" – did not entirely address her concern because it would not fit a situation where her assessment was that "it's such a blatant lie that it couldn't, wouldn't, under any circumstances have happened."

The potential for a poor handling of *Browne v Dunn* questioning to cause confusion and distress is illustrated by the following example:

> DC: I suggest to you that as he and you were talking about him leaving - I know you've denied that, but as that conversation was occurring, you spoke about your poor body image you were having, right during that consultation. What do you say about that?
>
> C: So I'm not sure if this is where I'm supposed to answer the question and again tell you that you are wrong--
>
> DC: What you did--
>
> C: --or if I'm supposed to tell you what actually happened--
>
> DC: No, we've heard what you say.
>
> C: --so that you don't keep on suggesting these things to me that are totally incorrect.

28 *Browne v Dunn* (1893) 6 R 67 (House of Lords). This rule of practice provides that, as a matter of fairness, "where it is intended that the evidence of the witness on a particular matter should not be accepted, that which is to be relied upon to impugn the witness's testimony should be put to the witness by the cross-examiner for his or her comment or explanation" (*Hofer v The Queen* [2021] HCA 36, [26] (Kiefel CJ, Keane and Gleeson JJ).

DC: Well, can I just make it clear to you, part of the rules of court say that I must do this. Okay?

C: Right.

DC: What you did--

C: Really upsetting, and I must apologise, I'm really trying really hard not to cry, and so upsetting--

DC: What you did--

C: --for me to hear you say this because it is so incorrect. Okay? So I apologise for the tears, but it is very upsetting.

DC: I'm just about to finish. What you did at that point in time was flex your right arm muscle to show the bicep.

C: Why would I flex - no, incorrect.

Wide boundaries of relevant evidence

In general, trial judges can reject questions on a variety of grounds, including that they are designed to elicit irrelevant evidence (Evidence Act, Pt 3.1). Relevance, however, is defined in s. 55 in "very broad language" (*R v Le* [2000] NSWCCA 49, [19]; Odgers, 2022, pp. 334-5). Our assessment is that, in practice, defence counsel were afforded extensive latitude to ask complainants about a wide variety of matters on which the relationship to a fact in issue was not necessarily obvious. In addition, the cross-examination exception to the credibility rule, which permits questions on matters that "could substantially affect the assessment of the credibility of the witness" (Evidence Act, s. 103(1)), appears to offer wide scope for defence counsel to ask broad-ranging questions of the complainant (Ligertwood & Edmond, 2017, [7.138]; Odgers, 2022, pp. 900-902). Topics regularly addressed during cross-examination in trials in this study included: i) aspects of the complainant's present or past life that were implicitly raised to reduce their credibility; ii) pre-event behaviour that was characterised as flirtatious (and said to be indicative of consent); and iii) post-event behaviour that was characterised as inconsistent with the "expected behaviour" of a victim of a sexual offence (and said to be indicative of fabrication). Being questioned on such topics is likely to be a significant contributor to complainant embarrassment and distress, noting that it also extends the duration of the complainant's time "on the stand".

Personal history

Some complainants were questioned about aspects of their past that might cast them in a poor light and be perceived as detrimental to their credibility as a witness. Aspects of personal history that were the subject of cross-examination included substance use and addiction, mental illness, criminal convictions and having had their children placed in out of home care.

Flirtation

We identified an express or implied reference to words or actions constituting flirting in 56% of trials. This was observed, not only during the cross-examination of the complainant, but also during accused evidence-in-chief, and defence closing. Some complainants were shown CCTV footage from a pub, bar or nightclub taken some hours prior to the alleged offence, and questioned about whether the depicted interactions between the complainant and the accused (proximity, a touch, a hug, a kiss) were evidence of "sexual interest" on the part of the complainant. This evidence was then relied upon in defence counsel's closing to suggest that subsequent sexual activity had been consensual. For example: "The vision, I suggest, supports the defence case that the sexual activity [later, at a different location] was entirely freely and voluntarily given".

Clothing

In two cases the complainant was cross-examined about her attire in a way that echoed the notorious "blaming" of women for dressing in a sexually provocative manner (in one, wearing a negligee or nightie without underwear (which she denied) in the accused's presence; in another, the style of her dress which meant that her "left thigh was exposed" when she crossed her legs). More commonly, clothing-related questions during cross-examination focused on the mechanics of undressing – typically carrying suggestions that the clothes (e.g. "skinny jeans") were of a type such that the complainant must have assisted with their removal – indicating consent.

The persistence of real rape attributes

A recurring theme in complainant cross-examination was the attempt to highlight those circumstances of the alleged sexual offence that were *not* consonant with the attributes of a so-called real rape. As noted above, attributes of a so-called real rape include an act of violence that involved physical injury to the complainant, verbal and/or physical resistance by the complainant, and immediate report by, and observable distress on the part of, the complainant (Estrich, 1987; Quilter, 2011). Table 3 summarises our findings on the regularity with which complainants were asked questions during cross-examination that sought to draw attention to the ways in which the complainant and their allegation departed from the hallmarks of real rape.

We note the symmetry between these aspects of defence cross-examination of complainants and the manner in which the Crown presented its case (see above). To put it another way, in many trials in this study, the prosecution and defence were playing different sides of the same coin: the Crown was engaging real rape attributes as indicative of the "truth" of the allegation (and the guilt of the accused); the defence was presenting their absence as indicative of the "falsity" of the allegation (and, therefore, the innocence of the accused).

Table 3. Number of trials that featured cross-examination questions that evoked real rape attributes

Absent real rape attribute	Number of trials (n = 75)	% of trials
No immediate complaint	63	84%
No physical resistance	38	51%
No verbal communication of non-consent	40	53%
No injuries	37	49%
No force or threat	23	31%
Absence of visible/demonstrable distress	25	33%
At least one of these attributes	67	89%

Delay in complaint

Some version of delay was suggested in more than four out of five cases in this study (84%). This included 18 cases where the complainant reported to police within 24 hours. We say *some version* of delay because we interpreted delay to include attacks on the complainant for "imperfect" complaint not limited to simply temporal delay (Quilter, McNamara & Porter, 2023a) but also *how* they made the complaint, including telling the "wrong" person or providing insufficient detail. The following defence counsel questions are illustrative:

> ... [I]t never occurred to you before ringing Lifeline that maybe you should be ringing the police, that hadn't occurred to you before then, had it?
>
> *
>
> You didn't immediately respond by text "I've been raped", did you?

Later we report our findings on the operation of the jury direction on absence of delay in complaint (CPA, s. 294). Here we note that the regularity with which complainants were questioned and challenged about delay in the trials in this study, suggests that the prospect of a direction being given during the judge's summing up to the jury was not regarded as a disincentive to pursuing this line of cross-examination.

Other real rape attributes

Table 4 contains illustrations of other real rape-inspired questions asked during the cross-examination of the complainant.

Table 4. Selected real rape evoking questions during complainant cross-examination

Real rape attribute	Examples from transcripts
No physical resistance	Q. Were you offering any resistance at this point in time? A. Resistance as in other than begging him to stop? Physical resistance? Q. Physical resistance? A. No because at that point in time I was trying, I was crying and holding the bed frame.
No verbal communication of non-consent	Q. And you had the opportunity at that stage to say something to him if you did not agree with this? A. I guess so, but I didn't, because I was frozen. * Q. I suggest to you, ma'am, that you didn't indicate that you were not consenting. You never said to him, "No." A. I did not give him consent to have sex with me.
No injuries	Q. You didn't suffer any injuries as a result of this incident? A. Physical injuries? Q. Yes, physical injuries? A. No.
No force or threat	Q. He certainly didn't push you to the ground and push you to your hands and knees, did he? A. That's correct. Q. Nothing like that, there was no force, and there were no threats? A. That's correct.

"Inconsistency" as indicative of fabrication and/or unreliability

A further dimension of the traditional expectation of immediate complaint was the expectation that the manner in which the details are subsequently articulated by the complainant should be *consistent*. Inconsistency was regarded as an indicator of lying (a feature that we consider further below). This expectation has been debunked by the literature on memory, recall and trauma (Haskell & Randall, 2019; Hohl & Conway, 2017; McDonald, 2020; Quilter, McNamara & Porter, 2023b), as well as research on accuracy and deception (Fisher, Powell & Dawson, 2021; Fisher, Vrij & Leins, 2013; Vredeveldt, van Koppen & Granhag, 2014). Further, since 2018, s. 293A of the CPA has provided for an educative direction on this topic (discussed below).

In the trials in this study, the veracity of a complainant's account was often challenged on the basis of differences between the account given at trial and the account given on a previous occasion (e.g. to a friend or family member, to the police, to a doctor). Questions that drew attention to such differences were observed in more than three-quarters (76%) of the cases in this study.

There is potential unfairness (and distress caused) to a complainant whenever they are questioned in a way that suggests that they have failed to deliver the consistency (and complete recall) that is expected of a "good witness", especially when the attention drawn to alleged inconsistencies evolves, as it often does, into a claim that the complainant is lying (discussed below). This must be all the more distressing where the asserted inconsistency relates to minutiae (e.g. the precise location of hands, arms, legs and other body parts), or matters of peripheral detail or dubious relevance. In the following example, the discrepancy related to the mode of transport (Uber or a lift from a friend) by which the complainant had arrived at the location where the alleged sexual offence occurred:

> DC: So you do agree that you've told, you originally told the police officer on the night of the alleged incident something different to what you've told the jury today about how you got there?
>
> C: Yes. I told her straight away that I made a mistake.

In this trial, the complainant was cross-examined at length about differences between her original police statement and her trial evidence, culminating in the following questions:

> DC: You're just making this up, aren't you?
>
> C: No.
>
> DC: There was no sexual assault, was there?
>
> C: Yes, there was.

Although there is no single model of how inconsistency was engaged during cross-examination of complainants in the trials in this study, this example is generally illustrative of a common pattern of questioning.

Since 1 December 2018, s. 293A of the CPA has allowed for a jury direction to correct the rape myth or misconception that inconsistency is indicative of fabrication. We consider the operation of this jury direction below. Here we simply note that we observed no discernible difference between trials conducted pre-1 December 2018 (41 trials) and post-1 December 2018 (34 trials) in terms of defence counsel's inclination to draw attention to differences in the complainant's account.

Intoxication evidence

Consistent with the findings of recent research on Victorian rape trials (Quilter et al., 2023), we found that where intoxication evidence was led by the Crown, it was often used by the defence during cross-examination to impugn the reliability of the complainant and/or to suggest an increased likelihood that they consented due to AOD-related disinhibition. A complainant's intoxication was also used by defence counsel to amplify deviation from attributes of a real rape, such as: failing to resist or bear injuries; lacking consistent memory; and delayed reporting (due to being unaware of what had happened until some time after the event). In addition, intoxication evidence was relied on to engage additional AOD-specific rape myths, such as attacking the complainant's character given their history of AOD use, and suggesting the complainant had failed to behave in a "responsible" rape-preventing manner (e.g. by drinking with men). In some trials, defence counsel suggested that intoxication was related to the complainant's fabricated allegation (i.e. regretting poor "drunken" decision making), and in others, intoxication was proffered as the reason why the complainant was confused and could not remember having consented. Evidence of complainant intoxication was also advanced by the defence in some trials as the basis for an "unreliable evidence" direction (Evidence Act, s. 165).

Lying

The narrative that characterises the rape complainant as a "lying woman" has a very long history (Banet-Weiser, 2021; Estrich, 1987; Quilter, 2015) and was once solidly embedded in the common law (Quilter, 2011, 2015). Although it no longer has the legal status it once had (i.e. presenting so grave a risk as to warrant a mandatory corroboration warning (*Kelleher v R* (1974) 131 CLR 534), we found that an express or implied suggestion that the complainant was lying in some respect was a very common feature of the trials examined in this study, occurring in 95% of trials. Sometimes the characterisation was offered in general express terms during cross-examination:

> DC: Madam, I suggest to you, you will say whatever you think helps your story whether it's true or untrue?
>
> C: I disagree.

Characterisations of the complainant as a liar also featured prominently in defence closing addresses. For example:

> So look, what's happened is this. [The complainant]'s told lie after lie after lie after lie and the best analogy is the block of Swiss cheese. You get your block of Swiss cheese it's got a number of holes in it but the problem here is we've now got to the point where there's just no cheese left, there's just all holes.

In almost three quarters of trials in this study (73%) defence counsel attempted to advance a motive for the complainant making a false allegation, presumably with a view to making it more likely that the jury would be persuaded to accept the defence's preferred characterisation of the complainant and their evidence, or at least regard it as a basis for having a reasonable doubt about the accused's guilt. There

was a range of “predictable” suggested motives including: revenge for an ended relationship or rejection; anger at the accused for alleged infidelity; “regretted” consensual sex; and to conceal consensual sex with another person from a partner/friends/family/local/religious community. We were struck by the range of suggested motives and, in some instances, their speculative nature, including that the complainant:

- was distraught that her GP (the accused) was leaving their medical practice and relocating;
- wanted her stepfather out of the family home because he had been preventing her from seeing her boyfriend;
- (and her mother) wanted to “cover their own backsides” in relation to a financial dispute with the accused;
- wanted her ex-partner “out of the road” so that their children would be returned to her custody;
- aimed to strengthen her application for permanent residency in Australia;
- wanted to “get and keep his attention” (i.e. the accused);
- sought to facilitate reunification with her (estranged) husband and sons;
- was “seeking sympathy” from a former partner, and trying to “preserve the possibility of the relationship continuing”;
- was attempting to deflect the accused’s demands for access to a medical report on a pregnancy termination;
- wanted to force the police to take action on a non-sexual assault and breach of apprehended domestic violence order by the accused;
- told a “story [that] had gotten out of hand” and, after being encouraged by a friend to go to the police, felt she had to go through with it;
- sought to extract financial compensation from the company that employed the accused;
- wanted compensation from the accused, or victim’s compensation, to pay for cosmetic surgery;
- was trying to cover for the fact that she had used her family’s holiday caravan without permission;
- believed the accused had stolen her laptop and glasses;
- wanted academic/special consideration on a university assessment task; and
- was attempting to “get sympathy” from, and avoid being assaulted by, her girlfriend (with whom she had had a serious argument shortly before the alleged sexual assault by the two accused).

The impact of these suggestions on jury-decision-making is unknown and we noted above that, in some cases, the Crown challenged the absurdity of the suggested motive to lie in their closing address. The impact on complainants should also be considered. In the last-mentioned case, where it was suggested that the complainant had lied to avoid being assaulted by her girlfriend (referred to in the de-identified transcript extracts below as “[the witness]”), the complainant responded as follows:

> DC: Is it the case … that you simply made up the complaint to [the witness] to try and get sympathy or something similar from her?
>
> C: No. …
>
> DC: It’s not the case, is it, that you made this story up so that [the witness] wouldn’t beat you?
>
> C: I’m sorry, but I don’t know what type of person would lie about something like that. I would never lie about something as serious as this, ever.

Nonetheless, the defence closing address to the jury included the following:

> There’s lots of unknowns in this case but one thing that we do know for certain is when … [the complainant] made her complaint, her first complaint to … [the witness], the fight stopped. That’s one thing that we do know for sure and we know that… [the complainant] didn’t get hit or slapped or assaulted that night after she got home by … [the witness] so if nothing else,

> and as I say, I can't tell you that the complaint was fabricated but if it was fabricated, it certainly served its purpose of protecting … [the complainant] from … [the witness] on that night.

Hearing the complainant's voice

We reported earlier that evidence-in-chief provided some limited opportunities for the complainant to tell their story in their own words. We found, unsurprisingly, that cross-examination is an even more constrained part of the process for complainants giving evidence. Some complainants did attempt to "push back" against the implications of cross-examination questions – whether those that sought to highlight departure from the attributes of real rape, or those that suggested that the complainant was lying, or other stereotypical or upsetting questions asked by the defence. For example:

> DC: Why didn't you just get out of the car?
>
> C: Because I was firstly, scared; secondly, intoxicated; and thirdly, had no idea where I was.
>
> DC: But there were people around, I suggest.
>
> C: I didn't see anyone.
>
> DC: You would assume that a service station would have an attendant, wouldn't you?
>
> C: When you're in that state of fear, you don't think like that. You get frozen. I was frozen.
>
> *
>
> DC: You did not ring triple-000, did you?
>
> C: No.
>
> DC: Having, on your version, just been raped?
>
> C: There's a lot of people that never tell police.

However, we observed that the constraints of the question and answer convention of cross-examination, and the associated power dynamic, could make it very challenging for complainants to answer what was being put to them. Attempts to "speak up" or explain were sometimes shut down. For example:

> DC: Given you have said you only have snippets of memory of the evening, do you accept that you may have gone to the toilet and don't remember it?
>
> C: I do, yeah.
>
> DC: Do you accept that you may also have removed the tampon that you had in?
>
> C: For what purpose?
>
> TJ: No. Could you answer the question please.
>
> C: No, I don't accept that one, no. …
>
> DC: I'm going to return to the propositions that I'm putting to you and ask you if you agree or disagree okay?
>
> C: Yep.
>
> DC: … [The accused] starting giving you oral sex. Do you agree or disagree?
>
> C: Disagree.
>
> DC: Your breathing became louder as the oral sex progressed?
>
> C: Disagree.
>
> DC: And [name redacted] came into the bedroom, and you pushed … [the accused] away and stood up; do you agree or disagree?
>
> C: Disagree. Just so there's another question, with the oral sex, was [the] tampon in or tampon out?
>
> DC: You appreciate, you are under cross-examination?
>
> C: Yeah, sorry.
>
> DC: Which means you have to answer the questions rather than ask; do you understand?
>
> C: Yep.

Prosecutor and trial judge interventions in cross-examination

The adversarial system governing criminal trials in NSW places constraints on the capacity of the judge and the prosecutor to control or intervene in what defence counsel does during cross-examination (Hunter et al., 2021, pp. 218, 261-265). However, the Evidence Act contains a number of tools for doing

so, including s. 55 (relevant evidence), s. 102 (the credibility rule) and s. 41 (improper questions). It is important to acknowledge that transcript analysis has limitations as a method for seeking to explain why a prosecutor or judge acted in a particular way, especially in relation to a failure to intervene. For example, what we observed as the absence of a Crown objection at a specific point in cross-examination may reflect a conscious strategic decision that an objection might cause prejudice in front of the jury or be otherwise counterproductive. Notwithstanding these limitations, there is value in highlighting the sorts of circumstances in which the Crown objected and the judge intervened during cross-examination of the complainant.

Crown objections

The majority of trials featured at least one objection from the Crown prosecutor (71%). However, we observed a variety of practices across the trials, ranging from no objection to regular objections. Overall, Crown objections during complainant cross-examination were most likely to focus on the form of the question (rather than on its substantive content), such as: use of compound questions; questions that were expressed in a confusing way; questions that were vague or lacked specificity or particularity; questions that mischaracterised the complainant's evidence-in-chief or the contents of earlier statements (e.g. police statement); or questions that interrupted the complainant before they had finished answering the previous question. Objections also related to *hearsay*, questions about another's thoughts, motives or intentions, and questions that called for speculation. Although repetition occurred during cross-examination in a significant number of trials, Crown objections to repetitive questioning were made infrequently, and typically only when the question had been asked multiple times (and answered by the complainant). For example:

> DC: It's the case that you went down to get your bags. Is that correct?
>
> CP: I object to being asked three times now.
>
> DC: No, I apologise.

In light of our reported finding (above) that cross-examination of complainants often took an expansive approach to relevance, it is noteworthy that Crown objections based on *relevance* were relatively rare. This finding does not carry an implied criticism of prosecutors – noting that where relevance-based objections were made, it was common for judges to dismiss the objections and allow the question. The following exchange (which related to a Facebook photo of the accused) is illustrative:

> DC: And then again from ... [the accused] down below there is another little picture - do you remember what that was?
>
> C: That's his display picture on Facebook of him and his son.
>
> DC: It looks like him without a shirt on bending down to his son?
>
> C: Yes.
>
> DC: Did he look good without a shirt on?
>
> C: Oh gosh.
>
> CP: Objection.
>
> TJ: What is the objection?
>
> CP: The relevance.
>
> TJ: It is relevant, I'll allow it.

It is noteworthy that in some cases, it was the complainant, rather than the prosecutor (or trial judge), who raised a query about the relevance of a question. For example:

> DC: ... So you have a loose singlet top?
>
> C: Yes.
>
> DC: And loose shorts when you arrived?
>
> C: Yes.
>
> CP: Your Honour, I don't think she said a loose singlet top.
>
> TJ: Yes.
>
> DC: It was a question and she agreed.

> TJ: Was it a loose singlet top?
>
> C: It was fitted but it wasn't particularly - *I don't see the relevance of the question, I'm sorry.*
>
> TJ: ... if the question is asked I suppose unless there is an objection to it on the grounds of relevance. Can you remember, was it loose or tight?
>
> C: I don't remember it being particularly loose or tight.
>
> TJ: Okay. (emphasis added)

Crown prosecutors sometimes objected to cross-examination questions that had a comment or submission embedded within them, though not necessarily with success. For example:

> DC. What I'm suggesting to you is that the reason you're saying you can't remember is because the version you gave to [the] Detective ... is largely inconsistent with the version you have given in court?
>
> CP: I object to that. It is a submission. It is argumentative.
>
> TJ: I will allow it.

Re-examination

Another less confrontational method of Crown engagement with what has occurred in cross-examination is, consistent with the rules governing re-examination (Evidence Act, s. 39), to use the opportunity to re-examine the complainant to address aspects of cross-examination considered to be potentially distressing to the complainant and/or damaging to the Crown case. We observed a number of positive instances of this practice. For example:

> CP: You said when you were asked questions today about making the sounds as if you were enjoying it?
>
> C: Yes.
>
> CP: Why did you make those sounds?
>
> C: To give him the false impression that I liked it.

Such moments may be important from the point of view of the complainant being given the opportunity to explain their actions. This is especially important in a context where the chance to "tell their story" is relatively limited (see above). However, as a further reflection of the variable manner in which trials are conducted, the opportunity for the Crown to use re-examination to remedy aspects of cross-examination, was dependent, to some extent, on the actions of opposing counsel and the judge. For example, the following attempt by the Crown to use re-examination to give the complainant the opportunity to explain something she had said during cross-examination was disallowed by the judge:

> CP: And you said in cross-examination that you were agreeable to all the acts between the two of you?
>
> DC: I object your Honour.
>
> CP: Your Honour raised in cross-examination.
>
> TJ: That doesn't mean that it's a matter for re-examination.
>
> CP: Well I'm entitled to clarify what she meant by agreeable.
>
> TJ: I think that goes beyond proper re-examination.
>
> CP: Very well. That's the re-examination your Honour.

Trial judge interventions

We observed a wide variety of practices in relation to trial judge interventions, ranging from very low to relatively high levels of intervention (whether prompted by a Crown objection or self-initiated). Of course, there is no correct level of judicial intervention: much will depend on the conduct of others, including counsel and witnesses. There are also individual differences in "judicial style" (Gleeson, 2007, p. 6). Our focus in this section is to highlight the circumstances in which judges did (or did not) influence the substance of cross-examination of complainants, whether by disallowing a question or directing that a question be modified.

Breaks and adjournments

We found that judges were generally sensitive and effective in the offering of breaks to the complainant during cross-examination, whether based on duration (i.e. time in the witness box), complainant request, observed distress or fatigue, or the suggestions of counsel. In one case, regular breaks were used not only for the complainant's well-being but to protect the "integrity of the proceedings" (specifically, the risk that the jury would be influenced by frequently seeing the complainant in distress). The complainant broke down and cried numerous times during her eight days giving evidence (including a long examination-in-chief and cross-examination), and sometimes tended towards expansive answers that went beyond the question asked. This led the judge to require the complainant to give a signal when she was becoming upset so that the CCTV link could be immediately turned off, and to issue several admonitions to the complainant (e.g. "Just answer the question, please, witness").

Regulation of questioning

Reflecting on what we found generally about the (formal) courtesy with which defence counsel conducted cross-examination of complainants, in the cases we analysed it was uncommon for the judge to address counsel on behaviour or style. In one rare instance, defence counsel was instructed to "dial down the tone a bit".

While the trial judge exercises control over the questioning of witnesses (Evidence Act, s. 26), and has a positive duty to disallow improper questions (Evidence Act, s. 41),[29] it is common practice for a judge to adjudicate on the acceptability of a question asked if opposing counsel objects to the question. In practice, we also observed a number of instances of judges "self-initiating" an intervention to disallow ("reject") or invite reformulation of, a question – although there was notable judge-to-judge variation in this approach. The reasons for direct judicial intervention were generally the same as for (successful) Crown objections: questions that were assessed to be imprecise, inaccurate, confusing, or speculative – and, therefore, disallowable under s. 41.

The form in which questions were asked was especially scrutinised. Some judges were proactive in disallowing questions that came with an embedded comment or submission. For example:

> DC: What I'm going to suggest to you, … [the complainant], is that the only time your stepfather said things to you like, "You're a kind, intelligent and beautiful girl", was when you had expressed some concerns that you weren't liked or that your friends wouldn't come over or expressed some insecurity, which is probably common in young teenage girls, and he'd respond--
>
> TJ: I reject the question. It contains within it a comment.

However, we observed that the characterisation of a question as containing a comment (appropriate for closing submissions but not for cross-examination) was selective and partial, and still left defence counsel considerable scope to effectively make submissions during cross-examination. On one view, many of the real rape-related questions (discussed above) that featured prominently in complainant cross-examination (including those suggesting a complainant had failed to act as a "genuine" sexual violence victim would and/or was lying) could be said to contain a comment or submission, and yet they were routinely treated as unobjectionable.

Sometimes a judicial intervention reflected the judge's assessment that, in the context of the wide latitude extended to counsel during cross-examination, a limit had been reached, such as in relation to repetition (one of the categories of disallowable questions in s. 41(1)(b)) or breadth of topics (what might be deemed 'overall' relevance). For example:

29 Section 41(1) provides:
The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a **disallowable question**)—
(a) is misleading or confusing, or
(b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
(c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
(d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

> TJ: Your cross-examination … [DC], is drifting into the territory that is pro - would entitle me to close it down.
>
> DC: Of course, your Honour.
>
> TJ: The questions of what the puppy was doing is neither here nor there.
>
> DC: May it please, your Honour.
>
> TJ: There's a great deal of detail has been gone over with this witness, it's getting close to the time when you should put your client's case to her whether--
>
> DC: I'm about to do that your Honour.

In the following illustration, the judge's intervention – prompted by a Crown objection to a multiple compound question – took the form of reformulating the question to go expressly to the heart of what was being suggested by defence counsel:

> DC: You wake up in the morning, the positive effects of alcohol are over, the positive effects of cocaine are now over, you realise what you did last night was not proper considering what's going to happen shortly regarding your marriage status and you blame this guy. You blame … [the accused].
>
> CP: I object, your Honour. There's at least six questions so far been asked continuum without---
>
> DC: I'll break it down. You wake up the next morning, do you agree with this, feeling the negative side effects of alcohol firstly, don't you?
>
> C: A little bit.
>
> DC: And the negative side effects of cocaine. Correct?
>
> C: Yes.
>
> DC: You remember what you did the night before or, to be fair, the very early hours of that same day, don't you?
>
> C: Yes.
>
> DC: And you're regretting what you've done, haven't you?
>
> C: No.
>
> TJ: … [DC]--
>
> DC: I note the time also, your Honour.
>
> TJ: *No. I think the question is just this, isn't it … did you [the complainant] make a false complaint against the accused because you regretted having consensual intercourse with him the night before?*
>
> C: No, I did not.
>
> TJ: I think that's the question you were going to ask, … [DC].
>
> DC: Your Honour, I'm so grateful for your preciseness.
>
> TJ: Thank you. Would you like to ask another question? You still have time. (emphasis added)

Although it serves to underline a technique of challenging the complainant that was prominent in most trials in this study (see above), the merit of this judicial intervention is that it cuts through innuendo, puts the proposition squarely and unambiguously, and gives the complainant a clear opportunity to provide a categorical denial.

On the topic of relevance, no judge in the trials we analysed could be said to have taken (and enforced) a narrow or confined conception of relevance, but some were more inclined than others, whether prompted by a Crown objection or self-initiated, to disallow a question for this reason, or direct defence counsel to "move on".

Overall, we found that there was no single mode of trial judge oversight of the substance of complainant cross-examination, and considerable variation between trials/judges in terms of how questioning by defence counsel was managed. With some exceptions, we observed only limited use of s. 41 despite the fact that it imposes a positive duty on the trial judge to disallow improper questions – a finding that aligns with previous research (Deck et al., 2022, p. 29).

In one sense, trial-to-trial variation in these respects is entirely predictable, and likely to be reflective of criminal trials generally. However, in another sense, variability may be seen as a weakness if it means that some complainants may be more exposed to (unmediated) inappropriate questioning depending on the

combination of defence counsel, Crown prosecutor and trial judge that they encounter at their trial. The unpredictability of what complainants are likely to encounter during cross-examination, including whether they are likely to be "protected" by the judge, may contribute to unease about participating in a sexual offence trial.

Trial judge summing up and directions to jury

In this section we report our findings on:

- the operation of the two sexual offence-specific "rape myth correcting" directions that were available during the review period for this study:[30] (1) the direction on lack of complaint (CPA, s. 294) (colloquially known as the "delay direction", first introduced in 1981), and (2) the direction on differences in the complainant's account (CPA, s. 293A) (introduced in 2018);
- the operation of other jury directions, including their interaction with the above directions, specifically: the complaint direction, the "single witness" direction and, the motive to lie direction;
- the manner in which the trial judge explained the elements of sexual offences, specifically, the element of absence of non-consent and the element of knowledge;[31] and
- the use of "mid-trial" directions. That is, directions given at the time of the evidence to which they relate, rather than only during the judge's summing up to the jury.

Direction on lack of (or delayed) complaint (CPA, s. 294)

This direction is designed to counteract the rape myth (and traditional common law expectation) that immediate complaint is a hallmark of a genuine complaint, and that delay is suggestive of fabrication (NSWLRC, 2020, pp. 156-157). Of the 69 trials for which we had access to the summing up, the s. 294 direction was given in 26 trials (38%). This is less than the number of trials during which, on our assessment, the complainant was cross-examined in a way that suggested delay or "imperfect" complaint (84%; see above). This discrepancy may be explained by the narrow terms of s. 294 which focuses on temporal delay, rather than the multiple and wider ways in which a complainant might be challenged in relation to the asserted incompleteness of their complaint (e.g. did not tell the right person; did not provide sufficient detail or did not use "correct" terminology).[32]

In the trials we analysed, the potential influence of the s. 294 direction on jury decision-making was compromised by two aspects of the manner in which it was typically delivered during summing up. First, while some judges integrated the direction with the evidence in the case (sometimes referred to as "fact-based directions" (Clough et al., 2018; VLRC, 2021, p. 446)), it was common for judges to deliver the direction "stand alone" (i.e. without any reference to the evidence to which it might relate). Secondly, in most trials in this study, the s. 294 direction was presented as a brief postscript to another direction with which it is fundamentally in tension – the complaint direction (Judicial Commission of NSW, 2022, [5-010] - [5-020]), an old common law direction which contains the very problematic assumptions that s. 294 is designed to counteract (and which the NSWCCA has expressly disavowed (see discussion above of *Harper* and *Nguyen*)): that there is an expected way for a sexual offence victim to react. The most commonly used form of words for the amalgamated directions was drawn from the version of the *Criminal Trial Courts Bench Book* current at the time of the trials in this study:

> … if the complainant has not acted in a way you would have expected someone to act after being assaulted as she described, then that may indicate that the allegation is false but bear it in mind when considering this issue that there may be good reasons why the complainant did not raise the allegation immediately following the alleged assault and that a failure to do so does not mean that the allegation must be false.

30 Five additional sexual offence-specific directions were introduced in 2022 (see now CPA, ss. 292-292E) but were not in operation during the review period for this study.

31 For sexual offences where the absence of consent is an element of the crime (e.g. sexual assault as defined in s. 61I of the Crimes Act), the Crown must also prove that the accused knew the complainant was not consenting. The current formulation of *knowledge* (as amended in 2022) is contained in s. 61HK of the Crimes Act.

32 The comparable provision in s. 52 of the *Jury Directions Act 2015* (Vic) is broader. See generally Quilter, McNamara & Porter (2023a).

This combination of conflicting directions is likely to be confusing for jurors, and raises doubt about whether the intention behind the s. 294 direction is being fully realised. In a context where, as reported above, complainants are still regularly cross-examined about their failure to report the alleged sexual offence promptly and completely, this is cause for concern.

Differences in account direction (CPA, s. 293A)

We earlier reported that complainants were regularly challenged during cross-examination about asserted inconsistencies in their accounts of the alleged sexual offence(s). The s. 293A direction is designed to discourage jurors from assuming that differences are necessarily indicative of unreliability or fabrication. As noted above, it was available in 34 of the 75 trials in this study, being trials that took place after 1 December 2018 (when s. 293A commenced operation).

Our assessment is that the s. 293A direction was under-utilised in the trials in this study. It was given in 11 (34%) of the 32 trials in which it was available (and for which we had access to the summing up). We identified a further 15 cases in which the direction was available and, on our assessment, it was warranted (i.e. differences in the complainant's account had been raised in evidence and/or submissions) but not given. On this analysis, the direction was given in only 42% of the cases in which it should have been given.

In a small number of cases the Crown requested the direction and the trial judge declined to give it, but in a number of other cases there was no indication in the transcripts that s. 293A was even considered. The relatively recent introduction of the direction (i.e. 1 December 2018) may have contributed to a lack of familiarity in trials conducted in 2019 (e.g. the judge in a September 2019 trial was not aware of the direction until alerted by the Crown), but that is not a satisfactory explanation for the under-use of s. 293A. In one case, the Crown prosecutor requested the direction, the defence argued strenuously against the giving of the direction (including some patently wrong arguments about the sorts of cases for which the direction is available), the trial judge decided not to give the direction, and the defence counsel went on to make closing submissions that drew attention to differences in the complainant's accounts as a basis for doubting her reliability.

As with the delay direction, the potential impact of the "difference in account" direction may also have been reduced by the fact that it was sometimes not integrated with relevant parts of trial evidence, and often combined with a version of an old direction that characterises consistency as an indicator of truth (a position which Crown prosecutors tended to advance in closing where they could) and differences as suggestive of dishonesty and/or unreliability. For example:

> One of the arguments presented by the defence in this case has related to inconsistencies noted in the evidence of the complainant. And … [DC] has spelt out a number of these, some 16, she enumerated. The defence case is that the complainant was not telling the truth, that there were gaps in the account she gave, the various accounts, and there were differences and inconsistencies in her versions. Now, of course, it is open to you as judges of the facts to regard these differences and inconsistencies as things which cause you to doubt the evidence of the complainant, generally or on particular points.
>
> However, experience shows that people may not remember all the details of an event, including a sexual allegation, in the same way each time; that trauma may affect people differently and may affect how they recall events; that sometimes there are differences in an account of a sexual offence, and both truthful and untruthful accounts of an event, including a sexual offence, may contain differences.

Such "hybrid" directions may leave juries confused as to the significance they should (or should not) attach to differences between the complainant's trial evidence and their previous accounts.

"Single witness" direction

One of the first important procedural reforms to the law governing sexual offences in NSW was the abolition of the traditional "corroboration warning" in 1981. That is, removal of the requirement that a judge direct the jury that it would be "unsafe to convict … on the uncorroborated evidence" of the

complainant (originally in s. 405C of the Crimes Act). The legislation has been strengthened over time, and since 2007 s. 294AA of the CPA has provided that a judge must not direct that "complainants as a class are unreliable witnesses", and "prohibits a direction to a jury of the danger of convicting on the uncorroborated evidence of any complainant". This should have signalled the end of what is widely known as a "*Murray* direction": that in a case where the Crown case is based on "only one witness asserting the commission of the crime" their evidence "must be scrutinised with great care" (*R v Murray* (1987) 11 NSWLR 12, 19). However, the *Murray* direction persisted, prompting the NSWCCA to say in *Ewen* [2015] NSWCCA 117, [140]-[141]:

> A *Murray* direction, based only on the absence of corroboration, is … tantamount to a direction that it would be dangerous to convict on the uncorroborated evidence of the complainant. … If the direction given suggests that merely … because a complainant's evidence is uncorroborated, it would be, on that account, dangerous to convict, it transgresses s. 294AA(2). The critical aspect of s. 294AA is the substance of the direction that is prohibited. It cannot be avoided by switching from one linguistic formula ("dangerous to convict") to another ("scrutinise the evidence with great care").

All but four of the trials in this study were conducted post-*Ewen*. In a small number of cases (seven of the 71 post-*Ewen* decisions), the trial judge refused to give even the "limited *Murray* direction" requested by defence counsel, in light of s. 294AA and *Ewen*. One judge commented that counsel's proposed direction was "in substance just a different form of words for what Parliament's prohibited". However, in a quarter of trials, a form of *Murray* direction was requested by the defence[33] and given by the trial judge, typically using a slightly modified formulation drawn from the *Criminal Trial Courts Bench Book*'s suggested direction for cases *other* than prescribed sexual offences (Judicial Commission of NSW, 2022, [3-610]). For example:

> So, in this case, there is *only one witness* as to the essential facts that are said to have occurred, and that is the complainant. That evidence is challenged by the accused. You should therefore *look at the evidence of the complainant very carefully* before coming to a conclusion as to what, in fact, occurred over these few days *based on her evidence alone*. [34] (emphasis added)

These findings suggest that in the sexual offence trials reviewed for this study there was both trial-to-trial inconsistency, and a degree of non-compliance with the provisions of the CPA as interpreted by the NSWCCA.[35]

"Motive to lie" direction

We noted earlier that it was a common feature of trials in this study for the complainant to be accused of lying, and that this often involved the defence advancing a purported motive for fabricating an allegation of sexual violence. It was routine in these cases for the defence to request, and the trial judge to give, a common law motive to lie direction. For example:

> Now, the accused has suggested that [the complainant] had a motive for lying. … Let me just remind you that the accused bears no onus to prove a motive to lie. And even if you reject that motive it does not necessarily justify a conclusion that the evidence of the complainant is truthful.[36]

Without questioning the legitimacy of this direction or the importance of respecting the onus of proof, we offer the following observations. It is well known that one of the things that complainants find distressing about giving evidence in sexual offence trials is being called a liar, and that this can be made worse when a credibility-damaging "ulterior motive" is advanced in support of this characterisation (McDonald, 2020, p. 345). The routine availability of the "motive to lie" direction enables defence counsel to continue to employ the tactic of challenging the complainant in this way, and ensures there is little disincentive for doing so.

33 In some trials the requested direction tended to blur the *Murray* direction with the unreliable evidence direction (Evidence Act, s. 165).
34 We note that the relevant entry has been modified in the current version of the *Criminal Trials Court Bench Book* (Judicial Commission of NSW, 2022, [3-610], as amended by Update 70, October 2022).
35 The *Criminal Trials Court Bench Book* now contains clearer and stronger guidance on the application of s 294AA in light of *Ewen* (Judicial Commission of NSW, 2022, [3-615], as amended by Update 70, October 2022). See also *Williams v R* [2021] NSWCCA 25.
36 See Judicial Commission of NSW, 2022, [3-635]; *Doe v R* [2008] NSWCCA 203, [58]; *Jovanovic v R* (1997) 42 NSWLR 520, 521-522, 535.

Directions on offence elements

Our assessment is that trial judges did not always outline the elements of the sexual offence in question in a way that was entirely consistent with how the relevant statutory provisions have been reformed and interpreted by the NSWCCA. This occurred most commonly in relation to the crime of sexual assault (Crimes Act, s. 61I), the elements of which must be explained with reference to accompanying legislative provisions (and case law) on consent/non-consent and knowledge (now ss. 61HI-61HK).

For example, on consent and non-consent:

> What is then meant by consent? A person consents to sexual intercourse if she freely and voluntarily agrees to have sexual intercourse with another person. That consent can be given verbally or expressed by actions. Similarly, *absence of consent does not have to be in words. It also may be communicated in other ways such as the offering of resistance,* although this is not necessary, as the law specifically provides that a person who does not offer actual physical resistance to sexual intercourse is not, by reason, only of that fact, to be regarded as consenting to the sexual intercourse. *Consent that is obtained after persuasion is still consent,* provided that ultimately, it is given freely and voluntarily. (emphasis added)

On the "no reasonable grounds for believing" form of knowledge:

> So, the Crown has to prove beyond reasonable doubt one of two facts before you can find the accused guilty: either that [the accused] didn't honestly believe that she was consenting; or, even if he did have an honest belief that she was consenting, that there were no reasonable grounds for believing that [the complainant] consented to the sexual intercourse.

In our assessment, both of these explanations, observed in trials in this study, are problematic. In its focus on resistance and persuasion, the former is out of step with the letter and spirit of the legislation that was operative at the time. The latter mischaracterises the Crown's obligation to prove knowledge of non-consent by evoking the old common law language of "honest belief" and by suggesting that the inquiry as to no reasonable grounds was a purely objective test (see *Lazarus* [2016] NSWCCA 52). In both instances, the wording was drawn from suggested directions which, at the time, were contained in the *Criminal Trial Courts Bench Book*.[37]

Mid-trial directions

Noting that the available evidence suggests that a "corrective" direction is most likely to have its desired effect if jurors have the benefit of it at the time they are hearing and processing the evidence in question (see the research discussed in Quilter, McNamara & Porter, 2022), neither ss. 294 or 293A directions was given *mid-trial* (i.e. at a point contemporaneous with the giving of the relevant evidence or asking of the relevant question) in any of the trials in this study. In fairness, we note that during the review period there was nothing in the CPA to require or expressly encourage the giving of these directions mid-trial, though there was nothing to prevent a judge from doing so (or a Crown prosecutor submitting that the judge should do so). When it came to a different set of directions – those concerned with the rights of the accused – judges regularly gave them at the time of the relevant evidence or event, consistent with NSWCCA authority on the question of timing (*Qualtieri v R* (2006) 171 A Crim R 463; *Sanchez v R* (2009) 196 A Crim R 472; *R v DBG* (2002) 133 A Crim R 227). This included the direction, required by CPA s. 294B(7), that evidence via alternative arrangements (typically in a remote location by way of CCTV) is standard procedure and that the jury should not "draw any inference adverse to the accused person or give the evidence any greater or lesser weight because it is given by those means…". We note that this direction (and the diligence with which it was given in trials in this study) is a consequence of one of the accommodations offered to complainants in sexual offence trials. In a number of trials, the judge went further than strictly required and directed the jury, at the commencement of the complainant's evidence,

37 We note that the relevant entry has been modified (improved) in the current update of the *Criminal Trial Courts Bench Book* (Judicial Commission of NSW, 2022, [5-820]). For example, the foregrounding of resistance as evidence of non-consent has been removed.

not to draw any inferences adverse to the accused about the presence of a support person.[38] Our point is that there appeared to be a sharp contrast between the (appropriate) urgency associated with the giving of jury directions motivated by the accused's rights to a fair trial, and the practice of only giving those directions designed to correct rape myths and misconceptions at the end of the trial, if at all.

DISCUSSION

The findings of this study suggest that although discrete reforms to specific aspects of the criminal trial, such as alternative arrangements for giving evidence (CPA, s. 294B) and restrictions on sexual experience evidence (now CPA, s. 294CB), are generally working as intended, these measures have not significantly changed the substance of how sexual offence trials are conducted, including how the Crown frames its case, and in particular, how complainants are cross-examined by the defence.[39] Trial features which are known to adversely impact on the experience of complainants continue to operate – largely untouched by the multiple "progressive" reforms that have happened around them. Our analysis of 75 recent sexual offence trials in NSW suggests that the archetype of the "perfect" (real or genuine) victim is still very prominent in the framing of sexual offence trials. This is in spite of the fact that countering associated myths and stereotypes has been a central theme of statutory reform, and in the face of repeated pronouncements by the NSWCCA (mentioned above) discrediting stereotypical assumptions about how complainants in sexual offence matters should behave.

We observed several instances of good practice consistent with the wider spirit and intention of law reform since the 1980s (NSW Department for Women, 1996), such as: judges' insistence on *pre-trial* adjudication of the admissibility of proposed sexual experience evidence; a judge's intervention encouraging defence counsel to adopt a more sensitive approach to questioning the young adult complainant; a Crown prosecutor's closing submissions that challenged rape myths that had been advanced by the defence; another Crown's closing that presented a strong account of consent as free and voluntary agreement; and a defence lawyer's clear and fair approach to the rule in *Browne v Dunn* during cross-examination of the complainant. However, these were isolated and uneven. They offer no basis for reassuring a prospective complainant about what their trial experience will be like (including the range of topics on which they will be questioned), and no foundation for concluding that sexual offence trials have been meaningfully transformed. In fact, returning to re-read the *Heroines of Fortitude* report (NSW Department for Women, 1996) after we completed the analysis of the transcripts in this study was sobering. Much of what we discovered from reading transcripts from trials conducted in recent years mirrored what had been discovered from listening to audio recordings of trials from the mid-1990s. Rape myths and stereotypes including a need for recent complaint, physical resistance and injury, evidence of complainant distress and consistency of accounts, continue to underpin the Crown case and many aspects of the way in which complainants are cross-examined. In cross-examination, complainants are routinely accused of lying and of having failed to behave in the way that a genuine victim of sexual violence would act.

Our findings on the treatment of relevant evidence are also illustrative. We do not presume to pass judgment on how relevance was operationalised in individual trials – not least because a variety of strategic considerations might be at play that are not discernible on the face of transcripts. However, it is important to consider the implications of our finding that complainants were regularly subjected to questioning that extended considerably beyond the specifics of the events that were the basis of the sexual offence charges in question. Testing of the complainant's evidence is entirely appropriate, but our

38 A jury direction about a support person as "standard procedure" is only legislatively required where the witness is a vulnerable person (CPA, s. 306ZI(3)).
39 We are conscious that some of the trial features about which we have raised concerns in this report are not necessarily unique to sexual offence trials but are associated with criminal trials generally (e.g. question and answer examination format, highlighting of witness inconsistencies, challenging the credibility of a witness in cross-examination, including by accusing them of lying). Nonetheless, we draw attention to them, and suggest they may warrant further attention, because of the particular issues they raise for the criminal justice system experience of sexual offence complainants, and the important policy objective of improving that experience.

findings suggest that questioning often blurs into testing of the complainant themselves. The latter is likely to be distressing for complainants – contributing to the sense that they are on trial – and, at least in some instances, it provides a platform for connecting the complainant with negative stereotypes relied upon to support a defence narrative of lying or consent or both (see Cossins, 2020, Ch. 8; McDonald, 2023, Ch. 6; McGlynn & Westmarland, 2019; Zydervelt et al., 2017). Our findings on the adjudication of relevance suggest that attempts to further transform sexual offence trials will require reconsideration of how relevance is assessed when it comes to the sorts of questions which complainants are expected to answer.

Our findings suggest that the problem is not that counsel are failing to follow evidentiary rules on relevance (or the credibility rule), nor that judges are failing to enforce them, but that the rules, as traditionally understood and interpreted (*IMM v The Queen* [2016] HCA 14, [39]; *R v SG* [2017] NSWCCA 202, [29]; *R v Le* [2000] NSWCCA 49, [19]; Odgers, 2022, pp. 335, 900) allow defence counsel to range over very wide terrain, if they so choose. This study confirms that the terrain continues to include topics underpinned by outdated and discredited rape myths and stereotypes, and negative inferences about the complainant's character, integrity and credibility. Consequently, while the language and tone of cross-examination may have generally changed for the better since the 1970s (see Law Reform Commissioner (Vic), 1976, p. 9; Featherstone, 2021, Ch. 2), and a small number of topics are now off limits (i.e. "sexual reputation" and, with exceptions, "sexual experience"), complainants are still routinely questioned in ways that place them at the centre of intense scrutiny and judgment that is underpinned by rape myths and associated assumptions about the attributes of a real rape (Estrich, 1987). Almost 50 years ago the Victorian Law Reform Commissioner (1976, p. 9) observed:

> Sometimes … the right to cross-examine is exercised at oppressive length or in an intimidating fashion so that … [the complainant] is made to feel that she is the person on trial. … Where the accused is acquitted … her emotional trauma is likely to be greatly increased by a feeling that she has been branded as a liar or as promiscuous.

Today, the complainant can be confident that they will not be accused of promiscuity (given the protections of CPA, s. 294CB), but our findings suggest that they are still very likely to be accused of going so far as to fabricate an allegation of a serious sexual offence in pursuit of an ulterior motive (i.e. "branded as a liar").

A transcript analysis study provides only limited direct insight into how complainants *experienced* the trial features documented in this report. However, we think it is likely that being questioned about past substance use or history of mental illness, and being accused of fabricating a sexual offence allegation, is disorienting, embarrassing and distressing. Such features of participating as a witness in a criminal trial are likely to contribute to the negative experiences reported by complainants (Campbell et al., in press; McDonald, 2020).

The continued influence on sexual offence trials of the concept of real rape is also illustrative of limited *practical* change, despite significant formal legislative reform of the law on substantive criminal offences, criminal procedure and evidence. Although concerted attempts have been made to shift law and practice from its problematic common law history, our findings suggest that Crown and defence counsel continue to see strategic value in evoking aspects of the concept of real rape including framing the case by the presence or absence of criteria such as immediate complaint and physical resistance. We note that there is little in NSW law to stop this occurring. Provisions like s. 61HI(4) of the Crimes Act ("A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity"), and s. 294(2) of the CPA (which provides for a jury direction that "delay in complaining does not necessarily indicate that the allegation that the offence was committed is false"), do not prohibit questions that seek to evoke the very rape myth that the legislation sets out to correct. It might have been assumed that such practices would diminish over time – noting that the two statutory provisions referred to above were both first introduced in 1981 (Crimes (Sexual Assault) Amendment Act). The findings of this study suggest that this has not occurred.

Although the non-representative nature of the sample for the study precludes generalisation, our finding on the regularity with which the complainant was accused, during cross-examination, of fabricating their allegation of having been the victim of a sexual offence warrants discussion, particularly in light of the fact that it has been estimated that only approximately 5% of sexual assault complaints to police are false (Ferguson & Malouff, 2016; Tidmarsh & Hamilton, 2020). Historically, the "risk" of the "lying complainant" was one of the most potent (and now notorious) influences on the rules and practices governing sexual offence trials, manifested in a *requirement* for corroborating evidence. In 1976, the Victorian Law Reform Commissioner (1976) endorsed the view that "there is sound reason for requiring corroboration in the case of all sexual offences because 'these cases are particularly subject to the danger of deliberately false charges resulting from sexual neuroses, fantasy, spite, or simply a girl's refusal to admit that she consented to an act of which she is now ashamed'" (quoting Glanville Williams, 1963, pp. 158-60). The frequency and nature of lying accusations (and associated motives) in the trials in this study suggest that despite the transformation of the law on corroboration (i.e. corroboration requirement abolished, corroboration warning prohibited (CPA, s. 294AA)) vestiges remain – manifested in the continued use of a single witness (modified *Murray*) direction – and the underlying myth continues to animate defence trial strategy and cross-examination practice. This is likely to contribute to the negative experience of many complainants.

Another vivid illustration of how little has changed was the troubling practice, observed in the majority of trials in our study, of trial judges giving both an old complaint direction and a new delay direction, often immediately in succession. In 1996, the authors of *Heroines of Fortitude* rightly observed, having detected a similar practice, that it "effectively waters down or cancels out the effects" of the statutory direction that was expected to break the assumed nexus between immediate complaint and truth (or delay and fabrication) (NSW Department for Women, 1996, pp. 213-214). Almost 30 years later, we find ourselves making the same point. We take up the need for a wholesale review of jury directions in sexual offence trials below.

Although it is not a formal source of law, it is clear that the NSW Judicial Commission's *Criminal Trial Courts Bench Book* is widely used and influential as a guide to aspects of trial process, including the words used by judges in their summing up and directions to the jury. We found that it was the source of some of the words spoken by trial judges that we have assessed as problematic – most notably regarding proof of non-consent and the element of knowledge, and complaint evidence. We note that the Bench Book is regularly updated, and that Update 71 (December 2022) made a number of improvements in these respects. An additional area that could be reviewed is strengthening the explanation of the s. 578A prohibition on publication of the complainant's name and anything that could identify them, by including a statement that the prohibition "does not depend on a court order",[40] and reference to *Carrington v R* [2021] NSWCCA 257.

Our findings on the limited opportunities afforded to complainants in most trials to "tell their story" stem to a large extent from the adversarial system and rules of evidence, including those which generally preclude witnesses from expressing opinions, beliefs or assumptions (Evidence Act, s. 76). However, given the primary concerns of this project regarding complainant experience, these findings are important – especially in the context of what is known about the "justice gap" (Cossins, 2020; Temkin & Krahe, 2008) and its relationship to victim-survivors being denied the opportunity to tell their story and be heard (McGlynn & Westmarland, 2019).

Although we have reported a number of recurring features of the trials observed in this study it is important to recognise the differences that we observed across trials. These differences serve to remind that although all trials are conducted according to the same rules, a great deal of autonomy is exercised by judges, prosecutors and defence counsel. If the goal is to create an environment in which complainants can be confident that they will not only be treated with respect, but that they will not be exposed to unfair scrutiny and judgment, then a more systematic approach to producing change is required. We recognise

40 This phrase currently appears only in a separate section of the *Criminal Trial Courts Bench Book*, in an archived paper at [10.530].

that this is a sensitive topic in light of considerations such as judicial independence, the rights of an accused person to the presumption of innocence and a fair trial, and the associated tradition of rigorous and wide-ranging cross-examination of Crown witnesses. However, we believe it is important to confront the disconnect between the prevailing narrative of progressive law reform and incremental improvement over 40 years in relation to sexual offences, and the practical reality that core features of sexual offence trials have remained unchanged.

To be clear, this is not primarily a problem of recalcitrance (or ignorance) on the part of judges and lawyers. Where a change has been legislated, this study shows that (with some limited exceptions) the change has been operationalised (e.g. closed courts, complainants giving evidence via CCTV, directions that there may be good reasons for delay in reporting a sexual crime). Rather, the problem is that the reforms of the last 40 years have attempted only modest incursions into the essence of what makes sexual offence trials so traumatic for many complainants, including the adversarial nature of proceedings, the breadth and sensitivity of topics complainants might be asked to address, the absence of substantive barriers to the evocation of rape myths and stereotypes, and the length of time for which complainants might be examined. These are features that may not be susceptible to further improvement via legislative reform alone. Below we discuss an alternative path to changing sexual offence trial practice: the use of pre-trial "ground rules" hearings.

It is common to speak of the experience of being cross-examined as an "ordeal" and to identify the risk that the experience will re-traumatise a sexual offence victim-survivor (Ellison & Munro, 2017; Haskell & Randall, 2019; McDonald, 2020; VLRC, 2021). That the complainant will be *tested* is an unavoidable and legitimate feature of the trial process. What we have found, however, is that, in the trials in this study, complainants were regularly tested in multiple ways – that extend beyond the parameters of the specific event that the Crown asserts constituted sexual assault or indecent assault (or another sexual offence) – and these are frequently underpinned by one or more real rape attributes. Complainants sometimes faced lines of inquiry during cross-examination that were mutually inconsistent. This may or may not strategically disadvantage the defence in terms of trial outcomes (depending on whether the illogic is registered by the jury) but, either way, this feature is likely to contribute to the complainant's confusion and upset, and sense of being under siege. These are not the sorts of harms that can be alleviated by (nonetheless important) strategies like optimising facilities for remote location/CCTV evidence (NSW Government, 2022), or amending the elements of sexual offences, or expanding the number of myth-correcting jury directions (NSW Government, 2021; Crimes Act, Div 10, Sub-div 1A; CPA, ss. 292-292E). In the trials analysed in this study there was very little about the substantive manner in which cross-examination is conducted (including the heavy emphasis on accusations of lying) that could be regarded as coming near being trauma-informed (see Cossins, 2020, Ch. 11; Ellison & Munro, 2017; Skellington Orr & Wilson Smith, 2022, p. 33f).

Further improving the complainant experience

One possible conclusion from the findings of this study (and the limited improvement since the last major study in the mid-1990s (NSW Department for Women, 1996)) is that the limits of what is possible when it comes to transforming the criminal trial experience for complainants may have been reached, and that it may be time to pursue alternative approaches, such as specialist courts or alternative restorative justice-oriented mechanisms (see Law Commission (UK), 2023, Ch.13; Munro, 2023; VLRC, 2021, Ch. 9). However, this study suggests that further steps can and should be taken to more substantively transform the criminal trial, to further reduce the influence of rape myths on sexual offence trials, and to better protect complainants from inappropriate lines of questioning. We suggest that consideration be given to four inter-related measures that address the substantive conduct of sexual offence trials:

1. a modified approach to framing the Crown case, with a greater focus on consent as a free and voluntary agreement, reduced reliance on real rape attributes and associated evidence, and more space for the complainant's voice;

2. a more robust and restrictive approach to the admissibility of evidence about the complainant and their actions;
3. a review of all jury directions used in sexual offence trials; and
4. the introduction of ground rules hearings for all sexual offence trials.

While these suggestions align with findings and reform proposals arising from other recent scholarship and research (e.g. Cossins, 2020, Ch. 12; McDonald, 2020, pp. 490-493), we recognise that none of them is straightforward and they are all likely to attract keen debate. We also recognise that attempts to reduce the influence of problematic rape myths and stereotypes in trials must be allied to efforts to reduce their prevalence in the wider community (Minter et al., 2021; Tidmarsh & Hamilton, 2020). Nonetheless, we submit that these suggestions warrant consideration and further investigation in light of the findings of this study.

1) Changes to composition of Crown case

Despite statutory reforms and NSWCCA pronouncements designed to shift trials away from stereotypes about how sexual offence victims are expected to behave, this study found that the Crown case is often framed in accordance with such myths by highlighting the ways in which the complainant met these expectations. We acknowledge that prosecutors may have what they regard as sound reasons for so doing, including established individual practice and habit, organisational culture, time pressures which may militate against the development of alternative approaches, and trial-specific strategic considerations. Nonetheless, the framing of cases around evidence (where available) of immediate complaint, complainant distress, physical and verbal resistance and injuries, and focus on what the complainant was wearing and how they were acting prior to the alleged sexual offence (including through scrutiny of CCTV footage), tends to consolidate rather than disrupt deeply embedded assumptions about a genuine victim. They also lay the foundation for well-trodden lines of cross-examination: the complaint was delayed; there was no real resistance; apparent distress was fabricated etc. In addition, these (traditional) foci fail to place at the centre of the Crown case what should be the central question in most trials: was there free and voluntary agreement to the sexual activity?

We recognise that the suggestion that prosecutors have a role to play in transforming how sexual offence trials are conducted may be challenged, including because framing the Crown case involves anticipating what matters will be put in issue by the defence. Nonetheless, in light of the clear trajectory of statutory reforms (including jury directions) towards the reduction of rape-myth influences in sexual offence trials we contend that there is an implied obligation on Crown prosecutors to actively contribute to the intended transformation. In the adversarial system, prosecutors are uniquely placed to do so. We believe that the findings of this study support the suggestion that prosecutors *can* play a greater role in shifting the focus of sexual offence trials.

We offer three suggested modifications to the way in which the Crown case is presented. We recognise that their viability is closely related to the need for further reform of the parameters of complainant cross-examination (which we address below).

First, examination-in-chief should be conducted in a way that provides more opportunity for complainants to tell their story in their voice. To that end, the Crown should, wherever possible, apply to have the complainant give evidence in narrative form (Evidence Act, s. 29(2)), though we recognise the need for careful management of this approach to minimise the risk that the complainant's evidence might extend beyond admissible evidence. Alternatively, greater use could be made of open-ended questions (including "cued recall" questions (Powell et al., 2022)). We note that this study identified a number of instances of Crown prosecutors already using the open-ended question technique with no or minimal objections from defence counsel.[41]

41 The open-ended format is already widely recognised as best practice for questioning 'vulnerable' witnesses (i.e. children and persons with a cognitive impairment (Australian Institute of Judicial Administration, 2020, pp. 50, 148; Powell et al., 2022)), and it has been suggested that all sexual offence trial complainants should have access to measures and practices previously introduced for 'vulnerable' witnesses (e.g. Cossins, 2020, Ch. 11; Deck et al., 2022).

Secondly, consideration should be given to limiting the scope of evidence that is led so as to exclude unnecessary "routine" evidence, rather than continuing to take the wide approach to "relevance" that we observed in trials in this study (and which is facilitated by the current interpretation of s. 55 of the Evidence Act). A more selective approach might involve: limiting the introduction of DNA and medical evidence unless the identity of the accused or the occurrence of the relevant sexual acts are in question; limiting the introduction of CCTV and social media/text message evidence unless it actually goes to facts in issue (e.g. video footage that captures the acts constituting the alleged sexual offence); generally avoiding questions about the complainant's attire; avoiding detailed questions about the specifics of sexual acts, unless these are directly relevant to the charge and/or the occurrence of the relevant sexual act is denied by the accused. Relatedly, detailed questioning about body parts (particularly genitalia) and insistence on 'formal' terminology should generally be avoided.

Thirdly, the essential components of the Crown case should be reimagined. The central concept of "free and voluntary agreement" should occupy a more prominent place.[42] Questions and language that focus on resistance should be abandoned. Serious consideration should be given to avoiding leading evidence underpinned by stereotypes or assumptions about how sexual assault victims should behave, including questions about complaint, distress, resistance, injury and consistent accounts.

2) Closer scrutiny of the relevance of evidence and the admissibility of credibility evidence

Current interpretation of evidence laws of general application on *relevance* and *credibility* are not preventing complainants in sexual offence trials being asked questions that mobilise rape myths and engage conceptions of what a real rape looks like. These practices are inconsistent with the trajectory of sexual offence law reform. Our findings suggest that a narrower category of relevant evidence (Evidence Act, ss. 55-56) and a more restrictive approach to the cross-examination exception to the "credibility rule" (Evidence Act, ss. 102-103) may be necessary. We recognise that in a context where the status quo involves wide parameters of admissible evidence available to the defence in a criminal trial *(Green (a pseudonym) v The Queen* [2015] VSCA 279, [34]), these are complex issues and reform would need to be approached with caution. However, our findings suggest that the cross-examination practices documented in this report will continue unless evidence admissibility rules are changed or applied differently. Without further change of the sort suggested here, complainants in sexual offence trials will continue to endure unfair and traumatising scrutiny, including routine accusations of fabrication. Existing restrictions on the admissibility of evidence about the complainant's sexual reputation or experience (CPA, s. 294CB) cannot be the only "brake" on the scope of cross-examination, and are no substitute for a wide-ranging and rigorous approach to scrutinising the *prior* issue of relevance.[43] They may, however, be of assistance in framing a more discerning approach to regulating the subject matter of cross-examination of complainants in sexual offence trials (see Cooper, 2022).

3) Review of jury directions

Over decades and in accelerated form in recent years (Cooper, 2022; Quilter, McNamara & Porter, 2022), considerable faith has been placed in legislated jury directions to reduce the influence of rape myths on sexual offence trials, and jury decision-making in particular. Whether jury directions "work" in the manner intended remains a manner of some debate (Chalmers, Leverick & Munro, 2021; Ellison & Munro, 2015; NSWLRC, 2020, [8.37]-[8.40]; VLRC, 2021, [20.22]) and requires ongoing monitoring. The latter is especially true now that the number of sexual offence trial-specific directions available in NSW has increased from two to seven (CPA, Pt 5, Div 1, Subdiv 3-4). The findings of this study lead us to suggest that the suitability of old common law directions for contemporary sexual offence trials, particularly the directions on 'complaint evidence' in their various forms (Judicial Commission of NSW, 2022, [5-020]), should also be reviewed. Jurors should not be faced with back-to-back directions that offer diametrically opposed sets of guidance on important matters such as what to make of the suggestion that the complaint was delayed, or that their evidence contained inconsistencies.

42 For offences committed on or after 1 June 2022, so too should the new "affirmative consent" standard that modifies the fault element of knowledge (Crimes Act, s. 61HK(1)(c), (2): "a belief that the other person consents to sexual activity is not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity").

43 In *R v Burton* [2013] NSWCCA 335 Simpson J found that where a party seeks to admit evidence, adjudication under the sexual experience provisions is not required unless the evidence has first been assessed as meeting the test for relevance.

The CPA now expressly provides that judges may give applicable sexual offence trial directions at any time during a trial and more than once (ss. 292(4), 293A(2A), 294(2A)). Consideration should be given to strengthening the statutory language so that a direction *must* be given if raised by the evidence, *at the time* the evidence is raised ("as soon as is practicable"), and with or without a request from the Crown or submissions from counsel (see s. 52 of the *Jury Direction Act 2015* (Vic)). The language of the CPA s. 294 should also be amended to clarify that its use is not limited to suggestions of temporal delay, but that it applies also to other suggestions that the complaint was somehow deficient (such as that the complaint was made to the wrong person, or did not use the expected language). Finally, we observed *integrated* jury directions being used by some judges in trials in this study, with anticipated benefits for juror comprehension and education (VLRC, 2021, pp. 446-447). Consideration should be given to promoting integrated directions as best practice in sexual offence trials.

4) Ground rules hearings

Ground rules hearings (GRHs) are a pre-trial procedure introduced or trialled in a number of jurisdictions in recent years for sexual offence trials where the complainant is a child or cognitively impaired adult. For example, they form part of the NSW Child Sexual Offence Evidence Program (CPA, Part 29). In essence, GRHs are an opportunity to discuss and decide how the complainant will be questioned by counsel, with a view to eliciting reliable evidence and minimising distress. In 2021, the VLRC recommended that GRHs be adopted for all sexual offences:

> To ensure complainants are respected when giving evidence … and are able to provide the best quality evidence, the *Criminal Procedure Act 2009* (Vic) should be amended to require, in the absence of the jury and before the complainant is called to give evidence, that the judicial officer, prosecution and defence counsel discuss and agree to: a. the style and parameters of questioning so that questioning is not improper or irrelevant; b. the scope of questioning including questioning on sensitive topics and evidence to reduce re-traumatisation; c. the preferences and needs of complainants. (VLRC, 2021, p. 463, Rec 84)

The Victorian Government has acted on the VLRC's recommendation. The *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) made relevant amendments to the *Criminal Procedure Act 2009* (Vic). These amendments will mandate GRHs for complainant witnesses in sexual offence trials (s. 389B(3)(b)).[44]

The Dorrian Review in Scotland also recommended GRHs for all sexual offence trials (Lord Justice Clerk's Review Group, 2021, pp. 39-41, Rec 1(c)); and in April 2023 the Scottish Government introduced legislation that will, inter alia, implement this recommendation (Victims, Witnesses, and Justice Reform (Scotland) Bill; Scottish Government 2023).

We suggest that consideration be given to introducing a system of mandatory GRHs for all sexual offence trials in NSW. We acknowledge that the resource implications of this proposal will need to be considered. In addition, the form and parameters of GRHs should be the subject of discussion and consultation, but we emphasise that the findings of this study support a robust exercise, including scrutiny of proposed cross-examination questions for relevance and reliance on rape myths. GRHs may also be valuable in framing the Crown case (on matters such as whether routine forms of evidence like DNA and other medical evidence are strictly necessary) and will also allow trial judges to be on advance notice about the need for one or more of the sexual offence trial-specific jury directions in Part 5 of the CPA *at the time* the relevant evidence is adduced.

44 These amendments came into force on 30 July 2023.

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