

---

# Chapter 1

## Introduction

### **SCOPE OF THIS REPORT**

1.1 This is the Victorian Law Reform Commission's Final Report on reform of sexual offences laws and procedures. The terms of reference for this inquiry require us to report on whether legal, administrative or procedural changes are necessary to 'ensure the criminal justice system is responsive to the needs of complainants'.

1.2 In December 2001 the Commission published a Discussion Paper, which called for submissions on various changes to substantive sexual offences and on some aspects of evidence and procedure in sexual offence cases.

1.3 In June 2003 the Commission published an Interim Report on sexual offences. The Interim Report sought responses to 107 recommendations for legislative, and administrative and procedural changes that were intended to improve the treatment of adults and children who report they have been victims of sexual offences, whilst ensuring that people accused of sexual offences continue to receive a fair trial.

1.4 Because the arguments for and against proposed legislative changes were examined in the Discussion Paper and Interim Report in considerable detail we do not repeat these arguments in this Final Report. Instead, the Final Report takes account of the responses which the Commission received in submissions and during consultations and expert roundtables, and makes final recommendations. The Report also describes additional research completed during the final stage of the reference, which has been taken into account in our recommendations.

### **THE CRIMINAL JUSTICE SYSTEM RESPONSE TO SEXUAL OFFENCES**

1.5 The Discussion Paper and Interim Report provided information on the incidence of reported and unreported sexual offences, and analysed the outcomes of rape prosecutions and penetrative offences other than rape between 1997–8 and

1998–9.<sup>1</sup> As many studies have shown,<sup>2</sup> the majority of alleged sexual offences go unreported. Victorian data shows that people who allege that they have been sexually assaulted are the least likely of all crime victims to report to the police.<sup>3</sup>

1.6 A relatively low proportion of reports of sexual offences result in prosecution. In our study, less than one in six reports to police of rape and less than one in seven reports of incest or sexual penetration of a child proceeded to prosecution.<sup>4</sup> Even if an offence is reported and the defendant is prosecuted, guilty pleas<sup>5</sup> and conviction rates are lower than for other criminal offences. In the years 1997–8 to 1998–9, of the 357 defendants who were initially referred to prosecution for one or more rape charges 76% were not convicted of rape.<sup>6</sup> Of the 282 accused who were committed for trial on at least one rape charge only 84 (30%) pleaded guilty or were convicted of rape at trial. A further 98 (35%) pleaded guilty to, or were convicted of, a non-rape offence.<sup>7</sup> Conviction rates for rape have fallen significantly since 1988–9, when approximately 46% of accused were convicted of at least one rape charge.<sup>8</sup>

1.7 In the same years, 116 (44.9%) of the 258 accused who were prosecuted for penetrative offences other than rape (for example incest and sexual penetration of a child) were convicted of at least one penetrative offence. Of the 223 cases committed for trial 116 (52%) of accused pleaded guilty or were convicted of a

- 
- 1 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Discussion Paper (2001) (hereafter Discussion Paper), Chapters 3 and 4; Victorian Law Reform Commission, *Sexual Offences*, Interim Report (2003) (hereafter Interim Report) Chapter 2.
  - 2 See, for example, Australian Bureau of Statistics, *Women's Safety Australia* Catalogue 4128.0 (1996) 28–9, which estimated that only 10% of women who had ever been sexually assaulted reported the last incident to the police. Fifteen per cent of women who had been sexually assaulted in the past 12 months reported the incident to the police. See also Julie Stubbs, 'Sexual Assault, Criminal Justice and Law and Order' (2003) 14 *Women Against Violence* 14, 16–7.
  - 3 In 1999, in Victoria, it is estimated that almost half of the victims of robbery reported that robbery to police, as did almost 30% of the victims of assault. In contrast, it is estimated that only 17% of the victims of sexual assault said they reported those offences to police: Department of Justice Victoria, *1999 Victorian Crime Victimization Survey* (1999) 3.
  - 4 Interim Report paras 2.37–44, 2.81. A similarly high attrition rate was reported by the former Law Reform Commission of Victoria, *Rape. Reform of Law and Procedure*, Appendixes to Interim Report No 42 (1991) pp 41–2. For a similar finding in NSW see Julie Stubbs, above n 2, 17.
  - 5 Julie Stubbs, above n 2, 17.
  - 6 Discussion Paper para 4.68.
  - 7 The various non-rape offences were not recorded. It is likely that many of these would have been convicted of lesser sexual offences such as indecent assault.
  - 8 Discussion Paper para 4.68.

penetrative offence at trial. A further 50 (22.4%) of accused were convicted of other sexual or non-sexual offences.<sup>9</sup> The higher conviction rate for penetrative offences other than rape may reflect the fact that cases involving children are only likely to result in a charge and proceed to trial where the police or the Director of Public Prosecutions (DPP) consider there is a strong prospect of conviction. Acquittal rates do not provide an accurate indication of the truth or falsity of an allegation as a person may be acquitted because the offence is not established beyond reasonable doubt.

1.8 Many submissions expressed concern about the low reporting rates for sexual offences and the difficulties that arise in successfully prosecuting people charged with these offences, particularly sexual offences against children. Low reporting, prosecution and conviction rates are a legitimate community concern because they are likely to result in some offenders escaping identification and conviction.

1.9 The statistics set out above illustrate the complexity of reforming sexual offences laws. The criminal justice system must be, and be seen to be, fair to the accused. People accused of sexual offences are entitled to the presumption of innocence. Conviction for a sexual offence has very serious consequences for an accused, which may include a lengthy prison sentence and life-long stigma. It is vital to ensure that any conviction is based on reliable evidence.

1.10 However, the criminal justice system must also take account of the needs of complainants who have a direct interest in the outcome of the prosecution, and of the community interest in encouraging people to report alleged offences and in convicting perpetrators. The Interim Report argued that current deficiencies in the system contribute to substantial under-reporting of sexual offences and discourage people who allege they have been assaulted from giving evidence at committal or trial.<sup>10</sup> Criminal procedures that discourage reporting or which stigmatise and traumatise witnesses in sexual assault cases may result in some offenders escaping apprehension, which may put more members of the community at risk.

1.11 Some people and groups in the community face particular difficulties in participating in the criminal justice process. Parents or carers of children may be reluctant to allow them to give evidence at a committal or trial because of the

---

<sup>9</sup> Interim Report para 2.81.

<sup>10</sup> See, for example, Interim Report Chapters 3 and 4–6.

traumatic nature of the experience. Research suggests that Aboriginal women and children experience a high rate of sexual assault<sup>11</sup> but offences against them are rarely reported. The criminal justice process also deals poorly with the needs of people from non-English speaking backgrounds (NESB).<sup>12</sup>

## THE UNIQUE CHARACTERISTICS OF SEXUAL OFFENCES

1.12 In addressing concerns about the operation of sexual offences laws expressed in submissions and consultations, the Commission has taken account of the unique characteristics of sexual offences, which present significant challenges for the criminal justice system. These include the following.

- Sexual offences usually involve the exercise of power by one person over another.<sup>13</sup> They are most frequently committed by family members, friends or other people known to the victim.<sup>14</sup> Such breaches of trust make sexual offences particularly traumatic for those who experience them. These factors contribute to the very low reporting rate for such offences, which means that some serious offenders are not prosecuted. People who are sexually assaulted by someone they know are less likely to report the offence than those who are assaulted by strangers.<sup>15</sup>
- Although sexual assault is frequently depicted as a criminal offence that is typically committed by a stranger, most sexual offences reported to the police involve persons known to complainant.<sup>16</sup> It has been suggested<sup>17</sup>

---

11 Julie Stubbs, above n 2, 16. See also NSW Aboriginal Justice Advisory Council, *Speak Out Speak Strong: Aboriginal Women in Custody* cited in Lisa Thorpe, Rose Solomon and Maria Dimopoulos for Elizabeth Hoffman House and CASA House, *From Shame to Pride: Access to Sexual Assault Services for Indigenous People* (2004).

12 Interim Report paras 3.12–23.

13 NSW Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003) para 2.3.

14 Police statistics for 1994–2002 show that only 12.1% of reported rapes and other penetrative offences were alleged to be perpetrated by strangers; Interim Report 68, Table 2.

15 ABS, above n 2, 29.

16 Interim Report paras 2.25–31.

17 Michael Briody (2002) ‘The Effects of DNA Evidence on Sexual Offence Cases in Court’, *Current Issues in Criminal Justice* 14(2) 159–181, cited in Julie Stubbs, above n 2, 19–21. Stubbs notes that there have been ‘few studies which examine factors associated with the processing of sexual offences and their outcomes beyond jury decision-making.’ (at p 18) She notes further that the study by Briody should be used with caution due to the ‘important differences in law and practice between the states and territories of Australia.’ (p 18) Also, the study was designed to test the impact of DNA evidence on outcomes in

that cases involving a sexual assault by a stranger are more likely to be prosecuted and more likely to result in conviction than those involving an accused known to the complainant.<sup>18</sup>

- Because sexual offences usually occur in private, it is often more difficult for the prosecution to satisfy the requirement that the offence be proved beyond reasonable doubt than is the case for offences where eye witnesses are likely to be present or there is other corroborating evidence. Where the complainant is an adult, the prosecution case normally depends on proving that the complainant did not voluntarily agree to the sexual act. This means that a successful prosecution will often turn on the credibility of the complainant, and that the complainant's character 'is put on trial in ways that are unparalleled in other areas of law'.<sup>19</sup> As a result, complainants are likely to feel that the trial focuses on their behaviour rather than on the behaviour of the accused. This is particularly the case where the accused does not give evidence, but the complainant is subjected to lengthy and arduous cross-examination. Although lawyers understand that an acquittal does not mean that the accused is innocent of the offence, a not guilty verdict may be perceived by the complainant as a judgment that the assault did not occur and may aggravate the trauma they have already experienced.

---

sexual assault matters and thus excluded all cases in which the accused agreed that sex took place but argued that it was consensual (such cases make up the majority of rapes. Melanie Heenan and Helen McKelvie in their study found that 'stranger rapes' were more likely to result in a conviction than were cases where the accused was known to the complainant. They note however, that due to the fact that most of the complainants who had been sexually assaulted by a stranger had sustained physical injury, and as the degree of physical injury was found to have a significant influence on trial outcome, it is difficult to know which variable had the greater impact on jury decision-making. They found no statistically significant links between the other relationship categories. Melanie Heenan and Helen McKelvie, *Crimes (Rape) Act 1991, An Evaluation Report* (1997).

- 18 A small empirical study by the Commission, however, found otherwise. In order to analyse whether or not the relationship between complainant and accused affects the outcome of a rape case, the Commission tracked all matters for the two-year period 1997/8–1998/9 in which there was at least one charge of rape at initiation. As a result of the small sample size, no statistically significant results were obtained. However our results suggest that family members (excluding partners) are least likely to be convicted of rape compared with other relationship types; strangers or accused who met the complainant the same day are more often acquitted when compared with other relationship types; when the accused and complainant are current or former spouses/ de factos, it is more likely that the accused will receive a rape conviction than a non-rape conviction as compared with other relationships. For further details of the Commission's empirical study including tables of results, see Appendix 1.
- 19 NSW Sexual Assault Committee, *Sexual Assault Phone-In Report* (1993) 39 cited in NSW Law Reform Commission *Questioning of Complaints by Unrepresented Accused in Sexual Offence Trials* Report No 101 (2003), para 2.8.

- Until recently sexual offences law reflected the assumption that people who were sexually assaulted normally complained of the offence immediately.<sup>20</sup> Research shows that this is not the case.<sup>21</sup> Many people do not tell anyone about the offence for some time and considerable time often elapses before the alleged offence is reported to the police. Such delays may make it difficult to prosecute offences successfully. They may also make it difficult for a person accused of an offence to run his or her defence.
- Historically, sexual offence laws were based on the myth that women as a class of witness are untrustworthy, that women frequently make false allegations of rape<sup>22</sup> and that the evidence of children who report sexual offences is inherently unreliable. Such misconceptions have been disproved by empirical research.<sup>23</sup> Although the law has been changed to remove many of these discriminatory assumptions<sup>24</sup> there still appear to be misconceptions about the way that perpetrators and victims of sexual assault typically behave. These assumptions may influence police decisions about whether a person should be charged, and prosecution decisions about whether to drop more serious charges if the accused agrees to plead guilty to less serious offences. At trial, defence counsel may use these misconceptions strategically to play on prejudices held by juries. Judges are still required to give some jury directions that do not accurately reflect research on the behaviour of complainants.<sup>25</sup> For example, the law may require the judge to tell the jury to take account of the fact that the

---

20 This was reflected in the ‘recent complaint rule’, which allowed the admission of a complaint of an offence made shortly after the offence occurred to be admitted to support the complainant’s credibility; see para 4.103.

21 See, for example, Interim Report paras 2.35–36, Graphs 3 and 4. Only 16.3% of reports to the police of penetrative offences other than rape were made within a week of the alleged offence, para 2.35.

22 This was reflected in the special evidentiary principles that applied to sexual offences, for example the principle that required corroboration of a woman’s evidence of sexual assault and the emphasis that the law places on the character and sexual experience of the complainant; see Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001) 630–1.

23 For an overview of the research on the accuracy and reliability of child witnesses see Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* Report 84 (1997) paras 14.19–24.

24 A broad overview of such reforms can be found in Gail Mason, ‘Reforming the Law of Rape: Incursions into the Masculinist Sanctum’ in Diane Kirkby (ed), *Sex, Power and Justice* (1995) 50.

25 A similar point is made by Simon Bronitt, ‘The Rules of Recent Complaint Rape Myths and the Legal Construction of the ‘Reasonable’ Rape Victim’ in Patricia Eastal (ed), *Balancing The Scales, Rape Law Reform and Australian Culture* (1998) 41, 54.

complainant did not tell anyone about the offence immediately after it occurred,<sup>26</sup> although the Commission's data and other studies show that delay is common, particularly if the complainant is a child.<sup>27</sup>

- Research shows that many complainants in sexual offence cases find their experience of the criminal justice system acutely distressing. Despite reforms over the past decade, the Commission's research and consultations show that many complainants are still very dissatisfied with the criminal justice process. While witnesses in other types of criminal prosecutions often find cross-examination stressful, in sexual offence cases this difficulty is compounded by the fact that the complainant must often answer questions about anatomical details and intimate sexual matters and be cross-examined at length on their behaviour prior to, and during, events that may have been very traumatic. Cross-examination may be particularly stressful for people from Indigenous backgrounds<sup>28</sup> and people from cultures where sexual matters are not usually discussed.<sup>29</sup>
- The adversarial nature of the criminal justice system requires prosecutors to prosecute the case vigorously while at the same time showing fairness to the accused. This may make it difficult for prosecutors to take sufficient account of the needs of complainants.<sup>30</sup> Similarly, defence counsel often argue that their responsibility to vigorously test the prosecution case, if the accused denies the allegations, makes it difficult for them to treat complainants sensitively. The trial judge's responsibility to ensure fairness to the accused means that some judges are reluctant to intervene to protect

---

26 For a judicial criticism of the current law see Justice J Wood, 'Complaint and Medical Examination Evidence in Sexual Assault Trials' 2003 (2003) 15 *Judicial Officers Bulletin* 63. For discussion of comments on this matter in jury directions see paras 7.65–122.

27 See, for example, the statistics discussed in Standing Committee on Law and Justice, Legislative Council, New South Wales Parliament, *Report on Child Sexual Assault Prosecution* Report No 22 (2002) para 1.18.

28 Pia van de Zandt, 'Heroines of Fortitude' in Patricia Eastal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 124, 127–8.

29 Roundtable discussion 'Progressing Responsive Strategies to Address Sexual Assault in Non-English Speaking Background Communities', co-hosted by the Commission and the Victorian Multicultural Commission attended by representatives of a range of stakeholder organisations, 23 August 2002.

30 Professor Jane Ursel has made similar comments about the difficulties which arise in prosecuting family violence cases, see "'His Sentence is My Freedom'" Processing Domestic Violence Cases in the Winnipeg Family Violence Court' in Leslie Tutty and Carolyn Goard (ed), *Reclaiming Self: Issues and Resources for Women Abused by Intimate Partners* 43, 44–5.

a complainant from unfair and harassing cross-examination. Research has shown that complainants in sexual offence cases are typically cross-examined for much longer periods than witnesses in other prosecutions cases involving assault or acts of violence.<sup>31</sup>

1.13 The difficulties outlined above are compounded for child complainants. Children who are abused by a family member may continue to have a close bond with the offender and may be reluctant to take action that will result in the break up of their family or the jailing of the perpetrator. They may not understand that the relevant behaviour is a criminal offence or may be coerced or threatened into keeping the behaviour a secret.<sup>32</sup> As a result, children are even more likely than adults to delay in reporting offences, which makes it difficult for the prosecution to prove that an offence has occurred. Even where the child does complain about the behaviour quickly, there will often be no physical evidence that supports their story.<sup>33</sup>

1.14 Children are even less familiar with the criminal justice process than adults and usually find it difficult to understand why they have to tell their story many times to many different people. They are particularly likely to find cross-examination confusing and stressful. Children may experience familial sexual abuse over a lengthy period of time, which makes it difficult for them to recall and recount details of particular events with sufficient clarity to allow prosecution of the alleged offender.<sup>34</sup> Those who are charged with such offences may also find it difficult to defend allegations about events which are alleged to have occurred over several months or years.

---

31 David Brereton, 'How Different Are Rape Trials? A Comparison of Cross-Examination of Complainants in Rape and Assault Trials' (1997) 37 (2) *British Journal of Criminology* 242. In this study it took about twice as long to cross-examine complainants in rape trials as it did in assault trials. Dr Caroline Shannon Taylor's thesis cites a case she observed in which a complainant in an incest case answered 1018 questions, 820 of which were from the defence. She cites a number of other similar cases, see *The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court in Australia in 1995* (Unpublished PhD Thesis, University of Ballarat, 2001), 229 n 7.

32 See, for example, the statistics discussed in Standing Committee on Law and Justice, Legislative Council, NSW Parliament, *Report on Child Sexual Assault Prosecutions*, Report No 22 (2002) 1.20.

33 Ibid paras 1.27-8.

34 *Crimes Act 1958* s 47A creates the offence of maintaining a sexual relationship with a child. This was intended to make it easier to prosecute when there are allegations of ongoing abuse. However the prosecution must be able to prove that at least three acts of abuse occurred over the specified period.

1.15 A study conducted in 1995 for the New South Wales Judicial Commission reported that approximately half of the children who testified in sexual offence cases found the criminal justice process an entirely negative experience.<sup>35</sup> In a more recent study in which children were interviewed who had given evidence in sexual offence cases, around half of the New South Wales and Queensland child complainants said they would not report a sexual offence if they were abused again. By contrast, 64% of child complainants in Western Australia where special procedures for children giving evidence in sexual assault cases have been in place for some time, said they would report an offence again.<sup>36</sup>

1.16 People with a cognitive impairment also experience significant problems in giving evidence in sexual offence prosecutions. The Disability Discrimination Legal Service (DDLs) has undertaken a project on the problems experienced by people with cognitive impairment in accessing the criminal justice system after sexual assault.<sup>37</sup> Despite the over-representation of people with a cognitive impairment as victims of sexual assault,<sup>38</sup> there are very few prosecutions under the Victorian offences that protect people with cognitive impairment from sexual exploitation by people with power over them.<sup>39</sup>

1.17 The recommendations in this Report are intended to take account of the unique characteristics of sexual offence cases and address the barriers to participation in the criminal justice process by people who allege they have been sexually assaulted.

## **OUR APPROACH—FAIRNESS TO BOTH COMPLAINANTS AND ACCUSED**

1.18 Many submissions received by the Commission in response to the Discussion Paper and Interim Report emphasised the need to improve the treatment of complainants in sexual offence cases. Complainants and government

---

35 Judy Cashmore and Kay Bussey, *The Evidence of Children* (1995) 39.

36 Christine Eastwood and Wendy Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System*, (2002) 1, Criminology Research Council <<http://www.aic.gov.au/crc/reports/eastwood.html>> at 27 May 2004.

37 Disability Discrimination Legal Service, *Beyond Belief, Beyond Justice: The Difficulties for Victim/Survivors with Disabilities when Reporting Sexual Assault and Seeking Justice*. Final Report of Stage One of the Sexual Offences Project (2003).

38 Lesley Chenoweth, 'Invisible Acts: Violence Against Women with Disabilities' (1993) 2 *Australian Disability Review* 22.

39 *Crimes Act 1958* s 51 and 52. Confirmed by Gary Ching, Manager Sexual Offences Unit in OPP in email of 23 September 2002.

and non-government bodies spoke of the difficulties experienced by people who report sexual offences and give evidence at committal and trial.

1.19 Submissions, consultations and research undertaken by the Commission also showed that earlier law reforms which were intended to improve the experiences of complainants had often failed to meet this objective.<sup>40</sup> For example, although child complainants in sexual offence cases are able to give evidence by closed circuit television from a place outside the courtroom, prosecutors are frequently reluctant to apply for this to be done and many judges do not initiate this procedure, although they have power to do so.<sup>41</sup> In the Interim Report we emphasised the need for cultural change to ensure that criminal justice processes placed greater emphasis on addressing the concerns of complainants and to encourage police, lawyers and judges to consider how complainants' needs could be met without compromising the rights of the accused.

1.20 On the other hand, lawyers' organisations and some judges were concerned that the Interim Report placed too much emphasis on the protection of complainants. Submissions from lawyers' organisations tended to assume that recommendations intended to make the criminal justice system more responsive to the needs of complainants would necessarily increase the chance of false convictions. For example, the Criminal Bar Association submission to the Interim Report commented that:

It is our assessment of the VLRC Interim Report that it has been formulated purely with a view to the interests of, and consequences for, the alleged victims of sexual offences without sufficient regard to the rights of the accused ... [T]hat has resulted in a report that creates the unfortunate impression that the more important result to be achieved is that more persons charged with these offences are more easily convicted of them. It is telling that none of the recommendations, findings or questions addresses the issue of how the number of wrongful convictions is to be reduced ... [W]e are concerned that implementation of the measures proposed in the Interim Report would undermine the rights of suspects and/or accused persons and may have the effect of compromising the integrity of the trial process.<sup>42</sup>

---

40 An example is *Evidence Act 1958* s 37A which was intended to restrict cross-examination of the complainant on prior sexual activity.

41 Interim Report para 6.62.

42 Submission 42.

1.21 The Criminal Bar Association was also critical of the Commission's failure to consult with people who had made false allegations of sexual misconduct or to ascertain the reasons why false complaints are made.<sup>43</sup> They commented that 'the old adage that an allegation of rape is easy to make and hard to disprove still holds true in some cases'.

1.22 The Commission is committed to retaining a fair trial process for people accused of sexual offences. It is important that the reforms we recommend do not increase the chance of wrongful convictions. However as the data discussed above<sup>44</sup> shows, the proposition that sexual offence allegations are easy to make and difficult to disprove does not accord with the empirical evidence. As we have seen, people who allege they have been sexually assaulted are the least likely of all crime victims to report to the police.<sup>45</sup> When an alleged assault is reported and a person is charged, the presumption of innocence provides considerable protection to people accused of sexual assault.

1.23 While the rights of accused must be protected, the Commission does not accept the argument that this is the sole purpose of the criminal justice system. The community has an interest in encouraging people to report sexual offences and in apprehending and dealing with those who commit serious sexual crimes. Complainants who decide to give evidence against an alleged perpetrator are performing a public service. Treating complainants fairly will help to ensure that 'potential witnesses are not discouraged from coming forward and that actual witnesses are not bullied into giving untrue or inaccurate evidence'.<sup>46</sup>

1.24 Australian and English courts have recognised that unfair treatment of complainants has the potential to undermine public confidence in the administration of justice. As Justice Brennan noted in *Jago v District Court (NSW)*.

---

43 Ibid 3.

44 See paras 1.6–7.

45 See above n 3. Note also that in ABS above n 2, 28, 19% of women who said they had been assaulted by a man said they had reported the incident to the police, compared with 15% of women who had been sexually assaulted. See the definition of sexual assault at 82. There is no definition of sexual assault in the *Victorian Crime Victimisation Survey*.

46 NSW Law Reform Commission, above n 13, 3.66.

Although our system of litigation adopts the adversary method in both the criminal and civil jurisdiction, interests other than those of the litigants are involved in litigation, especially criminal litigation. The community has an immediate interest in the administration of criminal justice to guarantee peace and order in society. The victims of crime, who are not ordinarily parties to prosecutions on indictment and whose interests have generally gone unacknowledged until recent times, must be able to see that justice is done if they are not to be driven to self-help to rectify their grievances.<sup>47</sup>

1.25 The Commission does not believe that the recommendations we make to improve the treatment of complainants will increase the chance of unfair convictions. In the course of our work we have considered a wide range of law reforms in other jurisdictions and found little or no evidence that these have resulted in injustice to those charged with these offences.

1.26 The recommendations in this Report are intended to achieve the twin goals of treating complainants in sexual offence cases decently while ensuring a fair trial for people accused of sexual offences. Many of the changes discussed in this Report are already in place in other parts of Australia.

## **EVIDENCE SUPPORTING OUR RECOMMENDATIONS**

1.27 The recommendations in this Report are based on evidence from a wide variety of sources including:

- information obtained from consultations and submissions; and
- empirical research on how the law operates in practice.

## **CONSULTATIONS AND SUBMISSIONS**

1.28 Full details of the Commission's consultation process prior to publication of the Interim Report are set out in that Report.<sup>48</sup> As the Interim Report explains, the Commission made particular efforts to obtain the views of Indigenous people, people from non-English speaking backgrounds and people with cognitive impairments, in order to understand the barriers that these people face in

---

47 (1989) 168 CLR 23, 49–50. See also *R v DJX* (1990) 91 Cr App R 36, 40 per Hutchison LCJ; *R v Brown* [1998] 2 Cr App R 364, 371 (Bingham LCJ).

48 Interim Report paras 1.12–25.

reporting sexual offences and negotiating other aspects of the criminal justice system.

1.29 Following publication of the Interim Report, the Commission arranged a number of meetings to explain and test the recommendations. These included:

- meetings to explain the recommendations in the Interim Report with the County Court, with members of the Law Institute and the Victorian Bar, with the Federation of Community Legal Centres, with coordinators and counsellor/advocates from Centres Against Sexual Assault and with the Statewide Steering Committee to Reduce Sexual Assault;
- meetings in Mildura and Warrnambool to explain the recommendations to organisations previously consulted by the Commission;
- two meetings and a number of less formal discussions with the Chief Judge and other County Court judges to discuss their response to Interim Report proposals;
- a forum to discuss the recommendations concerning child witnesses, which was jointly convened by the Commission and the Children's Welfare Association;
- roundtables to discuss evidentiary and procedural reforms with judges, magistrates, barristers, the Director of Public Prosecutions, employees from Victoria Legal Aid, academic lawyers, social scientists involved in researching aspects of sexual offences law and practice, and organisations providing services for people who have experienced sexual assault;
- meetings with members of the VOICES group which represents victims of sexual assault; and
- a meeting with representatives of the Disability Discrimination Legal Service to discuss the difficulties which people with a cognitive disability experience in the criminal justice system, whether as witnesses or as people accused of sexual assault.

1.30 The Commission received 75 submissions in response to the Discussion Paper published in September 2001. A further 55 submissions were received following publication of the Interim Report. Information from consultations and submissions has helped to shape our recommendations. Extensive reference to submissions is made throughout this Final Report.

## RESEARCH

1.31 In addition to our research on police statistics and prosecution outcomes, the Commission drew on expert advice provided in roundtables and consultations, comments in submissions and on two recent doctoral theses based on courtroom observations, case files and transcript analysis. These theses gave a systematic overview of the conduct of prosecution and defence lawyers and judges in sexual offence trials, and provided important information on the extent to which recent law reforms have actually affected the conduct of trials.<sup>49</sup>

1.32 Since the publication of the Interim Report the Commission has completed further research on the following matters:

- an analysis of jury directions in sexual offence trials occurring between 2000 and 2002 in cases in which consent, belief in consent or delay in reporting were in issue;
- an analysis on the effect of the relationship between accused and complainants on rape trial outcomes;
- focus groups with metropolitan and regional police/detectives to explore attitudes and practices about sexual assault generally and on the *Police Code of Practice for the Investigation of Sexual Assault*;
- an analysis of delays in processing child sexual assault cases; and
- an investigation of cross-examination of complainants at committal in serious sexual assault cases occurring between September and December 2003.

We refer to findings from these research projects throughout this Final Report.

## OTHER COMMISSION ACTIVITIES RELEVANT TO THE REFERENCE

### SUPPORT FOR INDIGENOUS ROUNDTABLE ON SEXUAL ASSAULT

1.33 During the second part of the reference, the Commission hosted a roundtable discussion for Indigenous leaders and workers from Indigenous and mainstream sexual assault services to discuss the needs of Indigenous

---

<sup>49</sup> Melanie Heenan, *Trial and Error: Rape Law Reform and Feminism* (Unpublished PhD Thesis, Monash University, 2001); Shannon Caroline Taylor, *The Legal Construction of Victim/Survivor in the Victorian County Court Australia in 1995* (Unpublished PhD Thesis, University of Ballarat, 2001). For a more detailed description of these theses see Interim Report para 1.26.

victim/survivors of sexual assault. The forum recommended that a second forum take place for Indigenous people only, to discuss their needs. The Commission supported this forum, which took place in October 2003. The Commission has received a report containing recommendations based on the two Indigenous roundtable discussions and a series of consultations arranged by Elizabeth Hoffman House Indigenous women's refuge.<sup>50</sup> The report identifies the barriers to participation in the criminal justice system that face Indigenous people and result in underreporting of sexual assault by Indigenous complainants. It proposes a number of measures to address these complex issues.

1.34 The report recommends the development and delivery of specialised 'Responding to Sexual Assault' training to Aboriginal community members and workers; the development and distribution of a Community Family Violence/Sexual Assault Resource Guide and a Statewide sexual assault awareness/safety campaign.

!	<b>RECOMMENDATION(S)</b>
1.	<p>The Department of Justice Diversity Unit should convene a steering committee with representation from criminal justice stakeholders, government agencies and Aboriginal services and community groups to oversee the development and implementation of the following:</p> <ul style="list-style-type: none"><li>• 'Responding to Sexual Assault' training for Aboriginal community members and workers;</li><li>• a Community Family Violence/Sexual Assault Resource Guide; and</li><li>• a Statewide sexual assault awareness and safety campaign for Indigenous people.</li></ul>

---

50 This consultation process was funded by the Lance Reichstein Foundation. A copy of the recommendations can be found in Appendix 2.

## STATEWIDE STEERING COMMITTEE TO REDUCE SEXUAL ASSAULT

1.35 The Statewide Steering Committee to Reduce Sexual Assault is a joint initiative by Victoria Police and the Office of Women's Policy. It met for the first time in June 2003<sup>51</sup> and its members include various government and community organisations. The terms of reference of the Committee state that sexual assault 'must be addressed through a whole-of-community whole-of-government approach...'<sup>52</sup> The committee is currently considering how the criminal justice system can better support the needs of sexual assault victims.

## COMMUNITY EDUCATION INITIATIVES

1.36 The Victorian Law Reform Commission's functions include the power to undertake educational programs on any area of law relevant to one of its references. The Commission believes that educational activities can improve the treatment of those who report sexual assault and play an important part in changing the treatment of complainants in the criminal justice system.

---

51 At the time, both the Office of Women's Policy and Victoria Police were developing women's safety strategies. Both had recognised the importance of having a range of government and community organisations involved in any strategy to reduce violence against women. Rather than duplicate efforts, it was decided that a joint initiative would be the best approach.

52 Statewide Steering Committee to Reduce Sexual Assault, Terms of Reference. The terms of reference go on to say: 'and in the context of the *Women's Safety Strategy* and the Victoria Police *Violence Against Women Strategy: A Way Forward*, the Committee will improve the safety of Victorian women and children by:

1. Providing advice on the improvement of prevention, education and early intervention in relation to sexual assault.
2. Providing advice on the development of intra/inter organisational best practice, including improved co-ordination between agencies and ongoing monitoring and evaluation.
3. Providing advice on how to improve responses of police, relevant service providers, courts, media and the community to sexual assault.
4. Providing advice to ensure that responses to sexual assault reflect the diverse needs and experiences of Victorian women and children, with specific reference to young women, women from culturally and linguistically diverse backgrounds, women from Indigenous communities, women with disabilities and women in rural Victoria.'

***A FORUM TO EXPLORE STRATEGIES TO INCREASE AWARENESS OF SEXUAL ASSAULT IN NON ENGLISH SPEAKING BACKGROUND COMMUNITIES***

1.37 In March 2004, the Commission and the Victorian Multicultural Commission co-hosted a forum which focused on best practice models for education in NESB communities around sexual assault. The forum made a series of detailed recommendations<sup>53</sup> about the appropriate content for any proposed program of community education to increase awareness and understanding of issues involving sexual offences. In particular, the forum participants emphasised that any education strategy involving a particular community must take place in the context of a long term commitment to addressing the issue of sexual violence within that community and must be appropriate<sup>54</sup> to its needs.

**RECOMMENDATION(S)**

2. The Department of Justice and the Victorian Multicultural Commission should convene a steering committee including representatives from the Department of Human Services, Victoria Police, the Centre Against Sexual Assault (CASA) and relevant NESB community organisations to plan and implement a series of community education campaigns focusing on strategies to reduce sexual assault in NESB communities.
3. These campaigns should be developed in consultation with appropriate women's organisations from the various communities targeted and should be consistent with the principles for NESB community education developed at the Victorian Law Reform Commission's forum.

1.38 Since the forum, the Commission has met with representatives of the Victorian Multicultural Commission and the Department of Justice Diversity Unit to discuss the preparation of a broad public education campaign focusing on the issue of sexual assault in NESB communities. The VMC and the Department

53 These recommendations are set out in Appendix 2.

54 The forum emphasised that diverse communities require diverse responses and that when working with NESB communities it is important to bear in mind the different ways fundamental concepts such as 'family' are understood by different cultures as well as the need to remember the limitations of the value of translation as a communication tool.

of Justice are committed to the organisation of this campaign and preliminary planning is underway. The Commission supports this work.

#### *PROFESSIONAL EDUCATION AND PARTICIPATION IN OTHER RESEARCH*

1.39 During the course of the reference Commissioners and members of staff have contributed to:

- planning a seminar for judges on dealing with child complainants, which was organised by the Victorian Judicial College;
- planning an Australian Institute of Judicial Administration workshop to be held in 2004, on issues which arise in dealing with child complainants;
- participating in planning for research on the comprehensibility of jury directions in sexual offence trials which is being considered by the Australian Institute of Judicial Administration; and
- participating in a continuing education program for prosecutors.

#### DATA COLLECTION

1.40 As noted in the Interim Report, there is a lack of available data about the characteristics of victim/survivors of sexual offences. In particular, there is no systematised data collection on the racial and ethnic background of victims and perpetrators. The NESB roundtable discussion, held in August 2002,<sup>55</sup> emphasised the need for accurate and comprehensive data to inform policy development. Subsequent to the roundtable, the VLRC, together with the Victorian Multicultural Commission and representatives of the Department of Justice's Diversity Unit, have met to discuss the need to develop a program for appropriate collection of data around race and ethnicity from relevant agencies. The Department of Justice Diversity Unit and the VMC have undertaken to resource this project. The Commission believes that this work will make an important contribution to policy making on the issue of sexual assault.

1.41 The 'From Shame to Pride' report makes similar observations regarding the need for an Indigenous Statewide Data system that accurately captures the data and the need for Aboriginal agencies to develop appropriate in-house data collection systems.

---

55 Interim Report paras 3.19–23.

!	<b>RECOMMENDATION(S)</b>
4.	The Department of Justice should convene a working party comprising representatives of Victoria Police, the Office of Public Prosecutions, the courts and other relevant stake-holders, to establish an integrated process for the collection of reliable statistics relating to sexual offences.
5.	If possible the database should permit tracking of offences from the time of report until the matter is concluded.
6.	The data base should also include information on: <ul style="list-style-type: none"><li>• incidence of offences in Victoria;</li><li>• the characteristics of victims and offenders, including racial and ethnic background, any disability and age;</li><li>• police reports and prosecution rates for such offences; and</li><li>• prosecution outcomes and the factors which may affect them.</li></ul>
7.	The Department of Justice Diversity Unit and the Victorian Multicultural Commission should continue to collaborate to develop a program for uniform data collection by the various government and non-government agencies and services that work with victim/survivors and perpetrators of sexual assault. The program should include the development of appropriate standards, systems and the provision of training to personnel to ensure that accurate data regarding the Indigenoussness and Aboriginality, ethnicity and other relevant characteristics of service users is recorded and forwarded to a centralised agency for collation.

## **THE STRUCTURE OF THIS REPORT**

1.42 Chapter 2 discusses the police response to sexual offences. We report on a series of focus groups we conducted with police members during late 2003 and make recommendations for improvements to police training and procedures.

1.43 Chapter 3 discusses ways in which the culture of the criminal justice system could be changed to improve the treatment of victims of sexual offences through education for key participants and through the creation of a specialist jurisdiction to handle sexual offences cases. It also proposes changes to the committal process.

1.44 Chapter 4 makes recommendations for changes to evidentiary principles and criminal trial procedure in sex offences cases. It covers

- alternative arrangements for complainants to give evidence;
- admissibility of prior sexual history evidence;
- admissibility of evidence of confidential counselling communications;
- modification of the hearsay rule;
- prohibiting the accused from personally cross-examining the complainant; and
- improving support for witnesses in sexual offence cases.

It also covers separation of trials (severance) in cases where the accused is charged with offences against multiple complainants.

1.45 Chapter 5 makes recommendations to meet the needs of child complainants including:

- enhancing support for child witnesses;
- providing alternative arrangements for children to give evidence;
- reducing delays in cases involving allegations of child sexual abuse;
- amending the competency requirements which apply to child witnesses;
- modifying the hearsay rule; and
- protecting children against over-long or harassing cross-examination.

1.46 Chapter 6 makes recommendations to assist complainants with a cognitive impairment to participate in the criminal justice process. It also proposes changes to the existing sexual offences which deal with sexual acts that exploit people with a cognitive impairment.

1.47 Chapter 7 reports on our analysis of jury directions and proposes substantive changes to the law on jury directions. It also proposes changes to the rules governing the warnings which judges are required to give to juries.

1.48 Chapter 8 proposes substantive changes to the law of rape. Chapter 9 considers the unresolved substantive law issues covered in the Discussion Paper and/or Interim Report and makes final recommendations for changes to:

- the offence of incest (to be renamed intra-familial sexual assault);
- sexual offences against children, including the offences of maintaining a sexual relationship with a child, participation in a sexual act with a child by a person in a position of care, supervision or authority and procuring; and

- offences that involve compelling a person to commit a sexual act.

The Chapter also confirms recommendations made in the Interim Report for the inclusion of an objects and interpretation clause in the *Crimes Act 1958* and the *Evidence Act 1958*.

Chapter 10 makes proposals for dealing with juvenile sexual offenders.

## OTHER ISSUES

### SENTENCING

1.49 In October 2000, the Victorian Government established a review of sentencing laws, and commissioned Professor Arie Freiberg to carry it out. The Report of that Review was delivered to the Government in 2002.<sup>56</sup> Because the period of the review overlapped with the VLRC project, we decided not to make recommendations about sentencing issues. The Sentencing Review recognised that ‘Victoria’s criminal justice statistical information base is amongst the least developed of any in Australia’.<sup>57</sup> The Sentencing Review was ‘hindered by not having comprehensive, up-to-date and accurate sentencing data readily available’. Similarly, detailed sentencing statistics were not available to the Commission when we began this project. The compilation of reliable sentencing information would have diverted resources away from tasks which we considered more important. In our view it would also have been inappropriate to consider sentencing for sexual offences separately from sentencing for other serious offences against the person.

1.50 The *Pathways to Justice* report commented that ‘[O]f all the aspects of the criminal justice system, sentencing is probably most in the public eye and the most sensitive to changes in community moods and public opinion’.<sup>58</sup> Hence it is not surprising that some of those we spoke to during the course of this inquiry felt that the sentences received by people convicted of sexual offences were too low and argued that the law should require more severe sentences. While such opinions are easy to understand, it is difficult to assess them in the absence of detailed information about sentencing patterns in sexual assault cases. Further, as *Pathways to Justice* pointed out, there is little evidence that harsher laws are

---

56 Arie Freiberg, *Pathways to Justice Sentencing Review* (2002).

57 Ibid 194.

58 Ibid 185.

successful in reducing the incidence of crime.<sup>59</sup> Longer custodial sentences for sexual assault may also have counter-productive effects, including discouraging offenders from pleading guilty, so that more complainants are forced to give evidence at trial. As Julie Stubbs has pointed out, the negative consequences of very long sentences for sexual offences may include

a further reduction in guilty pleas, a shift of discretion from judges in the fixing of penalties to police and prosecutors in charge and plea bargaining (such practices are much less open to scrutiny and review); discouraging juries from findings of guilt due to longer sentences; further entrenching notions of a dichotomy between ‘real’ sexual assaults and others (for instance because jurors may assume that only ‘real sexual assaults’ deserve such long sentences).<sup>60</sup>

1.51 *Pathways to Justice* recommended the creation of a Sentencing Advisory Council<sup>61</sup> which was established by Part 3 of the *Sentencing (Amendment) Act 2003*.<sup>62</sup> The functions of the Council include undertaking research on sentencing, analysing sentencing statistics and disseminating information on sentencing. The work of the Council will provide a basis for well informed community discussion on sentencing. When the Sentencing Advisory Council is established later this year we believe it would be appropriate for it to consider sentencing in sexual offence cases.

## THE LIMITATIONS OF THE CRIMINAL JUSTICE SYSTEM

1.52 Some of the submissions made to this inquiry assumed that the criminal law was the primary means of redress for people who have been sexually assaulted. Our research, which is confirmed by many other studies, shows that at present the criminal justice system plays a relatively minor role in apprehending and punishing sexual offenders. Although implementation of our recommendations will improve the situation for complainants in sexual offence cases, many people who are sexually assaulted will decide not to report the crime or not to give evidence against the alleged abuser. Even if a person decides to report an alleged offence, the presumption of innocence which is the fundamental tenet of our

---

59 Ibid 189.

60 Julie Stubbs, above n 2, 22.

61 Arie Freiberg, above n 56, 185–98.

62 See also *Sentencing (Amendment) Act 2003* inserting Part 2AA in the *Sentencing Act 1991*. This Part confers power on the Court of Appeal to deliver guideline judgments on sentencing.

criminal justice system will mean that some people who have actually committed offences will not be convicted of them. Where the assault occurred many years previously the alleged perpetrator will rarely be found criminally liable. It is important that people harmed by sexual assault should not see the criminal justice system as the only way of assisting them to recover from the wrong done to them, or of acknowledging the effect of sexual assault on their lives.

1.53 An adequate response to the harm of sexual assault must go beyond the criminal justice process and include other mechanisms for assisting people who have been sexually assaulted such as access to information, provision of counselling and support services by private counsellors and organisations such as CASA House, and compensation.<sup>63</sup>

1.54 Because our terms of reference were primarily concerned with reform of criminal justice processes we have not made recommendations on these matters. In 2001 the Victorian Government established a review of services for victims of crime, chaired by Mr Bob Stensholt MP. The review has led to substantial changes to the bodies responsible for providing victims support services. The Government has now established a new Victims Services Agency, which is responsible for integrating the provision of services. The Agency will purchase services from the Department of Human Services (DHS) and will be responsible for research and policy development on victim support.

1.55 The new Victim Services Agency and the Statewide Steering Committee to Reduce Sexual Assault established by the Chief Commissioner of Victoria Police have the capacity to substantially improve the response to victims of sexual assault. The Commission will continue to liaise with these bodies.

1.56 People who have experienced sexual assault may also be entitled to counselling and financial assistance under the Victims of Crime Assistance Scheme.<sup>64</sup> The legislation providing for victim's assistance was substantially amended in 2000.<sup>65</sup> The Commission's terms of reference did not allow us to investigate the adequacy of the current scheme.

---

63 Julie Stubbs, above n 2, 23.

64 *Victims of Crime Assistance Act* 1996.

65 *Victims of Crime (Amendment) Act* 2000.

