Defending Sexual Offence Allegations in the Year 2025

Defending those charged with sexual offences is a complex and challenging part of criminal defence practice. The law is complex. And the subject matter can be confronting. It is also a topic that provokes, often by the mere mentioning of such an allegation, hostility towards those charged with such offences. Sexual offences stand alone in the practice of criminal law in the animus they elicit and that, too, forms another part of the challenge in acting in this area. What follows is a 'roadmap' of sorts for those who are briefed to appear in contested cases of these type. The fundamental point is that the proper defence of matters of this type requires a particularity of approach that is different to other criminal offences. It is proposed to situate the defending of these allegations not only in its legal or procedural context but to place it, too, in a wider cultural and historical context. By doing so, this should ensure those charged with such offences receive not only a fair trial, but the best possible defence.

INTRODUCTION

Our concern today is with the defence of accused persons charged with sexual offences.

We are solely concerned with matters that are contested; that is, where is no prospect of resolution and where the case has been through the various pre-trial or pre-hearing processes – contest mention, case assessment hearing, sentencing indication – and where the matter will proceed to verdict. That is, these are cases that require nothing other than a hearing to determine the contested facts.

What we hope to provide is a generic 'formula' of how to prepare for such matters that optimises the prospects of a successful defence to charges of this type. That 'formula' is replicable for all sexual offences though our focus will be the offences of rape and sexual assault.

THE LEGAL AND CULTURAL ENVIRONMENT FOR DEFENDING SEXUAL OFFENCES OVER THE LAST TWENTY-FIVE YEARS

But before we get to that generic 'formula', we note that we have highlighted the year '2025' in the title to our presentation.

That is no accident.

Because the area of sexual offences in Victoria has undergone considerable reform over that period.

We have 'traced' the whole range of significant legal changes in Victoria – especially in the law surrounding rape – in this area and have set that out in a document that accompanies this presentation.

We note that those changes have been most pronounced in rape prosecutions.

Other reforms in sexual offences concern the appointment of intermediaries for children and other vulnerable complainants who require assistance in presenting their 'best evidence' to the judges of the facts.

Multiple reasons can be said to have contributed to the extent and frequency of legislative reform in this area.

One reason has been a change in the understanding of sexual offending within the community.

In particular, 'collective understandings' of the reality of sexual offending have been significantly enhanced.

Stereotypical ideas about sexual offending and victimization have been disassembled and replaced with a more enlightened understanding (although there is an argument that there is still not a sufficient understanding of the reality of sexual victimization).

Wider 'cultural' events may account for this more nuanced understanding of sexual offending within the community.

Stand out developments in the last 25 years include the *Royal Commission into Institutional Responses to Childhood Sexual Abuse* and the cultural phenomenon of the #MeToo movement.

Both of those developments documented the widespread acts of unwanted sexual behaviour.

It exposed how power and privilege were used to enable such offending and then, prevent, the detection and investigation of sexual offending.

Another reason for repeated legislative activity in this area – particularly for the offence of rape – is a concern that despite the legislative reforms conviction rates remain low for rape prosecutions in Victoria.

That is said to have implications beyond the immediate case and, in aggregate, acts as a discouragement for victims of sexual violence to seek redress through the criminal courts.

In that sense, defending those charged with sexual offences – in particular, rape – is done so in an environment where legislative reform has sought to increase the conviction rate.

For those appearing in defended matters those wider cultural changes must be accounted for and borne in mind.

Because not only do those changes inform the law, they also are likely to be in the minds of judges of the facts: Magistrates and juries.

Any person who appears in defending sexual offences needs to be well-informed about the wider context and demonstrate sensitivity to sexist tropes and stereotypical ideas about sexual offending.

We want to suggest that this is not mutually exclusive with a robust defence where it is necessary to contradict and challenge a complainant.

PREPARING FOR THE TRIAL AND CONTESTED HEARING IN SEXUAL OFFENCES

What is set out below are some of the important considerations and steps that are more likely to produce a successful defence for those charged with sexual offences.

1. **TREAT THE BRIEF AS AN ARTIFACT**

In a contested matter, treat the brief in a sexual offence as an 'artifact' that requires 'deconstruction'.

Do not be intimidated by the brief. Remember that the brief is a constructed document.

All it represents is the compilation of the investigate work, and in documentary form, following an investigation.

The resulting brief is not an objective nor neutral document. It is a document that aims to persuade. It is designed for the purpose of the prosecution.

It signals to the accused the nature of the prosecution case and the evidentiary basis for it.

In short, the 'brief' is an attempt by the police, and then the prosecution, to persuade the accused to plead guilty by conveying the following message: that the case is overwhelming.

The benefit of treating the brief as an artifact is that it gives proper weight to the fact that the brief is an exercise in reconstruction of past events.

And that reconstruction is necessarily a product of choices made by both investigators and complainants as to what information is provided.

The benefit of understanding the brief as an artifact compels you to have a framework for critical analysis.

And it reminds you that just because something is written down – for instance, in a statement or recorded in a VARE – that does not necessarily mean that it is true, let alone beyond forensic challenge.

That is not the case and the 'excavation' and 'deconstruction' of the brief in the hearing is a key forensic task.

Choices as to what is, and what is not, included by investigators has a profound influence of the 'content' of a statement or a VARE.

Police statements in sexual offences tend to work in a chronological form.

Proceed from topic to topic and from allegation to allegation.

Some statements are expansive while others are more confined in scope in what information is provided.

The fact that that is so emphasises the power of investigators to create a particular narrative by the mere fact of what questions are asked, and what information is sought.

And remember it may be what questions are not asked or what is omitted may be crucial in the defence of an accused.

This is important in establishing a 'counternarrative' to the prosecution case. 'Counternarratives' are necessary in every contested sexual offence case.

They provide a 'version' of the events that should keenly dispute the prosecution case.

It is in those areas – and the building of a coherent and plausible counter narrative – that produces reasonable doubt and a successful defence.

2. EXHAUSTIVE DISCLOSURE

A necessary corollary of treating the brief as an artifact, is the necessity of obtaining proper and 'exhaustive' disclosure.

Because in disclosure is to be found not only the course of the investigation but also material that can be useful in cross-examination of the complainant (especially in providing contradictory and inconsistent previous representations).

It is where hidden gems are to be found.

It is where it is possible to ascertain what investigative steps were not taken and what lines of inquiry were missed or consciously eschewed.

'Disclosure' then is the backstage to the brief as an artifact.

Not only seek full and complete disclosure but treat what is to be found in that disclosure in your preparation.

Of course, modern disclosure is different to what it was at the beginning of this century.

The extensive proliferation of mobile communications and the resulting data 'dump' produced by, for instance, Cellebrite provide important details that provide information – especially in relation to the complainant and other witnesses – that will be beyond what appears in their statements or otherwise in the brief of evidence.

3. PREPARE A COMPREHENSIVE CHRONOLOGY

Whether defending a person charged with historic, or contemporary, sexual offences a chronology is essential.

A chronology provides a 'ready reckoner' of the state of the evidence in the prosecution case.

Ideally, there should be a separate and discrete chronology that you should prepare based on the defence case and your instructions.

The benefit of a meta-view of the prosecution and defence case revealed by a chronology is that it permits the identification of themes, continuities, and contradictions.

Those "themes, continuities and contradictions" are important in the design of the narrative and story that is put forward as part of the defence case.

In addition, chronologies are of great value in cross-examination – particular historical allegations of sexual offending which traverse a significant period of time – as it allows you to confidently move between topics, events and time periods.

4. CHART THE NARRATIVE OF DISCLOSURE

The disclosure of allegations of sexual offending can occur in a variety of circumstances.

The 'narrative of disclosure' can be considered the heart of the prosecution case.

It is where the case against the accused commences.

It is with these 'previous representations' that can be the commencement of matters that raise legitimate questions about the reliability and credibility of the complainant's account.

In cases of sexual offending disclosure will typically occur in three contexts.

First, to friends, family, and work colleagues.

Second, to medical practitioners, teachers, and social workers and other allied professionals.

Finally, a complainant may report a matter directly to the police (where in most cases there will be a disclosure interview before the production of the witness statement).

And remember it is not simply what the complainant represents about the allegations that may become important.

It is other surrounding circumstances that form part of the narrative are also important.

When assessing the 'narrative of disclosure' it is also important to assess what has been 'omitted'.

'Omissions' by complainants – and self-selection of certain amount of material to investigators – are important in these types of cases.

With children, carefully consider the reactions and responses and questioning by those surrounding the complainant.

If there is a VARE in the case – that, too, must be carefully examined to see whether the questioning has contained impermissible leading questions – ensure you have the notes of the 'disclosure' interview.

Typically, those interviews are not recorded (and it is not clear why they are not) but there will be notes in existence of that disclosure interview.

Attempts have been made by the legislature to reduce the resonance of inconsistencies as part of the directions that are provided to juries to reduce the salience of inconsistencies in assessing the reliability and credibility of complainants.

But remember the important 'balancing' part of that direction that there may be differences in account in both truthful and untruthful accounts.

Finally, remember it is not simply a positive inconsistent statement that is useful forensically; 'omissions' – when established – can become significant and can be used to impair the reliability and credibility of the complainant.

5. INPUTS FROM CLIENTS AND OTHERS

We want to suggest that the client and others often provide a rich reservoir of material that may be useful in their defence.

Obtain that material.

Not only does it mean that the client is involved in a 'participatory defence' – that is, where the client's instructions extend beyond a mere response to the brief – but it allows for the development of a counter narrative to the prosecution case.

Of course, a request for such information may result – particularly in historic allegations of sexual offending – in a rich trove of material being produced by the client.

Treat that as helpful. Because it often is.

Of course, the use of that material must be discriminatory and not simply a regurgitation of the client's instructions and that material.

And that is where the skill of the lawyer is most important because a forensic judgment will be made to use how much and how little of that material.

The benefits of such a 'deep dive' are manifold.

First, such investigations will often be more than what the police investigation has uncovered.

Our experience has been that the approach of investigators is often narrow and circumscribed closely with the allegations of the complainant.

Second, by expanding the knowledge base beyond that of the prosecution case is a useful forensic tactic because it demonstrates that there is 'another side to the story' (which is all important in defending sexual offence allegations).

That 'other side' can be put to complainants in cross-examination to support the 'counter-narrative' that is the defence case.

Finally, have multiple conferences with the client.

As lawyers we do not always ask the right questions. And clients do not always realize the significance of information that they possess and its relative importance.

By having several conferences, the probability that you will be possessed of all relevant information will have increased.

6. FRAMING AND FORMING A CASE THEORY

Once you have undertaken the above 'steps' it is necessary to 'frame' your case.

'Framing' in the legal context, refers to the idea that one should be able to articulate what your case in a short, concise manner.

Two or three sentences or no more than 50-75 words. Try it.

We find it useful because it compels you – once you have considered all the material in the case – to articulate what exactly your case is about.

Be clear and consistent in what the defence is from the very start to the very end of the case.

In sexual offences, defences tend, broadly, to break down to either a straight denial of the allegations or an acceptance that the events occurred but that it occurred with consent and a reasonable belief in consent.

7. NARRATIVE AND THE DEVELOPMENT OF A 'STORY'

Storytelling has long been part of a human condition.

As a means of communication, it can create a vivid and lasting impression.

In the forensic context, where successful persuasion of the correctness of your defence is the only end, narrative and storytelling can work to assist by conveying the acceptability of your client's 'story'.

Empirical studies of jury decision making support this idea. Pennington and Hastie's seminal research on jury decision making found that in coming to a decision in a case the jurors used a 'story' model.

Importantly, they found that what jurors look favourably upon is those arguments – and that evidence – that they considered more plausible and probable.

By doing so they were relying not only on their common sense and life experience but were making findings about the probability and plausibility of one story over another.

In the case of sexual offences – especially where a principal issue may be consent and reasonable belief in consent – what can be critical is the account – or 'story' – which is the most probable and plausible between the competing versions.

In crafting and structuring a defence in sexual offence cases, highlights those parts of the evidence which suggest to the fact finder that this is the most likely and most probable narrative of events.

8. SCOPE AND ADEQUACY OF THE POLICE INVESTIGATION

We suggest that an underutilised aspect in contested matters of a sexual offence is questioning surrounding the scope and adequacy of the police investigation.

Part of the reason for inadequacies in police investigations – and which can be exploited at hearing or a trial – is that investigators may take an uncritical view of the complainant's account.

There is often a presumption that the complainant's account is true.

Because of that assumption, investigators may not conduct a proper investigation or rely entirely on the information the complainant has provided.

A poor investigation – whether a failure to speak to relevant witnesses or a failure to obtain corroborative evidence or follow logical leads or properly investigate matters raised by the accused in a ROI or having a 'tunnel' view of the case or failing to properly document investigative steps is a critical part of raising reasonable doubt.

CONCLUSION

Defending those charged with sexual offences is difficult.

It is work undertaken where there is a presumption that the complainant is telling the 'truth' and where legislative reforms have attempted to reduce the 'space' for defence arguments that hitherto been made on behalf of accused persons.

Such legislative reforms will be unlikely to abate.

But it is still possible – and despite those legislative reforms – to present a robust defence on behalf of those charged with such offences.

In a contested sexual offence matter, it is imperative that you leave the decision-maker – be it a Magistrate or a jury – with a unified narrative of the defence case that has been evident from the commencement of the case until you sit down.

Put simply: the judges of the facts – be it a Magistrate or a jury – should be in no doubt as to your counternarrative.