Print Page | Close Window

Cross-Examining Complainants in Sexual Assault Proceedings

Public Defenders
Criminal Law Conference
2009

Paper by Belinda Rigg, Public Defender

1. Cross-examination is a vital part of defending those accused of sexual crimes. Often the complainant in sexual proceedings has to be vigorously challenged. Although they do arise it is not common to have a sexual assault trial run on identification, or where lack of consent is not an element and there is no dispute that the sexual contact occurred, but only about knowledge of mental impairment, reasonable grounds to believe the complainant was over 16 or the like. The advocate frequently faces an indictment with numerous counts, many of which carry very significant standard non-parole periods. It is in relation to sexual assault proceedings that the conduct of defence counsel has come under particularly intense scrutiny.

2. I propose to deal reasonably briefly with some general aspects of cross-examination particular to sexual assault proceedings, then consider in greater detail the regime set out in section 41 of the *Evidence Act* and Rule 35A of the Bar Rules in relation to improper or disallowable questioning.

3. I refer generally throughout to the accused as 'he' and the complainant as 'she'. I do so for the sake of brevity and convenience only. There are of course some women occasionally charged with sexual crimes, and many males who are complainants in sexual assault proceedings.

4. The opinions expressed in the paper are, unless otherwise stated, my own views and are not put forward on behalf of the Public Defenders generally.

Preparation

5. As with all cross-examination, preparation is paramount. The brief can not be read too many times. Subpoenas are always important in these types of proceedings, but to whom they are directed will obviously vary greatly from case to case.

6. With child complainants, where their evidence in chief is known word for word before given, there is no reason why the cross-examination can not be entirely prepared in advance. I would suggest always asking the Crown whether they propose to ask the child complainant anything further after the tape(s) is / are played. Some will get annoyed at being asked this, but you are entitled to know of any additional evidence to be adduced. Conference notes will sometimes be provided – if not, you'll need to have set out for you the additional evidence to be raised.

7. I always watch the entirety of the JIRT tape(s) to be played. This has to be done for the same reason as the video recording of an accused person's ERISP – to check accuracy and completeness. But even if it is the case that the advocate is fortunate enough to have someone else available to whom this checking can be delegated, I encourage it being attended to by the advocate. A huge amount of information is available from such preparation. The child may appear to be fidgety, evasive, distraught, traumatised, hesitant, laughing flippantly or frightened in a way that the transcript does not reveal. What the complainant is actually like and how he or she will be likely to be viewed by the jury is crucial. It may be that there are actual occurrences during the course of the interview the advocate actually wishes to cross-examine upon – such as body or hand motions or other demonstrations while explaining alleged misconduct. But even in a more subtle way it may be the case that the 'mood' of the cross-examination is influenced by the impression of the witness' personality and / or treatment of the allegations.

8. Some advance consideration of the characteristics of the complainant – beyond that which appears on paper in the Crown brief – will further be of assistance if any s.41 issues need to be addressed, as s.41(2) specifically directs attention to consideration of the witness' personality.

9. Complaint is an important area for detailed prior consideration. It is useful to prepare a chronology of what the complainant has said on material matters from time to time, dealing with all representations out of court the advocate is (or can by subpoenas come to be) aware of. A chronology can be of assistance in gleaning motivations the complainant may have had to make a prior false account later locked into. Significant inconsistencies can arise. The importance of an inconsistency is something which needs to be carefully assessed – nothing looks worse than cross-examination upon inconsistencies which truly are peripheral, or understandable. A chronology is also important in working out what the Crown may be entitled to adduce pursuant to s.108 if certain paths are taken in cross-examination. The definitions of 'prior consistent statement', 'prior inconsistent statement', 'previous representation' and 'representation' need to be remembered in considering whether cross-examination (or indeed evidence in chief which is not objected to) opens up an alleged prior inconsistent statement. Such can be made out by conduct such as accompanying the accused alone when there were other options, or sending him a letter in amicable terms, thereby allowing the Crown to seek leave to adduce evidence of a consistent statement made prior to such conduct, which would not otherwise be admissible pursuant to s.66: see **R v Selsby [2004] NSWCCA 381** and **KNP v R [2006] NSWCCA 213**.

10. There will be some change of approach now that section 66 of the *Evidence Act* has been amended. I have not conducted a sexual assault trial since the amendment commenced, on the 1st of January this year. The section provides an exception to the hearsay rule in criminal proceedings where the maker of the representation (that is, the complainant) is available to give evidence about the asserted fact (the alleged sexual assaults). In such circumstances the hearsay rule does not apply if, when the representation was made (s/he complained to someone), the occurrence of the asserted fact (the alleged sexual assault(s)) was fresh in his or her memory. From 1 January 2009 there is operative a new sub-section 2A, inserted as a response to the decision of the High Court in **Graham v The Queen (1998) 195 CLR 606** (all judgments focussing on time elapsed, three justices of five finding temporal consideration central, usually measured in hours or days not months or years).

11. The section now provides that in determining 'freshness' of the memory the court may take into account all matters it considers relevant, not just the temporal relationship between the occurrence and the representation. Specifically included are the nature of the event concerned, the age and health of the person, and the period of time. These amendments have particular significance in sexual assault proceedings.

12. Even looking only at time, there is pre-amendment authority to the effect that where complaint was made recently after an incident in an ongoing course of alleged conduct (other incidents occurring in which were not hours or days prior to the complaint), the complaint regarding the whole course of conduct was admissible: see **R v Le [2000] NSWCCA 49** at [51] – [52] (case where earliest event in the course of conduct about six months prior to complaint, said to come within acknowledgment in judgment of Gaudron, Gummow and Hayne JJ in **Graham** that s.66 might well raise *"questions of fact and degree*').

13. An additional dynamic may more frequently enter sexual assault trials (and so have to be taken into account in preparing cross-examination of the complainant) because of the recent changes to the admissibility of opinion evidence. A new section 79 (2) has been inserted into the *Evidence Act* to make clear that the exception covers expert opinion evidence of persons with specialised knowledge of child development and behaviour (including specialised knowledge of the impact of sexual abuse on children and of their behaviour during and following abuse). It includes evidence in relation to the development and behaviour of children generally and the development and behaviour of children who have been the victims of sexual offences, or offences similar to sexual offences.

14. There should where possible be cross-examination to support any claim of forensic disadvantage due to delay. The new section 165B of the *Evidence Act* regulates warnings that are given to juries in criminal proceedings concerning delay and forensic disadvantage to the accused. Section 165B (2) provides that, if the court, on application by a party, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence. The mere passage of time is not to be regarded as a significant forensic disadvantage (section 165B (6)) and the judge need not take this action if there are good reasons for not doing so (section 165B (3)). The section is intended to make it clear that (contrary to the

requirement at common law in cases decided since **Longman v The Queen (1989) 168 CLR 79**) information about forensic disadvantage need only be given if a party applies for it, and should only be given where there is an identifiable risk of prejudice to the accused. Such prejudice should not be assumed to exist merely because of the passage of time.

15. Apart from lost records, witnesses, faded memory on the part of the accused, unfairly wide time spans and so on, part of the difficulty with delay is the more subtle problem of the vagueness of a complainant's account, and the natural tendency on the part of a jury to explain away her inability to be particular as a sign of confusion resulting only from an understandable failure of recollection as distinct from error as to the fundamental fact itself: see for example **DBG [2002] NSWCCA 328; (2002) 133 A Crim R 227** per Howie J at [37] – [38]; **RLT** at [102] per Adams J. Cross-examination may highlight this problem in an appropriate case, and supplement any demonstrated forensic disadvantage otherwise founding application for warning.

16. Great care is needed not to open up - by cross-examination on matters such as apparent lack of surprise, or delay in complaint - uncharged allegations which by ruling or agreement were not led by the Crown in chief.

17. Prior sexual experience of the complainant is something which needs to be carefully considered prior to the trial, and any argument pursuant to s.293 of the *Criminal Procedure Act* raised before the cross-examination commences. I have on one occasion deliberately left this until mid way through cross-examination, so that the complainant was not informed of the important area in relation to which I expected leave would be given. If a deliberate decision to delay the application is made, it nonetheless of course needs to be seriously thought through before cross-examination commences.

18. Where an exception arises the tailpiece to s.293 – the requirement that the probative value of the evidence outweighs any distress, humiliation or embarrassment that the complainant might suffer as a result of its admission – is related to and additional to the limitations on improper questioning dealt with below.

Improper / Disallowable Questions

19. Effective from 1 January 2009 s.41 of the *Evidence Act* provides as follows:

41 Improper questions

> (1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a "disallowable question"):

(a) is misleading or confusing, or
(b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
(c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
(d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

> (2)Without limiting the matters the court may take into account for the purposes of subsection (1), it is to take into account:
>
> (a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality, and
> (b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject, and
> (c) the context in which the question is put, including:

(i) the nature of the proceeding, and
(ii) in a criminal proceeding—the nature of the offence to which the proceeding relates, and
(iii) the relationship (if any) between the witness and any other party to the proceeding.

> (3) A question is not a disallowable question merely because:

(a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness, or
(b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.

> (4) A party may object to a question put to a witness on the ground that it is a disallowable question.
> (5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.
> (6) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.

20. Its form prior to amendment did not involve a mandatory requirement of the judge. The term 'confusing' was added to (1)(a), 'humiliating' added to (1)(b), the term 'disallowable question' was introduced, and sub-sections 1(c) and (d) were added. Subsections (3) to (6) are new, and a greater range of matters to be taken into account has been added. The previous form of the section, however, would not have applied to the cross-examination of complainants in sexual assault proceedings after 12 August 2005, as from that date the section's operation in criminal proceedings was excluded by virtue of s.275A of the *Criminal Procedure Act*. That section, operational since 12 August 2005, was in terms virtually identical to the new s.41, as set out above. It was in fact used as the model for the amendments to section 41.

21. Like s.41 section 275A related to criminal proceedings generally – not only sexual assault proceedings. The purpose in introducing the restrictions however, was clearly with sexual assault proceedings in mind. The Attorney General, in his Second Reading Speech introducing the *Criminal Procedure Further Amendment (Evidence) Bill* said that the bill

> " ..amends the Criminal Procedure Act 1986 to expand the protections that the Act provides to sexual assault complainants, thereby ensuring the complainants are accorded a measure of privacy and respect and are able to give the best evidence they can, and that the court process does not revictimise these courageous people. The bill is part of the Government's ongoing process of legal reform in sexual assault prosecutions….
> .. the Government is committed to improving the criminal justice system's response to sexual assault crimes, and is committed to doing this without sacrificing any of the principles, such as the right to a fair trial, that we as a society hold dear." The Hon Bob Debus, MP, *Hansard*, Legislative Assembly, 23 March 2005

22. The difficulty of sexual proceedings was referred to, particularly because the evidence must include precise and explicit details of sexual acts and of intimate sexual violence, and may include personal and derogatory remarks: "It is embarrassing and humiliating evidence to give." Further amendments, part of the same package of reform, included the prevention of circulation and unauthorised copying of sensitive evidence, extension of entitlements to have part of the proceedings held in camera, for the complainant to have a support person nearby, and further alternate means of giving evidence. The Attorney General indicated that the application of s.41 prior thereto had been inconsistent, continuing:

> " The amendment in relation to improper questions sets a new standard for the cross-examination of witnesses in criminal proceedings, including by referring, for the first time, to the manner or tone in which a question is asked. It is an important amendment because improper questions asked of them in cross-examination are one of the most distressing aspects of the court process for sexual assault complainants."

23. Around the tenth anniversary of the commencement of the NSW and Commonwealth acts, the Australian, NSW and Victorian Law Reform Commissions were given a joint reference to review the acts' operation. The previously operative s.41 was found in the report by the Australian Law reform Commission, New South Wales Law Reform Commission and the Victorian Law Reform Commission, in their enquiry into the operation of the uniform acts, to be inadequately approached in practice to protect vulnerable witnesses ALRC *Uniform Evidence Law* Report 102 at 5.111; and see for example reference to same in the Second Reading Speech of the Commonwealth Attorney-General, the Hon Robert McClelland MP, 28 may 2008, p.3463. There was a framework of judicial caution in intervening

in cross-examination being conducted on behalf of an accused person in the absence of objection from the prosecution.

24. Apart from s.293 of the *Criminal Procedure Act*, referred to above, further legislative provisions of potential relevance in relation to the questioning at trial of sexual assault complainants include section 26 (enabling court to control the manner and form of questioning witnesses), 29 and 42 (power to direct manner of giving evidence, allowing narrative, controlling leading questions) and 135 (which allows the court to exclude evidence that is misleading or confusing) of the *Evidence Act*). In Commonwealth matters the *Crimes Act* 1914 provides for the protection of children in proceedings for sexual offences, as set out in Part 1AD. There is a section within such part which specifies that a judge may disallow questioning which is inappropriate or unnecessarily aggressive, having regard to eth witness' personal characteristics including age, culture, mental capacity and gender: s.15YE.

25. As discussed below, the common law provides restrictions on the scope of proper cross-examination which in many ways is reflected in the type of questioning prohibited by s.41.

26. Since May 2008 there has additionally been Rule 35A of the Barristers' Rules. Rule 35, to which it relates is (and was prior to May 2008) in the following terms:

> " A barrister must, when exercising the forensic judgments called for throughout the case, take care to ensure that decisions by the barrister or on the barrister's advice to invoke the coercive powers of a court or to make allegations or suggestions under privilege against any person:

(a) are reasonably justified by the material already available to the barrister;
(b) are appropriate for the robust advancement of the client's case on its merits;
(c) are not made principally in order to harass or embarrass the person; and
(d) are not made principally in order to gain some collateral advantage for the client or the barrister or the instructing solicitor out of court."

27. Rule 35A provides as follows:

> " Without limiting the generality of Rule 35, in proceedings in which an allegation of sexual assault is made and in which the person who is alleged to have been assaulted gives evidence:

(a) A barrister must not ask that witness a question or pursue a line of questioning of that witness which is intended:
(i) to mislead or confuse the witness; or
(ii) to be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive.

> (b) A barrister must take into account any particular vulnerability of the witness in the manner and tone of the questions he or she asks."

28. Rule 35B mirrors the protections contained within s41(3) of the *Evidence Act* (as contained in s.275A of the *Criminal Procedure Act* before that), in that it clarifies that a barrister will not infringe Rule 35A merely because the question or questioning challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness; or the question or questioning requires the witness to give evidence that the witness could consider to be offensive, distasteful or private.

29. The amendments were made in May 2008 after opposition to changes initially proposed.

30. Other parts of the rules relevant to the current discussion include:

· Advocacy rules 16 – 17B regarding the duty to the client, including the requirement in rule 16 that the advocate must seek to advance and protect the client's interests to the best of the barrister's skill and diligence, and uninfluenced by the barrister's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the barrister or any other person, and always in accordance with the law and these rules;

· Advocacy rule 18, which requires that counsel not act as the mouthpiece of the client or solicitor, but 'must exercise the forensic judgements called for during the case independently' after appropriately

considering those others' wishes. Rule 19 clarifies that such independent forensic judgment can be exercised by choosing to confine the hearing to the real issues and presenting the client's case as quickly and simply as may be consistent with its robust advancement;

· Rules 35, 35A and 35B comes in the part of the advocacy rules dealing with responsible use of court process and privilege. Rule 38 appears in the same part, and provides that a barrister must not make a suggestion in cross-examination on credit unless the barrister believes on reasonable grounds that acceptance of the suggestion would diminish the witness's credibility;

· Under those of the advocacy rules relating to the efficient administration of justice, appears Rule 42. It provides that a barrister must ensure that the work s/he is briefed to do in relation to a case is done, inter alia, so a to limit the evidence (including cross-examination) to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case; and to occupy as short a time in court as reasonably necessary to advance and protect the client's interests which are at stake in the case;

· The cab rank principle is set out in rule 85;

· The preamble to the Rules states that the Rules are made in the belief, inter alia, that:
o the administration of justice in New South Wales is best served by reserving the practice of law to officers of the Supreme Court who owe their paramount duty to the administration of justice;
o as legal practitioners, barristers must maintain high standards of professional conduct;
o the role of barristers as specialist advocates in the administration of justice requires them to act honestly, fairly, skilfully, diligently and bravely;
o barristers owe duties to the courts, to other bodies and persons before whom they appear, to their clients, and to their barrister and solicitor colleagues;
o barristers should exercise their forensic judgements and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients;
o the provision of advocates for those who need legal representation is better secured if there is a Bar whose members must accept briefs to appear regardless of their personal prejudices and must not refuse briefs to appear except on proper professional grounds.

· The introduction and interpretations section confirms that the Rules do not purport to constitute a code for barristers' obligations; and that the Rules should be read and applied so as most effectively to attain the objects and uphold the values expressed in their Preamble.

Case Law

31. There is not a great deal of case law dealing specifically with section 41 or s.275A.

32. In **Gillies v DPP [2008] NSWCCA 339** there was no miscarriage of justice, in connection with the appellant's conviction of sexual assault of the complainant by use of a bottle, in the trial Judge disallowing questioning to establish that the prior sexual relationship between complainant and accused had included oral sex. The trial judge had purported to use s.41 of the Evidence Act. The Court noted that his Honour was mistaken in considering s 41 of the *Evidence Act*, its operation in criminal proceedings being excluded by s 275A(7) of the *Criminal Procedure Act*. The court continued as follows, at [65] – [66]:

> " However, s 275A itself applied and made it mandatory for the court to disallow a question put in cross-examination or direct a witness that it need not be answered if of the opinion that the question is, inter alia, unduly annoying, harassing, intimidating, offensive, humiliating or repetitive: s 275A(1)(b). The basis for disallowance relied upon is found in both provisions. His Honour was of the opinion that the question was "offensive" and for that reason disallowed it. He did not use the word "unduly" but his use of the word "offensive", which occurs in s 41, suggests he was relying upon the power given by that section to disallow the question. If so, it can be inferred that he found the question offensive to the degree required by that section, namely "unduly offensive".
>
> However, the appellant's case relied on alleged prior sexual intercourse involving a bottle and other implements. Even if oral intercourse may have been relevant to some other count, there was no miscarriage of justice vis a vis the conviction under appeal. The jury

> could not have reasoned that because on an earlier occasion the complainant may have consented to oral sexual intercourse, she now consented to the appellant using a bottle or that he may have thought she was consenting to such activity. The difference between the two acts was just too great to allow for such reasoning."

33. I would note that on such basis the tailpiece to s.293 of the *Criminal Procedure Act* would also have required exclusion.

34. In **R v TA [2003] NSWCCA 191; (2003) 57 NSWLR 444; 139 A Crim R 30** the Crown case was based upon a video recording of the relevant sexual activity, in circumstances where the complainant had no recollection of the relevant events. Drugs had been administered to her. On appeal it was argued that defence counsel should have been entitled to cross-examine her about whether it appeared from her filmed conduct that she was consenting. The Court of Criminal Appeal (Adams J with whom Spigelman CJ and Dowd J agreed) disagreed with such contention, as the line of questioning would have sought irrelevant opinion evidence. Adams J also indicated that the evidence would have been unfair and oppressive to the complainant. In additional remarks Spigelman CJ (with whom Dowd J agreed) observed at [12] that even if the proposed questioning had any relevance (which he did not agree that it did), "..its probative force was so slight that even a small element of harassment, offence or oppression, would be enough for the court to exercise its discretion under s.41 (1)(b)". Far from a small element of harassment, the exercise sought was found to be highly distressing for the complainant.

35. Much of that which the legislation prohibits is cross-examination which is improper and impermissible at common law. There are additional types of improper questions prohibited at common law, not specifically set out in s.41. The High Court has recently dealt extensively with the ambit of proper cross-examination in **Libke v The Queen [2007] HCA 30; (2007) 230 CLR 559; (2007) 235 ALR 517**. This case concerned the 'wild, uncontrolled and offensive' conduct of a Crown Prosecutor, who has additional well known obligations of fairness in the conduct of a trial. However the judgment of Heydon J in particular provides a very useful summary of the common law restrictions regarding improper cross-examination.

36. Some of the impermissible lines of questioning his Honour describes are inclusion of editorial comments or expression of personal views, compound questions, cutting off answers before they are completed, questions resting on controversial assumptions, and argumentative questions. Many examples were provided too as to an improper manner of cross-examination. The cases cited in paragraph [123] of his Honour's judgment make interesting reading, and re-iterate the relevant principles. They are however generally concerned with conduct of Crown Prosecutors **Robinson**, **Bouhsass**, **Randall**, and **R(AJ)** involved the conduct of the Crown Prosecutor in criminal proceedings. **Mechanical & General Inventions** was a civil case. **Rubin** related to the conduct of a defence attorney charged with contempt of court for his interchange with the judge in quasi-criminal proceedings, and **T** related to the cross-examination of defence counsel in a criminal trial – I make further reference to it below..

37. I note that in proposing the initial s.41 the Australian Law reform Commission referred to questions which assume the existence of disputed facts which the witness has not admitted as an example of misleading or oppressive questioning *Evidence (Interim)*, ALRC Report 26, 1985, vol 1 at [631]..

38. It is improper to ask a witness whether another is lying, or to explain why the witness has provided the testimony he has. It is not however improper to ask a witness whether another witness' evidence is correct: **Gonzales v The Queen (2007) 178 A Crim R 232; [2007] NSWCCA 321** at [147], [151]. In that case the questions were asked of an accused person by a Crown Prosecutor, and included questioning whether certain other witnesses were 'wrong', had 'got it wrong', or that records 'are either wrong or incomplete'; even concluding such line with "Mr Gonzales, all of these sheer coincidences, and of that evidence which is either wrong or incomplete, or misleading, do you think that you are a very unlucky man.": [144]. The line is crossed when a witness is asked to express an opinion as to whether another is telling the truth, or to suggest a reason to explain the variance in their account – in other words, where the witness is required to enter another's mind.

Questions which are misleading or confusing; or unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive

39. A number of authors have suggested that the word 'unduly' attaches to each of the adjectives in s.41(1)(b) His Honour Judge CE O'Connor QC 'Section 275A of the Criminal Procedure Act

1986' (found in Judicial Commission Sexual Assault Handbook) at [35]; S Odgers *Uniform Evidence Law* eighth edition at 132-3; Terese Henning 'Control of Cross-Examination – A Snowflake's Chance in Hell?' (2006) Crim LJ 133 at 134, 136.

40. Because of the limited case law which is of direct practical assistance to criminal practitioners involved in sexual assault proceedings, I have turned to some of the non-legal literature for examples of questioning to be assessed for compliance with s.41 and other factors which should mould appropriate cross-examination. In doing so, I must emphasise that it is an impossible area to give a list of questions or lines thereof which are in or out. Everything depends entirely on the particular brief, and the particular complainant.

41. I see there being little utility in trying to deal with each adjective in the section individually. Dictionary definitions can be looked up by the practitioner as needed. I will deal separately below with stereotypes, and with problematic manner of cross-examination (although there is a large degree of overlap).

42. Child sex cases pose special considerations, and I propose to the extent practicable to deal separately with child and adult complainants.

Children

43. As a result of the recommendation of the NSW Legislative Council's Standing Committee on Law and Justice 2002 *Report on Child Sexual Assault Prosecutions* a specialist jurisdiction was established on a trial basis on 24 March 2003 in the Sydney West District Court Registry. Cashmore and Trimboli have studied the perceptions of 277 jurors sitting on 25 trials heard during the trial operation – 14 within one of the specialist courts, and 11 at the comparison registry (Sydney District Court) between May 2004 and December 2005 Judy Cashmore and Lily Trimboli 'Child Sexual assault trials: A survey of juror perceptions' *Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research, Number 102 (September 2006) (available through Sexual Assault bench book on Judicial Commission website). The study was conducted by means of a short, structured questionnaire completed by jurors at the end of the trial.

44. The majority of jurors perceived that the child complainants in the trials understood the questions asked of them by both the prosecution and defence lawyers pages 6 – 7 , although there was a perception that the questions asked by defence lawyers were less well understood, with twice as many jurors believing that the child had difficulty with the questions asked by defence lawyers. It should be remembered, however, that the scope of the Crown Prosecutor's questioning of such a witness, with a pre-recorded interview, is extremely limited. Only 15 individual jurors commented that defence lawyers asked age appropriate questions. In response to questioning about how fairly the prosecutors and defence lawyers treated the witness, 35 jurors from 60% of the trials (15) made specific comments about the inappropriate nature of questions asked by defence lawyers, which were referred to as being ambiguous, repetitive, confusing (including intentionally so) and too difficult for the child's age or mental ability p. 7, 10-11. Defence counsel were described as 'aggressive', 'rude', 'gruff' and 'intimidating' towards the child, or as unfair because they badgered or upset the child or accused the child of lying p.11. I will come back to the ramifications of accusing a child of lying..

45. Only 1.5% described the complainant as having been treated 'very unfairly' by defence counsel, 11.4% 'quite unfairly', 53.1% 'quite fairly' and 33.9% 'very fairly'. Table 9, p.10 Interestingly, about half the jurors indicated that the complainants were less stressed than they expected them to be. p.8 Those who made positive comments about defence counsel referred to their behaviour as appropriate, and to the fact that they were doing their job, asking the difficult questions firmly but not unfairly.

46. There was a very strong link demonstrated between the jurors' perception of the child's consistency and the evaluation of credibility p.9. Unlike previous research, there was no demonstrated significant difference between male and female jurors in their perceptions of the child's confidence, consistency or credibility p.13. The authors set out literature which, contrary to jurors' perceptions regarding consistency, is said to have found that details surrounding true accounts can tend to be inconsistent, and that inconsistencies do not indicate the claims to be false p.14. The report offers the criticism that "There is, however, a widespread belief among legal professionals, and among potential and actual jurors, that consistency is an important indicator of accuracy or reliability. This underlines defence strategies to discredit the credibility of witnesses by highlighting both the inconsistencies in their

testimony and their inability to remember particular details of events that may have occurred some years before and been repeated over long periods of time." p.14, citations omitted

47. Along with consistency, perceived confidence level was said to have been regularly found to impact upon juror assessment of witness credibility, and was born out again in this study p.14. In an article examining the trend towards decreased faith in the ability of demeanour (particularly as revealed during cross-examination) to convey credibility, the Chief Judge at Common Law has commented upon the perhaps 'fallacious' traditional treatment of witness confidence as a measure of honesty, whereas "Modern research indicates that confident or powerful patterns of speech are more readily employed by the most powerful group within society – professional white men – regardless of the accuracy of their testimony. By contrast, 'Aboriginal speech habits involve silences, indirect answers and negative answers which might wrongly be understood as evasion, confusion or guilt.' When others are able to emulate a confident and powerful style of communication, they are regarded as less credible because they are not conforming to their stereotypes." The Honourable Justice Peter McClellan, CJ at CL, Supreme Court of NSW 'Who is telling the truth? Psychology, common sense and the law' *Judicial Officers' Bulletin* Volume 19 Number 1 (February 2007) at 2, endnotes omitted

48. In another article by Dr Cashmore she reports on the number of relatively minor changes able to provide an equal playing field for child witnesses which do not disturb the rights of the accused to a fair trial. These include minimising delay, having more appropriate means for testing competence, ensuring the use of appropriate measures such as pre-recorded interviews, closed-circuit television and support persons, remembering to explain to the child what is happening (for example when the link to the courtroom via CCTV is about to be broken for legal argument), and providing appropriate breaks. J Cashmore, 'Child Witnesses: The Judicial Role' (2007) 8(2) *Judicial Review* 281, available in the Sexual Assault bench book on Judicial Commission website. At pages 6 – 10 of such publication.

49. I note that the problem with delays in sexual assault matters generally has been addressed by means such as more strict supervision by the courts of the listing and progress of sexual assault trials. Each District Court registry maintains a separate sexual assault case list in accordance with District Court Criminal Practice Note 6. Sexual assault trials are to be listed within four to six months of committal, accorded priority and managed so as to lessen the anxiety experienced by the complainant. District Court Criminal Practice Note 5 requires that, where possible, prior to the trial date, issues concerning video and CCTV evidence are resolved.

50. The Equality Before the Law Bench Book produced by the Judicial Commission has a section in relation to children. At 6.3.4 (p.6306) it is said that

> " Procedural justice and the integrity of the court process demand that all witnesses understand what is going on, and the meaning of any questions they are asked. They also need to know that their evidence and replies to questions need to be understood by the court.
>
> It is the obligation of the questioner to frame questions so that they can be understood and answered by the child or young person giving evidence."

51. Suggestions are offered (at 6.3.4, p.6307) regarding the language used by the questioner. Examples include avoiding words and phrases which beg agreement, such as "It's true, isn't it?" or "Is that not true?". It is recommended that jargon should be avoided such as "I put it to you that …", as children may not even recognise that this is a question, and may be non-responsive. Short sentences are recommended, and words and phrases the child is likely to have learned first in time. Double negatives should be avoided: instead of "Didn't he tell you not to do this?" the child would be better asked "Did he tell you not to do this?" Active, not passive, speech is encouraged: subject, verb and then object; not object, verb then subject. For example an appropriate question would be "The dog bit you?" rather than "You were bitten by the dog."

52. A table with suggested 'ground rules' for cross-examination of children and young people which complies appears at pages 6309-10. In summary, these suggest that the cross-examination must:

· Be developmentally appropriate,
· Use simple and direct language without 'talking down' to the child or young person,
· Be conducted patiently and without interruption, allowing some flexibility about the admissibility of evidence,
· Not be intimidating,
· Not be repetitive,
· Be respectful and understanding of the developmental and social constrains that might have affected

a child or young person's actions or lack of them, and
· Be as brief as possible.

53. Authors Davies and Seymour examined transcripts of 12 pre trial interviews and 26 transcripts of examination in chief and cross-examination of child complainants in 16 child sexual abuse trials held in Auckland (District Court and High Court) in 1994 Emma Davies and Fred W. Seymour 'Questioning Child Complainants of Sexual Abuse: Analysis of Criminal Court Transcripts in New Zealand' (1998) 5 (1) *Psychiatry, Psychology and Law* 47.. As a result they suggested lawyers questioning children should adapt their vocabulary and eliminate questions involving negatives, multifaceted questions, questions with no grammatical or semantic connections, and questions in the passive tense 48, 54, 59.

54. Dr Judy Cashmore has reported that the recent evaluation of the pilot specialist child sexual assault jurisdiction in Sydney found that most children had difficulty with the questions they were asked and did not feel that they had the chance to say what they wanted to say or tell what happened in a coherent story J 'Child Witnesses: The Judicial Role' n. 17. I deal below somewhat critically with the problem of children not feeling they have their say. However it is vital that they understand the questions.

55. Related to this is the question of whether children (or in fact, witnesses generally) are entitled to understand *why* a question is being asked. In my view they are usually not – at least not in any way which should have an impact on cross-examination.

56. The Davies and Seymour article referred to above, dealing with the New Zealand transcripts, refers to research literature which is said to suggest that children's memory is best facilitated by logically ordered prompts. By way of contrast, they refer to cross-examination textbooks which 'advocate that lawyers should try to confuse witnesses by asking questions out of sequence Davies and Seymour, p.57. One 1994 source quoted, said to be specifically referable to cross-examining children, said the following

> " The cross-examiner can confuse the witness by quickly asking questions out of sequence, employing the 'skip-round technique' discussed in another part of this book… (pp 168)
>
> Eichelbaum (1989) also advocates use of this technique: 'Successful cross-examinations are usually based on indirection – the ability to establish points without the witness perceiving the purpose or becoming aware of the point until it has already been established. Varying the order of your topics will make it less likely that the witness will realise the purpose of a given line of questions.(pp203)"

57. An example was provided as to the employment of this technique by defence counsel in one of the trial transcripts reviewed:

> " When you talk about your other mum is her name C?...Yes
> Do you mind if I call her C?....No
> What do you want me to call her? …C
> When you say J touched you that time on the bottom whereabouts were you on the couch were you on the floor or what? …Standing up"

58. The last question was worded badly, and was a compound question. However the article's criticism was the lack of logical connection between that question and those preceding: "The last line of this excerpt has no relationship to the preceding questions in the transcript. It evokes a very different emotional response in the child. So, as pointed out by Brennan (1988), it is not just the lack of logically ordered prompts but also the placing of unrelated topics alongside each other that have unequal emotional significance to the child. Davies and Seymour. p.58"

59. I can not see any likelihood of cross-examination along such lines being objected to (on this basis), far less not allowed. It is hard to know what the intent of the author of the textbook on cross-examination was without having regard to the full context. Asking a child questions in a way to deliberately disorient him or her and bring about cognitive impairment is not permissible. However asking questions in an order in which the witness does not understand the examiner's agenda is not illegitimate. It can not be known without more whether this is what the New Zealand advocate was actually doing, so it is not a particularly good example.

60. It is a crucial part of cross-examination to ask questions in the right order See article 'Cross

Examination' by John Stratton SC, Deputy Senior Public Defender 1.8.07, available on the Public Defenders' website. It commences "Cross-examination is the art of asking simple questions in the right order". Many witnesses come to court with biases of one sort or another, and their own reasons for consciously or subconsciously distorting aspects of their evidence. The main thrust of legitimate cross-examination is to collect pieces of information which will be able to be pieced together in a way which favours the advocate's case. Coming straight out and asking a significant question, the point of which is obvious, allows the witness an opportunity to slant his or her evidence. Asking questions in a way and at a time in cross-examination which disenables the witness from understanding the point sought to be made is, far from being an inappropriate trick, a tool used to elicit answers which are more objective. There is no suggestion in the excerpt provided that the answer about the accused standing up was in any way unreliable, or in any event not what the child intended at that time to say. It is not as though the series of questions which preceded it could readily account for that answer being provided as compared to another.

61. A related technique said by Seymour and Davies to be used in cross-examination was to confuse child witnesses and undermine their credibility by asking about peripheral events. The requirement that evidence needs to be relevant is enough to show the impropriety of such a course, if indeed it is undertaken. The only indication of what the authors mean by 'peripheral events' is that children may have difficulty with things the child perceives to be irrelevant and uninteresting; and that peripheral events focused on by defence counsel to confuse can include questions on dates, sequence, specific locations or times of events p.57. An example from a trial transcript was chosen, as follows:

> " Do you know the name of the street in T where he is living? ..*No*
> Is he living in a place in T with a conservatory in it?...*Yes*
> Do you know what a conservatory is? … *Yes*
> Before that was he living in another house with Grandma? … *Yes*
> Was that a little brick house with a small garden? … *Yes*
> Did anything happen at that house to you? … *No um I can't remember*.
> Before that was Grandad living with Grandma in a house with big lawns do you remember that place? … *No*
> So how many houses do you remember Grandad and Grandma living in? … *3 plus the one they are living in now*.
> So the one they live in now is X? … *Yes, I think so*.
> This is the house with the conservatory? … *Yes.*
> And before that they lived in a small brick house with a little garden? … *Yes*
> And can you remember anything about the house they lived in before that can you tell us what it was like? … *I am not sure what house it was. I can't remember*."

62. The authors refer to research which suggests that children getting peripheral details of each event mixed up does not mean that 'abuse did not occur', such that children who have suffered long term abuse are perhaps most likely to make mistakes on such peripheral details as their experience will not fit neatly into discrete specific events.

63. The extract quoted seems to be flawless in terms of its unlikelihood of distressing the complainant. If the child thinks such questions are irrelevant, and stress is so caused, this is the job of prosecution lawyers and witness support officers to debrief on or otherwise deal with – it is not the type of stress which the witness has a legitimate sense of grievance about in the court setting, such as when defence counsel's questions are actually oppressive. On its face, the questions asked were questions of a type which are often crucial to defending particular charges.

64. Children are particularly vulnerable to oppressive or intimidating questioning. Dr Cashmore in her article 'Child Witnesses: The Judicial Role' quotes from a 1996 article entitled 'Linguistic, social and emotional influences on the accuracy of children's reports' by Carter, Bottoms and Levine, in which the conclusion is reached that:

> " ..attorneys are skilled at discrediting child witnesses in the courtroom by using conversational strategies that intimidate them into silence, contradictions, or general emotional and cognitive disorganization.".

65. She continues: "Indeed, the various strategies that lawyers use to cross-examine children are often stress-inducing, developmentally inappropriate, suggestive and 'evidentially unsafe'. They are, however, widely used and generally accepted to lawyers and judicial officers as an integral part of the adversarial process." J Cashmore op cit n.17, page 4 The same source is referred to, and point made, in the Equality before the Law Bench Book 6.3.5, p.6308. Dr Cashmore was a member of the Judicial

Commission, and the Equality before the Law Bench Book Advisory Committee at the time the Bench Book was published.

66. Independently of the obligations imposed by the statutory regime, I am of the view that it is not good advocacy to ever intimidate a child witness into silence or contradictions. Similarly, any display of emotional and cognitive disorganisation on the child's part apparently arising from the questioning, as opposed to flaws in the testimony does nothing to advance the client's case. Unless it is a part of the defence case that the child is highly suggestible and that this how the criminal allegations came about (put into his or her head by a vindictive parent, for example) there is no need to engage in questioning which results in answers which are apparently not truly meant by the child. Concessions made by a child which might appear to the jury to be simply the result of confusion and bullying would carry little weight.

67. I put into a different category distress which may be caused to a child by having his or her account challenged. The Equality Before the Law Bench Book suggests that being disbelieved is generally seen by children and young persons as the hardest aspect of the criminal process: "Children and young people find it very difficult to have their motives misconstrued and to be accused of lying. 6.3.5 (at 6308 ff.)" Commenting on s.275A of the *Criminal Procedure Act* shortly after it was introduced, Dr Cashmore noted that "Inappropriate questions include those that are misleading or confusing, unduly annoying, intimidating or harassing and asked in a manner or tone way (sic.) that is belittling, insulting or otherwise inappropriate." An endnote to the sentence refers to the mandatory nature of s.275A and an article by Mr Lloyd Babb; but an endnote corresponding with the term 'intimidating' is as follows:

> " While the defence clearly needs to be able to challenge the veracity of a witness's account of events, it is worthwhile noting that repeated accusations of lying can be very stressful for children and their level of distress can interfere with their capacity to respond to the questions. In the words of one child in the child sexual assault specialist jurisdiction evaluation: 'He called me a liar. He made me really angry because he's an adult and he did not have respect.' (11-year-old-complainant.)." Primary text at p5, end note 22 appearing page 13

68. The aggravation of harm in child sexual assault proceedings has also been reported as occurring because of children being at a crucial stage of their cognitive, emotional and psychological development See for example C Eastwood, S Kift, and R Grace, 'Attrition in child sexual assault cases: Why Lord Chief Justice Hale got it wrong' (2006) 16(2) *Journal of Judicial Administration* 81 (available in Sexual Assault Bench Book on Judicial Commission website) at 83.. We are getting here to issues raising sociological concerns which are potentially incompatible with the criminal justice system and the rule of law. Further detail appears from other studies. In an article by C Eastwood C Eastwood 'Child Sexual Abuse and the Criminal Justice System: What Educators Need to Know' (2003) 8(1) *Australia and New Zealand Journal of Law and Education* 109 (available in Sexual Assault Bench Book on Judicial Commission website) at 109, referring to a 2000 article by Ghetti and others, reference is made to recent research said to indicate that courtroom experience continues to be a source of severe disturbance for child sexual assault victims up to 12 – 14 years afterwards, especially where the proceedings have resulted in an acquittal. There is later reference to another study which looked at the low incidence with which child complainants who have gone through the criminal justice system indicate they would report again knowing what is involved, and which indicated that the result of the trial was not determinative of this, with two thirds of child victims where a conviction resulted indicating that they would not report again id, p.111. The author was of the view that it was evident from research findings that the reasons children disclose sexual abuse include to stop the abuse, to prevent it happening to other children, and a desire for justice. Such children are often left damaged and disillusioned by the process of involvement in the criminal justice system.

69. The author turns then to the greater understanding of child psychology which has developed over the last twenty years, including the view that in situations of child sexual abuse the cornerstone in the child's psychological development after abuse, in a rehabilitative way, is being believed. After setting out they type of harm brought about by sexual abuse, and the established importance of validation in dealing with the same, the author suggests that:

> " Testing the child's evidence in the adversarial court environment effectively re-abuses the child through the expression of disbelief and by placing blame on the child. Combined with the effects of child sex abuse, the problems for a child complainant of sexual abuse in the criminal justice system are considerable." id, p.113

70. The study indicated that the three major causes of trauma to children in the court process are the

extended wait for committal and / or trial, seeing the accused in the court, and cross-examination id, p 114.. The most hurtful aspect of cross-examination was said to be the accusation of lying. She argued that

> " Despite recognition that the child is disadvantaged in the justice process (Australian Law Reform Commission & Human Rights and Equal Opportunity Commission, 1997), and implementation of many legislative reforms in Australian jurisdictions, it can be argued the courts remain the legally sanctioned contexts in which the child is further abused (Eastwood *et al*,, 2000)." id. P109

71. The terms of s.41(3) of the *Evidence Act* are an important safeguard for the interests of the accused and the continuation of the just operation of the rule of law.

Adults

72. Sexual assault trials have been recognised as unusually distressing for complainants because of the intimate nature of the alleged offence, the role of consent and its focus on the complainant's credibility, and the likely relationship between complainant and accused.

73. The 'Heroines of Fortitude' study *Heroines of Fortitude. The Experiences of Women in Court As Victims of Sexual Assault.. Gender Bias and the Law Project* Department for Women, 1996. The report was prepared by a team of Department for Women project officers. It can be accessed online at www.women.nsw.gov.au, under publications. reviewed all NSW District Court sound recorded sexual assault proceedings in the year between 1 May 1994 and 30 April 1995, where the complainant was an adult female. The broad aim of the study was to determine how complainants of sexual assault were treated in their role as witnesses in the criminal justice process. The study ended up examining 150 hearings: 39 sentence hearings following a guilty plea, and 111 trials (34 of which involved further proceedings on sentence, following a guilty verdict). Some factual information of interest includes that the average length of evidence in chief was 1 hour, cross-examination just over two hours, and re-examination six minutes. p.126 50% of accused persons gave dock statements.

74. I propose to make reasonably extensive reference to examples of lines of questioning considered in the report, to raise a discussion as to the room for any required improvement. Defence counsel are not named in the report, but it may be the case that some practitioners recognise cases they themselves were involved in back in 1994 and 1995. I repeat what I said earlier – without knowing a lot more about the matter than that which is revealed in a tiny excerpt of transcript, it is not possible to reach firm views about propriety of questioning. I hope that the discussion offers something to think about nonetheless.

75. Under the heading 'Intimidation, Humiliation and Improper Questioning' p156 it is contended that

> " In the trials examined in this research, complainants were intimidated and humiliated by questioning from Defence counsel.
>
> The research found that Defence counsel frequently appeared to be unnecessarily aggressive in cross-examination of the complainants resulting in complainants being needlessly humiliated in the process.".

76. Six examples are then given, although the last of these involved a question from the trial judge.

77. The first example, in part, was as follows:

> "Defence counsel: You asked if he would like some toast?
> Complainant: I did
> Defence counsel: And what he'd like on it?
> Complainant: I did.
> Defence counsel: Why?
> Complainant: I was in shock, I don't know why
> Defence counsel: Oh come on, you can do better than that!
> Complainant: I was in shock (screaming).
> Defence counsel: This is a man who'd raped you the night before you've told us

> Complainant: I was in shock.
> Defence counsel: Who had forced you to have non-consensual intercourse.
> Complainant: I was in shock.
> Defence counsel: Who'd stuck his fingers in your vagina without your permission?
> Complainant: I was in shock (crying).
> Defence counsel: And you're making him coffee and toast the next morning?
> Complainant: I was in shock.
> Defence counsel: You're going to stick to that are ya?
> Complainant: Yes I am (screaming).
> Defence counsel: Are my questions annoying you?
> Complainant: Yes they are."

Defence counsel then moved on to question the complainant about her failure to call out so loudly during the alleged attack, the transcript of such being set out in the report.

78. Example 2:

> "Defence counsel: You're not simple are you?
> Complainant: What do you mean by simple?
> Defence counsel: A simple person is one who's not very bright.
> Complainant: Are you trying to say I'm dumb are you? .. I ain't slow all right …. I aint slow (shouting and crying).

79.

The third instance criticises defence counsel for questions 'clearly designed to undermine the complainant and imply that she was 'play acting', in asking her whether she had done acting or drama classes at any time.

80. In the fourth example defence counsel took the complainant to a part of her police statement in which she had described seeing the accused's ejaculate on her inner thigh after the assault, referring to it as disgusting. She was questioned over objection as to what was disgusting about sperm, eventually ending up with the answer "Given the context of why I had (defendant's) sperm on my body I did indeed believe that sperm was disgusting on that night."

81. The fifth line of questioning criticised was as follows:

> "Defence counsel: And it was then that you pushed your pants and your underpants down …
> Complainant: No (screaming, crying)!
> Defence counsel: That's what you did, didn't you?
> Complainant: I did not do that. (crying) He forced himself upon me (screaming). I did not consent! No means No!
> Defence counsel: Been reading the newspapers have you?
> Complainant: No – it's common knowledge (crying)!

82. The finally criticised question was one emanating from the bench. The witness was asked a question by defence counsel which included the word 'adjacent', and indicated she did not know the meaning of that word. The Judge asked the complainant "Did you say you went to X university?", and to confirm that she there obtained a degree, before directing the cross-examiner to continue.

83. The report is highly critical of many of the themes of cross-examination we would all frequently see as having some legitimate forensic role in sexual assault proceedings. A broad definition of credibility is provided (relating in the report to both honesty and general reliability of account). In dealing with 'credibility', the following is said See executive summary at pages 7-8, dealt with more thoroughly in the chapter on credibility at 149ff., conclusion above set out at p.180:

> " Complainants in the study were discredited and attacked during cross-examination by questions and themes which are biased in their nature and relied on stereotyped views of appropriate behaviour of women complainants of sexual assault.
>
> Half the complainants (52%) in the study were accused of making false reports based on ulterior motives such as vengeance, applications in Family Court proceedings and

> excuses for adultery.
>
> One of the most common motives about which complainants were questioned related to applications for victims compensation with one third of complainants (32%) being questioned about this.
>
> In one half of trials (57%) the complainant was questioned about behaving in a sexually provocative way. One half of women (59%) were questioned about drinking on the day of the offence. 42% of complainants were asked about the way they were dressed at the time of the offence in cross-examination and 22% of women were cross-examined about their responsibility for the offence.
>
> Just under half of all complainants (43%) were asked about why they were in the location where contact with the accused was made. Almost all complainants were cross-examined about lying (82%). One third of complainants (37%) were cross-examined about their resistance to the sexual assault and over two thirds of complainants were questioned about lack of resistance to the sexual assault."

84. There is a table produced at page 151 which sets out the percentage of trials in which questions falling into these categories was asked, and the range of number of such questions.

85. The report is critical of it being suggested at all to complainants that their account was fabricated:

> " Given that historically the sexual assault complainant has been regarded as inherently untrustworthy and unreliable, it is no surprise that a common theme of cross-examination was that the complainant was lying or making the story up. A majority of the complainants (84%) were asked questions as to whether they were lying or making the story up, with the average number of questions of those complainants being seven." 169

86. This criticism and that referred to above to which it relates – that cross-examination about lying is based on stereotypes – are no more valid than a suggestion that the accused is only charged because of a stereotype that men sexually assault women. In simple terms, he is charged because she says he sexually assaulted her. It is put to her that her account is not right because he says he didn't rape her. The terms of s.41(3) need to be remembered again. Fortunately criticism of the above kind does not have a role in restricting legitimate cross-examination. There has apparently been a study undertaken of trials in Melbourne – comparing sexual assault with assault proceedings – demonstrating that topics of the kind referred to above (often criticised as being focused on unfairly in sexual matters) are equally represented in non-sexual assault trials See Talina Drabsch (NSW Parliamentary Library Research Service)'Cross-examination and Sexual Offence Complainants' Briefing Paper No 18/03, citing and extracting from D Brereton 'How different are rape trials? A comparison of the cross-examination of complainants in rape and assault trials' *British Journal of Criminology*, 37(2) Spring 1997, p.257. The table extracted shows similar levels of cross-examination concerning general drinking / drug taking habits of the complainant, complainant's drinking on day of offence, whether complainant had history of mental illness / emotional instability, criminal history of complainant, possible motives for making false report..

87. The Heroines of Fortitude report indicates that in 54% of cases the woman was cross-examined about a possible motive for making a false report, with an average of five questions about whether she had made a false report and her motives for doing so (with a maximum of 37 questions). In just over a third of cases the issue of delay in complaint was raised in conjunction with suggested motives. The lines of cross-examination touching upon motive for fabrication included gaining revenge on accused, feelings of guilt after consensual sex with the accused, legitimation of separation from her husband and gain Australian residency, evasion of money owed to accused, covering up adulterous behaviour, and in connection with Family Court proceedings.

88. Although it is never legitimate to ask a jury to adopt of course of reasoning commencing with an absence of known motive to lie and moving towards guilt, it is imperative to raise any plausible motive for fabrication which appears from the Crown brief or the advocate's instructions. An accused man says he did not sexually assault a woman, she says he did. It is obviously highly relevant to understand why she may be fabricating such an account (which his innocence would usually entail) if it can be gleaned. My own view is that a possible claim for Victims' Compensation, raised for no reason other than its availability to victims of crime, comes across as clutching at straws and is better for the accused not to be raised. There may however be some cases where it has more substance. I see nothing problematic, in an appropriate case, with any of the other examples of lines of cross-

examination provided. The report seems to be particularly critical of suggestions of fabrication and motives for the same being raised in cases where there is prompt complaint or some form of support for the complainant's account 151, 152. It may be that it is all the more important to explore any realistic motive for fabrication in the stronger Crown cases. It is difficult to see how such suggestions are more offensive or humiliating for the complainant in such trials. Further, an average of five questions regarding a possible motive for fabrication, in those cases where it was raised, seems unusually concise!

89. Examples from individual trials were provided in a way critical of defence counsel suggesting a motive for fabrication p.152. One alleged offence was committed by a tradesman who came to the complainant's residence, he being a stranger to her. She made immediate complaint. There were 19 questions asked about possible motives for fabrication, and "The Defence line was that she had fabricated this story to anger her de facto husband." In another it was suggested that her embarrassment at others watching the intercourse provided her with a motive. These examples are all set out in a way which assumes the truth of the allegation, and so makes these suggestions sound more offensive than if it is presumed that the accused did not in fact commit any offence. The report sets out critically examples where the attainment of Victims' Compensation was suggested as a possible motive Pages 153-5.

90. In relation to cross-examination as to sexually provocative conduct towards the accused, it is difficult to see the problem with the example provided or the figures as to how long was on average spent on this topic, when raised At p.160-161. Many critics of defence cross-examination use reference to this topic in a pejorative fashion, as though the tenor of the case sought to be put forward is that because the complainant was affectionate, sexually forward, flirtatious, sexually attracted to / aroused by the accused she deserved to be raped. Nothing could be further from the forensic purpose of legitimate cross-examination on the topic it seems such critics are alluding to. Rather, particularly in a consent case where intercourse is admitted, but it is not accepted that the complainant was raped, evidence supportive of her willingness to engage in sexual intercourse with the accused is highly relevant.

91. It is similarly difficult to see a problem with the information provided regarding cross-examination on the use of alcohol and drugs At p.161-2. The point is not demonstrated by complainants' giving answers indicating they do not believe their intoxication to be relevant. Affectation by either substance can clearly significantly impact upon reliability of observation, formation of memory and recall; and in cases where consent is an issue intoxication is frequently relevant in relation to the complainant's disinhibition or preparedness to engage, for example, in sexual activity she might not otherwise have sought out, and which may be regretted afterwards.

92. The examples provided as to cross-examination as to clothing worn At p.162-3 do on their face seem inexplicable, although without knowing more it is difficult to rule out some probative value in such evidence which would outweigh any negative impact on the complainant. In some cases cross-examination as to clothing may be important to show, for example, that the complainant must have been an active participant, co-operating in the removal of her clothes. There doesn't seem to be much legitimate point in cross-examining the complainant about her clothing being flimsy or showing off her figure. One can imagine a scenario where such cross-examination may be appropriate, but this would seem unusual.

93. It is similarly difficult to see the probative value of most of the evidence adduced under the topics of 'contribution to the offence', and reasons for being at location contact first made or 'offence occurred' At 163-6. There was one example where a complainant was challenged regarding her assertion that she had to go into the bedroom for tissues when she was followed in and sexually assaulted. It may well be appropriate in such a case, if it is the defence case that she entered the bedroom knowing of the likelihood of amorous contact with the accused, to cross-examine her about the tissues having been a ploy – and so about things she could have done to obtain a tissue other than going to the bedroom. The cross-examination would inevitably, however, be limited. Other quoted instances such as questioning the complainant regarding her knowledge of the area she was walking being unsafe, or of knowing she would attract the boys' attention at pools do seem inappropriate on the face of things.

94. The report is also critical of cross-examination regarding the complainant's behaviour after the alleged offence. This can sometimes be an appropriate and essential area to cross-examine upon, but the example provided does seem to have been unduly offensive (and pointless). The complainant was cross-examined as to why she didn't have a shower, and then a bath (on revealing that she didn't have a shower in her house) at 4.30 am after the alleged assault, in circumstances where she said she had felt dirty p.166. Her answer that she was tired was not accepted, and she was reminded by a shouting cross-examiner that she was saying she had just been raped. She ended up providing an extremely

prejudicial answer, which was probably responsive to the question – namely that she had been raped ten times before (seemingly by the accused), and in fact felt dirty every time the accused touched her but did not have a bath every time.

95. The Heroines of Fortitude report is seemingly also critical of complainants being cross-examined about their previous criminal history for matters of dishonesty p.167. Apart from s.41 and Bar Rule 35A, s.103 of the *Evidence Act* (requiring substantial probative value in cross-examination relevant only to credibility) and Bar Rule 38 are also applicable. Subject to these qualifications, it is generally appropriate to conduct such cross-examination if honesty is an issue. Sometimes it is better not pursued, even if it would just pass .103, but not be of great assistance - for example one or two very old shoplifting offences. It goes without saying that cross-examination along these lines needs additional consideration if the accused is to be called to give evidence and has convictions for dishonesty offences himself.

96. Cross-examination regarding the issue of resistance or lack thereof is also criticised in the Heroines of Fortitude report 170, as are questions about inconsistencies and confusion about 'peripheral' matters such as exact times, exact positions, numbers of fingers and the like 168-9.

97. The Heroines of Fortitude report states that the research found that a particularly stressful component of the trial for complainants (generally) was having to recount all "the small details of the non-consensual sexual intercourse" 130. In an example provided at page 131 (in which it is not clear, because of conflicting suggestions, as to whether the questions were being asked by the Crown Prosecutor or defence counsel) the complainant's account had by inference been that the accused was 'stroking' three or four times. She was asked to say what she meant. Crying, she said that she couldn't. She was asked again to explain, in her own words, what happened three or four times, and responded "He raped me, that's what happened! I don't know what you really mean. I just don't know how youse mean." This was not suggested to be a complainant with any disability, and of course was an adult female.

98. There is nothing inadmissible, nor improper, in a complainant having to actually explain what is alleged to have taken place. The terms of s.41(3) make this clear. It is of course crucial if the allegations are to be brought within the criminal justice system, where an accused person has to be charged with something other than just being a 'rapist' or 'molester'

99. As a result of these criticisms, it was recommended that the Judicial Commission should take an active role in promoting judicial discussion and education in relation to the conduct and control of cross-examination (recommendation 6), and that the Chief Judge of the District Court strongly encourage Judges to utilise the provisions of the *Evidence Act* and Bar Association rules to limit questions that are insulting, degrading, humiliating or irrelevant during the cross-examination of the complainant (recommendation 7), and that the Senior Crown Prosecutor encourage Prosecutors to utilise the provision of the *Evidence Act* and the Bar rules to limit questions that are insulting, degrading, humiliating or irrelevant during the cross-examination of the complainant.

Manner or tone which is belittling, insulting or otherwise inappropriate

100. This part is hard to explain, but I'm sure all would recognise it if seen or heard. A witness should not be shouted at. The tone applicable for a child will be different to the tone which may be appropriate for some adult complainants. Sarcasm is one of the sins which recurs in the common law cases on improper questioning. There is no need to roll eyes, lose one's temper, or engage in angry outbursts.

101. Heydon J in **Libke** at [123] refers to a case of **Rubin v State (1927) 211 NW 926** as authority for the impropriety of remarks in cross-examination 'in the nature of a taunt'. This was a decision of the Supreme Court of Wisconsin, hearing an appeal against conviction for criminal contempt of court arising out of the conduct of the appellant as attorney in a jury trial in 1926, acting for the defendant at the suit of a Railway company. He was cross-examining the Plaintiff on the defendant's behalf, ".. and after having repeatedly carried answers of the witness into the next question for argumentative purposes before the jury, and after having persistently rushed and crowded questions upon the witness in such a manner as to deprive the latter of a fair and reasonable opportunity to think and speak, finally arose from his chair and advancing forward, with a stern and commanding voice, put to the witness the following questions, with a command in the nature of a question: 'You can not swear that you saw the automobile moving, can you, at that time? How about answering that?" Whereupon the attorney was chastised by the judge, he argued against the judge's ruling, accused the judge of interfering with cross examination. The contempt lay in calling the ruling undue interference.

102. Owen J found the contempt clearly made out in the attorney's exchanges with the judge, and at 928 ff. delivered an interesting judgment regarding fundamental principles of counsel's ethical obligations, including the principles upon which respect for legal institutions must be maintained. He spoke at 929 about what a judge should be, and what an attorney should be, and how his conduct should lend dignity to the court. The lawyer has a dual capacity because of the duty to the client and that owed to the court – but the duty to the client never requires him to be contemptuous to the court. He viewed the temper of the cross-examination clearly revealed by the last question asked of the witness, which was double and unfair. "How about answering that?" was in the nature of a taunt, and revealed the temper in which the cross-examination was being conducted. His Honour at 930 examined the sources of the court's obligation to intervene if an attorney attempts to browbeat, insult or intimidate a witness.

103. One issue which can be looked at a coming under the description of an impermissible manner, but perhaps also under oppressive questioning too, is that of cutting a witness off. A recurring theme of criticism of defence cross-examination is that complainants, both child and adult, have not been permitted to say what they want.

104. Dr Cashmore has said, after referring to the reasons why children do not feel they can give a full and proper account of their evidence (such as being constrained by the questions and directions, constrained by admissibility issues) that "Children's frustration and dissatisfaction with the process, and with cross-examination in particular, means that the legal system does not meet their expectation that they should be able to 'tell the truth, the whole truth, and nothing but the truth'; it also diminishes their faith in the fairness of the system." Child Witnesses: The Judicial Role p.3

105. It is always inappropriate to cut across a witness in the middle of providing a responsive answer to a question. It can of course be accidentally done sometimes, and should be immediately corrected. It is vital to ensure that the witness has in fact finished answering before proceeding to the next question.

106. It is absolutely crucial, however, to keep control of the witness. As said by Heydon J in **Libke v The Queen [2007] HCA 30; (2007) 230 CLR 559** at [119]:

> " A cross-examiner is entitled to ask quite confined questions, and to insist, at the peril of matters being taken further in a re-examination which is outside the cross-examiner's control, not only that there be an answer fully responding to each question, but also that there be no more than an answer. By these means a cross-examiner is entitled to seek to cut down the effect of answers given in chief, to elicit additional evidence favourable to the cross-examiner's client, and to attack the credit of the witness, while ensuring that the hand of the party calling the witness is not mended by the witness thrusting on the cross-examiner in non-responsive answers evidence which that witness may have failed to give in chief. To this end a cross-examiner is given considerable power to limit the witness's answers and to control the witness in many other ways."

107. This entitlement gives rise to responsibilities – but it is an entitlement which is warranted. Many witnesses want to talk about matters which are not responsive to the question. They have no entitlement to do so, and if they are distressed or feel oppressed or intimidated by not being permitted to speak at large it is not a matter with which defence counsel needs to be concerned in court. Prosecution lawyers and witness support officers are responsible for explaining to witnesses why they are not entitled to simply say what they want. Children in particular, if simply let say what they want, make extensive representations which have absolutely no bearing on the case. The judicial system obviously does not have time or resources, for a start, for witnesses to give evidence the only point of which is to make them feel heard. There are other arenas for this to be attended to. The court does not have the capacity to turn to the many matters witnesses left uncontrolled would seek to raise. Further, there would be a constant risk with criminal trials before a jury, of highly prejudicial inadmissible material being raised. Children for example will readily make an allegations of fact, convinced of its truth, based on no direct personal observation at all, but only on what they have heard. Direction of the jury to the real issues in the case would be virtually impossible.

108. Interruption of a witness' answer is accordingly often required when it is non-responsive, especially if venturing into a potentially prejudicial area. This should be done politely but firmly.

109. The Heroines of Fortitude report quotes an example said to give an insight into the type of questions asked of adult complainants, cutting off testimony At p.127. The complainant was asked in cross-examination whether the accused's shirt was on or off. She did not provide a responsive answer,

but asked whether she could make a point. Defence counsel did not allow her to make a point. She was asked on the voir dire in re-examination what she had wanted to say – she made reference to her statement, how she had indicated in her statement she was unsure about the accused's shirt, how she was very emotional when she made her statement, she is more clear now, and there was a lot going through her mind when she had made her statement. The extract quoted did not indicate that defence counsel had even asked her about her statement. Defence counsel was right not to give the complainant an unfettered opportunity to make a non-responsive speech when she asked to make a point.

Stereotype eg based on sex or race, culture or ethnicity

110. There is extensive literature which argues that the entire focus of the criminal justice system, in determining allegations of sexual assault, is founded on stereotypes based on the sex of women and girls. Some of these suggestions have been outlined above, as emerged from the Heroines of Fortitude report.

111. There is information available to judicial officers regarding these matters. For example the Equality Before the Law bench book has a section regarding women which deals, in the context of gender inequality, with some of the arguments as to why sexual assault proceedings may be said to be unfair for women – such as women being assessed from the male standpoint of what a reasonable man would have done rather than what a reasonable woman would have done given the circumstances 7.1 at p.7105. Judicial officers accessing the source are reminded to intervene as prescribed by law, if any cross-examination appears to be stereotyping and / or unfairly alluding to a woman's gender. Reference is made to s.41 of the *Evidence Act* (prior to the amendment), s.275A of the *Criminal Procedure Act* (prior to its repeal), as well as sections 26, 29 and 135(b) of the *Evidence Act*.

112. There are no real examples provided as to the type of cross-examination which would be based on a stereotype – although suggestions preceding this for the treatment of women generally had included ideas such as not assuming women are nurturing, like shopping, that a female at the bar table is less senior, or that a female juror needs to leave early to care for children and prepare the family meal. There is a section which offers information regarding domestic violence and sexual assault matters 7.3.3.2 (p.7304 ff.).

113. The exploitation of cultural myths was suggested by the authors of the Heroines of Fortitude report to be a problem arising from the studied cross-examination 173 ff.. Women from ethnic backgrounds were said to fare particularly badly in the process of cross-examination. One Asian woman was asked 11 questions regarding victims' compensation, and "This appeared to be an attempt by the Defence to construct a motive for the complainant's allegation of sexual assault. The Defence contextualised this motive within a common cultural myth about people from Asian countries being frugal and seeking financial gains." It would clearly be improper and contrary to s.41 to so cross-examine; but there is nothing extracted from the cross-examination or closing address to support the claim that this is actually what defence counsel was suggesting. The same woman was cross-examined about wearing pyjamas in the house during the day in the presence of the accused for a number of hours, the suggestion apparently being that this was sexually provocative behaviour, whereas it is said to be common for women from such background to wear such garments for work in the house. If this is right, then far from exploiting a cultural myth and focusing on a racial stereotype as was suggested, such cross-examination seems to have done the opposite – the woman was cross-examined on what she actually did, without any consideration of what Asian women 'usually' do.

114. A further example was given of a Middle Eastern woman being cross-examined about her residency status, in circumstances where the accused man was her husband and an Australian resident, and she had come to Australia on an arrangement to marry him p.173. It was suggested that she married him to gain residency, and the sexual allegation was being made to separate from him but nonetheless ensure her ongoing residence in Australia. I have had cases myself where this is obviously what has occurred, and have many colleagues in the same position. If it arises on the facts of the particular case, it is a highly probative possible motive. All will depend upon the particular matter before the court. I am not of the view, on the bare information provided by the Heroines of Fortitude report, that there was exploitation of a cultural stereotype in the case referred to.

115. Particular attention was paid in the report to the situation of Aboriginal complainants, as such women were said to be over-represented in such situation, had special needs, and faced "great problems with myths and stereotypes pedalled by defence counsel." There was said to be for these

women particular distress and shame in talking about their genitalia, especially in having to use English words for the same.

116. The study showed that 11.3% of the cases (17) involved an Aboriginal complainant, compared with the results of the 1991 Census in which just over 1% of women identified as being from an Aboriginal community. One of these cases involved a guilty plea. Of the trials, there were convictions in 25% of the cases (compared to 31% across the board). The majority of the cases involving an Aboriginal complainant were heard in the country. The study states that these women were asked more questions regarding drinking and drug use – both on the day of the alleged offence, and generally p 99. The report contends that these complainants suffered a higher level of distress than complainants generally.

117. The report contends that the research highlighted instances where Aboriginal women were bullied, harassed and intimidated during cross-examination p.105. It was said that defence counsel on occasions made a mockery of the women's lack of understanding of concepts and questions, and often used this to undermine the women. No particular examples were directly given at the point this claim was made.

118. There was report of questioning Aboriginal women on cultural and / or religious grounds regarding casual sex – although it appears from the incomplete transcript included to support this proposition that the topic was in fact introduced by the complainant.

119. It was said that the credibility of Aboriginal women was attacked with the use of racist myths and stereotypes regarding Aboriginal culture, focussing on drinking. p 108-9. Such myths were said to be powerful in the eyes of the jury. Aboriginal women spoken to were said to be strongly of the view that these issues should not be important. The authors stated that "The possible probative value of these questions is not outweighed by the complainant's humiliation when the questions are repetitive and many." I note that s.41 prohibits questioning that is unduly repetitive – it need not be based on a stereotype.

120. The authors suggest that the chapter has made clear the victimisation of Aboriginal women, and "the experience of these women goes beyond the testing of a complainant's evidence for its veracity and honesty and is insensitive, abusive and victimising of women." It is unfortunate that no real examples were given to support these claims. There were some numbers provided regarding a greater number of questions regarding cross-examination on alcohol consumption – but there is no information as to whether such questions were ill founded having regard to the evidence in the case. The authors simply cite the women's strong belief that it was not important. Furthermore, as seen above, cross-examination of all complainants in relation to drinking and drugs, regardless of aboriginality, was seen as biased and based on a stereotypical view of appropriate behaviour for women. Of potential use from the chapter was the suggestion that a lack of comfortable language match causes particular distress for Aboriginal women describing their body parts. This is something I was unaware of, and would I think be useful to keep an eye out for in relevant proceedings.

Browne v Dunn

121. Having looked at what can and can't be put, we should also look at what needs to be put in cross-examination.

122. The evidentiary and ethical limitations placed upon the advocate in sexual assault proceedings bring into further question the application of the rule in **Browne v Dunn (1893) 6 R 67** in criminal cases. That rule, developed in a civil case, is essentially one of fairness which obliges a party to give appropriate notice to the other party and any of that party's witnesses of any imputation intended to be made against the party or witness about conduct relevant to the case, or the party or witness' credit; and to raise with the witness material matters likely to be within the witness' knowledge regarding which evidence is otherwise to be called. Quite apart from s.41 of the *Evidence Act* and Bar rule 35A, the High Court has in **MWJ v The Queen [2005] HCA 74; (2005) 80 ALJR 329** cast serious doubt about the rule having an ongoing role to play in a criminal trial.

123. To the extent that previous authority affirmed the operation of the rule in criminal trials, it had always stressed that the nature of a criminal trial required qualification of the rule.

124. In **MWJ** the appellant was convicted by a South Australian judge sitting without a jury of sexual offences against his previous step-daughter. The complainant made complaint to her mother about the

last act of sexual abuse shortly after it occurred. It had occurred at a particular residence. Some time later, according to the mother, the complainant revealed in general terms ongoing, less invasive, sexual misconduct at an earlier time, at a different house. The accused had a number of charges laid against him, based upon one incident at each house (although the later incident in time involved a number of different acts). He was convicted in relation to the charges arising from the later incident. The complainant gave evidence at the trial in relation to a single incident at the earlier house, and indicated that she could not recall any improper conduct prior to that incident. She was not specifically asked whether there had been any other (later) incidents at the first house. She was not cross-examined about her arguably inconsistent complaint to her mother in relation to an ongoing course of conduct at the first house.

125. Defence counsel unsuccessfully objected to the mother giving the evidence of complaint which tended to reveal the commission of further uncharged acts. It is not completely clear what was or should have been expected at the time the complainant gave evidence. On the one hand the majority stated at [37] that "The complainant had already given her evidence when the mother gave her evidence. It was not for the appellant to know and anticipate, by cross-examining the complainant, what the mother would say about the complainant's assertions of complaints of multiple offences at [the earlier residence]. It was not for the appellant to iron out inconsistencies in the case for the prosecution.". However Gleeson CJ and Heydon J referred at [4] and [6] to the fact that defence counsel knew (from evidence at the committal proceedings) that the mother was going to give evidence of complaint of a course of conduct (accepting that failure to cross-examine the complainant on the same was hardly surprising).

126. The **Browne v Dunn** issue arose not because of any Crown cross-examination of the accused, but in assessing the weight to be given to defence counsel's submission regarding the inconsistency. In particular, a passage in the judgment of the South Australia Court of Criminal Appeal's judgment indicated a view that if the defence wished to impugn the complainant, then what was put forward by submission as said to achieve this should also have been put to the complainant herself. This statement was found, on appeal to the High Court, to betray "a misapprehension as to an accused's position and obligations in a criminal trial": per Gummow, Kirby and Callinan JJ at [28]. On no view was the appellant obliged to seek to have the complainant recalled as a condition of his reliance upon the inconsistency which had emerged in the case for the prosecution: [39].

127. On appeal to the Court of Criminal Appeal of South Australia and to the High Court, the appellant unsuccessfully argued that there was an inconsistency between the evidence of the complainant and her mother about the occasions of sexual abuse at the first house which was of such significance as to invalidate the convictions. Both courts disagreed, and dismissed the appeal against conviction.

128. However in the High Court it was also argued that the Court of Criminal Appeal erred in the application of the principle established in **Browne v Dunn**. The majority judgment in the High Court agreed. Gummow, Kirby and Callinan JJ at [40]–[41] held that reliance on the rule can be misplaced and overstated. If the evidence has not been completed, a failure which has genuinely caught a party by surprise can usually be remedied by seeking or offering the recall of the witness. Temporarily excusing witnesses in a criminal trial assists in this regard. Their Honours acknowledged that there may be some cases in which it is unfair to recall a witness. However subject to the obligation on the prosecution not to split its case, the suggested course could be adopted without injustice on most occasions.

129. Their Honours found that the South Australian Court of Criminal Appeal's criticism of defence counsel for not cross-examining the complainant regarding the allegedly inconsistent statement to her mother was erroneous, and did not give due weigh to the prosecution's burden of proof and obligation to present its whole case in chief. It was held at [41] that

> " The position of an accused who bears no burden of proof in a criminal trial cannot be equated with the position of a defendant in civil proceedings. The rule in *Browne v Dunn* can no more be applied, or applied without serious qualification, to an accused in a criminal trial than can the not dissimilar rule in *Jones v Dunkel*. In each case it is necessary to consider the applicability of the rule (if any) having regard to the essential accusatory character of the criminal trial in this country."

130. As had been earlier said, it was not for the defence to clear up or resolve inconsistencies in the prosecution's case. As soon as the inconsistency emerged, it was open to the prosecution to offer to call the complainant for further cross-examination. If the appellant had not accepted the offer, only then would the intermediate appellate court's criticism have been valid.

131. Gleeson CJ and Heydon J made similar pronouncements regarding the serious modification required, in relation to the rule in **Browne v Dunn**, in a criminal trial, saying (references omitted):

> " The principle of fair conduct on the part of an advocate, stated in *Browne v Dunn*, is an important aspect of the adversarial system of justice. It has been held in England, New South Wales, South Australia, Queensland, and New Zealand, to apply in the administration of criminal justice, which, as well as being accusatorial, is adversarial. Murphy J, in this Court, even applied it to the conduct of an unrepresented accused. However, for reasons explained, for example, in *R v Birks*, and *R v Manunta*, it is a principle that may need to be applied with some care when considering the conduct of the defence at criminal trial. Fairness ordinarily requires that if a challenge is to be made to the evidence of a witness, the ground of the challenge be put to the witness in cross-examination. This requirement is accepted, and applied day by day, in criminal trials. However, the consequences of a failure to cross-examine on a certain issue may need to be considered in the light of the nature and course of the proceedings."

132. Their Honours agreed at [19] that there was no obligation on the defence counsel at trial to question the complainant about whether there had been more than one incident of sexual abuse at the earlier lived in house, nor to seek to have the complainant recalled for that purpose. That would have run the risk of eliciting further evidence of uncharged criminal acts by the accused. This did not mean that the argument regarding inconsistency was not able to be put to the trial judge, but their Honours agreed with the finding in the Court of Criminal Appeal that the non-confrontation of the complainant was a matter to be taken into account in assessing the weight to be given to the supposed inconsistencies; "In the event, it was the fact that counsel chose (with reason) to leave the evidence in a state of uncertainty that undermined her submission about inconsistency. That was a forensic choice for counsel to make."

133. The majority had not dismissed the appeal for this same reason. The majority relied on the fact that the inconsistency related to the charge in connection with which the accused was acquitted, and that the incidents could be assessed quite separately. The inconsistency was found not to be so fundamental to transfer over to the strong Crown case in connection with the counts on which he was convicted.

134. MWJ was a particular sort of case because the topic upon which defence counsel refrained from cross-examining the complainant was an area which, if opened up, could well have allowed the complainant an opportunity to disclose further criminal allegations against the accused. I myself can't see why, in a Judge alone trial it could not have been cross-examined upon in a way which may have been more advantageous to the accused. As indicated towards the start of the paper, I am of the view that inconsistent accounts of a complainant is one of the most important areas of cross-examination in sexual assault proceedings. It is often an area of cross-examination capable of being used to achieve a calm, polite and methodical undermining of a witness' account.

135. It is generally not to the advantage of the accused to have the complainant recalled once cross-examination has been completed – even while the Crown case is still open. The **MWJ** point (and indeed that of other cases considering the rule in **Browne v Dunn** in a criminal trial) is interesting legally – but in practical terms really only arises once something has gone wrong. The accused in **MWJ** was simply lucky the Crown did not offer to recall the complainant. It is not a gamble I would take, given the desirability of incorporating all cross-examination into a cohesive exercise with some impact (and without giving the witness too much time to work out what answers to give). In a situation like **MWJ** where the subject matter of the inconsistent statement is potentially prejudicial, a tactical decision will simply have to be made as to where the accused's interests better lie.

136. To see if it is possible to give more practical content to the current state of the rule, it is perhaps helpful to look at a few NSW authorities in the period shortly prior to, and since, the High Court's decision.

137. In **Liristis [2004] NSWCCA 287** Kirby J (with whom Studdert and Hislop JJ agreed) upheld an appeal against conviction for perjury, said to have been committed by falsely swearing in an affidavit that a previously retained solicitor had not disclosed his costs structure. The Crown relied on a materially conflicting affidavit sworn in Supreme Court proceedings. The appeal was upheld on the failure of the learned trial judge to provide adequate instructions regarding the phrase 'costs structure'. The court dealt also with two grounds concerning **Browne v Dunn** issues.

138. The appellant gave evidence in the trial. His evidence included material which had not been put (in its detail) to various witnesses called by the Crown. The Crown objected on six occasions saying, in the presence of the jury, that the evidence had not been put to the particular witnesses. The appellant had been allowed to give the evidence. The court at [61] said that much of the material objected to was peripheral. However some matters were important. For example the accused said he had drawn an error to the attention of a Crown witness (a solicitor who witnessed one of the affidavits) three months before the court proceedings in which one of the affidavits was used.

139. The solicitor had been cross-examined to suggest that the accused had disclosed the error; but it was not put that this disclosure had been made three months before the Local Court hearing. Apart from his objections to the accused's evidence in chief, the Crown also cross-examined the accused regarding the 'defect' in cross-examination above – 'That would have been a very good thing to put to him when he gave his evidence?', he was asked, answering 'I did say that, I did say that to my barrister but it wasn't put to him.' The court found there was no unfairness in the objections because they were overruled: [64]. The cross-examination was inappropriate, as it sought an opinion on an issue which was irrelevant, and should not have been asked. However no objection was taken, and given the answer provided, the court found that no harm was done.

140. Complaint was made regarding the Crown Prosecutor's address, the relevant part of which is set out at paragraph [65] of the judgment. Adverse comment was made in relation to the evidence of the accused. Complaint was made that the Crown in describing his own surprise (and suggesting defence counsel demonstrated similar surprise) at the accused's evidence was in effect giving evidence, which is not permissible; and in purporting to state the law in respect of the rule in **Browne v Dunn** had in fact misstated it such that it was 'dangerously incomplete and misleading'.

141. There were alternate bases on which the ground was pursued: firstly, that if the rule applies in the context of a criminal trial, it had been misstated by the Crown; and "Alternatively, and more radically, it was said that recent decisions of the High Court threw into doubt the 'obligation' of an accused to 'put a case'."

142. As to the ambit of the rule and available comment, it appears that part of the evidence of the accused was that the solicitor had in fact brought the completed affidavit to his house in connection with a jet ski. This had apparently not been raised with the relevant witness. The Court viewed this omission as something which "..may or may not have been a peripheral detail. There certainly were better illustrations available to the Crown, which he might have used, where there was unmistakably a breach of the rule in **Browne v Dunn**, assuming it applied.": [72]. The court however found that the Crown Prosecutor had misstated and inadequately stated the rule in **Browne v Dunn**, particularly in relation to the failure to refer to s.46 of the *Evidence Act*: [72], [79].

143. In relation to the more 'radical' submission, it appears that such conceded that where a proposition which the rule would ordinarily require be put to a witness was not put, and then evidence was called by the accused, there may be consequences – such as an application to recall the witness pursuant to s.46 or a comment by the Crown in closing address or Judge in summing up: [75]. In other words, it would appear to have been a suggestion only that defence counsel is not required to put to a complainant, for example, that her account is untrue, or that she is lying, of that she did consent, before being able to address the jury without adverse comment to the effect that they would not accept her account, would find her to have been a deliberately dishonest witness and so on. As framed in the Court of Criminal Appeal's judgment, the radical submission was that "The principles stated in *Browne v Dunn* presuppose that the accused puts his case. It was said by the appellant that, as a natural extension of [the authorities such as **Azzopardi v The Queen (2001) 205 CLR 50** and **Dyers v The Queen (2002) 210 CLR 285**], there is no obligation for an accused to 'put his case' to Crown witnesses.": [75].

144. In relation to the more radical submission, the Court reviewed the authorities relied on by the appellant such as **Azzopardi**, **Dyers** which have emphasised the accusatorial nature of a criminal trial, where the Crown carries the burden of proof and the accused is not required to explain or contradict matters. The Court pointed out that recalling a witness pursuant to s.46 after the accused calls evidence would usually disadvantage the accused, such recognition of course forming the basis for the requirement that exceptional circumstances be shown before the Crown is permitted to split its case. Similarly, adverse comment would disadvantage an accused.

145. The Court indicated that there was 'difficulty' with the radical submission because of the numerous times in which the operation of the rule in criminal matters in this state had been affirmed, citing **Peter Schneidas (No 2)(1981) 4 A Crim R 101**; **Zorad (1990) 47 A Crim R 211** and **R v Birks (1990) 19 NSWLR 677**. The court referred to the references in **Birks** to the relevance of the notion of fairness to

criminal as well as civil trials, but specifying that such may have 'somewhat different practical content' in a criminal trials, such that ".. its practical content needs to be related to the circumstances of the particular case, and done important circumstance may be that what is involved is a criminal trial. The precise significance of that may vary from case to case."

146. As the court accepted that the Crown Prosecutor had made inappropriate and highly prejudicial comments, and incompletely stated the rule in **Browne v Dunn**, "The success of the appellant on this ground does not ultimately depend upon an adoption of 'the radical view', even though there is much to commend it.": [79].

147. As to the directions of the judge, the Court agreed that they had been defective in so far as they endorsed the Crown submissions as to the 'law' regarding barristers and their obligations, and failed to incorporate directions necessary where an adverse inference against an accused is invited, based upon counsel's conduct. The court confirmed that it was open to the Crown to comment on the failure to cross-examine, but agreed that where the Crown seeks to have the jury draw an adverse inference the trial Judge is obliged to instruct the jury as to the proper approach. The authorities referred to confirm that the drawing of adverse inferences against the accused on such basis is 'fraught with peril and should therefore be used only with much caution and circumspection', because there may be many explanations of the omission which do not reflect upon the credibility of the accused. Jurors may not understand, for example, the wide discretion available to counsel as to the conduct of the case.

148. Rend [2006] NSWCCA 41; (2006) 160 A Crim R 178 was decided in March 2006. The female accused was convicted of offences connected with a robbery alleged to have been committed with one Mr Wormleaton. The Crown had a statement of instructions signed by her in advance of the trial, which had been used on an application to reverse her plea. In this she stated that she drove the car used in the offence, and said nothing regarding being significantly affected by drugs (although she did refer to taking some pills). Her evidence at trial was that she did not drive, was 'stoned' or 'smashed' while she accompanied Wormleaton in the car, and that as to her statement of instructions she was told what to say. The Crown was allowed a case in reply, calling evidence from the solicitor and also recalling a police officer involved with the arrest of the accused shortly after the robbery had been committed, to provide evidence that she was not significantly affected by drugs. This police officer had not been cross-examined when called in the Crown case to raise the issue of his observations of the accused on arrest.

149. James J (with whom Buddin and Hall JJ agreed) upheld the complaint of error in allowing the police officer to be recalled, referring to the well known authority as to the requirement of exceptional circumstances before the Crown will be allowed to split its case. It could reasonably have been foreseen by the Crown before the close of its case that Ms Rend's state of intoxication might be relevant as to whether she was asleep, and whether driving, whether party to a joint enterprise to rob. His Honour at [79] made specific reference to the reason given by the trial Judge and by the Crown on appeal as to the propriety of the recalling of the police officer in reply – that he was not cross-examined by the accused when called on the first occasion – commenting that "..the very existence of the rule in **Browne v Dunn** (1893) 6 R 67, as applying to an accused in a criminal trial, has recently being seriously doubted by a majority of the High Court. **MWJ v The Queen** [2005] HCA 74 at (41) per Gummow, Kirby and Callinan JJ."

150. In **Oldfield [2006] NSWCCA 219; 163 A Crim R 242** the Crown Prosecutor inappropriately objected a number of times during the evidence of the appellant, on the basis that the assertions had not bee put to the complainant, when in fact some of such suggestions had been put and others were minor and were not required to have been put (on the orthodox application of the rule). There was one matter of significance which had not been put properly to the complainant, which was perfectly resolved by defence counsel. The complainant alleged sexual assaults on two sides of a roadway near Bowral – digital penetration on a driveway, and then on the opposite side of the road, down an embankment in a paddock, attempted or partially successful vaginal and anal intercourse, and further digital penetration (when her tampon was removed by him, a tampon later being found in that paddock by investigating police). It was suggested to the complainant in cross-examination that on the driveway side of the road there had been consensual kissing and touching and partial removal of clothing, with the accused then 'attempting' digital penetration before she told him to stop. In his evidence the accused said that he actually penetrated the complainant's vagina on the driveway side of the road, and that this was consensual. With the Crown's agreement, defence counsel informed the jury that it was an oversight on his part not to have put consensual penetration to the complainant, and that rather than having her recalled he conceded that she would have denied such proposition if put to her. The Crown then inappropriately still addressed in a manner inviting adverse inferences to be drawn against the accused on this topic.

151. There was however a further matter which had not been put to the complainant: that the accused had in fact removed the tampon during the (consensual) activity on the driveway side of the road. He gave evidence during cross-examination that this is what occurred, his case being that no sexual activity had occurred down in the embankment. He was cross-examined about the location of the removal of the tampon not having been put to the complainant, and the Crown addressed upon the same adversely to his credibility.

152. The Court of Criminal Appeal did not refer to the judgment in **MWJ**, decided about six months before **Oldfield** was argued. Giles JA (with whom Grove and Hidden JJ agreed), referring to authority, held that the caution and circumspection required in criminal trials regarding the application of the rule in **Browne v Dunn** do not prohibit cross-examination to suggest that because the accused's counsel did not put a matter to the complainant, the accused's evidence of that matter is false:

> " As a general rule, counsel should put to the complainant matters which are to be contradicted, for reasons of fairness in giving an opportunity to meet the challenge; lawyers know this as the rule in *Browne v Dunn*. There can therefore be an available inference that a matter not put to the complainant was recently made up, and depending on the circumstances the Crown is not barred from so suggesting. The point made in *R v Birks* was that, in such a situation, the judge should draw to the attention of the jury other possible reasons for the inconsistency between what was put to the complainant and the accused's evidence, such as misunderstanding or error on the part of the accused's counsel, since the jury is unlikely to be familiar with the forensic process (including the rule in *Browne v Dunn*) or conscious of forensic pressures.": [40]

153. His Honour found that the issue of where the tampon was removed was important. An available inference was that the appellant was cobbling together his story in the witness box. The question asked in cross-examination so suggested, and it was open to the Crown Prosecutor to ask it. His Honour referred to the fact that it was also open to the appellant to give or call evidence to negate the inference, for example by his solicitor giving evidence that the appellant's instructions had always been that the tampon was removed in the activity on the driveway.

154. The appeal was however allowed because of the combination of the various instances of the Crown Prosecutor's conduct on this matter, and the absence of adequate direction from the trial judge.

155. In **RLT [2006] NSWCCA 357** (decided November 2006) a four year old boy received a cut to his penis, resulting in serious injury (not amounting to grievous bodily harm). The child did not receive medical attention at the time. When in the care of his grandmother about 11 months later, at which time the injury to the area was discovered, he nominated the accused as its cause.

156. The appellant was charged with having maliciously wounded the complainant with intent to do grievous bodily harm. There was no evidence apart from the complainant nominating the appellant as the source of the injury. The defence case was that he was not with the boy at the time he was injured (which was able to be pinpointed to a particular day), having left him with his mother while he went to work. The appellant did not give evidence, and there were only imperfect work records available to him by the time of the trial, but he called two witnesses in support of his alibi. One of these was the complainant's mother, who gave evidence that she was at home alone with the complainant at the time his penis was injured. She said she came across the complainant who she saw had a knife to his penis. She said she told him to drop it, but it sort of slipped a bit and cut his penis. The cut had initially only been small, she said. The Crown had not been prepared to call the mother, apparently because she was unco-operative. The Crown Prosecutor objected to defence counsel asking the mother whether she held the knife and cut her son's penis, on the basis that this would amount to cross-examination of defence counsel's own witness. The trial judge rejected the question. The entirety of the cross-examination of the complainant on any matter of substance was to put to him that the appellant was not the person who had cut his 'ding dong', was not even there when it was cut, and that he loves his mother.

157. The medical evidence in the case demonstrated that the more likely cause of injury was one cut of a knife drawn across the penis as opposed to a small cut gradually made larger by continual picking by the child (the mother's suggestion). It was likely a deliberate slicing movement inflicted with the kind of dexterity a four year old wound not have. Evidence was called by the defence of an occasion where the complainant's mother had confronted her own mother with a knife. The trial judge explicitly directed the jury that it was not open for them to consider any possibility that the mother had inflicted the injury.

158. Sully J (with whom Hall J agreed) upheld the appeal against conviction on the grounds which

complained of the trial judge's criticism of defence counsel, treatment of the rule in **Browne v Dunn**, misunderstanding of the role of defence counsel and the defence case, and in failing to discharge the jury when defence counsel sought such on the basis of reasonable apprehension of judicial bias.

159. Adams J agreed that the conviction should be quashed but dissented as to the ordering of a new trial. His Honour quoted extensively from both judgments in **MJW**, moving to then find that the cross-examination of the complainant had directly raised the possibility that the mother had inflicted the wound, given that the complainant had said without qualification that there were two people present (his mother and the appellant), and counsel had directly put that the appellant did not inflict the wound and was not present when it was inflicted: " It necessarily followed that, if the injury was inflicted by any person, it had to be either the complainant himself or the complainant's mother.": [90]. His Honour at [91] described the mother's evidence of accidental self infliction by the child as 'incredible', and that if the wound was not self inflicted but she was telling the truth about the appellant not being present, she had inflicted the wound. "Counsel for the appellant plainly intended to put that scenario to the jury as a reasonable possibility. Accordingly he was bound (subject tho what was said in **MWJ** and as he at all events did) to give the mother an opportunity to deny it."

160. His Honour said this could have been done in a non-leading fashion not contravening s.38 such that leave was not required; although her evidence was clearly unfavourable such that leave to cross-examine should have been given if sought.

161. In **Turnell v R [2006] NSWCCA 399** (decided 13 December 2006) there had been extensive and vigorous cross-examination of the accused at trial in relation to matters not put to the complainant which emerged from the evidence of the accused. There was also significant adverse comment made in the Crown Prosecutor's closing address, and an absence of full explanation by the trial judge as to the possible reasons, other than recent invention by the accused, for the absence of cross-examination on these topics. This was a sexual assault case, and part of the Crown case was expert evidence about a DNA profile on the complainant's chest likely to have come from the saliva of the accused (in circumstances where she said he licked her breast). Apart from suggestions made by the accused in evidence that he had rested his head on the chest of the complainant, there was also cross-examination of the Crown scientific expert about possible transference of the accused's DNA onto the woman's chest through means such as use of a communal towel. This was not something the complainant had been cross-examined about – but it did emerge as an issue before the Crown case had closed.

162. Error was found by the Court of Criminal Appeal. Sully J (with whom Hidden and Latham JJ agreed) referred to the court's decision in **R v Abdallah [2001] NSWCCA 506; (2001) 127 A Crim R 46** where a significant inconsistency arose between the defence opening by experienced Queen's Counsel, and the evidence of the accused. The Crown Prosecutor in address and trial Judge in summing up suggested to the jury that it was open to the jury to conclude that the appellant had changed his story. The appeal was allowed. Sully J in **Turnell** quoted from such decision, in so far as it was held that whether an inconsistency arises between failure to cross-examine and the evidence of the accused, or between such evidence and an opening address on his behalf, the effect is the same: in both situations, a question arises as to whether the conduct of counsel accords with the instructions given by the accused. There are several possibilities, such as misunderstanding instructions, forgetting instructions, or an accused changing his story. There is danger if the trial judge fails to point out the possible causes for inconsistency other than fabrication on the part of the accused. A passage from the judgment in **Oldfield** was also quoted with approval, in relation to the availability of adverse inference, and the corresponding need to assist the jury with reasons why such inference may be unsafe to draw. The Court made no reference to **MWJ**.

163. Most recently in November 2008 in **NSW Food Authority v Nutricia Australia Pty Ltd [2008] NSWCCA 252** the Court of Criminal Appeal dealt with a case stated from James J, concerned with notices for contempt arising from orders to provide information and produce documents, potentially interfering with the privilege against self-incrimination. Spigelman CJ (with whom Hidden and Latham JJ agreed) at [151] made reference to the frequent characterisation of our system of criminal justice as 'accusatory' in High Court jurisprudence, in areas including duplicity, to explain the right to silence and determine the inapplicability of the rule in **Jones v Dunkel** in a criminal trial (citing **RPS v The Queen**, **Azzopardi v The Queen** and **Dyers v The Queen** and "..to explain the inapplicability of the rule in **Browne v Dunn** to a criminal trial (**MWJ v The Queen [2005] HCA 74; (2005) 80 ALJR 329** at [41] …"

164. One difference between **MWJ** and some of the other cases is that the evidence of the complainant was to be contradicted by evidence called by the Crown (and furthermore, to which objection was taken), as opposed to evidence to be adduced by the defence. The Crown was on notice of the inconsistency in its own case. Of the more recent NSW CCA decisions dealing with the rule in

Browne v Dunn, two since **MWJ** was decided (**Oldfield** and **Turnell**) confirm the existence of the rule in criminal trials in so far as there is an expectation that the material instructions of the accused will be put to the complainant (although with the safeguards and modifications required because of the nature of a criminal trial). **MWJ** was not mentioned however in either decision. Obiter remarks by Spigelman CJ in **NSW Food Authority v Nutricia** refer to **MWJ** as rendering the rule 'inapplicable' in a criminal trial. **Rend** was partly decided on the basis that the very existence of the rule in a criminal trial was seriously doubted by the majority in **MWJ** – although **Rend** was a case where the Crown was found to have sufficient notice of the issue before the close of the Crown case. Adams J was the only judge who considered **MWJ** in **RLT** – and his Honour still regarded there being an obligation to give the mother an opportunity to answer a suggestion that she in fact had injured her son's penis, before such suggestion could be made to the jury (although somewhat cryptically saying that this was 'subject to what was said in **MWJ**'). His Honour was of the view that the issue had been sufficiently squarely raised with the complainant himself by putting to him that it was not the accused who had injured him.

165. It seems that the majority decision in **MWJ** was sufficiently strong regarding the issue that the 'radical' position put forward in **Liristis**, the year prior to **MWJ** being decided, would probably now be accepted. I am not aware of it having been argued again since such time. This 'radical' proposition though conceded, of course, that there could be consequences to the accused if evidence was called by him in relation to the matters not put to the Crown witnesses. The examples given were the recall of a witness or adverse comment. The option of recalling a witness – which of course is confirmed by s.46 of the Act – was specifically mentioned in the relevant part of the majority judgment. The undesirability of a complainant in a sexual assault matter being recalled in reply would in my view, in practical terms, point in favour of a conservative application of the rule in the choice of matters to be put to the complainant.

166. It may be that 'adverse comment' would be limited to a comment about the weight to be given to the defence evidence, when it is not known what the Crown witness could have said about it. This would seem to be more in accordance with the judgment in of Gleeson CJ and Heydon J in **MWJ** (in accepting the judgment of Doyle CJ in the intermediate appellate court regarding giving less weight to defence submission on the inconsistency), which is what the majority did not accept to be the case in a criminal trial. It may be then that even the 'radical' position put forward in **Liristis** was not radical enough, and the only adverse consequence would be the recalling of witnesses.

167. Despite **Oldfield** and **Turnell** having been decided since the High Court delivered judgment in **MWJ**, I think that the High Court authority does offer compelling reasons for prohibiting cross-examination of an accused person about matters not having been put to the complainant (or other Crown witness). There is no legitimate basis for such cross-examination unless there is an expectation that the material instructions will be put. If the advocate is entitled to refrain from putting material instructions, and take a chance as to whether the Crown will seek to recall the complainant, then it is not quite right to refer to such an expectation. The only issue is an objective consideration of whether the Crown has been unfairly taken by surprise, and what can be done to remedy this situation. The basis on which an accused can even be criticised for not providing relevant instructions until the close of the Crown case is somewhat murky. And apart from omissions in cross-examination, the accused can't be cross-examined at large regarding the timing of his instructions to his legal representatives (in relation to which he has a claim of privilege). There can be no adverse comment against the accused personally by way of submission or direction unless such cross-examination has been allowed.

168. There is some irony in the fact that many of the matters which have been argued on behalf of alleged victims of sexual crimes to be most unfair and distressing – cross-examination that is too long, going over the precise details physically of the alleged offence, dealing with suggestions of 'provocative' behaviour or other conduct indicating interest in sexual contact, etc. – are similar matters to those in relation to which from the defence perspective there is a real issue to determine as to whether we are required, as a matter of fairness to the complainant, to squarely raise in cross-examination.

169. My own view is that conservative compliance with the rule in **Browne v Dunn** is desirable in most criminal trials, including trials for sexual offences. Although of course questions do not provide evidence, jurors always seem interested when positive propositions of fact are put to the witness. Especially if the accused is giving evidence or a recorded interview is to be tendered, such questioning is capable of re-iterating the impression that the defence case is cohesive, and that the advocate knows exactly what it is. There is however in sexual matters much to be said for as much brevity as possible regarding the sexual conduct itself. What is required will vary greatly from case to case.

170. Defence advocates are in a difficult situation in light of s.41 and the corresponding ethical / disciplinary consequences. Section 41 only arises once evidence sought to be adduced is relevant.

There is a large scope of area for disagreement among reasonable minds regarding which relevant questions for example, in sexual assault proceedings, are 'unduly' annoying, oppressive or offensive. This can be envisaged as arising particularly in the case of an adult complainant where the issue to be ventilated at trial is consent (and its necessary flow on to his knowledge of its absence, if proved). The conduct of the complainant ('moaning in pleasure', to quote a recent example? Or at least not screaming, not calling out, but moaning and co-operating) goes squarely to this issue.

171. My recommendation is that it is always prudent to obtain as much detail as possible by way of instructions from the accused regarding what the complainant did which led him to believe that she was consenting. In the absence of consideration of the particular complainant, I am not prepared to say in a vacuum that putting the entirety of this detail to the complainant could contravene s.41 – but a combination of the graphic nature of the detail, its lack of actual significance, and the reaction of the particular complainant in court may make a contravention of the section loom near – or at the very least bring counsel to a point of making a decision on his or her feet not to pursue the matter in more detail.

172. The absence of clear black and white answers to these questions emphasise the difficulty again in any resort on the part of the Crown to the rule in **Browne v Dunn**. If it has any ongoing role in a criminal trial, further caution and circumspection than ever is required because of the limitations on cross-examination set out in s.41. It would be unsatisfactory for trial Judges to have to start explaining to juries the effect of s.41 and the Bar Rules, to weigh this up as a possible reason other than the accused's recent invention for omissions in cross-examination.

173. In an ideal world, we would have the entirety of our instructions from our client typed up, signed and dated. But with a busy practice, the reality is that even hard working, committed and diligent practitioners are unable to always achieve this. The reality too is that clients do add things in during the course of evidence which counsel were not aware of. This may sometimes be a recent invention, or may genuinely be something the client was not asked by his legal representatives and not something which he should have brought up in response to something that was asked. There are all sorts of explanations in between, accounting for a failure to provide complete instructions.

174. I would hope that Crown Prosecutors would exercise greater circumspection than ever before objecting in the jury's presence to evidence from an accused person, or cross-examining him about this evidence, where it is material of a kind which may have been deliberately not touched upon in the cross-examination of the complainant. Ideally our word to the Crown Prosecutor that absence of cross-examination on such topic was a deliberate decision would be sufficient to stop such course being embarked upon – but of course not all relations between opposing advocates is always so good. Producing signed and dated instructions, or evidence from the instructing solicitor on a voir dire as to the accused having provided such instructions at an earlier point in time, would be another way to argue that the matter should not even be ventilated in the presence of the jury. It would be most undesirable for counsel to have to start resorting to informing the court from the bar table as to the making of forensic decisions and the timing thereof. If objection is unsuccessful, then of course evidence is able to be called in front of the jury to rebut the inference of the accused changing his account. In addition to the option referred to in **Oldfield** of the solicitor giving evidence as to the provision by the accused of the relevant instructions, an application for leave to re-examine the accused by raising a prior consistent statement pursuant to s.108 of the *Evidence Act* is another option.

175. In conclusion then on the **Browne v Dunn** issue, I would suggest the following as ordinarily appropriate:

· If evidence is to be called by or on behalf o the accused on material matters which might be expected to be within the complainant's knowledge, he or she should be cross-examined about such matters unless an express decision is made by counsel not to raise the matter because of s.41.

· If a decision is made not to cross-examine because of s.41, good records and / or available evidence as to when the client provided the relevant instructions would be useful as a fall-back. The first point would be to argue the law regarding the ongoing requirements of the rule in **Browne v Dunn**, particularly in light of the restrictions on cross-examination of sexual assault complainants.

· If the advocate intends to make a submission adverse to the credibility of the complainant, even if arising from other material yet to be called in the Crown case, then it is more prudent (subject to s.41) to raise it with her rather than having her recalled. A decision by counsel not to cross-examine upon this because of s.41 would need to be ventilated if the Crown later offered to recall her, after the inconsistent evidence was called.

· If something does go wrong, then counsel should be armed with the above authorities to argue against cross-examination of the accused and / or the making of adverse submissions; or be prepared to call evidence to remedy the problem and / or assist the trial judge in relation to directions to the jury.

CONCLUSION

176. I am firmly of the view that the limitations contained in s.41 encourage cross-examination in sexual assault proceedings which is in style and content in the best interests of the accused. As was said by Heydon J in **Libke** at [132]:

> " It is not unique in the law of evidence to find that the more closely the rules for admissibility are complied with, the greater the utility of the testimony from the point of view of the party eliciting it. It is certainly the case in this field. The rules permit a steady, methodical destruction of the case advanced by the party calling the witness, and compliance with them prevents undue sympathy for the witness developing. It is perfectly possible to conduct a rigorous, testing, thorough, aggressive and determined cross-examination while preserving the most scrupulous courtesy and calmness. From the point of view of cross-examiners, it is much more efficient to comply with the rules than not to do so."

177. Sexual assault proceedings do not commence with juror sympathy for the accused and warmth towards defence counsel. The allegations are of a kind where the accused is not assisted by any impression of the 'defence team' or defence case as inhumane, brutishly aggressive, bullying, dishonourable, unfair, or tricky. A perfectly robust cross-examination can be undertaken within what I think should be the proper interpretation of the section.

178. The focus on sexual assault proceedings in considering improper questioning offers an opportunity for defence counsel to think seriously about what we are doing, what we need to ask to best protect our clients. Much 'filler' cross-examination can be cut out with more thorough preparation. The statutory regime forces closer consideration of what we are trying to achieve. Most of the examples referred to above which I think would have run foul of s.41 were also, in my view, instances of not the most desirable advocacy for protecting the interests of the accused. Cross-examination in this area in particular should be limited to that which needs to be done to most powerfully address the jury. In the case of the complainant who made breakfast for example, what was to be addressed on other than the fact that she made breakfast (and did so in a completely normal fashion, if this could have been elicited), and the paucity of shock as a reason for the same? Which advocate would in addressing the jury turn to the part of the transcript where she was questioned as to whether she could come up with anything better, whether she was going to stick to what she had said. Why needlessly increase the chances of the jury seeing a distressed complainant?

179. Uncontrolled cross-examination also runs the risk of damaging answers being provided. The New Zealand case of **R v Thompson [2006] 2 NZLR 577** provides a good demonstration of the inevitability of a 'bruising' cross-examination irritating the complainant.

180. There is much which has been said in support of the rights of alleged victims of sexual offences in the criminal justice system which marks, in my view, an extreme misunderstanding of the nature of a criminal trial and the role of defence counsel. Although advocates of such rights always say that the accused needs a fair trial, there is never anything constructive said as to how complainants should be cross-examined, assuming the accused is innocent. The thrust of the criticism of the criminal justice system and cross-examination in particular seems to be that the complainant should simply be able to tell his or her story in his or her own words (which need not even correspond with particular specific charges), without being questioned and without dealing with any suggestion that it is not right. Pressing such approach comes perilously close to suggesting that sexual crimes should not be dealt with within the criminal justice system. This view though is eschewed by such advocates – the requirement is still there that the law harshly condemns and sentences the 'rapist' or 'molester'.

181. Just as I am of the view that the legal profession needs to keep abreast of and take into account the increasing awareness of the effect of sexual crimes on victims, and the effects of court processes on witnesses generally but in particular upon children and those alleging sexual violence, so too am I of the view that those who so strongly criticise defence conduct in sexual offence proceedings should take the time to develop a better understanding of why that which is legitimately done is done.

182. The word ‘unduly’ in s.41(1)(b), and the safeguards in s.41(3) ensure that those accused of sexual crimes can still be fairly defended. It is to be hoped that better public tolerance of the ambit of defending those charged with sexual crimes might be achieved through a concerted effort on the part of the profession to comply with the legislation.

BELINDA RIGG
Public Defender

March 4, 2009