AN EVOLVING JUSTICE SYSTEM[1]

Chief Judge Peter Kidd[2]

In recent years, there has been extensive community discussion about complainants' experiences during criminal trials involving sexual offences. Their experiences will vary as will their justice expectations. While some complainants experience satisfaction with the trial process, it may be accepted the system does not fulfill the justice needs of others.[3] There is debate about whether greater accommodations can be made for complainants to make trials 'fairer'.

It has been said that '[t]here must be fairness to all sides. … It involves taking into account the position of the accused, the victim and his or her family, and the public.'[4]

It is important that this public debate be informed by the way in which a criminal trial operates. Some unpacking is necessary.

A criminal trial is a public trial brought by the prosecution on behalf of State against the accused. The person who alleges they were a victim of sexual wrongdoing is the complainant. The complainant is called as a witness by the State. The complainant is not a party, and they are not represented by the State.

Criminal trials are difficult. They are hard-fought, and much is at stake. They are also adversarial: the accused is pitted against the State. The process is carefully calibrated to ensure a fair hearing and to minimise the risk of wrongful conviction.

But the adversarial system is not without its challenges. Marking the parameters of a complainant's participation in a sexual offence trial is one such challenge. This is a complex task, as certain tensions may exist between the architecture of a criminal trial and the justice needs of a complainant.

Historically, the criminal justice system paid insufficient regard to the complainant's experience during a sexual offence trial. Justice is not, however, frozen in time. It can evolve; notions of fairness are — as Justice Gaudron said in *Dietrich v The Queen* — 'inevitably bound up with prevailing social values.'[5]

In my career, no area has changed as much as it has in sexual assault cases.

Juries are now given directions to counter misconceptions about sexual assault.[6] For example, they are told there is no typical, proper, or normal response to sexual assault.[7]

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1 Speech delivered at the Judicial College of Victoria's event, *Managing Sexual Offence Cases*, on 28 June 2024.

2 Chief Judge of the County Court of Victoria. I acknowledge the assistance of my Senior Associate, Pierce Russell, in the development of this speech.

3 Victorian Law Reform Commission, *The Role of Victims of Crim in the Criminal Trial Process*, (Report, August 2016), ch 5; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) chs 19, 20, 21.

4 *Attorney-General's Reference (No 3 of 1999)* [2001] 2 AC 91, [118] (Lord Steyn).

5 *Dietrich v The Queen* (1992) 177 CLR 292, [4] (Gaudron J).

6 *Jury Directions Act 2015* (Vic) pt 5.

7 *Jury Directions Act 2015* (Vic) s 47E(a).

There are stronger restrictions on questioning the complainant, including about sexual history.[8] An accused cannot personally cross-examine the complainant.[9]

A complainant can give evidence from a remote location, and they are supported to do so.[10] Their evidence is now recorded, avoiding the need to give evidence repeatedly.[11]

Before the complainant gives evidence, the court conducts 'ground rules hearings'.[12] These are designed to set the parameters and tone of the questioning for the complainant.

Language specialists are used for child and vulnerable complainants with communication difficulties.[13]

The County Court has had a specialist sexual offences list in place for two decades.

Laws have changed to protect the unwarranted intrusion into the privacy of a complainant's confidential medical and counselling communications.[14]

The victim's voice plays a substantive role in sentencing.[15]

There is now extensive specialist judicial education available in relation to the management of sexual offence trials.

Whether characterised as a trial participant, or a witness with a legitimate interest in the criminal trial process, it is beyond doubt that complainants have a right to participate meaningfully in the trial process, and to be treated fairly and with dignity.[16]

The changes, and others, have been influential and constant and are based on consultation and evidence.

There may, however, be limits on how far the criminal trial system can go to advance all the justice needs of a complainant.[17]

These limits stem not from misguided loyalty to outdated traditions, but from fundamental trial principles; without which, our system would be unrecognisable:

- The right of an accused to a fair trial before an independent and impartial jury is the cornerstone of our criminal justice system. The fair trial guarantee is absolute. A conviction after an unfair trial cannot stand. This is in no one's interest.

- The State must also prove its case 'beyond reasonable doubt'. The bar is a high one because the stakes for an accused are high; they face the prospect of imprisonment, possibly for years.

- The accused has a right to be presumed innocent until proved guilty, which I will return to.

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8 See generally *Criminal Procedure Act 2009* (Vic) pt 8.2 div 1.
9 *Criminal Procedure Act 2009* (Vic) s 356.
10 *Criminal Procedure Act 2009* (Vic) ss 360, 363 and 365.
11 *Criminal Procedure Act 2009* (Vic) pt 8.2 div 7.
12 *Criminal Procedure Act 2009* (Vic) pt 8.2A div 1.
13 *Criminal Procedure Act 2009* (Vic) pt 8.2A div 2.
14 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32C.
15 *Sentencing Act 1991* (Vic) pt 3 div 1C.
16 *Victims' Charter Act 2006* (Vic) ss 4 and 6.
17 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) 413 [19.11]-[19.15].

- And, finally, the accused has a right to test the evidence called against them and to do so by cross-examination.

These bedrock rights have been tried and tested, here and in other legal systems. They find expression in contemporary human rights law.[18]

Of course, there is scope to advance the complainant's interests in ways which are complimentary of the accused's fair trial rights. The reforms implemented to date reflect this. It is best exemplified by the greater controls placed on cross-examination; they make it fairer for the complainant but do not result in an unfair trial for the accused.[19]

There may, however, come a point where the shape of the criminal trial no longer aligns with the complainant's expectations or perceptions of fairness. The criminal trial is inherently geared towards protecting the accused's right to a fair trial, and meeting the objective that any conviction is a safe one. This means that the interests of the accused and the complainant cannot be perfectly matched or evenly balanced.

I turn to give examples.

More generally, even if conducted with optimal respect and sensitivity, sexual offences will invariably be hard to prove, and trials will be difficult for many complainants to go through. That is so, even with the best will in the world.

By and large, the complainant's version of events, and their credibility or reliability, will come under intense scrutiny. This is because in most sexual offence trials the State will primarily depend upon the testimony of the complainant to prove its case beyond reasonable doubt. This scrutiny may be intrusive but is mostly unavoidable.

The accused is entitled to test the complainant's accuracy or honesty, through cross-examination. By its nature, cross-examination is searching. It is directed at exploring the issues in the case, and at exposing any deficiencies in the account of the witness. It can be a daunting, confrontational process, even when done respectfully and appropriately. Such cross-examination is, however, essential for a fair trial.

This does not give an accused licence to belittle the complainant. Rules now prohibit harassing, offensive, or humiliating questioning.[20] Stereotypes have no place in today's courtroom.

Judges have an important role to play in this area. It is also a difficult one. The judge must weigh competing considerations — the right of an accused to test the evidence led against them with the need to minimise the stressful trial experience of the complainant.

A judge is well positioned to assess what is in the interests of justice. Trial judges have watched the evidence unfold, are immersed in the atmosphere of the trial and are alive to the relevant issues.

Questions that may seem perplexing or irrelevant to a complainant may, as a matter of law, be entirely legitimate and directed at a live issue in the trial. It all depends on the facts of the case at hand.

My observations are these. It is difficult to avoid robust and stressful cross-examination altogether. A complainant might genuinely be embarrassed, distressed or angry about a line of

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18 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24 and 25.

19 *R v TA* (2003) 57 NSWLR 144, [8] (Spigelman CJ).

20 *Evidence Act 2008* (Vic) s 41.

questioning. But it cannot be reasoned from this alone that the cross-examination is improper or unfair.

My next example flows from the presumption of innocence, a principle which sets the tone of a criminal trial.

Despite sitting at the centre of a criminal trial, the practical effect of the presumption of innocence can be misunderstood. The presumption simply means that the prosecution has the burden of proving the accused's guilt beyond reasonable doubt. The accused does not need to prove their innocence.

But the presumption of innocence does not require a jury to believe or disbelieve any person or account. Instead, a jury is told to approach its task with an open-mind — to weigh and evaluate all of the evidence presented by the parties to decide whether the prosecution has proved its case.

The presumption of innocence is the reason we use the term 'complainant' rather than 'victim'. The choice of this language is not intended to be insensitive to the experience of the person who makes the allegation. It recognises that, until the jury returns a verdict of guilty, a charge is an allegation.

There has been discussion within the community about the circumstances in which a person making allegations of sexual assault should be believed. Whatever those views might be, a criminal trial cannot proceed upon the footing that the complainant is to be believed. That would assume the accused's guilt, and reverse the presumption of innocence. Similarly, the system does not proceed upon the basis that the complainant is to be disbelieved. These questions, and the question of guilt itself, are decisions for the jury, who represent the community.

To conclude, over the last few decades there has been a visible shift in courtroom culture, including cross-examination, reflective of generational reform. While this shift is acknowledged by reform and research bodies, it has been observed that there remains scope for greater consistency in the practical implementation of these reforms.[21] There will always be room to build upon and refine the application of these practices and changes.

If we can further improve the complainant's experience, while also maintaining the accused's fair trial rights, we should. It is, however, important that we remain alive to the inherent constraints on change within the criminal trial system. Law reform bodies are active in this area and are well-placed to explore additional evidence-based and carefully balanced reforms.

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[21] Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) 459 [21.34].