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

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## SUMMARY

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### BACKGROUND

Since the 1980s multiple legislative changes have been made to enhance the delivery of justice to victims of sexual violence, including by improving complainants' experience of sexual offence trials, and reducing the influence of "rape myths". The aim of this study was to better understand how these reforms are operating in NSW trials.

We used a dataset of transcripts from 75 sexual offence trials finalised in the District Court of NSW between 2014 and 2020. This included trials that: involved sexual assault charges and other sexual offences; were held in a variety of locations across NSW; involved a jury or were conducted by a judge alone; and resulted in both guilty and not guilty verdicts. 96% of trials involved female complainants and 4% involved male complainants. Most complainants (71%) were aged 15-29 years. 72% of the sexual offences were alleged to have occurred in a residential or hotel room setting; and in 91% of trials the accused was known to the complainant in some way prior to the alleged offence.

Qualitative content analysis of trial transcripts was undertaken to review the operation of legislative and privacy protections, examination-in-chief and cross-examination approaches, prosecution responses, judicial interventions, rules of evidence and jury directions.

### KEYWORDS

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

### KEY FINDINGS

Procedural reforms designed to improve complainant experience in sexual offence trials – including closed court arrangements, the opportunity for complainants to give evidence via CCTV from a remote location, access to a support person and use of pre-recorded evidence in retrials – were generally operating as intended. In addition, most of the time, judges and lawyers adopted respectful modes of communication towards the complainant, and were sensitive to the need for breaks when the complainant was distressed or tired.

Provisions of the *Criminal Procedure Act 1986* (NSW) that restrict questioning on a complainant's sexual "reputation" and past sexual experience (i.e. "rape shield" laws) were followed in most cases, although this did not prevent the admission of complainant sexual experience evidence in a significant proportion of trials (50%).

Despite these improvements, many of the sexual offence trials analysed for this study 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 about how a "genuine" victim of sexual violence should behave featured prominently in the trials examined. Evoking rape myths – like the assumption that a truthful allegation involves an immediate complaint and that "delay" is indicative of fabrication – is often associated with *defence* trial practice, but we found that the *prosecution* also relied on such myths where perceived to strengthen the Crown case (e.g. where there was evidence that the complainant *did* complain immediately).

Complainants were regularly cross-examined about having made a "delayed" or "incomplete" complaint (84% of trials), having failed to physically resist (53%) or verbally communicate non-consent (53%), or having incomplete or inconsistent recall of events (76%). Questioning and closing submissions that accused the complainant of lying were common, and in 73% of trials the complainant was accused of fabricating the sexual offence allegation 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. Defence counsel were 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 (e.g. substance use, mental illness, children in care).

Overall, we found that the problem is not that judges and lawyers are ignoring or misapplying the special rules that have been introduced for sexual offence trials. 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, and the absence of substantive barriers to the evocation of rape myths and stereotypes.

### CONCLUSION

Further improvement in the experience of complainants will require change to entrenched trial practices and narratives that are out of step with the spirit of four decades of statutory reform. Key areas for attention include how the Crown case is presented, the rules and practices governing the "relevance" of evidence and the admissibility of credibility evidence, and the use of jury directions. Consideration should be given to the introduction of ground rules hearings for all sexual offence trials.

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