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Qualitative Analysis of County Court of Victoria Rape Trial Transcripts

Report to the Victorian Law Reform Commission

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FINAL REPORT

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Contents

Acknowledgements 5
Summary of key findings 6
Glossary of de-identification codes 8
1. Introduction 9
1.1 Background 9
1.2 Aims 10
1.3 Research Design 11
1.3.1 Ethics approval 11
1.3.2 Case selection 11
1.3.3 The study sample and limitations 11
1.3.4 Confidentiality and de-identification 12
1.3.5 About the sample 12
1.3.6 Qualitative analysis 12
1.3.7 Nature and presentation of findings 13
2. Creating a courtroom environment of sensitivity and respect for complainants 13
2.1 Judicial intervention 17
2.2 Room for complainant's voice 22
2.3 Viewing CCTV in advance 26
2.4 Closed court arrangements 28
3. Using technology to minimise distress and facilitate justice 28
3.1 Showing CCTV footage 31
3.2 Pre-recorded evidence 33
4. The concept of consent 34
4.1 Non-consent as 'no' 37
4.2 Non-consent as physical resistance 40
4.3 Prosecution questions 44
4.4 'Inferred' consent 46
4.4.1 'Flirting' 46
4.4.2 Attire 53
4.5 No reasonable belief in consent 57
4.5.1 Steps taken 58
4.5.2 The 'sober' reasonable person and the s 47 direction 59
5. Intoxication evidence 61
5.1 Definition and terminology 61

Table 1: Illustration of Modes of Complainant Self-Assessment of Intoxication 62
5.2 Evidence on AOD effects 63
5.3 Section s 36(2)(e): 'so affected … as to be incapable of consenting' 67
5.4 Contrary purposes for which complainant intoxication engaged 69
5.5 Direction on unreliability of complainant's evidence due to intoxication 73
6. Cross-examination of complainants 75
6.1 Peripheral/irrelevant detail 76
6.2 Precision questions and expectations of detailed recall 84
6.3 Puttage 89
6.3.1 Jury direction on 'puttage' 91
6.4 Assertions of inconsistency 92
6.4.1 Difference from accounts given to other witnesses 93
6.4.2 Difference from police statement 96
6.4.3 Difference from committal evidence 100
7. The continuing influence of rape myths 106
7.1 Lying 107
Table 2: Defence-suggested motivation for false allegation 107
7.1.1 'Word on word'? 111
7.2 Delay 111
7.2.1 The complainant did not 'complain' to the accused immediately 112
7.2.2 The complainant did not tell the first person or the 'right' person 113
7.2.3 The complainant did not use her phone to report at the first opportunity 114
7.2.4 The complainant did not tell (or initially didn't want to tell) the police straight away 115
7.2.5 The complainant did not disclose sufficient detail about the alleged rape 118
7.3 'Correcting' rape myths 120
7.3.1 Expert evidence on rape myths 123
7.4 Crown questions and 'real rape' 123
7.4.1 Visible distress 124
7.4.2 Immediate report 125
8. Trial judge interventions and jury directions 125
8.1 Sexual reputation, sexual activity and sexual history evidence 126
8.1.1 General reputation for chastity: s 341 126
8.1.2 Restriction on evidence concerning complainant's sexual activities: s 342 126
8.1.3 Admissibility of sexual history evidence: s 343 130
8.2 Section 12 discussions 131
8.3 Delay in complaint direction: s 52 134

8.4 Differences in complainant account direction: s 54D 143
8.4.1 Difference in account -v- prior inconsistent statement 145
8.5 Consent direction: s 46 146
9. Conclusions and options for further reform 147
9.1 Improving complainant experience: logistics, technologies and procedures 147
9.2 Better guidance on intoxication evidence 148
9.3 Further modernisation of cross –examination 148
9.4 The challenge of transforming consent and eroding rape myths 149
9.5 A more proactive approach to jury directions 150

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Finally, we acknowledge the complainants in the rape trials examined in this report. Although their names have been anonymised to ensure confidentiality and to protect privacy we are acutely aware that their stories are at the heart of this report and their voices are present (particularly in quotes from transcripts).

[1] E McDonald, with P Benton-Greig, S Dickson and R Souness, *Rape Myths as Barriers to Fair Trial Process* (Canterbury University Press, 2020).

Summary of key findings

This report presents the findings of a qualitative study of transcripts for 25 rape trials conducted in the County Court of Victoria between 2013 and 2020. Its aims combine those of the authors' Australian Research Council-funded study of intoxication evidence in rape trials (DP200100101), with trial-related aspects of the Victorian Law Reform Commission's inquiry into 'Improving the Response of the Justice System to Sexual Offences'. A central objective was to assess whether a range of statutory reform measures enacted over several decades in Victoria have yielded the intended benefits and improvements, including by decreasing the re-traumatisation of sexual violence victims, and reducing the influence of 'rape myths' that have traditionally impeded the achievement of justice for rape trial complainants.

The courtroom environment

We observed that judges, counsel, witness support staff, and other court room participants make a concerted effort to ensure that the courtroom is a less foreign, hostile, daunting and intimidating place for complainants than it has traditionally been. However, we observed instances where practices fell short of the expected standard.

Technology-related disruptions and delays were common. Complainants giving evidence from a remote location via AVL is now a routine part of rape trials. It is, therefore, important that reliable technological arrangements be in place for all trials, including when video footage is played as part of examination-in-chief and/or cross-examination.

It was evident that for some complainants, the question and answer format of criminal trial witness examination constrains their ability to have their 'voice' heard in the courtroom. Consistent with the tenor of many other courtroom improvements designed to create an environment of sensitivity and respect for complainants, there might be value in exploring the feasibility (while remaining mindful of the rules of evidence) of greater flexibility in the application of question and answer conventions, to provide more room for the complainant's 'voice'.

Intoxication evidence

Evidence of the complainant's and/or accused's intoxication largely took the form of imprecise and colloquial self-assessment (how much was consumed or how the person 'felt'). Notwithstanding the legislative attempt – via s 36(2)(e) of the *Crimes Act 1958* (Vic) – to break the traditional nexus between intoxication and consent, evidence that the complainant was intoxicated was often engaged by the defence to challenge the Crown case. The claim that intoxication impedes memory – bringing into question the reliability of the complainant's evidence – tended to be asserted rather than substantiated with science-based evidence.

Expert evidence

This study has identified two purposes for which expert evidence might be more consistently employed in rape trials. First, in the cases we analysed, jurors rarely had the benefit of medical/scientific expert evidence on the effects of alcohol or other drugs (AOD). It would be preferable for the jury to receive better guidance on the relationship between AOD consumption and cognitive functions like consent formation, and the ways in which intoxication does (and does not) impact on memory and recall of events. Secondly, counter-intuitive expert evidence did not feature in any of the trials in this study. Given the frequency with which rape myths were engaged, and the prevalence of assertions and implications that the complainant had not behaved in the manner 'expected' of rape victims, consideration should be given to more active use of this form of expert evidence.

Concept of consent

Our findings suggest that despite decades of legislative reform, the project of transforming the concept of consent, as it operates in rape trials, is incomplete. We observed numerous instances of a discrepancy between the words and spirit of how consent is defined and explained in s 36 of the *Crimes Act 1958* (Vic) and s 46 of the *Jury Directions Act 2015* (Vic), and how it was evoked in trials. Complainants continue to be questioned on what they did to demonstrate non-consent – whether by words or acts of physical resistance. We saw few signs of a communicative model of consent or of a focus on the steps taken by the accused to establish that the complainant was consenting.

Rape myths

Despite attempts to legislatively 'write them out' of rape trials, aspects of rape mythology still featured prominently in the cases we analysed. Complainants were regularly met with questions which suggested that they had engaged in 'flirtatious' behaviour towards the accused (which provided a basis for inferring consent), or had 'delayed' making a complaint (with adverse implications for the veracity of their allegation). It was sobering to realise that although the law on the books has changed greatly since the 1980s, a number of the myths that underpinned 'pre-reform' rape law are continuing to be actively circulated in contemporary rape trials.

Complainant cross-examination

The experience of complainants in the witness box (real or virtual) has long been a barometer of the modernisation of rape trials. The cases we analysed suggested that, although there have been improvements, complainants continue to be subjected to questioning that concentrates on the scrutiny of *their* actions and *their* states of mind.

Instances of improper language and tone from counsel were relatively rare, though they did occur. More common were techniques of cross-examination that were not overtly aggressive, but appeared to contribute to complainant confusion and distress. These included: questions about irrelevant detail; questions that conveyed an expectation of precise recall of all events, and absolute consistency of accounts over time; questions that evoked rape myths (including expectations of active resistance, and immediate and comprehensive formal complaint); and a failure to distinguish between questions designed to adduce evidence and 'questions' that constituted puttage.

Although more active and consistent use of 'mid-trial' jury directions could yield improvement (see below), the persistence of these techniques of cross-examination suggest that further measures – such as 'ground rules' hearings – may be required.

'Mid-trial' jury directions

The directions contained in Part 5 of the *Jury Directions Act 2015* (Vic) have the potential to play an important educative function *during* the trial – reducing the risk that jurors will be influenced by outdated and discredited assumptions about the hallmarks of a 'real rape' and the manner in which a 'genuine' victim of rape is expected to respond. In the cases we analysed, this potential was not fully realised.

The most actively deployed 'mid-trial' direction was the delay in complaint direction, but it was not used as consistently as it could have been. The direction on difference in the complainant's account (introduced in 2017) was under-utilised, and the direction on consent is not currently available as a 'mid-trial' direction.

It would be preferable if all Part 5 directions could be given at any point in the trial, whether after request by counsel or via self-initiation by the trial judge. A (provisional) pre-trial discussion that mirrors the s 12 end of trial discussion might also be valuable — for flagging the directions that are likely to be required, depending on the lines of questioning pursued by counsel. This discussion could be integrated into a ground rules hearing.

Glossary of de-identification codes

Abbreviation	Trial Participant
VJ	(Victoria) Trial Judge
VP	Crown Prosecutor
VD	Defence Counsel
VA	Accused
VC	Complainant
VWO	Witness – Officer in Charge/Informant
VWP	Witness – Police Officer
VWM	Witness – Medical Doctor
VWS	Witness – Scientific Expert
VWC	Witness – of complaint
VWCG	Witness – Crown General
VWDC	Witness – Defence Character
VWDG	Witness – Defence General
VL	Location

1. Introduction

1.1 Background

In June 2020 we began a multi-year study of sexual assault/rape trials in selected Australian jurisdictions (including Victoria).[2] Earlier research on the manner in which the effects of alcohol or other drugs (AOD) are regarded in Australian criminal laws[3] led us to identify rape laws – and their – operation – as warranting closer investigation. A large proportion of reported sexual assaults are associated with AOD consumption,[4] this relationship has traditionally worked to the disadvantage of complainants in rape trials.[5] The main aim of the project is to assess the impact of legislative reforms that have been introduced to break the assumed nexus between complainant intoxication and consent,[6] and limit the opportunity for an accused person to rely on their intoxication as exculpatory.[7] The methodology for our three year study includes the collection and analysis of transcripts from sexual assault/rape trials.[8]

The commencement of this project coincided with the Victorian Law Reform Commission (VLRC)'s receipt of a reference from the Victorian Government on 'Improving the Response of the Justice System to Sexual Offences'.[9] Given the symmetry between our project and the VLRC's reference, we were commissioned by the VLRC to write a report on what transcripts revealed about the manner in which rape trials[10] are conducted in Victoria. As we explain further below, a criterion for inclusion in the study is evidence of complainant and/or accused intoxication. However, because intoxication

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[2] Australian Research Council Discovery Project (DP200100101) 'Intoxication Evidence in Rape Trials: A Double-Edged Sword?' (2020-2023).

[3] J Quilter, L McNamara, K Seear and R Room, *'Intoxication' and Australian Criminal Law: Implications for Addressing Alcohol and Other Drug-Related Harms and Risks*. Report to the Criminology Research Advisory Council. Grant: CRG 20/14-15 (May 2018); J Quilter, L McNamara, K Seear and R Room, 'The significance of "intoxication" in Australian criminal law', *Australian Institute of Criminology Trends and Issues* Paper No 546 (May 2018); J Quilter, L McNamara, K Seear & R Room, 'Criminal Law and the Effects of Alcohol and Other Drugs: A National Study of the Significance of 'Intoxication' Under Australian Legislation' (2016) 39(3) *UNSWLJ* 913.

[4] Studies have estimated that AOD consumption is a factor in 50-80% of rapes: T Zawacki et al, 'Perpetrators of alcohol-involved sexual assaults' (2003) 39 *Aggressive Behavior* 366; D Lievore 'Prosecutorial decisions in adult sexual assault cases', *Trends & Issues in Crime & Criminal Justice* No 291 (AIC, 2005); A Finney, *Alcohol and sexual violence: key findings from the research* (Home Office, 2004); Statewide Steering Committee to Reduce Sexual Assault (Vic), *Study of Reported Rapes in Victoria 2000–03: Summary Research Report* (2006); A Abbey, 'Alcohol's role in sexual violence perpetration' (2011) 30 *Drug & Alcohol Review* 481; A Abbey et al, 'Review of Survey and Experimental Research That Examines the Relationship Between Alcohol Consumption and Men's Sexual Aggression Perpetration' (2014) 15(4) *Trauma, Violence & Abuse* 265; L Orchowski, et al, 'Social Reactions to Disclosure of Sexual Victimization and Adjustment Among Survivors of Sexual Assault' (2013) 28(10) *Journal of Interpersonal Violence* 2005; S Triggs et al, *Responding to Sexual Violence: Attrition in the New Zealand Criminal Justice System* (Ministry of Women's Affairs, Wellington, 2009); V Stern, *Report By Baroness Vivien Stern CBE Of An Independent Review Into How Rape Complaints Are Handled By Public Authorities In England And Wales* (Home Office, 2010).

[5] R Schuller & A Stewart, 'Police responses to sexual assault complaints: The role of perpetrator/complainant intoxication' (2000) 24(5) *Law & Human Behavior* 535; N Taylor 'Juror attitudes and biases in sexual assault cases', AIC Trends & issues in crime & criminal justice No 344 (2007); S Croskery-Hewitt, 'Rethinking Sexual Consent: Voluntary Intoxication and Affirmative Consent to Sex' (2015) 26 *New Zealand Universities Law Review* 614; A Carline, C Gunby & S Taylor 'Too drunk to consent? Exploring the contestations and disruptions in male-focused sexual violence prevention interventions' (2018) 27(3) *Social & Legal Studies* 299; H Flowe & J Maltby, 'An experimental examination of alcohol consumption, alcohol expectancy, and self-blame on willingness to report a hypothetical rape' (2018) 44(3) *Aggressive Behavior* 225.

[6] *Crimes Act 1958* (Vic) s 36(2)(e).

[7] *Crimes Act 1958* (Vic) s 36B.

[8] Trial transcript analysis is one of the components of a three-pronged empirical research design, along with analysis of appellate decisions (ongoing) and qualitative interviews with prosecution and defence lawyers (planned for 2022).

[9] Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences*. Issues Papers A-H (October 2020), 3-4.

[10] The focus of this report and our larger study is the specific crime of rape, rather than the larger category of sexual offences which is the subject of the VLRC's inquiry.

evidence (in a variety of forms) is typical rather than exceptional in rape trials, our transcript data set would enable exploration of not only the nature and influence of intoxication evidence, but other aspects of rape trials – such as the operation of the statutory concept of consent in s 36 of the *Crimes Act 1958* (Vic), the visibility and influence of Part 5 of the *Jury Directions Act 2015* (Vic), the impact of alternative arrangements for complainants giving evidence and for the admission of recorded complainant evidence, under Ch 8, Pt 8.2, Div 4 and 7 of the *Criminal Procedure Act 2009* (Vic), and the extent to which rape myths and stereotypes remain present in the examination and cross-examination of complainants.

1.2 Aims

This report addresses two sets of aims.

The first set relates to our larger project's inquiry into intoxication evidence[11] in rape trials:

1) in what form, and for what purposes, is evidence of AOD consumption and effects introduced in rape trials?;
2) to what extent is 'intoxication' defined in the courtroom by scientific expert evidence or lay 'common sense'?;
3) what is the practical impact of statutory provisions which attempt to shape the manner in which intoxication is employed in rape trials?; and
4) what relationships exist, if any, between the admission of intoxication evidence in rape trials, and rape myths?

The second set of aims relates to the VLRC's wider terms of reference regarding the response of the justice system to sexual offences.[12] We considered:

5) the types of evidence that featured in trials, including whether evidence was 'word-against-word' only, or whether there was corroborating evidence;
6) the presence of expert evidence in relation to matters at issue in the trial;
7) the nature of complainant cross-examination, including questioning techniques directed at challenging the credibility of the complainant, and the truthfulness of her account;
8) whether myths and misconceptions about sexual harm and victimisation feature in rape trials;
9) judicial interventions (whether self-initiated or in response to objections from counsel) during complainant cross-examination;
10) the impact of the new fault element (applying from 1 July 2015), 'no reasonable belief in consent', including whether this reform has shifted the focus away from the complainant's behaviour, and towards the accused, and 'steps taken' to obtain consent; and
11) the operation of the *Jury Directions Act 2015* (Vic), particularly Part 5 'Sexual Offences'.[13]

[11] By 'intoxication evidence' we mean evidence related to whether the complainant and/or accused were affected by alcohol and/or other drugs.

[12] This study based on trial transcript analysis does not address all aspects of the VLRC's wide terms of reference.

[13] Both sets of aims are directed at evaluating the impact of reform introduced over the years to improve the quality of reliability of justice for rape *complainants*, reflecting the goals of our larger research project and selected aspects of the VLRC's terms of reference. Although not within the scope of this study, we recognise that the implications of rape trial reforms for accused persons are an important subject of attention.

1.3 Research Design[14]

1.3.1 Ethics approval

Approval for the collection and analysis of trial transcripts was granted by the University of Wollongong Human Research Ethics Committee (Approval 2020/376).

1.3.2 Case selection

Drawing on information in the public domain (appellate decisions, sentencing remarks), and communications with the VLRC, and with the Victorian County Court, Office of Public Prosecutions and Victoria Legal Aid (conducted on our behalf by the VLRC), we identified cases which met the following criteria:

- prosecution of a single defendant on a charge of rape[15] (whether with or without other charges);
- tried in the County Court of Victoria after a plea of not guilty;
- trial conducted during the period 2013-2020; and
- evidence of complainant and/or defendant intoxication (by AOD) at the time of the alleged offence.

1.3.3 The study sample and limitations[16]

The data set on which this report is based consists of 25 trials conducted in the Victorian County Court between 2013 and 2020.

The sample is a non-representative sample. It includes only a sub-set of the total number of trials conducted during the relevant period that would have met our case eligibility criteria. Also, reflecting the manner in which eligible cases were identified, the sample is skewed towards cases in which the trial resulted in a finding of guilt. Our sample included 15 trials resulting in a guilty verdict on at least one charge of rape; 8 trials with a not guilty verdict and 2 trials in which a verdict of acquittal was entered on appeal. As a small non-representative sample, we have no basis for assuming that the cases in our data set are illustrative of how rape trials have been or are conducted in cases outside our data set.

Another significant limitation is that it proved difficult to obtain complete transcripts of all parts of the trial. We obtained prosecution and defence closing addresses for only two of the 25 cases. We obtained the trial judges summing up and directions to the jury (the 'charge') in six cases. We obtained the accused's police record of interview in only two cases. In one case we did not obtain the complainant's evidence-in-chief (which had been given in the form of a VARE).[17] The minimum requirement for inclusion in the data set for this report is that our transcript holding for the case included the complainant's cross-examination. Finally, in some trials the evidence of the complainant (or occasionally, other witnesses) took the form of playing (typically, where the trial in our data set was a re-trial) the recorded evidence from the earlier trial. In some such cases we were provided with

[14] The focus of this study was to investigate what could be learned from analysing trial transcripts specifically. We did not undertake a secondary literature review for this report, nor did we review case law. Our priority was to generate qualitative insights about the operation of rape trials in Victoria that might not otherwise be available to, or verifiable by, the VLRC. Our expectation is that the VLRC would triangulate the findings of this transcript analysis study with other data collected during the course of the inquiry, including secondary literature, case law, quantitative data and qualitative data generated by stakeholder consultation.

[15] Currently, *Crimes Act 1958* (Vic) s 38.

[16] We also recognise that trial transcripts are only one data source relevant to understanding how and why rape trials are conducted in the way they are, and whether statutory law reforms have efficacy. Other important data sources, which we will be incorporating into our longer-tern study, include the experiences and perspectives of counsel (prosecution and defence), and the case law produced by appellate courts.

[17] Visual and audio recording of evidence, pursuant to Div 5 of Part 8.2 of Ch 8 of *Criminal Procedure Act 2009* (Vic).

the full transcript from the occasion when the person originally gave evidence, rather than the edited version that formed part of the official court record at the trial we were analysing.

Another limitation arises from the nature of our source material. Transcripts (ie, words on a page/screen) are effective for communicating the words that are spoken in the courtroom (although they are imperfect in this respect), but they cannot communicate tone, emotion, mood, atmosphere etc – all of which are important to the experience of complainants and other participants in a trial.

1.3.4 Confidentiality and de-identification

An important condition of ethics approval was the need to employ robust techniques for guaranteeing the anonymity of complainants, as well as defendants, judges, lawyers and witnesses. Confidentiality was also a requirement of the undertaking we made to the County Court of Victoria as a pre-condition to taking possession of trial transcripts. De-identification of transcripts at the earliest opportunity was a key part of this process. Transcripts were obtained from the County Court of Victoria by staff from the VLRC and securely delivered to us. All transcripts were de-identified upon receipt from the VLRC. De-identification involved the redaction from all pages of transcript the complainant's personal identifying information, information specific to the incident (such as location), and identifying information about defendants, witnesses, judges and lawyers. Each trial was given a unique alphanumeric code (V1, V2, V3 etc). Participants in the trial were assigned a sub alphanumeric code (eg V1C for the complainant in the first trial in our data set; or V7A for the accused in the seventh trial).

Once de-identification was completed, the original transcripts were stored in a secure cloud server location. Only the redacted versions of the transcript were shared with and read by research team members, and subjected to analysis.

1.3.5 About the sample

The 25 trials in our data set took place between August 2013 and February 2020. Those trials related to conduct that occurred between January 1985 and October 2018. In all cases the complainant was a woman[18] and the accused person was a man.[19]

1.3.6 Qualitative analysis

Consistent with the size and nature of the sample, this is a qualitative content analysis study. No quantitative analyses were undertaken.

De-identified trial transcripts were uploaded into the qualitative data analysis software package NVivo (version 12 plus). The research team developed a codebook, consisting of codes informed by the study's two sets of aims (above). The 85 codes covered 11 main categories: forms of intoxication evidence; purposes for which intoxication evidence was engaged; guidance on intoxication (statutory); complainant cross-examination (techniques and features); consent; corroborating evidence; expert evidence; engagement (and rebuttal) of rape myths; trial process (including objections by counsel and other judicial interventions); jury directions; and jury questions.

Transcripts were manually coded by a member of the research team. Each transcript file was read by a researcher, who determined whether a passage should be assigned one or more codes. Recognising that this process involves an exercise in interpretation and judgment, and in order to maximise consistency, we conducted an inter-coder reliability exercise, at the outset, to trial the codebook and

[18] In one case there were two female complainants.

[19] While rape complainants and defendants can be female or male, given the gender profile of the cases in this study's sample, in this report we have used she/her pronouns for complainants and he/him pronouns for the accused.

our application of it. The codebook was refined and coder interpretations were harmonised before coding all available transcripts for the 25 cases.

In a qualitative study of this sort, coding is a means to an end. It was a way of capturing the presence or absence of selected anticipated features of rape trials. It then facilitated systematic analysis of those features, isolation of illustrative examples of the feature in question, and comparison across trials in the sample. The main themes and findings that emerge from our analysis of the coded trial transcripts are presented in this report.

The process of transcript reading also revealed *other* features of the trial in question. With one exception, we did not code or otherwise record additional observations because they fell outside the parameters of the study. The exception was that, because they occurred in a number of trials, and appeared to us to be directly relevant to the overarching concerns of both our larger project and the VLRC's inquiry, we recorded occasions when trial practices appeared to fall short of the objective of creating an environment of sensitivity and respect for complainants. We report on this matter below, alongside our other findings.

1.3.7 Nature and presentation of findings

It is important to emphasise that this study has not attempted – and its methodology does not allow – the establishment of any correlation between *features* of trials which we regard as noteworthy and the *outcome* of the trials from which observations might be drawn. There are far too many variables, many of them unknown to us (most notably, jury deliberations) to speculate on such matters. More importantly, it was not our purpose to 'pass judgment' on any of the trials in our data set. Rather, we have endeavoured to render visible, for consideration by the VLRC, insights about the conduct of rape trials that may be considered relevant to the inquiry into 'Improving the Response of the Justice System to Sexual Offences'.

While we have not, of course, attempted a detailed assessment of the impact of more than 40 years of statutory reform in Victoria, our analysis *is* informed by an understanding of how the Parliament of Victoria has attempted to transform the way in which rape trials are conducted and criminal responsibility for the crime of rape assessed.[20]

Consistent with the qualitative nature of this study, in this report we have made extensive use of (anonymised) extracts from trial transcripts. These words have authenticity and considerable power and, in our assessment, they are often the most effective means for communicating our key findings on the operation of rape trials in the County Court of Victoria. Their inclusion also affords the reader an opportunity to assess whether the observations, claims and suggestions in our commentary are substantiated by the available evidence.

2. Creating a courtroom environment of sensitivity and respect for complainants

We observed that judges, counsel, witness support staff, and other court room participants make a concerted effort to ensure that the courtroom is a less foreign, hostile, daunting and intimidating place for complainants than it has traditionally been. This was evident in a variety of ways, including care and politeness in terms of modes of address, sensitivity to the demeanour and emotional state of complainants, the calling of breaks etc.

[20] Through this report we have generally used the term 'alleged rape', despite the fact that a number of the trials resulted in a conviction - which would warrant describing the events as 'rape'. However, our analysis focuses on the pre-verdict phase of trials (specifically, examination of witnesses) and at these times was still the subject of an allegation rather than a proven crime.

Nevertheless, we observed instances where practices fell short of what should be expected. Most of these were at the less serious end of the spectrum and involved a failure to extend 'small courtesies' to the complainant (or others) or resort to language more blunt than it could have been. We provide the following illustrative examples.

Although well-intentioned, the following advice from a judge might have been worded in a less patronising way:

> *JUDGE: Now, Ms [V20C], that's a soft little voice I heard. The jurors are a fair way away – this is a big courtroom. And our microphones are more for the recording of evidence than for amplifying. So you're going to need to think about making sure you can project so that they can hear you comfortably because if the jurors can't hear you or if I have to keep on interrupting you to ask you to speak up, then they're not going to be able to properly understand and evaluate your evidence; do you understand that?*[21]

In another case the judge referred to an expert witness in the following manner:

> *JUDGE: I know she is the doctor who did the examination, who looked 15 and has been in practice for 33 years and had a voice of a 15 year old. I found that quite amazing.*[22]

Another instance of inappropriate language involved defence counsel referring to video footage depicting the complainant (on her account, being raped in a taxi) as 'pornographic material'.[23]

In the following example, the judge appears to make a pejorative remark about the accent of the complainant (who is from New Zealand), after there was a question about whether she had said 'hid' or 'had':

> *JUDGE: It's a New Zealand accent, members of the jury.*
>
> *WITNESS: Sorry.*
>
> *JUDGE: Make[s] it a little hard on some of your ears.*[24]

In one case, a police witness indicated that they did not know how to pronounce the complainant's (eastern European) surname:

> *CROWN PROSECUTOR: And who did you learn that adult female to be?*
>
> *WITNESS: The - I can't say her name, sorry. …*
>
> *CROWN PROSECUTOR: I can't say it either but [name redacted]?*
>
> *WITNESS: Yeah.*[25]

While pronunciation of unfamiliar names can be challenging, it is a challenge that can easily (and

[21] V20.
[22] V15.
[23] V21.
[24] V20.
[25] V14.

should) be overcome, by making appropriate inquiries and practising in advance.

In another case, the judge demonstrated that even if not done in advance, good practice can still be adopted on-the-spot. The judge posed the following question at the beginning of the complainant's evidence:

> *JUDGE: All right. Can I just ask, how do you pronounce your first name?*[26]

We also observed that some of the vernacular language used to refer to routine aspects of the conduct of criminal trials might be better avoided - such as a judge saying 'we will *turn you off* for a moment' when advising a complainant that the AVL link is about to be temporarily closed or counsel saying 'we are not going to *finish her today*' when discussing the anticipated completion of examination or cross-examination of a witness.

Later in this report we turn to the substance of how complainants are cross-examined. Here, we note that in addition to *what* is said, *how* it is said may have an impact on the complainant's experience in the witness box. In one case, defence counsel asked the complainant about the point in time when, on her account, the accused was 'slobbering around in your vaginal area' and 'poking' her vagina.[27] Another case included the following exchange:

> *DEFENCE COUNSEL: And he put his hands down your pants and unzipped your vest, and pulled your boobs out?*
>
> *COMPLAINANT: Yes.*
>
> *DEFENCE COUNSEL: And you did report to Detective [V23W05] then that he fingered you and when he got in there, that you pushed him off - out?*
>
> *COMPLAINANT: Yes.*[28]

In these examples, the complainant may have used words like 'boobs', 'fingered' or 'slobbering' in her previous statements or evidence, and counsel may have understandably felt obliged to be faithful to the specific words used. If this means that such words could not be entirely avoided when the complainant was in the witness box, it might be preferable if they were prefaced by counsel with 'I am just going to use your own words', or other language to similar effect.

The language used in the following cross-examination exchange could also have been handled more sensitively:

> *DEFENCE COUNSEL: … And so in order for him to penetrate you, your legs must have been open?*
>
> *COMPLAINANT: Yes.*
>
> *DEFENCE COUNSEL: And they would have been - the term I would use is splayed, but they would have been separated quite widely is that right?*
>
> *COMPLAINANT: Yes.*
>
> *DEFENCE COUNSEL: And he's on top of you inside you?*

[26] V16.
[27] V11.
[28] V23.

COMPLAINANT: Yes.

DEFENCE COUNSEL: Was it effectively what we know as the missionary position?

COMPLAINANT: Um I don't understand … what you mean by missionary.

DEFENCE COUNSEL: That's fine if you don't understand that I won't - I won't press that. ….[29]

In the following case it was undisputed that the complainant and the accused met via Facebook, yet the complainant was asked about the authenticity of her profile picture:

DEFENCE COUNSEL: Now at the time that these messages were sent and I can't see because it's not blown up but I dare say, your profile picture was not you, is that right?

COMPLAINANT: Um that was me, yes.

DEFENCE COUNSEL: That is you in your profile picture?

COMPLAINANT: That is, yes.

DEFENCE COUNSEL: That is you, all right. All right, I just couldn't make that out. So it's not a child of yours, or not another person - that is you …?

COMPLAINANT: No, no it's actually me.

DEFENCE COUNSEL: … in your profile, all right?

COMPLAINANT: Yeah it's actually me.[30]

Despite the complainant's unambiguous and repeated answers confirming that the Facebook profile picture was indeed a picture of her, defence counsel persisted with a line of questioning which appears both insulting and irrelevant:

DEFENCE COUNSEL: Now Ms [V2C] consistent with some other questions, if my client's going to give some evidence that you can comment on, I have to put it to you, so I will do so. [V2A] will give evidence that, that profile picture that was on these messages is not you and it's actually a woman that he believed was about 25 - sorry 26/27 years of age. What do you say to that?

COMPLAINANT: No that is actually me.

DEFENCE COUNSEL: That is you, all right?

COMPLAINANT: Yes.

DEFENCE COUNSEL: All right?

COMPLAINANT: I can actually um tell you that it was a professional photo that was taken on a beach.

DEFENCE COUNSEL: How old were you when that photo was taken?

COMPLAINANT: Um that would have been taken earlier that year - - -

CROWN PROSECUTOR: Objection, relevance?

JUDGE: Yes just hold on, just, just hold on. What was the relevance of this? What does it matter?

[29] V2.
[30] V2.

DEFENCE COUNSEL: Well Mr [V2A] - his instructions are that when he arrived at [train station redacted] he was looking for a person who matched what he saw in the profile picture …

JUDGE: Right.

DEFENCE COUNSEL: … and he walked past Ms [V2C] three times and he said that she didn't look anything like her profile picture.

JUDGE: All right, so what?

DEFENCE COUNSEL: That's just part of his narrative.

JUDGE: Well, anyway, you say it is a photo taken of you?

COMPLAINANT: It is.

JUDGE: All right.

DEFENCE COUNSEL: All right?

COMPLAINANT: Correct.

DEFENCE COUNSEL: Was it a recent photo of you, can I put that?

COMPLAINANT: It was taken probably three or four months earlier.[31]

It is hard to discern a forensic purpose in the Facebook photo line of questioning regardless of the accused's apparent instructions. Whether intended or not, it is possible that having to answer such questions would have been embarrassing for the complainant – and unnecessarily so, given that there was no dispute that the complainant and the accused did meet face-to-face for the first time at the train station.

In the cases we analysed, it was not only defence counsel who sometimes used insensitive language that carries a risk of upsetting complainants. Crown prosecutors could err in this respect. In one case, the prosecutor was questioning the complainant about the specific sexual acts that occurred. The language used was clumsy, the complainant became upset, the judge momentarily interrupted questioning to check on the complainant's well-being:

JUDGE: Just a moment, Mr [V16P].

CROWN PROSECUTOR: Sorry, Your Honour.

JUDGE: Are you all right Ms [V16C]?

COMPLAINANT: I guess.

JUDGE: We can take a break if you need one?

COMPLAINANT: No, let's just get it over with.

JUDGE: Proceed for now Mr [V16P].[32]

2.1 Judicial intervention

In order for a rape trial to be conducted in a manner that is as respectful as possible for the complainant, self-restraint by defence counsel is obviously important. But as the above example illustrates, a potential safeguard or corrective mechanism where insensitivity is shown to the complainant is the judge's capacity to intervene (self-initiated or prompted by the Crown prosecutor). Although the distinction is not necessarily clear-cut, in this section of the report we will discuss

[31] V2.
[32] V16.

judicial responses to questioning and language that might cause unnecessary distress to complainants. Later in the report we turn to the topic of judicial responses to lines of complainant cross-examination that may be considered to evoke rape myths or stereotypes that the legislature has attempted to 'write out' of the criminal law and criminal trials, and so require intervention in the form of a jury direction.

As illustrated above, we did observe a number of 'good practice' interventions. For example:

> *DEFENCE COUNSEL: You wanted Mr [V16WC2] to know that you felt you had been wronged?*
>
> *COMPLAINANT: Yes.*
>
> *DEFENCE COUNSEL: That you didn't feel good about a sexual experience that you'd just had with V16A, Mr V16A? I will …*
>
> *JUDGE: Well, I mean she says she was raped, Ms [V16D].*
>
> *DEFENCE COUNSEL: I was going to put that to her.*
>
> *JUDGE: Sexual experience, really?*
>
> *DEFENCE COUNSEL: I was going to put that to her, Your Honour, and I will now.*
>
> *JUDGE: Ms [V16C], are you okay, or … ?*
>
> *COMPLAINANT: No, I'm not.*
>
> *JUDGE: Ms [V16D] doesn't have very long to go but I'll give you a short break?*
>
> *COMPLAINANT: No, that's fine. Let's just do it, just get it over with.*
>
> *CROWN PROSECUTOR: Your Honour.*
>
> *JUDGE: I think you have to be careful about the way you put things, Ms [V16D]. It's clear what the witness' account is. I don't think that should be undermined by the way the question is put.*
>
> *DEFENCE COUNSEL: I withdraw that question and I'll put it again. You had told Mr [V16WC2] in a message that you believe you had been raped?*
>
> *COMPLAINANT: Yes.*[33]

Sometimes it was counsel's tone, rather than the contents of questions *per se*, that attracted judicial attention:

> *DEFENCE COUNSEL: And I suggest that you were lying back then because it seemed to suit a purpose of yours back then?*
>
> *COMPLAINANT: What do you mean?*
>
> *DEFENCE COUNSEL: I'm suggesting to you that what you did is lie on oath at that committal hearing, deliberately. You agree, or you disagree with that?*
>
> *COMPLAINANT: Yeah.*
>
> *DEFENCE COUNSEL: Well, which one is it? Do you agree, or do you disagree with that, Ms [V20C]?*
>
> *JUDGE: Well, you can't sound cross with her when you put a double-barrelled question that gets an ambiguous answer.*
>
> *DEFENCE COUNSEL: Do you agree, or do you disagree?*

[33] V16.

JUDGE: Well, she answered your question, and then you very crossly sought clarification, but it was a responsive answer. The fact that the answer wasn't clear was because the question was ambiguous.

DEFENCE COUNSEL: Yes, Your Honour.

JUDGE: So it really wasn't fair to use that tone of voice.

DEFENCE COUNSEL: Sorry, Your Honour. I wasn't aware of the tone, but now I am.

JUDGE: Very well.[34]

We also observed a number of instances where it is arguable that intervention by the judge should have occurred but did not – or at least not in the presence of the complainant or jury. Two of the most troubling incidents we observed fell into this category.

In one case, the complainant was asked numerous questions of dubious relevance about the details of a hysterectomy which she underwent some time before the alleged rape:

DEFENCE COUNSEL: You gave evidence yesterday that you had had a hysterectomy. Is that right?

COMPLAINANT: That's correct.

DEFENCE COUNSEL: You had pain because of that hysterectomy and the hysterectomy had been some three months before. Is that right?

COMPLAINANT: Approximately – I'm not a hundred per cent sure - yes.

DEFENCE COUNSEL: Was that an abdominal operation?

COMPLAINANT: Keyhole.

DEFENCE COUNSEL Keyhole, through your stomach?

COMPLAINANT: Yes.

DEFENCE COUNSEL: You say that you had ongoing problems with pain. Is that right?

COMPLAINANT: Yes.

DEFENCE COUNSEL: Had you seen a doctor in relation to that?

COMPLAINANT: I went back to my - the doctor that operated on me, yes.

DEFENCE COUNSEL: Did the doctor tell you why you were experiencing pain?

COMPLAINANT: He said that's quite normal. It's part of the recovery.

DEFENCE COUNSEL: Did he tell you the reason or mention any conditions that might cause that pain?

COMPLAINANT: He said because my uterus was so large that they had complications and that could be why I'm still in a lot of pain.

DEFENCE COUNSEL: That pain was in the vaginal canal. Is that right?

COMPLAINANT: Yes.[35]

In another case, defence counsel put the following questions to the complainant during cross-examination:

[34] V20.
[35] V15.

DEFENCE COUNSEL: Why didn't you close your mouth when he's got his penis in it? Are you slack-jawed or something, are you? Sorry, Your Honour. You have no control over your jaw, is that what you are saying?

COMPLAINANT: I had no control of my body.

DEFENCE COUNSEL: You couldn't bite down on his penis that you didn't want in your mouth?

COMPLAINANT: No.[36]

Later in this report we consider whether questioning of this sort should be regarded as requiring an 'on-the-spot' jury direction on consent (specifically, that non-consent does not require physical resistance).[37] Here we draw attention to the fact that aggressive questioning of this sort carries a grave and unnecessary risk of distress to the complainant. At the time, neither the judge nor the prosecutor made any intervention or comment. *After* the complainant was excused, and in the absence of the jury (prior to the lunch break), the judge initiated the following exchange:

JUDGE: I didn't say anything when this question was asked and I'm not, at the moment, saying that this point can't be made in ... your final address, Mr [V13D], but I have never heard a complainant asked why she didn't bite the penis of a man who was orally raping her. .. [I]t's a very surprising question to ask. There was no objection when the question was asked and I felt reluctant to say anything. I think at the end of the day it's a matter for you to make a judgment about it, but it just seems to me that there's so many obvious answers to such a proposition, and ...

DEFENCE COUNSEL: I wasn't ...

JUDGE: ... as I say, I've never heard such a suggestion made in any trial, either as a barrister or as a judge.

DEFENCE COUNSEL: Yes, I regret asking it, Your Honour. It happened in - it was a white line fever thing.[38]

We hesitate to be too critical of how the incident was handled, mindful of the myriad forensic considerations at play, and the danger of focusing on one snapshot out of the totality of how the trial was conducted (including in closing addresses and the judge's charge to the jury). Rather, we reflect on how such a line of cross-examination may impact on a complainant, especially where they are not privy to the judge's (gentle) rebuke of defence counsel. We recognise that the line may sometimes be difficult to draw given that, in our adversarial system, defence counsel are allowed considerable latitude in cross-examination, and judges may be disinclined to chastise defence counsel in front of the jury out of fear of risking adverse inferences for the accused. However, if such instances are appraised from the perspective of creating an environment of sensitivity and respect for the complainant, including the potential for judicial intervention to reassure the complainant that there are limits to the sort of questions she can be asked, the tendency to reserve judicial remarks (if they are forthcoming at all) until the complainant is no longer in the witness box may be a missed opportunity.

Although it was a 'one off' amongst the cases in the study sample, one other incident that we observed should be mentioned. The complainant was giving her evidence by AVL (this being, as we note below, common practice in the rape trials we analysed). The jury asked a question about the complainant's physical dimensions. The question could have been regarded as irrelevant, or if

[36] V13.
[37] *Jury Directions Act 2015* (Vic) s 46(3)(d)(ii).
[38] V13.

considered relevant, the complainant could have simply been asked to answer a question about her height and weight (via AVL). Instead, defence counsel took the opportunity to suggest that the complainant should be asked to appear *in person* in the courtroom so the jury could make their observation and assessment:

> *DEFENCE COUNSEL: I am just wondering, obviously without her giving evidence, whether the jury can actually just see her. That would be the easiest way to achieve that after she has actually given her evidence.*
>
> *JUDGE: Yes, but how do they see her?*
>
> *DEFENCE COUNSEL: See her physically; bring her into the courtroom. We haven't seen her either so we don't know - she could tell us how tall she is and how much she weighs but we have no way of - - -*
>
> *CROWN PROSECUTOR: Your Honour, she is here and we have got a bit of time. I'm quite happy to go and ask her that. ... If she indicates some discomfort a screen could be put up if need be.*
>
> *JUDGE: Can we get her on the screen for a moment? Mrs [V15C], can you hear and see me.*
>
> *COMPLAINANANT: Yes, I can.*
>
> *JUDGE: How would you feel about coming into the courtroom very briefly, just so the jury can see how big a person you are? Would you object to doing that? A screen could be put up so that you didn't see the accused.*
>
> *COMPLAINANT: That would be good, yes, please.*
>
> *JUDGE: After you have given this very brief evidence, would you be prepared to do that?*
>
> *COMPLAINANT: As long as there's a screen.*[39]

Curiously, given that screen use is also standard practice when a rape trial complainant elects to be physically present in the courtroom to give evidence, defence counsel was opposed to the use of a screen:

> *DEFENCE COUNSEL: Perhaps the connection could be shut off.*
>
> *JUDGE: Thank you. I will just close it off and then we will discuss whether that is appropriate. Thank you.*
>
> *DEFENCE COUNSEL: Your Honour, I would be troubled by a screen. It creates like an adverse inference being drawn against the accused. I am happy to talk to him about the importance of not reacting or saying or doing anything.*
>
> *JUDGE: I think in view of other matters that have occurred, she may well be - I don't know; in light of his present situation, she might be very nervous about coming into a room with him.*
>
> *DEFENCE COUNSEL: Yes, but nothing is going to happen to her in the courtroom.*
>
> *JUDGE: I think maybe you should talk to her in private. She should be spoken to in private.*
>
> *CROWN PROSECUTOR: Yes, Your Honour. ...*
>
> *DEFENCE COUNSEL: The other option, Your Honour, is to have the accused absent briefly while she comes into the courtroom. I would prefer that to the screen.*
>
> *MS [V15P]: That is perfectly acceptable, Your Honour.*
>
> *JUDGE: We will do that. We will do that after she has given her brief evidence. We will get her up here and she can come in. I won't tell the jury that. I will just say that we will bring her into the*

[39] V15.

courtroom. You could also ask her those questions about her height and weight. Thank you. We will get the jury in. …

JUDGE: Ms [V15C], you have it explained to you that the jury will just come in and I guess if you just stand up.

CROWN PROSECUTOR: We suggested, Your Honour, there's no point Ms [V15C] going onto the other side of the room. If she comes and stands roughly here and if they need to have a better look.

JUDGE: And try not to feel too self-conscious.

DEFENCE COUNSEL: What I prefer, Your Honour, is for Ms [V15C] to be brought into the courtroom after the jury has come into the room.

JUDGE: All right. I think that's appropriate. So then they will see you walk in and you can just come up and just stand there for a moment, even maybe sit behind the prosecutor.

DEFENCE COUNSEL: Yes.

JUDGE: Just go out and then you will be brought into the court so they will see you walk into the court. Thank you.[40]

Although the transcript suggests that the complainant agreed to the unusual request in this case, it is questionable whether the practice should have been permitted. Expecting the complainant to appear in person in the courtroom, after she had given her evidence from a remote location via AVL, appears to us to be at odds with the manner in which criminal trial courtrooms have been transformed over the years to reduce the trauma caused to complainants (a topic to which we turn in the next part of this report). Later in this report we discuss cases in which the (also problematic) reverse was considered: requiring a complainant who had elected to give her evidence 'in person' in the courtroom to appear via AVL from a remote location.

2.2 Room for complainant's voice

Although there was variation from trial to trial, overall, we were struck by how little space there was in the process of examination-in-chief, cross-examination and re-examination for the complainant's 'voice'. The question and answer format by which evidence is elicited in our adversarial system can be a significant constraint on a complainant's attempts to 'be heard'. Of course, these conventions and limitations apply to all witnesses but the silencing (or at least muting) effect is especially noteworthy in the case of rape complainants. Creating a space for the complainant to *explain* herself and her actions (for example, after the alleged rape) is likely to be related to how she assesses the experience of being a witness, and may also be materially relevant.

Transcript for some trials revealed a complainant's voice that was expansive and resonant; and all the more compelling for that. For example, in one case, when it was suggested in cross-examination that her initial accounts to friends about the incident was vague and imprecise, the complainant effectively explains that she found it very hard to say the word 'rape'. In another case, the complainant provided a powerful response when defence counsel, in cross-examination, suggested that the accused was actually a nice guy whose English was imperfect, and that this may have caused miscommunication:

COMPLAINANT: … his English, even though it was broken, he understood what I was saying and everybody knows the universal word for no and please don't do this.[41]

[40] V15.
[41] V23.

Sometimes, complainants who attempted to 'break out' of the confines of the question-answer format, were reminded about the appropriate way to behave in the witness box. In one case, the complainant was asked whether there was any conversation between her and the accused when they were seated in a taxi shortly after he was alleged to have aggressively said 'fuck you' to her when she declined his invitation to go home with him:

> *DEFENCE COUNSEL: Well given what he had just done to you on your evidence, a person you barely know inches from your face?*
>
> *COMPLAINANT: I'm in HR …*
>
> *DEFENCE COUNSEL: Just wait please?*
>
> *COMPLAINANT: It's quite common for people to get aggressive and it was uncomfortable but it wasn't - it wasn't over the top.*
>
> *JUDGE: Ms [V9C], Ms [V9C], I just need you [to] understand, this is a process?*
>
> *COMPLAINANT: Okay.*
>
> *JUDGE: And in cross-examination what I need you to do is just listen to the questions and answer them as directly as you can?*
>
> *COMPLAINANT: Okay.*
>
> *JUDGE: If you don't know just say you don't know. The prosecutor will have an opportunity to ask you some more questions to clarify anything that arises in cross-examination, all right?*
>
> *COMPLAINANT: Okay and I apologise.*
>
> *JUDGE: Thank you. That's all right, you don't need to apologise. Go ahead please.*[42]

But, of course, there *was* something to apologise for, because the complainant had failed to conform to the expectations of how a witness is expected to engage in dialogue with counsel by answering the questions asked and no more.

In another case, the following exchange occurred:

> *DEFENCE COUNSEL: So in other words, it's clear, you wouldn't have given him oral sex unless he had his hands on your head making you do it, correct?*
>
> *COMPLAINANT: I wouldn't have given him oral sex if I was able to consent.*
>
> *DEFENCE COUNSEL: No, don't …*
>
> *COMPLAINANT: … if I was in a fit state.*
>
> *DEFENCE COUNSEL: Please, Ms [V21C], don't answer questions with a conclusion. Okay?*
>
> *COMPLAINANT: Okay.* [43]

It is possible for Crown prosecutors to remedy such situations during re-examination. For example, in one case the following exchange took place during cross-examination:

> *DEFENCE COUNSEL: So … ?*

[42] V9.
[43] V21.

COMPLAINANT: Can I say something?

DEFENCE COUNSEL: Not unless it's in answer to a question, Ms [V21C].[44]

During re-examination, the prosecutor gave the complainant the opportunity she had been seeking:

CROWN PROSECUTOR: You indicated that you wanted to say something in relation to that. What did you want to say in relation to that?

COMPLAINANT: I wanted to say that I remembered being offered money for sex and turning it down and having to do it anyway, and I wanted to see if he'd given me the money as like, I knew that I'd refused to take it and, like I said, 'I don't want to be a part of this.' But I knew that it had happened anyway. So I wanted to see if he'd like, left it in my bag or anything, and to like imply that I was like a prostitute or that I was partaking in prostitution.[45]

Notwithstanding the constraints, a noteworthy feature of transcripts we analysed was complainants who were articulate in resisting the manner in which defence counsel attempted to characterise their actions or state of mind. We feature illustrative quotations here:

DEFENCE COUNSEL: But when it was over, you regretted it, did you not?

COMPLAINANT: I regretted the entire night.

DEFENCE COUNSEL: When the sex act was over, you regretted it?

COMPLAINANT: I regretted it. I didn't consent to it.

DEFENCE COUNSEL: Well, you told the police you don't remember consenting?

COMPLAINANT: But I didn't consent to it.

DEFENCE COUNSEL: All right?

COMPLAINANT: I don't - when you have no memory of consenting to something, how can you consent? ...

DEFENCE COUNSEL: Precisely, and can I suggest that you then regretted your having sex with somebody in that bed in that situation? You regretted it?

COMPLAINANT: Of course I'm going to regret having sex with someone I didn't consent to.[46]

***

DEFENCE COUNSEL: You see, [V3C] what I'm saying to you is that when you woke up you, at that point, realised that you had sex. You hadn't remembered that before you reached down and felt your underwear?

COMPLAINANT: I recall that that's why I went and checked my underwear. That's what led me to checking my underwear. And it wasn't sex 'cause he raped me. So can you, can rephrase that from me having sex with someone when I gave him sent when I didn't give him consent. Can I have a break please?[47]

***

[44] V21.
[45] V21.
[46] V1.
[47] V3.

DEFENCE COUNSEL: Ms [V16C], is your memory of what happened in the lounge room foggy, that is unclear, because of what you've described as waking up from sleep and going back to sleep?

COMPLAINANT: I know what happened to me.[48]

***

DEFENCE COUNSEL: Well, is it possible that if you were in shock, you did not communicate what was going on in your mind? Any hesitation you had about what was happening, is it possible that you didn't communicate that as loudly or as clearly as you might have?

COMPLAINANT: I definitely said it. I definitely said it loudly and firmly.[49]

***

DEFENCE COUNSEL: So when you spoke to the police in November, on 5 November last year your gaps - you agree that you had gaps in your memory because of your depression?

COMPLAINANT: No. I must have just said the wrong thing. It's not because of my depression. I don't have gaps in my memory because of depression. It's not a thing. ...

DEFENCE COUNSEL: But we don't see anywhere in the [taxi camera] imagery anything that shows you pushing him off or ... ?

COMPLAINANT: There's a lot that you can't see in the imagery. .... [50]

***

DEFENCE COUNSEL: So, saying to [V4WCG2], both at that time immediately after he turns on the light and later in some of the text messages that we have, 'I thought it was you', was something you were saying because you felt a lot of blame at that time, is that what you're saying?

COMPLAINANT: I felt awful and disgusting, I did, and I'm not going to take away from that. However, I think that what one says immediately after an event such as this ...

DEFENCE COUNSEL: Yes?

COMPLAINANT: ... is often not a true reflection of the - the initial situation, it's a reflection of that person's mental state and the blame that they carry for what has occurred.[51]

In a very small number of cases in this study the complainant's voice was elevated and expansive and often uninterrupted, including in cross-examination:

DEFENCE COUNSEL: ... What I'm suggesting to you, just to be clear, [V8C], is this, that the reason you remained in bed, in the same bed as Mr [V8A] for the remainder of the evening was because he hadn't raped you. He'd sexually touched you and assaulted you but he hadn't put his fingers in your vagina and you had dealt with that. You had told him it wasn't on, to stop and he had stopped and he didn't try and do anything else and so you remained in the bed?

COMPLAINANT: No.

DEFENCE COUNSEL: I appreciate that's a long question but what do you say to that suggestion?

COMPLAINANT: That, that context is completely wrong. Um, I'll set it for you. I was absolutely scared, panicked, someone had just broken the trust in the worst way possible you can and I needed to protect myself so nothing worse happened to me or more happened to me so I stayed in my bed and curled up into a ball because what are you going to, fight, flight or freeze? You're going to

[48] V16.
[49] V18.
[50] V21.
[51] V4

run away, you're going to stay there and hope you don't provoke someone else who's already tried to put physical force into you, or are you going to force them away yourself?

You know, I did push him away and said, 'You should leave' and that's all I said to him and he didn't leave until that alarm clock went off. But no there - that's not wrong. There was no talk through it or anything. It was, 'You should leave' nothing else was said. I move into my ball, nothing else. I couldn't have left. I mean maybe if he hadn't raped me I wouldn't have been this scared of him so, I would have been able to get my car keys wherever they were and get out of there but he's gone past that and he's raped me so, of course, I'm thinking, 'Oh God, what's he gonna do next?'.[52]

One other case in this study stood out for the space afforded to the complainant to 'tell her story'.[53] Ironically, it appears that that freedom was, in large part, a by-product of the technical difficulties the trial encountered – specifically, in relation to attempts to show CCTV footage during the complainant's examination-in-chief and cross-examination from a remote location via AVL (a topic to which we return below). Rather than the conventional question and answer format, the Crown prosecutor adopted the practice of showing a segment of CCTV footage (of the complainant and the accused in the public area in which the rape was alleged to have occurred), and then asking the complainant to explain what was happening in the 'scene' just observed. Noting that the complainant is in a remote location and watching, on a different device, a parallel recording to the one being shown to the jury in the courtroom, at one point the prosecutor asks the complainant to take control over when the footage will be stopped and an account offered (by her). It seems likely that the complainant would not have been afforded such latitude but for the technical difficulties. Nonetheless, this case, and the previous case discussed, illustrate that the criminal trial *is* capable of accommodating a more prominent and autonomous voice for the complainant.

2.3 Viewing CCTV in advance

The case just discussed was one of just two in this study where the evidence involved CCTV footage of some of the interactions between the complainant and the accused that constituted the alleged rape. In both instances defence counsel was opposed to the complainant being allowed to view the footage before she entered the witness box. In one case, the matter did not require a judicial ruling because it transpired that the complainant had in fact viewed the footage on an earlier occasion (prior to an earlier trial that did not go ahead, and where the complainant did not give evidence) and the prosecutor indicated that they did not plan to show the complainant the footage (again) in advance of her time in the witness box.[54] In the other case, after extensive submissions and discussion, over defence objection, the trial judge ruled that the complainant should be given a chance to watch the footage ahead of time to help prepare her for its contents:

JUDGE: She is shown in the video naked and taking part in sexual acts in the taxi with the accused. It will be embarrassing and probably distressing for her to see the footage, and in the circumstances it is appropriate that she should not see it for the first time in front of the jury.

The setting in which she does see it for the first time should be an appropriate one in the presence of, for example, the crown instructor, and that may be a matter for discussion. I would like to discuss that with counsel before that happens.[55]

[52] V8.
[53] V23.
[54] V23.
[55] V21.

The result was that, in both cases, the complainant *had* been given the opportunity to view potentially upsetting footage by the time she stepped into the witness box, but it appears that this was not guaranteed.

Audio evidence (for example, of a pretext call between the complainant and the accused) also has the potential to cause distress. In the following case, the trial judge was alert to this possibility and forewarned the complainant – albeit, in court, immediately prior to the audio being played:

> *CROWN PROSECUTOR: All right. Now, I want to play these two records, Your Honour. And I want you to listen to them, please, Ms [V20C]. Then I will ask you some more questions after listening to those two phone calls, all right?*
>
> *JUDGE: Have you heard those phone calls since you made them?*
>
> *COMPLAINANT: No, I've read them.*
>
> *JUDGE: Okay. It can sometimes be a bit of a shock to hear your voice again, so just be ready for that.*[56]

The complainant *did* become distressed and the trial judge intervened appropriately by calling a break:

> *JUDGE: … (To witness) [The prosecutor] wants [to ask] you some questions before we play the third recording, so what I might do is just give you a bit of a break. As I said, it is – it's sometimes a shock, isn't it, to hear your voice on the recording when you haven't heard that before. So we will just give you a bit of time. Can you take a break, members of the jury. …*[57]

Consideration should be given to making advance viewing (by the complainant) of CCTV footage that include images of the complainant and the accused (and advance listening to audio that includes the voices of the complainant and the accused) standard practice. This would be preferable to allowing the matter to be contested, and in need of judicial adjudication, at each trial where it arises. We acknowledge that there may be tension here with the rigour of an adversarial system, including the expectation that matters that go to potential forensic advantage should be assessed on a case-by-case basis, with opportunities for counsel to make submissions. However, from the perspective of creating an environment of sensitivity and respect for complainants, and minimising distress, we believe that advance viewing is desirable.

This observation echoes a theme that runs through a number of the findings and recommendations in this report: the experience of the rape trial for complainants could be improved if a range of good practices became routine, rather than subject to amenable counsel or a favourable ruling from the trial judge, or good fortune (for example, in relation to the operation of courtroom technology, discussed below). Each criminal trial is, of course, a unique event, and deserves to be treated as such. However, some procedural aspects of rape trials occur with such regularity and/or are of such significance for the complainant (a uniquely positioned witness/non-party to proceedings) that they warrant reliable arrangements to guarantee best practice for minimising distress. This is especially so in relation to the location- and technology-related logistical matters that arise from complainants giving evidence from a remote location via AVL. Before we turn to this issue, we comment briefly on what we observed about the handling of closed court arrangements.

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[56] V20.

[57] V20.

2.4 Closed court arrangements

One of the many measures employed to protect the confidentiality of the complainant and to reduce distress is the practice of closing the court to members of the public while the complainant is giving evidence. With the exception of one day of one trial (where the Crown prosecutor forgot to request a closed court, and the trial judge consequently did not make an order that the court be closed – an oversight that was rectified at the beginning of the next day before the complainant recommenced giving evidence), [58] we observed consistent adoption of this practice.[59]

In one case, one of the persons (appropriately) exempted from the judge's closed court order was the complainant's Victims and Witness Assistance Service support person. This was an atypical case in which the complainant opted to give evidence in person in the witness box. It followed that her support person was seated in the front row of the public gallery (rather than sitting next to her in the remote location, as was the case in the majority of trials in this study). There was a discussion between the judge and counsel as to what the judge should tell the jury about the identity/role of the person sitting in the front row. We would have thought that the obvious answer was: complainants in rape trials commonly have a support person present when they give evidence, and you should think nothing of it. Instead, defence counsel requested that no mention be made of the woman's role, and the judge deferred: 'That's all right, yes, I'll be guided by what defence counsel want in respect of that.'[60]

3. Using technology to minimise distress and facilitate justice[61]

> *CROWN PROSECUTOR: I am sorry Ms [V23C], the law and technology are not great mates.*
>
> *COMPLAINANT: No.*[62]

Communication technology that does not require the complainant to appear physically in the courtroom is an important feature of the modern rape trial.[63] The aim is to reduce distress and the potential for re-traumatisation. Although the sample for this study is not a representative sample it appears that remote location AVL has become the most common method for complainants giving evidence in rape trials. In only 5 of the 25 trials in this study was the complainant physically in the courtroom to give evidence (and in two of these cases evidence-in-chief had been given in the form of a VARE).[64]

We observed examples of excellent advance planning and good practice (including ensuring that all relevant documents were available to the complainant in the remote location), which achieved a relatively seamless integration of the remotely located witness into the courtroom and the trial.

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[58] V1.

[59] We note that in a small number of cases the judge exercised their discretion to exempt some non-participants from the order and allowed them to stay in the courtroom during the complainant's evidence: a law student undertaking an OPP clerkship (V20); a small group of students (V16); the accused's mother (V8); the accused's girlfriend (V18).

[60] V19.

[61] Our observations on this topic are generalised and without reference to the different infrastructure that exists in different court locations. The trials in this study also span a 7 year period, and it is possible that the reliability and suitability of available technological arrangements may have improved over time.

[62] V23.

[63] *Criminal Procedure Act 2009* (Vic) s 360.

[64] In one case the complainant died before the trial, and so her evidence took the form of a recording of her committal hearing evidence (V17).

However, given that remote location + AVL evidence for complainants appears now to be routine, we were concerned to observe numerous incidents where the arrangements did not run smoothly. We were surprised by how often it appeared as if a location- or technology-based problem was unanticipated, as if it had never arisen (and been resolved) in previous trials. As suggested by the quote that opened this section of the report, and the one that follows here, regular courtroom participants, such as counsel and judges, are aware that the available technology is unreliable and apologetic about this:

> *JUDGE: Yes, thanks, members of the jury. Apologies for the delay. How shall I describe it?*
>
> *TIPSTAFF: Technical (indistinct), Your Honour.*
>
> *JUDGE: Technical problems. Put a man on the moon in when, 1968 and we've all watched him and we heard him. It is now 2018. One would think we'd be able to have the equipment necessary, but there you go.*[65]

Previous negative experience was presumably the motivation for some judges to be very proactive about having the technological set-up checked, and being explicit about their expectation that counsel conduct a 'test run'.

Some complications were at the minor end of the scale – as the following extracts illustrate – but still worth avoiding if possible (for example, via a protocol for setting up the witness appropriately ahead of time):

> *CROWN PROSECUTOR: I wonder before that's done if it's not asking too much, whether we can have the witness' head a bit lower so that we can see everything.*
>
> *JUDGE: So possibly move your chair back a bit further.*
>
> *CROWN PROSECUTOR: No, further. No, that's …*
>
> *JUDGE: We're just chopping off the top of your head at the moment. You're lowering the chair, are you?*
>
> *COMPLAINANT: I'm trying to.*
>
> *JUDGE: All right. I think that's better. Is everybody happy with that? Yes, all right.*[66]
>
> ***
>
> *CROWN PROSECUTOR: All right. Now, what if - I've just noticed, Your Honour, I've been standing where I'm standing, it must be - might be the great design of this courtroom, but I'm probably blocking some members of the jury, my big head standing in front of the screen. I'll stand back a little.*
>
> *JUDGE: I see.*
>
> *CROWN PROSECUTOR: Unfortunately. So I'm sorry about that.*
>
> *JUDGE: Members of the jury, do any of you have an interrupted view of Ms [V12C]? Thank you.*
> *…*
>
> *JUDGE: Ms [V12C], can you hear me?*
>
> *COMPLAINANT: Yes, I can.*
>
> *JUDGE: And what can you see?*

[65] V16.
[66] V18.

COMPLAINANT: I can see you, and half of a head on the other screen.

JUDGE: The one that just pointed to its nose?

COMPLAINANT: Yeah. But yeah, I can't see anyone on the other screen, it's just the top of a head.

JUDGE: All right. Well, the important thing is that you can hear us?

COMPAINANT: Yeah.

JUDGE: Thank you, Mr [V12P].[67]

This scene, of a complainant's evidence-in-chief beginning with clumsy attempts to remedy imperfect video arrangements (eg who could see who), was not uncommon. Sound quality was sometimes inadequate; the AVL was sometimes temporarily lost. Examination-in-chief and cross-examination were sometimes impeded by the fact that relevant exhibits, statements and other documents were not to hand (or were difficult to navigate) in the remote location from which the complainant was giving evidence. The suitability of the remote location could also be an issue:

JUDGE: I don't know where we're linked to but it's a terrible remote witness room. Can that be conveyed to the Crown. Having people wander past like …

CROWN PROSECUTOR: I know, I saw that Your Honour, I thought it was …

JUDGE: Just hopeless, terrible.

CROWN PROSECUTOR: … outrageous even. I got distracted by seeing someone …

JUDGE: It looks like a shopping mall. It's just not appropriate.

CROWN PROSECUTOR: No.

JUDGE: So I simply say that. These are serious matters, the complainant herself is - I simply put it on the transcript - entitled to an environment that is free from these distractions.

CROWN PROSECUTOR: Yes and also puts off counsel, not that that's a major thing, and probably distracts the jury as well Your Honour. And I totally agree.

JUDGE: Yes, so it shouldn't be used.[68]

The use of a remote location sometimes resulted in 'duties' being imposed on the complainant which she would not have had to perform if she had been physically in the courtroom:

CROWN PROSECUTOR: Can you maybe just hold those up just to confirm we're looking at the same photographs? Yes, thank you.

JUDGE: Just try not to knock the microphone, Ms [V16C]?

COMPLAINANT: Sorry.

JUDGE: That's okay.

CROWN PROSECUTOR: If you just …

JUDGE: If you just get the witness to describe things rather than hold it up? It may be difficult to hold it up, I suspect.[69]

[67] V12.
[68] V9.
[69] V16.

In other cases, the complainant was asked to take responsibility for operating the CCTV playback equipment in the remote location.[70]

3.1 Showing CCTV footage

One of the situations that greatly impeded trials was where counsel wanted to show CCTV or other video footage during examination-in-chief or cross-examination of the complainant.[71] The main complication was the difficulty of syncing the video footage which was to be shown in the courtroom with what could be viewed by the complainant in the remote location, and requiring two screens – one for the display of the CCTV footage, and one for the display of the witness (or courtroom in the remote location). Granted, such a situation requires a more sophisticated technological set-up than usual, but the technology needs could (and should) have been anticipated and addressed in advance.

In one case the technological hurdle appeared so insurmountable that the complainant was asked by the Crown prosecutor's instructor whether she might be willing to give her evidence in person in the courtroom as a 'solution' to the CCTV footage challenge. The complainant maintained her preference for giving her evidence via AVL, and another (stop-gap) solution was found. Clearly, it should not fall to the complainant to compensate for deficiencies of technology or forward planning. That the frustration (and extensive delays) could have been avoided was acknowledged by the judge:

> *JUDGE: If we had thought about this, I could have lobbied for this to be in the court with the pop-up screens, couldn't I? Next time - unless either of you want to make the call - we could possibly move the whole trial to a court with screens.*
>
> *CROWN PROSECUTOR: Yes, I think it is 8 and 9 that have them, Your Honour, courts 8 and 9.*[72]

Ironically, in another case, a complication arose from the fact that the complainant chose to give evidence in court – in the witness box, with a screen between she and the accused. However, the screen on which CCTV footage and her VARE were to be played could not be viewed from the witness box, and if she was to sit in a different location for these purposes, the positioning of the screen presented problems:

> *JUDGE: Good morning. ... I understand there have been some efforts this morning to sort out a plan for the use of the screen and that plan has hit some obstacles in terms of the use of the screen while the complainant is being cross-examined watching the CCTV footage. That sums it up does it, Ms [V21P]?*
>
> *CROWN PROSECUTOR: Yes, Your Honour.*
>
> *JUDGE: Can I ask you this first of all, Ms [V21P]? Do you plan to - is it the plan to have the complainant in the witness box whilst the VARE is being played or not? Is that ...*
>
> *CROWN PROSECUTOR: No. That wasn't ...*
>
> *JUDGE: No? That's fine. Has any solution been considered in respect of the use of the screen or not?*
>
> *CROWN PROSECUTOR: The informant is speaking with the complainant at the moment and asking her if it came down to giving evidence in court without a screen or the remote facility, what her preference would be. I've sort of just arrived, but I think my learned friend and Your Honour's associate have been discussing it for a while and it seems that there isn't really a solution if*

[70] V9, V23.
[71] V9, V16, V23.
[72] V23.

Mr [V21A] is to be able to watch the CCTV at the same time as my learned friend is cross-examining the complainant, and that's my friend's preference.

JUDGE: Yes. It seems to be the case, doesn't it?

CROWN PROSECUTOR: Yes, Your Honour.

JUDGE: Thanks, Ms [V21P]. Ms [V21D] that sums it up, does it?

DEFENCE COUNSEL: Yes, it does, Your Honour.

JUDGE: Well, I'll step off the Bench so that the informant can let you know, Ms [V21P], what's happening.

CROWN PROSECUTOR: Yes, Your Honour.

JUDGE: Of course we've moved courts again. I don't know what the possibilities are for the use of the remote room at this stage. But that can be looked into too.[73]

Ultimately, an adequate courtroom arrangement was achieved, but we are surprised that the use of remote location + AVL was identified as a possible 'solution', given that the rationale for introducing remote location arrangements was to improve the sensitivity and respect shown to the complainant, not to compensate for imperfections in the physical arrangements of the court.

In the same case, requiring the complainant to give evidence from a remote location via AVL was foreshadowed *again*, this time by defence counsel, as a possible solution to a different 'problem'. When video footage of the complainant and the accused during the alleged rape was shown in the courtroom, the complainant, who was present, became very upset. The problem, in the submission of defence counsel, was that the complainant's extreme emotional distress in the courtroom could be so prejudicial to the accused as to warrant a dismissal of the jury:

DEFENCE COUNSEL: Your Honour, I just want to register a concern that I have, and that's this: obviously the reaction of the complainant to watching the video - the footage was palpable. In my submission it creates all sorts of problems for emotional reactions and prejudicial responses to be enlivened in front of the jury. Now, I appreciate that it's difficult. That may be the case, but that doesn't get around the fact that her registering that emotional reaction is something that in my respectful submission has to be kept to an absolute minimum to ensure that the jury are not prejudiced by that.

JUDGE: Yes, certainly. …

DEFENCE COUNSEL: If she feels that she couldn't watch this - she's going to be asked to watch it for the next hour and a half, if not more, and comment on it. Some of those images she's going to be asked to comment on are graphic. If she feels that she can't keep her emotional reactions to a minimum, then I think we have to [re-]consider her giving evidence live in front of this jury.

JUDGE: Yes. I agree with you.

DEFENCE COUNSEL: The remote facility is designed …

JUDGE: Can I just say something?

DEFENCE COUNSEL: Yes, Your Honour.

JUDGE: I agree with you that it is a good idea to speak to her about her reaction and the need for her to tell me she needs a break, just as any other witness would when upsetting material is being put to them, for example in cross-examination as often happens when a young or even not so young witness gets upset. It's no different from that, but of course this is unusually confronting material for a witness to have to watch.

[73] V21.

DEFENCE COUNSEL: It is.

JUDGE: Now ...

DEFENCE COUNSEL: She was physically repulsed by what she was watching, and Your Honour's associate very kindly put a bucket there in case she vomited.

JUDGE: Yes.

DEFENCE COUNSEL: Well, I mean, we're looking at a discharge, with respect, if we get reactions like that. In my view that is much too prejudicial.

JUDGE: I was going to say that if Ms [V21C] was in the remote witness room, the same things might happen, but they wouldn't be quite so graphic.

DEFENCE COUNSEL: That's right. They're not so palpable in the remote - there's that distance, and that's my submission in a sense, that that's why those provisions are designed to be there. Well, they're obviously designed for protection of the complainant, but in a circumstance like this it may be more appropriate that she gives her evidence from a remote facility, given the nature of this graphic, pornographic material that she's going to be required to watch over and over again and comment on.

JUDGE: I will speak to her in a moment when she comes back into court about the need for her to let me know if she's too upset to go on for any reason at all, if she's feeling upset either emotionally or physically.

DEFENCE COUNSEL: Yes, Your Honour.

JUDGE: Now, I can also say to her that if it transpires that she does feel very upset physically or emotionally, there is an option available to her, I'd only put it in these terms at this stage, of giving evidence from what we call a remote facility, another room and her image would be seen by the jury. I'll explain that much her and we'll see how we go.

DEFENCE COUNSEL: Thank you.[74]

In the end, the complainant did give her evidence in court, including during the showing of the video footage, and a ruling on this defence counsel submission was not required. However, in our assessment, the submission that a complainant might be *required* to give her evidence from a remote location — for a reason that has nothing to do with her well-being — was inappropriate.[75]

3.2 Pre-recorded evidence

Another technology-reliant rape trial innovation that introduced complications in some of the trials in this study was the use of pre-recorded evidence from the complainant (typically, from a previous trial).[76] This sometimes created challenges for the smooth running of the trial due to equipment failure, disc non-recognition or the disc being cued to the wrong location:

CROWN PROSECUTOR: Your Honour, that's just kicked in halfway through.

JUDGE: Just play it from the start, I think, if you would.

(Recording played to court.)

JUDGE: No. Technical problems.

(Recording played to court.)

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[74] V21.

[75] We noted above that the language used by defence counsel to describe the contents of the video footage was also inappropriate.

[76] In a small number of cases, pre-recording was used for the other witnesses – for reasons of witness availability and convenience – and, of course, also in the case of a recorded police interview with the accused.

JUDGE: I think we've got to go further back, if possible.

TIPSTAFF: I don't know why it's doing that, Your Honour, it should be starting from the start.

JUDGE: All right, well ...[77]

Pre-recorded evidence sometimes requires editing. This posed its own challenges, including the need for negotiation between counsel over edits, and the question of what to tell the jury about footage that reflected edits, potentially confusing time stamps etc. The sound quality of pre-recorded evidence was also an issue in some cases. In one case, the judge's laudable efforts to ensure that the courtroom technology was working properly was confounded when it was discovered that the poor sound quality of the recording of the accused's police interview led the jury to request a transcript to aid understanding.[78]

The nature of this study is such that we have no basis for reaching any conclusions about whether location- and technology-related complications and imperfections, have any impact on outcomes. Nor do we have any direct insight into how complainants experienced the resulting delays, impositions and 'work arounds' but it is certainly possible that for some, it made the experience more distressing than it would otherwise have been.

Our finding is modest but important: given that technology-facilitated evidence is now mainstream in rape trials, it is desirable and reasonable to expect that court technology is reliably fit for purpose and that the appropriate preliminary checks are done before complainants are called.

Although it was beyond the scope of this study, the use of pre-recorded evidence warrants further attention. It appears to us that it may have effects over and above the primary (though not only) rationale for its use in rape trials – ie to relieve the complainant of the burden of having to give evidence a second time. An advantage may be that the editing that typically precedes the playing of pre-recorded evidence may allow for the exclusion of lines of questioning (and associated answers) that are determined, at the second trial, to be unfair to the complainant or otherwise inappropriate or inadmissible.[79] A possible disadvantage is that receiving a large amount of evidence by watching an audio-visual recording may be challenging for jurors. In one case, the only witnesses to give evidence in the courtroom were medical witnesses and the police informant. The evidence of all other witnesses was viewed and heard through a pre-recording.[80]

4. The concept of consent

A familiar law reform narrative is that Victoria is one of the jurisdictions in which the concept of consent, as it applies to the crime of rape, has been transformed: into a concept that is about free agreement, communication and consideration of the steps taken to ascertain whether the other person is consenting. Part of the statutory architecture for this transformation has been the express statutory disavowal of the traditional 'requirements' for proving non consent, such as evidence of an express 'no', force, threats, physical resistance, or injuries.

We were interested to observe how manifest this transformation was in the cases in this study's sample. Later in this report, we consider the related question of whether rape myths persist in rape trials – with a specific focus on the manner in which complainants are cross-examined. In this section,

[77] V16.
[78] V17.
[79] V16.
[80] V12.

we endeavour to discern the nature of the concepts of consent and non-consent that were operative in the rape trials in our data set.

Acknowledging the limitations of a methodology that involved access to only a small number of charges (6), and a very small number of closing addresses (2), our first observation is that examination-in-chief and cross-examination – for complainants and accused persons (in those cases in which the accused gave evidence) – carried little trace of the transformed concept. We do not mean simply that phrases such as 'communicative model' or 'communicative consent' did not appear in the transcripts (although this is certainly the case), but also that there was little articulation of the idea that consent as 'free agreement' involves communication between the parties to the sexual act. For example:

> *CROWN PROSECUTOR: … Did you consent or agree to the accused man removing your clothing?*
>
> *COMPLAINANT: No.*
>
> *CROWN PROSECUTOR: Did you consent or agree to him removing your tampon?*
>
> *COMPLAINANT: No.*
>
> *CROWN PROSECUTOR: Did you consent or agree to him putting his penis inside your vagina?*
>
> *COMPLAINANT: No.*
>
> *CROWN PROSECUTOR: Did you consent or agree to any sexual contact with the accused man that night?*
>
> *COMPLAINANT: No.*[81]

To be clear, we are not suggesting that the simplicity of this series of questions is improper; it may well be forensically advantageous. Our point is simply that the approach involves no amplification on the meaning of 'consent', and tends to assume that the meaning is mutually understood by the questioner and answerer (and the jury).

In some cases, the Crown's questions appropriately drew attention to the fact that the complainant had not done anything to communicate consent:

> *CROWN PROSECUTOR: Now at any point, did you do anything?*
>
> *COMPLAINANT: Only after he came.*
>
> *CROWN PROSECUTOR: What did you do?*
>
> *COMPLAINANT: I told him he needed to leave. I had made it clear that I'd been awake and I told him he had to leave and I got upset and sad.*
>
> *CROWN PROSECUTOR: When you told him to leave, was that the first time you'd said anything since the time he got on that second couch?*
>
> *COMPLAINANT: Yeah.*[82]
>
> ***
>
> *CROWN PROSECUTOR: Were you still on your back on the bed?*
>
> *COMPLAINANT: Yes.*
>
> *CROWN PROSECUTOR: Had you said anything to him at that point?*

[81] V12.
[82] V16.

COMPLAINANT: No.

CROWN PROSECUTOR: Had you moved your body at all at that point?

COMPLAINANT: No.[83]

The accused gave evidence in a minority of cases in this study (11 of 25), and questions in cross-examination that evoked the concept of communicative consent were rare. The following is one example:

CROWN PROSECUTOR: You say this was a consensual act?

ACCUSED: Absolutely.

CROWN PROSECUTOR: But when you say, 'Can I come inside you?', not one word is uttered from her?

ACCUSED: That's right.[84]

Sometimes it was the complainant who drew attention to the concept of communicative consent:

DEFENCE COUNSEL: Well, again, can I put to you that when you left the bench to find a secluded spot in the park it was following an agreement with [V10A] to have sex with him?

COMPLAINANT: That discussion about having sex was never had.

DEFENCE COUNSEL: That discussion would be consistent with your evidence just then that you wanted to have consensual sex with him?

COMPLAINANT: What I meant was if it were to go down that path then if we had had a communication, but there was no communication.[85]

Although we have highlighted here instances where the concept of communicative consent was detectable in examination-in-chief and cross-examination, these instances were more the exception than the rule. Our general impression is that that the concept had little visibility. The same is true of the statutory definition of consent as 'free agreement', but we acknowledge that the meaning of consent would routinely feature more prominently in the Crown's closing address and the judge's charge to the jury – these being parts of the trial transcript to which we did not generally have access. In one of the cases for which we did have a transcript of the charge the trial judge made specific reference to consent as 'free agreement' as well as to relevant s 36(2) circumstances.[86]

Our observations about the low visibility of communicative consent and free agreement are also supported by the sort of questions and language which *were* used in relation to examination and cross-examination about consent. Disturbingly, these often echoed 'old' indicia of consent that statutory form has attempted to displace. In particular, there was a focus (from defence counsel, but also sometimes by prosecutors) on the presence or absence of an express 'no' from the complainant, and/or resistance by the complainant. In addition, defence counsel often focused on prior behaviour by the complainant which was said to provide a basis for 'inferring' consent at the time of the sexual act.

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[83] V1.
[84] V1.
[85] V10.
[86] V21; *Crimes Act 1958* (Vic) s 36(2).

In the cases in this study, complainants were still regularly questioned about what they 'did' in response to the accused's actions – for example, 'did you say "no"?'; 'did you scream?'; 'did you try to push him off?' Later we will consider the relationship of such questions to rape myths. Here we provide illustrative examples of how such questions reinforce outdated conceptions of rape and non-consent, and are at odds with provisions such as s 36(2)(l) of the *Crimes Act 1958* (Vic) ('a person does not consent' if 'the person does not say or do anything to indicate consent to the act'), and s 46(3)(d)(ii) of the *Jury Directions Act 2015* (Vic) ('people who do not consent to a sexual act may not protest or physically resist the act').

4.1 Non-consent as 'no'

In the face of s 36(2)(l) (and its predecessor provisions[87]) we were surprised to observe lines of questioning during complainant cross-examination that were underpinned by the traditional expectation of verbalised demonstration of non-consent, and which attempted to infer consent on the basis of silence:

> *DEFENCE COUNSEL: What I suggest – ... you didn't say anything to him to indicate you weren't consenting, did you?*
>
> *COMPLAINANT: No.*
>
> *DEFENCE COUNSEL: I'm sorry?*
>
> *COMPLAINANT: No.*[88]
>
> ***
>
> *DEFENCE COUNSEL: You say in that panic you don't do anything or say anything to him?*
>
> *COMPLAINANT: No.*[89]
>
> ***
>
> *COMPLAINANT: Yes.*
>
> *DEFENCE COUNSEL: You did not scream out?*
>
> *COMPLAINANT: No.*
>
> *DEFENCE COUNSEL: You did not shout?*
>
> *COMPLAINANT: No.*[90]
>
> ***
>
> *DEFENCE COUNSEL: You didn't call him a rapist?*
>
> *COMPLAINANT: No.*
>
> *DEFENCE COUNSEL: You didn't even say to him, 'I'm not happy with what happened'?*
>
> *COMPLAINANT: Correct.*[91]
>
> ***
>
> *DEFENCE COUNSEL: Ms [V16C], you didn't - you'd agreed that you didn't attempt to leave the lounge room?*

[87] Previously, s 34C(2)(k) of the *Crimes Act 1958* (Vic), and s 37AAA of the *Crimes Act 1958* (Vic).
[88] V1.
[89] V11.
[90] V16.
[91] V11.

COMPLAINANT: Yeah.

DEFENCE COUNSEL: You didn't call out for [V16WC1] [housemate]?

COMPLAINANT: No.

DEFENCE COUNSEL: You told Mr [V16A] to leave?

COMPLAINANT: Yes.

DEFENCE COUNSEL: In a normal tone?[92]

***

DEFENCE COUNSEL: When this incident occurred with [V19A] ... [d]id you scream when this happened?

COMPLAINANT: At that time I was just quiet.

DEFENCE COUNSEL: You didn't make a sound?

COMPLAINANT: Not at that time.

DEFENCE COUNSEL: You didn't call out to your brother for help?

COMPLAINANT: No, not at the time.[93]

***

DEFENCE COUNSEL: See, what I suggest to you, Ms [V25C1] is that at no time when you were in the lounge room with Mr [V25A], that you behaved in a way to make him think that you were not consenting?

COMPLAINANT: I said no. I said stop. I said, "Fuck off". I'm not sure what else I needed to say.

DEFENCE COUNSEL: I suggest to you that you never said no?

COMPLAINANT: Well, I suggest that you're not telling the truth.

DEFENCE COUNSEL: And you said - you never said stop?

COMPLAINANT: I did.

DEFENCE COUNSEL: You never said that the penetration hurt you?

COMPLAINANT: I did.

DEFENCE COUNSEL: That he never put pressure on your throat?

COMPLAINANT: I - he did.

DEFENCE COUNSEL: That he never strangled you in any way?

COMPLAINANT: He was choking me.

DEFENCE COUNSEL: He certainly never laughed at you?

COMPLAINANT: He did.

DEFENCE COUNSEL: What I suggest to you, Ms [V25C1] is that he kissed you, and he sucked your neck in a way completely agreeable to you?

COMPLAINANT: Absolutely not. That is not what happened.

DEFENCE COUNSEL: I suggest to you that you never pushed him off you?

COMPLAINANT: I did.

DEFENCE COUNSEL: Never physically resisted?

COMPLAINANT: I did.

---

[92] V16.
[93] V19.

DEFENCE COUNSEL: You've given evidence that you've said no in various ways, or stop, yes?

COMPLAINANT: Yes.

DEFENCE COUNSEL: Your friend is in a bedroom next door, is she not?

COMPLAINANT: Across.

DEFENCE COUNSEL: Your friend is in a bedroom nearby, in a small, weatherboard house, yes?

COMPLAINANT: Yes.

DEFENCE COUNSEL: Did you ever think to call out to her, to use her name?

COMPLAINANT: No.

DEFENCE COUNSEL: You never called out, "[V25C2], this is terrible, come and help me"?

COMPLAINANT: No.

DEFENCE COUNSEL: Do you say that you used your full voice, calling out as loud as you could for Mr [V25A] to stop doing this to you?

COMPLAINANT: As I could at the time, yes.

DEFENCE COUNSEL: What do you mean, "As you could", Ms [V25C1]? Did you ... ?

COMPLAINANT: Well I couldn't breathe, so it was as loud as I could out.

DEFENCE COUNSEL: You say you couldn't call out because you couldn't breathe?

COMPLAINANT: Yes.

DEFENCE COUNSEL: So you're saying for this entire time you were being penetrated without your consent, you could not breathe?

COMPLAINANT: No, not the whole time.

DEFENCE COUNSEL: Well, there were times, I suggest to you, even on your own evidence that you could have called out forcefully for help?

COMPLAINANT: I could of, but I didn't.

DEFENCE COUNSEL: Did you tell him to stop as loud as you could?

COMPLAINANT: I told him to stop.

DEFENCE COUNSEL: Did you tell him to stop as loud as you could?

COMPLAINANT: I don't know what volume I used, but it was enough for him to hear me. Over and over again.[94]

***

DEFENCE COUNSEL: In contrast to Mr [V8A], you regard yourself as someone who's very able to assert yourself with others socially; would you agree with that description?

COMPLAINANT: Yeah, definitely. I've - yeah, I've spent a lot of time travelling solo and I've met a lot of people just by myself. Out of my group, I'm also quite outgoing, so yeah.

DEFENCE COUNSEL: You're a person who is able to express your thoughts and feelings to people, you're able to speak confidently being an extrovert; would you agree with that?

COMPLAINANT: I think so. I mean, today's a bit different but yeah. ...

DEFENCE COUNSEL: And you were aware that he was approaching your bed and got into your bed, would you agree with that?

COMPLAINANT: Yep.

[94] V25.

DEFENCE COUNSEL: You didn't say anything to Mr [V8A] as he was approaching you in your bed in terms of, 'What are you doing, stop, why are you here?'. Anything of that nature?

COMPLAINANT: No, um, I guess my alarm bell just didn't ring yet. …

DEFENCE COUNSEL: All right. May I ask [V8C], why didn't you at that point in time when you aware of what he was doing, say 'Stop [or] what are you doing?' or ask him, 'What's going on?'?

COMPLAINANT: Probably disbelief, shock, you've got one idea of someone and you don't expect that - and I've already made when you make friends with someone, you've already made that - you've created trust I guess.[95]

4.2 Non-consent as physical resistance

The traditional common law position was that a 'genuine' rape victim must 'resist to the utmost'.[96] It has been decades since law-makers first attempted to consign this rape myth to history. We were surprised and disappointed to observe the regularity with which questions carrying an expectation of resistance were asked during complainant cross-examination in the cases we analysed:

DEFENCE COUNSEL: Now, before the break I was putting some things to you. And what I also need to put to you is that at no stage that evening did you do anything to resist engaging in sexual activity with [V18A]?

COMPLAINANT: Yes I did. …

DEFENCE COUNSEL: Is it not true that if you had used all your strength you could have pushed him off you?

COMPLAINANT: Um, not in that moment.[97]

***

DEFENCE COUNSEL: All right. Of course, given what's happened on the airbed just moments before, you're concerned what [V6A] might then try on, yes?

COMPLAINANT: Yeah.

DEFENCE COUNSEL: All right. You didn't try and wrap yourself up in the doona, make it more difficult for him?

COMPLAINANT: No.

DEFENCE COUNSEL: No, all right. Of course, you never told police about any of that, did you? Because it just didn't happen, you didn't try and put a barrier between the two of you in any way?

COMPLAINANT: I don't think so.

DEFENCE COUNSEL: No. You had access to the pillow where your head was, you didn't try and put that as a barrier between the two of you?

COMPLAINANT: No.

DEFENCE COUNSEL: But you could have?

COMPLAINANT: I could of. …

DEFENCE COUNSEL: So what are you saying? You didn't indicate anything to him to say, don't do it?

---

[95] V8.

[96] See J Quilter, 'From *Raptus* to Rape: A History of the "Requirements" of Resistance and Injury' (2015) 2 *Law & History* 89.

[97] V18.

COMPLAINANT: I never once gave him the thought of me wanting to have sex with him.

DEFENCE COUNSEL: You didn't scream out, stop?

COMPLAINANT: I did say stop but I didn't scream it.

DEFENCE COUNSEL: You didn't kick him?

COMPLAINANT: No.

DEFENCE COUNSEL: Could have bitten him, could have scratched him, did none of that?

COMPLAINANT: No, I was in shock.[98]

***

DEFENCE COUNSEL: Why didn't you close your mouth when he's got his penis in it? Are you slack-jawed or something, are you? Sorry, Your Honour. You have no control over your jaw, is that what you're saying?

COMPLAINANT: I had no control of my body.

DEFENCE COUNSEL: You couldn't bite down on his penis that you didn't want in your mouth?

COMPLAINANT: No.[99]

Even where there was evidence of physical resistance, a complainant might still be questioned as to why she hadn't 'cried out':

DEFENCE COUNSEL: When you were strong enough or sorry, when you were able to knee him in the stomach, were you able to yell out?

COMPLAINANT: Um I don't recall no.[100]

In one case in which the accused gave evidence, his evidence-in-chief included the following exchange:

DEFENCE COUNSEL: Did you rape Ms [V17C]?

ACCUSED: No.

DEFENCE COUNSEL: Did you force yourself upon her?

ACCUSED: No, I did not.

DEFENCE COUNSEL: Did you use any force or violence to make her have sex with you?

ACCUSED: No, we were drunk and we fall for each other and that's what happened that night.[101]

In some cases, complainants were expressly asked whether the accused had threatened them:

DEFENCE COUNSEL: Through the sexual activity in that room, throughout what happened, it's not your evidence that [V20A] verbally threatened you, did he?

---

[98] V6.
[99] V13.
[100] V2.
[101] V17.

COMPLAINANT: What do you mean?

DEFENCE COUNSEL: He wasn't verbally – as in saying words that were threatening?

COMPLAINANT: No.

DEFENCE COUNSEL: No. In fact, what you say, and what you've told the police, is he was, through this activity, whispering compliments to you.[102]

***

DEFENCE COUNSEL: ... He's not made any verbal threats to you at any of these times, has he?

COMPLAINANT: No.

DEFENCE COUNSEL: So you're not in fear of anything he might've threatened to do to you?

COMPLAINANT: No.[103]

***

DEFENCE COUNSEL: It's not the case that you're alleging that Mr [V23A] was aggressive towards you, as – he wasn't aggressive was he?

COMPLAINANT: He was forceful. He was forceful. ...

DEFENCE COUNSEL: ... [H]e didn't make any threats to you or anything of that nature, did he?

COMPLAINANT: Not threats, but when he was touchy.

DEFENCE COUNSEL: But verbally, he didn't threaten you ...?

COMPLAINANT: No.

DEFENCE COUNSEL: In terms of his posture of stance, other than the holding of the hand, he didn't threaten you?

COMPLAINANT: But verbally – verbally he didn't threaten me, but physically, yes, he was overpowering.[104]

In the same case, defence counsel simultaneously disavowed and invoked an expectation of resistance (suggesting that the 'veneer' of a transformed concept of consent may be thin):

DEFENCE COUNSEL: *Yes, now, there doesn't appear to be, and I'm not suggesting you had to, but there doesn't appear to be any pushing back or you getting up or ...?*

COMPLAINANT: Because I was scared, I was frozen.[105]

***

DEFENCE COUNSEL: I suggest to you if you felt uncomfortable with anything [V6A] was doing, any touching, you had the two of them very close by and you could have said something to them?

COMPLAINANT: Yes, I could have but I have never been in that situation before and I was very scared and confused.

DEFENCE COUNSEL: You could have simply got up but you didn't?

(No audible response.)

DEFENCE COUNSEL: Is that a no?

---

[102] V20.
[103] V6.
[104] V23.
[105] V23.

COMPLAINANT: I could have got up.[106]

In one case in which the complainant was cross-examined as to why she had not resisted, defence counsel went on to ask questions designed to introduce evidence of the complainant's physical strength. At the time, she was doing strength training at the gym:

DEFENCE COUNSEL: You weighed at that stage about 70 kg?

COMPLAINANT: Yep.

DEFENCE COUNSEL: And [V18A] was pretty skinny?

COMPLAINANT: Yep.

DEFENCE COUNSEL: And he weighed about 65 kilos, would you agree with that?

COMPLAINANT: Yep.

DEFENCE COUNSEL: And so again, I put it to you, if you had used all your strength to push him off on the night of 13 August, you could've done so?

COMPLAINANT: If I wasn't in a state of shock, then yes.

DEFENCE COUNSEL: So you say the only thing from preventing you from pushing him off was your shock?

COMPLAINANT: Yeah, I was in shock and trying to process what was going on, and I was scared.

DEFENCE COUNSEL: Well, is it possible that if you were in shock, you did not communicate what was going on in your mind? Any hesitation you had about what was happening, is it possible that you didn't communicate that as loudly or as clearly as you might have?

COMPLAINANT: I definitely said it. I definitely said it loudly and firmly.[107]

At the time, the line of questioning directed at the complainant's weight and strength attracted no objection from the prosecutor, but the defence returned to the topic later in cross-examination, aided by a photograph of the complainant at the gym (retrieved from her Instagram account) which depicted her lifting a large barbell:

DEFENCE COUNSEL: So I suggest to you that the young woman depicted in that photograph is not someone who would've chosen, as you say you did, not to use all your strength to resist [V18A] when he was allegedly raping you …?

CROWN PROSECUTOR: I object to that question, Your Honour.

JUDGE: Yes.

CROWN PROSECUTOR: It's sort of speculative and it's really a comment.

DEFENCE COUNSEL: I'll withdraw the question, Your Honour, nothing further.[108]

To this point, the exchange could have represented an instance of defence counsel asking an inappropriate question, the Crown objecting, and the defence conceding that the question should not have been put. The inference that rape victims are expected to resist, if they are strong enough, would

[106] V6.
[107] V18.
[108] V18.

at least have been dampened. Unfortunately, the sequence did not entirely end there. The judge asked a question which risked enlivening that very implication and expectation:

> *JUDGE: [V18C], do you know how much weight is on that bar?*
>
> *COMPLAINANT: Um, 90 kilos.*[109]

We return later in this report to the question of whether a more appropriate judicial intervention to such a situation in the future might be to remind the jury, *at the time such questions are asked*, that there is no requirement for a rape victim to resist, and that 'people who do not consent to a sexual act may not protest or physically resist the act'.[110]

4.3 Prosecution questions

A further complication for attempts to transform the rape trial treatment of what non-consent 'looks like', is that sometimes, in the cases in this study, the *Prosecution* drew attention to the *presence* of 'real rape' attributes like shouting 'no' and offering resistance. Understandably, where complainants *did* say 'no', or *did* physically resist, they wanted to emphasise this fact:

> *CROWN PROSECUTOR: And what happened at that point?*
>
> *COMPLAINANT: This - so he managed to insert himself into me another three or four times. My face is on the ground, so I … went into fight mode, but I just thought to myself, 'I have to scream as loud as I can for help, otherwise I don't know what else this guy is going to do to me,' because he went from sweet, passionate kisses and holding my hand to an aggressive, violent person just like that.*[111]
>
> ***
>
> *CROWN PROSECUTOR: Ms [V15C]s, Mr [V15A] you said pushed you back onto the bed. What was the next thing that he did to you at that stage?*
>
> *COMPLAINANT: He was forcing to kiss me.*
>
> *CROWN PROSECUTOR: Whereabouts was he forcing to kiss you?*
>
> *COMPLAINANT: On my lips.*
>
> *CROWN PROSECUTOR: What did you do in response to that, if anything?*
>
> *COMPLAINANT: I fought very hard and closed my mouth as hard as I could and he continued to push his mouth onto me and was biting my lips to open my mouth and I kept trying to move away.*
> *…*
>
> *CROWN PROSECUTOR: Did you do anything in relation to that action?*
>
> *COMPLAINANT: I was fighting him and fighting.*
>
> *CROWN PROSECUTOR: When you say you were fighting him and fighting him, how were you fighting him? What were you doing?*
>
> *COMPLAINANT: Trying to punch him off me, trying to pull his hair but his hair was so short I couldn't get a grip.*[112]

---

[109] V18.
[110] *Jury Directions Act 2015* (Vic) s 46(3)(d)(ii).
[111] V10.
[112] V15.

***

CROWN PROSECUTOR: What were his hands doing, do you recall?

COMPLAINANT: Holding me down. Just on the, on the shoulders.

CROWN PROSECUTOR: And what were you doing?

COMPLAINANT: I couldn't do anything, I - he was too strong I couldn't, I couldn't get him off.

CROWN PROSECUTOR: Did you try?

COMPLAINANT: Of course I did.

CROWN PROSECUTOR: How?

COMPLAINANT: Um tried to push him off and I couldn't get him off.

CROWN PROSECUTOR: Did you say anything?

COMPLAINANT: No.

CROWN PROSECUTOR: Why not?

COMPLAINANT: 'Cause my kids were asleep in the room, I can't wake 'em up. I didn't want them to come in and see what was going on.[113]

In the following case, the trial judge joined a resistance-focused line of questioning from the prosecutor:

CROWN PROSECUTOR: Did you say anything to him?

COMPLAINANT: I asked him to stop.

CROWN PROSECUTOR: And what, when you say you asked him to stop, what did you say?

COMPLAINANT: Can you stop.

JUDGE: And was that the second time you said stop, after he made that comment, is that right?

COMPLAINANT: Yes.

JUDGE: All right.

CROWN PROSECUTOR: All right. And did you say softly or loudly or what?

COMPLAINANT: In a loud voice.

CROWN PROSECUTOR: All right?

COMPLAINANT: And I was holding him away from me. So, like – 'cause I was laying down, so he was on top. So, I was pushing him away from me.

CROWN PROSECUTOR: All right. And when you said stop the first time, how loud was it the first time?

COMPLAINANT: I'd say it was loud enough, because he asked me to put my voice down because of his housemate.

JUDGE: And when you say you were pushing him away, can you just describe – again, I know you did something with one of your hands there, was it one hand, two hands or just explain what you did?

COMPLAINANT: With two hands. So, I tried to move him away from me.

JUDGE: And where [were] your hands on him?

[113] V7.

COMPLAINANT: On his chest. His chest, towards that area.[114]

If the statutory transformation of the concept of consent had been fully effective, rape trial questioning would cease focusing so heavily on resistance [force and other explicit (verbalised) expressions of non-consent]. If s 36(2)(l) was operating as intended, defence counsel would have to confront the fact that questions that adduced evidence that the complainant said or did nothing would, in effect, be assisting the prosecution to prove the actus resus element of non-consent beyond reasonable doubt. Unfortunately, in the cases we analysed, we saw no evidence that s 36(2)(l) was operating in this way. On the contrary, questions that evoked expectations of verbalised non-consent or physical resistance were commonplace. Further, as we will discuss below, this is just one of the ways in which rape myths were evoked in the rape trials we analysed.

Later, we consider whether lines of questioning which equate force/resistance with non-consent should be considered as a trigger for a direction about the meaning of consent *at the time* the evidence is adduced – something which is not currently available under the *Jury Directions Act 2015* (Vic).

4.4 'Inferred' consent

Words and/or actions temporally related to the sexual acts in question can be relied on to support an assertion that a person consents. This is consistent with consent as free agreement and communicative consent. However, in more than half of the cases in this study, we observed lines of questioning that drew a very long bow in terms of pointing to conduct of the complainant that was said to support the inference that she consented to (later) sexual acts. These included variations on the theme of 'flirtation', and references to the complainant's attire.

4.4.1 'Flirting'

DEFENCE COUNSEL: And indeed, when you met him in the flesh, that confirmed your view that he was attractive to you?

COMPLAINANT: That is correct.

DEFENCE COUNSEL: Do you agree that in your messages that the two of you were sending each other, that there was a degree of flirtation by both you and him?

COMPLAINANT: More so from him but there was a little bit from myself as well.[115]

***

DEFENCE COUNSEL: I would suggest that on the night, you're being friendly with one another?

COMPLAINANT: Yeah.

DEFENCE COUNSEL: You're having a good time with one another?

COMPLAINANT: I guess so. Yeah.

DEFENCE COUNSEL: And I would suggest that there's some flirtation between the two of you?

COMPLAINANT: No. Only from his side.

DEFENCE COUNSEL: So only from his side. And when – what, he would complement you, I think is what you told the jury yesterday?

[114] V3.
[115] V10.

COMPLAINANT: Yeah.

DEFENCE COUNSEL: And the complements, you didn't tell him to stop or say anything to him, did you?

COMPLAINANT: Well, no. I kind of just ignored him and then went and told [V20WC2] [complainant's boyfriend] what was happening, because it made me feel uncomfortable…[116]

***

DEFENCE COUNSEL: You were away from home at a conference?

COMPLAINANT: Yes.

DEFENCE COUNSEL: With other colleagues?

COMPLAINANT: Yes.

DEFENCE COUNSEL: You were affected by alcohol?

COMPLAINANT: I had been drinking. Yes.

DEFENCE COUNSEL: You have a - and I suggest to you some time after 3.30 in the morning you had unprotected consensual sex with a colleague?

COMPLAINANT: I did not have consensual sex with a colleague.

DEFENCE COUNSEL: A person you were obviously attracted to?

COMPLAINANT: No.

DEFENCE COUNSEL: Who you had been flirting with throughout the night?

COMPLAINANT: No.

DEFENCE COUNSEL: Who you knew was sexually interested in?

COMPLAINANT: No. That is not what happened.[117]

In one case, even though defence counsel could not point to specific conduct of the complainant that could be characterised as 'flirtatious' towards the accused, an attempt was made to characterise the social setting in which the two first met (in a group at a bar) as 'flirtatious':

DEFENCE COUNSEL: And I'm putting to you it was obvious that there was a bit of flirting and sexual tension?

COMPLAINANT: Well, as I said, I don't recall much of sitting at that table.

DEFENCE COUNSEL: [V1WCG1] was obviously interested in the other man, Mr [V1WCG2], wasn't she, the one that she thought was hot?

COMPLAINANT: I'm not sure.[118]

One of the effects of cross-examination that proffered speculative characterisations of certain conduct as 'flirting' is that the complainants sometimes attempted to contest the characterisation:

DEFENCE COUNSEL: You certainly weren't flirting with him?

COMPLAINANT: I wasn't flirting with him.

---

[116] V20.
[117] V9.
[118] V1.

DEFENCE COUNSEL: You didn't flirt with him whilst you were down at the 7-Eleven?

COMPLAINANT: I didn't flirt with him. I don't think I did.

DEFENCE COUNSEL: All right. Do you call the two of you taking some photographers together at the 7-Eleven?

COMPLAINANT: Yes, I do. ...

DEFENCE COUNSEL: [V3C], would you agree with me that that series of photographs appear to show that, at least at that moment, you were engaged in flirting behaviour with [V3A]?

COMPLAINANT: No. 'Cause the photos look, they don't look like they're flirting pictures. I always take photos, even when I go to nightclubs, sometimes with randoms. It's just photos. Random people at the nightclub when the photographer's there, they were like 'photo', everyone gets close to each other. I just recently went on holiday and I met a bunch of people and we all took photos and we were quite close. I don't see that to be flirting. There's no kissing, there's no flirtatious looks. Most of the photos it's just me posing and just posing for the photo. A laugh. On the second last one, the second last one's blurry. The third last one I'm just smiling away. He's not even looking at me and I'm just looking away towards him.

DEFENCE COUNSEL: All right?

COMPLAINANT: I wouldn't call them flirtatious photos. Or flirtatious moves. ...

DEFENCE COUNSEL: All right. [V3A] says that you were flirting with him that night. You disagree with that?

COMPLAINANT: I do disagree with that.

DEFENCE COUNSEL: That you were flirting with him at the 7-Eleven, you disagree with that?

COMPLAINANT: I disagree with that.

DEFENCE COUNSEL: That you were flirting with him in a similar manner whilst you were at the [bar name redacted] and afterwards, you disagree with that?

COMPLAINANT: I disagree with that.[119]

It is entirely understandable that a complainant would resist a 'flirting' characterisation where she did not think it was accurate or warranted. In the case just discussed, the complainant was, in our view, effective in this regard. However, for present purposes, it is important to emphasise that if she had engaged in 'flirting' of the sort suggested, it is a considerable leap to treat such behaviour as a basis for inferring consenting to sexual acts some time later.

We observed a number of instances where a flirtation suggestion was made even though the word was not expressly used:

DEFENCE COUNSEL: The two of you were having this conversation and you get through the two bottles of wine together?

COMPLAINANT: Correct.

DEFENCE COUNSEL: You were wrapped up in the conversation with each other?

COMPLAINANT: Yeah.

DEFENCE COUNSEL: Wrapped up in each other?

COMPLAINANT: Well, what does that mean?

[119] V3.

DEFENCE COUNSEL: That you were paying close careful attention to each other, what's being said?

COMPLAINANT: Yeah.

DEFENCE COUNSEL: And it's an intimate conversation about very personal things?

COMPLAINANT: About relationships; yeah, I guess so.[120]

***

DEFENCE COUNSEL: During your shift, you had a good time working?

COMPLAINANT: Yeah.

DEFENCE COUNSEL: And you were working with [V16A]?

COMPLAINANT: Yeah.

DEFENCE COUNSEL: You were having a good time working with [V16A]?

COMPLAINANT: Yeah.

DEFENCE COUNSEL: You were having fun with [V16A]?

COMPLAINANT: Yeah.

DEFENCE COUNSEL: You got along well?

COMPLAINANT: Yeah.

DEFENCE COUNSEL: You were making jokes as you were working?

COMPLAINANT: Yeah.

DEFENCE COUNSEL: And you were able to make a connection with him?

COMPLAINANT: How do you mean?

DEFENCE COUNSEL: Become friends?

COMPLAINANT: Yeah.

DEFENCE COUNSEL: You describe you and [V16A] as having clicked during that shift?

COMPLAINANT: Yeah. He was nice.

DEFENCE COUNSEL: He was pretty easy to work with?

COMPLAINANT: Yeah.

DEFENCE COUNSEL: He had a good attitude towards his work behind the bar; is that right?

COMPLAINANT: He liked being a bartender.

DEFENCE COUNSEL: Your impression of him at that time was that he was a super cool guy?

COMPLAINANT: Yeah, he seemed pretty cool.[121]

The following example illustrates yet another variation on the flirtation (sexual interest) angle – and the gendered assumptions that underpin it:

DEFENCE COUNSEL: It's 9 o'clock at night. Is that right?

COMPLAINANT: Yes, that's right.

DEFENCE COUNSEL: And you're driving to meet a man you have only met the day before?

[120] V11.
[121] V16.

COMPLAINANT: I didn't consider him as a man. I considered him as my cousin.

DEFENCE COUNSEL: You didn't think to take your husband with you?

COMPLAINANT: No, not at all.[122]

Another case demonstrated that although the deployment of 'flirtation' as a basis for inferring consent has a long history, it is capable of being deployed in relation to 21st century modes of communication. It was suggested that the complained had 'liked' a number of the accused's Facebook statuses. The complainant's evidence was that she had not done so, and that the accused must have done so by accessing her phone and account while she was asleep.[123]

A flirtation line of questioning was advanced in one case even though it related to conduct months before the alleged rape and despite the fact that it was not in dispute that the accused and the complainant had consensual sex the week before and on the day of the rape:

DEFENCE COUNSEL: And after he came to your [birthday party], did the two of you continue contact?

COMPLAINANT: We did, yes.

DEFENCE COUNSEL: And would it be fair to say that the contact between the two of you, over social media at least, started to become flirtatious?

COMPLAINANT: A little bit, yep.[124]

Despite the fact that it is arguable that 'flirting' lines of questioning are inconsistent with the contemporary statutory definition of consent, in the cases we analysed, Crown prosecutors did not usually object. Instances in which a flirtation line of questioning attracted an objection and/or judicial intervention were rare, but did occur:

DEFENCE COUNSEL: Now, you observe, yourself, virtually running towards [V24A] as soon as you spotted him. True?

COMPLAINANT: Correct.

DEFENCE COUNSEL: Yes. Such as your desire to get into his company?

COMPLAINANT: Describe what you mean by that specifically, please.

DEFENCE COUNSEL: Such was your intense enthusiasm to get to him?

COMPLAINANT: In what way?

DEFENCE COUNSEL: In the way that we've just seen. You picked up the beer bottle and ran to him?

COMPLAINANT: In a friendly manner.

DEFENCE COUNSEL: That's because in your heart of hearts, you were very excited to see him. Correct?

COMPLAINANT: In a friendly manner, yes.

DEFENCE COUNSEL: And you were very keen to get into his company?

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[122] V15.
[123] V3.
[124] V18.

COMPLAINANT: Define that, please.

DEFENCE COUNSEL: Don't you know [what] I mean when I say that you were keen to get into his company?

JUDGE: You said 'very keen'?

COMPLAINANT: I feel like you're implying something else.

DEFENCE COUNSEL: All right. (To witness) You were, really, excited to see him, and that's why you ran to him. Isn't it?

CROWN PROSECUTOR: What the witness is saying that she can't – she's been told to answer the question, seven days, a couple of days, and she's been told you're implying – she's saying you're implying something. So she's legitimately, I submit, asking my learned friend to spit it out, rather than say 'you were glad to see'.

JUDGE: Or 'very excited' or – what are you putting to the witness, Mr [V24D]?

DEFENCE COUNSEL: Just pretty clearly I thought, Your Honour. That her level of enthusiasm to get into [V24A]'s company was such that she ran towards him?

COMPLAINANT: Implying what?

DEFENCE COUNSEL: Just deal with the facts. That's what was going on inside your head. Wasn't it?

COMPLAINANT: Still, explain, though, what you mean by 'that level of enthusiasm'. Are you suggesting that I was running to him because I had a sexual desire, or are you implying that I ran to him because I had a friendly desire to return his drink?

DEFENCE COUNSEL: Just answer the question?

COMPLAINANT: What are you implying?

CROWN PROSECUTOR: Your Honour, in my submission, that's a legitimate ...

JUDGE: She has answered the question.

(To witness) What is the situation, Ms [V24C]?

COMPLAINANT: The situation is he was my friend, and I was returning his drink. Excitedly, yes, but in a very innocent nature.[125]

In the following case the 'flirtation' line of questioning was directed at the complainant's boyfriend when he was in the witness box:

DEFENCE COUNSEL: But what I'm suggesting to you, Mr [V20WC2], is just in terms of that previous contact that you observed between [V20A] and [V20C], there was a bit of mucking around or playing around during that interaction.

CROWN PROSECUTOR: Your Honour, I object to this. What's 'playing around, mucking around', really?

JUDGE: Take a seat, Ms [V20D2]. There's an objection.

DEFENCE COUNSEL: Sorry, Your Honour. Yes.

JUDGE: Take a seat. There's an objection.

DEFENCE COUNSEL: I'm sorry.

[125] V24.

CROWN PROSECUTOR: In my submission, it's utterly ambiguous. 'Playing around, mucking around' is – to this witness it may amount to having a laugh. It's highly ambiguous. It's directed towards something else, and if that's the question it should be spelt out.

JUDGE: What do you say, Ms [V20D2]?

DEFENCE COUNSEL: Your Honour, I say that they're terms generally familiar, but I can ask specific …

JUDGE: They are very general.

DEFENCE COUNSEL: Yes.

JUDGE: And if they for you are interchangeable with 'flirting', then you do, I think, have to commit yourself to that.[126]

Note that the net effect of this objection was not to prevent the defence line of inquiry (for example, as irrelevant) or to trigger a corrective jury direction (for example, that 'flirting' does not equal consent). Rather, defence counsel is effectively told via the exchange: if you want to assert that the complainant flirted with the accused, be direct and use the word 'flirting'.

In another case, a self-initiated judicial intervention seemed only to *underscore* (and potentially validate the relevance of) the inferred consent line of questioning of the accused in cross-examination:

DEFENCE COUNSEL: You chose to stay in the lounge room with Mr [V16A]?

COMPLAINANT: Yes.

DEFENCE COUNSEL: You undressed in the lounge room?

COMPLAINANT: Yes.

DEFENCE COUNSEL: You were standing next to one of the couches when you undressed?

COMPLAINANT: Yes.

DEFENCE COUNSEL: By undressing, I'm referring to taking your top off?

COMPLAINANT: Yes.

DEFENCE COUNSEL: Taking your pants off?

COMPLAINANT: Yes.

DEFENCE COUNSEL: And remaining in your underpants?

COMPLAINANT: Yes?

DEFENCE COUNSEL: And a bra?

COMPLAINANT: Yes.

DEFENCE COUNSEL: Mr [V16A] was sitting on the couch you'd made up for him?

COMPLAINANT: Yes.

DEFENCE COUNSEL: While you were undressing?

COMPLAINANT: Yes.[127]

Following some further questions from defence counsel about exactly where she and the accused were located in the room during these events, the judge intervened:

[126] V20.
[127] V16.

JUDGE: Ms [V16C], do you remember which way you [were] facing as you got undressed?

COMPLAINANT: No.

JUDGE: Yes.[128]

4.4.2 Attire

In the previous example, the complainant's apparent willingness to be briefly visible to the accused while in her underwear (before she got into bed) appears to have been suggested as a basis for inferring consent. It is typical of the manner in which consent-suggestive references were made in relation to the complainant's attire in some cases in this study. We did not observe instances of the explicit and outrageous shaming of women based on what they were wearing at the time of the alleged rape which were once common in rape trials, although the following line of cross-examination comes close:

DEFENCE COUNSEL: But you change into shorts knowing you're going to get on the bed with him next to you, is that right?

COMPLAINANT: Yes.

DEFENCE COUNSEL: I understand from your interview it was a hot night?

COMPLAINANT: Yes, there was four of us in the room.

DEFENCE COUNSEL: You couldn't simply leave your leggings on?

COMPLAINANT: Um, they were my pyjama shorts and I didn't know I wasn't allowed to wear them.

DEFENCE COUNSEL: It didn't cross your mind, you've got this guy who's trying it on, on the airbed, and you're giving him perhaps easier access to legs, your upper-thighs, whatever else?

COMPLAINANT: That was not my intention.[129]

In another case, the line of questioning was less overt, but still appeared to attempt to sexualise the complainant based on her attire:

DEFENCE COUNSEL: You descended the stairs, and you split your jeans?

COMPLAINANT: I did, yes.

DEFENCE COUNSEL: And that was as a result of them being so tight on you. Correct?

COMPLAINANT: Are you suggesting I was overweight?

DEFENCE COUNSEL: No, I'm not suggesting that, Ms [V24A]. I'm just putting ... ?

COMPLAINANT: Sorry?

DEFENCE COUNSEL: Correction, Ms [V24C]. I'm putting to you exactly what I said to you. Please answer the question. You split your jeans descending the stairs because they were so tight?

COMPLAINANT: They were fitted jeans.

DEFENCE COUNSEL: That's why they split?

[128] V16.
[129] V6.

COMPLAINANT: Because they fit me. The button was able to be done up, and the zip was able to be done up.

DEFENCE COUNSEL: You weren't expecting them to split, were you, as you descended the staircase?

COMPLAINANT: No one would expect their pants to split, but it was an unfortunate event. ...

DEFENCE COUNSEL: In that descent, walking down the stairs, the pants that you were wearing were split - are split. You've already given that evidence?

COMPLAINANT: Correct.

DEFENCE COUNSEL: You were not wearing underwear at that time, were you?

COMPLAINANT: No.

DEFENCE COUNSEL: Is this the case that you were not wearing underwear at that time because your pants were so tight that you did not want the outline of underwear to be visible?

COMPLAINANT: That's incorrect. I very rarely wear underwear. I find it uncomfortable.

DEFENCE COUNSEL: But nevertheless, you believed your pants split because they were firm-fitting. Yes?

COMPLAINANT: They split - they split because they were an old pair of pants. Pants split all the time. It wasn't because they were way too tight.[130]

The following example suggests that consent inferences can be made, at the same time as ostensibly maintaining that no judgment should be made of a complainant's attire:

DEFENCE COUNSEL: Now, just have a bit more of a look please at yourself [in a photo], and again, it's not an attempt to embarrass you, but you need to actually look. Tell us in more detail, please, now, you were wearing a skirt that night?

COMPLAINANT: Yes.

DEFENCE COUNSEL: Okay, and again, I'm not criticising you for your length of your skirt. Was it a particularly short skirt or are you not wearing your skirt there?

COMPLAINANT: I can't tell.[131]

Defence counsel went on to suggest that the complainant (not the accused) removed her skirt (a proposition she rejected).

Several cases in this study involved cross-examination references to the complainant's attire which were focused on the mechanics and logistics of removing clothes: in essence, that the clothes could not have been removed by the accused without the complainant's assistance:

DEFENCE COUNSEL: I omitted before the break to tender the balance of the clothing, which I'll do. That's the jeans, the bra – I better show them to the witness, Your Honour, just to get her to identify them.

(To witness) Sorry, this will just take one second. Do you recognise this as your bra?

COMPLAINANT: Yes.

DEFENCE COUNSEL: And it has eyelet clips at the back?

[130] V24.
[131] V21.

COMPLAINANT: Yes. [132]

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DEFENCE COUNSEL: He then attempted to slide his hand under your – the top of your pants, the waistband area of your pants?

(No audible response).

DEFENCE COUNSEL: But he was unable to do so?

COMPLAINANT: I disagree.

DEFENCE COUNSEL: And he was unable to do so, because your pants were so tight. So?

COMPLAINANT: I extremely disagree with this.

DEFENCE COUNSEL: Yes. Now, in order to?

COMPLAINANT: If my pants were so tight, they were ripped anyway. So therefore they would have been loose for him to be able to move them down, towards my mid-thigh.

DEFENCE COUNSEL: In order to undo your pants, you would agree, that the waistband had to be undone in order to move your pants down to mid-thigh?

COMPLAINANT: Absolutely.

DEFENCE COUNSEL: Yes. Now in order to undo your pants, the waistband of your pants, that is, it would be necessary, first, to unfasten a hook-clip that was on your waistband. Correct?

COMPLAINANT: Yes.

DEFENCE COUNSEL: Then it would be necessary to undo a button that was also on your waistband. Correct?

COMPLAINANT: Correct.

DEFENCE COUNSEL: Then after that, it would be necessary to unzip the fly. Correct?

COMPLAINANT: Correct.

DEFENCE COUNSEL: [V24A] did all of those things?

COMPLAINANT: He did.

DEFENCE COUNSEL: He unclipped your clip, he unbuttoned the button, he pulled down the zip. Do you recall that being done?

COMPLAINANT: Well how else would they – my pants end up half way down my thighs.

DEFENCE COUNSEL: I'm putting to you that you had to be aware that he was doing that?

COMPLAINANT: I woke up to his fingers inside of me. I've already said that. I can't tell you that he - that I remember him pulling my pants down because I was asleep. [133]

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DEFENCE COUNSEL: But during the time that you were in that bed he's removed your shorts, your underpants and your stockings?

COMPLAINANT: Yes.

DEFENCE COUNSEL: And all of that, you say, has happened without either waking you?

COMPLAINANT: Yes.

DEFENCE COUNSEL: And without you being aware of any of it?

COMPLAINANT: Yes.

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[132] V1.
[133] V24.

DEFENCE COUNSEL: In any way?

COMPLAINANT: Yes.

DEFENCE COUNSEL: And the shorts that you were wearing were denim shorts?

COMPLAINANT: Yes.

DEFENCE COUNSEL: With, what, a zip and a button at the front?

COMPLAINANT: They were buttons, three buttons.

DEFENCE COUNSEL: Buttons down the front?

COMPLAINANT: Yes.

DEFENCE COUNSEL: And so all of the buttons had to be undone?

COMPLAINANT: Yes.

DEFENCE COUNSEL: And then the shorts - I gather they were reasonably tight fitting shorts?

COMPLAINANT: No, these shorts were a bit big for me.

DEFENCE COUNSEL: Right. But they had to be pulled off down past your hips?

COMPLAINANT: Yes.

DEFENCE COUNSEL: And off your legs?

COMPLAINANT: Yes.

DEFENCE COUNSEL: I suggest to you that what actually happened is that you were moving during that process, you were reacting as your clothing was being removed, you just don't remember it. You can't comment on that, can you?

COMPLAINANT: I don't ...

DEFENCE COUNSEL: You just don't know?

COMPLAINANT: I don't remember it, no.

DEFENCE COUNSEL: And that when your top was pushed up and your bra was pushed up you were active during that, you were participating, you just don't remember it?

COMPLAINANT: Are you suggesting that I was letting him do this? That I was - no, no, I did not give him consent to remove my clothes.

DEFENCE COUNSEL: I'm not suggesting you did. I'm suggesting that you weren't lying there - you weren't just lying there, you were actually moving during all of this?

COMPLAINANT: No.[134]

***

DEFENCE COUNSEL: Now, you're wearing as we've seen - I don't mean this critically at all just as a fact, tight jeans on this night?

COMPLAINANT: I was wearing jeans.

DEFENCE COUNSEL: And as we've discussed you say he pulled them down but not off?

COMPLAINANT: Yes.

DEFENCE COUNSEL: And that included your underpants?

COMPLAINANT: Yes. I don't know if they end off I don't know but yes.

DEFENCE COUNSEL: As I understand your evidence it's that he had sex with you from behind?

COMPLAINANT: Yes.

[134] V12.

DEFENCE COUNSEL: Without your consent while your jeans were somewhere down your legs but not off. Is that right?

COMPLAINANT: No.

DEFENCE COUNSEL: Well, what do you say then?

COMPLAINANT: I'm saying that he had sex with me from behind and I don't know at what point my jeans came off but when you spoke to me yesterday when he initially - when it happened and my pants were coming down, I don't recall them going all the way off and that's what I said because someone said 'She didn't say off, she said down' and I agreed to that. That's what I remember the conversation being.

DEFENCE COUNSEL: So I suggest he did take your jeans and underpants off but he did so because you wanted him to?

COMPLAINANT: No.[135]

Detailed questions about the nature and position of the complainant's clothes and underwear also featured prominently in sequences of cross-examination designed to draw attention to deficiencies of memory and 'inconsistencies' in the complainant's evidence. We discuss this further below.

4.5 No reasonable belief in consent

We recognise that the adoption of a 'no reasonable belief in consent' fault element for rape (in 2015[136]) was a noteworthy statutory reform. This updated definition of rape (referred to below as the post-2015 definition) was operational in 14 of the 25 cases in this study.[137] We were interested to observe the prominence of this part of the definition in the trials, including its constituent parts and allied provisions — specifically: the need to consider '*any steps that the person has taken* to find out whether the other person consents' (s 36A(2)); and the requirement that, where the accused was intoxicated, reasonableness must be assessed using the 'standard of a reasonable person who is not intoxicated' (s 36B).

In the 14 cases we analysed (noting that in only 7 of the 14 trials did the accused give evidence) the 'no reasonable belief in consent' element of rape was rarely the subject of examination or cross-examination questions or answers. With the significant qualification that we did not have access to any of the closing addresses and only two of the charges for the post-2015 definition trials, our impression is that the 'no reasonable belief in consent' element of the definition of the offence was rarely in issue in the trials we analysed. In none of the 14 post-2015 definition cases was the defence position based exclusively on challenging the Crown's ability to prove that the accused did not reasonably believe that the complainant was consenting. In each case, the focus was on one or both of the other (actus reus) elements of rape: asserting that the physical acts alleged never occurred at all; and asserting that the complainant consented to the physical acts. Thus, as has traditionally been the case in rape trials, the focus was heavily directed at the *complainant's* actions and state of mind (as to consent).

Although the sample (14) is certainly too small to make generalised conclusions, this study did not produce evidence that the 2015 reforms have shifted the focus of inquiry from the complainant's state of mind to the accused's state of mind.

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[135] V9.

[136] Amendment to the *Crimes Act 1958* (Vic) made by the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) came into effect on 1 July 2015. Further changes were made by the *Crimes Amendment (Sexual Offences) Act 2016* (Vic).

[137] The remaining 11 related to conduct alleged to have occurred before 1 July 2015.

In some cases, defence counsel expressly submitted that the 'no reasonable belief in consent' part of the definition of rape was not in issue, one going so far as to suggest that the trial judge need not even direct the jury on this element. They asserted that it was 'purely a consent case' and endorsed the trial judge's characterisation of the case as one in which the Crown's ability to prove that the asserted acts occurred without the complainant's consent as 'really the battleground in this case':

> *DEFENCE COUNSEL: The position is as Your Honour's put it. On the accused's account given to the police she consented, and obviously consented, and the reason why the accused would have reasonably believed that she consented is because she in fact did.*[138]

On first glance this might appear to be something of a concession – relieving the Crown of the responsibility to specifically prove one of the elements of rape: that the accused did not reasonably believe that the complainant was consenting. But it is possible that blurring the actus reus and mens rea elements in this way works to consolidate the traditional rape trial focus on the *complainant – her* actions and *her* state of mind. This was reflected in a draft direction which the trial judge rehearsed for counsel's benefit:

> *JUDGE: 'I could take you chapter and verse through the elements of the offences is not really necessary here, as the issue is have the prosecution established beyond reasonable doubt that the acts occurred without her consent. There's a clear factual dispute as to how the acts unfolded in that room. If you're satisfied beyond reasonable doubt of the complainant's account of what took place you will find Mr [V9A] guilty of the charges.'*[139]

4.5.1 Steps taken

In those cases where the accused gave evidence, questions about the steps they had taken to find out whether the complainant consented were not a feature of cross-examination.[140] Nor did the topic feature prominently in late-trial discussions between judges and counsel on matters in issue and jury directions.[141] In one case the trial judge was leading the prosecutor through a check-list of requested directions when the following exchange occurred:

> *JUDGE: So nothing about the accused finding out steps to find out whether or not the complainant was consenting?*
>
> *CROWN PROSECUTOR: No.*
>
> *JUDGE: Well, nothing was put to him about that.*
>
> *CROWN PROSECUTOR: No.*[142]

---

[138] V9.

[139] We did not have the transcript of the judge's charge in this case and so do not know whether the final version of the charge included this passage in this form.

[140] Transcript analysis is, of course, a blunt mechanism for understanding the *absence* of a feature. We hope to gain further insights into 'steps taken' lines of questioning when we interview Crown prosecutors in a future phase of the larger project.

[141] *Jury Directions Act 2015* (Vic) ss 11-12.

[142] V4.

In other cases, even where the discussion turned specifically to the topic of reasonable belief in consent, there was no discussion at all of that part of the definition of rape that relates to 'steps taken' by the accused.[143]

Later in this report we discuss other aspects of the operation of Pt 5 of the *Jury Directions Act 2015* (Vic). Here we simply make the observation that there is no reference to 'steps taken' in s 47 of the *Jury Directions Act 2015* (Vic) – the otherwise quite detailed provision that provides for a direction on reasonable belief in consent. The phrase only appears in the 'companion' provision of the *Crimes Act 1958* (Vic) – s 36A – and there is nothing in the wording of s 47 that expressly suggests a relationship to s 36A. This may be contrasted with the language of s 46 (which provides for a direction on consent) which expressly cross-references s 36 of the *Crimes Act 1958* (Vic) (which explains the meaning of consent).

It is possible that this matter of drafting may contribute to the relative invisibility of the concept of 'steps taken' by the accused in the rape trials we analysed, although it is likely to be only one of several factors. One of those factors is that the minimal attention given to 'steps taken' is a by-product of the limited focus on the offence element to which it relates: no reasonable belief in consent.

4.5.2 The 'sober' reasonable person and the s 47 direction

Another by-product of the low visibility of the fault element in the cases we analysed was that the statutory provisions which provide that the relevant touchstone for assessing reasonable belief is 'a reasonable person who is not intoxicated' – s 36B of the *Crimes Act 1958* (Vic) and s 47 of the *Jury Directions Act 2015* (Vic) – were not prominent. However, they were discussed in some cases, though in a variety of ways. In one case defence counsel was keen to ensure that the jury was directed in such a way that they understood that the accused's intoxication was still relevant to his subjective belief:

> *JUDGE: All right. We've already discussed the reasonable belief element in relation to self-induced intoxication. It's a relatively simple direction.*
>
> *DEFENCE COUNSEL: It is, Your Honour.*
>
> *JUDGE: Although relatively simple is one thing. Whether a jury understands it is another.*
>
> *DEFENCE COUNSEL: Yes. I just note the - and this also comes from the charge book, 'When directing a jury on the relevance of the accused intoxication it may be important to separate the effects of intoxication on whether the accused held a belief in consent and whether any such belief was reasonable. It's erroneous to conflate those issues.' So, clearly self-induced intoxication does bear upon reasonableness in that it's irrelevant when it's self-induced but it is part of the circumstances and part of subjective belief. So it still bears some relevance, as far as that is concerned.*
>
> *JUDGE: I mean we do have a problem with that as well because as high as we get is his description saying that he was drunk and we don't even know what that means.*
>
> *DEFENCE COUNSEL: Yes.*
>
> *JUDGE: Subject to what you say I would just give a direction along the lines as in the charge book, that in this case you've heard evidence that [V4A] was intoxicated the time he inserted his penis into [V4C]' vagina. If you find that he was intoxicated you must not take this into account when assessing [whether] his belief about consent to that penetration was reasonable and then the law requires you to consider what the beliefs of a reasonable person who was sober might have been.*

[143] V16, V18.

DEFENCE COUNSEL: Yes. I would request that there just be some comment about its relevance, whatever it may mean, whatever the jury do make of it to a subject belief but it doesn't bear upon the issue of reasonableness.[144]

In a case previously discussed, the prosecutor initially attempted to resist the characterisation of the matter as one in which the Crown's ability to prove non-consent was the only 'battleground'. It appears that one of the reasons for submitting that the element of 'no reasonable belief in consent' was also in issue was that there was evidence in the accused's police interview that he was 'on his own words, highly intoxicated at the time'.[145]

In another case the prosecutor pursued a different strategy on evidence of the accused's intoxication. The Crown sought a direction on reasonable belief in consent under s 47 of the *Jury Directions Act 2015* (Vic), but, surprisingly, suggests that reference to sub-s 47(3)(b)(i) – 'regard must be had to the standard of a reasonable person who is not intoxicated' – may not be required:

JUDGE: You don't want the intoxication … ?

CROWN PROSECUTOR: No. Well [s 47(3)(b)(i)], if the intoxication is self-induced, regards must be had to the standard of a reason[able person] - I don't seek that, no.

JUDGE: Well there has been evidence about drinking, hasn't there?

CROWN PROSECUTOR: There has, whether what intoxication means in that …

JUDGE: … But don't you need 3(b)(i)?

CROWN PROSECUTOR: Well the question is, whether he is intoxicated.

JUDGE: Well, that's a matter for the jury. If they find that he was, don't I then need to tell them how to deal with it if they make that finding?

CROWN PROSECUTOR: Yes.

JUDGE: It's not a concession on the part of the Crown that he was intoxicated. But there is obvious evidence here that they'd been drinking, that they were throwing down vodka shots.

CROWN PROSECUTOR: Yes, the Crown position is that he was - he had had enough alcohol to do things that may well be things he mightn't do sober.[146]

To this point in the discussion, the Crown's position appears to resemble some of the defence counsel approaches to *complainant* intoxication, discussed above. The Crown seeks to rely on evidence of the accused's intoxication for a particular purpose – to show disinhibition – but appears to perceive a risk that the jury might form the view that the accused was so intoxicated that he lacked the mens rea for rape. This suggests that evidence of the accused's intoxication was seen as both a strength and a potential weakness for the Crown. Ultimately, the prosecutor is persuaded by the trial judge that the s 47 direction must include a reference to 'the standard of a reasonable person who is not intoxicated', and that this could assist the Crown case:

JUDGE: So you've got to have a 47[(3)](b)(i) in this case, given the evidence of the drinking. Yes?

CROWN PROSECUTOR: That's what's troubling me, Your Honour.

JUDGE: But it's not a concession that he was intoxicated.

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[144] V4.
[145] V9.
[146] V18.

CROWN PROSECUTOR: No, but I'm just thinking of the complicating issues by having that direction.

JUDGE: Well the jury might think that if he was too intoxicated to know what he was doing, that that leads to an acquittal.

CROWN PROSECUTOR: That's right.

JUDGE: Well, ... [s 47(3)(b)(i)] says that it doesn't. ... it's open for a jury to find as a fact that he was affected by alcohol to the extent of being intoxicated, whatever that means, and therefore they should be directed that in assessing the reasonableness of his belief - which after all is one of the main things they're going to have to do, they should know that if the intoxication was self-induced - which here it clearly was - regard must be had to the standard of the reasonable person who is not intoxicated.

CROWN PROSECUTOR: Yes, yes. I ... I ...

JUDGE: All right? You agree with that?

CROWN PROSECUTOR: I do now, Your Honour.

JUDGE: Yes, all right, so (3)(b)(i), yes?

In the preceding discussion, a number of the transcript extracts have included judicial comment on a lack of precision in relation to the evidence of a person's intoxication. This goes to one of the main topics of inquiry in this study – the nature and relevance of intoxication evidence – a matter to which we now turn.

5. Intoxication evidence

In 18 of 25 cases, there was intoxication evidence in relation to both the complainant and the accused. In 2 cases there was evidence of complainant intoxication only. In 5 cases there was evidence of accused intoxication only. 16 cases involved evidence of alcohol consumption only. 8 cases involved use of alcohol with another drug or drugs (variously, cannabis; methylamphetamine (ice); cocaine; ecstasy and prescription drugs). In the remaining case the complainant was drugged with doxylamine.

5.1 Definition and terminology

In previous research on appellate decisions arising from a diverse range of criminal trials where intoxication evidence was in issue,[147] we have drawn attention to the fact that intoxication evidence often takes the form of retrospective self-assessment. During examination-in-chief and cross-examination witnesses are asked questions such as: What were you drinking? How many drinks did you have? Over what period of time? How did you feel? Sometimes, witnesses are asked to make an assessment of another person's intoxication: How much did you see them drink? How did they seem? Apart from driving-related offences it is relatively rare for a trial to feature biological detection evidence (such as a blood alcohol concentration result). Expert evidence about AOD effects is also rare. One of the consequences of intoxication evidence being routinely provided in these ways is that it is typically imprecise with a heavy 'layperson' orientation. Juries are often left to apply common sense or 'common knowledge'[148] to two complex questions: How intoxicated was the person? What

[147] L McNamara, J Quilter, K Seear & R Room, 'Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects' (2017) 43(1) *Monash University Law Review* 148.

[148] J Quilter & L McNamara 'The Meaning of 'Intoxication' in Australian Criminal Cases: Origins and Operation' (2018) 21(1) *New Criminal Law Review* 170, drawing on M Valverde, *Law's Dream of a Common Knowledge* (Princeton

did this mean for cognitive functions related to elements of the crime charged (like consent and intent formation)? We were interested to discover what the present study's data set of rape trials revealed in these respects.

We observed that complainant intoxication evidence (and accused intoxication evidence, when it was present) overwhelmingly took the form of self-assessment, as well as third party witness assessment (including assessment of the complainant by the accused and vice versa). Consistent with previous findings, the extent of the complainant's intoxication was usually articulated via a combination of questions and answers on what type of AOD had been consumed, and the volume of consumption, along with adjectival description of sensation (or appearance) and colloquial labels (see Table 1).

Table 1: Illustration of Modes of Complainant Self-Assessment of Intoxication

Form of self-assessment	Description	Case
Volume of alcohol consumed	… [W]e were drinking sangria but sharing it in a jug, and before that I think we were drinking champagne. I'm guessing around 15 to 16 glasses maybe.	V11
	Q: A quarter of a bottle of wine, 10 mojitos and a couple of gin and tonics would be a lot more alcohol than you were used to drinking; do you agree with that? A: That's correct.	V10
	I had four cocktails. I had an espresso martini, two white chocolate martinis, and a French martini. Then I've had three shots. There was one called a Jam Donut shot and one called a Wet Pussy shot, and there was one that was with a coffee-based liqueur in it, but I'm not too sure what it was called.	V1
	Q: You'd had the six and a half cans of Red Bear? A: Yes. Q: The sip of the accused man's whisky? A: Yes. Q: And then one shot of what you think was vodka? A: Yes.	V12
Descriptive/adjectival	I was feeling a bit tipsy, not drunk, just tipsy.	V18
	Q: How were you feeling? A: Very intoxicated and sick.	V12
	I was very drunk ... I was drunk and intoxicated ...I put myself in a position to get drunk to the point where I had no control over my body.	V1
	At this point I felt it and I was falling over, stumbling. I was just all over the place. I could hear conversations around me but my body just felt, like, useless.	V13
	This is the part where I start to feel very, very intoxicated ... Very heavy bodied and tired, like I need to flop over …	V11

University Press, 2003); and A Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford University Press, 2012).

In a small number of the cases in this study, the challenges that arise from such forms of evidence were expressly recognised. For example, in one case, in which both the accused and the complainant had been drinking alcohol, the trial judge observed:

> *JUDGE: We haven't got an expert as to the effects of alcohol, the effects of - the elimination rates or the differences in the way a female disposes of alcohol as opposed to a male, we've got none of that on which we can go to the jury. ... [The accused] denies being alcohol affected at that point in time but says that he thought, 'She was as drunk as I was' without knowing what on earth that means.*[149]

Only a small number of cases involved blood alcohol concentration (BAC) evidence. In several cases,[150] a blood (or urine) sample was taken from the complainant during a forensic medical examination, but the result was zero, the sample having been taken several hours after the alleged rape.

In one case a BAC reading for the accused was, by chance, available because shortly after leaving the complainant's house (on the Crown's case, having been ordered to leave after he raped her) he was pulled over while driving and breath tested. Defence counsel submitted, and the judge appeared to accept, that the BAC result (0.119) was irrelevant:

> *DEFENCE COUNSEL: Your Honour, the traffic infringement notice has a reading on it.*
>
> *JUDGE: What is the reading?*
>
> *DEFENCE COUNSEL: It is .119. It comes without explanation and those of us in the courtroom who are experienced with road traffic matters know that that's, while it's over the legal limit and it's more than twice the legal limit, that doesn't actually say anything about whether he's drunk per se.*
>
> *JUDGE: No, it suggests he has been drinking and the jury can be directed about that and don't make any conclusions about how much he's had to drink ...*[151]

We do not draw any wider conclusions, based on this single (unusual) case, about attitudes towards BAC evidence or other forms of biological detection evidence, but it does give us the opportunity to make an observation: although the fact of the intoxication of the complainant and/or accused was in issue in many cases, juries were left with precious little guidance on how to assess a person's intoxication. It is unlikely that BAC will ever be routinely available in rape trials – because it requires the taking of a contemporaneous (or near-contemporaneous) sample. However, one of the by-products of a biological detection test result is that it can be the catalyst for the calling of expert evidence on AOD effects[152] – something that was a very rare occurrence in the cases in this study. In the absence of a BAC (or other biological detection) result to interpret, it appears that it is unlikely that an expert witness will be called to give evidence on AOD effects.

5.2 Evidence on AOD effects

Even though all cases in this study featured evidence of AOD consumption, only four of them featured expert evidence about AOD effects. Expert evidence was called in cases where:

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[149] V4.
[150] V1, V2, V9, V21.
[151] V7.
[152] See Quilter and McNamara, above n 148.

- the complainant had (unknowingly) consumed coffee served to her by the accused, which was laced with doxylamine;[153]
- the complainant had consumed alcohol, anti-depressant medication (fluoxetine) and diazepam;[154]
- the accused had consumed methamphetamine and (perhaps) benzodiazepine (Xanax);[155]
- the accused was an alcoholic and consumed a very large amount of alcohol.[156]

In the first mentioned case, a toxicology statement was available which contained the results of urine and blood samples from the complainant – which detected doxylamine, as well as codeine, morphine and paracetamol (consistent with having consumed Panadeine Forte), and no alcohol. This case was atypical not only because of the particular drugs detected, but because it was a rare instance in which the judge referred specifically to the challenge faced by the jury in interpreting intoxication evidence:

> *JUDGE: Yes. But what does it all mean? Is there any evidence being placed before the jury as to what the particular drug is, the Doxylamine?*
>
> *CROWN PROSECUTOR: No Your Honour.*
>
> *JUDGE: Why not? What are they going to make of that?*
>
> *CROWN PROSECUTOR: That there's a sedative found in urine.*
>
> *JUDGE: Well who says it's a sedative? I mean it is, but who says it is. They're not chemists. …*
>
> *JUDGE: Well you might have to call [a toxicologist]… I mean if this sort of material is being placed into … the hands of the jury, they're not toxicologists.*[157]

In this case, a medical expert subsequently gave evidence about the nature and effects of the drugs in question.

In another case, where the complainant had consumed alcohol and an antidepressant, there was no expert evidence. 'Instead', during cross-examination of the complainant, defence counsel put to her a series of assertions:

> *DEFENCE COUNSEL: And you understand that intoxication - heavy intoxication has some effects, including the following. It can affect the way you perceive things - it affects the way you see and hear and understand what's happening, is that fair to say?*
>
> *COMPLAINANT: Yeah.*
>
> *DEFENCE COUNSEL: It can affect the way you remember things, because it can make things hard to remember?*
>
> *COMPLAINANT: Yep.*
>
> *DEFENCE COUNSEL: Yes, and it can distort your memory?*
>
> *COMPLAINANT: Yes, I agree.*
>
> *DEFENCE COUNSEL: It can - I think the term that's sometimes used is disinhibit you, but it can lead you to do things that you wouldn't do when you were sober?*

[153] V2.
[154] V21.
[155] V14.
[156] V11.
[157] V2.

COMPLAINANT: Yeah, that's true.

DEFENCE COUNSEL: And when you're extremely intoxicated, you can even get to the point of doing things that you later - that you only learned later that you've actually done. Are you aware of that?

COMPLAINANT: Yep.

DEFENCE COUNSEL: Yes. Have you experienced that?

COMPLAINANT: Not really, no.[158]

This series of questions was put without objection from the Crown or judicial intervention. That the questions were regarded as unremarkable illustrates the extent to which people (complainants, other witnesses, lawyers, judges, jurors) are assumed to have a body of 'common knowledge' about AOD drug effects, particularly when the drug is alcohol. There are two related issues. First, there is a question about the accuracy of the assertions contained in defence counsel's questions. Secondly, there is a question about the appropriateness of counsel effectively giving evidence (or making submissions) in this way. Even though the complainant, in this trial, agrees with the propositions as they are put to her, the fact that she ultimately says she hasn't experienced the effects said to be well-known, brings into question the stability of the foundation for treating them as common knowledge about AOD effects.

Only 2 of the 25 cases in this study involved expert evidence of alcohol intoxication effects – and these were unusual cases, raising issues on the phenomenon of 'alcoholic blackout',[159] and the combined effect of alcohol, an anti-depressant drug and diazepam.[160] A possible explanation for the general absence of expert evidence in the cases in this study is that there may have been sound forensic reasons why expert evidence was considered unnecessary. For example, evidence about the effects of intoxication on cognitive functions such as consent formation may have been considered superfluous given that in all but one of 25 cases, the Crown did not ultimately assert that the complainant was *incapable* of consenting, this being the relevant standard in s 36(2)(e) of the *Crimes Act 1958* (Vic) (discussed below)

However, in a number of cases in this study, the complainant's memory of events, given her intoxication, *was* in issue. Expert evidence may have been useful to assist the jury to understand different aspects of memory and how they are (or are not) affected by AOD, including substance-specific effects.

A full discussion is beyond the scope of this report, but there is a large body of scientific literature on the effects of alcohol, including on motor functions, cognitive functions and memory specifically.[161] As an expert said when giving evidence in one of our cases:

WITNESS: Of all the drugs and chemicals that people put into their bodies, there's probably been more research on alcohol than anything else. It's a very well understood substance. So the way alcohol behaves in the body and the way the body responds to alcohol is very well-known. There are lots of research projects, text books written about it and so forth.[162]

We do not think it is safe to assume that alcohol effects are a matter of common knowledge that is already held by jurors (and judges) when they come to the trial. The following expert evidence is

[158] V12.
[159] V11 (accused).
[160] V21 (complainant).
[161] See below, nn 185-86.
[162] V21.

likely to have been valuable in a number of the cases in this study, not just the one at which it was presented:

> *WITNESS: You can do tests on people and measure individual effects of alcohol on just about every function of the brain and body that you can think of. So that includes things like reaction time, so you know, the time it takes people to react to things, it involves thinking, you know, whether people can make decisions in the same way when they drink alcohol as to when they don't, whether they're impulsive, you know, they can make decisions without thinking about the consequences much more readily if people drink.*
>
> *It can affect inhibition, so people will do things that they might not normally do when they've got alcohol in their system. It effects a lot of physical aspects such as movement and - reflexes I've mentioned. It can affect people's perception of things and how they interpret what's going on around them and how they can remember what's going on around them. It can affect people's ability to do many things at the same time. It's one of the reasons why there are laws about driving and alcohol, because you need to be able to do lots of things at the same time when you drive.*
>
> *It can affect decision-making and information processing, and it can also affect what we call motor control, that is the way that people's muscles are controlled. That's what makes people - you know, when they're drunk they become unsteady and they can't walk properly and they can't talk properly. That's one of the things that's the last to be affected. So when people drink early on it might affect their personality or their inhibitions or their decision-making or their thinking without necessarily making them look drunk. You know, they can still walk in a straight line and so on. Then as they drink more and more, more and more functions become affected. By the time they can't walk any more, then as I said before, that's one of the last things to be affected, so all the other things have been well and truly affected by the time a person gets to the stage where they can't move properly. So once a person has had enough alcohol not to be steady on their feet or to be able to talk properly, we can be sure that all the other things I've talked about are well and truly affected well before then.*[163]

Particularly noteworthy is the insight here that, in terms of a person's level of intoxication, cognitive functions may be impaired *before* the point in time when motor functions are impaired. This is important because of how commonly a complainant's level of intoxication is assessed with reference to observable behaviours like walking, slurring words, texting on a phone (motor functions) rather than cognitive functions which, although not observable in the same way, are more directly relevant to the elements of rape, and the absence of consent in particular.

Expert evidence about the relationship between AOD intoxication and memory was also rare – only referred to in the above-quoted case[164] and one other case[165] – and this surprised us, given that recall of events by complainants who were intoxicated at the time of the alleged rape was frequently in issue. One of the consequences of layperson self-assessment and definitional imprecision about intoxication, and reliance on 'common knowledge' about AOD effects rather than scientific expertise, is that it fosters the prevailing conventional wisdom: that intoxication equates to impaired memory, which in turn provides a basis for defence counsel to characterise the complainant's evidence as unreliable, and expecting the jury to be directed accordingly. Before we turn to this specific issue, we will first examine how s 36(2)(e) of the *Crimes Act 1958* (Vic) operated in the cases in this study.

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[163] V21.
[164] V21.
[165] V11 (where there was expert evidence on the accused's ability to the remember events in question, given his alcoholism and the likelihood that he was experiencing an 'alcoholic blackout' at the time).

5.3 Section s 36(2)(e): 'so affected … as to be incapable of consenting'

One of the original motivations for the larger project of which this report is a part, was to assess the operation of statutory provisions in Australian rape laws which aim to break the assumed nexus between complainant intoxication and consent. Traditionally, this cultural assumption has been a significant barrier to justice for sexual violence victims. The Victorian provision is s 36(2)(e) of the *Crimes Act 1958* (Vic) – a person does not consent if 'the person is so affected by alcohol or another drug as to be incapable of consenting …'.

Without wishing to over-simplify the rationale for s 36(2)(e), in essence, the provision is designed to shift the traditional characterisation of complainant intoxication evidence as an inherent weakness in the Crown case, and to challenge the culturally embedded assumption that an intoxicated person is more likely to have consented to sex. We were interested to observe how visible and influential s 36(2)(e) was in the trial's approach to proving the actus reus element of non-consent. It is important to note that, with one exception, we did not have the opportunity to examine closing addresses, and had access to only three jury charges. Therefore, our assessment of the 'visibility' of s 36(2)(e) was based on our analysis of examination-in-chief, cross-examination and re-examination of witnesses and pre-closing/charge discussions between the trial judge and counsel.

Given that 20 of the 25 trials in this study involved evidence of complainant intoxication (albeit, to varying degrees), we were somewhat surprised by how little visibility – and perceived applicability and relevance – s 36(2)(e) had in the trials we analysed. Our tentative impression, based on transcript analysis alone,[166] is that s 36(2)(e) is perceived by counsel and judges as only of potential relevance where there is evidence of extreme intoxication. This view is reflected in the following example. On the question of the complainant's intoxication the judge asked the Crown prosecutor, in the course of jury direction discussions pursuant to s 12 of the *Jury Directions Act 2015* (Vic) (discussed further below) whether s 36(2)(e) was in play:

> *JUDGE: how's the prosecution putting it?*
>
> *CROWN PROSECUTOR: It doesn't put it that highly.*
>
> *JUDGE: She doesn't [sic] paralytic when she leaves the [pub], is it, or whatever pub that was … I mean, I don't think she says 'I was so paralytic'.*
>
> *CROWN PROSECUTOR: No.*
>
> *JUDGE: 'I didn't know what I was doing'.*
>
> *CROWN PROSECUTOR: No, Your Honour. And she's - no, she's certainly not. I mean, she's talking to Ms [V16WCG1] on the phone, she's making sense. That's not relied on.*[167]

In only one of our 25 cases did the Crown unambiguously seek to rely on the provision. Even in this case, however, the Crown did not seek to prove the element of non-consent exclusively on the basis of the complainant's intoxication-related incapacity to consent, but pointed also to other conduct by the complainant that manifested her non-consent. The defence submitted that this dual-track approach was untenable and that reliance on s 36(2)(e) must be 'all or nothing' - the complainant either lacked capacity or she did not. Ultimately, the trial judge did not accept this submission as the following excerpt from the judge's charge to the jury reveals:

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[166] At a later stage of the larger project of which this study is a part, we plan to interview barristers with experience prosecuting and defending rape trials.

[167] V16.

JUDGE: The law identifies a number of circumstances where the complainant is deemed or considered not to freely agree or consent to sexual penetration. These circumstances include where the person is so affected by alcohol, or another drug, as to be incapable of freely agreeing.

If you are satisfied beyond reasonable doubt that this circumstance existed in relation to Ms [V21C] you must find that she was not consenting. However, you do not need to consider this question only by reference to these particular circumstances. If you are satisfied beyond reasonable doubt on any basis arising from the evidence that the complainant was not consenting then this element will be proven. [168]

In another case, the Crown prosecutor initially suggested that the jury could rely on this section, and the complainant's high level of intoxication, in determining whether the element of non-consent was proven. However, during late trial discussions about closings and the charge pursuant to s 12 of the *Jury Directions Act 2015* (Vic), the trial judge counselled the Crown not to rely on s 36(2)(e) as a basis for establishing non-consent. The judge pointed out that: i) this might be inconsistent with the complainant's account that she had consensual sex with her boyfriend shortly before the alleged rape; and ii) there was no strong evidence about the degree of the complainant's intoxication – evidence having taken the typical form of self-assessment and witness observational assessment (discussed above). The judge observed that there was 'no clarification of what she [the complainant] means really by intoxicated':

JUDGE: So, I'm extremely uncomfortable with going to the jury on the basis that she was too intoxicated as to be incapable of consenting, given her own evidence on that point.

CROWN PROSECUTOR: Yes, Your Honour. In my submission, the inference would be open based on the amount she had to drink.

JUDGE: She was pretty unclear about that, she said five drinks at the [V4L1], 'Don't really remember', and then it was suggested to her on [V4D]- that on the maths it was probably seven.

CROWN PROSECUTOR: Seven.

JUDGE: And then she was criticised for changing seven to five when really her evidence was, 'I don't remember.' And then, when she gets to the [V4L2] she says they continued to drink and dance but there's no real precision, he gives some precision, says four or five and then he stopped.

CROWN PROSECUTOR: Four or five, yes.

JUDGE: But we've got no evidence about what that means for those people.

CROWN PROSECUTOR: We don't, but ten drinks approximately is - the jury might be able to infer it's a significant amount to drink.

JUDGE: But a significant amount to drink is one thing.

CROWN PROSECUTOR: Yes, Your Honour.

JUDGE: Too intoxicated to be capable of consenting is another… [169]

Ultimately, the Crown was persuaded not to rely on s 36(2)(e), and to rely only on s 36(2)(d): – a person does not consent if 'the person is asleep or unconscious'.

This case illustrates a pattern that we observed in a number of cases: a complainant's intoxication was most likely to be treated as a 'strength' of the Prosecution's case if the level of her intoxication was such as to render her asleep or unconscious at the time of the alleged rape. This was a common

[168] V21.
[169] V4.

feature of the various fact scenarios in the trials we analysed. Typically, it was not the fact of the complainant's intoxication *per se* that was relied on to assist the Crown to prove the element of non-consent. The influence of intoxication evidence was indirect. In 13 of the 25 cases in this study the Crown case was that the complainant was asleep (due to being heavily intoxicated or simply asleep) when the rape commenced. Section 36(2)(e) is effectively redundant in such situations, because the list of 'non-consent' factors in s 36(2) already includes sub-s (d): 'the person is asleep or unconscious'.

We tentatively conclude that s 36(2)(e) of the *Crimes Act 1958* (Vic) may be relatively ineffective as a mechanism for breaking the traditionally assumed nexus between intoxication and consent. Contributing factors appear to include the high threshold set by the words of the statute ('*so affected* by alcohol or another drug as to be *incapable* of consenting'), common imprecision about the extent of the complainant's intoxication, and the fact that trials typically do not feature evidence about the relationship between AOD effects and cognitive functions like consent formation. There was very little sense in the cases we analysed that the existence of s 36(2)(e) invites or encourages Crown prosecutors to actively and directly rely on evidence of the complainant's intoxication to prove the elements of rape, or that such evidence is a 'strength' of the Crown case. In fact, this study suggests that, despite attempts to shift the role played by complainant intoxication in rape trials, on balance, such evidence may weaken rather than strengthen the Crown case.

5.4 Contrary purposes for which complainant intoxication engaged

Despite the policy underlying s 36(2)(e) – including breaking the assumed nexus between intoxication and consent, and removing (or reducing) the resulting barrier to proving non-consent – we observed that, in a number of trials, evidence of the complainant's intoxication was engaged by defence as a Crown case weakness. We have previously hypothesised that despite the tenor of progressive reforms like the introduction of s 36(2)(e), complainant intoxication might remain something of a 'double-edged sword' in terms of its value as part of the Crown's case in a rape trial.[170] Our analysis of transcripts for this study leads us to consider whether it is more common for complainant intoxication to have only a *single* edge — one that (still) tends to weaken the Crown case rather than strengthen it.

We observed defence counsel characterising evidence of the complainant's intoxication in three inter-related ways:

i) to suggest that the complainant was intoxicated but not so intoxicated as to be incapable of consent (ie s 36(2)(e) has no application);
ii) to suggest that the complainant was intoxicated, with intoxication producing inhibition, which in turn contributed to consent; and
iii) to suggest that the complainant was intoxicated, that intoxication impaired memory and that, as a result, the complainant's account of events (including whether she consented) is unreliable.

A combined effect of the narrow scope of s 36(2)(e) and the potential for these defence strategies to be employed was a dynamic that we did not necessarily anticipate observing: cases in which the defence attempt to 'talk up' (and draw attention to) the extent of the complainant's intoxication, and the complainant (and the Crown) seeking to resist this characterisation and 'play down' the complainant's level of intoxication. The following exchanges are illustrative:

DEFENCE COUNSEL: Do you agree that the game involved sculling shots of vodka?

[170] McNamara, Quilter, Seear & Room, above n 147, 168-69.

COMPLAINANT: I think we had one or two shots of vodka during the game, yes.

DEFENCE COUNSEL: I suggest to you in fact that during the course of the game, the two of you managed to finish the bottle of vodka?

COMPLAINANT: No, I don't agree with that. ...

DEFENCE COUNSEL: Now, you disagreed that the two of you finished the bottle of vodka. I need to ask you this anyway. Was it the case that you had more vodka to drink than [V18A]?

COMPLAINANT: No.

DEFENCE COUNSEL: Do you agree that you were affected by the vodka that you drank?

COMPLAINANT: I was tipsy, but I was still aware of my surroundings and everything that was going on.

DEFENCE COUNSEL: All right, well just to be clear, I'm not suggesting you were unaware of your surroundings, but I'm suggesting that the alcohol you drank was making it difficult for you to speak clearly?

COMPLAINANT: No.

DEFENCE COUNSEL: And it was also making you a little unsteady on your feet?

COMPLAINANT: I disagree.[171]

***

DEFENCE COUNSEL: Well, tipsy's perhaps what people use to describe how they feel after a few glasses. You're not suggesting you were just tipsy, are you?

COMPLAINANT: Okay, I was – I was intoxicated, yes.

DEFENCE COUNSEL: What do you say to the proposition that you were severely intoxicated?

COMPLAINANT: I would say so, yes. ...

DEFENCE COUNSEL: So, you're suggesting that, if I follow what you're trying to convey, that what occurred between you and [V10A] had the effect of sobering you up, is that right?

COMPLAINANT: That is correct.

DEFENCE COUNSEL: So, you're suggesting that your sobering up wasn't really dependent on time passing and the alcohol processing through your body, it was dependent on something happening to you?

COMPLAINANT: Yes, correct. When I was thrown to the ground and violently assaulted, yes.

DEFENCE COUNSEL: What do you say to the suggestion that that doesn't really have the ability to sober you up and that you remain severely intoxicated?

COMPLAINANT: I believe it did sober me up because I was able to summon the strength to scream for help.[172]

***

DEFENCE COUNSEL: Would you agree with this; that by that late stage, you were off your face?

COMPLAINANT: I don't know. What is - what's the difference between drunk and off your face?

DEFENCE COUNSEL: Extremely drunk; I will put it that way?

COMPLAINANT: I'd say quite drunk but maybe not extremely drunk.

DEFENCE COUNSEL: You could have been unsteady on your feet?

COMPLAINANT: Perhaps, but I sway a lot anyway.

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[171] V18.
[172] V10.

DEFENCE COUNSEL: And you would have been slurring your words?

COMPLAINANT: I don't know if I actually was. I was getting quite upset.

DEFENCE COUNSEL: It's a possibility then that you were slurring your words?

COMPLAINANT: Could have been but I hadn't notice that myself.[173]

Despite the clear intent of s 36(2)(e), the cases we analysed suggest that defence counsel may emphasise the extent of the complainant's intoxication to 'engage' the very assumed nexus between intoxication and consent that the provision was designed to break (or at least weaken):

DEFENCE COUNSEL: Do you say at this stage you were so intoxicated that you probably weren't thinking straight?

COMPLAINANT: I don't understand what you mean by that.

DEFENCE COUNSEL: You weren't making decisions and reasoning in the same way that you normally do?

COMPLAINANT: I don't think I was doing anything abnormal.

DEFENCE COUNSEL: What about joining [V11A] on the bed? That would be abnormal?

COMPLAINANT: Yes. …

DEFENCE COUNSEL: Isn't it possible that in your normal state, in your conscious mind, you wouldn't have done these things but in the state that you were in that night you might have?

COMPLAINANT: No, I wouldn't have done those things in a drunken state.

DEFENCE COUNSEL: It's possible on this night that you did; that they occurred consensually?

COMPLAINANT: I dispute that. [174]

This questioning appears designed to support a version of the 'drunken consent, but still consent' line that has been a staple of rape trials for decades. We note that the words of s 36(2)(e) – which set such a high bar ('so affected ... as to be incapable of consent') – do nothing to interrupt this line.

In direct contrast to a pattern we describe below where defence counsel suggested that the complainant was *more* intoxicated than she says she was, in some of the trials where there was clear evidence that the complainant had fallen asleep as a result of her intoxication, the defence attempted to suggest that she was *less* intoxicated than she said – to support a position that she later woke from sleep and participated in consensual sex:

DEFENCE COUNSEL: You appear from the CCTV to be functioning in a normal way?

COMPLAINANT: Looked to be normal, yes.

DEFENCE COUNSEL: It wouldn't be, would it, that you're using alcohol as an excuse to cover your behaviour?

COMPLAINANT: It's not an excuse.

DEFENCE COUNSEL: And that anything you don't want to answer you're going to say you don't remember or you were drunk?

COMPLAINANT: It's because I don't remember.

[173] V11.
[174] V11.

DEFENCE COUNSEL: Do you say that you don't remember being introduced to the men at about 11.35?

COMPLAINANT: I don't – I don't remember it. It only – I only saw it on the CCTV.

DEFENCE COUNSEL: You have no memory of having a conversation with them?

COMPLAINANT: No.

DEFENCE COUNSEL: Because of the alcohol?

COMPLAINANT: Because of the alcohol intoxication.[175]

This strategy was pursued, it would seem, because, notwithstanding evidence from later CCTV footage and several witnesses that the complainant was highly intoxicated, to the point of being unable to walk unassisted, vomiting and being put to sleep on a hotel room floor, the line being advanced by the defence was that, some hours later, the complainant had been woken from sleep by the accused and had consensual sex with him.

The contrast between these various illustrations highlights that intoxication evidence in the form in which it was most commonly present in the trials we examined – complainant self-assessment – is regarded as *malleable*, capable of being maximised or minimised depending on the case line being advanced by the defence. And there is a further risk that complainant intoxication evidence can pose to the Crown case: that the reliability of the strongest evidence of non-consent – the complainant's testimony – might be characterised as unreliable, due to her intoxication at the time.

The defence strategy of drawing attention to the complainant's intoxication to challenge her credibility, and the reliability of her evidence, was vividly illustrated by one of the rare cases for which we had access to the transcript of closing addresses. Defence counsel emphasised how critical the complainant's evidence was to the Crown's ability to make its case:

She's the one that has to get all the way from innocent to beyond reasonable doubt. And my submission to you, ladies and gentlemen, is that she is simply not good enough. She can't do it. She cannot do it reliably enough to make that long, long journey all the way to guilt beyond reasonable doubt.

Here's why. She's drunk a lot. She takes a breathalyser sometime the next morning after the police have arrived, we don't know what time. She was either just under or just over. So that's her evidence about her reading sometime during the morning when the police were there. She's had no dinner, no dinner she can remember, anyway. She's drunk two Wild Turkeys, bourbons and Coke of slightly indeterminate number, Wet Pussy shots, and at some stage a police officer in the morning records, '[V25C1] too drunk to make a statement'. So she is a very heavily intoxicated person throughout all this, and probably all the way out through that next morning as well.

It's really important, because you're being asked to rely on her ... And in my submission to you, it's incredibly difficult to trust someone who's that intoxicated. It's just not good enough. Certainly, Ms [V25C2] describes her as being drunk.[176]

This passage is noteworthy in two ways. First (and noting that this was not a case in which the Crown attempted to assert that the complainant was so intoxicated as to be incapable of consent), it demonstrates what we described earlier as the 'single edge sword' role that complainant intoxication can play in a rape trial – that is, as an asserted *weakness* in the Crown case. Secondly, it illustrates a feature of how intoxication evidence commonly featured in cases in this study: in the absence of any

[175] V1.
[176] V25.

expert evidence about AOD effects, and, in this instance, with non-expert commentary about the significance that the jury should attach to the complainant's intoxication.

In the next section, we consider whether such practices may be affirmed by how judges direct juries on 'unreliable evidence'.

5.5 Direction on unreliability of complainant's evidence due to intoxication

Later in this report we discuss what this study revealed about the specific *Jury Directions Act 2015* (Vic) Part 5 provisions applicable to rape trials, as well as the process required by s 12 of the Act. Here we comment on another impact of complainant intoxication evidence that may be regarded as adverse to the Crown case. Not only were cross-examination questions about the quality and accuracy of the complainant's recall, given her intoxication, common, in some cases, the defence sought a s 32 'unreliable evidence' direction under Pt 4, Div 3 of the *Jury Directions Act 2015* (Vic).[177]

Given that we had access to the judge's charge to the jury in only a small number of cases, our discussion here is necessarily tentative; and because the sample for this study is not representative we cannot comment on the frequency with which an unreliable evidence direction is requested in rape trials where there is evidence of complainant intoxication. However, in a number of cases in this study,[178] defence counsel did request a jury direction to the effect that the complainant's evidence may be unreliable due to her intoxication. The fact of a person's intoxication is not expressly mentioned in the list of 'evidence of a kind that may be unreliable' (s 31) but the list is not exhaustive.

In the cases where a direction was requested, prosecutors did not generally resist. In one case, the Crown began to do so, submitting that 'evidence of the intoxication would seem, on first principles, to fall outside' the scope of s 32 of the *Jury Directions Act 2015* (Vic), but ultimately abandoned this position.[179] The trial judge appeared[180] to settle on the view that a direction of the sort sought by the defence should be given:

> *JUDGE: ... [W]ell, the jury are clearly going to want to focus on her state of intoxication. It'll be an important matter in assessing her credibility. They'll obviously see that as an issue of potential unreliability.*[181]

In another case, the Crown prosecutor attempted to confine the terms of the direction:

> *JUDGE: So is your submission that if I'm to give the unreliable evidence direction, it should be confined to her being alcohol-affected?*
>
> *CROWN PROSECUTOR: Yes it is - or intoxicated.*
>
> *JUDGE: Intoxicated.*
>
> *CROWN PROSECUTOR: Yes which could be - - -*

---

[177] Previously s 165 of the *Evidence Act 2008* (Vic).

[178] V12, V13, V18, V22, V25.

[179] V13. The *Victorian Criminal Charge Book* entry on the s 32 direction contains a summary of 'non-listed categories' of unreliable evidence recognised by the case law, including: 'Evidence of a witness who was alcohol or drug-affected at time of the events, whether voluntarily or by the alleged actions of the accused (*R v Maple* [1999] VSCA 52; *Hudson v R* [2017] VSCA 122) …': [4.22.21].

[180] We did not have access to the transcript of the judge's charge in this case, and cannot confirm the inclusion or wording of a s 32 direction in this trial.

[181] V13. In another case the judge ruled that a s 32 direction on the basis of the complainant's AOD consumption was not warranted in the circumstances of the case (V22).

JUDGE: That might be a better word.

CROWN PROSECUTOR: Because that might cover - well, that would cover the state she was in regardless of how she got there.

JUDGE: Yes.

CROWN PROSECUTOR: And it might have been, we just don't know, it might have been some impact with the Pristiq. That's my submission if Your Honour gives it.

JUDGE: All right, yes. I follow that.[182]

In this case, the judge's charge to the jury included the following:

JUDGE: I must now warn you about the need for caution when considering [V12C]'s evidence.

I must give you this warning because the evidence [V12C] gave that she had consumed alcohol in combination with her Pristiq [anti-depressant] medication and was highly intoxicated to the extent that she had vomited and then, on her evidence, fallen asleep.

My warning to you is as follows. It is the experience of the law that the evidence of a witness who is highly intoxicated may be unreliable. This unreliability can arise due to the effects heavy intoxication can have on a person's perceptions and recollections.

The law says every jury must take this potential unreliability into account in determining whether you accept [V12C]'s evidence at all, and if you do accept it, in whole or in part, and then deciding what weight to give to that evidence.

In considering the safety of relying on [V12C]'s evidence, you should have regard to any supporting evidence led in this trial that you accept, and by supporting evidence, I mean evidence from a source that is independent of [V12C] and that tends to show the truth of her evidence of the accused's guilt.[183]

In another case – the case, discussed above, in which defence counsel submitted in closing that 'it's incredibly difficult to trust someone who's that intoxicated' – the judge's charge included a similar warning:

Reliability, that is another matter I need to say a little bit more about this, because in this case you have heard evidence about a good deal of drinking going on during the course of that evening, and certainly each of Ms [V25C2] and Ms [V25C1] accepted that they had a fair bit to drink, both before the club and after they got to the club and, indeed, there was some alcohol, I think, in the car, and each of them, you may think, accepted that they were affected by alcohol to some degree or another. ...

I must warn you in relation to both Ms [V25C1] and Ms [V25C2], that it is the experience of the law that evidence that a witness is affected by alcohol gives rise to a real question about their reliability. They may be unreliable. That unreliability can arise as a result of the perceptions of the individual being affected by alcohol or the recollections of the witness being affected by alcohol. The law says that every jury must take those considerations, that potential unreliability caused by the alcohol into account when considering the evidence of those witnesses.

You must take into account, in determining whether you accept the evidence of Ms [V25C1] and Ms [V25C2], the fact that they had taken on board a not insignificant quantity of alcohol that night.

[182] V12.
[183] V12.

> *You have to take that into account in deciding whether you accept their evidence in whole or in part and in deciding what weight you give to that evidence.*[184]

We do not take issue with the view that a complainant's intoxication *may* impact on her recall of the alleged rape. However, we suggest that the 'experience of the law' on this topic may need to be unpacked and approached in a more nuanced way.

Intoxication due to AOD use can have widely varying effects on the encoding and recall of memory, depending heavily on the type(s) or combination of drug involved and the degree of intoxication. Alcohol is the drug that has been most widely researched in relation to its effects upon memory, and the available scientific literature broadly indicates that intoxication can impact upon the *completeness* of an individual's memory but does not appear to decrease the *correctness* of the information that is reported.[185] A recent study by Flowe and colleagues specifically involved participants encoding a hypothetical rape scenario while they were either sober or alcohol-intoxicated. The authors reported that, while intoxication decreased the completeness of participants' recall, there were no alcohol-related effects on recall errors and no evidence that intoxicated women were more prone to incorporating misleading information into their statements.[186] Regarding intoxicated witnesses as inherently unreliable, therefore, does not align with current research, nor does it recognise the wide variability of intoxication's impacts upon memory.

A more nuanced approach is also supported by Victorian Court of Appeal jurisprudence. In *Keogh* the Court held that the complainant's intoxication did not compel the jury to conclude that her evidence, regarding absence of consent, was unreliable.[187] In *Roberts* the Court recognised the difference between core issues and peripheral details:

> ... [W]hile it may be accepted that the intoxication of the complainant reduced her reliability on some of the details surrounding the offending, on the material aspects relating to the elements of rape and false imprisonment her evidence was firm. The inconsistencies alleged were largely peripheral to the offending. Under cross-examination, the complainant was resolute and unwavering that the appellant had penetrated her vaginally and that he had done so forcibly and without her consent.[188]

6. Cross-examination of complainants

Cross-examination has long been regarded as the most traumatic aspect of a rape trial for a complainant, and improvement in this area has been a priority of statutory reform over several decades. Ours is not a longitudinal study and so we make no claims about whether there has been improvement over time (though we do consider the persistence of rape myths below). In this section of the report we draw attention to a number of techniques of cross-examination that have the potential to distress complainants and which echo some of the discredited attitudes and practices of the past. We highlight four features here:

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[184] V25.

[185] See T Jores et al, 'A meta-analysis of the effects of acute alcohol intoxication on witness recall'' (2019) 33(3) *Applied Cognitive Psychology* 334 at 340. See also L Kloft et al, 'Hazy memories in the courtroom: A review of alcohol and other drug effects on false memory and suggestibility' (2021) 124 *Neuroscience & Biobehavioral Reviews* 291 at 298.

[186] H Flowe et al, 'An experimental examination of the effects of alcohol consumption and exposure to misleading postevent information on remembering a hypothetical rape scenario' (2019) 33(3) *Applied Cognitive Psychology* 393 at 405-406.

[187] *Keogh v The Queen* [2018] VSCA 145 at [93].

[188] *Roberts v The Queen* [2012] VSCA 313 at [52].

- questions on peripheral and irrelevant details;
- questions that expect high level of precision in the complainant's recall and account of events;
- questions that are not designed to adduce evidence, but are 'puttage'; and
- questions that highlight asserted differences between accounts given by the complainant at different times.

6.1 Peripheral/irrelevant detail

In multiple cases in this study cross-examination included a large number of questions directed at details that appeared peripheral to the facts in issue. For example, we observed questions related to: the identity and seating arrangement of those with whom the complainant shared drinks at a bar prior to the alleged rape; the location of where a car was parked in the city; conversations with persons that had little relevance to the rape; detailed questions about a trip to a Cash Converters; the orientation of the bed in the room; the proximity of the bed to the door and bathroom. Given the relative unimportance of these matters, it appeared that the motivation for asking them was to unsettle the complainant and/or create a 'foundation' for impugning the complainant's reliability and credibility – by eliciting an 'I don't remember' response or by adducing evidence that was inconsistent with how the complainant may have described events on an earlier occasion.

In one case, the complainant was extensively questioned about where a car was parked in the city – the car being the mode of transport by which the complainant was taken to the accused's apartment. There was no dispute that she was in fact driven to the accused's apartment (although the complainant gave evidence that she understood she was going to another person's home):

> *DEFENCE COUNSEL: Not carpark in the sense of a … ?*
>
> *COMPLAINANT: … A building, no.*
>
> *DEFENCE COUNSEL: A building. All right. If I was to say to you that the car was just parked right there outside the [bar redacted], less than 10 metres away, would you agree with that or disagree?*
>
> *COMPLAINANT: I don't remember where the car was parked, but I know that we walked to the car and it was parked somewhere. This happened two years ago. Again, I don't really have a spot on memory of where the car was parked.*
>
> *DEFENCE COUNSEL: It's a pretty significant night, though, isn't it. You agree with that, it's a pretty significant night?*
>
> *COMPLAINANT: To me, yes.*
>
> *DEFENCE COUNSEL: And you have made a detailed statement to the police about all of this?*
>
> *COMPLAINANT: Well, yes, the details that mattered, not the details of where the car was parked.*
>
> *DEFENCE COUNSEL: All right, you say it's not an important detail, not one that you remember?*
>
> *COMPLAINANT: No.*
>
> *DEFENCE COUNSEL: All right. So, when you say in answer to the learned prosecutor's question, 'All right and where was [name redacted]'s car?' And your answer is, 'Somewhere in the city.' That was as good as you could do in terms of where the car was?*
>
> *COMPLAINANT: If that's what was my answer, which was my answer, then, yes.*

DEFENCE COUNSEL: All right, but if the car was parked – you concede the car might have been parked just 10 metres away from the restaurant. Is that right, you're conceding that, it might have been, you don't remember?

COMPLAINANT: I don't remember where the car was parked or – I just remember, now, two years after that night, I just remember going to the car.

DEFENCE COUNSEL: All right. This is the car… ?

COMPLAINANT: So my memory wouldn't be so spot on to – of you asked me these questions on the day that I gave the evidence or when I gave the statement or when I reported it, maybe then I would remember where the car was, but given that it's been two years, I don't even know what I ate for lunch yesterday, so.

DEFENCE COUNSEL: Yes, right, but this is the car that you go in and ultimately you are taken back to this man's house and you say you are raped, that's what you say, yes?

COMPLAINANT: This is the car that [name redacted] was driving. I didn't take the car and I got into the car 'cause I know [name redacted].

DEFENCE COUNSEL: All right, and you say, just can't remember. Was it just outside the [bar redacted] or somewhere, anywhere in the city, you can't remember?

COMPLAINANT: It's not a vital detail that I would remember from the night.[189]

The fact of where the car was parked was of no obvious consequence. The questions appear to be superfluous at best, and, at worst, designed simply to lay a foundation for suggesting the complainant is an unreliable witness, with implications for the veracity of her recollection of the alleged rape.

In another case, the complainant was asked multiple questions about a jacket in the accused's house. There was no obvious relevance to the facts in issue, yet the line of questioning appeared designed to support the suggestion that the complainant was lying about the rape allegation:

DEFENCE COUNSEL: In fact I will read it to you - p.231. This is from line 8. This is after I asked you, 'It's not true that you were heading to the dining room to get a jacket. Is that right?' 'No. I was going to the dining room' was your response. 'Even though you hadn't seen a jacket up there?' 'I hadn't even noticed whether there was a jacket or not at the time.' Do you remember giving that evidence?

COMPLAINANT: Yes, that's correct.

DEFENCE COUNSEL: But in your evidence in chief you talked about having seen a jacket in a boy's bedroom. Is that right?

COMPLAINANT: In a boy's bedroom? No, I did not.

DEFENCE COUNSEL: Did you not? All right. Page 170 ... ?

COMPLAINANT: I went nowhere near the kids' bedrooms. ...

DEFENCE COUNSEL: Where do you say that you saw the jacket?

COMPLAINANT: In the lounge. Sorry. I did not say that I had actually seen a jacket. I just presumed there was a jacket there because there were always jackets laying around.

DEFENCE COUNSEL: When you gave evidence in your evidence in chief that you were adamant that you had seen a jacket, that wasn't true. Is that right?

JUDGE: Sorry, I didn't understand that question. Does she say she's adamant?

[189] V3.

DEFENCE COUNSEL: Her evidence is that she doesn't recall having seen a jacket and I am simply putting …

JUDGE: She said that she didn't know whether she saw a jacket or not, didn't she?

DEFENCE COUNSEL: That's right, and I am putting to her now what she says in her evidence in chief, 'I was adamant I had seen a jacket.'

JUDGE: To him?

DEFENCE COUNSEL: Yes.

JUDGE: I see, yes?

COMPLAINANT: Sorry, I'm a bit lost here.

DEFENCE COUNSEL: All right. Do you recall in your evidence in chief - sorry. What is true? Did you see a jacket or not?

COMPLAINANT: On that day I don't recall seeing a jacket, but there was always jackets laying around so I presume there might have been a jacket there. On the day I don't know whether I had seen one.

DEFENCE COUNSEL: You're changing the details of the story because you're making this story up, aren't you?

COMPLAINANT: No, I'm not.

DEFENCE COUNSEL: If I can return to … ?

COMPLAINANT: Can I have a break, please?[190]

In another case, defence counsel asked the complainant very specific questions about the drinks she consumed and her proximity to the bar at a venue. The complainant says several times that she can't remember and that it was a long time ago:

DEFENCE COUNSEL: Do you remember that a drink - your drink was spilled soon after [V16A] arrived?

COMPLAINANT: I don't know.

DEFENCE COUNSEL: To understand you Ms [V16C], you don't remember anything in relation to your drink specifically, whether or not you shared it with [V16A]?

COMPLAINANT: No, I don't know. I'm sorry, it was a long time ago.

DEFENCE COUNSEL: All right. Do you remember finishing that drink?

COMPLAINANT: I don't believe - I've never really not finished a drink, so I guess I must've, yeah.

DEFENCE COUNSEL: You don't remember whether you gave [V16A] any of that drink or [V16A] drank any of that drink?

COMPLAINANT: No. …

DEFENCE COUNSEL: You went up to the bar with [V16A]?

COMPLAINANT: No, he went to the bar, I was standing maybe two metres from the bar.

DEFENCE COUNSEL: You While [V16A] was at the bar and ordering drinks - - -?

COMPLAINANT: M'mm.

DEFENCE COUNSEL: … did you stay back two metres from the bar the whole time?

[190] V15.

COMPLAINANT: I don't know, it's hard to …

DEFENCE COUNSEL: Did you - sorry?

COMPLAINANT: No, it's hard to say.

JUDGE: You're going to have to let the witness finish.

DEFENCE COUNSEL: Sorry?

COMPLAINANT: I'm sorry, it's just hard to say exactly where I was standing while he was …

JUDGE: No, that's all right. If you can't say, that's fine, Ms [V16C], just say you're not sure or you can't say?

COMPLAINANT: Yeah.[191]

Defence counsel then attempted to show the complainant (and the court) CCTV footage taken from the establishment where the complainant and the accused were present, apparently for the purpose of determining if she was indeed standing two metres back from the bar:

DEFENCE COUNSEL: You will recall, you said that you stood about two metres back from the bar, or where [V16A] was standing at the bar, after you first arrived at the [bar name redacted]?

COMPLAINANT: Yeah.

DEFENCE COUNSEL: You didn't know whether that was for the whole time?

COMPLAINANT: Yeah, no.

DEFENCE COUNSEL: And you said that you didn't want a drink when you first got there?

COMPLAINANT: Yeah.

DEFENCE COUNSEL: Ms [V16C], I'd like to play you a clip of CCTV now. If you can just watch it without saying anything. After you've viewed it, I'm going to ask you some questions about what you're doing in the CCTV and what Mr [V16A] is - or what you can see Mr [V16A] doing, all right?

COMPLAINANT: Okay.

DEFENCE COUNSEL: The footage is the two of you at the bar?

COMPLAINANT: Yeah.[192]

The technology failed at that point and the judge intervened:

JUDGE: Ms [V16D], how important is this? I would assume the footage would speak for itself. I may be wrong on that, but is there any real need to take the witness through chapter and verse, confirming that she's standing at the bar, or less than a metre from the bar at any particular time?[193]

[191] V16.
[192] V16.
[193] V16.

We have extracted this particular case at some length because we think it is a good illustration of a practice we observed in a number of cases: complainants being asked detailed questions about events of no obvious relevance to matters in issue, where the objective appears to be to evoke or allude to one or more rape myths (in this case, it would seem, that a woman who drinks and socialises with a man in a bar is more likely to consent to sex). Such questioning sequences also appear to be designed to discredit the complainant as a witness by inviting her to repeat 'I don't remember' answers (even if in relation to peripheral matters) and by demonstrating differences between her recollection and other evidence (like CCTV footage). The strategy, it would seem, is to establish a basis for extrapolating the complainant's 'unreliability' from peripheral and irrelevant matters to the substance of her ('false') rape allegation.

In another case, the complainant was questioned extensively over the name of the dating app (via which she had met the accused) she mentioned in conversation with witnesses who attended to her at the scene after the alleged rape. There was no contest that they had met on 'Plenty of Fish' and yet:

> *DEFENCE COUNSEL: Sorry, if I can just pause you there. Did you tell anyone that you'd been on a Tinder date with this man?*
>
> *COMPLAINANANT: I can't recall if I had said anything to any of the men but I do recall the conversation I had with the wife when she came. So, I gave her most of the information.*
>
> *DEFENCE COUNSEL: Well, you hadn't been on a Tinder date, had you?*
>
> *COMPLAINANANT: No.*
>
> *DEFENCE COUNSEL: And your evidence is that you hadn't met [V10A] on Tinder?*
>
> *COMPLAINANANT: That's correct, I didn't meet him on Tinder.*
>
> *DEFENCE COUNSEL: So, what do you say to the proposition that you would've told someone that you'd been on a Tinder date?*
>
> *COMPLAINANANT: Ah, I don't believe I would've said that, no.*
>
> *DEFENCE COUNSEL: Did you tell her that you'd met [V10A] on Bumble?*
>
> *COMPLAINANANT: No, but I don't recall there was the conversation she asked how I met him, which app it was and I would've told her Plenty of Fish and I believe she said one of her friends had just downloaded or her friends was using it, something along those lines and that's how the conversation about Bumble came up and I told her I had downloaded it but I didn't use it and that's not where I met him.*[194]

It is, of course, of no real consequence which names of which dating apps were mentioned during the conversations in question, or whether witnesses accurately recalled the names later. It appears that the only point of this style of cross-examination is to try to weaken perceptions of the complainant's general credibility and reliability.

Later in this report we comment on the way in which complainants were questioned about what they were wearing (evoking rape myths). Here we note that, in some cases, complainants were also expected to have detailed recollection of what the accused was wearing:

> *DEFENCE COUNSEL: You also said that when you were in the bathroom that this man, or that [V14A] was wearing blue sport pants?*
>
> *COMPLAINANT: As I remember, something blue.*

[194] V10.

DEFENCE COUNSEL: So they were like shiny material pants?

COMPLAINANT: I don't remember those details.

DEFENCE COUNSEL: He hadn't been wearing those earlier in the day, had he?

COMPLAINANT: I don't remember.

DEFENCE COUNSEL: Earlier in the day he was wearing trousers?

COMPLAINANT: I think, yes.

At what point did he change out of the trousers into the blue sports pants?

COMPLAINANT: I don't remember.[195]

***

DEFENCE COUNSEL: So at that point, do you remember what he was wearing?

COMPLAINANT: I have no clue.

DEFENCE COUNSEL: Was he simply in the clothes he arrived in?

COMPLAINANT: Yes.

DEFENCE COUNSEL: You couldn't help us with whether he'd taken his pants off or his shoes off?

COMPLAINANT: Um, I, I have no idea.[196]

In some trials, repetitive questions were asked about peripheral matters where it was hard to discern how anyone could be expected to answer them with accuracy. For example, in the following case, the complainant was asked numerous questions about tissues in a hotel room bin:

DEFENCE COUNSEL: ... I'll put to you what you said at the committal, and I'll ask you whether that helps your memory firstly. This is at p.43, Your Honour, line 21. 'What did you see in the bin before you took the bin liner out?' Answer: 'There were some tissues. Question: 'How did they get in there?' Answer: 'I don't know.' Do you agree you were asked those two questions last year and you gave those answers?

COMPLAINANT: Yes.

DEFENCE COUNSEL: Does that help ...?

COMPLAINANT: Yes.

DEFENCE COUNSEL: ... you revive your memory?

(No audible response.)

DEFENCE COUNSEL: All right. So tell the jury what you remember now about what you saw in the bin?

COMPLAINANT: There was tissues.

DEFENCE COUNSEL: How many?

COMPLAINANT: I - I don't know.

DEFENCE COUNSEL: Were they scrunched up ...?

COMPLAINANT: Yes.

[195] V14.
[196] V6.

DEFENCE COUNSEL: … or were they folded up?

COMPLAINANT: Scrunched up.

DEFENCE COUNSEL: Scrunched. Were they stained or were they still white like the photos that appear in 13?

COMPLAINANT: I can't remember.

DEFENCE COUNSEL: So you see there's a box of tissues in 13; do you agree that that's where the tissues would have come from, or are you unable to say?

COMPLAINANT: I can't remember.[197]

In addition to focussing on peripheral details, we noticed another common technique of cross-examination was to focus on the theme of 'time'. Cross-examination about time featured typically in two ways. In the first category were questions about *when* particular prior events occurred, again, often with little obvious relevance to matters in issue. In the second category were questions about the *length* of time particular acts/events were said to have lasted during the alleged rape. It is unlikely that anyone can say with precision how long particular events lasted, and even more difficult when those events occur during a traumatic event.

By way of illustration of the first category, in one case the complainant was subjected to significant questioning about the timing of going to a Cash Converters on the day of the rape.[198] The complainant had travelled from interstate, was unfamiliar with the suburb in which the Cash Converters was located, and gave evidence that she was not wearing a watch. In these circumstances, cross-examination on the timing of the trip to the Cash Converters and return to the house (where the alleged rape occurred) was not only of no obvious relevance to the alleged rape, but also underpinned by an assumption that these were questions that *could* be answered precisely when, in fact, given the context, they could only be answered with guestimates:

DEFENCE COUNSEL: … you've said that the trip to Cash Converters, on your recollection now, started at about 2.40, is that correct?

COMPLAINANT: That's correct. But as I said, I just don't recall the exact time.

DEFENCE COUNSEL: And do you agree that the document that you signed, being the pawn ticket I've just taken you through, was timestamped and printed on that date at 4.10 pm?

COMPLAINANT: That's what it shows, yes. …

DEFENCE COUNSEL: … So getting back to your evidence today. Today you say that the trip to Cash Converters - I'm going - I'm going to add it all up all right? An estimated departure time from [V2L1] of 2.40. Estimated trip time of 15 minutes. Maximum time in Cash Converters 10 minutes, return trip roughly the same. Would you agree that's about a 40 minute round trip?

COMPLAINANT: Yep.

DEFENCE COUNSEL: Which has you back at [V2L1] around 3.20 in the afternoon?

COMPLAINANT: Yep.

DEFENCE COUNSEL: Notwithstanding that the document that you've signed was printed out at 4.10 pm?

COMPLAINANT: Well that's correct.

[197] V13.
[198] V2.

DEFENCE COUNSEL: You then say that [V2A] made you a cup of tea, is that right?

COMPLAINANT: Cup of coffee yes that's correct.

DEFENCE COUNSEL: Thank you, that's the terminology I tend to use. He made you a cup of coffee is that right?

COMPLAINANT: That's correct. ...

DEFENCE COUNSEL: All right. How long did he take from when you returned, if we accept that you returned from the trip to Cash Converters around about 3.20, how soon after arriving did he make you the cup of coffee?

COMPLAINANT: Um probably about 15 minutes.

DEFENCE COUNSEL: So if it's around 15 minutes and we've arrived home at 3.20, he's making you the cup of coffee about 3.30 is that right?

COMPLAINANT: Um ...

JUDGE: You're building estimate upon estimate upon estimate Mr [V2D], she's - I'm not sure where the maths is going with any of this, but she's - she's told you that the starting point of that is an estimate, as from the time that she leaves the house.

DEFENCE COUNSEL: Yes Your Honour.

JUDGE: Yes.

DEFENCE COUNSEL: Well there's - other evidence I'll put to her later on.

JUDGE: Well you can do that but you're trying to lock her in, in terms of time, she's said of each one of those things, that is the departure time from the house, the - the time of the trip, the time in the shop, the return trip, they're all estimates.[199]

The judge's (welcome) intervention goes to some of the problems with the time-focused line of cross-examination, but it is hard to know what impression jurors are left with regarding the implications of the complainant's 'imprecision'.

In another case, the duration of a conversation between the complainant and the accused while they were in a car some hours prior to the alleged rape, was the subject of detailed questioning:

DEFENCE COUNSEL: All right, so you went there and you met him?

COMPLAINANT: Mm.

DEFENCE COUNSEL: You sat in the car with him for about half an hour, didn't you?

COMPLAINANT: I wouldn't say half an hour. 20 minutes? I don't recall.

DEFENCE COUNSEL: You don't recall it being half an hour?

COMPLAINANT: No. I wouldn't - no.

DEFENCE COUNSEL: All right. I'm going to read you some evidence that you gave at the committal, all right, and I'm going to read out the ... ?

COMPLAINANT: What page is that, sorry?

JUDGE: No, you won't have that.

DEFENCE COUNSEL: No, you won't have it. I will just read out the question and the answer, okay, and tell me if you recall that. I'm reading from p.7 of the committal transcript from line 9. 'And he gave you a hug when he got into the car.' 'Mm.' 'Okay, and did he give you a kiss

[199] V2.

as well?' and you replied, 'Yeah, which is normal for us.' 'And how long did you talk to him for?' 'I would say a good half hour.' Do you remember giving those answers?

COMPLAINANT: Yes, it could have been half an hour. I'm not exactly sure, yes.[200]

6.2 Precision questions and expectations of detailed recall

It is to be expected that complainants will be questioned about the nature of the sexual acts that provide the basis for the rape charge against the accused, but in a number of cases in this study cross-examination went further. We observed a number of instances where cross-examination involved large numbers of very detailed questions that expected the complainant to recall and describe with precision each and every aspect of what occurred – including: the location of clothes and underwear; the position of hands, arms and legs (at multiple time points); the number of fingers used to effect penetration; the angle of her leg at the time of penetration; the duration of penetration etc.

The location of underwear was a topic of extensive cross-examination in several cases in this study:

DEFENCE COUNSEL: Your knickers were next to your clothes on the floor?

COMPLAINANT: I don't – I don't recall.

DEFENCE COUNSEL: You don't recall. If I put to you your knickers were on the floor and you found your knickers in the semi-darkness and put them on?

COMPLAINANT: I don't recall.

DEFENCE COUNSEL: You don't recall. I suggest you then sat on the edge of the bed and you pulled your tight black jeans on?

COMPLAINANT: I pulled them up, yes. I got dressed.[201]

***

DEFENCE COUNSEL: Now, today you said in your evidence in relation to where your underpants were, that they were around your ankles. Do you agree with that?

COMPLAINANT: Yes, I do.

DEFENCE COUNSEL: In this note it says, 'Victim's pants completely off and her underwear pulled down to mid-thigh.' Do you recall whether or not you said mid-thigh to the police when you made your report?

COMPLAINANT: That could have been correct. I can't remember, it's been such a long time since the actual incident.

...

DEFENCE COUNSEL: You said, 'I was just wearing my jumper and my undies were down at my knees,' not your ankles?

COMPLAINANT: Oh I don't, I thought I had told the police that they were around my ankles.

DEFENCE COUNSEL: But you signed this statement as being true and correct, do you agree with that?

COMPLAINANT: Yeah.

DEFENCE COUNSEL: And the statement ... ?

COMPLAINANT: Yes I do.

[200] V15.
[201] V1.

DEFENCE COUNSEL: … and the statement says according to you, your undies were down - or 'My undies were down at my knees.' Do you agree that was in your statement?

COMPLAINANT: Yes.

DEFENCE COUNSEL: So are you changing your evidence now from your statement?

COMPLAINANT: I'm just saying I recall them being around my ankle now.[202]

Cross-examination of this sort is not only questionable for the reasons discussed above (ie dubious relevance, unrealistic expectations of precise recall) but also because the intimate subject matter carries the risk of causing the complainant embarrassment and or further traumatisation. A third dimension illustrated by the case just discussed – questioning that suggests inconsistency between accounts given by the complainant at different time points – is explored further below.

In another case, the complainant was cross-examined about whether her underpants were pushed to the left or right, or whether she was unable to remember, as well as differences between the account she gave at trial and the evidence she had given at the committal hearing:

DEFENCE COUNSEL: … You were asked questions about this topic [at committal] … Question, 'Are you able to say which side of the panties that I assume must be pushed aside for him to be doing this?' Answer, 'No.' Question, 'Well, you can't say?' Answer, 'I can't say.' Were you asked those questions and did you give those answers?

COMPLAINANT: I believe so, yeah.

DEFENCE COUNSEL: … And was that the truth?

COMPLAINANT: Yeah, at the time, I believe so.

DEFENCE COUNSEL: … So at the time of giving your evidence [at committal] … you believed you were unable to say to which side they were pushed?

COMPLAINANT: Correct.

DEFENCE COUNSEL: … But you tell us today that you have a memory of them being moved to the left and it's something that's always been in your memory?

COMPLAINANT: Yes.

DEFENCE COUNSEL: … It must be something that you're mistaken about?

COMPLAINANT: Sorry?

DEFENCE COUNSEL: … It must be something that you're mistaken about?

COMPLAINANT: What is?

DEFENCE COUNSEL: … Your statement.[203]

We offer two observations about this style of cross-examination. First, even if the wording of questions is 'polite' and professional, it is likely to be distressing for many complaints to have to participate in recounts of events in this way, particularly in relation to details that appear to be of no or marginal relevance. Secondly, and foreshadowing an observation on which we expand below, it appeared to us that, at times, the motivation for such lines of questioning was not the pursuit of accuracy, but an attempt to 'shake' the complainant's account – by eliciting answers that were

[202] V2.
[203] V11.

confused, uncertain or imprecise, which in turn could support an assertion that the complainant had fabricated the rape allegation.

In another case, questioning focused on details such as the colour or style of bedding in the hotel room where the alleged rape occurred:

> *COMPLAINANT: I don't remember [if] it was a sheet or it was a blanket, I couldn't see because English is not my mother tongue so I used the word sheet but it was a blanket or some big – (Through Interpreter) A cover, a bed cover.*
>
> *DEFENCE COUNSEL: You said before that you – well, you couldn't remember what colour the sheet was, could you?*
>
> *COMPLAINANT: No, I don't remember.*
>
> *DEFENCE COUNSEL: Now, you say it was a blanket possibly?*
>
> *COMPLAINANT: I think it was a white sheet but I don't quite remember what colour it was. Sheet or blanket, for me it was like the same when I was giving the evidence because I used my English as best as I can, so I used that word which I knew. So I hadn't had translator so.*
>
> *DEFENCE COUNSEL: Can I just ask you what you mean by that? You've had the interpreter available to you at court?*
>
> *COMPLAINANT: Yeah. Not at court, when I gave my statement I mean.*[204]

In other trials, cross-examination focused on the precise way in which the rape took place including where hands and legs were positioned and the length of time for which various components of the rape continued:

> *DEFENCE COUNSEL: How did he manage - you've - he's got you in a grip. What, his arm around you; is that right?*
>
> *COMPLAINANT: Yes.*
>
> *DEFENCE COUNSEL: It's not his hands, it's his arm; is that what you're saying?*
>
> *COMPLAINANT: Yeah, yeah.*
>
> *DEFENCE COUNSEL: So his hands played no part on the restraints. It's physicality with his arm; is that right? One arm?*
>
> *COMPLAINANT: I - I guess.*
>
> *DEFENCE COUNSEL: Because it would have to be one arm because the other hand is doing the touching?*
>
> *COMPLAINANT: Yes.*
>
> *DEFENCE COUNSEL: What about his legs? You've not said anything to the police or us here today about him restraining you, putting a leg over you or both legs over you and gripping your legs to keep you restrained. There's none of that?*
>
> *COMPLAINANT: I don't think that happened.*[205]

Questioning of this sort could be said to defy logic – it assumes a perfect or 'birds eye view' of the position of each person's body. While it might be possible for the complainant to recall where her

[204] V14.
[205] V6.

own body was positioned at various points it would be difficult in the extreme to know exactly how the accused's body was positioned at any one time.

Similar expectations of the complainant were evident in the following case:

> *DEFENCE COUNSEL: All right. Now you say that [V2A] was on top of you and he had his hands on my wrists up against my shoulders is that right?*
>
> *COMPLAINANT: That's correct.*
>
> *DEFENCE COUNSEL: So had he placed - sorry, had he pushed your wrists up so that they were touching your shoulders?*
>
> *COMPLAINANT: They were against my shoulders yes.*
>
> *DEFENCE COUNSEL: They were against your shoulders, all right. And you said that he was on top of you for six minutes, is that right?*
>
> *COMPLAINANT: That would be correct.*
>
> *DEFENCE COUNSEL: And it wasn't until six minutes pass that you kneed him in the stomach?*
>
> *COMPLAINANT: Exactly.*
>
> *DEFENCE COUNSEL: Earlier today you said that [V2A] was kneeling whilst he was penetrating you, is that right?*
>
> *COMPLAINANT: He was - after I kneed him in the stomach, he was on the floor kneeling yes.*
>
> *DEFENCE COUNSEL: After you kneed him, all right?*
>
> *COMPLAINANT: Yep.*
>
> *DEFENCE COUNSEL: So when he was actually on top of you, was he lying on top of you?*
>
> *COMPLAINANT: Yes he was.*[206]

We note that this was a case in which the accused denied that any sexual conduct occurred, and so the only purpose for which questions about body positions were 'relevant' was to suggest fabrication by the complainant.

In another case, the complainant was cross-examined about her knowledge of the number of fingers that were used to penetrate her, together with questions about the exact positioning of the accused:

> *DEFENCE COUNSEL: No, and that's the paragraph [in complainant's statement] relating to him putting his finger in your vagina, isn't it?*
>
> *COMPLAINANT: Yes.*
>
> *DEFENCE COUNSEL: In that paragraph you refer to finger, singular, don't you; just one finger?*
>
> *COMPLAINANT: To be honest, I don't know whether it was one, two or five.*
>
> *DEFENCE COUNSEL: All right. In your evidence - you don't remember how many fingers were placed in you. Is that right?*
>
> *COMPLAINANT: No.*

[206] V2.

DEFENCE COUNSEL: In your evidence in chief you talked about inserting his fingers into your vagina. Do you remember giving that evidence?

COMPLAINANT: I recall saying fingers, yes.

DEFENCE COUNSEL: But you now say you're not sure whether it was a single finger or it was multiple fingers. Is that right?

COMPLAINANT: I just said fingers, not meaning one or two. It was just the incorrect wording, fingers.[207]

In another case, the focus of intimate questioning was the exact position of the accused during the alleged rape, and whether or not the complainant saw his penis penetrating her vagina:

DEFENCE COUNSEL: When you looked, he did not have his penis in your vagina, that's ...?

COMPLAINANT: When I looked - yeah, when I sat up, yeah.

DEFENCE COUNSEL: No, no, when you opened your eyes. You felt the pain, you opened your eyes and looked and he didn't have his penis in your vagina?

COMPLAINANT: Well, no, he didn't - he didn't put his penis in my vagina. He tried to, that's what I felt.

DEFENCE COUNSEL: When you felt that ... ?

COMPLAINANT: Yes.

DEFENCE COUNSEL: ... you opened your eyes and looked and he didn't have his penis in your vagina, correct?

COMPLAINANT: No, no.

DEFENCE COUNSEL: And when you opened your eyes and looked, he wasn't trying to put his penis in your vagina at that point in time, was he?

COMPLAINANT: Yes, that's what it felt to me was, well, exactly what he was doing.

DEFENCE COUNSEL: Yes, but when you looked, it didn't look like what he was doing, did it?

COMPLAINANT: It was dark - yes, it did. That's exactly what it looked like 'cause it's what it felt like.

DEFENCE COUNSEL: So your evidence is that he had - he was putting his penis in your vagina as you opened your eyes and looked. That's your evidence, isn't it?

COMPLAINANT: Yes.

DEFENCE COUNSEL: And even as you say that, it doesn't make sense to you even, does it?

COMPLAINANT: What - can I take a break, please?[208]

The examples included in this section of the report, drawn from 7 of the cases in this study, proved the foundation for an important question: is it necessary or reasonable that complainants in rape trials often face such high expectations when it comes to precision and detail? A certain intensity is probably inevitable but, as we will see, this is just one of the reasons why cross-examination can be a gruelling experience for complainants in rape trials.

[207] V15.
[208] V12.

6.3 Puttage

In a number of cases we noticed that confusion and distress was often caused to complainants by how defence counsel handled 'puttage' – that is, questions that are assertions *put* to the complainant, as distinct from questions designed to adduce evidence. 'Puttage' questions are entirely appropriate. Indeed, they are necessary to ensure compliance with the rule in *Browne v Dunn.*[209] However, we observed a number of instances where they appeared to confuse the complainant (understandably) because of the *manner* in which they were included in cross-examination. At times, defence counsel put the accused's contrary version of events to the complainant in way that seemed to come out of nowhere, because the 'puttage' question did not appear to fit chronologically or logically in the sequence of questions that preceded them. Additional sources of confusion (and additional distress) for the complainant included that 'puttage' questions were not always sign-posted as such, and were sometimes followed by a rapid shift back to confronting questions about the specific details of the alleged rape. The following example is illustrative:

> *DEFENCE COUNSEL: You had suddenly started seeing your sister again who you hadn't seen much of in the two previous years?*
>
> *COMPLAINANT: Yes, because she started coming over and wanted to make peace because she had gotten married and she wanted to have a family unity.*
>
> *DEFENCE COUNSEL: On 31 July it was in fact you who initiated sexual activity with Mr [V15A]?*
>
> *COMPLAINANT: I did not do that whatsoever.*
>
> *DEFENCE COUNSEL: Everything that happened between the two of you on that day sexually was consensual?*
>
> *COMPLAINANT: Absolutely not.*
>
> *DEFENCE COUNSEL: You are now trying to make false allegations in order to save your marriage?*
>
> *COMPLAINANT: What's my marriage got to do with it? What false allegations?*
>
> *DEFENCE COUNSEL: These allegations of rape which you're making against Mr [V15A]?*
>
> *COMPLAINANT: They are not allegations.*
>
> *DEFENCE COUNSEL: All right. I'm going to return to your evidence?*
>
> *COMPLAINANT: He is my cousin. Why would I want to have sex with my cousin?*
>
> *JUDGE: Ms[V15C]?*
>
> *COMPLAINANT: Sorry. Sorry.*
>
> *JUDGE: No, it's all right. I understand that you're upset but counsel has to put these matters to you?*
>
> *COMPLAINANT: Okay.*
>
> *JUDGE: It's a necessity for the purposes of the trial. Thank you.*
>
> *DEFENCE COUNSEL: Thank you, Your Honour. (To witness) You remember giving evidence in evidence in chief that when the assault first started, it occurred when he grabbed you by the back of the head. Do you remember giving that evidence?*

[209] *Browne v Dunn* (1893) 6 R 67.

COMPLAINANT: Yes.

DEFENCE COUNSEL: We spoke yesterday about the two statements that you provided, one to the police and one to the court at the committal hearing?

COMPLAINANT: Yes.

DEFENCE COUNSEL: Now I say ...

JUDGE: Just slow down a little bit for the interpreter.

DEFENCE COUNSEL: Yes, sorry. (To witness) When you made that statement, I say to you that you only alleged that he grabbed you by the back of the hair after the sexual assault was over?

COMPLAINANT: No, he had grabbed my hair before.

DEFENCE COUNSEL: But you didn't say that in your statement to the police, did you?

COMPLAINANT: I don't recall.[210]

In some cases, such methods of asking 'puttage' questions led judges to intervene (either following objection from the Crown prosecutor or of their own volition), with defence counsel instructed to reframe questioning so that the complainant understands the nature of what is being asked:

CROWN PROSECUTOR: Objection, your Honour. The witness hasn't said that at any point.

DEFENCE COUNSEL: Your Honour, it's puttage.

JUDGE: You're putting it as a - yes.

DEFENCE COUNSEL: Yes. I'm entitled to put this.

JUDGE: That needs to be made clear.

DEFENCE COUNSEL: Yes, your Honour.

Do you understand? What you say to this jury is that ...

JUDGE: No. Perhaps you could - sorry to interrupt you, Ms [V21D].

DEFENCE COUNSEL: Yes. I was just going to break it down.

JUDGE: Yes, if you could explain what puttage is.[211]

***

DEFENCE COUNSEL: It's at that point that Mr [V16A] asked you or said to you something like 'You aren't going to sleep in your own - in your bed?'.

JUDGE: Just a moment. So is this - is this being - is this puttage or ...

DEFENCE COUNSEL: It is.

JUDGE: ... are you simply asking the witness ... ?

DEFENCE COUNSEL: No, it's puttage. I can make it clearer.

JUDGE: I think the witness needs to understand the issue of puttage.

DEFENCE COUNSEL: Sure.

JUDGE: Ms [V16C], there will be times from now when the barrister will be suggesting to you what things occurred, okay? So the barrister will say, 'I suggest to you that what occurred was X, Y, Z,' okay?

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[210] V15.

[211] V21.

COMPLAINANT: M'mm.

JUDGE: That's being done so that you can have an opportunity of saying what you say was the situation?

COMPLAINANT: Yeah.

JUDGE: So if what is being suggested is true, you can agree with it, if what is being suggested, in your mind, is not true or is incorrect, then you should say so, okay?

COMPLAINANT: Okay.

JUDGE: So please do it by way of saying, 'I suggest to you.' It may be clear then.

DEFENCE COUNSEL: All right, I will do that.[212]

This was an example of a constructive judicial intervention, and we saw also instances of good defence counsel practice in relation to 'puttage' without the need for judicial intervention. For example:

DEFENCE COUNSEL: Okay, I put to you that the version you gave Constable [V23W03] and [V23W04] was not a true version. It wasn't really what happened. What would you say to that?

COMPLAINANT: No, it did happen, but it didn't happen in that location. So maybe our communication got mixed up. I was shocked and scared at the time, and I'd gone blank, you know.[213]

It would be desirable if there was a consistent practice in relation to 'puttage' questions, so that complainants are aware of the distinctive nature and purpose of these questions, and less likely to feel confused or ambushed.

6.3.1 Jury direction on 'puttage'

The required direction that questions asked of witnesses are not evidence[214] is also important for ensuring that the jurors understand that 'puttage' is not evidence. We are unable to make any general conclusions about how this direction was employed in the cases in this study, given that we did not have access to transcripts of the charge in most cases. We simply make two observations. First, it appears that, when addressing 'puttage' in their charge to the jury judges may be disinclined to illustrate the point with reference to specific questions (and answers) from the case, preferring hypothetical illustration. In one case in this study the judge said as much during end of trial discussions with counsel pursuant to s 12 of the *Jury Directions Act 2015* (Vic):

JUDGE: Usually I don't use specific examples from either the evidence or from a closing address as to what I mean when I explain to them that it's the answer not the question that's the evidence. I give them a standard theoretical example. I'll give that some thought.[215]

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[212] V16.
[213] V23.
[214] *Victorian Criminal Charge Book* (Judicial College of Victoria), [1.5].
[215] V21.

The judge's charge included the following:

> *JUDGE: And a word about the evidence from the witnesses. It's the answers that you've heard from the witnesses that are the evidence, not the questions they are asked. … [S]ometimes counsel will have confidently included an allegation of fact in the question that they have asked a witness. No matter how positively or confidently that allegation is presented, it will not form part of the evidence, unless the witness agrees with it. …*
>
> *So here's the simple example that has nothing to do with this case. Imagine counsel says to a witness, 'The car was blue, wasn't it?'. And the witness replies, 'No, it wasn't.'. Given that answer, there is absolutely no evidence that the car was blue. Even if you do not believe the witness or you think he or she is lying, there is no evidence that the car is blue.*[216]

It might be preferable if such a direction was illustrated with references to questions and answers from the case, rather than a generic hypothetical of the type used here – as is common-place with some other directions (such as on prior inconsistent statements). Our second observation, and tentative suggestion, is that consideration should be giving to adding this direction to the list of directions that can be given 'mid-trial' – that is, at or adjacent to the time of the 'puttage' questions (and answers). We consider the value of 'mid-trial' directions further below. Here we simply note that jurors may be better placed to understand and process the significance of 'puttage' questions (and the complainants' answers) if they are 'educated' by the judge at the time, as well as in the charge just prior to the commencement of deliberations. Complainants may also appreciate being present to hear that just because counsel has asserted a version of events that contradicts her account, doesn't necessarily mean she is disbelieved.

6.4 Assertions of inconsistency

> *DEFENCE COUNSEL: So, I'm going to ask you now exactly what you told [V23WCG2] in that time?*
>
> *COMPLAINANT: M'hmm, yeah.*
>
> *DEFENCE COUNSEL: I'm not asking you whether this is what actually happened with [the] man, just what you told [V23WCG2]?*
>
> *COMPLAINANT: Yeah.*[217]

A cross-examination technique employed by defence counsel in 24 of the 25 cases we examined was the deployment of earlier accounts provided by the complainant as a reference point for challenging the veracity of the complainant's trial evidence (and hence, her credibility and reliability as a witness).[218] A variety of earlier accounts were drawn upon by defence counsel for this purpose, including what was said to a complaint witness (such as a friend, person on the scene, parent etc),

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[216] V21.

[217] V23.

[218] In the one case in this study where this technique was not employed (V22), the accuracy of the complainant's account was strongly challenged on other grounds; specifically, evidence that she experienced 'visual and auditory hallucinations' and 'delusional beliefs' on the day of the alleged rape.

police officer, ambulance officer or medical officer, what was recorded in a police interview and statement, and the complainant's evidence at the committal hearing.

It is to be expected that, in an adversarial system, there will be a strong focus in cross-examination on testing the veracity of the complainant's evidence. However, in the cases we analysed, we were struck by how frequently and intensely this testing took the form of highlighting differences in accounts given by the complainant at different times in different contexts – not only in relation to central facts in issue, but also peripheral details, and even matters of no obvious relevance. There was limited space for the complainant to be able to explain why there might be differences, such as the context, audience, passage of time etc. For example, what a complainant tells a friend about events may well be different to what she says to a stranger such as a medical officer during a forensic examination, or a police officer during a formal interview.

The objective of 'differences' lines of questioning appeared to be less about clarifying what actually occurred – or directly disputing the account offered by the complainant in evidence-in-chief – and more about 'catching out' the complainant and laying a foundation for characterising her as, at best, unreliable, or a liar. Below we consider the accuracy of the 'word on word' (or 'her word against his') label that is often applied to rape trials, but here we note that our analysis on cross-examination focused on asserted differences in the complainant's account suggests that a more apt description might be: her word today -v- her word at committal -v- her word in police interview -v- her word at first complaint – noting that these different accounts will often span a period of 18 months or more.

It is now well recognised that victims of sexual offences may recount events differently at different times and to different audiences and that such inconsistencies are not necessarily indicative of fabrication or unreliability. This is now reflected in s 54D of the *Jury Directions Act 2015* (Vic) which provides for an educative and corrective direction on how the jury should (and should not) consider differences in the complainant's account. Later in this report we discuss our findings on the operation of s 54D – but, to foreshadow, we did not find that the availability of the s 54D direction (since 2017) had a discernible impact on the prevalence or nature of 'differences' lines of complainant cross-examination.

6.4.1 Difference from accounts given to other witnesses

In a number of cases the complainant was cross-examined about the account she was said to have given to a complaint witness. For example:

> *DEFENCE COUNSEL: I suggest either then or later she said to you, 'Well, what do you think happened? What do you think happened'?*
>
> *COMPLAINANT: Okay.*
>
> *DEFENCE COUNSEL: Did you say anything like that?*
>
> *COMPLAINANT: I don't ...*
>
> *DEFENCE COUNSEL: You don't know?*
>
> *COMPLAINANT: I don't know.*
>
> *DEFENCE COUNSEL: Did you tell [V1WC1] that you woke up and 'he was on top of me and I couldn't move and he finished' and you left, words to that effect?*
>
> *COMPLAINANT: Okay.*
>
> *DEFENCE COUNSEL: Did you say something like that?*
>
> *COMPLAINANT: I think I said something along the lines of that but I don't remember the ...*

DEFENCE COUNSEL: In particular, I'm suggesting that you said to her that when you woke up he was on top of you and that you couldn't move and you couldn't say anything?

COMPLAINANT: M'mm. Okay.

DEFENCE COUNSEL: Did she ask you questions why you couldn't do or say anything?

COMPLAINANT: Not that I can remember.

DEFENCE COUNSEL: Did you tell her that you were concerned about your clothes and your hair?

COMPLAINANT: I don't know.

DEFENCE COUNSEL: Did you ask her if you could have a shower?

COMPLAINANT: I don't know if I asked her. I don't know if I asked her or if she offered.

DEFENCE COUNSEL: No, no. You told the jury yesterday she told you or asked you that, suggested a shower. I'm suggesting you're the one who asked her for the shower?

COMPLAINANT: No, I didn't ask for the shower.

DEFENCE COUNSEL: So you say you remember that you didn't ask for a shower?

COMPLAINANT: Yes.[219]

In other cases, the touchstone for an assertion of inconsistency was what the complainant was said to have told a police officer or an ambulance officer first on the scene. For example:

DEFENCE COUNSEL: Prior to their attendance, do you recall speaking at length in particular to one male police officer?

COMPLAINANT: I do recall one male – male police officer, yes.

DEFENCE COUNSEL: And did you tell him that you hadn't planned to meet [V10A] previously?

COMPLAINANT: I don't recall.

DEFENCE COUNSEL: Well, it wouldn't be correct if you had said that, would it?

COMPLAINANT: I don't recall.

DEFENCE COUNSEL: Well, let me suggest this to you, if you had told a police officer that night that you hadn't previously planned to meet with [V10A], that would be false, do you agree with that?

COMPLAINANT: Possibly, yes.

DEFENCE COUNSEL: Did you tell police who attended that you hadn't planned to meet with [V10A] before?

COMPLAINANT: I don't – I don't recall, um, I would've – when the [V10WO3] came, I remember most of my conversation was with her and I showed her the – um, my communication with him online. I would have said something along the lines of this is my first time meeting him, I was just at my work Christmas party, he suggested let's catch up, I wasn't sure as of yet 'cause I knew I'd be out and I'd be drinking but once the night progressed, that's when thing – I decided to meet up with him.

DEFENCE COUNSEL: All right. If I can just ask then, did you tell her that you'd met [V10A] at the park?

COMPLAINANT: I don't believe so, no.

[219] V1.

DEFENCE COUNSEL: Because that would be wrong?

COMPLAINANT: That's correct. 'Cause I would've told her I was at my work Christmas party.

DEFENCE COUNSEL: Did you tell an officer, Senior Constable [V10WO1], that you were at a licensed venue in [suburb redacted] for your work Christmas party prior to meeting the male in the park?

COMPLAINANT: I don't recall.

DEFENCE COUNSEL: Well, again, that would be wrong, wouldn't it, if you had told him that?

COMPLAINANT: I don't recall.

DEFENCE COUNSEL: Well, if you'd told someone that you'd met him at the park, do you agree that would be wrong?

COMPLAINANT: That's correct, yes.

DEFENCE COUNSEL: So, if, indeed, you told somebody that, you would have told them the wrong thing; do you agree with that?

COMPLAINANT: I don't believe I did say that, but, ah ...

DEFENCE COUNSEL: Did you tell the ambulance officer, [V10WCG5], that you left your work Christmas party to meet up with a man you met on an online dating site at a nearby park?

COMPLAINANT: I don't recall.[220]

In this case, the complainant was further cross-examined about her failure to provide the (male) police officer at the scene with a precise account of the rape, including that it involved vaginal penetration, as her later testimony evidenced:

DEFENCE COUNSEL: Did you understand at the time you spoke to police at the scene, that is at the park in [suburb redacted], that you understood that it was important to tell them as much as you could about what had occurred to you?

COMPLAINANT: I believe that's what I did.

DEFENCE COUNSEL: And because of that it would follow, wouldn't it, that you would have believed that you'd told them about being penetrated in your vagina by [V10A]'s penis?

COMPLAINANT: If that's what I said I did.

DEFENCE COUNSEL: Because what I suggest to you is that the situation is that you didn't mention to any of the police or anyone at the scene in [suburb redacted] that [V10A] had penetrated your vagina with his penis?

COMPLAINANT: I would have said, I would have said the words something along the lines of he raped me.

DEFENCE COUNSEL: But you were asked questions specifically, weren't you, about how you were raped?

COMPLAINANT: I don't recall the questions they asked me that night.

DEFENCE COUNSEL: The male police officer asked you how you'd been penetrated, vaginally or anally, and you told him anally, isn't that correct?

COMPLAINANT: I don't recall, I was in shock.

DEFENCE COUNSEL: So what I'm suggesting to you is you didn't mention to anyone at the scene that [V10A] had put his penis in your vagina, what do you say about that?

[220] V10.

COMPLAINANT: I don't recall, I was in shock.

DEFENCE COUNSEL: What do you say to the suggestion that the account you've given about being face-to-face having sex with [V10A] is just a reconstruction?

COMPLAINANT: That's incorrect.

DEFENCE COUNSEL: Something that you had no memory of at the time you spoke to police at the scene in [suburb redacted]?

COMPLAINANT: Because I was in shock.[221]

A further variation was observed in another case where the reference point for suggesting inconsistency was the informal notes taken by a police officer (ie not a police statement) while talking to the complainant in the back of a police car while she was being transported to the hospital for a forensic examination.[222]

Another touchstone for suggesting inconsistency was the account given by the complainant to a medical officer during a forensic examination:

DEFENCE COUNSEL: When you were with the doctor at the hospital, you were asked questions about what you said Mr [V16A] did to you?

COMPLAINANT: I can't remember.

DEFENCE COUNSEL: Do you - you recall being at the hospital with the doctor?

COMPLAINANT: Yes.

DEFENCE COUNSEL: You recall the doctor making notes as he spoke to her?

COMPLAINANT: No, I think I kept my eyes shut.[223]

In another case, defence counsel took the complainant through multiple conversations she had with different people in the aftermath of the alleged rape, and what she told them about events. The very challenging (perhaps impossible) task which defence counsel set for the complainant was to remember with precision the contents of each of those conversations – or to be able to account for the differences. [224]

In all of these instances, the apparent aim was to show variations in how complainants described events to different people at different times – and thereby to discredit her trial account of the rape.

6.4.2 Difference from police statement

In a number of trials the focus was on minor differences between the complainant's police statement and evidence given either during examination-in-chief or cross-examination. Commonly this technique started with a confirmation that the complainant had read her police statement before giving evidence, and that when she signed her police statement she had acknowledged that the contents were 'true and correct' – followed by questioning designed to highlight an inconsistency (often minor) between that statement and her evidence at trial. Sometimes, the order of events was reversed: the inconsistency was highlighted first, and then the complainant was reminded (challenged) about the 'true and correct' acknowledgment in the signed statement. For example:

[221] V10.
[222] V14.
[223] V16.
[224] V23.

DEFENCE COUNSEL: But you made a statement to police approximately 24 hours later which you signed at 6.46 pm by the following night, is that right?

COMPLAINANT: That's correct.

DEFENCE COUNSEL: And when you made that statement there was an acknowledgment whereby you, when you signed it, you acknowledged that the statement was true and correct and made it in the belief a person making a false statement in the circumstances is liable to the penalties of perjury, do you agree that that was in the statement that you signed?

COMPLAINANT: That is correct.

DEFENCE COUNSEL: And at paragraph 36, No.36 in the depositions, Your Honour, you said, 'Then we all went back to their place' referring to all of the people involved in the Cash Converters trip. 'We were back there by 20 to three.' You said that in your police statement 24 hours after you made the report. Do you agree that's in your statement?

COMPLAINANT: That is in my statement, yes.

DEFENCE COUNSEL: Right. See, I'm trying to work out ... ?

COMPLAINANT: It might've just been a typing error. I might've said the wrong time, I can't remember.

DEFENCE COUNSEL: Well, with respect, madam, I presume when you made the statement you were given an opportunity to read the statement before you signed it and acknowledged it as being true and correct?

COMPLAINANT: Yes.[225]

In this case, as in others we observed, the highlighted 'inconsistency' was of no obvious relevance to the facts in issue. Similarly, in another case, the complainant was cross-examined about *when* she had smoked cannabis on the night of the alleged rape (a topic not obviously relevant to any facts in issue and potentially prejudicial to the complainant in the eyes of the jury), and what she had said on this topic in her police statement:

DEFENCE COUNSEL: And you say you had two to three puffs of cannabis, that's what you say?

COMPLAINANT: Correct.

DEFENCE COUNSEL: Right. And your evidence on Friday in relation to when you had that cannabis, your evidence was that that was about 2.30 or 3 o'clock in the morning?

COMPLAINANT: I believe so. ...

DEFENCE COUNSEL: All right. So it definitely wasn't before that, at the start of the night, at 12 o'clock or something like that?

COMPLAINANT: I don't think so.

DEFENCE COUNSEL: All right. Well, we've discussed that you made a statement to police, right? Remember the 11 page statement you made to the police?

COMPLAINANT: Yes.

DEFENCE COUNSEL: And you made that on 2 February 2017? Yes?

COMPLAINANT: Correct.

[225] V2.

DEFENCE COUNSEL: And when you sat down with the police they told you that it was an important document, is that right?

COMPLAINANT: Correct.

DEFENCE COUNSEL: And at the conclusion of making the statement you signed an acknowledgement. The acknowledgement says, 'I hereby acknowledge that this statement is true and correct and I make it in the belief that a person making a false statement in the circumstances is liable to the penalty of perjury.' You remember signing that acknowledgement?

COMPLAINANT: Yes.

DEFENCE COUNSEL: You did. And you signed that, is that right?

COMPLAINANT: I did.

DEFENCE COUNSEL: Now, did you understand, when you made the statement, that it was important to include all of the important details about what happened that night?

COMPLAINANT: Yes. ...

DEFENCE COUNSEL: All right. Now, in relation to the cannabis, do you recall saying to the police that you had those puffs of cannabis at about 12 o'clock?

COMPLAINANT: I don't recall what exact time it was. I gave that statement – I've given the statement, I think it was a year ago, two years ago now.

DEFENCE COUNSEL: Yes, I understand that?

COMPLAINANT: Yeah.

DEFENCE COUNSEL: But you've given quite clear evidence that you recall having the cannabis at about 2 or 3 in the morning, halfway through, after you'd been dancing?

COMPLAINANT: I ...

DEFENCE COUNSEL: You were quite specific about that?

COMPLAINANT: I think so. I said I believe so. 'Cause I don't check my phone, I don't bring out my phone and check on the time when I'm out. But when I gave the statement, the day that I reported it, I wrote everything down, as best – to my memory. And then when I went to give the statement, I'd – had read through what I wrote when I reported it.[226]

At other times, attention was drawn to a detail that the complainant had omitted from her police statement but which was included in the trial. For example:

DEFENCE COUNSEL: But you didn't say that in your statement to the police, did you?

COMPLAINANT: I don't recall.

DEFENCE COUNSEL: Would you like to read your statement to confirm that?

COMPLAINANT: Yes.

DEFENCE COUNSEL: Can I ask you a couple of questions first about your statement?

COMPLAINANT: Yes.

DEFENCE COUNSEL: You took home a copy of your statement from the police station when you first made your statement?

COMPLAINANT: I did.

[226] V16.

DEFENCE COUNSEL: And you have read that statement on numerous occasions since then?

COMPLAINANT: No, I didn't.

DEFENCE COUNSEL: Before the committal hearing, you in fact made a significant number of amendments to that statement?

COMPLAINANT: Minor changes, yes.

DEFENCE COUNSEL: You read that statement before the committal hearing?

COMPLAINANT: Yes.

DEFENCE COUNSEL: And you have read that statement again before this hearing?

COMPLAINANT: Just last week, yes.

DEFENCE COUNSEL: Yes, and you read it on a number of occasions before this hearing, didn't you?

COMPLAINANT: No, just last week.

DEFENCE COUNSEL: In that statement, you give a detailed account of the assault made on you?

COMPLAINANT: Yes.

DEFENCE COUNSEL: What I am saying to you about that statement is that you did not allege that he pulled you by the hair until after the assault was over?

COMPLAINANT: No, he had pulled my hair prior to the assault was over.

DEFENCE COUNSEL: Yes, sorry. (To witness) When you made that statement, I say to you that you only alleged that he grabbed you by the back of the hair after the sexual assault was over?

COMPLAINANT: No, he had grabbed my hair before.[227]

The cross-examination continued:

DEFENCE COUNSEL: I will stop there. You don't mention in that description - you talk about being grabbed by the arm but you don't talk about being grabbed by the hair, do you?

COMPLAINANT: Not in this statement, no. ...

DEFENCE COUNSEL: But there are at least three occasions where you have added the detail that you were grabbed by the hair when the sexual assault started, when you were going from the bedroom into the laundry and just before you were leaving, after you had been on the deck?

COMPLAINANT: Mm'hmm.

DEFENCE COUNSEL: That's new evidence, isn't it? You have never mentioned that in the statement before?

COMPLAINANT: No. It's not in the statement but that is what happened.

DEFENCE COUNSEL: You are adding false details ... ?

COMPLAINANT: No, I'm not adding false details.

DEFENCE COUNSEL: ... to try and create a more prejudiced view of Mr [V15A], aren't you?

[227] V15.

COMPLAINANT: No, I am not. I have nothing against him. He is my cousin so I am not trying to accuse him of something that he hasn't done.

DEFENCE COUNSEL: But you are changing the details of your story as it goes on, aren't you?

COMPLAINANT: No.[228]

6.4.3 Difference from committal evidence

Our review of rape trial transcripts indicates that it was common practice for rape complainants to have been required to give evidence at the committal hearing. This pre-trial experience is a significant part of the totality of what makes the experience of rape complainants in the criminal justice system so challenging. The potential for distress and re-traumatisation at multiple points – including the committal hearing – is well recognised, even if there are different views about the best way forward. In one case in this study, the complainant spoke powerfully of how stressful the committal hearing was:

DEFENCE COUNSEL: But in [date of committal hearing], it wasn't in your memory?

COMPLAINANT: Correct.

DEFENCE COUNSEL: How do you account for that difference?

COMPLAINANT: I would say that I was incredibly stressed ... by the manner of the questions from the defence lawyer ...

DEFENCE COUNSEL: The stress of that questioning made you forget things that you now remember?

COMPLAINANT: Yeah, made me feel under, yeah, a lot of pressure and like I didn't have any power.

JUDGE: So you said you felt like you were under a lot of pressure and - what was the next bit?

COMPLAINANT: I didn't have any power or any rights.

DEFENCE COUNSEL: And that position made you on two separate occasions forget something that was now in your memory?

COMPLAINANT: Yes.

...

DEFENCE COUNSEL: Do you agree to telling him that you were embellishing when you said there were two fingers involved?

COMPLAINANT: I guess that's, yes, what he wore me down to?

DEFENCE COUNSEL: My question was did you agree to the proposition from him that you were embellishing?

COMPLAINANT: I can't remember so you'd have to read me what I said.[229]

To date the focus of debates over whether rape complainants should continue to be required to give evidence at committal hearings has focused on the desirability of reducing the degree of distress and risk of re-traumatisation. [230] We believe that our analysis of rape trial transcripts may provide another

[228] V15.
[229] V11.
[230] Victorian Law Reform Commission, *Committals*. Report No 41 (March 2020), Ch 11.

reason to reconsider the wisdom of routinely expecting complainants to give evidence and be cross-examined at committal hearings: complainant committal evidence provides *another* touchstone for the inconsistency technique of trial cross-examination described in this section of the report.

In one case, the trial judge expressly recognised, during an exchange with defence counsel, that engaging committal evidence as a touchstone for asserting inconsistency is a common defence strategy:

> *JUDGE: It's one of the problems with committal proceedings in that the witness doesn't get taken through her evidence-in-chief and it's an advantage to the cross-examiner at committal proceedings, which is frequently used in this court to create the impression that there is a prior inconsistent statement. I think this is one such occasion. I'm not saying you're doing anything improper but it's one such occasion when you're attempting to do that.*[231]

In the cases we analysed, sometimes the technique focused on asserted discrepancies between trial evidence and committal evidence; sometimes it focused on differences between committal evidence and police statement; and sometimes, all three sources of complainant account were compared.

For example, in the following case, the complainant was questioned about whether she was walking hand-in-hand with the accused and whether he had his arm around her (noting that CCTV footage was available that confirmed this was the case):

> *DEFENCE COUNSEL: Question from me: 'So, in terms of the walk that you and [V10A] took, we're talking less than a kilometre?' Answer: 'Possibly, yes, so about two or three blocks.' Question: 'During that walk, how were you and [V10A] walking together?' Your answer: 'Side by side. We weren't holding hands.' Question from me: 'Sorry, what did you say then?' Your answer: 'Side by side. We weren't holding hands.' Question from me: 'Did you say 'We weren't holding hands'?' Answer: 'We were not.' Now do you agree ... ?*
>
> *COMPLAINANT: That was ...*
>
> *DEFENCE COUNSEL: ... that those were questions from me and answers from you at the committal hearing?*
>
> *COMPLAINANT: That was my truth at the time, what I believed to be true. Since then, I do recall that did occur.*
>
> *DEFENCE COUNSEL: All right. I will read you a further portion of that committal transcript. Question: 'So, what do you say to the suggestion that you were holding hands as you walked down the street together?' Answer: 'Sorry, say that again.' Question: 'If I was to suggest to you that you were holding hands as you walked down the street together, what do you say to that?' Answer: 'I don't believe we did. I know we definitely held hands after we sat down and had a chat and we got to know each other a little better.' Question: 'So, your memory is that you didn't hold hands until you were sitting down at the park?' Answer: 'That's correct.' Do you agree that those questions were asked and those answers were given?*
>
> *COMPLAINANT: That question was asked and that answer was given to the best of my ability at the time. Since upon reading the transcript, my memory - it has jogged my memory and I do recall that occurring.*
>
> *DEFENCE COUNSEL: So, your best memory in June 2018 when you gave evidence on oath was that you did not hold hands with [V10A] as you walked down the street towards the park?*
>
> *COMPLAINANT: That's correct.*

[231] V25.

DEFENCE COUNSEL: And am I correct in saying that the first time you told anyone that that memory of yours was incorrect was earlier today?

COMPLAINANT: That's correct, after I read the transcript.

DEFENCE COUNSEL: So, the first time you formed a memory about holding hands with [V10A] as you walked down the street was this morning, a year and a-half on from the incident?

COMPLAINANT: It jogged my memory.

DEFENCE COUNSEL: And you are confident of that memory, are you?

COMPLAINANT: Ah, I would say so, yes. So, there was holding hands and he put his arm around me. I recall that happening.[232]

Putting to one side the dubious relevance of hand-holding (noting that we discussed above inferences of consent based on 'flirtation'), the availability of confirmatory CCTV footage means that the only forensic advantage from this line of questioning is to draw attention to a discrepancy between different accounts given by the complainant so as to discredit her.

In another case the complainant was cross-examined about differences between her evidence at committal and her police statement:

DEFENCE COUNSEL: Well, see, what I'm suggesting to you is that you actually forgot that he was even on the bed with you, didn't you?

COMPLAINANT: I remember that.

DEFENCE COUNSEL: When you were asked at the [committal hearing] ... about [V12A] getting into the bed with you, you said you didn't believe that he did. That's right, isn't it?

COMPLAINANT: I can't remember.

DEFENCE COUNSEL: All right, well, I'll read out the passage to you. This is at p.10, Your Honour, at line 8. I suggest to you that you were asked this question and gave this answer at that hearing ... ?

COMPLAINANT: Yes.

DEFENCE COUNSEL: Question: 'As I understand, what you say is initially he got into the bed with you. Is that right?' Answer: 'No, I don't believe so.' Now, you were asked that question, and you gave that answer, correct?

COMPLAINANT: Correct.

DEFENCE COUNSEL: And when you gave that answer, your belief was that he didn't get into the bed with you?

COMPLAINANT: Yes.

DEFENCE COUNSEL: Yes, and that was - that belief and that answer was based on your memory that you held as at ... ?

COMPLAINANT: Yes. ...

DEFENCE COUNSEL: And what you effectively now agree with is, 'Look, I accept that that answer is wrong, because I know I said something different to the police in my statement four days or three days, whatever, later'?

COMPLAINANT: Sorry, can you repeat that?

[232] V10.

DEFENCE COUNSEL: Yes. I'm suggesting to you that you accept that your belief as at the time of giving that evidence at the Magistrates' Court, you accept that that belief was wrong, and you accept that because you know you said something different in your police statement ... ?

COMPLAINANT: Sorry, I don't understand.

DEFENCE COUNSEL: The reason that you changed your mind about whether [V12A] got into bed with you or not ... ?

COMPLAINANT: Yeah.

DEFENCE COUNSEL: ... is because you know that you've described to police in your police statement that he did?

COMPLAINANT: Yes, that's fair, yes, I remember that.

DEFENCE COUNSEL: And what I'm really suggesting to you is that your actual memories of what happened in the bed, how you got there and how he got there and what took place, those memories, are patchy?

COMPLAINANT: A detail like someone being under the blanket next to me, from an event that happened two years ago, is rather hard to remember.

DEFENCE COUNSEL: All right?

COMPLAINANT: Could I take a break, please?[233]

In the following two cases, cross-examination focused on differences between evidence given at committal and at trial:

DEFENCE COUNSEL: And you understood at the time that you came to the Magistrates' Court in February last year that it was a very serious matter?

COMPLAINANT: Yes.

DEFENCE COUNSEL: And you swore on your oath to tell the truth?

COMPLAINANT: Yes.

DEFENCE COUNSEL: And did you give an honest answer ... ?

COMPLAINANT: Yes.

DEFENCE COUNSEL: ... when you were asked that question? Do you accept that the answer that you gave in February last year is different to your evidence today?

COMPLAINANT: Ah slightly different.

DEFENCE COUNSEL: And which one do you say is correct?

COMPLAINANT: I don't remember.

DEFENCE COUNSEL: So is it your evidence today that you're not sure which of those is correct?

COMPLAINANT: Which one?

DEFENCE COUNSEL: Whether Mr [V7A] is sitting on you at the point at which you say he's penetrating your vagina with his fingers or whether he's lying on you at the point at which he penetrates you with his fingers?

COMPLAINANT: I'd probably say lying on.

[233] V12.

DEFENCE COUNSEL: And is it fair to say that the first time you've mentioned Mr [V7A] sitting on you penetrating your vagina with his fingers is today?

COMPLAINANT: Yeah.

DEFENCE COUNSEL: And do you accept that in fact that's not what happened?

COMPLAINANT: Oh I don't remember.

DEFENCE COUNSEL: [V7C] is it the case that really when you come to court hand on your heart you don't fully remember what happened that evening?

COMPLAINANT: I fully remember what happened that evening but to go into detail I'm trying to block out of my brain. So [as to] the way he was - I - I remember his hands penetrating but I can't remember the way he was - if he was sitting or laying.

DEFENCE COUNSEL: It's the case isn't it that you don't remember how it finished other than that you say he got off you?

COMPLAINANT: Yeah I remember how it finished.[234]

***

DEFENCE COUNSEL: And do you recall Ms [V9C], giving evidence in relation to this matter in a committal hearing last year?

JUDGE: Just pause for a moment. A committal hearing from your point of view members of the jury, is just another occasion when the witness has given evidence on oath in relation to this matter. Thank you, thanks Mr [V9D].

DEFENCE COUNSEL: Right?

COMPLAINANT: Yes.

DEFENCE COUNSEL: I was asking you questions again on that occasion?

COMPLAINANT: Yes. ...

DEFENCE COUNSEL: We were talking about this very incident, the 'Fuck you' with the very aggressive tone?

COMPLAINANT: Yes.

DEFENCE COUNSEL: And I want to read you your question and answer. I said at line 15, 'Can you explain to me what you mean by that, in what way he got really aggressive?' Your answer: 'He got close to my face and said, 'Fuck you' and then he literally just got - he got - he ended up getting up.' Now we've all got a transcript, do you accept that I've read correctly ... ?

COMPLAINANT: Yes.

DEFENCE COUNSEL: ... what you said at the committal hearing?

COMPLAINANT: Yes.

DEFENCE COUNSEL: Was that correct what you said there?

COMPLAINANT: Yes.

DEFENCE COUNSEL: Then your answer continued. 'Um, [V9WCG1] and [V9WCG2] were both present.' Now do you accept that I've read that correctly from the transcript?

COMPLAINANT: Yes.

DEFENCE COUNSEL: So do you accept that on oath last year in the committal hearing your evidence was that both [V9WCG1] and [V9WCG2] were present?

COMPLAINANT: Are present at the bar. ...

---

[234] V7.

DEFENCE COUNSEL: So you're going to say they were present at the bar, that's what you meant by that answer?

COMPLAINANT: Pardon?

DEFENCE COUNSEL: Is that your evidence as to what you meant by that answer?

COMPLAINANT: Well I don't know but I'm saying that I - they were present at the bar, when I'm thinking about that specific moment I only recall [V9WCG1] being in the area that we were sitting.

DEFENCE COUNSEL: I see, excuse me?

COMPLAINANT: I don't know where [V9WCG2] was, he could very well have been there, he could've stood up but I know that I do recall [V9WCG1] sitting there.

DEFENCE COUNSEL: So [V9WCG1] is definitely there, you're not sure if [V9WCG2] is there or not?

COMPLAINANT: But I'm sure that [V9WCG2] is in the bar, he is present in the bar.

DEFENCE COUNSEL: But you're not sure whether [V9WCG2] at this time was actually sitting, was actually there in the group close by while that happened?

COMPLAINANT: No I can't be sure, I can't recall.[235]

At other times, the inconsistency suggestion put to the complainant drew on differences between three different accounts: trial evidence, committal evidence and police statement:

DEFENCE COUNSEL: Now, I put a quarter past two to you at the committal because that's what you said in your police statement the day after the incident as being the time that you went on the trip to Cash Converters being quarter past two. But now you've changed your evidence today and you're saying it's more like 2.40. Is that correct?

COMPLAINANT: As I said, I'm not sure of the exact time. I didn't have a watch, I didn't look at the time. I'm just going off memory. ...

DEFENCE COUNSEL: Yes. Ms [V2C], in your statement that you made to the police ... at paragraph 33, you said, 'I remember walking across the crossing and there were lollipop ladies there at the time. It might've been about quarter past two we went straight to Cash Converters.' That was in your statement, do you agree with that?

COMPLAINANT: Yes.

DEFENCE COUNSEL: And now today you've said that the trip to Cash Converters, on your recollection now, started at about 2.40, is that correct?

COMPLAINANT: That's correct. But as I said, I just don't recall the exact time. ...

DEFENCE COUNSEL: Now, getting back to your statement. Sorry. I've already asked you in relation to line 36, you said, 'We were back there by 20 to three.' So in your statement the day after the incident you gave 20 to three as being the time you returned to the house, do you agree that that was what you put in your statement?

COMPLAINANT: Yes.

JUDGE: You're jumping all over the place, you're going from the committal to the statement. Where are you now?

DEFENCE COUNSEL: I was just confirming that in the statement.

JUDGE: All right.

DEFENCE COUNSEL: Sorry, Your Honour. Page 36 of the – paragraph 36, sorry, on p.36.

[235] V9.

JUDGE: Yes. So what are you asking?

DEFENCE COUNSEL: I was just asking her to confirm that in her statement she said, at line 36, 'Then we all went back to their place, we were back there by 20 to three.'

JUDGE: Yes.

DEFENCE COUNSEL: Do you agree that was in your statement?

COMPLAINANT: Yes.

DEFENCE COUNSEL: Now, in relation to that aspect at the committal I'm going to take you to the committal transcript again. ...

DEFENCE COUNSEL: So at the committal, you agreed that you - sorry - you confirmed your evidence that you returned back from the Cash Converters trip at 20 to 3 because you could see the clock on the wall, is that right?

COMPLAINANT: Yes. That's correct.

DEFENCE COUNSEL: And that was the time that you said was on the clock on the wall?

COMPLAINANT: Yes.

DEFENCE COUNSEL: So getting back to your evidence today. Today you say that the trip to Cash Converters - I'm going - I'm going to add it all up all right? An estimated departure time from [V2L1] of 2.40. Estimated trip time of 15 minutes. Maximum time in Cash Converters 10 minutes, return trip roughly the same. Would you agree that's about a 40 minute round trip?

COMPLAINANT: Yep.

DEFENCE COUNSEL: Which has you back at [V2L1] around 3.20 in the afternoon?

COMPLAINANT: Yep.

DEFENCE COUNSEL: Notwithstanding that the document that you've signed was printed out at 4.10 pm?

COMPLAINANT: Well that's correct. ...[236]

It must be challenging enough to give evidence at trial, let alone follow lines of questioning that traverse committal transcripts, police statements and trial evidence, especially in relation to details peripheral to the alleged rape.

Overall, we were struck not only by the ubiquity of inconsistency lines of cross-examination in the cases we analysed, but also how commonly the focus of scrutiny was a topic of marginal relevance to the allegation of rape. Such practices must add to the distress caused to complainants – with no obvious 'value add' for the quality of the trial as a decision-making process. Later in this report we discuss whether the availability of a jury direction on differences in the complainant's account[237] has shifted the over-reliance on this particular technique of cross-examination.

7. The continuing influence of rape myths

While the 'rape myths' that circulate in a society are not solely a product of the criminal law (or rules of evidence), there is no doubt that one of the objectives of statutory reform since the 1980s has been to reduce the influence of negative and unfair stereotypes and attitudes on the conduct and outcome of rape trials. The presence of some rape myths has already been discussed in this report – including questions suggestive of 'flirtation' as an indication of consent; resistance as an expectation of non-consent; and intoxication as productive of consent. Here we consider the visibility of other rape myths

[236] V2.

[237] *Jury Directions Act 2015* (Vic) s 54D.

(including aspects of the traditional 'real rape' schema[238]), specifically: assertions that the complainant has made a false allegation; lying to cover up what was consensual sex; and an expectation that a 'genuine' rape victim makes an official complaint, and that any 'delay' is suggestive of fabrication.

7.1 Lying

When a decision has been made to plead not guilty, and the best evidence of the accused's guilt is the complainant's account of events, it is perhaps to be anticipated that the defence strategy is likely to involve a challenge to the believability of the complainant's account. Of course, such an approach is not inevitable or pre-ordained. A defence position based (only) on challenging the Crown's ability to prove the fault element for rape – in its current formulation, 'no reasonable belief in consent' – need not involve disputing the complainant's account. However, it is rare for a defence strategy to rely on disputing the fault element for rape,[239] let alone exclusively. As we noted above, there were no such cases in this study.

Table 2: Defence-suggested motivation for false allegation

Case	Asserted or implied 'motivation'
V1	To conceal from employer and parents getting drunk and having consensual sex with man she just met
V2	Angry at the accused for having 'rejected' her
V3	To conceal consensual sex from 'boyfriend'[240]
V4	To conceal consensual sex from boyfriend
V8	Angry at the accused for having touched her breast without consent
V6	To conceal consensual sex with man she just met
V9	To conceal consensual sex from partner
V10	To conceal consenting to unprotected sex
V11	To conceal consensual sex to which she had given 'drunken consent'
V15	To conceal consensual sex with another man during 'unhappy' marriage
V16	To conceal consensual sex from former boyfriend and friend
V18	Angry at the accused because he now seeing someone else
V20	As an excuse to leave her current boyfriend and return to old boyfriend
V21	To conceal consensual sex for which she was paid
V23	To conceal consensual sex with a stranger (when angry at boyfriend)
V24	To conceal consensual sex from boyfriend
V25	Jealous because the accused subsequently lay down in bed with another woman

[238] S Estrich, *Real Rape* (Harvard University Press, 1987); J Quilter, 'Re-Framing the Rape Trial: Insights From Critical Theory About the Limitations of Legislative Reform' (2011) 35 *Australian Feminist Law Journal* 23, 31.
[239] See, eg, M Heenan, *Trial and Error: Rape, Law Reform and Feminism* (PhD Thesis, Monash University, 2001), 371; M Heenan and H McKelvie, *The Crimes (Rape) Act 1991: An Evaluation Report*. Rape Law Reform Evaluation Project, Report No. (Department of Justice, Victoria, 1997), 191; Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure*. Report No.43 (LRCV, 1991), 13.
[240] The complainant's evidence was that she did not have a boyfriend.

What we did observe were numerous instances in which the defence asserted that the complainant had consented to the sexual acts in question and was now lying when she gave evidence that she had not been consenting. This prompts us to make two observations.

First, although this practice is not unique to rape trials – it being a common means of discrediting a witness in a trial – its impact on rape complainant witnesses can be acute, and may contribute to the re-traumatisation reported by many rape victims who give evidence at trial. It is also central to the process by which the *complainant*, rather than the accused, becomes the primary focus of attention during rape trials.

Second, a defence case that asserts that the complainant did consent and is now lying, is one of the ways that rape myths enter the courtroom. It is an established rule of evidence (and juries are routinely directed to this effect) that no motive for lying need be established.[241] However, as Table 2 shows, in most cases in this study in which a 'she consented and is now lying' position was advanced by the defence, a motivation was suggested.

Of course, it is not possible for us to discern from transcripts precisely what explained the adoption of a particular 'false allegation' narrative in any given case. We speculate that defence counsel may be 'reaching' for a case theory and this may lead them to fall back on familiar (and troubling) myths or tropes about rape and women who allege rape – in order to suggest fabrication (ie to label consensual sex as rape for an ulterior purpose). Although adapted (or customised) with reference to the specificity of the case in question, the 'motivations' in Table 2 are reminiscent of narratives that have long histories. Their potential 'familiarity' with jury members may make them more compelling. This may be so even if, on their face, the asserted motivation for a false allegation lacks plausibility. Indeed, in one case, the trial judge observed that making a 'false' allegation to hide consensual sex from her partner (that being the motivation for the complainant's allegation suggested by the defence), is a guaranteed way of ensuring that the partner finds out about what the defence says was consensual sex:

> *JUDGE: The motivation, as I understand it, is she was stewing about the fact that her partner would find out.*
>
> *DEFENCE COUNSEL: Yes.*
>
> *JUDGE: Even though your own client's admission in the interview is that instantly she's saying, 'I hate you, get out.'*
>
> *DEFENCE COUNSEL: Yes.*
>
> *JUDGE: But this was to avoid her partner finding - she was - I've got it written down, I've been preparing the charge last night, 'Terrified her partner would find out about this unprotected consensual act and that she stewed on this in her room after the sex. She concluded the only way she could avoid her partner learning that she'd cheated on him was to tell an appalling lie, that is to create this account.'*
>
> *DEFENCE COUNSEL: That's the motive that's been put, Your Honour, yes so ...*
>
> *JUDGE: Which is, on its face, an absolute guarantee of publication of the fact of intercourse.*
>
> *DEFENCE COUNSEL: It is.*
>
> *JUDGE: Yes.*[242]

[241] *Jury Directions Act 2015* (Vic) s 44L.
[242] V9.

It may be that the wisdom of a lie + motivation defence assertion, in terms of strategic or forensic advantage, is doubtful, particularly in cases where the asserted or implied narrative might be regarded as a considerable 'stretch'. However, where the strategy is employed, there is a risk that juries may be influenced by rape myths that have long suggested that women who allege rape may have been motivated to lie. In the cases we observed it was rare for the Crown to object, or the judge to intervene or comment, when the defence pursued a 'lying for ulterior purpose' line of questioning. The following case was an exception:

> *JUDGE: Now you want to cross examine her about whether or not she had a happy marriage?*
>
> *DEFENCE COUNSEL: Yes, because it's part of the defence case that she does have an unhappy marriage and is attracted to Mr [V15A] and the activity was consensual, and this provides the sort of context for that. I might indicate that Ms [V15WCG1] at the committal gave evidence that she had told her that the marriage wasn't happy.*
>
> *JUDGE: But how many times would you think about your marriage not being happy, or being happy and it might be happy - especially a longer marriage, it might be happy for three years and then unhappy for six months. I mean, it's just nonsense. In my view, it's just nonsense, but I'm not going to stop you from asking the question.*
>
> *MR DEFENCE COUNSEL: I won't take it much further.*
>
> *JUDGE: You won't be able to take it*
>
> *DEFENCE COUNSEL: No, and she has answered the questions.*
>
> *JUDGE: I think she has answered it. She has answered it more than once.*
>
> *DEFENCE COUNSEL: Yes.*
>
> *JUDGE: What do you want to do, ask it again?*
>
> *DEFENCE COUNSEL: No. I'm content. She has responded to the questions, Your Honour.*[243]

This particular instance may have attracted judicial attention because it was one of the more speculative of the asserted motivations for a false allegation to conceal consensual sex, but we would venture that it might not have been the only instance in this study of questioning which could be characterised as 'nonsense' – but nonetheless permissible.[244] In an adversarial system, where the accused's rights are of paramount importance, it is probably unrealistic to expect that judges will seek to prevent defence strategies based on a version of the 'false allegation/the complainant is lying' line. Judges may, however, be more active in seeking to influence *how* such lines of questioning are pursued, as another case in this study illustrates. In this instance, defence counsel was making something of a hash of suggesting that the complainant had falsely alleged rape to conceal consensual sex from her best friend (and former sexual partner):

> *DEFENCE COUNSEL: Ms [V16C], I'm suggesting to you that you contacted Mr [V16WC2] because you wanted to tell your story first?*
>
> *JUDGE: Well, what does that ... ? What do you mean? Just a moment, Ms [V16C]. That is unclear, Ms [V16D].*
>
> *DEFENCE COUNSEL: I can clear it up by changing the last ...*

---

[243] V15.

[244] This judgment may be applied not only to the suggested motivations for lying discussed here, but also to a number of the 'flirtation'/inferred consent questioning instances discussed above, and many of the 'delay' questioning instances discussed below.

JUDGE: Just a moment, just a moment. I'm just going to pause the recording only for 30 seconds or so, Ms [V16C], okay, and then we'll resume?

COMPLAINANT: Okay.

(THE WITNESS WITHDREW)

JUDGE: Ms [V16D], is it as simple as this? That you are exploring the possibility that the witness was concerned about having had consensual sexual activity with Mr [V16A] and that that would become general knowledge, at least perhaps to [V16WC1] through Mr [V16A] and thereby to [V16WC2], and that with that concern she decided to present herself as a victim of a rape.

DEFENCE COUNSEL: Yes.

JUDGE: And that's why she contacted [V16WC2] as she did.

DEFENCE COUNSEL: Yes.

JUDGE: Well, I think it can be put clearly and simply in that way.

DEFENCE COUNSEL: Yes.

JUDGE: Did you, rather than contact [V16WC2] to complain of a rape, did you contact him because you were concerned that a consensual sexual experience with Mr [V16A] would become known to [V16WC1] and through her to [V16WC2], and that you wanted to present yourself as a victim of a rape rather than as being disloyal to [V16WC2] or something to that effect?

DEFENCE COUNSEL: Yes, and I certainly am seeking to attempt to put it directly.

JUDGE: It's being put as a potential motive to lie.

DEFENCE COUNSEL: That's right, and I'm just seeking ...

JUDGE: I mean unless ultimately on a non-acceptance of her account, but do you want a moment just to ...

DEFENCE COUNSEL: If I could.

JUDGE: ... compose the actual question you are going to ask?

DEFENCE COUNSEL: Yes, I would - just a moment and I'll seek to put it more directly than perhaps as was prepared.[245]

When the AVL link was restored and cross-examination re-commenced, defence counsel had clearly benefited from the judge's 'tutorial':

DEFENCE COUNSEL: All right, Ms [V16C]. I'm asking you questions about when you contacted Mr [V16WC2]?

COMPLAINANT: Yes.

DEFENCE COUNSEL: You contacted Mr [V16WC2], Ms [V16C], because you were concerned that at some stage Mr [V16WC2] might come to learn of the consensual sex that had occurred between you and Mr [V16A]?

COMPLAINANT: No.

DEFENCE COUNSEL: You wanted to present yourself as a victim of a rape by Mr [V16A] to Mr [V16WC2]?

COMPLAINANT: No.

DEFENCE COUNSEL: Because Mr [V16WC2] might have come to learn about that consensual sex from someone else at some stage?

[245] V16.

COMPLAINANT: No.

DEFENCE COUNSEL: Mr [V16WC2] might have learnt about it from [V16WC1]?

COMPLAINANT: No.

It is not for us to speculate as to how this revised 'lying' assertion was experienced by the complainant or received by the jury, but it is possible that the refined version was both less upsetting and less potent as an attack on the Crown's case.

7.1.1 'Word on word'?

The frequency with which it was suggested in the cases in this study that the complainant had fabricated the allegation of rape prompted us to reflect on the fact that rape trials are often described as 'word on word' trials.

'Word on word' (or 'she said/he said') suggests a trial in which an account of events consistent with rape is presented by the complainant and an account of events *inconsistent* with rape is presented by the accused – with no (or minimal) 'objective' evidence. The majority of the cases in this study did not neatly meet this description. In 14 of the 25 cases[246] in this study the accused did not give evidence at trial (as was their right). Also, in most cases, the Crown also relied on evidence other than the complainant's testimony, including: evidence of complaint, CCTV/video footage (before during or after the alleged rape), medical expert evidence, DNA evidence etc.

We observe that not only is the 'word on word' phrase often inaccurate, it is a loaded concept – to the extent that it implies inherent weakness in the Crown's case on a charge of rape – and it is closely related to the common defence position that the complainant is lying about what was consensual sex. A more accurate dichotomous description for the majority of cases in this study, that better captures the nature of the relevant dynamics, might be 'she said/she's lying', which serves to underscore just how firmly the focus remains on the complainant, and how regular lying assertions are.

It is also important to consider the possible ramifications of the phrase and characterisation. In one case the Crown prosecutor forcefully resisted the applicability of the 'word on word' characterisation. In the discussion about which directions the trial judge should include in their charge to the jury, pursuant to s 12 of the *Jury Directions Act 2015* (Vic) (considered further below), the Crown was adamant that 'this case is not a word against word case' – given the existence of evidence of what the Crown regarded as admissions. The Crown submitted that it would be a misrepresentation if the jury was given the impression that this was simply a case of 'his word against hers'. The importance of the jury considering the totality of evidence was underscored.[247]

7.2 Delay

The delay narrative has a long (and discredited) history. For centuries, a 'failure to complain immediately' was regarded as supporting 'a presumption of fabrication on the part of the rape complainant'.[248] It is a rape myth (or 'real rape' attribute) that has long been the subject of statutory 'rebuttal'; in Victoria, since 1991.[249] Given this, we were interested to observe how prominent delay suggestions were in the rape trials in this study, and what form they took.

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[246] However, in all but one of these 14 trials (V23), a recording of the accused's interview with police was played to the jury, so the accused's voice was entirely absent in only one case. In the remaining 11 trials the accused gave evidence before the jury and in 6 of these trials a recording of the accused's police interview was also played.

[247] V18.

[248] ALRC, *Family Violence - A National Legal Response*. ALRC Report 114 (2010) [27.281].

[249] *Crimes (Sexual Offences) Act 1991* (Vic).

Cross-examination questioning which attempted to draw attention to a claimed 'delay in complaint', featured in a significant number of the cases we analysed. In 21 of the 25 cases in this study, the defence asserted or implied some version of a delay on the complainant's part. We say 'some version' because our analysis reveals that the suggestion of 'delay' covers many forms of departure from the traditional expectation of immediate complaint. It is commonly taken to refer to instances when a considerable period of time had elapsed between alleged rape and complaint, but 'delay' has an enlarged meaning in this context, and this is reflected in the wording of s 52 of the *Jury Directions Act 2015* (Vic) (the operation of which is discussed below), which states that:

> (a) people may react differently to sexual offences and there is no typical, proper or normal response to a sexual offence; and
>
> (b) some people may complain immediately to the first person they see, while others may not complain for some time and others may never make a complaint; and
>
> (c) delay in making a complaint in respect of a sexual offence is a common occurrence.[250]

Although counter-intuitive, this means that a suggestion of 'delay' can be operative even in rape trials where there is evidence that the complainant reported promptly. In one case, the Crown prosecutor preferred the term 'incomplete complaint' to capture the breadth of what we have referred to as *versions* of delay in complaint.[251]

Defence counsel pursued multiple variations on the concept of credibility-damaging 'delay' (but still very much invoking the 'real rape' notion of immediate complaint): the complainant was challenged because of the person to whom she complained or how she complained – for example, telling a work colleague rather than her mother; telling a friend rather than the police officer; attending a police station rather than calling 000.

In two cases, the complainant made a report (to the police) multiple years after the alleged rape.[252] In a further three cases, a complaint was made almost contemporaneously with the alleged rape – to persons present in the homes where the alleged rapes occurred.[253] In 19 of the remaining 20 cases some version of a delay suggestion was made, including in cases where the complainant reported the rape to someone within minutes. We have grouped these instance into different categories of 'delay' (or incomplete complaint):

7.2.1 The complainant did not 'complain' to the accused immediately

> *DEFENCE COUNSEL: You didn't tell [V6A] off for what he'd been doing on the air mattress?*
>
> *COMPLAINANT: I told him to stop numerous times, but I was very scared.*
>
> *DEFENCE COUNSEL: Sorry, was that on the air mattress?*
>
> *COMPLAINANT: Yes.*
>
> *DEFENCE COUNSEL: So he and [name redacted] were outside having a smoke. You didn't say anything to him [the accused] in the presence of [name redacted]?*
>
> *COMPLAINANT: No. …*[254]

***

[250] *Jury Directions Act 2015* (Vic), s 52(4).
[251] V18.
[252] V7, V19.
[253] V4, V12.
[254] V6.

DEFENCE COUNSEL: Given that context, can I ask you, [V8C], why in that point in time when you're in bed, why didn't you say to him, 'Look, get out of my bed. You've just raped me'?

COMPLAINANT: Well, one, I'm freaking out, two, I'm smaller than him, three, he's broken my trust, what's he going to do next. So if someone's going to rape you, they're capable of hurting you any other way, they might do it again. I'd rather not start anything else. I just want to - just protect myself, that's literally what I was doing.[255]

***

DEFENCE COUNSEL: How long do you say that [V18A] remained awake between the time that he withdrew from you and went to sleep?

COMPLAINANT: Oh, not long at all.

DEFENCE COUNSEL: There was enough time for you, if you chose, to speak to him about what had just happened

COMPLAINANT: Ah, I - I can't remember.

DEFENCE COUNSEL: You didn't try and speak to him in the morning about what had happened?

COMPLAINANT: Um, no.[256]

7.2.2 The complainant did not tell the first person or the 'right' person

DEFENCE COUNSEL: So the first person you contact, can I suggest, is your boss?

COMPLAINANT: Yes.

DEFENCE COUNSEL: You don't contact your mum the minute you walk out the door [of the hotel], do you?

COMPLAINANT: No.

DEFENCE COUNSEL: You don't contact anybody at the lobby area and ask for help?

COMPLAINANT: No..[257]

***

DEFENCE COUNSEL: So what was your expectation about where you were then going to sleep?

COMPLAINANT: Um, I suggested that we all sleep on the queen bed, because then I would be next to [V6WCG1] and he would not be able to touch me.

DEFENCE COUNSEL: 'All of us sleep on the Queen bed', all four of you?

COMPLAINANT: Yes.

DEFENCE COUNSEL: You didn't say anything like, 'Look, I'm so concerned [V6WCG1] that what he's just done, I want nothing to do with him. I don't want to be in his proximity at all. Make him sleep on the floor'; didn't say anything of that nature'?

COMPLAINANT: I did not tell [V6WCG1] what happened on the airbed.[258]

***

DEFENCE COUNSEL: You eventually met up with [V15WCG1]. Is that right?

COMPLAINANT: That's right.

---

[255] V8.
[256] V18.
[257] V1.
[258] V6.

DEFENCE COUNSEL: You don't immediately tell her about a sexual assault, do you?

COMPLAINANT: No.

DEFENCE COUNSEL: But she knew that you had been at her place?

COMPLAINANT: Mm'hm.

DEFENCE COUNSEL: With Mr [V15A], alone?

COMPLAINANT: Mm'hm.[259]

7.2.3 The complainant did not use her phone to report at the first opportunity

DEFENCE COUNSEL: After he got off you, what's the next thing you remember?

COMPLAINANT: Falling asleep, as I said before, on Friday.

DEFENCE COUNSEL: You went back to sleep?

COMPLAINANT: I fell asleep.

DEFENCE COUNSEL: Now, do you agree with me you had your phone with you on that night? Is that right?

COMPLAINANT: Correct.

DEFENCE COUNSEL: Did you seek to access your telephone at all?

COMPLAINANT: I didn't. I was drowsy.[260]

***

DEFENCE COUNSEL: After withdrawing his penis he told you he was tired?

COMPLAINANT: No.

DEFENCE COUNSEL: He went to sleep?

COMPLAINANT: He went to sleep, yes.

DEFENCE COUNSEL: At that point you went to the bathroom?

COMPLAINANT: Yeah, about 15 minutes later I did, once he was asleep.

DEFENCE COUNSEL: You had your mobile phone available to you?

COMPLAINANT: Ah, I would have, yes.

DEFENCE COUNSEL: And yet you did not try to call anyone to tell them ...?

COMPLAINANT: No.

DEFENCE COUNSEL: ... what had happened to you?

COMPLAINANT: No. I was embarrassed.

DEFENCE COUNSEL: I suggest you didn't call anyone at that stage because you had not been raped?

COMPLAINANT: No.

DEFENCE COUNSEL: You didn't try and leave the house?

COMPLAINANT: No.[261]

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[259] V15.
[260] V3.
[261] V18.

***

[After leaving the house where the alleged rape occurred, the complainant, who was from out of town, walked to a nearby convenience store.]

DEFENCE COUNSEL: And you spoke to a gentleman who was an employee there, is that right?

COMPLAINANT: That's correct.

DEFENCE COUNSEL: You didn't ask to use the phone, is that right?

COMPLAINANT: No.

DEFENCE COUNSEL: Do you agree that you could have asked to use the phone or asked him to dial 000 to call the police?

COMPLAINANT: I didn't know what I needed to do, I just wanted to ask him where the police station was, I guess.

DEFENCE COUNSEL: Well according to your evidence you've just been the victim of a sexual assault, is that right?

COMPLAINANT: Yes.

DEFENCE COUNSEL: And you didn't think that calling 000 or asking someone to call 000 when you arrived at somewhere that may have had a phone would be something that you could do?

COMPLAINANT: I wasn't thinking clearly, obviously. I wanted just to get out of there.

DEFENCE COUNSEL: I'll put it this way. If you were assaulted as you've given evidence about, you would have wanted to call police very soon thereafter, wouldn't you?

COMPLAINANT: Yes, but I would have preferred to go to the police station.

DEFENCE COUNSEL: Why wouldn't you just dial 000 and have a police officer come and pick you up?

COMPLAINANT: I didn't – I wasn't thinking clearly.[262]

7.2.4 The complainant did not tell (or initially didn't want to tell) the police straight away

DEFENCE COUNSEL: When a number of men came to your assistance in that park in [suburb redacted], is it the case that you were trying to get an Uber car on your phone?

COMPLAINANT: Yes, that is correct.

DEFENCE COUNSEL: That is with the intention of going home?

COMPLAINANT: That's correct.

DEFENCE COUNSEL: And is it the case that you actually ordered a car but one of the other people cancelled it on your behalf?

COMPLAINANT: That is correct. As to whether someone cancelled it or I cancelled it myself or I believe the Uber did arrive but I was talking to the male who arrived first and he was the one who convinced me to make a police statement.

DEFENCE COUNSEL: Okay. However it happens, an Uber is ordered and you're ultimately dissuaded from getting in it and going home?

COMPLAINANT: That's correct.

DEFENCE COUNSEL: There were other men there who were suggesting you call the police?

[262] V2.

COMPLAINANT: The main person, I don't recall the name, but the main person who came was the main one I spoke to who suggested I stay and call police.

DEFENCE COUNSEL: Right?

COMPLAINANT: Make a report.

DEFENCE COUNSEL: Is it correct that prior to calling police you declined the police being called a number of times?

COMPLAINANT: At the time I was scared. I wanted to go home, yes, that is correct, hence why I called the Uber. And then that main man, as I had mentioned, he said something along the lines of, 'I work in such and such career, I know what he's done to you is wrong', something along those lines, 'You should report this. I'll stay help you, I'll stay with you', something along those lines.[263]

***

DEFENCE COUNSEL: I finished asking you about [V23WCG5] and [V23L3] and we've agreed that the next person in the sequence is [V23WCG3], your ex-boyfriend?

COMPLAINANT: Yes. Yes, that's correct. We were friends. We're friends.

DEFENCE COUNSEL: And we've agreed that was some time before – between 8:48pm and 9:00pm?

COMPLAINANT: That's correct.

DEFENCE COUNSEL: So, it was effectively on your way home?

COMPLAINANT: Yes.

DEFENCE COUNSEL: So, you had your mobile phone on you?

COMPLAINANT: Yes, that's correct.

DEFENCE COUNSEL: And you didn't call the police?

COMPLAINANT: No, I was terrified. I – I – I can't remember if he – I called him? I called him, I think. …

DEFENCE COUNSEL: [V23WCG3] asked you next were you near a police station, and he asked you could you call the police. Is that what he asked you?

COMPLAINANT: Yes, yes he did.

DEFENCE COUNSEL: And you said no, you weren't near a police station?

COMPLAINANT: Yes.

DEFENCE COUNSEL: Okay, but you'd agree you were pretty close to [suburb redacted] Police Station at the time, weren't you?

COMPLAINANT: Not that close to – I didn't have a car, so – as in walking distance it was a fair way, and it was gonna – if I had to walk back to the police station, it was in the way where I was attacked. So I didn't want to walk back that way.

DEFENCE COUNSEL: And you didn't call police, did you?

COMPLAINANT: No, because I was scared and ashamed of what had happened. I was thinking I wanted to forget it. …[264]

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DEFENCE COUNSEL: You've said that your stockings were ripped in this incident?

COMPLAINANT: Yep.

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[263] V10.

[264] V23.

DEFENCE COUNSEL: Did you keep them?

COMPLAINANT: No.

DEFENCE COUNSEL: And you didn't at any stage turn them over to police?

COMPLAINANT: No, I threw them out.

DEFENCE COUNSEL: They were potentially supporting evidence of what you had said happened?

COMPLAINANT: I guess they were, yes. I didn't want them anywhere near me.

DEFENCE COUNSEL: And you didn't go to the police either?

COMPLAINANT: Correct.

DEFENCE COUNSEL: It was them that contacted you?

COMPLAINANT: Correct.

DEFENCE COUNSEL: So on your version you say you've been raped. That's what you say happened?

COMPLAINANT: Yes, at which - yes, that's what I say happened, but which - is there a particular time that you're pointing out?

DEFENCE COUNSEL: No, as a general proposition?

COMPLAINANT: Yes.

DEFENCE COUNSEL: In the morning you say, 'I realised I was raped, and that's what was in my head'?

COMPLAINANT: Yep.

DEFENCE COUNSEL: But you don't keep this potential piece of evidence and you don't go to the police?

COMPLAINANT: Correct.

DEFENCE COUNSEL: In fact, you don't make a statement to them until some five months later?

COMPLAINANT: Correct.[265]

Cross-examination in the following case combined several of the variations on delay discussed so far:

DEFENCE COUNSEL: And then you and [V20WC2] [the complainant's boyfriend] get into a cab together; is that right?

COMPLAINANT: Yes, and go home.

DEFENCE COUNSEL: Yes. And you told the jury that you were, when you returned home, looking for the right time to tell [V20WC2]; that's what you said yesterday?

COMPLAINANT: Yes. ...

DEFENCE COUNSEL: Okay. Do you have any idea how long you were in the cab for?

COMPLAINANT: No.

DEFENCE COUNSEL: You didn't say anything to [V20WC2] at the time?

COMPLAINANT: No.

DEFENCE COUNSEL: You had your mobile phone on you at that time?

[265] V11.

COMPLAINANT: Yes.

DEFENCE COUNSEL: Yes. You didn't make any phone calls in the cab?

COMPLAINANT: No.

DEFENCE COUNSEL: Didn't try calling the police or 000 or any number of that sort?

COMPLAINANT: No.

DEFENCE COUNSEL: Didn't ask that cab driver to stop at the closest police station?

COMPLAINANT: No.

DEFENCE COUNSEL: You return to the place that you're living with [V20WC2]?

COMPLAINANT: Yes.

DEFENCE COUNSEL: So his parents' place, and you speak to [name redacted], the stepfather of [V20WC2]; is that right?

COMPLAINANT: Well, we say hi as we're passing.

DEFENCE COUNSEL: All right. So as you and [V20WC2] are passing, you say hi to [name redacted]?

COMPLAINANT: Yes.

DEFENCE COUNSEL: No conversation?

COMPLAINANT: No.[266]

7.2.5 The complainant did not disclose sufficient detail about the alleged rape

In the following case, the complainant ran from a hotel room (where, on her account, she was raped), flagged down a member of the public and told a police officer on arrival that she had been raped:

DEFENCE COUNSEL: When you spoke to [V14WP5] outside the motel room ... ?

COMPLAINANT: You mean the first one detective. Yes?

DEFENCE COUNSEL: The first one, yes. You didn't tell [V14WP5], did you, that [V14A] had rubbed his penis against your vagina?

COMPLAINANT: I don't quite remember.

DEFENCE COUNSEL: You didn't tell [V14WP5] that he had licked your vagina? ...

COMPLAINANT: I said that – I said – as I remember, I said that I was raped. I think I – as I remember, I didn't gave a lot of details for her or for him because there was not one police person.

DEFENCE COUNSEL: What I'm putting to you, Ms [V14C], is the very first police officer that you spoke to, you did not tell her that he had licked your vagina?

COMPLAINANT: I don't remember.

DEFENCE COUNSEL: And you did not tell her that he had kissed your vagina?

COMPLAINANT: I don't remember.

DEFENCE COUNSEL: You didn't tell her that he had licked or sucked your breast or your nipple?

[266] V20.

COMPLAINANT: As I said, I said that he rape me, but I don't remember that I run through details. I run through details in the police car with those people who brang me to the – to the hospital.[267]

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DEFENCE COUNSEL: That was the total amount of information that you gave [V23WCG2] about what happened, isn't it?

COMPLAINANT: Yes.

DEFENCE COUNSEL: You didn't say anything to [V23WCG2] about kissing, or hugging, or penetration, or anything of that nature?

COMPLAINANT: No, because I was embarrassed and, um, I wasn't going to go into detail. I was in shock.[268]

***

DEFENCE COUNSEL: Now do you agree that at this stage, you did not tell your sisters anything about the nipple ring being … ?

COMPLAINANT: Um I don't think so.

DEFENCE COUNSEL: … yanked. Sorry, I'll start the question again. Your evidence is that [V18A] during the course of this alleged sexual assault, had yanked so forcefully on your nipple ring that he'd injured you?

COMPLAINANT: Yes.

DEFENCE COUNSEL: Is that right?

COMPLAINANT: Yep. …

DEFENCE COUNSEL: But it's also right isn't it that you made no mention of that part of the assault or the injury to your sisters?

COMPLAINANT: Ah, no at that stage.

DEFENCE COUNSEL: Yes sorry, not at that stage?

COMPLAINANT: Yep.

DEFENCE COUNSEL: And in fact you didn't tell your sisters anything about that allegation until sometime later?

COMPLAINANT: Yep.[269]

***

DEFENCE COUNSEL: And you didn't go into any detail with [V8WC1], your cousin, at that point and I'm not being critical of you, please be clear about that but I just wanted to be sure about the position that you didn't go into any detail with your cousin at that point in time about what had happened?

COMPLAINANT: No, I only, I only talked about it with her um, after I realised the police would talk to her because I just wanted to make it clear that our family didn't find out and I didn't want her to freak out as well. Um, and it was more of a protective thing too 'cause she's - I see her as like a little sister. …

DEFENCE COUNSEL: All right. In any event, do you agree that over the course of that week, you weren't - well you didn't provide detail to either of the [V8WC2] and [V8WC3] in terms of the activity that you say took place between you and [V8A] that evening?

COMPLAINANT: No, I sort of wanted to forget about it.

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[267] V14.
[268] V23.
[269] V18.

DEFENCE COUNSEL: Were you angry - in the course ... ?

COMPLAINANT: Oh, I did speak (indistinct) ...

DEFENCE COUNSEL: ... of that week, were you angry at [V8A]?

COMPLAINANT: ... sorry, I just remembered I did show [V8WC3] - I didn't want to say it. I just couldn't say the word 'rape'.

DEFENCE COUNSEL: Yes?

COMPLAINANT: Um, I sort of showed [V8WC3] the Facebook messages whenever they happened one night um ...

DEFENCE COUNSEL: You don't dispute ...

JUDGE: Just let her finish. Are you finished? You showed [V8WC3] the Facebook messages?

COMPLAINANT: Yeah, so I could show her that it was rape without saying it because I didn't want to say it. I guess that's a acceptance thing. You don't want to believe it happened. Um, was I angry? I was more depressed. In denial, sad. I don't particularly remember a time I was like angry. Um, but I might have been. That's one of the grief things you do so it's not unreasonable to be angry I guess. ...

DEFENCE COUNSEL: At no stage in the days following [the date of the alleged rape], so in that week that I've been asking you about, did you tell anyone that Mr [V8A] raped you by putting his fingers in your vagina. Would you agree with that?

COMPLAINANT: I don't - I - I never like talked about it.[270]

Each of these versions of 'delay' is underpinned by the same essential proposition and accusation: a 'genuine' victim of 'real rape' is expected to immediately report to the police with a comprehensive and 100% accurate account of what occurred; and departure from this standard provides ground for doubting the veracity of the complainant's allegation.

Although they have a very long history, such delay-based imputations are directly in conflict with the guidance provided by s 52 of the *Jury Direction Act 2015* (Vic). We examine below how the direction on delay in complaint was engaged in the cases just discussed, and in the cases in this study generally.

7.3 'Correcting' rape myths

Later we will discuss jury directions as a mechanism for guiding the jury. Here we briefly discuss instances when, during examination/cross-examination, the complainant (or another witness) gave answers (and/or counsel asked questions) which attempted to correct an asserted or implied (or anticipated) rape myth. In the cases we analysed, 'correcting' evidence was often elicited during re-examination of the complainant by the Crown prosecutor (including where the question asked was designed for this purpose), but it could also occur in answers to questions in examination-in-chief and cross-examination.

One example is questions and answers directed at explaining a failure to immediately report:

CROWN PROSECUTOR: How were you feeling?

COMPLAINANT: I was feeling, again still in shock, and I was - I felt too embarrassed to call anybody to come and help or to come and pick me up.

CROWN PROSECUTOR: What do you mean that you felt embarrassed?

[270] V8.

COMPLAINANT: I was just ashamed of what had just happened. I felt, yeah, just embarrassed and uncomfortable and I didn't really know what to do, and I still wasn't processing it all properly.[271]

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CROWN PROSECUTOR: Why was it that you didn't call the police, first of all, on that day when you woke up …?

COMPLAINANT: I didn't want to involve the police. I didn't want it to happen. I didn't want my life to fall apart. I didn't want, you know, like this. I didn't want this big thing to happen. I wanted everything to stay the same and wished that it couldn't have happened.[272]

In the following example, in response to questions asked during cross-examination, the complainant directly addressed the suggestion that she had falsely alleged rape (a suggestion, as discussed above, that many of the complainants were confronted with in the cases we analysed):

DEFENCE COUNSEL: Do you think it's possible in the days that followed when you were angry and upset at Mr [V8A] that you've exaggerated the extent of what did happen in the bed sexually between you and Mr [V8A] and you've said that he raped you when in fact he didn't rape you?

COMPLAINANT: Why would I do that? Sorry. I'm thinking out loud.

DEFENCE COUNSEL: Well, I'm suggesting to you that you were angry and upset with him because he had sexually assaulted you, he touched your breasts against your consent - without your consent?

COMPLAINANT: Why - I'm not a lying person, no. I don't - I don't - why would someone make up something like that? There's - ah, you can't make up something like that. Why would I ever put myself through something like that? And you keep saying I was angry and frustrated - I'm trying to reiterate how depressed I was.[273]

In the following example, the complainant's response effectively 'corrects' the expectation that a rape victim should be able to give a clear and entirely accurate account of what happened shortly after the event, and that she should later recall exactly what she said at the time:

DEFENCE COUNSEL: The question is though, is that what you said to Detective [V23W06]?

COMPLAINANT: I – I can't remember what I said, because I was in – in shock and I was upset. My mind had gone numb, I'd just been attacked and – and I'm suddenly at, you know, hospitals and police stations and, you know. So, I can't – I can't – I tried to the best of my ability.[274]

Another correction that we observed in a number of cases was explanation of a 'freeze' response to being raped:

DEFENCE COUNSEL: You didn't make a sound?

COMPLAINANT: Not at that time.

DEFENCE COUNSEL: You didn't call out to your brother for help?

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[271] V18.
[272] V11.
[273] V8.
[274] V23.

COMPLAINANT: No, not at the time.

DEFENCE COUNSEL: Ms [V19C], what I suggest to you is this incident didn't happen at all, did it?

COMPLAINANT: That's incorrect, 'cause I froze.[275]

***

CROWN PROSECUTOR: What did you mean when you told police, … 'There's nothing I could do about it'?

COMPLAINANT: I just felt so helpless. …

CROWN PROSECUTOR: Why do you say you felt helpless?

COMPLAINANT: 'Cause I didn't know what to do. I just froze.[276]

***

CROWN PROSECUTOR: And what was the next stage after he tried kissing you – were you resisting him at that stage?

COMPLAINANT: I think I was more frozen, but not – just not doing anything. …

DEFENCE COUNSEL: You could have walked away at the time where you actually turned the corner and gone to the front of the nightclub there. Could you have if you had wanted to?

COMPLAINANT: I could have, but when you're – when you're attacked is one thing you say, and then when you're attacked is another thing you do. I froze. I – I didn't know what to do. People say when they're attacked, 'Oh yeah, I would have fought him off,' but no, I had the – the – I froze.[277]

***

COMPLAINANT: I was in my panic state. Absolutely frozen. So I could guess you're in a fight, flight or freeze and I was in freeze. Um, as normally happens with something traumatic um, and I was in that state of alarm for quite a long time. Um, again, time is subjective. Um, and once I was able to be closer to myself again, I pushed him away.[278]

Note that only in this last response did the complainant refer to 'fight, flight or freeze' – and even then there was no elaboration that these are three known (and 'normal') human responses to a threat or danger. There are obvious limitations on the complainant's capacity (and authority) to educate the jury of such matters, but a complainant's reference to having 'frozen' loses some of its power unless the jury understands the relevance of the label. The concept of 'freezing' is also implicit in the contemporary concept of consent (discussed above) in s 36 of the *Crimes Act 1958* (Vic) and s 46 of the *Jury Directions Act 2015* (Vic).

In one case, a witness (to whom the complainant had reported the rape) gave an answer which could have assisted the jury in understanding the freeze response, which prompted the judge to intervene:

CROWN PROSECUTOR: Now she stated again to you how strong he was, is that right?

WITNESS: That's correct, she did. She said that he was so strong. He was just so strong I couldn't move and she then went on to say that she froze and she said, 'I just didn't move and he just', and she said, 'I couldn't move. Why couldn't I move? I just froze', and to which she got really upset again and I told her to calm down. The - her freezing was a natural reaction.

[275] V19.
[276] V16.
[277] V23.
[278] V8.

CROWN PROSECUTOR: All right?

WITNESS: Sorry.

CROWN PROSECUTOR: Did you tell her that?

WITNESS: I did.

JUDGE: Sorry, did who - well that's not relevant at all.

CROWN PROSECUTOR: No, I know. That's why I just want to stop?

WITNESS: Sorry.

CROWN PROSECUTOR: If you just slow down.

JUDGE: There's no criticism of you, Ms [V9WCG4].

CROWN PROSECUTOR: Criticism of me.

JUDGE: No, there's no criticism, counsel.

CROWN PROSECUTOR: No sorry, Your Honour.

JUDGE: It's just a reminder …

CROWN PROSECUTOR: Thank you.

JUDGE: That we need to try and confine it to what's relevant.[279]

The witness may have stepped beyond the bounds of what is expected of witnesses in a criminal trial, though what they said was true, and we would suggest that it was information that the jury should hear. Later in this report we consider the effectiveness of jury directions as a device for educating the jury about the meaning of consent.

7.3.1 Expert evidence on rape myths

In addition to the use of jury directions (discussed below), another method for correcting rape myths, and educating jurors and judges, is adducing counter-intuitive expert evidence: that is, expert opinion that seeks to explain what is known about how people respond to sexual violence, including information that is designed 'to correct erroneous beliefs that juries otherwise hold intuitively'[280] (hence the term, *counter-intuitive* evidence).

Counter-intuitive expert evidence did not feature in any of the trials in this study. Given the frequency with which rape myths were engaged, and the prevalence of assertions and implications that the complainant had not behaved in the manner 'expected' of rape victims, consideration should be given to more active use of this form of expert evidence.

7.4 Crown questions and 'real rape'

The engagement of 'real rape' hallmarks is not exclusively the preserve of defence counsel questioning during complainant cross-examination. We observed instances where, during complainant examination-in-chief, the *prosecution* elicited evidence that evoked conceptions of 'real rape', for the purpose of strengthening the Crown case. Earlier in this report we highlighted instances where, in relation to proving non-consent, the Crown highlighted the fact that the complainant *did* expressly say 'no'; and/or *did* attempt to physically resist. Here we illustrate other Crown

[279] V9.

[280] New Zealand Law Commission, *Evidence*. Report 55, Volume 2 (1999), 67, cited in *M A v The Queen* [2013] VSCA 20, [23]; see also *Jacobs (a Pseudonym) v The Queen* [2019] VSCA 285, [52]-[61].

engagements of aspects of the 'real rape' schema, specifically, visible distress, and complaint at the first opportunity.

7.4.1 Visible distress

> *CROWN PROSECUTOR: Describe the female when you saw her?*
>
> *WITNESS: She was distressed, she was crying, she was sort of getting herself together and she'd already ordered an Uber.*[281]
>
> ***
>
> *CROWN PROSECUTOR: What happened in that call? What do you recall about it?*
>
> *WITNESS: [V11C] was quite upset and she - to begin with it was quite inaudible. She was very, very upset.*
>
> *JUDGE: Sorry, what did you say?*
>
> *WITNESS: It was quite inaudible to begin with. She was very upset. And then she started to spit out a few sentences, which were, 'Something's happened' ...* [282]
>
> ***
>
> *CROWN PROSECUTOR: Now how was [V12C] when you first saw her in that room?*
>
> *WITNESS: Devastated. She was ...*
>
> *CROWN PROSECUTOR: Why do you say - what was it about her that she was either doing or saying or her appearance that made you think she was devastated?*
>
> *WITNESS: It's just her emotions had taken over, she was just crying and crying and she wasn't talking. I was asking her most of the questions and she would kind of just give me one word answers. So when I noticed she was like that, I just decided to get her home.*[283]

We are not suggesting that it was improper for Crown prosecutors to lead evidence from witnesses that they observed the complainant's distress. Just as the Crown leads evidence of resistance by the complainant, where possible, because it is perceived to strengthen the prosecution case (discussed above), it is understandable that the Crown would want to lead evidence of the complainant's distress. So doing will also enable the Crown to request that a distress direction be included in the judge's charge.[284] However, the practice does rely on an aspect of the traditional expectation of how a victim of 'real rape' would respond, which depending on the facts of a case, may be exploited by the defence, as the following example illustrates:

> *DEFENCE COUNSEL: All right, well now I've asked you earlier this morning about the fact that you were leaving in the [hotel] corridor, right?*
>
> *COMPLAINANT: Yes. ...*
>
> *DEFENCE COUNSEL: I want to suggest to you, you weren't running away from the room or anything like that?*
>
> *COMPLAINANT: Sorry?*

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[281] V10.
[282] V11.
[283] V12.
[284] *Victorian Criminal Charge Book* (Judicial College of Victoria), [4.9].

DEFENCE COUNSEL: You weren't running down the corridor?

COMPLAINANT: No, was trying to work out where to go 'cause I didn't know where I was.

DEFENCE COUNSEL: There was, can I suggest, no obvious signs of panic or agitation?

COMPLAINANT: No, no obvious signs.[285]

7.4.2 Immediate report

In the following case the Crown drew attention to evidence that the complainant's behaviour conformed neatly with the traditional common law (discredited) expectation of immediate formal complaint. The witness was a motorist who was flagged down by the complainant when she ran from the hotel where the alleged rape occurred:

CROWN PROSECUTOR: What happens next, Mr [V14WC1]?

WITNESS: I wind the window down and see what the problem was.

CROWN PROSECUTOR: When you wound your window down did you ask her any questions, or did you speak to her?

WITNESS: I didn't have time. As soon as I opened the window, she told me to call the police 'cause she'd been raped.

CROWN PROSECUTOR: Were they the first words that she spoke to you?

WITNESS: Yes.

CROWN PROSECUTOR: What did you do at that point, Mr [V14WC1]?

WITNESS: She kept telling me to ring 000 and ring the police, so I got me phone out and I rung 000.[286]

As we have noted in relation to Crown reliance on physical and verbal resistance to establish non-consent (above), and visible distress to establish the veracity of the complainant's allegation, such practices suggest that a set of facts that resembles a 'real rape' schema is still regarded as constituting a strong prosecution case. This is a conundrum from the point of view of whether the underlying values of progressive statutory reform – which disavow rape myths and the idea of 'real rape' – can ever be fully translated into the practice of rape trials.

8. Trial judge interventions and jury directions

We have already made a number of observations about instances of noteworthy judicial interventions in the cases we have analysed. These include examples of good practice, consistent with the objective of creating an environment of sensitivity and respect for the complainant, as well as some instances which may have been sub-optimal in this regard. At intervals, we have speculated as to whether the judge might have intervened differently; for example, by taking the opportunity to direct the jury so as to correct or balance the impression that may have been left by a line of questioning that may have relied on outdated conceptions of consent/non-consent, or invoked rape myths in one way or another. Here we want to specifically consider: the handling of applications to elicit sexual reputation and

[285] V1.
[286] V14.

sexual history evidence under ss 341-43 of the *Criminal Procedure Act 2009* (Vic); and the operation of *Jury Directions Act 2015* (Vic), Part 5.

We note that our ability to comment on how the *Jury Directions Act 2015* (Vic) operated in the rape trials in this study was limited by the fact that we had access to a transcript of the judge's charge to the jury in only 6 of the 25 cases. Therefore, our analysis has focused on: i) what could be gleaned from conversations between counsel and judge about end of trial directions, of the sort that are expected to take place in accordance with s 12 of the *Jury Directions Act 2015* (Vic); and ii) occasions when the trial judge did (and did not) administer a direction to the jury at some point prior to the formal charge to the jury at the end of trial (what might be called 'mid-trial' directions).

8.1 Sexual reputation, sexual activity and sexual history evidence

The admission of, and cross-examination on, sexual reputation evidence and/or sexual history evidence has long been regarded as having the capacity to re-traumatise complainants. Such evidence is also largely irrelevant to the facts in issue. 'Rape shield' provisions, such as those contained in the *Criminal Procedure Act 2009* (Vic) ss 341-343, are designed to either prohibit such questions or restrict them by requiring an application and the leave of the court. While noting the limitations of this study's sample, we found that these rules appeared to be working as intended.

8.1.1 General reputation for chastity: s 341

Section 341 states:

> The court must not allow any questions as to, or admit any evidence of, the general reputation of the complainant with respect to chastity.

We observed no instances in which complainants were cross-examined about their 'general reputation … with respect to chastity'.

8.1.2 Restriction on evidence concerning complainant's sexual activities: s 342

Section 342 states:

> The complainant must not be cross-examined, and the court must not admit any evidence, as to the sexual activities (whether consensual or non-consensual) of the complainant (other than those to which the charge relates), without the leave of the court.

Consistent with the intention of the legislation, cross-examination or other evidence about a complainant's sexual activities did not feature prominently in the cases in this study. Where it was raised, it was generally subject to careful handling by way of a *voir dire*, rulings by the trial judge and careful questioning by counsel.[287]

In one case, where leave was granted, defence counsel's proposed questions regarding past sexual activities were carefully scrutinised in advance by the trial judge, with input from the Crown prosecutor. The questions were then revised to make them less 'brutal'. Ultimately, it was decided (based on the prosecutor's suggestion) that the questions would be asked during a 'Basha' inquiry. Our reading of the transcript of that inquiry suggests that the cross-examination was measured and in accordance with the agreed approach.[288]

[287] V14, V15, V18, V21, V23, V25.
[288] V23.

In another case, the prosecutor sought leave to adduce evidence of prior sexual activity with the accused. The relevant evidence on the notice was discussed before the trial judge on the first day of the trial. The following extract gives a sense of the measured nature of the discussion:

> *CROWN PROSECUTOR: And the other thing is again at - really I think I'm right in saying a formality, and that is that the Crown has put in formal s.342 notice about prior sexual conduct, and I think it's common ground that it all is admissible and it's a reference to sexual conduct between the two both on earlier before the alleged rape…*
>
> *JUDGE: Yes.*
>
> *CROWN PROSECUTOR: And also a week or so earlier.*
>
> *JUDGE: Yes. Well, you wish to lead that evidence as part of the background to - or, well, context of the offending and the relationship between the parties obviously.*
>
> *CROWN PROSECUTOR: Yes.*
>
> *HIS HONOUR: And the - I'll hear from [V18D] but - sorry, [V18D] but I understand from the defence response that that's not going to be opposed. I still need to make an order, I think, don't I?*
>
> *CROWN PROSECUTOR: I think technically you do.*
>
> *JUDGE: Without the leave of the court.*
>
> *CROWN PROSECUTOR: You have to give leave, I suppose, yes.*
>
> *JUDGE: I have to grant leave, all right, yes. Now that's in respect of the complainant, yes. …*
>
> *DEFENCE COUNSEL: For completeness, the prosecution opening also - so the s.342 notice refers to two instances of consensual sexual intercourse, one on the - immediately before the alleged rape on the same night.*
>
> *JUDGE: Yes.*
>
> *DEFENCE COUNSEL: It also refers to consensual sexual intercourse a week earlier on 6 August.*
>
> *JUDGE: Yes.*
>
> *DEFENCE COUNSEL: The Crown opening refers to a kiss in July.*
>
> *JUDGE: Yes, at the dance, or where they were dancing at a party, yes.*
>
> *DEFENCE COUNSEL: Which was a passionate kiss, as I understand it, and…*
>
> *JUDGE: All right, well you'd seek to have the notice amended to extend to that?*
>
> *DEFENCE COUNSEL: Yes.*
>
> *JUDGE: All right, well you're happy to do that, [V18P]?*
>
> *CROWN PROSECUTOR: Yes, yes.*
>
> *JUDGE: All right, well you kind file the amended notice as soon as possible.*
>
> *CROWN PROSECUTOR: Although that's not sexual activity, really.*
>
> *JUDGE: Well it may be. Let's not take the risk that the Court of Appeal takes a different view. If it's there, it's there.*
>
> *CROWN PROSECUTOR: It was going to be led, I was going to open it.*
>
> *JUDGE: Well it's better on the notice than not on the notice, just in case somebody else has a different view.*
>
> *CROWN PROSECUTOR: Yes, we'll fix that up.*
>
> *JUDGE: Yes, I mean it doesn't hurt having it there.*

CROWN PROSECUTOR: No, no, I agree.

JUDGE: If it's not there and it was meant to be, then we've got problems. All right - or we may have problems, I suppose I can waive notice, I guess, but - all right, so I'll grant leave, given it's not opposed, to cross-examine the complainant as regards those three matters which are now going to be the subject of the amended s.342 notice.

CROWN PROSECUTOR: And to make it truth, I elicit that, in truth, in any event. The notice seeks that as well.

JUDGE: Yes, well all right - for that evidence to be led in chief ...

CROWN PROSECUTOR: It's not limited to cross-examination.[289]

In another case, defence counsel made an application to cross-examine the complainant (in a Basha inquiry) regarding the complainant's sexual activities with the accused's brother and the complainant's sexual activities with her bisexual girlfriend (who had also been sexually active with the accused's brother). The relevance of such questions was said to relate to the possibility of secondary DNA transfer. The application was unopposed by the prosecutor and granted by the trial judge. The Basha inquiry was relatively short as the complainant's answers to early questions revealed that DNA transfer could be discounted given the timing of sexual contact with the accused's brother (months before the alleged rape) and the fact that the relationship with the bisexual girlfriend had been of a non-sexual nature. [290]

In one case, the cross-examination on 'sexual activity' began to stray outside the agreed parameters but was quickly closed down after a Crown objection and discussion by the trial judge with counsel in the absence of the jury.[291] Before the commencement of the trial, the Crown prosecutor had sought leave to lead evidence that the complainant had recently had a hysterectomy, making sex painful, and consequently, had not had sex with her husband for some time. The defence wanted to assert that the absence of sexual activity between the complainant and her husband signalled an 'unhappy marriage', and defence counsel suggested that the *absence* of sexual activity was not caught by s 342. In the following exchange, the Crown prosecutor contested this submission and the trial judge ruled to confine the questions that could be asked:

CROWN PROSECUTOR: ... I am of the view, Your Honour, that to delve into sexual activity between her husband and the complainant does offend against s.342 and really is not relevant. Whether she had had sex with her husband or not has really got nothing to do with whether she is initiating sex with this man.

JUDGE: No. I agree with that. What you want to do is simply lead the evidence that she had had a hysterectomy three months earlier and that sex would be painful.

CROWN PROSECUTOR: Or if Your Honour feels that to go into sexual activity being painful is beyond the limits, then I can warn her that she may give a description that it was painful because of the hysterectomy, but I am of the view that it does go into whether she was consenting or likely to initiate contact. The defence view is that she is a sexual predator and she is the one who has pushed herself on the accused man. I respectfully submit that it is relevant as to the likelihood of that happening because of the medical condition.

JUDGE: There are no other questions to be asked in relation to her being a sexual predator I presume.

[289] V18.
[290] V12.
[291] V15.

DEFENCE COUNSEL: No. It is not a fact in issue if the evidence goes the way it is expected ... Ms [V15WCG1] gave evidence at the committal that the marriage, contrary to the evidence of Ms [V15C], had been an unhappy one and was loveless and they were in separate bedrooms. ...

JUDGE: I don't know how relevant the state of her marriage is. I mean, if she has a hysterectomy, does it really matter what the state of the marriage is? If it is painful because she has had a hysterectomy, then what are you going to say? "You haven't been having sex with your husband for two years and you are in separate rooms"?

DEFENCE COUNSEL: I probably wouldn't put it that bluntly. In fact, Your Honour, I could just simply say, "Did you have separate rooms at home?"

JUDGE: I mean, lots of people have separate rooms. It doesn't mean anything.

DEFENCE COUNSEL: Yes. I could confine the questioning then to the state of the marriage, whether it was happy or not, and that doesn't necessarily carry a sexual implication.

JUDGE: I don't see how relevant it is. Anyway, I think it is better to do that. I mean, I think she is entitled to say that she was in pain because it was painful for her on that day.

DEFENCE COUNSEL: Yes.

JUDGE: But perhaps if she doesn't say anything about that she couldn't have sex with her own husband, that doesn't open up a lot of stuff.

DEFENCE COUNSEL: No. I won't go into the issue of the fact of sex with her husband. [292]

Despite the checks placed on cross-examination, and the undertakings given, defence counsel began to cross-examine on issues outside that agreement. Importantly, the prosecutor quickly objected and the trial judge, in the absence of the jury, disallowed the line of questioning:

DEFENCE COUNSEL: Your relationship with your husband wasn't very good at this time either, was it, as of July 31 last year?

COMPLAINANT: It wasn't good? What do you mean? It wasn't good?

DEFENCE COUNSEL: Did you tell your sister that your marriage was a loveless marriage?

COMPLAINANT: No, I did not.

DEFENCE COUNSEL: Did you tell your sister that your marriage relationship had ceased?

CROWN PROSECUTOR: Your Honour, I interrupt at this stage. I object to this line of questioning on the basis of its relevance to the fact in issue, Your Honour.

DEFENCE COUNSEL: Your Honour, twice yesterday in evidence the complainant put this matter into issue. She said the reason why she wouldn't have consented to sex with Mr [V15A] was because she had a happy marriage, so I say that puts it very much in issue?

COMPLAINANT: And I do have a happy marriage. I have been married for 24 years.

DEFENCE COUNSEL: Perhaps, Your Honour, it might be best ...

JUDGE: I am going to have to ask you to go out briefly. Sorry.

In the absence of the jury:

JUDGE: Now you want to cross examine her about whether or not she had a happy marriage?

[292] V15.

DEFENCE COUNSEL: Yes, because it's part of the defence case that she does have an unhappy marriage and is attracted to Mr [V15A] and the activity was consensual, and this provides the sort of context for that. I might indicate that Ms [V15WCG1] at the committal gave evidence that she had told her that the marriage wasn't happy.

JUDGE: But how many times would you think about your marriage not being happy, or being happy and it might be happy - especially a longer marriage, it might be happy for three years and then unhappy for six months. I mean, it's just nonsense. In my view, it's just nonsense, but I'm not going to stop you from asking the question.

DEFENCE COUNSEL: I won't take it much further.

JUDGE: You won't be able to take it

DEFENCE COUNSEL: No, and she has answered the questions.

JUDGE: I think she has answered it. She has answered it more than once.

DEFENCE COUNSEL: Yes.

JUDGE: What do you want to do, ask it again?

DEFENCE COUNSEL: No. I'm content. She has responded to the questions, Your Honour.

In one other case, the judge interrupted cross-examination of the complainant to warn defence counsel that their line of questioning (ie that it was not uncommon for the complainant to allow female and male friends to sleep in her bed) might be veering into territory prohibited by s 342. After a brief discussion in the absence of the complainant, defence counsel indicated that they would not continue the line of questioning.[293]

Our analysis suggests that the legislative restrictions on sexual activity evidence and cross-examination, although not entirely fool-proof, were operating as intended in the cases in this study.

8.1.3 Admissibility of sexual history evidence: s 343

Section 343 states:

> Sexual history evidence is not admissible to support an inference that the complainant is the type of person who is more likely to have consented to the sexual activity to which the charge relate.

We found no evidence that sexual history evidence was being admitted in the trials we examined. We note, however, that the prohibition contained in s 343 may be operating in ways not necessarily intended by the legislature. In one case the prosecutor sought to lead evidence of the complainant's virginity prior to the alleged rape – a reference to her virginity being contained in her VARE. The defence sought to have that evidence excluded. The trial judge initially ruled that the evidence could be admitted. That ruling, however, was revisited after defence counsel later re-agitated the issue and sought exclusion under s 343:

DEFENCE COUNSEL: It is being proposed to lead that evidence that is supposedly relevant to two things, the likelihood of consenting to sexual activity with a stranger. Let's have a look at that a little bit more, Your Honour. Consent is the issue in this trial, and as I've indicated to the jury it is the sole issue for them to consider. They're going to be directed as a matter of law as to the third and fourth elements of rape, and obviously if they are allowed to consider the fact of her virginity as going to the likelihood of consent - really, the way it's put is that it's the improbability of consent, that's the way it'll be put.

[293] V8.

> *Here's a number of difficulties with that proposition. The first is it is incapable of challenge by the defence. It will be presented to this jury as an incontrovertible fact and that is, in my submission, extremely prejudicial to the accused man because it has such minimal probative value to that question of consent, which I'll return to in a moment, but it has such an enormous prejudicial impact on the accused man, firstly because he can't challenge it, he's got no capacity to say, "Well, you're not telling the truth about that," because on what basis could that be said? On what basis could that be challenged? They don't know each other.*[294]

The trial judge then ruled that the evidence relating to virginity was inadmissible:

> *JUDGE: I agree that the evidence is relevant and probative as to consent and the other issues raised by Ms [V21P], but the risk of unfair prejudice is high and in my view outweighs the probative value. The risk of prejudice lies in the likely perception by the jury that the complainant was indeed a virgin. That likely prejudice is increased by reason of the inability of the defence to challenge the evidence. Consent is the real issue in this trial, not whether the complainant was a virgin, and as I say, although that has some relevance, it is outweighed by the risk of prejudice to the accused. Therefore the answer to question 197 should be excluded from the VARE.*[295]

In another case, the Crown sought to lead evidence of the complainant's sexual activity with her boyfriend prior to the alleged rape in order to explain the presence of a second Y chromosome DNA profile found following forensic swabs taken from the complainant. Defence counsel had not sought to cross-examine the complainant on her sexual activity and preferred to leave the issue of the second DNA profile 'hanging', and argued it would be prejudicial for the prosecution to introduce such evidence. The trial judge determined that the prejudice outweighed the probative value and refused the admission of the Crown evidence.[296]

8.2 Section 12 discussions

Section 12 of the *Jury Directions Act 2015* (Vic) requires the judge to engage in a discussion with counsel about which directions should (and should not) be given.[297] This is a laudable procedure, and before we turn to the substance of the directions under Pt 5 Sexual Offences, we offer a few comments about the s 12 discussions we observed.

In the cases we analysed, we observed a variety of practices in relation to s 12 discussions. In some cases, the discussion commenced late in the trial, after all witnesses had given evidence, while in others, the discussion began at some point during the trial – often to take advantage of a hiatus between witnesses, but also informed by what was becoming apparent about the matters in issue. In some cases the trial judge was very proactive, inviting counsel at the very outset of the trial to consider which directions might be required (while recognising, of course, that final decisions could not be made at that early point).

One of the potential benefits of an early (preliminary) discussion of jury directions is that it may increase the likelihood that the judge will make a timely 'mid-trial' direction if evidence that warrants it is adduced. We were impressed by the conduct of one trial in particular in which the judge, at the beginning of the trial expressly drew to the attention of counsel the availability of 'mid-trial' directions in relation to delay in complaint (s 52) and difference in the complainant's account (s 54D):

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[294] V21.
[295] V21.
[296] V14.
[297] The predecessor to s 12 – s 11 of the *Jury Directions Act 2013* (Vic) – was in identical terms.

JUDGE: … Are there any preliminary directions under the Jury Directions Act in this case that I need to give? I should say to both of you that the Jury Directions Act in its current form has been in since October 17. It's my favourite piece of legislation because it engages counsel in the process of defining the issues and preparing the charge for the jury.[298]

Unfortunately, counsel did not appear to be as ready for this discussion as the judge was:

DEFENCE COUNSEL: Just to clarify, Your Honour is not asking for the applications for the directions to the jury at closing?

JUDGE: No. The timing of that is set out in the Act and that's what we'll follow.

DEFENCE COUNSEL: Yes.

JUDGE: But I'm giving you the heads up now that I want you to be turning your mind to what's in it and the very heavy burden it imposes upon counsel to identify the issues and the directions that you want. But it also has some provisions in it about directions you give juries in certain circumstances, about delayed complaint and …

CROWN PROSECUTOR: Yes, there's not that issue here, Your Honour.

JUDGE: … and so forth. … Do either of you think that any preliminary remarks about that need to be made to the jury?

CROWN PROSECUTOR: Certainly not in relation to delay, Your Honour, and I can't think of any other particulars.

JUDGE: Delay and credibility.

DEFENCE COUNSEL: I will turn my mind to it, if I may.

JUDGE: Yes. We should do that. …

DEFENCE COUNSEL: I'm just pulling up the Act now, Your Honour.

JUDGE: And division 3, [on differences] in a complainant's account

DEFENCE COUNSEL: That would be at the end of the trial anyway.

JUDGE: See, what it actually provides for is that, 'The trial judge may repeat a direction under this section at any time in the trial.' So have either of you had a think about whether you want any direction concerning those matters given in my opening remarks to the jury and instructions at trial?

CROWN PROSECUTOR: No, Your Honour.

JUDGE: Or at any time before the charge, at the end of the trial?

DEFENCE COUNSEL: Not from our side, Your Honour.

JUDGE: And Mr [V23P], no?

CROWN PROSECUTOR: No. No.

JUDGE: All right. In some cases, I've been asked to and have given directions like that at the opening of the trial because they become live issues, but because all this got reported on the day, neither of you want to go there. Is that what I'm hearing?

DEFENCE COUNSEL: Yes, Your Honour.[299]

[298] V23.
[299] V23.

As it happens, the need for a 'mid-trial' delay direction *did* later arise (in the 'enlarged' sense discussed above, and contemplated by s 52), when the complainant was cross-examined to the effect that she failed to phone the police at the first opportunity. The Crown prosecutor interjected and during a *voir dire*, foreshadowed that if the line of questioning was pursued, a s 52 direction would be requested. We will return, below, to the substance of this discussion, and its implications for the utility of jury directions. Here we focus on the judge's understandable frustration and defence counsel's response:

> *JUDGE: See, I directed everyone's mind to this, these provisions before we got a jury.*
>
> *DEFENCE COUNSEL: Yes, Your Honour, but Your Honour's*
>
> *JUDGE: And everyone said, 'Don't worry about it.'*
>
> *DEFENCE COUNSEL: That's right.*
>
> *JUDGE: Because what it really says is, before any evidence is adduced in the trial – so this is all supposed to happen before the case starts.*
>
> *DEFENCE COUNSEL: Your Honour asked if anyone was seeking those directions, and that was the opportunity to make application.*
>
> *JUDGE: Well, it's not a question of application. If I reach the apprehension whether an application or not is made or not, I then have to hear submissions, and I was expecting from counsel, if it was anybody's case ...*
>
> *DEFENCE COUNSEL: That was ...*
>
> *JUDGE: Delayed case. That was the opportunity to tell me that there's a likelihood that it will be.*
>
> *DEFENCE COUNSEL: Yes, that was perhaps my error in understanding that it was a call for an application to make such a direction, and I ...*
>
> *JUDGE: Well, I didn't want anyone to have to tell me how they're going to run their case.*
>
> *DEFENCE COUNSEL: No.*
>
> *JUDGE: Because only you know that.*
>
> *DEFENCE COUNSEL: And I understand what Your Honour's saying now, is that that would have been an opportune moment for me to inform Your Honour that I intended to pursue that course. That being said - and I apologise for that and to my learned friend. That being said, I don't think we're at the point where there's any harm done, because there's only just been a question about that point and this is the opportune moment or at the charge to the jury at the end. They are both opportune moments to do – to give such a direction. The opportunity to give the direction before the evidence or before the jury hears any evidence is gone, and I apologise for that, but I don't think it's a particularly unfair prejudice against the prosecution case.*[300]

In our assessment, the need for a 'mid-trial' difference in complainant's account direction also arose, but was not the subject of comment or intervention from the prosecutor or the judge during the trial. We discuss this topic further below.

The other general observation we would make about the s 12 discussions we observed is that there was variation in terms of their structure and level of pre-planning. In some cases, judges came to discussions prepared with extracts from a draft charge, and counsel had prepared a list of requests. However, our impression is that the level of advance preparation varied across the trials we analysed. The best discussions were orderly, and reflected careful consideration of those directions that might be appropriate in the circumstance of the case. Sometimes the s 12 discussion appeared to be rather

[300] V23.

an 'on the run' affair, which is not necessarily conducive to comprehensiveness and precision. In the worst example, the Crown prosecutor was clearly ill-prepared:

> *JUDGE: … I don't mean to be rude about this, but have you had a careful look at this, and got a list for me?*
>
> *CROWN PROSECUTOR: I haven't got a list, particularly, Your Honour.*
>
> *JUDGE: But that is the process that I was trying to alert counsel to at the start of the trial. This is a very prescriptive process in this statute. And it requires you to say exactly what it is you want in the way of directions. So I don't want you to hold up the statute for the first time, to be winging it, Mr [V23P].*
>
> *CROWN PROSECUTOR: I read this document a number of times, Your Honour. I can't say that I understand it entirely, Your Honour.*
>
> *JUDGE: Well, that's what we – we have no choice but to understand it, in order to give the jury directions that accord with the law as it now is. … Now, again, I don't mean to [be] rude about this but have you studied these to see whether you have decided in this case you want any of them or are you doing it as you stand there now?*
>
> *CROWN PROSECUTOR: I'm doing it as I stand here now, yes.*
>
> *JUDGE: Do you think this is a satisfactory way to do it given how important it is?*
>
> *CROWN PROSECUTOR: Well, it probably isn't, Your Honour.*[301]

Rather than being unduly critical about what we observed in relation to s 12 discussions, we think it is more constructive to conclude that a proactive approach to the topic of jury directions has the potential to allow Part 5 of the *Jury Directions Act 2015* (Vic) to inform not only what is contained in the end-of-trial charge to the jury, but also to exert an influence on the running of the whole of a rape trial. The Act already conceives of jury directions as a mechanism for influencing not only jury room deliberations at the end of the trial, but also how jurors receive and process evidence during the trial. A customised direction delivered at a time adjacent to the relevant evidence is likely to be more influential than a generic direction delivered at the end of the trial, at some temporal distance from the evidence in question. Directions delivered 'on the spot' – for example, during complainant cross-examination – also have the potential to positively influence the trial experience of rape complainants.

8.3 Delay in complaint direction: s 52

Earlier, we noted the high proportion of cases in this study in which the veracity of the complainant's allegation was challenged because of an asserted 'delay' in complaint. This defence technique has a long history and explains why, today, delay in complaint is one of the three topics on which a jury may be directed under Pt 5 of the *Jury Directions Act 2015* (Vic). Moreover, under s 52, the obligations are as follows:

> (1) If, before any evidence is adduced in the trial and after hearing submissions from the prosecution and defence counsel (or, if the accused is unrepresented, the accused), the trial judge considers that there is likely to be evidence in the trial that suggests that the complainant delayed in making a complaint or did not make a complaint, the trial judge—
>
> (a) must direct the jury in accordance with subsection (4) before any evidence about delay in making a complaint or lack of complaint is adduced; and

[301] V23.

(b) may give the direction before any evidence is adduced in the trial.

(2) If, at any other time during the trial, the trial judge considers that there is evidence in the trial that suggests that the complainant delayed in making a complaint or did not make a complaint, the trial judge must direct the jury in accordance with subsection (4) as soon as is practicable.

Section 52(2) is unique amongst the Pt 5 directions in that it is not only *possible* for the judge to give a 'mid-trial' direction, temporally adjacent to the evidence in question, but *required* ('as soon as is practicable'). It is perhaps unsurprising, therefore, that of the three directions contained in Pt 5 of the *Jury Directions Act 2015* (Vic), the direction on delay in complaint was the most visible 'mid-trial' direction in the cases in this study. The fact that the direction has a long legislative history (back to 1991[302]) is probably another contributor. However, on our assessment, a 'mid-trial' delay direction was not given in all cases where it was required, recalling that, as discussed above, some version of delay was suggested in 21 of the 25 cases in this study.

In the small number of cases where the passage of time from alleged rape to complaint was multiple years, trial judges took a proactive approach to the delay in complaint warning, in accordance with s 52(1).[303] Where the asserted 'delay' was less about time elapsed and more about one or more of the variations on delay discussed above, judges did not give a direction 'before any evidence about delay in making a complaint or lack of complaint is adduced' (s 52(1)(a)), and the use of 'mid-trial' directions (s 52(2)) was more patchy.

In an illustration of best practice, the judge interrupted cross-examination as soon as they realised defence counsel's line of questioning involved suggesting that the complainant's conduct departed from the 'real rape' expectation of immediate complaint:

JUDGE: Are you raising that as a delay, Mr [V1D1], are you?

DEFENCE COUNSEL: I'm sorry?

JUDGE: You're raising that as a delay, are you?

DEFENCE COUNSEL: No, Your Honour.I'm raising it ...

JUDGE: Why are you raising it?

DEFENCE COUNSEL: Your Honour, I'm raising it as – sorry. It's her delay in contacting her mother because I'm saying ...

JUDGE: A delay in complaining?

DEFENCE COUNSEL: Yes.

JUDGE: Really? ...[304]

Defence counsel attempted to argue that the line of questioning being pursued – highlighting the fact that the first person to whom the complainant complained (minutes after the alleged rape) was her work colleague, rather than her mother or staff at the hotel reception – did not involve a suggestion of delay in complaint. The judge disagreed:

JUDGE: Yes, all right. Well, I'll give a s 52 direction. I believe that, inescapably, the provision is now invoked, and the transcript will disclose my reasons for doing so in the circumstances ... I

[302] The forerunner to s 52 of the *Jury Direction Act 2015* (Vic) – s 61(1) of the *Crimes Act 1958* (Vic) – was introduced by the *Crimes (Sexual Offences) Act 1991* (Vic).
[303] V7, V19.
[304] V1.

have no doubt that it has been triggered. I don't think it's a big issue, it's almost unavoidable in some respects, and none of it shuts Mr [V1D1] out from pursuing the line of cross-examination that he wishes to, but I'm now at a point where, having seen the way the matter has unfolded, I have to give this direction as soon as is practicable, which is now. Bring in the jury, please.

DEFENCE COUNSEL: Your Honour, can I just - I'm not at all quibbling with Your Honour's ruling, but just so there's no misunderstanding my position. We say there is very little or no delay in making a complaint.

JUDGE: I agree.

DEFENCE COUNSEL: And we say, Your Honour, that to give this direction now is misleading and confusing to the forensic point that's being made.

JUDGE: Bring in the jury, please.[305]

The judge went on to give a s 52 delay in complaint direction.

Another case of proactive judicial intervention followed a similar pattern. The judge interrupted cross-examination of the complainant (who had attended a police station within hours of the alleged rape) when the complainant was asked why she hadn't called 000 immediately, rather than attempt to find a police station:

DEFENCE COUNSEL: ... Why wouldn't you just dial 000 and have a police officer come and pick you up?

COMPLAINANT: I didn't – I wasn't thinking clearly.

JUDGE: You're raising this as a ... ?

COMPLAINANT: I had just been assaulted.

JUDGE: You're raising this as a delay, Mr [V2D], she's gone to the police station on this day, hasn't she, and made a report.

DEFENCE COUNSEL: Yes.

JUDGE: You're raising this as some sort of delay.

DEFENCE COUNSEL: No, no.

JUDGE: Well, what are you raising it as?

DEFENCE COUNSEL: Sorry?

JUDGE: What are you raising it as? Why are you asking these questions?

DEFENCE COUNSEL: I'm raising it as a credibility issue.

JUDGE: Right, all right. So you are.

DEFENCE COUNSEL: Credibility issue, yes.

JUDGE: Yes.

DEFENCE COUNSEL: No, no, it's not a delay in complaint issue.

JUDGE: Well, it is, isn't it? How is it ...

DEFENCE COUNSEL: Well, maybe the way that I've put it.

JUDGE: Well, there's only one way you're putting it. You're saying if this happened this is what you would have done.

[305] V1.

DEFENCE COUNSEL: I can see how that – yes. …

JUDGE: And what's the point of all this, in terms of the delay? Because there isn't a delay.

DEFENCE COUNSEL: Now that you put it that way, there probably isn't, well there's certainly not a significant delay.

JUDGE: Well there isn't.

DEFENCE COUNSEL: No.

JUDGE: And indeed what she's doing is she leaves the - what she says is this is the event that takes place, I regained consciousness, this is what the man is doing, I leave the premises and go to the 7-Eleven, go to a taxi driver, ask for them - they don't understand. I then find a woman and a boy at the front yard of a house and get her to take me to a police station.

DEFENCE COUNSEL: Yes.

JUDGE: This is a woman who's … from [interstate].

DEFENCE COUNSEL: Yes.

JUDGE: Yes. So hard to imagine a more direct and immediate complaint Mr [V2D].

DEFENCE COUNSEL: Well I suppose it's the manner in which the complaint's made rather than asking someone to call 000 upon leaving, like on her evidence she's - she's leaving the house around 3.30, 4 o'clock.

JUDGE: Yes.

DEFENCE COUNSEL: Now we know that she arrives at the police station at 6.45, according to her police notes.

JUDGE: Yes but she's describing what she's then doing. Speaking …

DEFENCE COUNSEL: Yes that takes three hours.

JUDGE: Yes and the point …

DEFENCE COUNSEL: That seems to be a long time for her to …

JUDGE: Yes well that's the point.

DEFENCE COUNSEL: … end up at a convenience store, ask two questions of two people and then - and then …

JUDGE: Yes. All right so and so the point is that what the expectation then is that the person as the victim of a sexual assault gets immediately on the phone and rings the police. That's the attack upon her credibility then, just so we understand it.

DEFENCE COUNSEL: Yes.

JUDGE: Yes. Right well in other words she's not complained in a timely manner. It's scarcely believable that you could be suggesting that on the context of a complaint that's made by this woman at the police station on the very afternoon, or early evening, but nonetheless you have.

DEFENCE COUNSEL: Yes.

JUDGE: Yes. Well then I'm required to give a direction aren't I, to the jury pursuant to s.52 of the Jury Directions Act.

DEFENCE COUNSEL: I think, having raised it yes, a direction will have to be given at the appropriate time, it's a matter for you.

JUDGE: Well the appropriate time is right now.

CROWN PROSECUTOR: It's a mandatory direction.

DEFENCE COUNSEL: Yes all right.

JUDGE: Yes. And then I'll have to deal no doubt with a s 53 direction in due course, all in a setting where we've got a complainant who is complaining to the police on the very - on the very day.

DEFENCE COUNSEL: Yes. I totally agree.

JUDGE: Yes all right. I'm just going to leave the bench for one moment, I'll be back onto the bench in a couple of minutes. Everyone stay in place please?

(Short adjournment.)

(In the absence of the jury.)

All right. Well, anyway, you accept that I have to give a s 52 direction?

DEFENCE COUNSEL: Yes, Your Honour. The cat's out of the bag, I've raised it, it has to happen.[306]

The two cases just discussed are good illustrations of the breadth of s 52 – ie it is not simply concerned with narrowly conceived temporal delay – and how judges can best fulfil the obligations the legislation imposes on them by early and strong intervention, and the giving of a direction as adjacent to the relevant evidence as possible.

In another example of proactive judicial intervention it was during the complainant's *examination-in-chief* that evidence was adduced that was considered to trigger a delay direction:

JUDGE: ... The issue I want to raise is delay in complaining. It seems to me it is now raised. ... You'll remember we had a discussion earlier about my obligations and giving the jury a direction if there is evidence of delay in complaining. It seems to me that there now is evidence of delay in complaining to the police and reasons put forward as to why she did not complain immediately. ...

It seems to me that I'm required to ... give the jury the direction pursuant to the Jury Directions Act and s 52(4) in particular. I mean it's not going to be a matter of - it's not a real issue in the trial, as I see it.

CROWN PROSECUTOR: No.

JUDGE: Nothing is going to be made of it, but the law obliges me to give the direction I think, do you agree with that?

CROWN PROSECUTOR: Yes, Your Honour.

JUDGE: Do you agree with that, Mr [V13D]?

DEFENCE COUNSEL I do, Your Honour.[307]

In some cases, the Crown prosecutor played a key role by applying for a 'mid-trial' jury direction.[308] In one case, the Crown requested a delay direction at the completion of the complainant's evidence. Initially, the judge appeared unconvinced by the need for a direction, but was ultimately persuaded, including after input from defence counsel:

CROWN PROSECUTOR: ... [W]e've heard evidence that she was reluctant to tell her parents and she's given an explanation of her reluctance. She was reluctant to tell the police - to go to the police and she's given an explanation of that. We've heard evidence of course of an incomplete type of complaint, put that to the side. We've heard evidence that she had her phone on her and she couldn't use it.

JUDGE: Sorry, what do you mean by an incomplete complaint?

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[306] V2.
[307] V13.
[308] V18, V23, V24, V25.

CROWN PROSECUTOR: Well in the sense that she didn't say it was the accused. ... But in any event - so there's - and she's given explanations in re-examination, at least, and to some extent in cross-examination for the lack of complaint then ... So in my submission, it is appropriate to give those directions ... [I]n my submission that should be done now, that being as soon as practicable.

JUDGE: Yes, what do you say about this [V18D]?

DEFENCE COUNSEL: I accept that direction has to be given, Your Honour. ...

JUDGE: Assuming that it was past midnight that it had occurred, it's just the probability I guess, given what else had gone on that evening. But if not, it's soon as she gets home. Is that really delay? Is that really what the court - the law understands by delay in making complaint? ...

DEFENCE COUNSEL: I feel like I'm arguing against myself, Your Honour. ...

JUDGE: In the context, as we know, of the law of these sorts of matters, where complaints are made many years after the event, I have a little bit of a difficulty, I must say, forming the view - or grasping with both hands, the view that there's any delay here when it's the next day, or that day. Arguably that day, I would have thought. ...

DEFENCE COUNSEL: The Crown would be saying it was, in the circumstances, the first reasonable opportunity, given her explanations. And the Crown would say that she's acted consistently by telling her sisters what she did tell them. ... At the first opportunity, the jury may take the view the first - and that may be the argument, that may be the thrust of the cross-examination. 'At the first opportunity you didn't tell anyone'.

JUDGE: I suppose it was put to her in terms, that she had a mobile phone with her.

DEFENCE COUNSEL: Yes.

JUDGE: And she didn't ring anyone.

DEFENCE COUNSEL: Exactly.

JUDGE: All right, yes, I'm satisfied that there's a basis for giving the direction under s.52, ss.4.

DEFENCE COUNSEL: Sub-section 4.

JUDGE: I'll do that when we get the jury in.

DEFENCE COUNSEL: Thank you.[309]

A similar situation occurred in another case. The Crown prosecutor invited the judge to give a delay direction at the *beginning* of the trial, in accordance with s 52(1). In discussion, the judge observed that the alleged facts did not suggested a 'classic kind' of delay, and expressed a preference for waiting to see 'how the evidence comes out'.[310] After the complainant's cross-examination had been completed, the prosecutor renewed their s 52 request, and the next morning, the judge gave a direction:

JUDGE: Just a minute. Good morning, members of the jury. I think I said to you at the outset that there were some issues that I might have to give you some directions about in the course of running of the trial, and there is a direction that I do need to give you at this stage.

It relates to the evidence of [V24C] that you heard yesterday, and the suggestion to her that she didn't inform [V24WC1] about this incident when they first spoke the first time that they saw each other. Saw each other, communicated with each other. Whether it was by Facebook or phone or whatever.

I must give you the following direction of law about this delay. Experience shows that people react differently to sexual offences, and there's no typical, proper or normal response to a sexual offence.

[309] V18.
[310] V24.

Some people complain immediately to the first person they see, and others may not complain for some time, and others might never make a complaint. It's a common occurrence there's a delay in making a complaint about a sexual offence.

All right, now Mr [V24P], the next witness, please.[311]

We have highlighted these good practice examples (including a commendable contribution by defence counsel in the second-to-last discussed case) to demonstrate the opportunity that s 52 provides for timely 'disruption' of lines of questioning that draw on problematic traditional conceptions of 'real rape' –like the inference that 'delay' is synonymous with fabrication of a rape allegation. However, these cases were the exception rather than the rule. In most of the 21 cases in which, on our assessment, the defence suggested that there had been some version of a delay in complainant, no 'mid-trial' direction was requested by the Crown prosecutor or self-initiated by the judge. We note that the need for a s 52 delay direction to be included in the charge featured in many s 12 discussions — including in cases where no 'mid-trial' delay in complaint direction had been given. It follows that it is likely that a relevant direction was contained in the trial judge's charge to the jury.[312]

The case for requiring a judge to give a direction *at the time* the relevant evidence is adduced (rather than waiting until the end of the trial) is compelling: this approach is most likely to influence how the jury receives and processes the relevant evidence. Whether the *prospect* of 'mid-trial' directions influences the strategy and lines of questioning is much less certain, and not a topic on which our methodology allows us to express any firm conclusions. However, the fact that suggestions of delay were a recurring feature of the trials we analysed suggests that the mere fact of s 52's existence is not a significant disincentive. In one case in this study, defence counsel was effectively 'warned' that if they continued with a particular line of questioning, a delay in complaint warning was likely, but they did not resile:

JUDGE: The prosecutor very fairly is alerting you to the risk that it will be made. Delay in making complaint includes where the complainant has not made a complaint at the first or subsequent reasonable opportunities. So, the reasonable opportunity is the advice from the boyfriend to ring the police and she doesn't take it.

DEFENCE COUNSEL: That's a forensic choice, Your Honour, and I'm prepared to go down that course.

JUDGE: Okay.

DEFENCE COUNSEL: It will be a direction that the jury gives [in] Your Honour's charge or at any other time Your Honour decides is appropriate. …

JUDGE: … So, if I consider it's likely, and it seems that it is, that's your line, isn't it?

DEFENCE COUNSEL: Yes, Your Honour, I would agree with all that.

JUDGE: You would agree that, in the end, you're going to go to the jury with the proposition that after she hung up from [V23WCG3], she should have straight away done what [V23WCG3] said, which was ring the cops and she didn't.

DEFENCE COUNSEL: Yes, Your Honour. So, it's - my learned friend is quite right in pointing it out. If he's making the application for the direction, I don't have a good reason why not. The Jury Directions Act is clear. As Your Honour said, it's a forensic decision. …

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311 V24.

312 We cannot verify this because for most cases we did not have access to a transcript of the charge. We note that in one case where we did have the charge – a case for which our assessment was that a delay direction was warranted – no delay direction was included in the charge (V17).

JUDGE: Okay. So, even though – so even though it's known that she does complain within the hour, you're still going to go to the jury on a delay complaint?

DEFENCE COUNSEL: Yes, Your Honour.[313]

To be clear, the course of action reflected here is completely consistent with the relevant law. The *Jury Directions Act 2015* (Vic) does not prohibit lines of complainant questioning that suggest delay. Section 52 provides simply that such lines of questioning should be accompanied by a direction that educates the jury about the assumptions that underpin a suggestion of delay in complaint. However, to the extent that the 'spirit' of Pt 5 of the *Jury Directions Act 2015* (Vic) includes an attempt to contribute to the transformation of rape trials away from intense complainant scrutiny and rape-myth engaging narratives, it is important to acknowledge the limitations of jury directions as a technique.

There is no doubt that defence counsel *can* be influenced by the prospect of a delay direction. In one case in this study, in which a witness's evidence was being pre-recorded,[314] the trial judge was quick to pick up on an implied delay in complaint line of questioning, paused cross-examination and raised the issue with defence counsel. After discussion, the defence indicated that they would not be pursuing the line of questioning. Because the evidence was being pre-recorded (to be played to a jury in a trial at a later date) the appropriate 'remedy' was not a jury direction but editing of the recording to remove the impugned questions and answers.

Our penultimate observation about 'mid-trial' delay directions (which is also applicable to other 'mid-trial' directions) relates to whether the complainant should be present where a direction that relates to her evidence is given. In one case, after it had been determined that a s 52 direction should be given, there followed a discussion of whether the direction should be given in the presence of the complainant (who had yet to be cross-examined):

JUDGE: I'm just wondering whether there's any reason why I should not give the direction to the jury in the presence of the witness, when otherwise what I've got to do is bring the jury in, give them the direction about delay, send them out, send the accused out, get the witness in, get the accused back, get the jury back. Ordinarily I think I'd give the direction in the absence of the witness.

CROWN PROSECUTOR: There's no problem with it from my point of view, Your Honour.

JUDGE: No. I don't think there would be from your point of view. Do you have a view on, Mr [V13D]?

DEFENCE COUNSEL: I'd prefer it not ...

JUDGE: If you'd prefer ...

DEFENCE COUNSEL: For her not to be in the room whilst the jury is given the direction.

JUDGE: Yes. Then I think I'll give them the direction when we resume after the completion of the complainant's evidence.

DEFENCE COUNSEL: Yes, sir.

JUDGE: I think that's the best way of doing it in those circumstances.

CROWN PROSECUTOR: Yes, Your Honour.[315]

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[313] V23.

[314] V16. The complainant was a visitor to Australia and was due to return to her home country prior to the scheduled date for the trial.

[315] V13.

The implication of this discussion and the resolution is that the complainant's presence during a 'mid-trial' direction to the jury might be prejudicial to the accused. It is not obvious to us why this might be considered to be the case. We also wonder whether there might be value – from the point of view of improved sensitivity and respect for the complainant – if they were present to hear the messages contained in s 52: that there is no 'typical, proper or normal response to a sexual offence' etc and that the complainant will not be assumed to be a 'liar' if her response did not conform to the outdated 'real rape' conceptions of the past. Depending on the precise timing of the direction, it may not be possible to guarantee that the complainant is still in the witness box (physical or virtual via AVL). But if it possible, it may be preferable to, for example, cutting the AVL link with the complainant still in the (virtual) witness box, and not restoring the link until after the direction is given.[316]

Finally, we observed different judicial practices in terms of how conspicuous the 'mid-trial' direction should be. In the best practice examples discussed above, the direction was given at a point adjacent to the evidence in question and in relatively unambiguous terms as to the evidence to which the direction related. By contrast, in one of the cases in which a 'mid-trial' warning was given, curiously, in our opinion, the judge decided to give the direction in what might be described as a 'gentle' manner:

> *JUDGE: Yes. So I think probably what I should say to the jury is that when I was giving them the instructions at the outset of the trial, I overlooked a matter.*
>
> *CROWN PROSECUTOR: I don't know that Your Honour need to add that, but if Your Honour just gives the instruction here and now because it's*
>
> *JUDGE: Well, it's just – it's going to be …*
>
> *CROWN PROSECUTOR: … been raised.*
>
> *JUDGE: It might make it a little less conspicuous.*
>
> *CROWN PROSECUTOR: Yes. Well, I'm …*
>
> *JUDGE: And then tell them what experience shows, which is what the direction consists of.*
>
> *CROWN PROSECUTOR: Yes.*
>
> *JUDGE: I might say because of matters that have just arisen, counsel has reminded me that I omitted to do this.*
>
> *DEFENEC COUNSEL: I'd be most grateful.*
>
> *CROWN PROSECUTOR: That's a very generous way of dealing with it, Your Honour.*
>
> *JUDGE: Yes. I don't think any harm will be …*
>
> *CROWN PROSECUTOR: That's probably the most appropriate way, in the circumstances, to*
>
> *JUDGE: Yes, we don't want to …*
>
> *CROWN PROSECUTOR: … not cause any difficulty to the accused.*
>
> *JUDGE: Yes. Okay, I'll do that. Would you bring the jury in please …*[317]

Fairness and due process for the accused are, of course, paramount considerations in a criminal trial. However, we would suggest that where a 'mid-trial' direction is called for, it is most likely to have the desired effect if there is a clear and explicit connection made between the direction and the questioning which precipitated it. Such an approach is most likely to produce both the trial-specific effects intended by the *Jury Directions Act 2015* (Vic), as well as wider and more enduring impact

[316] As occurred in V23.
[317] V23.

on the future likelihood of defence counsel choosing to run delay in complaint lines of questioning (ie a type of 'deterrence' effect).

8.4 Differences in complainant account direction: s 54D

As we explained in some detail above, an attempt to bring into question the complainant's testimony by pointing to asserted differences in her account of the alleged rape or surrounding events was a recurring feature of the cases in this study. Like suggestions of delay in complaint, this aspect of a complainant's experience of rape trials has been recognised as one which unfairly and inaccurately assumes that a 'genuine' rape victim will describe her experience in the same terms every time she is asked to give an account, no matter the context or circumstance. In 2017[318] the Victorian Parliament added this assumption to the list of assumptions that jurors should *not* bring to rape trials. Section 54D of the *Jury Directions Act 2015* (Vic) requires a judge who is satisfied that there is evidence of differences in the complainant's account to direct the jury on a range of matters, including that a complainant 'may not remember all the details', 'may not describe a sexual offence in the same way each time'; and that 'it is common for there to be differences in accounts of a sexual offence'. Like the s 52 delay in complaint direction, the s 54D direction can be given at any point in the trial, although the phrase 'as soon as is practicable' is not used in s 54D.

The 2017 amendments came into force on 1 October 2017. This means that the s 54D direction was available in 14 of the 25 trials in this study. Because we only had access to the transcript of the judge's charge in two of these cases,[319] we can't say with certainty how many charges included a s 54D direction. However, having reviewed transcripts of s 12 discussions for all 14 trials, our estimate is that the charge included a direction on differences in complainant account in at least 9 of the 14. This is not surprising given, as discussed above, the frequency with which complainant cross-examination included attempts to draw attention to differences between the complainant's trial evidence and what she has said on a previous occasion (for example, medical examination, police interview, committal). What *was* surprising was that across the 14 cases (including the 9 in which we anticipate that a charge direction was given) we did not observe a single instance of a 'mid-trial' direction.

In one case, the trial judge expressly put counsel on notice at the start of the trial that s 54D was one of the directions that could be given at any time, and even offered to include a direction on differences in the complainant's account (and delay in complaint) in their opening remarks:

> *JUDGE: In some cases, I've been asked to and have given directions like that at the opening of the trial because they become live issues, but ... neither of you want to go there. Is that what I'm hearing?*[320]

The Crown prosecutor and defence counsel confirmed that no directions were requested.

In this case, during cross-examination of the complainant, when *delay* was suggested, the prosecutor requested a 'mid-trial' direction and the judge gave one. During that same cross-examination, when the defence pursued a line of questioning that drew attention to differences between the complainant's account of events during examination-in-chief, and the accounts she had given to police officers shortly after the alleged rape, no s 54D direction was requested and none was given. The complainant's attempts to account for the differences go to the heart of why this statutory direction was added in 2017:

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[318] *Jury Directions and Other Acts Amendment Act 2017* (Vic).
[319] V24, V12.
[320] V23.

DEFENCE COUNSEL: That was your first answer to [V23WCG1], wasn't it, [street name redacted]?

COMPLAINANT: No. I said in [suburb redacted], I think. I can't remember....

DEFENCE COUNSEL: What you didn't mention though was anything of a sexual nature. Is that correct?

COMPLAINANT: No, because I didn't – I knew it was – I was sexually attacked, I didn't realise that it was rape until it was explained to me, um, and – and I was also embarrassed to tell him that I was violated. ...

DEFENCE COUNSEL: You didn't say anything to [V23WCG2] about kissing, or hugging, or penetration, or anything of that nature?

COMPLAINANT: No, because I was embarrassed and, um, I wasn't going to go into detail. I was in shock.

COMPLAINANT: ... in my quick description I left out the full [details], 'cause I was in shock.[321]

A differences in account direction does appear to have been given in the end of trial charge to the jury, and we recognise that there may have been forensic reasons why the Crown prosecutor declined to request a s 54D direction during or after the complainant's cross-examination. Nonetheless, this case strikes us as illustrative of something we observed in a number of cases: a missed opportunity for achieving the maximum possible educative benefit for the jury – ie that they should not misread differences in the complainant's account as necessarily requiring an adverse assessment as to credibility or reliability.

In another case – a re-trial which involved recorded evidence from the first trial – the trial judge was proactive in identifying at the beginning of the trial that a s 54D direction would be required:

JUDGE: There'll be a need to give a direction as to differences or inconsistencies or gaps in account, won't there? I think there was ... one given ... by the judge at the last trial because there were cross-examinations as to inconsistencies, weren't there?

DEFENCE COUNSEL: There were ... there were I think in the end one, possibly two that require the direction.

JUDGE: There were a handful in the way that she described how she got into the room, I think and ...

DEFENCE COUNSEL: Yes.

JUDGE: But anyway, look. At an appropriate time. I won't do it at the outset. I'll do it once there's an issue of inconsistencies being flagged, I would do what I would do if we were live before a - with a witness, I would turn to the jury and give them a direction at that point so - you'll say that it is raised on the cross-examination anyway?

DEFENCE COUNSEL: It is. Unquestionably, yes.[322]

[321] V23.
[322] V9.

Unfortunately, when the relevant portion of the complainant's cross-examination was played for the jury, the anticipated pause in the playing of the recording followed by a s 54D direction did not occur, and no s 54D direction was given at the end of the cross-examination.[323]

8.4.1 Difference in account -v- prior inconsistent statement

Our focus in this part of the report is on those directions contained in Pt 5 of the *Jury Directions Act 2015* (Vic) that are specifically designed for sexual offence trials, including rape trials, rather than other directions that may have featured in cases in this study. However, there is one other direction that warrants discussion here, because of its interaction with the s 54D difference in complainant's account direction: the direction on prior inconsistent statements. The *Criminal Charge Book* expressly contemplates that the evidence of a complainant may require that both directions be given,[324] but does not speak to the fact that there may be a tension between the two directions. Without suggesting that they are opposite sides of exactly the same coin, in simple terms, a s 54D direction is usually requested to *strengthen* the Crown case, while, as it relates to the evidence of a complainant in a rape trial, a prior inconsistent statement direction is usually requested to *weaken* the Crown case. As a judge put it in one of the cases in this study in which defence counsel requested a prior inconsistent statement direction in relation to the complainant's evidence:

> *JUDGE: … I find it curious when you give one direction on the one hand and forgive it with another direction.*[325]

As this case illustrates, the tension was recognised in a small number of cases in this study, but not necessarily resolved. In one case, during the s 12 discussion at the first of two trials,[326] there was an attempt to differentiate between the territory covered by the two directions. Defence counsel submitted that a prior inconsistent statement direction was warranted because the complainant had previously said that she was picked up by the throat/neck and thrown on the bed, and at trial she said that she didn't know how she came to be on the bed. The trial judge initially indicated that they would use the same example to direct the jury on prior inconsistent statements *and* difference in the complainant's account. The Crown prosecutor submitted that the example supported the latter but not the former; that is, it was an example of a difference in the complainant's account, but not of a prior inconsistent statement. By the time of the equivalent discussion at the second trial, the defence appears to have conceded the point:

> *JUDGE: All right. What about prior inconstant statements? No one's mentioned that either.*
>
> *CROWN PROSECUTOR: In my submission, there aren't any. Well, I'll let my learned friend canvas that.*
>
> *DEFENCE COUNSEL: We had a lengthy discussion in the last trial about this and that doesn't affect Your Honour's view, obviously but the view is taken, ultimately, and with respect, I think correctly that, in fact, the differences were differences of account which were covered by earlier direction we've already given and it would be the same examples, they were, in fact, more better*

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[323] The later s 12 discussion between counsel and the trial judge suggests that, in this case, a s 54D direction would have been included in the judge's charge to the jury.

[324] *Victorian Criminal Charge Book* (Judicial College of Victoria), [4.26.16].

[325] V3.

[326] The focus of our analysis was the re-trial, but the transcripts we received included transcripts from the complainant's evidence from the first trial (which was played at the re-trial as an audio-visual recording), and adjacent discussions between judge and counsel.

dealt with under the differences in account, direction rather than the prior inconsistent statement direction.[327]

This example suggests that it *may* be possible to distinguish between differences in account and prior inconsistent statements, or otherwise resolve the tension between the two directions. However, this requires discussion (and possibly a ruling) rather than simply assuming that the same piece of evidence can sustain both directions.

In other cases, the possible tension appears not to have been recognised at all (or, at least, the transcript reveals no relevant discussion). In one case, the defence requested a prior inconsistent statement direction on the basis of the complainant's 'failure to provide the doctor with the full extent of the allegations that were later provided to police'.[328] We did not have access to a transcript of the charge (so can't be sure what directions were given), but we note here that neither this request, nor the general context of the discussion under s 12 of the *Jury Directions Act 2015* (Vic), appears to have prompted consideration of whether this difference in the complainant's account should be 'defended' by a s 54D direction.

8.5 Consent direction: s 46

The direction on consent contained in s 46 of the *Jury Directions Act 2015* (Vic) is of a different nature to the two directions discussed so far in this section of the report. Firstly, it overlaps with the expansive statutory definition of consent contained in s 36 of the *Crimes Act 1958* (Vic). Secondly, it is not a direction that can be made 'mid-trial'; it is reserved for possible inclusion in the judge's charge to the jury at the end of the trial.[329] Although we had access to transcripts of the charge in only three cases, it is evident (including from our analysis of s 12 discussions) that a direction on consent – in more or less detail, depending on the requests made by counsel – is a routine inclusion in the charge.

However, given the considerable effort that has gone into the statutory transformation of the concept of consent, and the way in which proof of non-consent should be approached, it seems anomalous that the jury does not have access to the educative benefits of s 46 until after the close of evidence. We observed numerous instances where a 'mid-trial' direction would have been warranted and valuable if it were available. As we have documented in this report, in the cases we analysed it was commonplace for traditional conceptions of consent to underpin lines of cross-examination – including expectations that a non-consenting person verbalises their non-consent and/or physically resists, or that prior 'flirtation' provides a basis for inferring consent to later sexual activity.

If defence counsel, based on instructions, elect to pursue lines of questioning that evoke the very same assumptions and attitudes that the legislature has attempted to 'write out' of the law of criminal offences and criminal trials, it seems logical to allow a judge to provide an educative direction on consent — just as they can when counsel evoke other rape myth and 'real rape' tropes (such as that a delayed complaint equates to fabrication; or that differences in account suggest inaccuracy, doubt or lying). Earlier, we noted a case where a witness was interrupted when they attempted to explain and validate the 'freeze' response.[330] This strikes us as an example of where, if empowered to do so, the judge could have explained the freeze response, noting that the words of s 46(3)(d)(ii) of the *Jury Directions Act 2015* (Vic) – 'people who do not consent to a sexual act may not protest or physically resist the act' – are followed by:

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[327] V9.
[328] V16.
[329] VLRC, above n 9, 6.
[330] V9.

Example

The person may freeze and not do or say anything.

'Mid-trial' directions on consent have the potential not only to enhance the capacity of jurors to receive and process evidence, but may also improve the complainant's trial experience. For example, when a complainant was asked why she didn't 'bite down' on the penis that the accused had inserted into her mouth without her consent, we suggest that she was entitled to hear the judge explain to the jury that the law does not require a victim of sexual violence to physically resist or 'fight back', and that 'people who do not consent to a sexual act may not protest or physically resist the act' (s 46(3)(d)(ii)). Similarly, in another case discussed earlier, when the Crown objected to a line of questioning in complainant cross-examination which suggested that, as a strong weight-lifter, the complainant should have been able to 'use all [her] strength to resist', it would have been desirable for them to be able to request a direction there and then in terms of s 46(3)(d)(ii).

9. Conclusions and options for further reform

Our priority in this report has been to generate insights about the operation of rape trials in Victoria that might not otherwise be available to, or verifiable by, the VLRC, or which might be triangulated with other data, such as including secondary literature, case law, quantitative data and qualitative data generated by stakeholder consultation. We are conscious that some of the matters to which we have drawn attention are not necessarily unique to rape trials but are attributes of criminal trials generally. Nonetheless, where they have implications for the experience of complainants, we have determined that they warrant comment. To the extent that this report contains criticisms of practices engaged in (or not engaged in) by defence counsel, Crown prosecutors and judges, it is important to emphasise that we have not made any findings about the prevalence of those practices (whether acts or omissions). Rather, we have endeavoured to identify practices still occurring which may be considered inconsistent with the concerted effort attempt to 'modernise' rape law and rape trials – which has been a central theme of reform for more than 40 years[331] – as well as drawing attention to 'best practice' examples that demonstrate what is possible. In this final section of the report, we highlight opportunities and priorities for further reform, arising out of this study's findings.

9.1 Improving complainant experience: logistics, technologies and procedures

In important respects the procedures by which the contemporary rape trial is conducted in Victoria are very different to the way in which trials were conducted 40 years ago, prior to the advent of a concerted reform program. There is much greater sensitivity to the experience of the complainant, and a commitment to minimising distress and the risk of re-traumatisation. However, we observed a number of instances where practical, technical and logistical aspects of the trial fell short of what would be considered optimal. Possible further improvements supported by our findings include:

- a more consistent approach to language and terminology, and basic courtesy protocols, to further enhance the quality of sensitivity and respect for complainants;
- technological upgrades and/or improved forward planning in terms of the allocation of rape trials to particular courtrooms to ensure that remote location + AVL methods for giving evidence, and/or arrangements for showing video footage during examination-in-chief or cross-examination, run smoothly, and relieve rather than exacerbate the distress experienced by complainants;

[331] *Crimes (Sexual Offences) Act 1980* (Vic).

- adherence to the use of remote location arrangements only for the reasons for which they are designed (ie complainant well-being), and consistently respecting the election made by complainants as to whether to give evidence from a remote location or in person in the courtroom;
- adoption of 'standing rules', rather than *ad hoc* resolutions and rulings, on important practical matters like ensuring that a complainant has a chance to watch confronting video footage in advance of being required to view it during examination-in-chief or cross-examination; and
- flexibility in the application of question and answer conventions of criminal trial examination-in-chief and cross-examination – to provide more room for the complainant's 'voice'.

9.2 Better guidance on intoxication evidence

As anticipated, based on pilot research previously undertaken,[332] we found that evidence of the intoxication of the complainant and/or accused largely took the form of imprecise and colloquial self-assessment. Jurors rarely had the benefit of medical/scientific expert evidence on AOD effects. Intoxication evidence is often directly relevant to a matter in issue (eg whether the Crown has proven that the complainant did not consent) and it would be preferable for the jury to receive better guidance on the relationship between AOD consumption and cognitive functions like consent formation.

In the cases we analysed, s 36(2)(e) of the *Crimes Act 1958* (Vic) did not appear to be achieving its purpose of breaking the traditionally assumed nexus between intoxication and consent to sex. The provision was very rarely engaged by the Crown.

In the cases we analysed, complainant intoxication evidence was more likely to feature in the *defence* case. It was relied on to suggest disinhibition that was productive of consent and to raise doubt about the accuracy of the complainant's recall of events and, therefore, the reliability of her evidence. Our findings suggest that a gap may have opened up between, on the one hand, what is assumed about the adverse impact of intoxication evidence in rape trials, and, on the other, the state of knowledge in the expert literature. This is another issue on which rape trials would benefit from expert evidence on AOD effects.

9.3 Further modernisation of cross–examination

Although the manner in which complainant cross-examination is conducted may have improved, our findings suggest that rape trials continue to involve many of the attitudes and assumptions that legislative reform has attempted to 'write out' of rape law. Complainants in the cases in this study were regularly confronted with one or more of the following assertions (all of which rely on a gendered conception of the characteristic of a 'real rape' and a plausible allegation): 'flirtatious' behaviour on which consent to sex can be inferred; a failure to vocalise non-consent or physically resist; post-event lying to conceal consensual sex with the accused; a delay in complaint that suggested a false allegation of rape.

While acknowledging the limitations of a small non-representative sample study, our findings suggest that the pursuit of such (familiar) narratives in rape trials cannot be seen as an aberration, or attributable only to barristers who learned their craft in an earlier era of rape trials. Rather, it appears that such practices are still routine.

For the most part, in the cases we observed, Crown prosecutors were reluctant to object to the evocation of 'rape myths', or the pursuit of other forms of problematic questioning, during cross-examination. There was considerable variation in the level of judicial intervention. In an adversarial system, and given that the questioning practices we are talking about are not prohibited, the failure to

[332] Above nn 3, 147, 148.

'call them out' or interrupt them may be explicable. In addition to the rules of evidence (and associated opportunities for objection), the main tool of intervention available in such instances is a jury direction – which the Crown can request and the judge may issue. This study suggests that jury directions specifically designed for rape trials and other sexual offence trials – in their current form in Pt 5 of the *Jury Directions Act 2015* (Vic) – may not be exerting much influence on the manner in which cross-examination is conducted (recognising that it may nonetheless have other benefits, such as improving the quality of jury deliberations). We return to this topic below.

Our findings on the prominence of rape myths and 'real rape' conceptions in the cross-examination of complainants suggest that consideration should be given to whether rape trials should be added to the list of matters for which a ground rules hearing is conducted in accordance with Part 8.2A of the *Criminal Procedure Act 2009* (Vic). We recognise that the suggestion is not a straightforward one. We are not suggesting that all rape complainants fall into the category of 'vulnerable witnesses', in the manner in which that phrase is usually understood. However, our analysis suggests that vulnerability is often generated because of the lines of questioning that are regularly pursued in rape trials. It is this reality, rather than anything inherent to the complainant, which might be said to justify adoption of the ground rules pre-trial procedure. At a minimum, the process might assist in the advance identification of which jury directions might be required, and to create an opportunity for this to be done proactively at the beginning of the trial, rather than reactively, during or after complainant cross-examination, or only in the judge's charge to the jury.[333]

Our findings on the manner in which defence counsel often rely on asserted differences between the complainant's committal evidence and her evidence at trial prompt us to suggest that this may be an additional reason (along with complainant traumatisation) for further consideration of whether there should be a prohibition on committal cross-examination of complainants in all rape prosecutions, noting that the current prohibition applies only to complainants who are children or have a cognitive impairment.[334] An alternative path, as recently recommended by the VLRC,[335] is a more robust approach to assessing whether leave should be granted to cross-examine complainants in rape charge committal hearings.[336]

9.4 The challenge of transforming consent and eroding rape myths

Our findings suggest that despite decades of legislative reform, the project of transforming the concept of consent, as it operates in rape trials, is incomplete. We observed numerous instances of a discrepancy between the words and spirit of how consent is defined and explained in s 36 of the *Crimes Act 1958* (Vic) and s 46 of the *Jury Directions Act 2015* (Vic), and how it was evoked in trials. We saw few signs of a communicative model of consent or of a focus on the steps taken by the accused to establish that the complainant was consenting. Section 36(2)(l) of the *Crimes Act 1958* (Vic) – 'a person does not consent' if 'the person does not say or do anything to indicate consent to the act' – appeared to be largely ignored.[337] In fact, complainants continue to be questioned on what they did to demonstrate non-consent – whether by words or acts of physical resistance or both.

The nature of this study does not offer a foundation for commenting with confidence on whether the solution lies in further changes to statutory language – for example, to embed a stronger communicative consent concept in the definition of rape. However, our findings do suggest that it is unlikely that this alone would be sufficient for real change. Statutory language does not necessarily

[333] In one case in this study, a ground rules hearing was held because the complainant had a cognitive impairment (V22). In our assessment, the dynamic of the complainant's cross-examination was noticeably different to that of others cases, including by virtue of being more logical and clear in the sequencing of questions, and less adversarial.
[334] *Criminal Procedure Act 2009* (Vic) s 123.
[335] Victorian Law Reform Commission. *Committals*. Report No 41 (March 2020), 131.
[336] *Criminal Procedure Act 2009* (Vic) s 124.
[337] Our limited access to transcripts of charges to the jury preclude a definitive assessment of the operation of s 36(2)(l).

change trial practice and dynamics in all the ways anticipated. Procedural and evidentiary changes, including the 'ground rules' procedure discussed above, and more consistent and proactive use of jury directions (to which we turn next) may have a greater chance of success. Consideration should also be given to the use of counter-intuitive expert evidence to assist the jury to process and evaluate evidence that seek to suggest that the complainant did not behave in the manner 'expected' of a rape victim.

9.5 A more proactive approach to jury directions

Data limitations largely constrained our ability to assess the quality of end-of-trial jury directions contained in Part 5 of the *Jury Directions Act 2015* (Vic), and so the focus of our analysis was on 'mid-trial' directions.

The problematic assumptions at the heart of all three complainant-focused directions – consent (s 46), delay in complaint (s 52) and differences in account (s 54D) – were each invoked in the majority of the cases in this study. However, there were observable variations in how different Pt 5 directions were formally engaged in the cases analysed. The only 'mid-trial' directions we observed were for delay in complaint. This may reflect the fact that it is the most established of the directions (pre-dating the *Jury Directions Act 2015* (Vic) by decades), and the fact that the power to make the direction is expressed in the most expansive and mandatory language, with an express self-initiation power for the judge. However, we still observed instances where, on our assessment, the direction was warranted but not given. We observed no 'mid-trial' directions for s 46 or s 54D.

In the case of the consent direction (s 46) this is a product of statutory drafting. The Act does not authorise 'mid-trial' directions on consent, reserving this direction for inclusion in the charge to the jury, if requested by counsel during the end of trial discussion pursuant to s 12 of the *Jury Directions Act 2015* (Vic). Our findings on the prevalence of cross-examination questioning that draws on 'old' pre-reform conceptions of consent suggest that this restriction should be revisited.

We cannot account so easily for the absence of s 54D directions on difference in the complainant's account. Under the Act, such directions *can* be delivered 'mid-trial', but in order for this to occur, Crown prosecutors must be vigilant about detecting when the need for a s 54D direction arises, and making appropriate submissions.

Our findings on the presence and absence of 'mid-trial' directions suggest that consideration should be given to standardising the statutory language for all three directions, modelled on the s 52 delay in complaint direction. For maximum effect, all directions should be capable of being given (and repeated) at any point in the trial (from beginning to end), and self-initiated by the judge; and required to be given 'as soon as practicable' after the need for the direction is triggered.

In addition, consideration should be given to requiring a pre-trial discussion of whether evidence in the trial is likely to go into territory covered by ss 46, 52 and 54D. This discussion may lead a judge to include a direction or directions in their opening remarks. This initial discussion would not be a final determination on whether a particular direction is required in the trial, but would ensure that the judge and counsel are on notice about the possible need to request or initiate a direction depending on the nature of questioning that occurs, especially when the complainant is giving evidence.

It is impossible to determine, with any certainty, what effect jury directions have on jury deliberations and trial outcomes. However, if utilised consistently and actively, jury directions (specifically, early and 'mid-trial' directions) have the potential to produce other benefits. It may prove to be a slow evolutionary process, but the attraction of rape myth-related narratives and lines of complainant cross-examination may be reduced over time if defence counsel know that there is a high likelihood of a direction during (or immediately after) cross-examination if they ask questions that: infer consent based on gendered 'flirtation' grounds; suggest that non-consent requires vocal or other active resistance; or imply fabrication of the allegation by pointing to an asserted 'delay' in complaint.