

COMMITTALS

The sexual assault offences studied in this research are all indictable offences, meaning they are all offences to be tried before a Judge and jury.¹ The usual procedure in NSW is that all indictable offences are subject to a committal (sometimes referred to as preliminary) hearing prior to the hearing before a Judge and jury. These hearings take place before a Magistrate only and are held in the Local Court. The Magistrate's role is to determine whether or not the accused should be committed for trial. If the accused is committed for trial, a trial will be held in the District Court. Similarly if the accused pleads guilty at the committal hearing, the accused will be committed for sentence to the District Court.²

As the High Court explains in *Grassby v R* (1989):

(The committal process) enables the person charged to hear the evidence against him and to cross-examine the prosecution witnesses. It enables him to put forward his defence if he wishes to do so... (the) decision of a Magistrate that a person should or should not stand trial has in practice considerable force so that the preliminary hearing operates effectively to filter out those prosecutions which, because there is insufficient evidence, should not be pursued.

In a committal hearing the Magistrate must apply a two-tiered test. Under section 41 (2) of the *Justices Act 1902 NSW* the Magistrate must decide whether the evidence is capable of satisfying the jury beyond reasonable doubt that the accused person has committed an indictable offence. After the Prosecution evidence has been taken, the Magistrate must consider, having regard to all the evidence, whether a jury would not be likely to convict the accused.³ Once s/he has found that this is not the case, the committal hearing can proceed. Secondly, following the presentation of all the evidence (including the accused's evidence if he wishes to present evidence) the Magistrate is required to discharge the accused if (a) the Magistrate concludes that a jury would not be likely to convict the accused; or (b) where the Magistrate 'is not of the opinion' to commit the accused for trial.⁴ So the legislation is set up in a way which requires the Magistrate to first consider discharging the accused and only when this is rejected may s/he commit the defendant for trial. Overall

¹ See s.495 and s.496 of the *Crimes Act 1900 NSW*.

² See s.51A of the *Justices Act 1902 NSW*.

³ *Chid's case* (1985) 4 NSW LR 182 at 201.

⁴ See section 41(6) of the *Justices Act 1902 NSW*.

Magistrates are required to critically assess the case for the Prosecution and not merely be part of a rubber stamping process.⁵

In this way, committals operate as a screening process for trials in the higher courts. The Magistrate makes an assessment of the evidence against the accused and the strength of the Prosecution case. This saves time and money for the courts if, from the beginning, it is obvious that the case against the accused is not a strong case. Historically police prosecutors have always handled committal proceedings. In NSW however DPP took over committal proceedings in 1990 and DPP solicitors now conduct all committal proceedings.

The committal process enables the accused to hear the Prosecution case against him and is a chance for the accused to test the strength of this case. On the other hand the accused does not have to declare his defence case. In fact, he does not have to do anything although he may wish to cross-examine witnesses to test the strength of their story or their credibility or he may wish to put to the witness some possible defences.

For women victims of sexual assault, committal proceedings have been like a trial before *the* trial. The existence of committal proceedings, a time to test the evidence of the Prosecution has meant a time for the accused or his representative to also 'test the victim'. In the past, complainants have been put through distressing examinations by the Prosecution and cross-examinations by the Defence at the committal process. Some described their experiences as like giving evidence at two trials.

One complainant in this research was cross-examined at length at committal.⁶ The committal process was stopped three times because of the witness's distress. The complainant was an Aboriginal woman. At one point during the committal the complainant said to the Magistrate:

Do you know what it's like to go through humiliation over and over all the time? It's not easy. I'm sorry your worship, but it's not. Reliving this over and over. It's not nice. You can't sleep at night because you're thinking about it all the time.

The complainant subsequently did not show up for the trial. The Judge, after refusing submissions from the Crown Prosecutor to adjourn the matter, directed the jury to find the accused not guilty.

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⁵ M Aronson and J Hunter, *Litigation: Evidence and Procedure*, 5th edition, Butterworths, Sydney, 1995, pp. 147-150.

⁶ The matter came through the committal process prior to the introduction of s.48EA of the Justices Act in 1992.

Research by BCSR looking at 1981 data, showed that some of the worst abuses of the legislative protections for complainants occurred in the Local Court at the committal stage. In 47.1% of the cases studied by BCSR, sexual experience evidence was admitted in committal proceedings without prior application to the Magistrate.⁷ The experiences for these women have in the past been so bad that they have not shown up at the subsequent trial or have pleaded with the DPP to not follow through with the matter in the District Court. There have also been arguments that Magistrates have shown bias and discrimination and made inappropriate comments about women during the committal process.⁸ Furthermore there was anecdotal evidence that the Local Court often allow the humiliating and rigorous manner of cross-examination of complainants that is more restrained by the presence of the Judge and jury and an observance of the legislative safeguards in the higher courts.⁹

In 1992 the Government legislated to protect categories of witnesses in court during committal proceedings from being cross-examined by introducing section 48EA of the *Justices Act 1902 NSW* which says that:

Where in any committal proceedings the Justice or Justices is or are satisfied that:

- (a) the defendant has been charged with an offence involving violence; and*
- (b) the person who made a written statement tendered as evidence under this Subdivision is an alleged victim of that offence,*

the Justice or Justices shall not give a direction under section 48E requiring the attendance at those proceedings of the alleged victim or otherwise reject the statement because the defendant has requested the attendance at those proceedings of the alleged victim unless the Justice or Justices is or are satisfied that there are special reasons why the alleged victim should, in the interests of justice, attend at those proceedings to give oral evidence.

Section 48A of the *Justices Act 1902 NSW* also provides that written statements are admissible in committal proceedings as evidence to the same extent as oral evidence.

⁷ This contravenes s.409B (4) of the *Crimes Act 1900 NSW*: R Bonney, *Crimes (Sexual Assault) Amendment Act 1981: Monitoring and Evaluation*, Bureau of Crime Statistics and Research, 1985. For further discussion of these matters see chapter on *Sexual Reputation and Sexual Experience*.

⁸ Sexual Assault Committee; *Sexual Assault Phone-In Report*, NSW Ministry for the Status and Advancement of Women, Sydney, 1993.

⁹ For further discussion of these issues see Women's Co-ordination Unit, *Report of the NSW Sexual Assault Committee 1985-1987 to the Premier of NSW, the Hon. Barrie Unsworth*, Sydney, 1988; Women's Co-ordination Unit; *Report of the NSW Sexual Assault Committee, 1988-1991*, Sydney.

This section allows the Prosecution to present its case by relying on the written statements of the witnesses (often referred to as 'hand up briefs'). Copies of these statements must be given to the accused or his representative prior to the trial and the accused must indicate before the trial if s/he wishes to cross-examine any of the witnesses. In relation to complainants in committals proceedings involving crimes of violence, the Defence is only permitted to cross-examine those complainants if s/he can establish that there are 'special reasons' for doing so. The Defence can still require cross-examination of every other witness upon whom the Crown is relying. These 'special reasons' have been interpreted quite strictly by the magistracy.¹⁰ Therefore in these committal proceedings involving crimes of violence Magistrates often rely on the statements of witnesses handed up by the Prosecutor. For this reason they are referred to as 'paper committals'.

As can be seen the legislation refers specifically to committal proceedings involving complainants of crimes of violence and it protects these complainants from being further traumatised by giving evidence and being cross-examined at the committal proceedings as well as the trial.

Criminal defence advocates have heavily criticised this abolition as a removal of a yet another significant protection for the accused. They have argued that accused persons now have less access to justice and are more disadvantaged by having no forum in which to test the Prosecution prior to arraignment (usually the first day of the trial) in the District Court. Others argue that to test Crown proofs for the first time in the District Court is far more expensive than testing the evidence in the first instance in the Local Court. There is merit in both arguments.

However for victims of sexual assault, their advocates, some feminist lawyers and women's groups, the limitation of the committal process limits the traumatising experience of being a primary witness in sexual assault proceedings and prevents women from feeling they have been 'tried twice'.

CURRENT STUDY

The aim of the present study was to examine women's experiences from the day of arraignment onwards, which usually means the first day of the trial. A detailed analysis of the committal process is beyond the scope of this research. However during the analysis of DPP files, information was collected about the committal experience of complainants.

¹⁰ *Baines v Gould and the DPP* (1993) 67 A Crim R 297

[COMMITTALS]

Table 1 Number of paper committals

<i>Type of hearing</i>	<i>Number of hearings</i>
Paper committals	96
Full committal hearing	53
Not known	1
Total	150

Table 2 Complainant's presence at committal hearing

<i>Complainant's presence</i>	<i>Number of hearings</i>
Present	26
Not present	112
Not known	12
Total	150

Table 3 Cross-examination of complainant at committal

<i>Cross-examination</i>	<i>Number of hearings</i>
Cross-examination permitted	11
Cross-examination not permitted	31
Case prior to introduction of s48EA	2
No application made	85
Not known	21
Total	150

Table 4 'Special reasons' for permission to cross-examine

<i>Reason</i>	<i>Number of hearings</i>
Test consent issue where prior sexual relationship	3
Test evidence of fact in issue	3
Test emotional state of the complainant	1
Other	2
Reason unclear/not known	2
Total	11

Tables 1 to 3 above show that in almost two thirds of cases (64%) the hearing was disposed by way of a paper committal and that rarely was the complainant present at the committal proceedings (in only 17% of cases). The Defence made an application to cross-examine the complainant in 28% of cases (42 out of 150 hearings) and this application was successful in only 11 out of these 42 hearings (26%) in which an application was made. This shows overall that in 7% of the hearings studied the complainant was required to give evidence and be cross-examined.

For an application to be successful it means that the Defence must have successfully argued to the Magistrate that there were 'special reasons' for which they wished to cross-examine the complainant. This shows that in more than two out of three cases in which an application was made to the Magistrate, the Magistrate denied the application. Some of the reasons why the Magistrate allowed the cross-examination are listed in Table 4. This shows that these reasons included questioning the complainant about her previous sexual relationship with the accused (where the accused argued that she consented to the current sexual intercourse), to test some other important fact in issue such as identification of the accused by the complainant (where the accused argued mistaken identity) or in one hearing, to test the emotional state of the complainant.

The complainant was sexually assaulted by her ex-spouse at their marital home having suffered severe injuries as a result of a physical assault. The complainant called the police to report the physical assault and after being initially too ashamed to complain about the sexual assault, later also reported the sexual assault. The defendant admitted the sexual intercourse, but claimed it was with consent.

The Defence applied under section 48EA to cross-examine the complainant at the committal proceedings. The Magistrate denied the application and the Defence appealed to the Supreme Court of NSW.¹¹ In his decision Studdert J explained the concept of 'special reasons' under which the Defence may be permitted to cross-examine the complainant at committal. Studdert J stated that he did not propose to attempt to catalogue what may or may not be 'special reasons'. It must depend entirely upon the circumstances of the case.

'Special reasons' could include cases where it is in the interests of justice to cross-examine the complainant, but not because the defendant would be

¹¹ Ibid.

prejudiced if the complainant is not called; where the weakness of the Prosecution case is a relevant matter; where identification evidence is a live issue and it depends solely on the complainant; where the complainant has given more than one version of the event and these versions are inconsistent; where the alleged victim wishes to give evidence at committal. In the current case the Supreme Court Judge, Studdert J did not allow the Defence appeal and ruled that the Magistrate's decision to not permit the cross-examination of the complainant was not in error.

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The complainant was an Aboriginal woman who had said to the police in her original statement that 'he tried to rape me'. The Defence argued at committal that this statement of itself was not evidence enough to establish penetration and thus that sexual intercourse without consent had taken place. The Magistrate agreed that this constituted 'special reasons' and allowed the complainant to be cross-examined. The Magistrate upon hearing all of the evidence committed the accused for trial.

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COMMENT

Previous research and Government reports have recommended that there be judicial guidelines set down in the legislation to place restrictions upon the circumstances in which 'special reasons' may be made out. This would then define what some of these 'special reasons' may be to provide a guide to Magistrates. It seems from the current study that this is unnecessary as the circumstances in which cross-examination of the complainant is permitted by the Magistrate, apart from a few exceptions, seem to be valid and legitimate. In these hearings it seemed it would be in the interests of justice to allow cross-examination.

The current study indicates that the amendments to the *Justices Act* 1902 NSW to protect victims of violence at the committal stage are functioning effectively. Paper committals were utilised frequently, and where the complainant was required to give evidence and be cross-examined, legitimate 'special reasons' were established by the Defence. In these cases cross-examination was limited by the Magistrate to only those areas or facts in issue which were the subject of the Defence's application.

SUMMARY

- In 13 cases the accused pleaded guilty at the committal hearing and was sentenced in the District Court.
- In two thirds (64%) of cases in the present study there was a paper committal.
- Complainants were present at only 17% of committal proceedings.
- The Defence made an application to cross-examine the complainant in just under one third of cases (28%) and this application was successful in only 26% of these hearings.
- Overall the study shows that women complainants were cross-examined in 7% of the cases studied.

NOLLE PROSEQUI ((NO BILLS))

There has been much discussion amongst advocates for complainants of sexual assault about the comparatively high incidence of ‘no bills’ or *nolle prosequi* by the DPP in sexual assault proceedings.

Where a magistrate commits an accused person for trial in the District Court the prosecuting authority (the DPP) must prepare an indictment (a statement to the court outlining the charges for which the accused will stand trial). The indictment is then presented to the court usually on the first day of the trial, after the jury has been empanelled and the accused is formally arraigned. In preparing the indictment the DPP must determine whether the charges for which the accused has been committed to stand trial are appropriate.

This determination is normally made by a Crown Prosecutor on advice from a solicitor and is referred to as ‘finding a bill’. For example the solicitor will brief the Crown Prosecutor about the facts of the case, including the statement made to the Police by the complainant and any other witnesses’ statements, a summary of the accused person’s record of interview if there is one and any admissions or confessions made. The solicitor will also make observations about the case, followed by a recommendation as to what charges to lay.

Based on this, the Crown will indicate that s/he has ‘found a bill’ and set out the charges to be laid in the indictment. If, based on the brief, the Crown believes that the charges should not be proceeded with the Crown will ‘not find a bill’ and apply to DPP for a no bill. If the Director agrees (and he usually does on recommendation from senior staff) the DPP give formal notification to the District Court that it does not intend to proceed with the charges (*a nolle prosequi*). The Defence can also apply to the DPP for a no bill and defendants can petition the Attorney General for no bills.

There are many reasons why the DPP would decide to ‘no bill’ a matter. It may occur where a previous trial has resulted in a hung jury, where new evidence exculpating the accused is discovered after committal and leading up to the trial, where the defendant is terminally ill, or in the case of sexual assault proceedings, where the victim is unwilling or unable to cope with the rigours and stress of a trial.

The *Annual Report of the Office of the Director of Public Prosecutions* for 1995 states that in the 1994-95 year, there were 397 no bill applications in which there was a direction that there be no further proceedings. The report shows that 107 of these were no billed for

considerations personal to the victim/witness, where the victim did not wish to proceed because of the stress of the court process.¹

CURRENT STUDY

The research came across a significant number of matters (61) which were listed for trial and no billed shortly before the trial commenced. However, it was not the focus of the current study to address the rate of no bills or the reasons for no billing in sexual assault proceedings.

¹ Office of Director of Public Prosecutions, *1994-95 Annual Report*, Sydney, 1995, pp. 63-64.

WOMEN FROM ABORIGINAL COMMUNITIES

This chapter looks at sexual assaults occurring within Aboriginal communities, whether the sexual assault is perpetrated by an Aboriginal man or upon an Aboriginal woman, or where both the victim and the perpetrator are Aboriginal people. No act of sexual assault occurs in a context free of societal values and dominant cultures,¹ so it follows that an analysis of sexual assault must always take place within the social context in which the offence occurs.

This discussion does not purport to be exhaustive in its description of the incidence, nature or explanations for and about sexual assault in Aboriginal communities. The research recognises the extreme difficulty in collecting accurate statistics about the levels, incidence and nature of sexual assault upon Aboriginal women.² However this research presents a unique opportunity to look at the treatment of Aboriginal women in court and draw out particular examples of a legal system breaking down in the face of diversity.

This research shows that when an Aboriginal woman reports a sexual assault and serves the court and the justice system as its primary witness in the trial of her perpetrator she will experience compounded discrimination and bias – because she is a woman and because she is a person from an Aboriginal community. The women from Aboriginal communities in this research were treated in ways which were abusive, yet these women were also the women who were at their strongest in challenging the system and its players. This research confirms the statement made by Maree Andrews at the National Sexual Assault Conference Melbourne in November 1995 when she said ‘there is no *justice*, there is just us.’³

THE INCIDENCE OF SEXUAL ASSAULT

It is acknowledged that violence amongst Aboriginal people and directed at Aboriginal people is generally a grave problem in Aboriginal communities. Aboriginal women described how sexual assault in Aboriginal communities was spoken about as ‘just something that happens – not that it is a crime’.⁴

¹ P Greer, ‘They throw the rule book away: sexual assault in Aboriginal communities’, in J Breckenbridge and M Carmody (eds), *Crimes of Violence – Australian Responses to Rape and Sexual Assault*, Allen and Unwin, 1992.

² This has been recognised in a host of research reports and criminological writings. Not only is the task extremely difficult, but it has also met with some reluctance by standard research agencies across Australia.

³ M Andrews; ‘Aboriginal Women and the Law’, Keynote address, National Sexual Assault Law Reform Conference, Melbourne, November 1995.

⁴ Consultation with Aboriginal women at DFW on 6 June 1996.

There is a dearth of statistical information about the level of sexual assaults upon Aboriginal women in NSW. The anecdotal nature of incidence rates suggests a need for improved statistics. As Greer states:

*(Without this) a true picture of violence against Aboriginal and Torres Strait Islander women...cannot be known and isolated projects remain severely limited.*⁵

The National Aboriginal and Torres Strait Islander (NATSI) Survey conducted by the ABS in 1994 found that assault was approximately five times more prevalent amongst Aborigines than all Australians. A comprehensive study of rates of victimisation for Aboriginal people conducted by the University of Western Australia's Crime Research Centre using the police computerised Offence Information System found the following:

- Rates of victimisation for both Aboriginal men and women are much higher than rates for non-Aborigines.
- Aborigines are 6.5 times more likely to be victims of a reported violent crime than non-Aborigines.
- Aboriginal women were 10.7 times more likely to be victims of violent crime than non-Aboriginal women.⁶
- Aboriginal women were clearly the most victimised group with risks of victimisation peaking at 10,255 per 100,000 amongst those women aged between 20 and 24 years.⁷

This research shows that over one in every ten Aboriginal women aged between 20 and 24 years was likely to have been the victim of some form of violence in 1993. In relation to domestic violence, of which most victims are women, Aboriginal women were 36 times more likely to be a victim of spousal violence than non-Aboriginal women.⁸ Although there is no comparative information about Aboriginal women's victimisation in NSW we can assume that the rates of victimisation would not be dissimilar.

Measuring the incidence of sexual assault in Aboriginal communities is important especially for activists, service providers and policy makers. However this information must be

⁵ Standing Committee on Social Issues; *Sexual Violence: Addressing the Crime, Inquiry into the Incidence of Sexual Offences in NSW* Part II, No. 9, 1996: 201-202. Note that the Bureau of Crime Statistics and Research is currently planning a research project to ascertain the nature of sexual assault offences committed upon Aboriginal women and possible solutions. The project is directed by Pam Greer, consultant.

⁶ Compare this with the fact that the same study found that male Aborigines are 'only' 3.6 times more likely to be victims of violent crime than male non-Aborigines. This shows that Aboriginal women have a much higher victimisation rate for offences of violence than men.

⁷ R Harding, R Broadhurst, A Ferrante and N Loh, *Aboriginal Contact with the Criminal Justice System and the Impact of the Royal Commission into Aboriginal Deaths in Custody*, The Crime Research Centre, University of Western Australia, Hawkins Press, 1995, pp. 20-23.

⁸ Ibid. p. 27.

balanced firstly by a recognition that Aborigines are often targets for discrimination and adverse exercise of personal discretion by law enforcers and secondly that crime statistics measure those who are apprehended and punished for offences.⁹

REPORTING SEXUAL ASSAULT

In reporting sexual assaults, Aboriginal women experience similar difficulties and come up against the same barriers as non-Aboriginal women.¹⁰ However difficulties for Aboriginal women victims of sexual assault are further compounded by racist attitudes of police, lawyers and other parties in the legal system. Aboriginal women speak about sexual assaults perpetrated upon them by police officers and claim that police spend more time digging up old warrants than investigating sexual assaults.¹¹ A lack of appropriate services targeted at Aboriginal women victims of violence is also a difficulty. They clearly have needs similar to non-Aboriginal women but also specific needs as women from Aboriginal communities.

In January 1996 an Aboriginal woman in the Northern Territory was locked up for several hours after she had made a complaint of sexual assault. The woman reported her gang rape to Darwin police and instead of taking her to hospital for medical treatment they took her to the police watch house at Berrimah and detained her on outstanding warrants. The three men she accused of the rape were also detained but later released on bail. The complainant had an outstanding warrant for failing to appear in court on a charge of drinking alcohol in public. The case was reported in the media and attracted significant publicity. It also ignited a public debate about police practices and police racism in the Territory.¹²

Courts are often seen by Aboriginal women as lacking in compassion and a large number of Aboriginal people have had experience with the courts as defendants themselves¹³ or being with a member of their family who has been a defendant. Thomas explains that the courts have a low opinion of Aboriginal women and see them as fine defaulters, nuisances,

⁹ See a detailed discussion of these factors in D McRae, G Nettheim and L Beacroft (1990) *Aborigines and the Law*, Federation Press, Sydney, pp. 245-247.

¹⁰ C Thomas; in P Easteal (ed.), *Without Consent*, Conference Proceedings, Melbourne, 1993, pp. 141-142.

¹¹ Aboriginal women comprised 5.1% of victims attending sexual assault centres during 1993/4: NSW Health; *Victims of Sexual Assault – Initial Contact at NSW Sexual Assault Services*, 1990, p.33.

¹² *Northern Territory News*, Friday 19 January 1996; The NT Ombudsman has now completed a report of an inquiry into this matter. See C Cunneen, 'The Other Voice', *Newsletter of the Institute of Criminology*, Faculty of Law, University of Sydney, p. 3; see also J Kiss, 'A Matter for Regret: Anger Over NT Police Procedures', *Australian Lawyer*, Volume 31, No. 2, March 1996: pp. 14-15.

or as women who report assaults and then do not follow through and therefore waste the court's time.¹⁴ In addition to this, as Greer states:

*The number of black deaths in custody, has heightened fears that if sexual violence by Aboriginal men is reported, then the alleged offender will suffer the next death in custody. Many communities are torn apart by the secrecy that is inherent in this attitude, which protects offenders and allows the cycle of sexual violence to continue.*¹⁵

Aboriginal women consulted by us told of examples where solicitors from the Aboriginal Legal Service at times threatened women saying that if they went through with the trial they could be responsible for the next death in custody.¹⁶

It is clear that beliefs, myths and stereotypes about Aboriginal women, which have their basis in the views and treatment of Aboriginal women over the last two centuries, have pervaded the community and in particular the legal system to this day.

OTHER RESEARCH REPORTS

The many difficulties experienced by Aboriginal women in the legal system are well documented in recent research and discussion papers.¹⁷ Some of the issues raised in these reports can be summarised as follows:

- ignorance of indigenous cultures within the legal system;
- lack of recognition of the diversities amongst indigenous women;
- lack of knowledge and understanding about the difference between men's business and women's business;
- policies of most existing Aboriginal and Torres Strait Islander legal services which will not assist an Aboriginal person in a dispute with another Aboriginal person and hence usually prioritise Aboriginal men charged with a criminal offence.¹⁸

¹³ It is important to note here that Aboriginal women are imprisoned at a rate that is 18 times higher than the non-Aboriginal population. Aboriginal women are the most over-represented of all groups in the prison population; see A Edwards, *Women in Prison*, NSW Bureau of Crime Statistics and Research, 1996.

¹⁴ See also C Thomas (1993), p. 141.

¹⁵ P Greer (1992) p. 193.

¹⁶ Consultation with Aboriginal women at DFW on 6 June 1996.

¹⁷ There is ample research which documents the poor treatment of Aboriginal people and in particular Aboriginal women in the courts. For a good overview see Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report No. 69, Part I, 1994, pp. 117-128; NSW Ministry for the Status and Advancement of Women, *Dubay Jahli – Aboriginal Women and the Law Report*, 1994; Access to Justice Committee (chaired by Sackville R); *Access to Justice*, Commonwealth Attorney General's Department, 1994.

CURRENT STUDY

This chapter describes and analyses only the results of cases involving Aboriginal women. The research does not describe the general population of cases studied. Throughout the report, the research uses or points to information which relates specifically to the needs of Aboriginal women.¹⁹ Other information about Aboriginal women is provided throughout the report in various chapters such as *Sentencing* and *Profile of hearings*.

The analysis of the data and points of discussions have been assisted by consultations held with Aboriginal women from a variety of agencies. This includes a consultation held at the DFW on 6 June 1996.

DETAILS OF HEARINGS

Of the 150 cases studied in the NSW District Court, 17 cases (11%) involved an Aboriginal woman complainant.²⁰ This means that Aboriginal women were ten times more likely to be complainants in our study than non-Aboriginal women.²¹ There were also 18 accused that were of Aboriginal descent. In 11 of the 17 cases involving an Aboriginal woman complainant (61%), the accused was an Aboriginal man.

TRIAL DETAILS

The majority of cases involving Aboriginal women were heard in courts in country NSW. Trials were between one and ten days long, with an average length of about four and a half days. This was half a day longer than the average duration of trials for the general population.

CLOSED COURT AND SUPPORT PERSONS

About one third of Aboriginal women had a support person in court with them when the court was closed. In the study only one occasion was documented where the court was closed and the presence of a support person was requested but denied by the court. In this hearing the complainant was an Aboriginal woman. The case proceeded as follows:

¹⁸ Australian Law Reform Commission; (1994) pp 119-124

¹⁹ See especially chapter *In Court*.

²⁰ It is noted that in order to establish the Aboriginality of the complainant, the researchers used the DPP file which contained the police statement. Women complainants did not always identify their Aboriginality. Of all matters in the study, 14% were listed as 'country of birth unknown'. It is likely that some of these women complainants may also have been Aboriginal women but were not identified using this methodology.

²¹ This is based on the Aboriginal and Torres Strait Islander population being 1.2% of the overall NSW population.

Following closure of the court the Crown Prosecutor requested that a support person for the complainant be permitted to stay and be excluded from the closed court order. The Defence opposed this application and the Judge heard arguments from each counsel. In winding up his application for a support person the Crown Prosecutor said:

For what my opinion is worth, the young lady is a relatively unsophisticated Aborigine and she would benefit from the support of a friendly face in court.

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EVIDENCE OF COMPLAINT

Nearly three quarters of Aboriginal women in the study reported the sexual assault to someone within one hour of it occurring (71%) and in just under half the cases the sexual assault was reported to the police in less than five hours (47%). In over half the cases involving Aboriginal women the Defence raised the issue of 'delay in complaint'. This is about the same rate at which 'delay in complaint' was raised in the general study population. However, this is extremely surprising given that Aboriginal women were, overall, relatively timely in their complaint, and in fact, more so on average than non-Aboriginal women.²²

Where complainants in the research did delay in making a complaint to another person or to the police, the reasons offered by these women in evidence when asked by the Defence included:

I was scared, I didn't know how others would react.

I was scared for my safety as well as my children.

I didn't tell the police 'cause I didn't want to see that dog in court.

CREDIBILITY

Aboriginal women in the study, like women in the general study population, regularly had their credibility attacked or undermined in various ways.

²² See description of Reporting Practices in chapter *Profile of Hearings*.

Drinking/drug use

The research collected two types of information about drinking: the number of questions asked about drinking **on the day of the offence** and the number of questions about **general** drinking/drug use habits. Many of the Aboriginal women were asked about their drinking on the day of the sexual assault and general questions on drinking and drug use, by the Defence during cross-examination.

In comparing this treatment with all women in the study, it was found that Aboriginal women were asked many more questions about **general** drinking and drug use habits. One woman was asked 173 questions (there were two Defence counsel in this case representing two co-accused). In other cases women were asked 105 questions and 98 questions about general drinking and drug use during cross-examination by the Defence.

The average number of questions about drinking **on the day of the sexual assault** was over 20. This was higher than the average number of questions about drinking asked of the women in the general sample. One Aboriginal woman was asked 98 questions and another 64 questions about this. Again, like questions about general drinking and drug use habits, Aboriginal women were asked a higher number of questions about drinking on the day of the offence than women in our general study population.

In this hearing the complainant was asked 98 questions about her drinking and drug use. During one interaction the complainant became fed up with the line of questioning:

Complainant *That's regarding amphetamines Sir not regarding what happened to me on the evening.*

Defence counsel *Look I am asking you about amphetamines.*

Complainant *Yes Sir, that's all you've been asking me. Why don't you ask me something that's relevant to this case!*

Defence counsel *Look would you just answer the question please!*

And later in this hearing the Defence counsel continued:

Defence counsel *Has your memory suddenly got worse over the last few months [complainant]?*

Complainant *Yes it has Sir*

Defence counsel *What – is that because of the drugs?*

Complainant *No – it is because of this trial that has been drawn out and drawn out.*

The Judge too finally became impatient with Defence counsel indicating that he thought the questioning was irrelevant and unnecessarily long.

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Lying/making up the story

In two separate cases, Aboriginal women complainants were asked 70 questions and 29 questions respectively by the Defence on whether they were lying or making the story up. In the general population of the study women were asked an average of seven questions about lying or making up the story.

Victims Compensation Scheme

Like women in the general population of the study, Aboriginal women were also asked questions about their applications for victims compensation. Often these questions were linked by the Defence to a motive being that the accusation of the sexual assault was falsely made in order to gain compensation. Almost all of the Aboriginal women were asked about victims compensation. The general sample was asked an average of 2 questions each about victims compensation.

During cross-examination of an Aboriginal woman the Defence asked the following:

Defence counsel *[Complainant] are you aware that people who are assaulted in the way you describe have a right to apply for victims injury compensation?*

Complainant *Yes.*

Defence counsel *Is that why you've made these allegations against this accused?*

Complainant *No.*

Defence counsel *Are you sure about that?*

Complainant *Yes.*

Case 54

In one hearing an Aboriginal woman complainant was asked eight questions about victims compensation. In her summing up, the Judge made it clear to the jury that all victims of

crime were eligible to apply for victims compensation whether or not the accused had received a conviction for the offence.²³ Very few Judges gave this direction to the jury about Defence questions on victims compensation.

Distress

Many women from Aboriginal communities were very distressed as a result of their experience at trial or became distressed at the thought of the experience. The research looked at a complainant's distress by documenting her crying, breathing difficulties, screaming and inability to continue answering questions when giving evidence.

The complainant in one of the trials studied had also been the victim of a sexual assault three years previously. In the previous hearing (not studied in the current research) 'the trial was aborted because of the possibility of prejudice to the accused flowing from the distressed state of the victim'.²⁴ Following this the complainant went missing declaring that she wanted to kill herself. A few years later following another sexual assault upon her, she was the primary witness in the trial of the offender. This later hearing was studied in the current research.

The first trial of this accused was aborted halfway through the complainant's evidence because of the inadvertent admission of evidence which contravened section 409B of the *Crimes Act* about her previous sexual behaviour. In the second trial the accused was found not guilty.

Case 71

The longest cross-examination by the Defence in the entire study was of an Aboriginal woman (five hours and 20 minutes)²⁵. A hearing involving an Aboriginal woman was interrupted 12 times during cross-examination because of her distress²⁶. This represented the highest incidence of interruption for any single case recorded in the study.

In other hearings, complainants dry-retched, claimed to feel nauseous in the witness box, were unable to answer questions or had to take regular breaks.

²³ Case 34.

²⁴ District Court file note 92/61/0102; Case 71.

²⁵ Case 65.

²⁶ Case 45.

The distress and traumatising these women undergo is evident in the following case study:

The complainant was in a de facto relationship with the defendant for a number of years. There was a history of violence in the relationship and there was a restraining order in place at the time of the sexual assault.

The first trial was aborted because of the complainant's illness and distress. At the second trial the complainant failed to appear and she was ordered to attend the court under section 13 of the *Evidence Act 1995 NSW*. The local police went to pick up the complainant for court. The complainant was extremely distressed all the way through giving her evidence, crying and simply not being able to answer questions. She found it difficult to understand the legal jargon and answer the questions and clearly needed assistance with court language and court layout.

Case 30

One Aboriginal woman also reported being harassed and intimidated by the accused and his family before the trial. The accused person in this hearing threatened her so she would not turn up at the trial, allegedly commenting to the complainant: 'Do this for me and I won't let no one bust you up.'²⁷

Almost all of the cases studied in this research which involved hung juries (where the jury cannot come to a unanimous decision) and retrials involved complainants who were Aboriginal women. These cases often led to women not turning up for the second or third retrial and being forced to attend, being subpoenaed or having the trial aborted and the accused acquitted.

RESISTANCE

The research also found Aboriginal women reported significant verbal and physical resistance to the sexual assault and also further displayed this determination and defiance to minimise attempts by Defence counsel to have their credibility undermined.

One woman when asked to identify the defendant by the Crown Prosecutor said to the court 'That's him sitting in that cage over there'. She spoke very clearly and loudly throughout a harrowing cross-examination by the Defence counsel. In another interaction:

²⁷ Case 44.

Defence counsel *I suggest you felt bad because you had sex with a (age) year old*

Complainant *I felt bad because I was assaulted at knife point by a (age) year old*

After further suggestions were put to the complainant about the offence she said 'Suggest what you want but I know he assaulted me'. The complainant was also asked why she did not physically struggle with the defendant. To this she answered 'I wasn't going to let him put the knife in my throat – just for a fuck. Why get stabbed for a fuck?'

Case 34

In another hearing the complainant had been subjected to lengthy cross-examination lasting over five hours in which she was asked many questions relating to alcohol and drug use. Towards the end of the cross-examination she said the following:

Defence counsel *Have you ever been – has it been suggested to you how to give your evidence?*

Complainant *No Sir.*

Defence counsel *Has anybody suggested to you that in giving your evidence you should just let your emotions hang out – has anyone suggested that?*

Complainant *No Sir.*

Defence counsel *Has anybody suggested to you that if you become upset you should let it all hang out?*

Complainant *No Sir I have just been told to hang in there!*

Case 65

LANGUAGE

The use of language in the courtroom is problematic for most women in court as complainants of violence. However language and jargon made it very difficult for many Aboriginal women. It was clear that Aboriginal women in particular felt ashamed and embarrassed to talk about the circumstances of the offence in the court room. They were ashamed to describe their private body parts and the actual act of forced penetration.

For the purpose of establishing the essential elements of the offence complainants are required to describe body parts, using English terms. Many of the Aboriginal women were not familiar with or were embarrassed to use these words for their genitalia.

In one hearing the complainant was almost nauseous in giving her evidence in chief. She was extremely distressed and began dry-retching in the witness box. The Judge warned the complainant that if she was going to be sick she must let the Judge know.

The Crown Prosecutor spent 30 minutes trying to draw out the evidence of the act of sexual intercourse in legal terms. The complainant clearly found it almost impossible to describe her vagina or say the word 'vagina'. The Crown Prosecutor asked a total of 34 questions about the complainant's and accused's sexual organs. Some of these questions were:

Where did he put his private part?

What is the part of your body at the top of your legs where you pee from?

Do you know the part of the body you pee from as your vagina?

Were you as big physically at the time?

At one point the Defence counsel objected that the Crown was using leading questions and leading his witness. The Judge agreed and said he was very concerned about the situation but would allow this line of leading questions. Notably this case was the only hearing in the entire study in which a support person for the complainant was requested and refused by the Judge.

Case 33

The complainant in the above hearing was clearly embarrassed and ashamed to describe her body parts and to describe the actual act of penetration in language that she was not accustomed to using.

In an exchange between a Crown Prosecutor and an Aboriginal woman the following was said:

Crown Prosecutor *Can you tell us what you mean when you say he was 'stroking' three or four times?*

Complainant *I don't know how to say it.*
Crown Prosecutor *Just tell us in your own words if you can, just exactly what it was that happened three or four times.*
Complainant *He raped me, that's what happened! I don't know what you really mean... I just don't know how youse mean.*

Case 54

In another case the complainant was an Aboriginal woman who also had a psychiatric disability. She would not use the word 'anus' to describe her anal rape however the Judge insisted she use that word in order to make out the essential element of the offence.²⁸

The research highlighted instances where Aboriginal women were regularly bullied, harassed and intimidated during cross-examination. Defence counsel on occasions made a mockery of the women's lack of understanding of concepts and questions and often used it to undermine the women. In one case the Crown Prosecutor commented in his closing submission that the complainant was 'not very bright'.²⁹

Many complainants were often confused by cross-examination and the line of questioning. In these situations they did not answer, answered incorrectly or answered 'yes' when they may not have meant 'yes'.

Complainant *It's just that I'm getting a bit confused.*
His Honour *I understand. But just pay attention if you would to what is asked in the question and just simply answer the question.*
Complainant *He just seems to be asking the same questions over and over again!*
His Honour *Yes well, just do your best.*

and later in the same case the complainant said:

I can't understand what you're talking about. Can you talk about it without talking in something I can't understand?

Case 71

²⁸ Case 45.

²⁹ Case 14.

CULTURAL ISSUES

Apart from the above issues, Aboriginal women experienced many other obstacles in the court room as a result of their culture. One Crown Prosecutor said to the judge ‘these are not educated people’ referring to the Aboriginal woman complainant.³⁰ In another case the Defence cross-examined the Aboriginal woman complainant about cultural laws and whether these laws permitted casual consensual sexual relations.

One complainant was asked about her cultural laws and whether these permitted casual sexual relations. These questions were first asked in a *voir dire*³¹ and at its conclusion the judge ruled that the Defence questions would be limited to only these questions. The questioning went as follows:

Defence counsel *By that did you mean to convey to this court you had religious beliefs?*

Complainant *Yes.*

Defence counsel *And they are such that you would engage in casual sexual relations?*

Complainant *No, because it is against our religion.*

...

Defence counsel *Do you think it is a sin to have sex without being married?*

Complainant *Well see with myself, my father is a traditional owner of Arnhem land, we have got two religions, we have got our culture and the Catholic religion.*

Defence counsel *Does your cultural religion conflict with your religious beliefs?*

Complainant *No, the teachings we have, my cultural religion is a more stronger law.*

Defence counsel *So your culture is stronger law than your religion?*

Complainant *We live by the old law of the old testament.*

Defence counsel *What does that mean to you?*

Complainant *It means that, you know, how with – it says an eye for an eye and a life for a life.*

Defence counsel *Does your culture say anything about whether or not it is right to have casual sexual relationships, do you know what I mean by that?*

³⁰ Case 12.

³¹ A trial within a trial; a procedure during a trial where the Judge will hear the evidence of a witness in the absence of the jury to decide whether the evidence is admissible or not.

- Complainant *I know what you're saying. With Catholicism, right, you are supposed to be married when you have intercourse, okay, with Aboriginal law, with my law, with myself, I am nedatur and you're ardour, you're fairer skin than myself, I can have as many husbands as I please, but it does not necessarily mean, with the way that I live, you know, I don't have as many husbands as I please, I am a single mum okay. I prefer to be on my own with my children.*
- Complainant *Can I say something?*
- His Honour *Yes.*
- Complainant *I don't think my personal life has got anything to do with this court hearing.*
- His Honour *Well that's for me to decide I'm afraid [complainant].*
- Case 71
-

In giving evidence the women were often asked to refer to times and length of time of different parts of the sexual offence. Many times these questions did not mean much to Aboriginal women who may assess time in different ways.

-
- When asked in cross-examination about the events on the day of the offence one complainant said:
- Defence counsel *It's possible you went to the hotel before 4 o'clock on [the day].*
- Complainant *I don't know.*
- Defence counsel *Well...according to your evidence (it) was a very important (day) in your life, wasn't it?*
- Complainant *Every day is important.*
- Defence counsel *What I'm asking you is this is an important day in your life – you say something dreadful happened to you on [the day] don't you?*
- Complainant *I wouldn't call it important, I'd call it degrading.*
- Defence counsel *Surely you can recall whether you were at the hotel before 4 pm that date?*
- Case 71
-

SENTENCING

Of the hearings studied in the research involving Aboriginal women as complainants, one accused pleaded guilty and only 25% of accused persons were found guilty. The chapters in this report on *Sentencing, Charges and Outcomes* provide more details on sentencing issues.

In the cases involving Aboriginal women the study did not highlight particular difficulties or cultural issues during the sentencing process. In one hearing the judge in sentencing the offender said *it was a degrading and repulsive attack upon this woman*.³²

In another hearing the Judge spoke about the Aboriginal woman complainant in his remarks on sentence saying:

I have no doubt that the events have left her with a considerable degree of emotional trauma.

He continued by commenting on the Aboriginality of the complainant saying that:

(Aboriginal women) are entitled to the protection of the law as much as anybody else and male acquaintances such as the prisoner just have to be made to realise that.

Case 44

COMMENT

CREDIBILITY

The research found that the credibility of many Aboriginal women was frequently attacked with the use of racist myths and stereotypes about Aboriginal culture. These myths focused on Aboriginal women drinking on the day of the offence and myths about Aboriginal people being habitual drinkers. This is evidence of a cultural myth about Aboriginal people that is used as a false basis upon which to undermine and challenge the testimony of Aboriginal women. The use of these myths is powerful in the eyes of the jury and is used excessively to pedal cultural stereotypes. The Aboriginal women consulted for the research were strongly of the view that the use of alcohol by complainants at the time of the offence

³² Case 65.

should not be important in court in sexual assault hearings. They believed these sorts of questions were based on a stereotype of Aboriginal women associating alcohol with being promiscuous.³³

The possible probative value of these questions is not outweighed by the complainant's humiliation when the questions are repetitive and many. The bounds of relevance must be clearly established by the court and managed by the judge presiding over the trial. Defence counsel should be required to make points more concisely on issues of credit, which would prevent the difficulties observed and documented by this research. These issues are explored in detail in the chapter on *Credibility*.

In reading the material in this chapter it becomes clear why Aboriginal women would be more distressed as witnesses in court than non-Aboriginal women. The research shows that these women suffer enormous victimisation during the court process.

The experience of these women goes beyond the testing of a complainant's evidence for its veracity and honesty and is insensitive, abusive and victimising of women.

LANGUAGE

It is clear from this study that there are specific problems with the language of sexual assault – problems with how Aboriginal women articulate their experiences, their genitalia, their ways of saying 'no'. It seemed to the researchers that court language and legal jargon as well as the apparent need to use English words to describe the offence meant that Aboriginal women experienced great difficulty in having their story heard and believed. Language and cultural barriers often resulted in Aboriginal women not being able to give meaningful evidence. It is important that lawyers and Judges find ways to communicate more effectively.

The Aboriginal women consulted with explained the issue in this way:³⁴

We're so used to using our own language to describe our bodies.

The only time I use the word 'vagina' is when I'm talking to gubbas.

We were taught not to say those words especially not to say them to non-Aboriginal people.

³³ Consultation with Aboriginal women at DFW on 6 June 1996.

³⁴ Consultation with Aboriginal women at DFW on 6 June 1996.

I must go out and learn all the English words for my body parts just in case I get raped.

Imagine how hard it is for us to talk about our sex organs.

This helps to understand the reluctance of some Aboriginal women to describe their genitalia in the way in which they were asked in giving their evidence. It also highlights the traumatising effect for women when forced to describe their body parts in a foreign language or in a way that goes against what they were taught. Many Aboriginal women will not talk about their own body parts in front of men, especially non-Aboriginal men. One Judge asked a reluctant complainant about her underwear, what type of underwear she was wearing at the time of the offence and about the colour and shape of her underwear.³⁵ For many women this information is seen as women's business.

The lack of interpreters or expert witnesses to explain cultural issues that may arise during the course of the trial for Aboriginal women mean that women are obstructed from telling their story and giving evidence that is meaningful. When asked about this, the Aboriginal women consulted with stated that it was not about getting interpreters or anthropologists to explain it to the court, it was about changing the court process so that Aboriginal language is permitted when describing body parts. Procedures must be adopted to allow the elements of the offence to be established without the complainant having to describe details when, for cultural reasons, these descriptions are not the business of men. As one Aboriginal woman said: 'it is about accepting Koori language in court'.³⁶

The study indicates that procedures need to be developed to accommodate Aboriginal women's ways of describing their bodies, especially their sexual organs.

CULTURAL ISSUES

Given Aboriginal people in NSW do not live traditionally, questions about cultural laws and practices and links with permissive or casual sexual relations are not relevant and can be offensive and racist. Importantly, as shown at the beginning of this chapter, cultural laws have very strict and severe punishments for sexual assault. The 'cultural defence' as some Aboriginal women³⁷ have called this line of defence, is a misnomer and has no correct basis in law. Instead the 'defence' has operated to protect the interests of Aboriginal men.³⁸

³⁵ Case 22.

³⁶ Consultation with Aboriginal women at DFW on 6 June 1996.

Other lines of questioning highlighted in the study raise cultural issues when questions were based on the experiences of non-Aboriginal people. Many Aboriginal women (and also non-Aboriginal women) would argue that timing and the length of the incident is difficult to assess and is also not relevant.

SENTENCING

Judges seemed to be aware of the experiences of Aboriginal women and were respectful in their remarks on sentencing.

In contrast Aboriginal women consulted for the research believed that Aboriginal men received lower sentences because of what they called the 'Deaths in Custody defence'.³⁹ They said this sends a message to the community that crimes committed by Aboriginal men upon Aboriginal women are less of a crime. They acknowledged the over-representation of Aboriginal men in gaols but were careful to point out that these men had been arrested and gaoled for 'doing something wrong'. All of the Aboriginal women present at the consultation called for uniform sentencing of Aboriginal men.⁴⁰

CONCLUSIONS

Many of the experiences described in this chapter can be prevented by education of those in the court room. This education should involve more than just an awareness of Aboriginal culture. The Aboriginal women consulted for the research stated that such education should be seen as compulsory and as another skill in the range of skills needed to be a solicitor, Judge, Prosecutor, Defence counsel or court attendant.⁴¹ These women spoke also about the desperate need for the DPP to establish Koori Witness Assistance Officer positions in the DPP's Witness Assistance Service. Alternatively it was suggested that at every District Court there should be an Aboriginal person with a good understanding of the law to tell the complainant what is to be expected in the case. These people might be Aboriginal Support Workers.⁴² Also it was suggested that the Victims Rights charters and declarations

³⁷ See for example M Andrews' keynote address, National Sexual Assault Conference, Melbourne, November 1995.

³⁸ Consultation with Aboriginal women at DFW on 6 June 1996.

³⁹ The NSW Law Reform Commission's Discussion Paper on sentencing confirms this view. It states 'In practice courts have adopted a more lenient approach when sentencing Aboriginal offenders particularly those living on reserves and remote areas. The practice is justified not by reference to race alone, but to the social, economic and other disadvantages suffered by Aboriginal offenders'. NSW Law Reform Commission (1996), p. 182; See also *R v Neal* (1982) 7 A Crim R 129.

⁴⁰ Consultation with Aboriginal women at DFW on 6 June 1996.

⁴¹ Consultation with Aboriginal women at DFW on 6 June 1996.

include specific mention of the rights of Aboriginal women victims of crime and perhaps specify rights for these women.⁴³

SUMMARY

- Aboriginal women were ten times more likely to be complainants in the current study than non-Aboriginal women.
- Aboriginal women have particular needs in the court room and trial process compared with non-Aboriginal women.
- Questions about alcohol, victims compensation and myths of promiscuity are regularly used to undermine the credit of Aboriginal women.
- Myths and stereotypes of Aboriginal women as unsophisticated, vengeful and morally corrupt are used in court room.
- Language barriers and the use of jargon present particular difficulties for Aboriginal women.
- Aboriginal women experience shame in giving evidence about the essential elements of the offence such as describing their sexual organs.
- Aboriginal women experience greater distress during the court process than non-Aboriginal women.
- There were incidences in which a cultural defence argument was raised by Defence counsel in cross-examining complainants from Aboriginal communities about the perceived prevalence of casual sex/personal violence in Aboriginal communities.

⁴² Consultation with Aboriginal women at DFW on 6 June 1996.

⁴³ Consultation with Aboriginal women at DFW on 6 June 1996.

IN COURT

Many commentators have argued that the sexual assault complainant 'occupies a unique position in the legal system which treats her with unequalled suspicion'.¹ A woman who alleges sexual assault is therefore in a particularly vulnerable position in the court room. It is true that for many witnesses, the court room is a foreign environment; it can be intimidating, indeed frightening. Procedures of the courtroom can be mysterious and the language of its participants incomprehensible. For sexual assault complainants the anxiety is compounded because of the intimate nature of the assault and the evidence to be given.²

This chapter looks in detail at those aspects of the complainant's courtroom experience which were identified as distressing for complainants by previous studies³ and anecdotal information. These include the desire for privacy while giving evidence, particularly evidence regarding the details of the sexual assault; the need for a support person for the complainant; the experience of giving evidence and the language used in the courtroom. Each aspect is discussed in turn.

PRIVACY IN THE COURT

It is a generally accepted principle that courts should be open so that 'justice may be seen to be done'. Consequently, the media have been free to report the details of most court proceedings. Clearly there are many delicate issues of public policy involved. The case for restricting publicity in some classes of case, and in some particular instances, must be weighed carefully against the important principle that justice must be done in public and must be accessible to the public through reports of court proceedings.

In most common law jurisdictions, however, a number of statutory exceptions have been created. Legislation now governs the procedures by which court closure orders and non-publication orders are sought. Decisions about whether courts should be closed, the provision of interpreters, and whether a support person should remain with the

¹ C MacKinnon, 'Rape: On Coercion and Consent', *Towards a Feminist Theory of the State*, Harvard University Press, London, 1989, p. 175.

² NSW Sexual Assault Committee, *Sexual Assault Phone-in Report*, Sydney, August 1993.

³ See, for example, Law Reform Commission of Victoria (1991), p. 45; NSW Sexual Assault Committee; *Sexual Assault Phone-in Report*, Sydney, August 1993; and A Edwards; *The Criminal Justice Response to Sexual Assault Victims*, Bureau of Crime Statistics and Research, Sydney, 1996, pp. 32-44.

complainant if the court is closed, are ultimately determined by the Judge following arguments by both Counsel.

CLOSED COURT

Section 77A of the *Crimes (Personal and Family Violence) Amendment Act 1987 NSW* allows for part of the proceedings to be held in camera where the court so directs.⁴ In making such decisions, the Judge must consider the needs of the complainant, including the need to have any person excluded or present at those proceedings.⁵ This provision applies to both adult and child sexual assault complainants⁶ and is designed to maintain the privacy of the sexual assault complainant in court. It also recognises that a failure to appreciate the particular experiences of the complainant in the court room can have a deterrent effect on whether or not women report sexual assault.⁷

Until the present study, no research was available on the frequency and success of applications for closure of the court in sexual assault trials, or whether an exemption to permit a support person to be present in a closed court is granted.⁸

NON-PUBLICATION ORDERS

In recognition of the need for sensitivity and awareness about the vulnerability of sexual assault complainants to public hearings and sensational media publicity, section 578A(2) of the *Crimes (Personal and Family Violence) Amendment Act 1987 NSW* was introduced to protect a complainant's privacy during court proceedings.⁹ The legislation prohibits the publication of any information which identifies or is likely to identify a complainant in

⁴ Section 77A(5) sets out the matters to be considered in determining a direction to close the court as follows:

- (a) the need of the complainant to have any person excluded from those proceedings;
- (b) the need to have any person present in these proceedings;
- (c) the interests of justice; and
- (d) any other matter which the Court thinks relevant.

⁵ See section 77A (5)(a) and (b).

⁶ Prior to this legislation being introduced, section 77A of the *Crimes (Child Assault) Amendment Act 1985 NSW* required the court to consider the needs of the child when making a decision to close the court in child sexual assault proceedings and provided for a support person. The 1987 amendments were enacted in recognition that the needs of adult victims of sexual assault are similar to those of child victims.

⁷ See NSW Hansard, Legislative Assembly, 29 October 1987 at 15466:

The bill will also extend to adult sexual assault victim-witnesses the same privacy protection during court proceedings as currently apply to child victim-witnesses. The court, when directing that proceedings are to be held in camera, will be required to take into account the needs of the complainant.

⁸ NSW Sexual Assault Committee, *Sexual Assault Phone-in Report*, Sydney, August 1993, pp. 41-42.

⁹ See Women's Co-ordination Unit, *New South Wales Sexual Assault Committee Report*, January 1985 to December 1987, pp. 26-27.

prescribed sexual offence proceedings.¹⁰ Under this legislation, a Judge must seek and consider any view of the complainant and publish such names only if the publication is in the public interest.¹¹

SUPPORT PERSONS

A support person is someone, normally a member of the complainant's family, a friend, a sexual assault counsellor or advocacy worker who provides support to the complainant during the court process.¹² A support person will often work with the complainant prior to the trial, provide information about the court process during the trial or discuss with the complainant the court process. She may also assist the complainant with other requirements such as phoning friends and family and getting water, tissues and food for her during the course of the trial. A support person must not discuss the evidence with the complainant, influence the evidence she may give, or talk with the complainant in a way that could be construed as coaching.

The provision of emotional support throughout the trial can help to reduce the emotional trauma of the court experience and 'may alleviate the intimidating and alienating effects of the courtroom'.¹³

A sexual assault complainant at present has no legal right to be provided with a support person throughout the court proceedings, despite studies indicating that many

¹⁰ Except in circumstances outlined in subsection (4).

- (a) a publication authorised by the Judge or Justice presiding in the proceedings concerned;
- (b) a publication made with the consent of the complainant;
- (c) a publication authorised by the Attorney General under section 11 of the *Children (Criminal Proceedings) Act 1987* NSW;
- (d) an official law report of the prescribed sexual offence proceedings or any official publication in the course of, and for the purposes of those proceedings;
- (e) the supply of transcripts of the prescribed sexual offence proceedings to persons with a genuine interest in those proceedings or for genuine research purposes; or
- (f) a publication made after the complainant's death.

Section 578(2) provides for penalties to be imposed on any individual or corporation who publishes information likely to identify a sexual assault complainant without the consent of the court. These penalties are a \$5,000 fine or six months imprisonment for individual offenders and a \$50,000 fine for offending corporations.

¹¹ Section 578A (5) states that 'a Judge or Justice shall not authorise a publication under subsection (4) (a) unless the Judge or Justice -

- (a) has sought and considered any views of the complainant; and
- (b) is satisfied the publication is in the public interest.'

¹² See A Edwards, *The Criminal Justice Response to Sexual Assault Victims*; NSW Bureau of Crime Statistics and Research, June 1996, p. 37.

¹³ G Stekette and A Austin, 'Rape Victims and the Justice System: Utilisation and Impact', *Social Service Review*, June 1989, p. 298; Australian Law Reform Commission; *Equality Before the Law: Interim Report No. 69, Part 1*, 2.23, p.152.

complainants benefit enormously from the presence of a support person.¹⁴ However a trial Judge has the discretion to permit a support person to be present for the complainant during a closed court hearing.¹⁵

GIVING EVIDENCE

The Prosecution begins its case first by presenting evidence before the court. Each witness for the Prosecution is called to testify and does so generally by responding to questions from counsel for the prosecution—the Crown Prosecutor. This is known as evidence-in-chief or examination-in-chief. The Defence counsel then cross-examines each witness, which means asking questions of the witnesses that clarify, expose inconsistencies or challenge the truthfulness or credibility of their evidence. It must be noted that this is the purpose of cross-examination for all witnesses in all criminal trials, not just primary witnesses in sexual assault proceedings. For further discussion of these issues see the chapter on *Credibility*.

The Australian Law Reform Commission (ALRC) has noted :

*...when a woman has to give details of a sexually intimate nature as a witness it can be profoundly embarrassing to face a male audience, and more so if she is from a cultural background in which these matters are never discussed in front of men.*¹⁶

Of the 29 complainants who gave a response to a question about their experience of being examined and cross-examined in a recent BCSR study, only two stated that the experience had not been difficult. The worst aspects of giving evidence were reliving the event in public, seeing the offender in court while giving evidence and feeling nervous or emotional. Other upsetting aspects were that the Crown Prosecutor was not familiar with the case, the complainant's residential address was revealed in court, questions were repetitious, giving evidence took too long and was confusing, the comments made about her evidence by the Judge, and being called a liar.¹⁷

¹⁴ A Edwards (1996), p. 37.

¹⁵ The Court shall consider the need of the complainant to have any persons present in those proceedings. Section 77A (5)(b).

¹⁶ Australian Law Reform Commission (1995) 2.23, p.28. In the full report the ALRC commented that one submission received by the reference described a recent sexual assault case where an Aboriginal woman was forced to give her evidence and undergo cross-examination before approximately twenty high school students. See Australian Law Reform Commission; *Equality Before the Law: Justice for Women*, Report No, 69, Part 1, 7.31, p.152.

¹⁷ A Edwards, *The Criminal Justice Response to Sexual Assault Victims*, NSW Bureau of Crime Statistics and Research, Sydney 1996, pp. 52-54.

Complainants were also questioned on the worst aspect of being cross-examined by Defence counsel. Their responses included seeing the offender in the courtroom, that the questioning was unfair, that they were asked to repeat questions too often. Some respondents felt some questions were misleading, they could not remember aspects of their evidence and that the Defence counsel was trying to embarrass them. A number thought the cross-examination took too long, was repetitious, and that too much detail was required.¹⁸

For the purposes of establishing the elements of the offence, complainants, as primary witnesses at trial, are usually required to recount the entire assault in precise detail and with minimal inconsistencies in the presence of the accused. She must give an explicit and detailed account of sexual penetration to establish that sexual intercourse occurred, including the mechanics of the sexual activity. Many women find this embarrassing, humiliating and distressing. The stress and embarrassment is magnified for women from Aboriginal and ethnic communities.

LANGUAGE IN THE COURTROOM

The manner in which complainants are treated, and how they are perceived and referred to by Judges, lawyers and other court personnel has a critical impact on their credibility as witnesses. Personnel who make remarks or use language demeaning to women distract the court participants from the merits of the case and may adversely affect the jury's perception of the complainant, and the ultimate outcome of the trial.

A third of the complainants in the BCSR study had difficulty understanding what occurred during court hearings. They identified legal terminology and arguments as the principal aspects of the court hearing they found difficult to understand, but also referred to other aspects such as the Judge's rulings, objections from both the Defence and the Crown and the admissibility of evidence.¹⁹

¹⁸ *ibid.*, pp. 52-54.

¹⁹ *ibid.*, p. 52.

ALTERNATIVE ARRANGEMENTS FOR THE COMPLAINANT TO GIVE EVIDENCE

A distressing aspect of giving evidence for complainants is the proximity and unavoidable eye contact with the accused in court. Often the accused sits behind the Bar table. This means that for the complainant to answer questions from Counsel she must also look at the accused. Women have reported that they were 'intimidated by the non-verbal threats made by the accused in the courtroom.'²⁰

The respondents have identified this as the worst aspect of giving evidence and being cross-examined.²¹ Eight complainants in the BCSR study recommended that complainants should be allowed to give their evidence via video.²²

In NSW complainants are able to give evidence using one-way screens.²³ The screen is placed before the complainant so that the complainant cannot see the offender but he and the jury can see the complainant. A Crown Prosecutor reported to the Standing Committee on Social Issues that the screen was:

A very, very simple device...which achieves exactly what you want to achieve, which doesn't compromise the accused's rights at all, which enables everyone in the courtroom to see the complainant and how she's reacting to questions.²⁴

The Committee also heard evidence that the use of screens was being refused by Judges who considered that 'the accused person has a right to hear and see his accuser'.²⁵

While the *Crimes Act 1900* NSW permits child sexual assault complainants to give their evidence by way of closed circuit television (CCTV)²⁶, the Act does not permit CCTV for adult sexual assault complainants.

²⁰ Sexual Assault Committee (1993) p.41.

²¹ A Edwards (1996), p.37.

²² A Edwards (1996), p.44.

²³ Provided an application by the Crown Prosecutor is made to the Judge and the Judge agrees to the order for the use of screens.

²⁴ Standing Committee on Social Issues; *Sexual Violence: Addressing the Crime*, Report No. 9, April 1996, p. 166.

²⁵ *ibid.*, p.167.

²⁶ There are currently 12 locations throughout NSW where a child witness may give evidence in a separate room eliminating contact with the accused. The government is currently looking at extending the provision of this service to all courthouses throughout NSW.

LEGAL REPRESENTATION

Sexual assault complainants have very little control over how the matter will proceed. The complainant has no say in how the matter is investigated and once it has made its way to court the Crown takes over control of the case and the complainant becomes a (primary) witness for the Prosecution.

In the present adversarial system the accused has a legal representative who is employed to protect his interests. The job of the Prosecutor is to present the Crown case against the accused. The Crown is not the complainant's representative, but has an independent role and represents the interests of the state. The complainant has no entitlement to legal counsel or separate representation and is compelled to give evidence and undergo cross-examination.²⁷ The complainant has no right to have witnesses testify to her good character and is not given the opportunity to rebut assertions by the Defence. She will generally have no knowledge of the Defence claims or often of the other prosecution evidence and will have had little preparation for giving evidence.²⁸

Research by BCSR found that complainants were less satisfied with services provided by the DPP than they were with those provided by police and sexual assault services. Up to 14% of complainants had never met with the DPP solicitor before the court case. One respondent had not met with the Crown Prosecutor. Several witnesses said that they had not been informed by the DPP that they could have a support person with them during the trial and more than one third of respondents said that they had not received adequate information about the roles of the people in the courtroom or about what would happen in court. A substantial number of women also reported that they did not feel adequately consulted by the DPP.²⁹

EVIDENCE BY THE ACCUSED

Prior to May 1994, NSW was one of the few jurisdictions in which a defendant in a criminal trial was permitted to give evidence in court by way of an unsworn statement from the

²⁷ There was one case (Case 35) in the sample however, where the complainant did not give evidence at trial, but the matter nonetheless proceeded, resulting in a conviction. The trial had been postponed a number of times because of the complainant's poor recovery. A psychiatrist at the trial gave evidence that the complainant was suffering from post-traumatic stress disorder and would not be in a position to attend the court in the foreseeable future. The Judge determined that the matter would proceed on a charge of attempted sexual assault. Evidence other than the complainant's statement (e.g. the evidence of police witnesses) was then presented to the court.

²⁸ Law Reform Commission of Victoria, Appendixes to Interim Report No 42, *Rape: Reform of Law and Procedure*, LARCH, July 1991, pp.126-127.

²⁹ A Edwards (1996), pp. 51-52.

³⁰ Commonly known as a 'dock statement'.

dock.³⁰ This unsworn statement allowed the accused person to tell the jury his/her version of events without the risk of cross-examination.³¹

The dock statement came under heavy criticism from some feminist groups and advocates of complainants of sexual assault as providing yet another forum in which the accused person could slander the complainant, accuse her of lying and raise issues about her prior behaviour.³² Sexual assault services reported that many complainants in sexual assault trials were extremely distressed by the fact that, after being examined and cross-examined in court, they then saw the accused person tell their version of the events without being subjected to intensive cross-examination to test their story.

In May 1994 the *Crimes (Unsworn Evidence) Amendment Act 1994 NSW* abolished the right of an accused person to give unsworn evidence or to make an unsworn statement in criminal proceedings. The NSW Attorney General's Department gave the following reasons for the abolition of the right of an accused person to give unsworn evidence:

- the truth of statements made by the accused should be subject to testing by cross-examination;
- the accused should be subject to prosecution for perjury for any untrue statements made to the jury;
- a dock statement often confuses the jury about what weight to accord to it and its status in relation to sworn evidence;
- the right is an historic anachronism, introduced at a time when accused persons were not permitted to give sworn evidence;
- the right has been abolished in almost every other Australian jurisdiction and most comparable jurisdictions overseas.³³

The Act applies to the trial of a person charged with an offence on or after 10 June 1994 (the date of commencement of the Act). Following abolition of the dock statement, accused persons now have two options at trial: to say nothing or to give sworn evidence.

In recent years efforts have been made to improve the experience of the sexual assault complainant in court. These include the introduction of 'date certainty' in the listing of all

³¹ Many advocates argue that the dock statement is one of the few fundamental rights of an accused person and is a mechanism for those persons who do not perform well under cross-examination for reasons of their gender, class, disability, cultural or ethnic background, to tell their story to the court. See Brown, D (1994) Silencing in court: 'The Abolition of the Dock Statement in NSW', *Current Issues in Criminal Justice*, 6(1), pp. 158-162.

³² Although this was prohibited by section 409C of the *Crimes Act 1900 NSW* (now repealed). See also the chapter *Sexual Reputation and Sexual Experience*.

³³ 'Unsworn Evidence' pamphlet, NSW Attorney General's Department, June 1994.

sexual assault trials, and provisions for the closure of the court, suppression of the complainant's name, establishment of a Witness Assistance Service within the DPP and abolition of the dock statement. However in NSW since the introduction of such changes there has been no research into whether these provisions are being observed by courts or indeed whether they are effective in minimising the distress of the complainant.

CURRENT STUDY

The current study collected information about the following:

- non-publication orders;
- court closure and if so whether support persons were permitted for the complainant;
- length of time taken for complainants to give evidence-in-chief, be cross-examined and re-examined;
- interruptions to the giving of evidence because of complainant's distress;
- number of questions complainants were asked concerning their sexual organs or those of the accused;
- prosecution objections throughout the cross-examination; and
- judicial management of the court.

The study collects qualitative information on the language used in court and any other factors which affected a particular complainant's court room experience.

LENGTH OF TRIALS AND SENTENCES

The average length of each trial was approximately four days. The longest trial in the sample was 18 days and about one in ten trials were finalised within a day. Sentence hearings studied in the research normally lasted one day but were often adjourned numerous times for the preparation of reports.

PRIVACY IN THE COURTROOM

Closed court

Figure 1 Court closure (n=111)

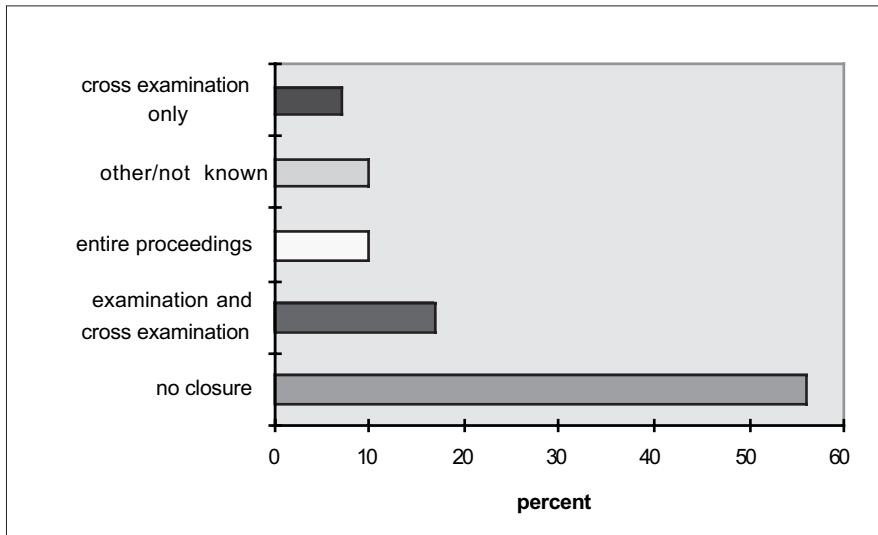


Figure 1 shows that of the 111 trials studied in the research sample 62 trials (56%) were heard in open court, that is, where the court was not closed to the public at any stage of the trial. Of the 111 trials, 11 trials (10%) were closed for the entire proceedings, 19 trials (17%) were closed for the evidence-in-chief and cross-examination of the complainant and only 8 trials (7%) were closed for the cross-examination of the complainant only. In a further 11 trials (10%) it was not known whether the court was closed or not.³⁴ The findings show that overall the court was closed for part or all of the trial in a total of 49 out of 111 trials (44%).

In several trials the application for the closure of the court was debated within the courtroom and subsequently refused by the Judge.

The following exchange in the court room of a small country town in western NSW relating to the refusal to grant an application for a closed court illustrates the attitudes of some Judges. The Crown argued:

³⁴ These figures are similar to those collected in the Bureau of Crime Statistics and Research study by A Edwards (1996: p. 41) which found of those who answered the questionnaire, 57% gave evidence in open court and 40% gave evidence in a closed court. 35% of respondents reported that the court was closed for some of the time. These results are also similar to the findings of the NSW Sexual Assault Committee *Sexual Assault Phone-In* (1993) which reported that 59% of callers indicated that the court was 'not closed so passers-by could easily enter'.

...in a small country town like this word goes through the community like a bushfire. It is difficult enough for an alleged victim of sexual assault to give evidence but to have to give evidence in a court room...when that person knows that every word in effect is being said is going to be discussed at great length in the community...

The Defence opposed the application arguing:

...she is 28 years of age, not a child...it is a grown woman who is in the witness box.

The Judge determined:

Well, it is also a fact that it is not usually the system in our courts of justice to have hearings held in camera – there has to be some compelling reason for the court to be closed. I believe that unless there is some other reason that you can advance Mr Crown in support of the application – that the only order I would be prepared to make is a non-publication order. You see there is a public interest in having trials open to and heard by the public which is possibly just as important, probably more important than the interests of the complainant – I refuse the application.³⁵

In nine of the eleven trials involving complainants with disabilities, the court was open to the public throughout the trial. In one trial the Defence stated that the age of the complainant (21 years) should not affect her ability to withstand open court and the presence of the accused's parents.³⁶

In two of these trials, an application for a closed court during the complainant's evidence was refused by the Judge. In one case where the complainant was hearing-impaired, the Judge ruled that a non-publication order would be sufficient and commented:

I am very reluctant to hear anything in closed court. So far as I am concerned anybody can walk in and out of my court at any time.³⁷

In another case, in which the complainant suffered from an intellectual disability, an application for a closed court was refused by the Judge who commented:

Secret courts are a danger to the administration of justice. An atmosphere of great unreality intrudes into the proceedings. A trial of this kind is a difficult matter for any body to retain a sense of ordinary reality in. To compound the strangeness of the occasion is...materially likely to add to a jury's difficulty in applying common sense to what they hear. I acknowledge there is likely stress, likely embarrassment for a

³⁵ Case 112.

³⁶ Case 143.

³⁷ Case 143.

*complainant but unless extreme difficulty can be shown, (it is important that) courts be open for scrutiny by ordinary citizens.*³⁸

NON-PUBLICATION ORDERS

In over half the trials (57%) in the study a non-publication order of the complainant's name was applied for and granted. However in 30% of cases a non-publication order for the complainant's name was not requested. There were no cases in which a non-publication order was applied for and refused.

SUPPORT PERSONS

Figure 2 Applications for support person to remain in the court and success of applications (n=49)

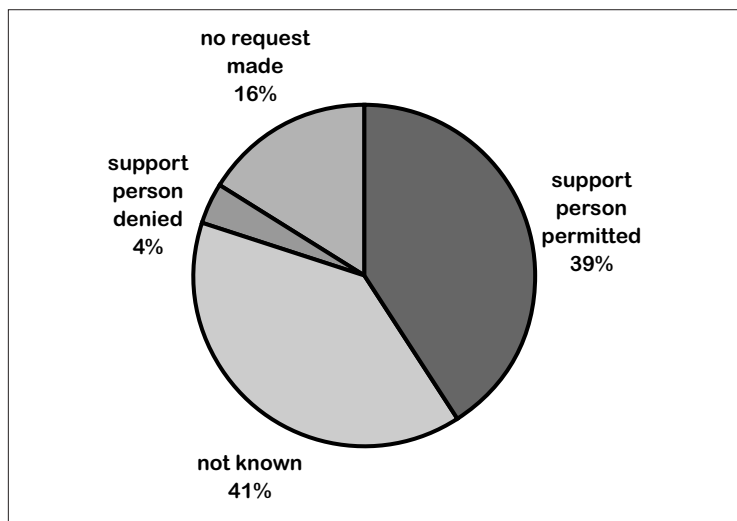


Figure 2 presents the findings of the present research. The study found that when the court was closed for all or part of the trial (49 trials), the Crown made an application for a support person to be permitted to stay in the court room in 21 of the 49 trials. Of the 21 trials in which an application was made 19 were successful and the request to have a support person present during the trial was made and refused in only two cases. In eight trials there was no request from the prosecutor for a support person to remain in the closed court room. In 20 trials it was not known whether an application for a support person was made or was successful.³⁹

³⁸ Case 136.

³⁹ The high proportion of unknown entries is because of the difficulties with collecting this information from data sources used, especially sound recordings.

The Figure shows that in 39% of trials in which the court was closed, a support person was permitted to stay with the complainant through the proceedings.

One case in which the Judge refused the application for a support person involved an Aboriginal woman complainant. The Crown made an application for a closed court asking that the complainant's support person be allowed to remain in court while it was closed. The Defence counsel opposed the support person staying in court for the complainant, commenting that the complainant was 25 years old and although she had been described as 'backward', she should not need a support person. The Crown argued that the legislation does not specify age as a factor in determining whether a support person should remain in court. The Crown in response then made the following comment:

For what my opinion is worth, the young lady is a relatively unsophisticated Aborigine and she would benefit from the support of a friendly face in court.

The Judge decided that if it were important to have a support person in court the matter would be heard in an open court. After an adjournment the Crown renewed the application for a closed court without a support person to which the Judge agreed. The trial was conducted in a closed court without a support person.

Case 33

In another trial where the complainant had a physical disability, the application for a closed court and the attendance of a support person for the complainant was granted but the Defence argued that the accused should also have support persons.

The complainant was intellectually disabled. On the night of the offence the complainant met a 'friend' who, with two other co-accused, allegedly took her to a remote area and repeatedly sexually assaulted her. The complainant reported the offence to her sister one and half weeks after the incident. When asked why she delayed in complaint, the complainant replied that she was frightened and that she had been threatened by her attackers. The complainant gave evidence at the trial that the accused 'threatened to tie me up.'

The cross-examination by Defence counsel centred mainly on recounting the minute details of each act of sexual contact and penetration including

positions and duration. The court allowed the complainant's sister to sit with her in the witness box for support while she gave evidence.

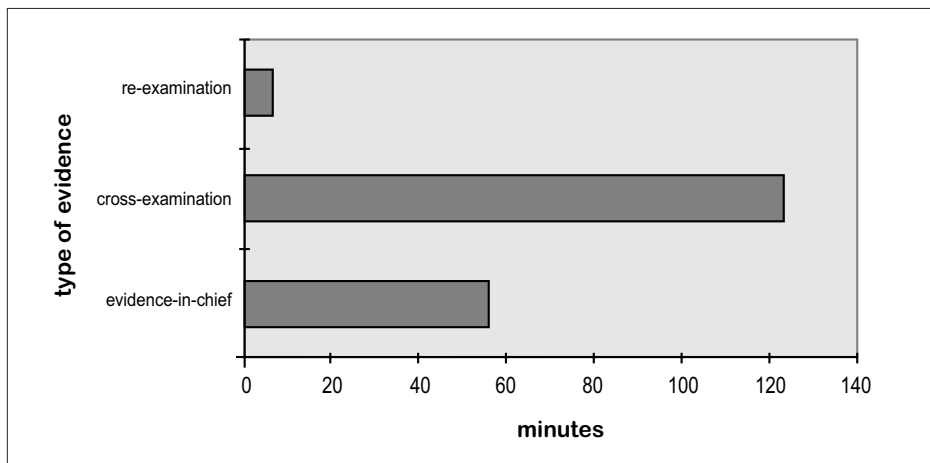
Case 130

GIVING EVIDENCE

It is difficult to quantify a complainant's experience in giving evidence in court as a primary witness and complainant of sexual assault. Specific data was collected about certain aspects of giving evidence which is presented comprehensively in the chapter on *Credibility*.

The research has noted some details about the nature of giving evidence in court and has supplemented this with illustrations of common experiences of women complainants of sexual assault.

Figure 3 Length of time giving evidence (n=106)



The average time for a complainant to give her evidence-in-chief was just under an hour (56 minutes). The time for giving evidence-in-chief varied greatly depending on the complexities of the case and resilience of the complainant. The maximum time for any one complainant was three hours and five minutes and the shortest time was ten minutes.

The average time for a complainant to be cross-examined was just over two hours (124 minutes). Again cross-examination length varied enormously amongst all trials studied depending on the accused's line of Defence and the complexities of the evidence. The minimum time was 15 minutes and the maximum time was eight hours and six minutes, occurring over two days.

Re-examination took on average six minutes. The longest re-examination was for 45 minutes.

The following exchange during cross-examination by Defence and re-examination by the Crown gives an insight into the type of comments and questions routinely asked.

The Defence counsel was cross-examining the complainant on whether the accused had his shirt off or on at a particular time:

Complainant *Can I make a point?*

Defence counsel *No just answer the question.*

And in re-examination:

Prosecution counsel *At one stage during cross-examination you asked can I make a point – do you remember that?*

Complainant *Yes I do.*

Prosecution counsel *Can you recall what it was that you wanted to say?*

Defence counsel *Objection – too broad a question.*

The Judge however did allow the point to be made in the absence of the jury.

The complainant stated:

The point I wanted to make was that in my statement I say I wasn't sure what he was wearing on the top half and I just wanted to make a point that the day I made my statement was a very emotional day for me and that I know what my statement says. I do not contradict or disagree with anything I have said in my statement but I'm able to recall a lot more now than on the actual day it happened, I'm more clear. But on the day there was a lot more going through my mind than just recalling what had happened – that was the point I was going to make – that's what I wanted to say.⁴⁰

The woman complainant in the above matter articulated sentiments that were commonly expressed by many women during the course of giving their evidence.

COMPLAINANT'S DISTRESS IN COURT

One indicator of the amount of distress experienced by complainants in giving evidence is whether the trial Judge had to interrupt the proceedings to allow the complainant to regain her composure. In 65% of trials there were interruptions to evidence because of the

⁴⁰ Case 147.

complainant's distress. Among these there was an average of two interruptions per trial. The highest number of interruptions in any one trial was 12. This case involved an Aboriginal woman as the complainant. For further discussion of the distress experienced by women from Aboriginal communities see the chapter on *Women from Aboriginal Communities*.

Generally the research found that the court was sensitive to the complainant's distressed state whilst giving evidence but that, on a number of occasions, insensitivity of court personnel was evident. The following case studies illustrate the varying attitudes of court personnel and judicial officers to the complainant's distress.

An Aboriginal woman was giving evidence as a complainant of sexual assault. While giving evidence it became apparent that she was extremely distressed, to the point of dry retching in the witness box. The Judge did not allow for regular breaks but became impatient with the witness and warned her that if she was going to be sick then 'you must let me know.'

Case 33

The complainant was incensed by the Defence cross-examination and very distressed throughout. The trial was in fact stopped nine times because of the complainant's distress. The Defence counsel asked the Judge for the trial to be aborted saying 'I can't cross-examine this witness'. The Judge insisted the Defence proceed saying 'I'm not stopping this trial. You carry on'.

Case 68

The complainant broke down and was crying during her cross-examination. At this point the Judge said to the complainant:

Now I want you to think about this. Mr H (Defence Counsel) has a job to do, he is just doing his job, he will ask you a lot of questions, a lot of them you won't like. But you have to just try and keep your composure, answer them, as well as you can...he is not trying to be nasty to you, nor is anyone else in this court room.

The complainant had suffered severe injuries as a result of a physical assault in addition to the sexual assault. She became extremely distressed while reliving the details of the offence in the court room. The Defence

counsel asked the complainant to demonstrate how the accused had tied her hands above her head during the assault. She indicated that she would prefer not to demonstrate this aspect of the assault in court. The Judge decided that the complainant should not be compelled to do so.

In another case where the trial was held in a country area, the Defence counsel made an application to the Judge to have the jury discharged on the basis that the jury had observed the complainant outside the court 'sobbing'. The Defence counsel commented:

My concern about this your Honour is that that behaviour may well have cause to influence jurors by attracting sympathy for her or be a reinforcement of her version of events...the jury may be contaminated.⁴¹

Distress of complainants with disabilities

The research found that complainants with disabilities were more distressed in court while giving their evidence than any other complainants. In six of the 11 matters that proceeded to trial in which the complainant had a disability, the trial was interrupted because of her distress. In one case where the complainant had a psychiatric disability the trial was interrupted 12 times. This represented the highest number of times in the study for which a trial had to be interrupted because of the complainant's distress.

In one trial the complainant had an intellectual disability. She became very confused and upset by the questions. She was asked 60 questions concerning her own sexual organs or the sexual organs of the accused. The trial was interrupted four times because of her distress. It became very difficult to obtain comprehensible answers from the complainant and the trial was halted. The jury was sent out while the Judge and Prosecution and Defence counsels discussed the problem.

The Crown Prosecutor at this point made an application to read a psychological report explaining the complainant's intellectual disability in order to show that her demeanour in court was because of her intellectual disability and not because she was vague or using drugs.

After hearing arguments from both sides the Judge decided the psychological report would not be admissible as it had the potential to 'water down the

⁴¹ Case 147.

onus of proof...the jury may feel sorry for her'. The Judge however did allow the Crown Prosecutor to lead the witness through the questions on the report. The Judge commented:

I think a stage has to be reached in a trial where a witness has in effect been put through a crucible and that's no criticism of counsel, but where a witness is having difficulty because of her probable mental shortcomings, where it reaches a stage where it's just simply torture to keep her subject to the ordinary range of cross-examination which [Defence] of course has to put.

The Judge wanted the complainant to be asked if she would like to continue with the trial, given her distress. The Crown Prosecutor suggested a counsellor ask the complainant how she felt about continuing with the trial. At this point the Defence counsel said:

Perhaps if my learned friend's instructing solicitor (would talk to the complainant). If your Honour were of the view that some course like that should be pursued it would be my submission it should be done only by somebody who is bound by the ethics of the profession and not otherwise, and perhaps this could be made but I would submit that it ought not be done by either the sister or even a social worker. It should be done by a member of the profession.

QUESTIONS REGARDING SEXUAL ORGANS

The research found that a particularly stressful component of the trial for complainants was having to recount all the small details of the non-consensual sexual intercourse.

The study collected information about the total number of questions asked of complainants concerning direct contact with the sexual organs of either the complainant or the accused.

In almost every trial (95%) the complainant was asked questions regarding sexual organs. On average complainants were asked 16 questions of this type. The maximum number of questions asked in any one trial was 145. In one trial in which the complainant had a psychiatric disability, she was asked 81 questions concerning direct contact with sexual organs.

The following case studies illustrate the types of questions and interactions experienced by complainants of sexual assault in the study.

One very young woman found it difficult to articulate her experience of the assault as it was clear she had no reference point or previous experience of sexual intercourse. She described the experience as follows:

I felt something really sharp stuck into my vagina, it really hurt...like he [the accused] stuck something in me and he did that for ten minutes.

Case 55

One complainant during cross-examination provided some insight into the difficulties faced in recounting the details of a traumatic assault:

Defence counsel *You say that intercourse took place, well you've given lurid details of intercourse. Can you estimate the time – did it last for a couple of minutes?*

Complainant *No I cannot estimate the time, how long it took, for me it took forever.*

Case 26

Another complainant had difficulty ascertaining what the Defence counsel required and was clearly upset at recounting the precise details of the sexual assault:

Prosecution counsel *Can you tell us what you mean when you say he was 'stroking' three or four times?*

Complainant *I don't know how to say it! [crying]*

Prosecution counsel *Just tell us in your own words if you can, just exactly what it was that happened three or four times?*

Complainant *He raped me, that's what happened! I don't know what you really mean...I just don't know how youse mean!*

Case 54

In one matter where the complainant found it difficult to use the word 'vagina', during cross-examination the Defence counsel commented to her:

You know what a vagina is, don't you – you did six years of personal development at High School didn't you?

Case 41

In another case an Aboriginal woman was very clearly embarrassed and ashamed to describe her private body parts and describe the actual act of penetration. The Crown spent up to half an hour establishing that the act of sexual intercourse took place, asking questions like 'What is the part of your body at the top of your legs where you pee from?' and 'Do you know the part of the body you pee from as your vagina?'. The complainant would not answer questions on many occasions and became extremely humiliated and distressed.⁴² In another case involving an Aboriginal woman the Judge insisted that she repeat the description of an anal sexual assault when the complainant was clearly uncomfortable and embarrassed to use the word 'anus'.⁴³

LANGUAGE IN THE COURTROOM

The study found a number of instances where court personnel used demeaning terms and expressions for women complainants and made, for example, comments about her Aboriginality and level of education. During his summing up, one Judge referred to the 17 year old complainant as an 'unfortunate little girl'.⁴⁴

In one trial the Judge continually referred to the complainant as 'the girl' during summing up. Defence counsel asked the Judge not to refer to the complainant as 'the girl' as it engendered sympathy. The Judge agreed, advising that he did it because he had trouble remembering the complainant's name.⁴⁵

A lack of cultural sensitivity was also evident in the court room. A Crown Prosecutor in his closing submissions argued that the Aboriginal complainant was 'an unsophisticated Aborigine' who is 'not very bright' and therefore was unlikely to have made up the story.

In another case where the complainant had an intellectual disability the Judge commented 'this witness is a bit retarded'. In this matter the DPP file described the complainant as 'simple'. During cross-examination, the complainant introduced evidence that was not in her statement. The Defence counsel asked her how she had suddenly come to remember this evidence. The complainant replied 'no comment'. The Crown Prosecutor commented

⁴² Case 33.

⁴³ For further discussion of the experiences of women from Aboriginal communities, see the chapter on *Women from Aboriginal Communities*.

⁴⁴ Case 91.

⁴⁵ Case 4.

to the Defence counsel 'you knew she was slightly backward' to which the Defence counsel replied 'Well she is not slightly backward, I find her a very intelligent person.'

Case 132

One Judge also referred to the jury as gentlemen, even when women were clearly present.

His Honour to the jury:

Would you move back to the jury room please gentlemen.

The Judge then apologised later to the jury saying:

First apologies, I said 'would you move back to the jury room please gentlemen'. It is a force of habit, I still have not got used to the requirement to say ladies and gentlemen. I apologise for that.

Case 45

A number of complainants experienced difficulty with the use of legal terms in the court room, finding the language used by the court personnel confusing and difficult to understand. As one complainant reported to a Defence counsel 'I can't understand what you're talking about. Can you talk about it without talking in something I can't understand?'.⁴⁶

WOMEN FROM ETHNIC COMMUNITIES

The study included only eight women from ethnic communities as complainants of sexual assault.⁴⁷ The majority of women complainants from ethnic communities were competent in English. Interpreters were used in court for complainants on only one occasion and in that instance a male interpreter was provided. In one other trial the complainant needed the assistance of an interpreter in giving evidence but none was provided.

To illustrate some of the specific difficulties encountered by women from ethnic communities as they proceed through the trial process, case studies have been summarised below. The names, locations and countries of origin have been changed for confidentiality reasons.

⁴⁶ Case 71.

⁴⁷ See the Chapter on the *Profile of Hearings*.

Case A

The complainant was sexually assaulted in her own home by a man she knew. She made an immediate complaint to her husband and then to the Telephone Interpreter Service. She reported the sexual assault to the police five hours after the sexual assault. The complainant was not taken to a Sexual Assault Centre and did not receive a medical examination. She had a male interpreter at the police station when making her statement and was not given a translated copy of the document.

The first trial was aborted because the male interpreter, in translating the complainant's account of the sexual assault, did not state the word 'vagina'. As a result, an essential element of the case (i.e. penetration of the complainant's *vagina* by the accused's penis) could not be established, so the Judge dismissed the jury and ordered a new trial.

The complainant again had a male interpreter for the second trial.

There were recurring problems about possible misinterpretation of the complainant's evidence by the interpreter. The interpreter did not translate the entire proceedings for the complainant.

Case B

In this trial the complainant did not have an interpreter. While she was giving evidence it was clear that the complainant was not familiar with the English words for male and female genitalia. After some minutes she found the words in her vocabulary and pronounced them incorrectly.

Sometimes she said yes when she meant no. At times the Judge and Crown prosecutor identified and corrected these misunderstandings but on the whole the complainant was clearly in need of the assistance of an interpreter.

ALTERNATIVE ARRANGEMENTS FOR THE COMPLAINANT TO
GIVE EVIDENCE

Information concerning the type of arrangements made in the courtroom for the complainant to give evidence by alternate means was collected for each trial. Alternative

arrangements were made in the courtroom in only four (4) of the 108 trials in the study. These included:

- The use of a sound system to amplify the complainant's voice in the courtroom at the Judge's request.⁴⁸
- The removal of the accused from behind the Bar table to the dock so that the complainant was not forced to look at the accused whilst giving evidence. The Crown made an application for this arrangement which was agreed to by the Judge.
- The use of computer technology to give evidence in a trial where the complainant was hearing-impaired.

In a number of trials the softness of the complainant's voice and the acoustics of the court room made it difficult for the complainant to be heard in court. As noted above, in one such case the Judge successfully arranged for her voice to be amplified. In a number of other cases it was clear that the complainant would have benefited from an amplifier but none was available or no arrangements were made for one to be supplied. In one case the jury advised the Judge they were having difficulty hearing the complainant's evidence. The Judge made the following comment:

No we don't have an amplifier. Here we are in 1994 and we don't have an amplifier.

The Judge then said to the complainant:

You have a soft voice as all women do and it's a large courtroom and it's very hard to hear sometimes, so please speak up.

In one case involving a hearing-impaired woman, the Judge agreed after some argument to the use of a computer for the complainant's evidence:

Case Study C

The complainant was hearing impaired and communicated by reading lips, signing and partially speaking. The accused person was charged with two counts of sexual intercourse without consent.

The first trial was aborted after one hour because the court was unable to comprehend the complainant when she gave her evidence.

At the commencement of the second trial, legal argument was heard on the Defence concerns about the complainant's ability to answer questions

⁴⁸ See Case study C, below.

throughout cross-examination. The Judge ruled that the complainant's evidence should be tested and her ability to be a competent witness assessed in the absence of the jury. The prosecutor suggested that the evidence of the complainant be taken electronically, through the use of a computer system. Defence counsel wished to see the system in operation first.

In the absence of the jury, the Judge directed that the complainant first provide evidence as to her inability to give evidence by normal means. The complainant was asked a series of questions regarding her name and address and her ability to give evidence was assessed by the court. The complainant clearly had difficulty in verbally communicating and understanding the questions asked of her. The Judge decided that her evidence must be given by other means.

A computer system was set up and the complainant typed her evidence into the computer. The image was then projected on to a large screen for the court to read. The complainant gave the system a trial run and it proved to be effective.

The Defence counsel then made an application that the trial not proceed as the complainant was not giving her evidence orally. The Defence counsel submitted that as the evidence was typed it was not 'evidence' and thus should not be allowed. The trial Judge rejected this application and ordered that the trial proceed.

Prior to the jury being empanelled and the commencement of the trial, the Defence counsel and Crown Prosecutor agreed on a plea of guilty to one of the two sexual assault charges and to have the other charge against him dismissed. The complainant therefore did not have to give evidence and the accused was sentenced for one offence of sexual assault.

The Judge made the following remarks about the case in sentencing the offender:

Had she [the complainant] been able to express herself more clearly... on this night it may be that this matter would never have arisen.

I must confess that I haven't heard of a case like this being prosecuted.

The sadness of course about this case is that quite clearly because of the victim's profound incapacity to relate a situation this matter came before the courts on a very false footing.

The prosecuting authorities are to be congratulated for their final success in distilling what was the nature of the complaint.

Case 149

Use of screens, video evidence and repositioning of accused

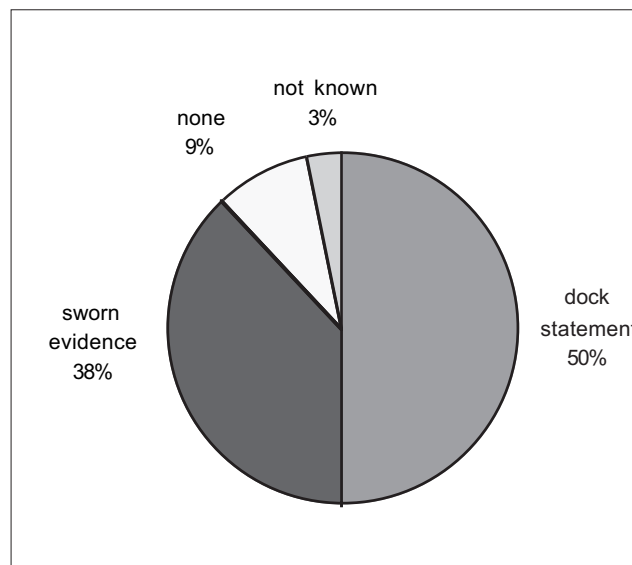
On no occasion in the study was it apparent that a screen was made available to shield the complainant from seeing the accused person while she was giving evidence.

THE ACCUSED PERSON IN COURT

Accused in the research sample had the option to give evidence in the following ways:

- give unsworn evidence or to make an unsworn statement (commonly known as a 'dock statement');⁴⁹
- give sworn evidence;
- remain silent.

Figure 4 Accused's evidence in court (n=111)



In almost all of the cases (97%) which went to trial in the study, the accused was arrested before 10 June 1994. He was therefore eligible to give an unsworn (dock) statement in court.⁵⁰ Figure 4 shows that the accused gave unsworn evidence (a dock statement) in 50% of all

⁴⁹ Provided they were arrested prior to 10 June 1994.

⁵⁰ The research sample covered the period 1 May 1994 to 30 April 1995.

trials in the study and in 38% of trials the accused gave sworn evidence. In 9% of trials the accused exercised his right to remain silent.

Information was collected throughout the research relating to whether the trial Judge commented on the accused giving sworn evidence, unsworn evidence or the accused remaining silent throughout the proceedings.

In most trials (85%) in which the accused gave a dock statement the Judge read the dock statement out to the jury in full during the summing up. Where the accused gave sworn evidence, the Judge in the vast majority of cases (86%), also commented on that evidence. In 11% of trials the Judge made no comment on whether or not and how the accused gave evidence.

Figure 5 Record of Interview introduced by Prosecution (n=110)

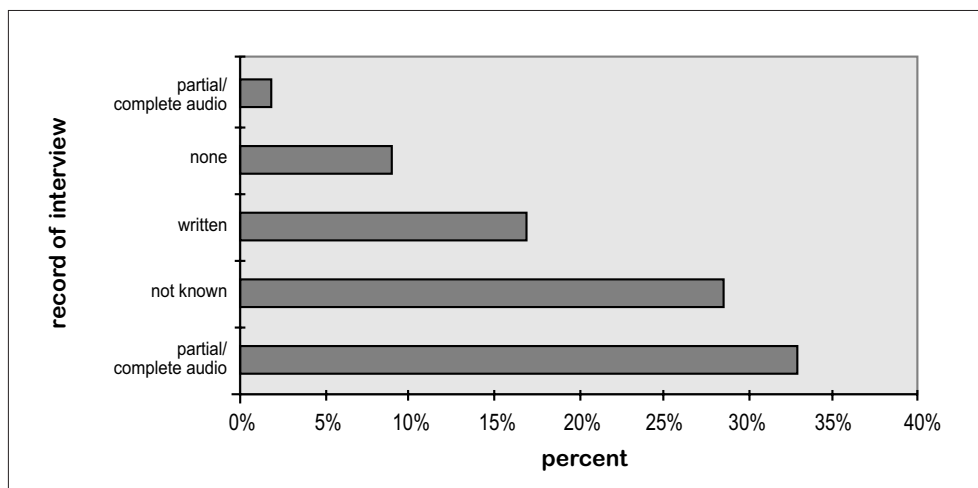


Figure 5 shows that in 19% of trials the accused's written record of interview was introduced by the prosecution. In just over a third of trials all or some of the accused's video-taped record of interview was played in the trial (37%). In two trials (2%) an audio tape of the accused's record of interview was introduced and in 10% of trials it appeared no record of interview evidence was introduced.⁵¹

⁵¹ From the data source used it was often difficult to assess whether written or video/audio records of interview were introduced. The high proportion of 'not known' may include video/audio recorded interviews but could not be confirmed by researchers.

A NOTE ON THE *EVIDENCE ACT* 1995 NSW

Section 29(1) of the *Evidence Act* 1995 NSW provides, subject to obtaining the court's approval, for a party to have a witness testify wholly or partly in narrative form.⁵² If this section were to be used for complainants, an application would be made by the Crown to take advantage of the narrative form during evidence-in-chief. The ALRC explained the rationale for this provision as follows:

*...psychological research lends support to the claim advised at times by witnesses that being tied to answering designated questions tends to result in the distortion of their testimony. Similarly, the claim that a free report would give a more accurate version of the events in dispute is supported. On the other hand, psychological research also confirms the experience of many legal practitioners: a free report by a witness is usually found to be sketchy or incomplete...obviously both these techniques have positive and negative attributes and there would be considerable merit in the courts generally adopting a procedure which incorporated the use of each method to its greatest advantage.*⁵³

Section 29(2) stipulates that the narrative form may be used if the party calling the witness permits it and makes an application to the court for a direction that it be allowed. Thus in sexual assault cases it would be a matter for the consideration of the Crown as to the form in which the complainant's evidence should be given. Odgers notes that 'this [the decision to permit the narrative form] is likely to be rare, since one criticism that is levelled against narrative reporting is that it leads to witnesses, rather than lawyers, taking charge of the proceedings' and that it is more likely to be suitable to those able to observe the rules of evidence such as expert witnesses.⁵⁴

However this provision may allow some scope for sexual assault complainants to have their stories heard during examination-in-chief, particularly if the narrative form was followed by direct examination by the prosecutor to ensure the evidence was complete. To some extent the opportunity for the complainant to give a free report is currently available in a limited form during examination-in-chief but this depends on the sensitivity of the individual prosecutor. Presumably any problems about the observance of rules of evidence by the witness who gives a free report were similarly encountered, and generally successfully overcome, in the giving of dock statements by accused persons.

⁵² S Odgers, *Uniform Evidence Law*, Federation Press, Sydney 1995, p. 42.

⁵³ Australian Law Reform Commission Report No 26, Vol 1, par. 607-9 cited in Odgers (1995) p.43

⁵⁴ Odgers (1995): 43

COMMENT

PRIVACY IN THE COURTROOM

Closed court

Despite applications being made by the Crown to close the court, the study showed that in refusing these applications, the Judge considered many factors, such as the age of the complainant, which are not specified by the legislation as relevant factors in deciding to close the court.

In trials involving women complainants who would be susceptible to difficulties in giving their evidence in a public court, such as women with disabilities, the court was often not closed. In these cases the study found that court personnel demonstrated little understanding of, and were not sensitive to, the difficulties experienced by these women.

As one Crown Prosecutor said:

...if you are going to balance it [closed court] against the interests of justice- and here what we are interested in is the victim being able to give her evidence in a very unfettered way and in a way that does justice to herself and what occurred to her – if she says, “Look, I cannot give the evidence if I know that there are going to be other people in the courtroom’ I really think that is enough for us to be able to close the court...there should be no discretion of the trial Judge to say yea or nay; it should be closed, thinking about whether that affects the accused’s right to a fair trial, I cannot see how it would because he has his lawyer present in court with him.⁵⁵

The Standing Committee on Social Issues said that they ‘had received numerous calls for proceedings in all sexual assault trials to be heard within a closed court’ and were ‘concerned that existing legislative provisions are not exercised sufficiently.’⁵⁶

Non-publication orders

The research shows that section 578A(2) *Crimes (Personal and Family Violence) Amendment Act 1987 NSW* is being applied efficiently and effectively in the court room in line with the spirit of the legislation in those cases in which an application was made for a non-publication order.

⁵⁵ Conlon evidence, 22 July 1994, in Standing Committee on Social Issues, 1996, p.171.

⁵⁶ Standing Committee on Social Issues, 1996, p.170.

SUPPORT PERSONS

The provision of a support person for the complainant, particularly while the complainant gives evidence, is crucial in achieving the objective of reducing the emotional trauma of the court experience. It is a cause of great concern that in two cases examined in the research an application to have the support person remain in the court whilst the court was closed were refused by the trial Judge. In one of these cases the complainant was an Aboriginal woman.

A support person should always be permitted, and allowed to sit near the complainant at all times throughout the court process. The refusal of a Judge to allow a support person to be in court despite the court's closure may act as a deterrent to reporting of sexual assault.

GIVING EVIDENCE

Complainants in this study generally were not able to express their feelings about the sexual assault in court. Their stories were sanitised and confined within the narrow limits defined by the rules of law, both substantive and procedural, and by the discretionary decisions made by the Judge. The question and answer format for giving evidence did not allow the complainant to tell 'her story' and may have led to relevant evidence being omitted or other evidence given the wrong emphasis.

Giving evidence using a narrative form may facilitate more meaningful evidence being adduced in examination-in-chief in sexual assault trials.

LANGUAGE

For many complainants in the study the language of the court room appeared to be problematic. The language of the court caused difficulties for complainants in having their story heard, believed and appreciated, particularly for women from ethnic communities and Aboriginal communities.

QUESTIONS ABOUT SEXUAL ORGANS

The research found that women are asked an enormous number of questions about their sexual organs and the accused's sexual organs. These questions and the level of detail required by the court to substantiate the charge are embarrassing and humiliating for many women to answer and make their overall court experience very traumatic.

A Crown Prosecutor has said:

...there is no point with minute cross-examination about what [the offender] did after he inserted the penis and then what happened, unless they want to establish that the victim was in some way returning the affection.⁵⁷

Of even more concern is the fact that this sort of questioning occurs with monotonous regularity, which may well contribute to the under-reporting of sexual assault. As Dr Sheila L. Martin states:

...there are subtle and powerful factors which may influence the woman's deliberations. For example, less obviously, reporting of sexual assault means that a woman is forced to talk about her body, in a sexualised way, to strangers, and in a situation where the strangers have the power to withhold validation by refusing to treat her as a credible witness. In police interviews, in the court room, and with the doctor, she must discuss otherwise intimate parts of her body. The telling of the story, especially under the distortions of cross-examination, may turn the victim's violation into what has been called a 'pornography vignette'. Understanding this, and the fact that the woman is there in the flesh to experience and feel the humiliation, illustrates how the statement that the trial is a second violation is more than a metaphor.⁵⁸

ALTERNATIVE MEASURES FOR THE COMPLAINANT TO GIVE EVIDENCE

While the study documented several creative mechanisms used by the court to facilitate or enhance the capacity of the complainant to give her evidence, overall the study found the court inflexible and insensitive to the need to provide facilities to make this easier for the complainant. There are arguments against the use of closed circuit television (CCTV) which, for example, include that the practice may unduly disadvantage the accused as the jury may assume that the accused is dangerous and hence guilty. However this effect can be countered by an appropriate direction from the trial Judge.

The Attorney General has established a Witness Taskforce to look at possible reforms to legislation and procedure to reduce the trauma and difficulties associated with giving evidence for vulnerable witnesses. The Taskforce will consider the broader application of

⁵⁷ Latham evidence, 24 May 1994 in Standing Committee on Social Issues, 1996, 153.

⁵⁸ S Martin, *The Social Context of Sexual Violence Against Women and Its Constitutional Dimensions*, Faculty of Law, University of Calgary, Western Judicial Education Centre Conference Materials, Yellowknife, June, 1991, at 10-11.

CCTV to certain other categories of witnesses, such as women complainants in proceedings for crimes of violence.⁵⁹

Information about the few creative mechanisms by which the court allowed women complainants to give evidence could be shared and publicised amongst members of the legal profession and in particular among officers at the DPP.

INTERPRETERS

While the study included only a few trials involving complainants from ethnic communities, it was clear that the issue of availability and use of interpreters is very real.⁶⁰ This view is confirmed by numerous studies, reports and conferences.⁶¹ It has been an issue about which women from ethnic communities and workers advocating for these women have lobbied long and hard. Yet still the issue of interpreters in court has not been comprehensively addressed.

The Chief Magistrate of the Victorian Local Court said recently:

*Women of non-English speaking backgrounds, must be confident that the court can really 'hear' their case...The difficulty is that inevitably, unconsciously and unintentionally, people who do not speak English or don't speak English well end up being treated differently. The court is aware that giving evidence in court is not an enjoyable experience and not being able to speak English only compounds this...it should be remembered that it is in the interests of justice and the effectiveness and efficiency of the court system that adequate facilities and services are provided. Therefore, the promotion and advancement of interpreting services concerns and involves the court.*⁶²

Researchers from the DFW discussed these issues and the preliminary findings of the research with participants at a conference in May 1996 titled *Many Voices Different Stories: Conference on Speaking About Cultural Diversity and Sexual Assault*. There was broad-ranging

⁵⁹ The *Evidence Act* 1995 NSW in section 31 provides for alternative means for being asked questions and giving answers for 'deaf and mute' witnesses stating that a witness who cannot hear adequately may be questioned in any appropriate way and a witness who cannot speak adequately may give evidence by any appropriate means. The Act also provides for the court to make directions about the means by which a witness may give evidence.

⁶⁰ The Standing Committee on Social Issues in its 1996 report noted that 'of all issues faced by non-English speaking background women when confronting the legal system, the issue of interpreters seems to be the most problematic. It impacts upon the delivery of all services, but most importantly the provision of legal services' (p. 171).

⁶¹ Women's Legal Resources Centre; *Quarter Way to Equal: access to legal services for non English speaking women and migrant women*, Sydney, 1994.

⁶² N Papas, Chief Magistrate, 'Changes in the Magistrates' Court' in *Not the Same: Conference proceedings and a strategy on domestic violence and sexual assault for non-English speaking background women*, Melbourne, 1996, pp. 39-40.

discussion about the issues for women from ethnic communities in court as complainants of sexual assault.⁶³ The participants outlined a number of suggestions on how the justice system could better respond to complainants from ethnic communities:

- A complainant from an ethnic community should have access to a victim advocate who speaks her language.
- There should be training for bilingual health educators who could step in as support persons for the complainant at trial.
- Female interpreters should be made available at every point of contact in the criminal justice system.
- A 'Best Practice' model should be developed for Defence counsel with respect to the use of interpreters.
- Cultural awareness training should be compulsory for all lawyers.
- Complainants should have the right to have the entire proceedings interpreted for them including any pre-trial proceedings and committal proceedings.
- A language-specific court support scheme should be developed.
- A complainant should have the right to have her statement translated.
- The DPP should make cultural and language appropriate information about the legal process accessible to complainants.
- Brochures similar to those developed by the Victorian Centres Against Sexual Assault which translate information about the court process into several different languages should be produced for sexual assault complainants in NSW to compliment existing English-language brochures.
- Funding should be provided for an interpreting service specific to women from ethnic communities in violent situations.
- A system of monitoring court trials for cultural sensitivity should be established.

THE ACCUSED PERSON IN COURT

Contact with the accused

In a number of cases in the study it was apparent that there was a need for separate waiting facilities for complainants and their support persons. This issue has been raised in relation to domestic violence complainants and their attendance at court in apprehended violence cases. It is clear that complainants of sexual assault have similar concerns and should be

⁶³ Conference held on 8-9 May 1996 at Macquarie Function Centre, Liverpool, convened by Fairfield Multicultural Family Planning Association.

included as a category of complainants for whom special facilities and safe rooms should be provided.

Accused's evidence

Given the high rate of unsworn dock statements found in the study and the problems highlighted in previous reports with respect to dock statements, the abolition of dock statements across NSW in 1994 may prove to be of significant benefit to complainants in sexual assault proceedings. This should be balanced with the impact of the abolition of dock statements on others in the court system, such as accused persons with disabilities, Aboriginal accused persons and women accused, who may have benefited by the retention of the dock statement.

CONCLUSIONS

The study found that complainants experience trauma, humiliation and significant distress in court as witnesses in sexual assault proceedings. It is noted however that for many witnesses, as well as sexual assault complainants, giving evidence in court is a difficult and stressful experience.

The research found that particular legislative initiatives to minimise distress for sexual assault complainants, such as provisions to close the court, are not systematically used and may in some instances be refused by the Judge using his/her discretion. Some Judges take into account extraneous factors which are not relevant to the issue and which are not specified in legislation.

Complainants undergo lengthy and detailed examination-in-chief and cross-examination and are compelled to give detailed descriptions of sexual acts and body parts, which may not always be necessary to establish elements of the offence. The legislation is structured in such a way as to require complainants to give this evidence in detail to establish the offence. The legislation and court requirements do not take account of women's difficulties in thinking about or describing their sexual acts and body parts. The legislation reflects men's experience and interest in sexual relations with women, without taking into account women's view of their sexuality or their own bodies.

The study did document some exceptional cases in which the court provided flexibility and showed sensitivity and an awareness in dealing with the difficulties faced by the complainant in giving her evidence.

SUMMARY

- Sexual assault trials lasted on average four days.
- More than half of all trials (56%) were heard in an open court.
- One in ten trials (10%) were closed for the entire proceedings, 17% were closed for the evidence-in-chief and cross-examination and 7% were closed for the cross-examination of the complainant only.
- Some Judges took into account irrelevant matters when deciding about whether to close the court.
- Non-publication orders were granted in 57% of trials, representing all the trials in which an application was made.
- Support persons were normally allowed to remain in the court room with the complainant despite the court closure.
- Complainants gave evidence-in-chief on average for about one hour.
- Complainants were cross-examined on average for about two hours.
- Complainants were re-examined for about six minutes on average.
- In 65% of trials there were on average, two interruptions to evidence because of the distress suffered by complainants. This occurred more often for complainants with disabilities and complainants from Aboriginal communities.
- Almost every complainant was asked questions about her own sexual organs or the sexual body parts of the accused person, with complainants being asked 16 questions on average about contact with their sexual organs or the accused's sexual organs.
- The court rarely provided for alternate mechanisms for the complainant to give evidence even when it was clear that the complainant could not give meaningful evidence because of her disability or language.
- Many accused persons (50%) gave their evidence by way of an unsworn statement (dock statement) which has since been abolished.
- The Judge almost always commented on the evidence given by the accused person, whether sworn or unsworn, and in 85% of trials in which a dock statement was given, re-read the statement out in full to the jury in summing up.
- In more than one third of trials (37%) part or all of the accused's video-taped record of interview was introduced in the trial by the prosecution.

RECOMMENDATIONS

RECOMMENDATION 1

That the Witness Taskforce established by the Attorney General:

- promote the use of section 29(2) of the *Evidence Act 1995* NSW amongst judicial officers and Prosecution Counsel to allow the complainant to deliver her evidence in narrative form;
- develop and encourage alternative mechanisms by which complainants may give their evidence such as through the production of written statements, closed circuit television and computer technology;
- examine the provision of amplifiers for all courtrooms throughout NSW to provide ready access for complainants when giving evidence should their audibility be an issue.

RECOMMENDATION 2

In preparing a complainant for court, that complainants be informed by witness assistance officers, court support workers, counsellors, DPP solicitors or Crown Prosecutors of:

- their entitlement to request breaks during giving evidence;
- the requirement, for the purposes of establishing the elements of the offence, to recount in precise detail the sexual assault including the explicit and detailed parts of the act of sexual intercourse and sexual penetration;
- their entitlement to request the Crown Prosecutor to make an application to close the court to protect them from undue distress or embarrassment;
- their entitlement to request the Crown Prosecutor to make an application to have a support person present despite court closure.

RECOMMENDATION 3

That the Judicial Commission of NSW provide education to judicial officers which refers to:

- gender issues and gender biased conduct and also looks at experiences of a diversity of women with emphasis on women from Aboriginal and ethnic communities and women with disabilities;

- the need for sensitivity, privacy and the importance of a support person in sexual assault trials to reduce the trauma and difficulties experienced by complainants in sexual assault matters;
- appropriate language and behaviour of Judges which will assist in eliminating gender bias in the courtroom;
- their responsibility as Judges to manage the courtroom and intervene where legal counsel engage in gender-biased conduct;
- relevant legislation in sexual assault proceedings and the spirit and intention of such legislation.

RECOMMENDATION 4

That NSW Law Schools, the NSW Bar Association and the NSW Law Society include information and research material in professional responsibility, clinical and skills training courses as well as other substantive law courses to make students and lawyers aware of the subtle and overt manifestations of gender bias directed towards complainants.

RECOMMENDATION 5

That the Attorney General make legislative change to effect the following:

- that the judicial discretion to close the court in sexual assault proceedings be removed;
- that if the court is closed a support person be always exempted from this order to be available to support the complainant throughout the court process;
- that where in any sexual assault proceedings in the District Court of NSW the complainant gives evidence using alternative mechanisms such as those listed above, the Judge be required to instruct the jury that the procedure is a routine practice of the Court and that they should not draw any inference as to the defendant's guilt from the use of the procedure.

CREDIBILITY

Cross examination of the complainant and indeed witnesses in most trials can often amount to a gruelling test of the witness' credibility and character. The testing of the complainant's evidence is an important requirement in any trial. The question is whether the cross-examination ordeal endured by sexual assault complainants is greater than for other witnesses in non sexual assault matters.

A witness' credit¹ refers to her 'veracity in the witness box, her truthfulness as a witness'², and whether the witness is accurate, sincere, consistent and honest. Credibility, in evidence law, is a much broader notion which refers to the general believability of the witness. The *Evidence Act 1995 NSW* defines credibility as including the witness' ability to observe or remember facts and events. For the purposes of this report credit and credibility will be used interchangeably.

Testing of a witness' credit/credibility is not the same as testing her character. Credit/credibility is a much narrower legal concept than character and care should be taken not to confuse credit with character.³ Generally speaking, a witness' character is irrelevant to matters arising in the trial and therefore not inadmissible in evidence. In evidence law, if evidence is not relevant to the facts that are in issue in the trial, it will only be admissible if it is relevant to the credit of the witness. There are limitations on a party's right to discredit witnesses.⁴

However much of the complainant's credit that is tested in a sexual assault trial is unrelated to her powers of observation and veracity. Her manner of dress, her perceived reaction to the crime and her lifestyle seem to be unfairly deemed relevant to the determination of the defendant's guilt or innocence. The complainant often has the experience of being forced or bullied into proving *herself* innocent.

A witness' credit is tested and at times undermined through the process of cross-examination by Defence counsel. Cross-examination follows the witness' examination-in-

¹ Note as the matters observed were conducted during the period April 1994 to April 1995 the *Evidence Act 1995 NSW* definition of credibility did not apply. Thus any reference to credit or credibility in this paper relates to the common law notion of credit as set out in J Hunter and K Cronin, *Evidence, Advocacy and Ethical Practice: A Criminal Trial Commentary*, Butterworths, Sydney, 1995, pp. 323-325.

² *Veracity* refers to a witness's conformity to truth or fact: Hunter and Cronin K, (1995) p. 323.

³ *ibid.*, pp. 323-324.

⁴ *ibid.*, pp. 323-324.

chief. In cross-examination a witness' evidence can be tested to achieve the following objectives:

- to destroy directly the evidence of the witness;
- to destroy indirectly the evidence of the witness by attacking her credibility;
- to elicit admissions about facts in the matter;
- to set the mood or theme of the cross-examiner's case;
- to establish a defence; and
- to destroy the evidence of other witnesses.

While the cross-examination should be directed to relevant matters which are in issue at the trial, often cross-examination goes beyond this. As Hunter and Cronin state:

Although it is important in the interests of the administration of justice that cross-examination be contained within reasonable limits, a Judge should allow counsel some leeway in cross-examination in order that counsel may perform the duty, where counsel's instruction warrant it, of testing the evidence given by an opposing witness.⁵

Defence counsel in cross-examining a witness will develop lines and themes of questioning but there are limits to the style of these questions: lawyers do not have unrestricted rights to persecute or pressure witnesses. NSW now has legislation which disallows questions which are unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.⁶ Section 41 of the *Evidence Act 1995* NSW limits cross-examination by requiring questions which are relevant to the witness' credibility and within standards of propriety.

CURRENT STUDY

The study documents questions asked of complainants in sexual assault proceedings. The results of the study are presented as themes commonly used by Defence counsel to undermine the credibility and attack the credit of the complainant.

Table 1 below sets out the results of the present research. Each theme of cross-examination is discussed in detail below.

⁵ *ibid.*, p. 376.

⁶ Section 41 of the *Evidence Act 1995* NSW; Hunter and Kronin (1995), p. 341; note that the *Evidence Act 1995* NSW was not in operation during the period of the current study.

Table 1 Themes of cross-examination

Theme of questions in cross-examination	Median number of questions	Highest number of questions to a complainant (n=710)	Number of complainants cross-examined (n=108 trials)	Percentage of complainants cross-examined (n=108)
Motive for 'false report'	5	37	58	53.7%
Motive being victims compensation	2	43	35	32.4%
Sexually provocative behaviour	5	43	63	58.3%
Drinking on the day of offence	9	84	65	60.2%
General drinking/drug use habits	3	178	47	43.5%
Style of clothing	4	42	47	43.5%
Being in location where initial contact made or offence occurred	4	28	48	44.4%
Complainant's contribution to the offence	2	18	35	32.4%
Lying	7	98	91	84.3%
Resistance	5	60	37	34.3%
Lack of resistance	7	54	76	70.3%
Injuries (or lack of)	5	25	52	48.1%

MOTIVES FOR MAKING A FALSE REPORT

A common theme explored in the cross-examination of the complainant was the possible motives for making a false report. Suggestions that the complainant was lying about the sexual assault or had ulterior motives for bringing the defendant to court often arose despite evidence of significant injuries and damage. As Table 1 shows, in over half (54%) of the trials studied in which the complainant gave evidence, she was cross-examined about a possible motive for making a false report to the police. Complainants were on average asked five questions during cross-examination about whether they had made a false report and their motives for this, with the maximum number of questions regarding this issue to any one complainant being 37. In just under a third of trial matters (32%) the issue of delay in complaint was raised by the Defence in conjunction with questions of motives for false report.⁷ A vast array of motives were suggested by the Defence for why the complainant would fabricate an allegation of sexual assault including:

⁷ It is interesting to note that in the present study it was found that 83% of complainants told someone about the sexual assault within 12 hours of its occurrence and more than half reported the sexual assault to the police within five hours of its occurrence.

- to gain revenge on the accused;
- because the complainant felt guilty after consensual sex with the accused;
- to legitimate separation from husband and gain Australian residency;
- to evade paying money owed to the accused;
- to cover up for adulterous behaviour;
- because of property settlement or child custody proceedings in the Family Court.

In one case where the complainant was sexually assaulted by a gang of men it was suggested that the complainant was motivated to fabricate a complaint because she was embarrassed that other people were watching. Defence counsel put the following to the complainant during cross-examination:

Complainant *Your complaint to them at that stage was really that you had had intercourse with (no.of) men while they watched...and that is really what I suggest lies at the heart of your complaint in this case. It was the watching by all the other men. That's true isn't it?*

Complainant *No, I said (no. of) guys made me.*

Defence counsel *Yeah, but it was (the fact) they watched that worried you wasn't it?*

Complainant *No.*⁸

In another case the complainant was allegedly sexually assaulted by a tradesman who came to the house one evening. The situation was one of typical 'stranger' assault as the complainant had no previous contact with the accused. The complainant complained immediately to the police and showed significant signs of distress. Despite these factors the complainant was asked 19 questions during cross-examination about her possible motives for allegedly fabricating the report of sexual assault. The Defence line was that she had fabricated this story to anger her de facto husband.

Case 56

⁸ Case 83.

VICTIMS COMPENSATION AS MOTIVE FOR MAKING A FALSE
REPORT

A common motive suggested by Defence counsel for a complainant making a false report was that she sought financial gains available to her through an award of victims compensation. As with any victims of crime, complainants of sexual assault can apply to the Victims compensation Tribunal for compensation within two years of the offence occurring subject to certain conditions being met. One third (32%) of complainants who gave evidence at trial were cross-examined about false complaint in order to make financial gain through victims compensation. Complainants who were cross-examined on this issue were asked an average of two questions each about victims compensation with the maximum number of questions asked of any one complainant being 43.

The complainant in this trial was sexually assaulted by someone known to her at his home. A neighbour gave evidence in this case that she had heard screaming at the time of the sexual assault. The complainant reported to a friend and the police within an hour of the occurrence of the offence. The complainant suffered a broken arm as a result of the offence and her doctor gave evidence at the trial that she hyperventilated in his surgery from distress when she visited his rooms just over an hour after the offence.

Despite this, the complainant was cross-examined about whether victims compensation was her motive for making a false complaint.

Defence counsel *Have you made a claim for compensation from the Government?*

Complainant *No.*

Defence counsel *Do you intend to do so?*

Prosecution counsel *I object to that your Honour.*

Judge *I think it is a legitimate question [Crown]*

Defence counsel *Do you have any assets?*

Prosecution counsel *I object to that your Honour.*

Judge *It goes to possible motives [Crown] – I let it through.*

(Further questions followed from Defence counsel regarding cash savings etc)

Complainant *Is this really relevant?*

Prosecution counsel *Are these really relevant – we are talking 1994.*

Judge *[Crown] isn't it legitimate to raise possible motives – isn't cash a possible motive?*

Case 36

In another case in which there was evidence of significant injuries to the complainant and in which the complainant had run naked from the deserted car park where she had been forcibly taken, across fields to the nearest house, and complained immediately, the Defence counsel asked:

*Is there any connection in your mind of the prosecution of this accused and money you may receive from compensation?*⁹

In one case in the research sample the complainant had been previously sexually assaulted by someone other than the accused. This charge had been proven. The full details of that previous sexual assault and follow up counselling records found on the victims compensation file were admitted into evidence by the Judge, despite protestations from the Prosecution, as evidence to prove that the complainant had a motive which was to submit another compensation claim for her financial advantage. The Judge ruled that the Defence was able to ask whether she received 'thousands of dollars' for the previous victims compensation claim:

Defence counsel *Did you receive some thousands of dollars in relation to that victims compensation application?*

Complainant *What do you mean by thousand of dollars?*

Judge *Well you tell us what you mean – the exact amount.*

Complainant *Six thousands of dollars.*

Judge *Thank you.*¹⁰

In yet another case in which it was alleged by the Defence during cross-examination of the complainant that the complainant's motive for fabricating an allegation of sexual assault was victims compensation . The complainant was asked the following:

⁹ Case 55.

¹⁰ Case 146.

*Are you aware that there is a person in your street who claimed Victims compensation?*¹¹

A Crown Prosecutor in one case successfully argued against the relevance of cross-examining on victims compensation. The Prosecutor said the following during legal argument:

Essentially the objection is one of relevance your Honour. Whether or not victims of crime are entitled to compensation is not a relevant matter this jury need consider. I understand him (Defence counsel) to be saying it goes to motive. However in this situation your Honour the complaint could not possibly have been anymore immediate but for I suppose the complainant bellowing through the house at the time the event was occurring. The complaint is made to her friend, the police are there within an hour or so. It is difficult in the extreme to expect and it just flies in the face of common sense, in my submission your Honour, to suggest that a complainant like this at that hour of the morning has suddenly thought she might be entitled to compensation which is why she is raising this 'hue and cry' with her friend and the police and going to a doctor, going to motive.¹²

The Judge asked the Defence counsel for his response. The Defence counsel replied:

Your honour, with the usual skill and erudition of the Crown, he's clearly got me beaten on this one. I'll withdraw the question having thought about it your Honour.¹³

In another case the complainant herself commented on the relevance of questions relating to victims compensation:

Defence counsel *Do you intend to claim compensation?*

Prosecution *I object to that your Honour*

Complainant *No that's all right, I'll answer it. That's got nothing to do with this. I am just seeking a bit of justice.*

Case 97

¹¹ Case 96.

¹² Case 148.

¹³ Case 148.

INTIMIDATION, HUMILIATION AND IMPROPER QUESTIONING

In the trials examined in this research, complainants were intimidated and humiliated by questioning from the Defence counsel.

The research found that Defence counsel frequently appeared to be unnecessarily aggressive in cross-examination of the complainants resulting in complainants being needlessly humiliated by the process:

Defence counsel	<i>You asked if he would like some toast?</i>
Complainant	<i>I did.</i>
Defence counsel	<i>And what he'd like on it?</i>
Complainant	<i>I did.</i>
Defence counsel	<i>Why?</i>
Complainant	<i>I was in shock, I don't know why.</i>
Defence counsel	<i>Oh come on, you can do better than that!</i>
Complainant	<i>I was in shock (screaming).</i>
Defence counsel	<i>This is a man who'd raped you the night before you've told us.</i>
Complainant	<i>I was in shock.</i>
Defence counsel	<i>Who had forced you to have non-consensual intercourse.</i>
Complainant	<i>I was in shock.</i>
Defence counsel	<i>Who'd stuck his fingers in your vagina without your permission?</i>
Complainant	<i>I was in shock (crying).</i>
Defence counsel	<i>And you're making him coffee and toast the next morning?</i>
Complainant	<i>I was in shock.</i>
Defence counsel	<i>You're going to stick to that are ya?</i>
Complainant	<i>Yes I am (screaming).</i>
Defence counsel	<i>Are my questions annoying you?</i>
Complainant	<i>Yes they are.</i>

[CREDIBILITY]

- Defence counsel *Was it annoying you on the night when you said he had non-consensual sexual intercourse and put his fingers in your vagina?*
- Complainant *Yes.*
- Defence counsel *Does it annoy you as much as my questions?*
- Complainant *Yes.*
- Defence counsel *Well, why didn't you yell?*
- Complainant *Because I was in shock and I was scared.*
- Defence counsel *You've been yelling at me haven't you?*
- Complainant *Yes.*
- Defence counsel *You think your mother would've heard you if you said things in the same loud voice that you've been using here?*
- Complainant *I don't know. I didn't scream.*
- Defence counsel *Yes but you know your mother would've have heard you if you said things in the same loud voice that you've been using here. And you didn't scream because you didn't want them to come out did you?*
- Complainant *I was in shock, I was embarrassed, I was humiliated, I felt dirty (crying).¹⁴*
- And in another matter:
- Defence counsel *You're not simple are you?*
- Complainant *What do you mean by simple?*
- Defence counsel *A simple person is one who's not very bright.*
- Complainant *Are you trying to say I'm dumb are you?..I ain't slow all right...I ain't slow (shouting and crying) .*

Case 63

The above trial had to be interrupted at this point because of the victim's distress. The Crown Prosecutor didn't question the relevance of the questions.

¹⁴ Case 43.

One complainant was asked very early in cross-examination by Defence counsel whether she had done acting or drama classes at any time. The question was asked twice and the complainant, after expressing disbelief, answered that she had done some drama as a part of her schooling in Year 9.¹⁵ The questions were clearly designed to undermine the complainant and imply that she was 'play acting'. There was no objection from the Crown Prosecutor.

Many questions asked by the Defence counsel and allowed by the Judge appeared to lack sensitivity to the complainant's position.

Defence counsel	<i>Did you say to police 'I noticed sperm, cum, whatever you want to term the disgusting stuff on my upper inner thigh'?</i>
Complainant	<i>Yes.</i>
Defence counsel	<i>What is disgusting about sperm?</i>
Prosecution counsel	<i>Oh your Honour I object to that, that is offensive.</i>
Judge	<i>Do you want to press that question?</i>
Defence counsel	<i>It is submitted it is not offensive your Honour with respect.</i>
Judge	<i>I allow the question.</i>
Defence counsel	<i>What was disgusting about sperm in itself?</i>
Complainant	<i>Given the context of why I had (defendant's) sperm on my body I did indeed believe that sperm was disgusting on that night.¹⁶</i>

And in another case:

Defence counsel	<i>And it was then that you pushed your pants and your underpants down...</i>
Complainant	<i>No (screaming, crying)!</i>
Defence counsel	<i>That's what you did didn't you?</i>

¹⁵ Case 36.

¹⁶ Case 146.

[CREDIBILITY]

Complainant *I did not do that. (crying) He forced himself upon me (screaming). I did not consent! No means No!*

Defence counsel *Been reading the newspapers have you?*

Complainant *No – it's common knowledge (crying)!¹⁷*

In one case the Judge humiliated the complainant in front of the jury because she did not understand a question asked of her by the Defence counsel.

Defence counsel *The bathroom is at the southern end of the building and there is a neighbour's property immediately adjacent thereto?*

Complainant *I don't know what you mean by adjacent.*

Judge *Did you say you went to X university?*

Complainant *Yes*

Judge *Did you get a degree there?*

Complainant *I got a Bachelor of Science.*

Judge *Yes, thank you.¹⁸*

One particular method of opening cross-examination adopted by Defence counsel in one hearing documented by the research was very effective in explaining to the complainant and the jury the role of the cross-examiner. In this case, counsel for the Defence opened his cross-examination with the following comments:

You know don't you, that I appear for the accused. You know that I'm the barrister engaged to represent him here in these proceedings, and that its my job to represent his interests in these proceedings and to ask you questions and to test you, your version, your account. If you feel uncomfortable, or if you want a glass of water or a break please feel free to ask his Honour at any time...see, during the course of me asking you questions, you understand, I'm going to be putting questions to you on matters that I say on instructions from the client, happened. Do you understand that? I will put propositions to you, and if you don't agree with them please say so and tell me what your observations are about what I'm putting to you.¹⁹

¹⁷ Case 43.

¹⁸ Case 146.

¹⁹ Case 63.

SEXUALLY PROVOCATIVE BEHAVIOUR

In over half (58%) the trial matters the complainants were asked if they had flirted or engaged in 'sexually provocative' behaviour towards or in the presence of the accused. Complainants who were cross-examined on this issue were asked an average of five questions on the topic with the maximum number of questions asked of any one complainant being 43.²⁰

In one trial the complainant was assaulted after accepting a lift home in a friend's car where she sat with the accused in the front seat:

Defence counsel *You realise of course that the position you took you were resting on his penis?*

Complainant *No.*

Defence counsel *That would have been likely wouldn't it from the knowledge you have of human anatomy?*

Complainant *Well I didn't take any notice.*

Defence counsel *How do you describe your posture – sitting between his legs?*

Complainant *Yes.*

Defence counsel *And as you moved into that position you would have realised wouldn't you, that you were sitting on his penis?*

Complainant *I wasn't sitting on it.*

Defence counsel *Weren't you?*

Complainant *No.*

Defence counsel *You were sitting in between his legs?*

Complainant *Yes.*

Defence counsel *You know where a penis is to be found on a male don't you?*

Complainant *Yes.*

Defence counsel *Nothing unusual about that position that struck you, nothing suggestive?*

²⁰ Case 48.

[CREDIBILITY]

Complainant	No.
And later:	
Defence counsel	<i>Didn't it all start when you got between that man's legs Miss?</i>
Complainant	No.
Defence counsel	<i>You drove up and down the western suburbs with you sitting between that man's legs in the passenger seat...and during none of this time do you remember where his hands were?</i>
Complainant	<i>They weren't on me.</i>
.....	
Complainant	<i>It didn't matter to you that in order to sit in the front you had to sit between a strange man's legs?</i>
Complainant	No. ²¹

ALCOHOL AND OTHER DRUGS

The study looked at two types of questions asked about drinking and substance abuse: complainant's **general** drinking habits and drinking **on the day of the offence**.

Over half (60%) of the complainants whose cases went to trial were asked questions regarding their drinking **on the day of the offence**. Complainants who were cross-examined on this issue were asked an average of nine questions on the topic with the maximum number of questions asked of any one complainant being 84.

Just under half (44%) of complainants were also asked questions regarding their **general drinking** or **drug use habits** with one complainant being asked 178, and another 105 questions along these lines.²² This complainant, who was a woman from an Aboriginal community, became exasperated at the Defence questioning of her general drug use and commented:

Complainant	<i>That's regarding amphetamines sir, not regarding what happened to me on the evening.</i>
-------------	---

²¹ Case 55.

²² Cases 40 and 65.

[HEROINES OF FORTITUDE]

- Defence counsel *Look I am asking you about amphetamines.*
- Complainant *Yes sir that's all you have been asking me. Why don't you ask me something that's relevant to this case?*
- Defence counsel *Look [Complainant] would you answer the question please.²³*

One complainant commented on the relevance of questions relating to her drinking on the night of the offence during cross-examination:

I can't see that it matters whether I had four drinks or five drinks – it's not going to change the fact that he raped me.²⁴

Another complainant who was asked 20 questions about her drinking on the day of the offence commented:

Whether I was affected by alcohol I still know what rape is and being punched across the face unexpectedly is not something that happens to you everyday.²⁵

CLOTHING

Just under half of complainants (44%) were asked details of the style of clothing they were wearing at the time of the offence. An average of four questions were asked of complainants who were cross-examined on this aspect, with one complainant being asked 42 questions on this issue.²⁶

One exchange was as follows:

-
- Defence counsel *(Your swimmers) gripped your skin?*
- Complainant *It was just a normal pair of swimmers.*
- Defence counsel *Yes well, it gripped your skin?*
- Complainant *It was yeah, just the normal kind of swimmers.*
- Defence counsel *And did you wear your swimmers round at X's place?*
- Complainant *Yes.²⁷*

²³ Case 65.

²⁴ Case 138.

²⁵ Case 122.

²⁶ See section on minority status in this chapter.

²⁷ Case 148.

And in another case where the Defence counsel questions the Complainant about her jeans:

Defence counsel	<i>They are quite tight fitting?</i>
Complainant	<i>No, baggy.</i>
Defence counsel	<i>Baggy are they?</i>
Complainant	<i>Yes.</i>
Defence counsel	<i>What baggy in the leg?</i>
Complainant	<i>Yes.</i>
Defence counsel	<i>Baggy round the hip or tight round the hip?</i>
Complainant	<i>They fit comfortably round the hip but they have baggy legs.</i>
Defence counsel	<i>And where they fit comfortably, they display your figure?</i>
Complainant	<i>My waist maybe.</i>
Defence counsel	<i>And your back side. They hug your back side don't they?</i>
Complainant	<i>Not tight no.</i>
Defence counsel	<i>You also had the white top on that's shown in the photograph?</i>
Complainant	<i>Yes.</i>
Defence counsel	<i>That material is rather flimsy – is that true?</i>
Complainant	<i>Yes.</i>
Defence counsel	<i>And you had a body suit underneath the shirt?</i>
Complainant	<i>Yes.²⁸</i>

BEING IN LOCATION WHERE CONTACT WAS MADE OR OFFENCE OCCURRED

Just under a half of the complainants (44%) were asked about their reasons for being in the location where the initial contact was made with the accused.²⁹ An average of four

²⁸ Case 122.

²⁹ Initial contact refers to the first point of contact made between the complainant and the accused which begins the series of continuous events leading up to the sexual assault.

questions were asked of complainants who were cross-examined on this issue.

One complainant was asked 28 questions about why she was at the location where the initial contact with the accused was made:

Defence counsel *Earlier that evening you'd been offered a lift home hadn't you?*

Complainant *Yes.*

Defence counsel *You didn't take that opportunity. Any reason for that? Didn't you have a child to look after?*

Complainant *He was babysitted.³⁰*

During the cross-examination of one complainant the Defence questioned the witness about why she went into her bedroom to obtain a tissue. The facts of the case were that the accused followed the complainant into the bedroom and assaulted her:

Defence counsel *Is it the case that you walked into the bedroom?*

Complainant *Yes I did*

Defence counsel *And you say that was for the purposes of getting a tissue?*

Complainant *That's exactly right – I suffer from sinus and went into the bedroom to get a tissue.*

Defence counsel *Is it not the case that you led the accused into the bedroom?*

Complainant *I did not.*

Defence counsel *Are there tissues kept in any other part of the house?*

Complainant *No – they have always been kept in the bedroom.*

Defence counsel *What about toilet tissue?*

Complainant *The toilet is off the back verandah*

Defence counsel *What about the bathroom?*

Complainant *No.*

Defence counsel *There are not tissues in the kitchen?*

Complainant *No.*

³⁰ Case 47.

[CREDIBILITY]

- Defence counsel *There are no napkins in the kitchen?*
- Complainant *Paper napkins, yes.*
- Defence counsel *Why didn't you blow your nose on a paper napkin?*
- Complainant *Because I use a tissue – I don't use paper napkins*
- Defence counsel *At the point where you decided to walk into the bedroom the accused had already attempted to kiss you hadn't he?*
- Complainant *Yes he had.*
- Defence counsel *Did you think to yourself at that stage you should avoid the bedroom?³¹*
-

In one case where the complainant was assaulted whilst walking home at night the Defence counsel cross-examined her about why she was walking in that area at the time:

- Defence counsel *See, it's not a very safe area to walk down there is it?*
- Complainant *But I've done it before, that's why I did it – that's why I did it by meself again.*
- Defence counsel *It's a very unsafe area to walk at night...isn't it?*
- Complainant *Well I haven't been here that long and I've done it a couple of times.*

Case 70

CONTRIBUTION TO THE OFFENCE

A total of 32% of complainants were asked questions which suggested that they were responsible for or contributed to the offence. Complainants who were cross-examined on this issue were asked an average of two questions on the topic with the maximum number of questions asked of any one complainant being 18.

In one case it was suggested to a young complainant by the Defence counsel that she should have been aware of the 'danger' of swimming in a pool near a group of boys:

- Defence counsel *You didn't think the fact that there were four or five young girls in this pool might interest the boys who were there?*
-

³¹ Case 145.

Complainant No.

Defence counsel *Anyway you didn't see any problem about 12.30 at night going into the swimming pool with a group of drunken boys nearby did you?*

Complainant No.

Case 108

BEHAVIOUR FOLLOWING THE ASSAULT

There were several cases in which it was suggested to complainants by Defence counsel throughout cross-examination that they did not react 'normally' or 'appropriately' to the assault.

For instance in one case where the complainant went to bed directly after the assault the Defence counsel questioned as follows:

Defence counsel *Did you have a shower around 4.30 [am]?*

Complainant *No. I haven't got a shower I've only got a bath.*

Defence counsel *Was there any reason why you did not have a bath at half past four in the morning?*

Complainant *I was very tired.*

Defence counsel *You'd just been raped, hadn't you (shouting)?*

Complainant *I'd been raped 10 times before that*

Defence counsel *You went to bed?*

Complainant *I know what I done. I know I was there, I went straight back to bed.*

Defence counsel *See, you told the police that you felt dirty and disgusted.*

Complainant *I felt dirty and disgusted every time [the accused] touched me but I didn't wash every time.*

Defence counsel *You certainly didn't this time, did you?*

Complainant No.³²

³² Case 103.

PREVIOUS CRIMINAL HISTORY

Although not quantified in the present research, the study found several cases in which the complainant was found to have previous convictions and was cross-examined on the details of that previous criminal behaviour. In one case, prior to the questions being asked of the complainant, the Judge heard legal arguments about the matter. The Defence counsel argued that the convictions went to the complainant's credit saying that 'each of the matters involves some form of dishonesty your honour'. The Crown Prosecutor objected to the questions stating that the questions were irrelevant. The Judge determined 'I'll allow it, Mr Crown, this is very much a one-way street isn't it, happens to all witnesses except an accused.'³³

In another case the complainant was cross-examined on the details of a shop lifting conviction.³⁴ In a matter in which the complainant was intellectually disabled the exchange in the court room was as follows:

Defence counsel *Can you tell me if you were convicted at...Local Court of imposition?*

Complainant *What's that got to do with this case?*

Judge *Just answer the question please.*

Complainant *I don't feel like answering that question!*

The Defence counsel at a later point said to the complainant 'I'm putting to you that you're bunging on a front of honesty'.

CONFUSION/PRIOR INCONSISTENT STATEMENTS

The credibility of the complainant was often attacked where the complainant revealed confusion or appeared to be presenting a different version of the small details of the assault. This is the case with all witnesses in all trials who reveal confusion or inconsistency in their statements. This behaviour was seen to be relevant to the credit of a witness.

In the present research Defence counsel worked on this in cross-examination of the complainant and the trial Judge then reinforced the issues by referring to these peripheral issues as highly pertinent to the complainant's credit. Some examples of the small details (which many people would have difficulty recalling even in a situation of consensual sex)

³³ Case 103.

³⁴ Case 83.

related to questions about exact times, exact positions of fingers, penises, clothing and duration of non-consensual intercourse during the sexual assault.

One complainant, when questioned about her estimate of the time and duration of each incident of sexual assault in cross-examination answered 'I don't know, to me it's just one big episode'.³⁵ Many complainants became highly confused and distraught when they could not recall these details precisely. The research showed that much time was taken up questioning the complainant about relatively minor inconsistencies between her trial evidence and what she said at committal or in her initial statement to the police which may have been taken up to five years previously.

One complainant explained the difficulties of remembering the details in court:

*What I said and what is in my statement is so much the same thing. You know, I'm sitting up here and I'm not enjoying this and it's very stressful for me.*³⁶

In one case where the complainant was allegedly sexually assaulted by a gang of young men the Defence ridiculed her for not recalling details of each of the attackers:

Defence counsel *Was my client circumcised?*

Complainant *Sorry?*

Defence counsel *Was my client circumcised?*

Complainant *I don't know.*

Defence counsel *You just didn't make any observations?*

Complainant *No.*

Defence counsel *The portion of his body being his penis that was, you say, about to enter you...didn't notice that?*

Complainant *No.*

Defence counsel *One way or the other was he wearing anything?*

Complainant *What do you mean?*

³⁵ Case 29.

³⁶ Case 138.

[CREDIBILITY]

Defence counsel *Did he have a watch on?*

Complainant *I don't remember.*

Defence counsel *I'd suggest to you that every occasion you've seen my client in court and otherwise he is wearing a black watch on his left hand?*

Complainant *I've never paid attention to his watch.*

Defence counsel *You didn't pay any attention to his watch?*

Complainant *No.*

Defence counsel *You didn't notice whether he had a prominent scar on his leg?*

Complainant *No.*

Defence counsel *Well, let's think of the other things you might've paid attention to. You didn't pay attention to the penis that was about to enter you, is that right?*

Complainant *No.³⁷*

In one case the Judge interrupted the Defence counsel after there had been much questioning about the incident and the complainant kept indicating that she has blocked out much of the incident. The Judge said:

I'm going to stop this line of cross-examination, it has been exhausted as far as I am concerned. You've got on more than one occasion the witness saying she doesn't remember how the jeans came off. You've made your point. It's a matter for comment to the jury at the appropriate time.³⁸

LYING

Given that historically the sexual assault complainant has been regarded as inherently untrustworthy and unreliable, it is no surprise that a common theme of cross-examination was that the complainant was lying or making the story up. A majority of complainants (84%) were asked questions as to whether they were lying or making the story up with the average number of questions of those complainants being seven. One complainant was asked 73 and another 98 questions about whether she was lying about the complaint she had made.

³⁷ Case 82.

³⁸ Case 21.

Examples of typical exchanges follow:

- Defence counsel *Now you told us yesterday a variety of different stories about when you stopped using amphetamines. Now which one is it that you are voting for today?*
- Complainant *Well, the last 12 months or so I've been clean.*
- Defence counsel *You're prepared to sit there calmly in the witness box and tell lies and then when it suits you, you throw a little tantrum to assist you don't you?³⁹*

And in another case:

- Defence counsel *You weren't in shock, you were having consenting sexual intercourse on the lounge room floor weren't you?*
- Complainant *I was not.*
- Defence counsel *You see this is a tissue of lies by you isn't it?*
- Complainant *It is not (crying) a lie – why would I go to the police station and make a 20 page statement and be there for 8 hours and go through hell for this! (screaming)⁴⁰*

RESISTANCE, LACK OF RESISTANCE AND INJURIES INCURRED

One third (34%) of complainants were asked whether they physically resisted during the assault with the average number of questions regarding resistance put to complainants who were cross-examined about this being five. One complainant was asked 60 questions on her resistance during the attack.

Over two thirds of complainants (70%) were asked questions relating to their *lack* of resistance during the assault. Complainants who were cross-examined on their lack of resistance were asked an average of seven (7) questions about the topic with the maximum number of questions asked of any one complainant being 54.

One exchange in cross-examination was as follows:

- Defence counsel *You didn't scream or anything then? You didn't yell out for help?*

³⁹ Case 40. This complainant was asked 178 questions regarding her general drug use habits and it was put to her 70 times that she was lying or making the story up.

⁴⁰ Case 43.

Complainant *I was panicked. I didn't know what to do. I couldn't get out of the situation. What was I supposed to do?*

Defence counsel *How were you trying to stop him? Were you kicking?*

Complainant *No.*

Defence counsel *Why not?*

Complainant *I was frozen, I didn't know what to do...I was scared shitless OK!*

Case 78

Just under half of complainants (48%) were asked questions relating to whether they suffered any injuries during the sexual assault. Complainants who were cross-examined on this issue were asked an average of five questions on the topic with the maximum number of questions asked of any one complainant being 25.

Defence counsel *You were struggling, you put up a bit of a fight. You would have got a few bruises from it?*

Complainant *A couple.*

Defence counsel *Is that all? Couldn't have been much of a fight then? ⁴¹*

In case a which involved a woman with a physical disability, the Crown Prosecutor made an application to recall the complainant after she had completed giving evidence. The Crown Prosecutor wished to take evidence of her disability and the impact that it had on her ability to resist an attacker. The Judge agreed that it was relevant. Evidence was taken of the complainant's disability and capability to restrain an attacker. The Crown Prosecutor then described the complainant's disability in detail for the record. The Crown Prosecutor asked questions of the complainant as follows:

Prosecution counsel *You were asked some questions about how forcefully you resisted, remember that?*

Complainant *Yes.*

Prosecution counsel *Did your disabilities affect you... in your attempts at resisting?*

⁴¹ Case 143.

Objection from Defence as it doesn't arise from cross-examination, however the Judge claims it is relevant.

Complainant *I guess they would have.*⁴²

MINORITY STATUS

Attacking or ridiculing the minority status of a complainant was one way in which the Defence counsel sought to undermine the credibility of the complainant. The fact that the complainant came from an Aboriginal community or an ethnic community or had a physical or psychiatric disability was often used to undermine and besmirch her throughout the cross-examination.

In one case where the complainant had a physical disability the Defence counsel cross-examined as follows:

Defence counsel *Tell me, do you feel when you go out in public where you don't know people, that people take undue notice of your physical limitations?*

Prosecution counsel *Well, I object to that your honour.*

Complainant *I don't care, that has nothing to do with it.*

Judge *I don't think that is relevant [Defence counsel].*

Defence counsel *Well with respect your Honour, I'd submit that it is.*

Judge *I reject that question.*

Defence counsel *Could I argue it your Honour?*

Judge *No, you can't argue it [Defence counsel]!*

Defence counsel *Are you a self-conscious person about how you think people relate to you?*

Complainant *Sometimes.*

Defence counsel *Are you self conscious about whether people are honest with you in their relationships with you?*

Complainant *Sometimes.*⁴³

⁴² Case 43.

⁴³ Case 43.

In the few matters involving women from ethnic communities, their minority status too became the subject of cross-examination. In one matter involving a woman from an Asian community who was sexually assaulted by a man she knew in her own home, the Defence counsel's cross-examination focused on racial stereotypes. For example the complainant was asked 42 questions about the type and style of clothing she was wearing around the house on the day of the sexual assault. The Defence counsel argued that because she was wearing pyjamas she was engaging in sexually provocative behaviour even though the pyjamas were commonly worn for working in the house during the day by women of this culture. The complainant was also asked 11 questions about victims compensation. This appeared to be an attempt by the Defence to construct a motive for the complainant's allegation of sexual assault. The Defence contextualised this motive within a common cultural myth about people from Asian countries being frugal and seeking financial gains.

Another case study highlights similar issues.

The complainant had come from a Middle Eastern country to Australia with an arrangement to marry the defendant. The defendant had immigrated from the same country and had been resident in Australia for many years. At trial Defence counsel attacked the credibility of the complainant using myths about migrant women. In cross-examination he questioned the complainant relentlessly, proposing that the complainant had agreed to marry the accused to gain residency in Australia and was only bringing this complaint so that she could separate from the defendant and gain residency.

Case 12

EMOTIONAL STABILITY

Another method of undermining the credibility of complainants used in several cases by Defence counsel in the study was to question them about their use of counselling services and court preparation classes prior to the court proceedings. These questions are presumably designed to demonstrate to the court that the complainant's evidence is rehearsed and diverts attention from and minimises the nature and extent of the sexual assault. The following case demonstrates a common questioning by Defence counsel along these lines:

Defence counsel	<i>Are you still seeing a counsellor?</i>
Complainant	<i>No.</i>

[HEROINES OF FORTITUDE]

Defence counsel *How long did your counselling go on for?*

Complainant *Over a year.*

Defence counsel *What was the name of your counsellor?*

Complainant *I had [counsellor] and one before that.*

Defence counsel *Please give their full names.*

Complainant *I don't know their full names, they are from [suburb].*

Defence counsel *And what was the office you went to?*

Complainant *In (name of street).*

Defence counsel *And what was the name of the department?*

Complainant *Community Services I think.*

Defence counsel *And how often did you go?*

Complainant *Once a week.*

Defence counsel *Did that go on for years?*

Complainant *No.*

Defence counsel *Amongst the things you discussed with the counsellor did you discuss the giving of evidence?*

Complainant *Yes.*

Defence counsel *Were you spoken to about questions you might be asked in court?*

Complainant *Yes.*

Defence counsel *And how to deal with them?*

Complainant *Yes.*

Defence counsel *Did they take an attitude to you that was generally encouraging and supportive?*

Complainant *Yes.*

Defence counsel *Did they take an attitude to you that they believed what you were saying?*

Complainant *Yes.*

Defence counsel *They weren't critical or disbelieving?*

Complainant *No.*⁴⁴

And in another case the Complainant was asked the following:

Defence counsel *Has it been suggested to you how to give you evidence?*

Complainant *No Sir.*

Defence counsel *Has anybody suggested to you that in giving your evidence you should your emotions hang out – has anyone suggested that?*

Complainant *No Sir.*

Defence counsel *Has any body suggested to you that if you become upset you should let it all hang out?*

Complainant *No Sir. I have just been told to hang in there.*

Case 91

PROSECUTORIAL INTERJECTION AND JUDICIAL MANAGEMENT OF THE COURT

This research counted the number of times the Prosecution objected during the cross-examination of the complainant by the Defence. In two thirds of trials the Prosecution objected at least once during cross-examination of the complainant with the average number of objections being four. The maximum amount of objections recorded was 19. The objections from the Prosecution were successful at least once in 55% of matters.

The present research also recorded the number of times the Judge interrupted cross-examination to question relevance or propriety of questions. In just over two thirds of trials (68%), the Judge interrupted the cross-examination of the complainant with the average number of interruptions during the cross-examination being one. The maximum number of interruptions from the Judge recorded in any one trial was 25.

One Judge interrupted the Defence counsel and questioned why he was asking the same question over and over, commenting angrily to the Defence counsel:

*It doesn't help to repeat questions to the complainant.*⁴⁵

⁴⁴ Case 55.

⁴⁵ Case 119.

In another case the complainant challenged the aggressive style of the Defence counsel and found judicial support:

Complainant *Why are you yelling at me, I'm not yelling.*

Judge *I think that is a reasonable response...this is a cross-examination not an examination crossly.⁴⁶*

COMMENT

The research shows that some Judges and Crown Prosecutors do not protect the complainant from harassment and inappropriate questioning. The findings highlight trials in which there appeared to be very little awareness of or sensitivity to the position of the complainant. However the present research shows also that there were a few Judges and Prosecutors who were very careful and understanding of the complainant's situation and interrupted cross-examination to question the relevance and propriety of questions on a regular basis.

Overall it was found that stereotyped views of the behaviour of women complainants of sexual assault are often used as the basis for cross-examination. In the trials examined by this research, questions which the Defence were permitted to ask of complainants appeared to be in many instances of dubious relevance to the facts in issue at the trial. During cross-examination the complainant was routinely implied to be a liar, seeking financial compensation or vengeful. She was often described as the type of woman who could be expected to consent to sexual advances, or as an inexperienced person who consented to sex at the time but later regretted her actions. In these scenarios the Defence attempted to portray the complainant as a person of low intelligence or of low morality who was inherently untrustworthy.

Of most concern are the findings which demonstrate that Defence counsel often use the ethnicity of a complainant or her disability to undermine her credibility in cross-examination. The themes of the Defence's cross-examination in the two trials involving women from ethnic backgrounds were based on inappropriate and offensive cultural

⁴⁶ Case 21.

stereotypes. This again highlights the fact that women from ethnic communities encounter particular problems in court because of their language, their ethnicity and their culture.⁴⁷ From the little known it appears that women from ethnic communities experience the justice system's adherence to stereotypical notions of women and are burdened by and attacked using myths about their culture and ethnic origins.

The research showed that Defence counsel were frequently and unnecessarily aggressive in the cross-examination of complainants. This resulted in complainants being needlessly humiliated. Common themes explored in cross-examination of the complainant were her general drinking habits, drinking behaviour at the time of the offence, her alleged sexually provocative behaviour, and her possible motives for making a false report—these themes arose even if there was corroborative evidence of significant injuries and damage. The credibility of the complainant was often attacked where the complainant revealed confusion or appeared to be presenting a different version of the smaller details of the assault. This behaviour—arguably normal for someone under stress and in an alien environment—was heightened by the ferocity of the Defence counsel and often led to the complainant inadvertently discrediting herself.

It seemed that Defence counsel often asked questions which inferred that the responsibility for the sexual assault was to be found in the complainant's behaviour. This represents an antiquated view of women and their participation in the world. It also perpetrates the myth that women who engage in particular behaviour, such as being out at night and drinking, put themselves at risk and make themselves vulnerable to sexual assault or, worse, freely available for sexual activity.

Instances of cross-examination of complainants about their behaviour after the assault were also found in the research. In a similar way in which the law constructs women's behaviour in the area of complaint⁴⁸ so too do men's perceptions about women's lives after an assault define behaviour for a woman complainant of sexual assault that is credible and consistent with a truthful complaint.

There are contrary views on the complex issue of cross-examination and the need to control cross-examination of complainants in sexual assault trials. LRCV noted that :

...many members of the profession – particularly those involved in the conduct of the trials – argue that an accused is entitled to defend himself or herself by whatever

⁴⁷ Assafiri and Dimopoulos in their critique give a number of examples of 'the widespread racism of the legal system' through a focus on non-English speaking background women's application for intervention orders in Victoria. H Assafiri and M Dimopoulos 'The Legal System's Treatment of NESB Women Victims of Male Violence', Conference, Melbourne, May 1996.

⁴⁸ See Chapter on *Complaint*.

*legitimate means are available, even if this may result in acute distress for the complainant. On this view further controls over cross-examination would undermine the right of the accused to a fair trial.*⁴⁹

However, there is nothing about the presumption of innocence or the right to a fair trial⁵⁰ which requires witnesses to be intimidated. Indeed it could be said that there is another presumption in criminal trials and that is the expectation that the courts will ensure complainants are treated with common decency.⁵¹

The LRCV compared transcripts from a sample of assault trials with a sample of rape trial transcripts, and found that while complainants in rape trials tended to be subject to longer, and more intensive, cross-examination than those in non-sexual assault trials, many of the tactics and lines of questioning employed by counsel in the two types of trials were similar. Although research such as this does not render invalid the criticisms which have been made of the conduct of sexual assault trials, it does show that the problems with cross-examination are not unique to sexual assault as one area of the criminal law.⁵²

Clarification prior to cross-examination by way of a public statement to the complainant from Defence counsel of his/her role goes a long way in explaining to the complainant the complex nature of cross-examination. The explanation also clarifies the role of the cross-examiner and gives the complainant a framework from which to understand her experience as the primary witness. Statements of this kind may well assist with the proper process of the trial and provide an outline, for the benefit of the jury, of the purpose of cross-examination.

Professional standards can also be used to limit cross-examination. Rule 52 of the NSW Bar Association Rules provide that counsel must believe on reasonable grounds that an accusation about a witness' credibility is well-founded before putting such a question. The present research indicates that there appears to be a better understanding of the differences between vigorous cross-examination which protects defendants' rights and questioning which includes improper stereotyping and harassment. Training is required to prompt prosecutorial and judicial intervention when cross-examination becomes extreme.

⁴⁹ Law Reform Commission of Victoria; *Rape: Reform of Law and Procedure*, Supplementary Issues Report No. 46, 1992, Melbourne, p. 140.

⁵⁰ See *Dietrich v R* (1993) 177 CLR 292.

⁵¹ Hunter and Cronin, p.377.

⁵² Law Reform Commission of Victoria (1992), p. 136.

A NOTE ON THE *EVIDENCE ACT* 1995 NSW

Section 32 of the *Evidence Act* 1995 NSW provides for more flexibility in the area of refreshing memory. The section provides that, with leave of the court, a witness may revive their memory about a fact or opinion during the course of giving evidence with a document which was made or written or verified by the witness as accurate at a time when the facts were fresh in her memory. There may be some scope for complainants to use this provision to refer to their statement to prompt their memory whilst giving evidence. The complainant's distress in court may very well be a strong basis for arguing that the court should give leave in these circumstances.

Section 41(1) of the *Evidence Act* 1995 NSW empowers the court to disallow indecent questions, reinforcing the claim that the cross-examiner does not have an unrestricted right to persecute the witness. The section provides that:

the court may disallow a question put to a witness in cross-examination or inform the witness that it need not be answered if the question is:

a) misleading; or

b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.

Section 41(2) of the Act sets out that the court must take into account the age, personality, education, mental and intellectual and physical disabilities of the witness.⁵³ This section may provide some scope, additional to that already available, for the Judge to disallow questions and advise complainants that they are not obliged to answer offensive questions. This provision may assist in protecting the complainant from questions and admissions of evidence which, from her perception at least, are totally irrelevant to the question of whether she has been sexually assaulted.

CONCLUSIONS

It is important to note that all witnesses in all criminal trials undergo at times stringent and distressing cross-examination and that Prosecutors for reasons of personal trial tactics often refrain from interjecting or objecting to Defence harassment or improper questioning of witnesses.

However themes of cross-examination in the present research of sexual assault trials centre around myths and stereotyped notions of women's behaviour which are clearly biased

⁵³ S Odgers; *Uniform Evidence Law*, Federation Press, Sydney, 1995, pp. 57-58.

and do not reflect the reality of women's lives. Lines of cross-examination which focus on complainant's general drinking habits or drinking on the day of the offence and allegedly sexually provocative behaviour seem to be very common. Other themes of cross-examination used regularly in trials to undermine the complainant's credibility include questions about victims compensation, lying and false motives for making sexual assault allegations, as well as questions indicating contribution to the sexual assault merely by being present at the venue where contact with the accused person was initiated. Modes of questioning are also often used to unnecessarily intimidate and harass an already distressed witness. Of most concern is the practice of using a complainant's minority status or emotional stability as a point of cross-examination.

The study also shows that on the whole judicial officers and Prosecutors are reluctant to limit irrelevant and inappropriate cross-examination even when it is clear the complainant is suffering distress. In this way Judges may well be sanctioning the revictimisation of complainants in court.

SUMMARY

- Complainants in the study were discredited and attacked during cross-examination by questions and themes which are biased in their nature and rely on stereotyped views of appropriate behaviour of women complainants of sexual assault;
- Half the complainants (52%) in the study were accused of making false reports based on ulterior motives such as vengeance, applications in Family Court proceedings and excuses for adultery.
- One of the most common motives about which complainants were questioned related to applications for victims compensation with one third of complainants (32%) being questioned about this.
- In one half of trials (57%) the complainant was questioned about behaving in a sexually provocative way.
- One half of women (59%) were questioned about drinking on the day of the offence.
- 42% of complainants were asked about the way they were dressed at the time of the offence in cross-examination.
- 22% of women were cross-examined about their responsibility for the offence.
- Just under half of all complainants (43%) were asked about why they were in the location where contact with the accused was made.
- Almost all complainants were cross-examined about lying (82%).

- One third of complainants (37%) were cross-examined about resistance and over two thirds of complainants were questioned about lack of resistance to the sexual assault.
- The study highlighted trials in which the complainant's minority status was the subject of attack by the Defence counsel.
- Crown Prosecutors and Judges often failed to interject when cross-examination was irrelevant, intimidating and harassing; Prosecutors only interjected in a third of all trials while Judges stopped or questioned cross-examination in 68% of hearings.

RECOMMENDATIONS

RECOMMENDATION 6

That the NSW Judicial Commission should take an active role in promoting judicial discussion and education in relation to the conduct and control of cross- examination.

RECOMMENDATION 7

That the Chief Judge of the District Court strongly encourage Judges to utilise the provisions of the *Evidence Act* 1995 NSW and the Bar Association Rules to limit questions that are insulting, degrading, humiliating or irrelevant during the cross- examination of the complainant.

RECOMMENDATION 8

That the Senior Crown Prosecutor encourage Prosecutors to utilise the provisions of the *Evidence Act* 1995 NSW and the Bar Association Rules to limit questions that are insulting, degrading, humiliating or irrelevant during the cross- examination of the complainant.

RECOMMENDATION 9

That the Witness Taskforce established by the Attorney General in conjunction with the Public Defenders Office investigate formalising a Defence opening address to the court explaining to the complainant and the jury the role of Defence counsel.