
Chapter 4

Making it Easier for Complainants to Give Evidence

INTRODUCTION

4.1 In Chapter 1 we referred to the unique characteristics of sexual offences which create particular challenges for the criminal justice system. These factors contribute to the low reporting rate for sexual offences and to the reluctance of those who report such offences to give evidence at committal and trial.

4.2 The adversarial nature of the criminal justice process makes giving evidence a difficult process for most witnesses in criminal trials,³⁰⁰ but the experience is particularly daunting for complainants in sexual offence cases because of the nature of the offence and the intimate matters on which they are likely to be questioned.³⁰¹ While it is vital to ensure that people accused of such offences are treated fairly, there is also a public interest in ensuring that witnesses are fairly treated and not subjected to unnecessary distress or harassment. The recommendations in this Chapter seek to strike an appropriate balance between ensuring a fair trial for the accused and protecting the interests of complainants. Many of the reforms we recommend are already in force in other States.

300 For a comparison of the cross-examination process in rape trials and other trials see David Brereton, 'How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials' (1997) 37 (2) *British Journal of Criminology* 242.

301 Most recently the NSW Law Reform Commission has recognised the fact that sexual offence trials are particularly distressing for complainants because of the nature of the crime, which often involves the exercise of power by the perpetrator over the complainant; the focus in sexual offence trials on the credibility of the complainant; and the fact that in many sexual offence trials the accused and the complainant knew each other before the alleged assault occurred; NSW Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials* Report 101 (2003) paras 2.2–11.

4.3 The Chapter deals with:

- alternative arrangements for complainants to give evidence;
- restrictions on cross-examination of complainants about their sexual activities;
- restrictions on admission of evidence about the content of counselling communications;
- modifications to the hearsay rule;
- prohibiting people accused of sexual offences from personally cross-examining complainants; and
- support for witnesses in sexual offence cases.

4.4 The Chapter also discusses whether changes should be made to the provisions that regulate separation (severance) of trials in cases where it is alleged that the accused has committed offences against more than one complainant.

4.5 The recommendations in this Chapter are intended to apply to all complainants in sexual offence cases. Chapter 5 makes recommendations that apply specifically to child witnesses and Chapter 6 makes recommendations that apply specifically to people with a cognitive impairment.

ALTERNATIVE ARRANGEMENTS FOR GIVING EVIDENCE

CURRENT LAW AND PRACTICE

4.6 Provisions which give the court power to allow some or all complainants to give evidence in sexual offence cases by closed circuit television (CCTV) have been in force in most States for some years.³⁰² In Victoria, section 37C of the *Evidence Act 1958* allows the court, on its own initiative or on application of the prosecution or defence, to direct that alternative arrangements be made for witnesses in sexual offence proceedings to give their evidence.

302 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 6, introduced 1991; *Evidence Act* (NT) as in force at 1 January 2004 (no further amendments) s 21A, introduced 1994; *Evidence Act 1977* (Qld) s 21A and 21AP–AR, introduced 1989 and 2003 respectively; *Evidence Act 1929* (SA) s 13, introduced 1993; *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 6 and s 8, enacted 2002; *Evidence Act 1906* (WA) s 106N and 106R, introduced 1992; *Evidence (Children) Act 1997* (NSW) s 18.

4.7 Alternative arrangements include allowing the person to give evidence outside the courtroom by use of CCTV or a screen to remove the defendant from the witness' direct line of vision.³⁰³ The court can also direct that a person be allowed to be beside the witness for the purpose of providing emotional support,³⁰⁴ that legal practitioners do not robe and/or that they remain seated while examining or cross-examining a witness³⁰⁵ and that only specified persons be present in court while the witness is giving evidence.³⁰⁶ If the court directs that alternative arrangements are to be made for a witness to give evidence, the judge must warn the jury that no inference adverse to the defendant should be made and that the evidence of the witness should not be given greater or lesser weight as the result of the arrangements.³⁰⁷

4.8 Despite provisions allowing use of screens and CCTV for vulnerable witnesses, in practice these alternative measures are rarely used when adult complainants give evidence in sexual offence committals and trials.³⁰⁸ In relation to committals, Magistrate Lisa Hannan's submission commented that 'In my experience often prosecutors do not seek to utilise CCTV and sometimes positively assert that they wish not to use it'.³⁰⁹

4.9 In New South Wales it has also been found that lawyers and other frequent players in the criminal justice process are uncomfortable with CCTV and that this is an impediment to its use.³¹⁰ Legal practitioners are familiar with, and tend to prefer, witnesses to give oral evidence. A study in New South Wales showed that use of CCTV was refused in 43% of child sexual assault trials.³¹¹

4.10 The Commission was told that prosecutors are often reluctant to ask the court to order the use of CCTV because they feel that it will reduce the impact of the complainant's evidence and the chance that the accused will be convicted. Some prosecutors believe that juries are likely to be convinced of the guilt of the

303 *Evidence Act 1958* s 37C(3)(a) and (b).

304 *Evidence Act 1958* s 37C(3)(c).

305 *Evidence Act 1958* s 37C(3)(d) and (e).

306 *Evidence Act 1958* s 37C(3)(f).

307 *Evidence Act 1958* s 37C(4).

308 Interim Report paras 5.5–7.

309 Submission 8.

310 NSW Law Reform Commission, above n 301, 89–90.

311 Christine Eastwood and Wendy Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* (2002) Criminology Research Council 55.

accused by the sight of a visibly distressed complainant giving evidence in open court. Although judges may order use of CCTV on their own motion, this appears to happen rarely in cases involving adult witnesses.

4.11 In Chapter 3 we referred to the OPP training program established for solicitors and barristers involved in the prosecution of sexual offence cases. If the law remained unchanged, the training program might prompt some prosecutors to apply to the court for an order allowing an adult complainant to give evidence using CCTV. However if use of CCTV remains an exception rather than a routine procedure, prosecutors will still experience a tension between their obligation to prosecute crimes on behalf of the State and their need to take account of the concerns of complainants.³¹²

4.12 Prosecutors often express the view that a jury is more likely to convict the accused if the complainant gives evidence in open court. As a result, prosecutors are likely to advise complainants to do so, even though complainants may prefer to give evidence by alternative means. Some commentators take the view that video transmission enhances a jury's perception of the credibility of evidence 'with the risk of making it more credible than it deserves to be'³¹³ while others argue that CCTV evidence has an air of unreality and lacks the emotional impact of evidence given directly. The Commission is not aware of any empirical data which clearly supports the view that the use of alternative arrangements affects outcomes of committals and trials.

4.13 There is no unequivocal evidence to support either prosecution or defence claims about the effect of the use of CCTV evidence. There is limited and fairly inconclusive data that attempts to measure the impact on juries of testimony given via closed circuit television.³¹⁴ Spencer and Flin analyse much of the contradictory

312 Under the *Public Prosecutions Act 1994* s 24(c) the Director of Public Prosecutions must in exercising his or her functions have regard to 'the need to ensure that the prosecutorial system gives appropriate consideration to the concerns of the victims of crime'.

313 J. R. Spencer and Rhona H. Flin, *The Evidence of Children, The Law and the Psychology* (2nd ed) (1993) J. R. Spencer and Rhona H. Flin, *The Evidence of Children, The Law and the Psychology* (2nd ed) (1993)109.

314 Davies and Noon evaluated the use of video link by child witnesses in 1991 and found that children using live link are less stressed, more resistant to leading questions and more confident than children giving evidence in open court. See G M Davies and E Noon, *An Evaluation of the Live Link for Child Witnesses* (1991). Research by Goodman et al (1998) made similar findings when evaluating mock jurors' reactions to child witness testimony in a mock trial. However, although Goodman et al found that jurors' were more inclined to believe the testimony of child witnesses testifying via CCTV to the extent that it was, in fact, more accurate, they found on the whole that children testifying via CCTV

material about the impact of CCTV and make two observations. First, contradictory findings about the impact on juries are to be expected given the highly individual nature of both witnesses and jurors. Some witnesses may well be more plausible to some jurors in one format and simultaneously less convincing to other jurors, just as some actors convince some audiences more than others. Secondly, they observe that while the emotional impact of evidence is sometimes observed to be diminished by CCTV, this is not the same as the credibility being reduced and may, in fact, not be a bad thing from a forensic perspective.³¹⁵

4.14 Surveys of the views of judges and lawyers are divided in their assessments. The large majority of the judges (74%) and barristers (83%) surveyed by Davies and Noon³¹⁶ were favourable in their responses to the system.³¹⁷

RECOMMENDATIONS IN THE INTERIM REPORT ON CCTV

4.15 Recommendations 23–5 in the Interim Report proposed that adult complainants in all sexual offence cases should give evidence by CCTV, except where the prosecution seeks an order that the complainant should give evidence in court and the court is satisfied that the person is able and wishes to do so. Recommendation 26 said that where CCTV cannot be used (for example because the equipment malfunctions) or an order is made that the complainant should give evidence in court, a screen should be used to remove the defendant from the complainant's direct line of vision, except where the court is satisfied that the complainant does not want a screen to be used.

SUBMISSIONS

4.16 Of the 23 submissions that commented on these matters, all but six agreed that complainants in sexual offences cases should be entitled to give their evidence by CCTV in committals and trials involving sexual offences. These submissions argued that this would reduce the distress of complainants and improve the accuracy and quality of their evidence.

were perceived by jurors as more likely to be making up a story than those testifying in court. See G Goodman et al, 'Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions' in R Bull (ed), *Children and the Law* (2001).

315 Spencer and Flin, above n 313.

316 Davies and Noon, above n 314.

317 C Latham, *Care Proceedings—An Outline of the Law and Practice* (1989), cited in Spencer and Flin, above n 313.

4.17 The Youth Affairs Council of Victoria submission argued that routine use of CCTV was necessary to prevent complainants being harmed by the criminal justice process:

We believe that exposure to the alleged perpetrator can often re-victimise and re-traumatise the complainant. Further, we see that the giving of evidence relating to the sexual assault in explicit detail in front of a jury, and courtroom gallery can be very intimidating and embarrassing for the complainant.

4.18 A submission from Katie Elliott suggested that use of CCTV could benefit:

both the accused and the complainant... I feel this would give more accurate and truthful evidence, as I know from personal experiences that under pressure the human brain does not always work, it does not take in information or convey it out correctly.³¹⁸

4.19 Similarly, the Federation of Community Legal Centres supported the recommendation with the proviso that judges receive training to ensure that complainants who wish to give evidence in the court room can do so, and that the process by which this is determined is recorded to ensure that their wishes are accurately reflected and considered.³¹⁹ Magistrate Lisa Hannan also supported routine use of CCTV.³²⁰

4.20 By contrast, submissions from the Victorian Bar, the Criminal Bar Association, VLA and the County Court, and two separate submissions from County Court judges, opposed routine use of CCTV for adult complainants.

4.21 Judges Neesham, Nixon, Kelly and Hart argued that adult witnesses in sexual assault cases should normally be treated in the same way as adult witnesses in other cases, though there should be power to order that an adult give evidence by alternative means where the proximity of the accused might prevent the witness doing themselves justice. They also commented that it was not their experience that 'as a general rule adolescent children, giving evidence in court, are inhibited by the presence of the accused'.³²¹ Judge Anderson's submission also said that the judicial discretion to order use of CCTV should be preserved. In his view the

318 Submission 6.

319 Submission 47.

320 Submission 8.

321 Submission 39.

reluctance of prosecutors to apply for its use should be dealt with by continuing education of prosecutors.³²²

4.22 The Victorian Bar submission also argued that the current law should not be changed, commenting that:

Not all complainants and child witnesses are inhibited by giving evidence in open court in the presence of the accused. Accordingly there is no need for a general provision that evidence be given by way of CCTV. The basic premise of the criminal law that all witnesses give evidence in front of the jury and the accused in open court is fundamental and should be maintained. It should only be in exceptional circumstances that a person who accuses another of a serious crime is excused from making that accusation in open Court.³²³

4.23 The County Court submission did not oppose routine use of CCTV for child complainants in sexual offence cases, but suggested that for adults a 'fairer presentation of the trial will result when the complainant gives evidence in the court room'. They also noted that it was their anecdotal experience that the use of CCTV results in higher acquittal rates in sexual offence cases.³²⁴

4.24 The Criminal Bar Association suggested that use of CCTV was common and that where appropriate, applications for use of alternative arrangements were usually made and were granted by the court.³²⁵

4.25 The Commission accepts that where an application is made it will often be successful. However a number of complainants told us they felt pressured by the prosecutor to give evidence in court when they would have preferred not to do so. Some judicial officers also told us that prosecutors did not make applications in circumstances where this would have been appropriate. Magistrate Lisa Hannan's submission suggested that a provision allowing, but not requiring, CCTV to be used for all adult complainants would not go far enough. Because prosecutors will often prefer the witness to give evidence in court 'a model where CCTV is the default position would be appropriate'. However, she was also 'concerned that complainants can give evidence in the courtroom if they wish to do so'.³²⁶

322 Submission 49.

323 Submission 48.

324 Submission 52.

325 Submission 42.

326 Submission 8.

RECOMMENDATIONS

ROUTINE USE OF CCTV

4.26 Giving complainants in sexual offence cases the right to give evidence by CCTV could encourage people who have been victims of sexual assault to give evidence at committal or trial. Use of CCTV will also help complainants to maintain their composure and give their evidence more accurately.

4.27 Fear, shame and embarrassment about speaking in open court on intimate sexual matters may be a particular ordeal for Indigenous women and women from cultures where such matters are rarely discussed. It may also be very difficult for people with disabilities or cognitive impairments to give evidence in the presence of the jury and the accused. Routine use of CCTV will assist those who face special barriers to participate in the criminal justice system and will reduce the distress experienced by virtually all complainants in sexual offence cases.

4.28 ACT legislation requires use of CCTV in all sexual offence cases.³²⁷ Similar provisions apply in the Northern Territory.³²⁸ The New South Wales Law Reform Commission has also recently recommended that complainants in sexual offence cases should have a statutory right to use alternative arrangements, unless the court considers that it is not in the interests of justice for them to do so.³²⁹ A Bill has recently been introduced into the NSW Parliament to amend the *Criminal Procedure Act 1986* to create a presumption that a complainant who gives evidence in sexual offences proceedings is entitled to give evidence from a place outside the courtroom by CCTV unless the complainant chooses not to do so or the court determines that there are special reasons, in the interests of justice, why these arrangements should not be used.³³⁰

327 The current provisions are found in *Evidence (Miscellaneous Provisions) Act 1991* ss 41–7 which was amended by the *Evidence (Miscellaneous Provisions) Amendment Act 2003* and came into force on 30 April 2004. It has been possible for an order to be made for the use of CCTV for children in the ACT since 1991. Mandatory use of CCTV for children has applied since 31 May 1994; see *Evidence (Closed Circuit Television) Amendment Act 1994*. Mandatory use of CCTV for complainants in sexual offence cases has applied since 15 December 1994; see *Evidence (Closed Circuit Television) Amendment Act (No 2) 1994*.

328 *Evidence Act* (NT) as in force 1 January 2004, s 21A.

329 NSW Law Reform Commission, above n 301, Recommendations 10, 99.

330 Criminal Procedure Amendment (Sexual Offence Evidence) Bill 2004.

4.29 Provision for people to give evidence by CCTV does not hinder effective cross-examination of complainants or prejudice the right of accused to test the evidence against them. Routine use of CCTV would also prevent juries drawing inferences adverse to the accused from the fact that the complainant gives evidence by alternative means, as the submission from the VOICES group pointed out.³³¹

4.30 For these reasons the Commission reaffirms the Interim Report recommendations on routine use of CCTV by adult complainants (or screens where CCTV is not available or the complainant chooses to give evidence in court). Our recommendations allow an adult complainant to give evidence in court if the court is satisfied that the adult complainant is aware of his or her right to give evidence by CCTV and is able and wishes to give evidence in the court room.³³²

4.31 Some practical issues arise in determining how CCTV should be used. Legislation in the ACT and Northern Territory empowers the court to make orders on a case by case basis about matters such as who and what should be seen by complainants when they are giving their evidence and who and what be seen by the jury and others in the court room.³³³ In our view it would be preferable for the Magistrates' Court and the County Court to develop protocols to deal with these issues, drawing on existing experience in Victorian Courts and on advice from jurisdictions such as Western Australia where this technology is extensively used. We have included a recommendation to this effect.

4.32 Scheduling problems may make it difficult to ensure that CCTV equipment is available for use in all sexual offence committals and trials immediately, without delaying the hearing of cases. In Chapter 5 we recommend use of CCTV for all child witnesses in sexual offence cases. If it is necessary to phase in use of CCTV for all complainants we recommend that priority should be given to routine use of CCTV for child complainants and witnesses and complainants with cognitive impairments (for example people who have an intellectual disability) who are particularly likely to find giving evidence in the presence of the accused and the jury distressing and confusing.

331 Submission 30.

332 The provision is similar to that contained in *Crimes Act 1958* s 400 relating to exemptions from giving evidence for the prosecution; see s 400(6).

333 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 44; *Evidence Act* (NT) as in force 1 January 2004, s 21C.

! RECOMMENDATION(S)

59. Section 37C of the *Evidence Act 1958* should be amended to give all adult complainants in sexual offence trials the right to give evidence by closed-circuit television (CCTV).
60. The prosecution should be able to apply for an order that the complainant give evidence in the court room. Before the court makes such an order the presiding judge or magistrate must satisfy him or herself that the complainant is aware of his or her right to give evidence by CCTV and that the complainant is able and wishes to give evidence in the court room.
61. Every effort should be made to install appropriate CCTV facilities in all courts in which sexual offence proceedings are held. Where facilities are unavailable, cases should be relocated where practical.
62. Where the complainant gives evidence by CCTV the court may make any order it considers appropriate to allow the complainant to take part in a view or identify a person or thing.
63. The Magistrates' Court and the County Court should develop a protocol dealing with matters relating to the operation of the CCTV link, including who in the courtroom is to be able to, or not to be able to, be heard or seen by the complainant.
64. Where CCTV cannot be used, or an order is made that the complainant should give evidence in court, a screen is to be used to remove the defendant from the complainant's direct line of vision, except where the magistrate or judge has satisfied him/herself that the complainant does not wish a screen to be used for this purpose.
65. If it is not practically possible to implement Recommendations 59–63 for all complainants in sexual offence cases immediately, priority should be given to ensuring that CCTV is available for use by all child witnesses in sexual offence cases and for witnesses with a cognitive impairment.

SUPPORT PEOPLE

Current Law

4.33 Section 37C(3)(c) of the *Evidence Act 1958* says that the court may direct that complainants have a person sitting beside them to give them emotional support while they are giving evidence, either on the application of a party or on its own motion.

Recommendation

4.34 The current provision allows the court to maintain control over the way in which this support is provided. This is appropriate because it is not in the interests of justice for complainants to have a person sitting beside them who is, or is perceived to be, likely to influence them in giving their evidence. While the court should have the power to exclude a particular person from acting as a support person, there is otherwise no reason why complainants should not have a right to have a support person of their choice present when they are giving their evidence. For this reason we recommend that complainants should be entitled to the presence of a support person of their choice, except where the court is satisfied that the complainant does not wish to have a support person present. The court should have power to exclude a particular person from providing support where it is not in the interests of justice for that person to do so.³³⁴



RECOMMENDATION(S)

66. Complainants in sexual offence cases should be entitled to have a person of their choice beside them for the purpose of providing emotional support while they are giving evidence, (whether or not they give evidence by CCTV) except where the presiding judge or magistrate is satisfied that the complainant does not wish to have a support person present.

334 The NSW Parliament has recently introduced a Bill to amend the *Criminal Procedure Act 1986* to allow a complainant to have a person of their choice near them for the purpose of providing emotional support while they give their evidence.

**RECOMMENDATION(S)**

67. Where the presiding judge or magistrate is of the opinion that it is not in the interests of justice for a particular person to provide support to the complainant, that person shall not be entitled to act as a support person, but this does not prejudice the right of the complainant to have another person beside them for the purpose of providing emotional support while they are giving evidence.

4.35 Section 37C of the *Evidence Act 1958* currently applies to all witnesses in sexual offence cases, not just to complainants. The recommendations above are confined to complainants. The current provisions, which allow applications to be made for leave to give evidence by alternative means, should continue to apply to other adult witnesses.

THE ADMISSIBILITY OF CERTAIN TYPES OF EVIDENCE

PRIOR SEXUAL ACTIVITY

The Current Law

4.36 Historically women complainants in sexual offence cases were subjected to detailed cross-examination about their prior sexual history. Evidence about the complainant's sexual activities was regarded as relevant because of the 'twin myths'³³⁵ that 'unchaste' women who are sexually experienced are likely to lie about being sexually assaulted and that they are more likely to consent to sex on a particular occasion.

4.37 Fear of humiliating and irrelevant cross-examination about their sexual activities may contribute to women's reluctance to report sexual assault or to give evidence at committal or trial. Inappropriate admission of evidence about prior non-consensual sexual activity has a disproportionate impact on women from groups in which there is a high incidence of sexual assault, for example women with cognitive disabilities and Indigenous women.³³⁶

335 Susan M Chapman, 'Section 276 of the Criminal Code and the Admissibility of "Sexual Activity" Evidence' (1999) 25 *Queen's Law Journal* 121.

336 A similar point is made by Susan Chapman, *Ibid* 130.

4.38 All States have now legislated to restrict admission of prior sexual activity evidence.³³⁷ In Victoria, section 37A of the *Evidence Act 1958* restricts the admission of evidence of complainants' prior sexual activities with both the accused and with other people. This provision is consistent with and reinforces section 37(1)(b)(iii) of the *Crimes Act 1958* which requires the judge in a sexual offence case—where relevant—to direct the jury that a person is not to be regarded as having freely agreed to a sexual act just because on that or a previous occasion he or she freely agreed to another sexual act with the accused or with another person. Both provisions reflect the view that a person's free agreement to participate in sexual activity on one occasion is irrelevant in determining whether he or she has freely agreed to do so on another occasion.

4.39 Under section 37A(1) of the *Evidence Act 1958*:

- the court is to forbid any questions and exclude evidence of 'the general reputation of the complainant with respect to chastity';
- evidence of the complainant's sexual activities can only be admitted with the court's permission; and
- the court must not grant permission for the admission of the evidence unless it 'is satisfied that the evidence has substantial relevance to facts in

337 In the NT and ACT, the restriction applies only to evidence about sexual activity with a person other than the accused. In the NT, the court cannot give leave for admission of such evidence unless the judge is satisfied that the evidence has substantial relevance to the facts in issue. Evidence of events which are substantially contemporaneous with an alleged offence are to be regarded as having substantial relevance: *Sexual Offences (Evidence and Procedure Act) 1983* (NT) as in force 7 November 2002 (no further amendments), s 4. In the ACT, the court cannot give leave for admission of the evidence unless the judge is satisfied that it has substantial relevance to the facts in issue or is a proper matter for cross-examination about credit; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 53. In NSW, the legislation covers sexual activities with both the accused and others; some exceptions apply: *Criminal Procedure Act 1986* (NSW) s 293. In Qld, it includes sexual activity with both the accused and other people, unless it relates to acts which are 'substantially contemporaneous' with the offence with which the defendant has been charged or is part of a sequence of events that explains the circumstances in which the alleged offence occurred: *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4. In SA it covers sexual activities with both the accused and others, other than 'recent sexual acts' with the accused: *Evidence Act 1929* (SA) s 34I. The court can only grant leave for admission of the evidence if it is of substantial probative value or would in the circumstances be likely to materially impair confidence in the reliability of the evidence of the alleged victim and its admission is required in the interests of justice. A similar approach applies in Tas and WA; *Evidence Act 2001* (Tas) s 194M; *Evidence Act 1906* (WA) ss 36B, 36BA and 36BC.

issue' or because it 'is a proper manner for cross-examination' on whether the complainant is a trustworthy witness.³³⁸

4.40 Section 37A(1) Rule (4) of the *Evidence Act 1958* says that evidence that relates to or tends to establish the fact that the complainant was accustomed to engaging in sexual activities shall not be regarded as:

- (a) having a substantial relevance to the facts in issue because of inferences it may raise as to the 'general disposition' of the complainant; or
- (b) being a proper matter for cross-examination as to credit in the absence of special circumstances, which would be likely to materially impair confidence in the reliability of the evidence of the complainant.³³⁹

4.41 Procedural controls have also been imposed on the admission of prior sexual history evidence, following an evaluation of earlier reforms which showed that they had limited effect.³⁴⁰

4.42 A written application seeking permission to cross-examine the complainant about his or her sexual activities must be given to the DPP (or in the case of a committal the informant) at least 14 days before the date fixed for cross-examination at committal, or 14 days before the date listed for the trial. The application must be forwarded to the Magistrates' Court or the Criminal Trials Listing Directorate. Under section 37A(1)Rule 5C of the *Evidence Act 1958* the judge may allow an application to be made orally to cross-examine the complainant as to his or her sexual activities in exceptional circumstances.

4.43 The written application must set out the initial questions sought to be asked of the complainant, the scope of questions which will follow and how the evidence sought to be elicited from the questioning has substantial relevance to facts in issue or why it is proper matter for cross-examination as to credit.³⁴¹ When

338 *Evidence Act 1958* s 37A(1) Rule (3)(a). It can also be taken account in sentencing, see s 37A(1) Rule (3)(b).

339 Such evidence can be admitted where the court considers it desirable in the interests of justice to do so.

340 Melanie Heenan and Helen McKelvie, *Rape Law Reform Evaluation Project, The Crimes (Rape) Act 1991 An Evaluation Report*, Report No 2 (1997). This examined admission of sexual activity evidence in cases in 1992-3. The legislation was amended following this Report by the *Crimes (Amendment) Act 1997* s 9(2).

341 Section 37A(1) Rule (5).

the court grants leave it must state in writing the reasons for granting it and those reasons must be entered in the records of the court.³⁴²

Does the Restriction on Cross-Examination Work in Practice?

Prior Non-Consensual Sexual Activity

4.44 Courts have sometimes taken the view that section 37A of the *Evidence Act 1958* only applies to prior consensual sexual activity. As a result, some complainants have been required to give evidence or have been cross-examined about earlier incidents of child sexual abuse or sexual assault, without the court considering whether the evidence should be admitted on the grounds set out in the legislation.³⁴³

4.45 The prosecution may lead evidence about lack of prior sexual activity to support the case against the accused.³⁴⁴ For example, in a trial of a person accused of sexual offences against a child, the prosecution may want to lead evidence about the child's knowledge of sexual acts, to support allegations that the abuse occurred. The defence may attempt to counter this evidence by cross-examining the child about an earlier incident of sexual abuse, in order to suggest to the jury that the child's knowledge about sex arises from an incident of abuse by some person other than the accused, or to suggest that the child is mistaken about the identity of the accused.

4.46 In cases involving adult complainants, the defence may want to cross-examine the complainant about prior abuse in order to suggest that they are prone to making false allegations of abuse. It may also be suggested that the complainant has a 'victim mentality' because of prior abuse, which has resulted in them making mistaken allegations about the accused.

4.47 While evidence about prior abuse may sometimes be relevant to a fact in issue in the trial, in many cases the main purpose of this type of cross-examination is to unsettle the complainant by suggesting he or she is prone to lie or is mentally

342 Section 37A(1) Rule (6).

343 Submission 44.

344 Another example of a situation where the alleged sexual activity of the complainant was raised by the prosecution was in the recent case of *R v TSR* [2002] VSCA 87. The accused, a policeman who was charged with assaulting his 14-year-old niece, had told another member of the police force that she should not be believed because she was promiscuous and used marijuana. The prosecution cross-examined him about this belief to support their assertion that the accused thought the complainant was sexually available.

unstable. Normally the complainant will have little opportunity to challenge an implication that the prior allegation of sexual assault was false or misguided, even if that abuse actually occurred. Cross-examination about prior incidents of abuse, which the victim of the abuse has never revealed to family or friends, is likely to be particularly humiliating and painful and may force a complainant to relive a prior incident of victimisation. The admission of such evidence may also discriminate against women with cognitive impairments and Indigenous women (who have a high incidence of sexual victimisation) by making it more difficult for them to give evidence.

4.48 Many complainants find it difficult to understand why the defence should be able to cross-examine them about prior abuse when evidence about the accused's prior sexual behaviour is rarely admissible and the accused is entitled to exercise the right to remain silent.

Prior Consensual Sexual Activity

4.49 Section 37A of the *Evidence Act 1958* has also had a limited effect in restricting cross-examination about prior consensual sexual activity. Bronitt and McSherry³⁴⁵ comment that empirical research on the effect of provisions limiting admission of prior sexual history evidence shows that such provisions:

have not significantly improved the treatment of women during cross-examination... In some instances, trial judges admitted evidence of sexual reputation and previous sexual history with scant regard to the statutory restriction or the 'relevance' of the evidence to the issues in dispute in the case. In other cases, the trial judge, mindful of the overriding duty to ensure a 'fair trial', has given the provision a more restrictive interpretation than the drafters intended. ...[T]he failure of the rape shield laws is a combination of deficient legislation and non-compliance and resistance within the legal profession.³⁴⁶

4.50 The Interim Report discussed recent research which found that cross-examination was still occurring in circumstances falling outside section 37A of the *Evidence Act 1958* and that this sometimes occurred without a written application being made. Defence counsel still frequently cross-examine complainants about

345 Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001). The authors refer to T Henning and S Bronitt, 'Rape Victims on Trial: Regulating the Use and Abuse of Sexual History Evidence' in Patricia Eastal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) Chapter 6.

346 Bronitt and McSherry, *Ibid* 631 and see also Law Reform Commission of Victoria, *Rape and Allied Offences: Procedure and Evidence*, Report No 13 (1988) 52–3.

prior sexual activities in order to cast doubt on their credibility. In addition, it appears that sexual activity evidence is still admitted without the court's permission in a relatively high proportion of cases.³⁴⁷

4.51 The Interim Report mentioned some procedural changes which had been made since the Victorian Law Reform Commission began its work on sexual offences. Discussions were held between the VLRC and the Solicitor and Director of Public Prosecutions about the admission of prior sexual history evidence without a prior application having been made. Following these discussions, the DPP has decided that in cases where complainants are called to give evidence at committal or trial, the solicitor handling the case in the Office of Public Prosecutions should write to the defence informing them of the procedural requirements imposed by section 37A of the *Evidence Act 1958* and informing them that they will have to show exceptional circumstances to justify admission of the evidence without a prior written application.³⁴⁸

4.52 Gary Ching, Manager of the Sexual Offences Section at the OPP, believes that this practice has increased the number of written applications for permission. However, he estimates that written applications are still only made in approximately half of cases where they are required.³⁴⁹ OPP solicitors suggested that inexperienced lawyers are less likely to comply with procedural requirements for admission of prior sexual history evidence than defence lawyers who are familiar with procedures in sexual offence cases. The OPP advised that when written applications are made, they usually indicate the issues to be covered and if they do not, the judge will require the defence to amend the application before making the order.

4.53 If a written application is not made, an oral application may be made at committal or trial. OPP solicitors estimate that this occurs in about 50% of cases. If the complainant is not cross-examined on prior sexual history at committal, an application to cross-examine the complainant will usually be made at trial rather than at the earlier directions hearing. Even where the written application is made it will not be considered by the trial judge until the first day of trial. The Commission was told that there is considerable individual variation amongst the

347 Interim Report paras 5.23–29.

348 *Evidence Act 1958* s 37A(1) Rule (5B).

349 Meeting with Gary Ching, Gabriele Cannon, Luisa Dipietrantonio and Jacquelyn Verkade, 3 December 2003.

practices of judges and magistrates in giving permission to cross-examine the complainant about his or her prior sexual history.

Recommendations in the Interim Report

Prior Non-Consensual Sexual Activity

4.54 The Interim Report recommended that section 37A of the *Evidence Act 1958* should be amended to make it clear that it applies to both non-consensual and consensual activities. All the submissions which commented on this matter (including the submissions from the Victorian Bar,³⁵⁰ the Criminal Bar Association³⁵¹ and the County Court)³⁵² supported the recommendation. We make this recommendation below.

! RECOMMENDATION(S)

68. Section 37A of the *Evidence Act 1958* should be amended to make it clear that it applies to both consensual and non-consensual sexual activities.

Prior Consensual Sexual Activity (or Lack of It)

4.55 The Interim Report considered two main options for changing the section:

- adopting the NSW approach, under which prior sexual activity evidence is only admissible if the evidence fits within legislatively defined categories;³⁵³ or
- retaining the court's discretion to admit evidence of prior sexual activity, but requiring the court to weigh a number of factors in exercising this discretion. These factors include the distress, humiliation and embarrassment that the complainant may experience if the evidence is admitted and also require the court to take account of the need to ensure the accused receives a fair trial.

350 Submission 48.

351 Submission 42.

352 Submission 52. The County Court said it 'did not oppose it'.

353 *Criminal Procedure Act 1986* (NSW) s 293.

4.56 The Interim Report rejected the current New South Wales approach, under which such evidence is only admissible if the evidence fits within legislatively defined categories. The Commission was concerned that this had the potential to exclude evidence that was important to the accused's defence. It recommended that section 37A of the *Evidence Act 1958* be amended to create a more structured discretion to admit evidence of prior sexual history.

4.57 The Interim Report noted that the current Victorian legislation places fewer limits on the admission of evidence of prior sexual activity than New South Wales,³⁵⁴ South Australia, Western Australia and Tasmania. In South Australia the equivalent provision prohibits the admission of evidence about alleged victims' sexual activities before and after the offence (except evidence of recent sexual activity with the accused) without the leave of the court. The judge is required to give effect to the principle that complainants should not be subjected to unnecessary distress, humiliation or embarrassment and shall not grant leave to admit prior sexual activity evidence unless the evidence is of substantial probative value or would impair confidence in the reliability of the complainant and its admission is required in the interests of justice.³⁵⁵ In Tasmania³⁵⁶ and Western Australia³⁵⁷ such evidence is inadmissible unless the probative value of the evidence outweighs any distress, humiliation or embarrassment that the complainant might suffer as the result of admission of the evidence. The New South Wales Law Reform Commission has also recommended that a number of factors, including the distress, humiliation or embarrassment that the complainant may experience if the evidence is admitted, should be considered by the court when it decides whether the evidence should be admissible.³⁵⁸

4.58 The recommendations in the Interim Report required the court to be satisfied that the evidence had significant probative value to a fact in issue, and that the probative value of the evidence outweighed the danger of prejudice to the proper administration of justice having regard to a number of listed matters. These included both the accused's right to make a proper defence and the distress,

354 Ibid.

355 *Evidence Act 1929* (SA) s 34I(2) see also (3).

356 *Evidence Act 2001* (Tas) s 194M. Sexual experience which forms part of the events or circumstances out of which the charge arises is not excluded.

357 *Evidence Act 1906* (WA) s 36BC. Evidence which is part of the *res gestae* (in effect the same event) is not excluded.

358 New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)* Report No 87 (1998) 149.

humiliation and embarrassment that the complainant might suffer as the result of the evidence being admitted. It was argued that this approach would protect the accused by ensuring that evidence which was genuinely relevant to the defence case would be admitted, but would also give the complainants more protection against irrelevant and harassing cross-examination. The Interim Report also recommended judicial education to ensure that prior sexual activity evidence was only admitted in accordance with the provision.

Response to Interim Report Recommendations

4.59 All except four of the submissions³⁵⁹ which expressed a view on this matter supported further restrictions on the admission of prior sexual history evidence,³⁶⁰ although one commentator argued that judicial education was likely to have a greater impact than changes to the substantive law.³⁶¹

4.60 The Federation of Community Legal Centres' submission said that:

all the research shows that sexual history evidence is still being introduced in trials despite legislative change to restrict it.³⁶²

In its view the recommendations did not go far enough in limiting the trial judge's discretion. Judge Anderson commented that the amendments could provide a stronger basis for upholding the trial judge's discretion to restrict questioning of the complainant.³⁶³ The Department of Human Services strongly supported the recommendation³⁶⁴ and pointed out that it would be an advantage to make Victorian legislation more consistent with that in force in other Australian states.

359 Submissions 39, 42, 48 and 52 opposed some or all of the recommendations relating to admission of prior sexual history. Opposition in Submission 39 appears to have been based on an interpretation of Recommendation 30, which said that evidence of prior sexual activity will not be regarded as having substantive probative value merely because of the fact that the complainant engaged in a sexual act with the accused or another person on an earlier occasion might mean that such evidence was not admissible. Judges Neesham, Nixon, Kelly and Hart said that if this would prevent evidence of prior sexual activity between the accused and the complainant ever being admitted they opposed it, but if matter were left to the discretion of the trial judge that would be 'well and good'. The Commission did not intend to suggest that such evidence would never be admissible. Indeed the provision is consistent with s 37(1)(b) of the *Crimes Act 1958*; see para 4.38.

360 Submissions 2, 6, 7, 8, 9, 12, 28, 30, and 40.

361 Submission 49.

362 Submission 47.

363 Submission 49.

364 Submission 44.

4.61 Defence lawyers and the County Court were more critical of the proposal. The Criminal Bar Association argued against the proposed legislative change because in its view the current provisions were working as intended:

It is the experience of our members that both prosecutors and defence counsel alike comply with leave requirements.

Judges do not simply ‘rubber stamp’ applications for leave; they hear arguments and then rule. There is no evidence to suggest abuse of this process by the judiciary. There is no evidence to suggest that judges are not cognisant of the tension created by section 37A of the *Evidence Act 1958* or that they are predisposed to resolve that tension in a particular way.³⁶⁵

The Criminal Bar thought that it was undesirable for the legislation to exhaustively state the matters which should be taken into account in exercising the discretion.

4.62 The Victorian Bar submission also questioned whether the proposed changes were necessary.³⁶⁶ The County Court submission suggested that a change in the legislation from a requirement of ‘substantial relevance’ to ‘significant probative value’ was ‘nitpicking’. Judicial discretion to admit prior sexual history evidence should not be further restricted, although the matters we recommended should be taken into account are ‘matters which the judge would ordinarily consider in his/her thinking’.³⁶⁷

Recommendations

A New Test for Admission of Prior Sexual History Evidence

4.63 In preparing this Final Report the Commission considered whether the procedural changes made by the OPP, combined with prosecutor training and judicial education, might make it unnecessary to make further changes to section 37A of the *Evidence Act 1958*. While the Commission has recommended judicial education and prosecutor training on issues arising in sexual offence trials, we do not believe that this will be sufficient to prevent the inappropriate admission of irrelevant evidence about the complainant’s prior sexual history.

365 Submission 42.

366 Submission 48.

367 Submission 52.

4.64 In our view educative measures should be reinforced by legislative amendments which articulate the basis for admission of sexual activity evidence more clearly. The recommendation will require the court to consider whether the probative value of the evidence outweighs the distress, humiliation and embarrassment that the complainant may suffer as the result of its admission. This is intended to ensure that complainants will not be subjected to embarrassing and distressing cross-examination on matters which have only peripheral relevance to the facts in issue and which are likely to throw little or no light on the question of whether the complainant consented to the particular sexual act.

4.65 As mentioned above, section 37(1)(b)(iii) of the *Crimes Act 1958* requires the judge in a sexual offence case to direct the jury that a person is not to be regarded as having freely agreed to a sexual act just because on that or a previous occasion he or she freely agreed to another sexual act with the accused or with another person. This expresses the policy that evidence of prior sexual activity is not normally relevant to the issue of consent. Hence, such evidence should not be admissible unless the court believes that it is directly relevant to consent or other facts in issue in the particular case.

4.66 An example of such a case would be where the prosecution puts in issue the fact that the complainant has never participated in a particular sexual act with the accused, to prove that she did not consent to the act which is the subject matter of the charge. In such circumstances the defence may seek leave to cross-examine her about whether she has previously consented to the particular act with the accused. Of course, the fact that she had done so would not necessarily establish that she had consented on the occasion that has given rise to the prosecution.

4.67 In response to comments made in submissions we have made some minor changes to the recommendations in the Interim Report.

- Instead of requiring that the evidence have ‘significant probative value to a fact in issue’ it is proposed that the evidence should be required to have ‘substantial relevance to a fact in issue’. This meets a concern expressed in the County Court submission³⁶⁸ and uses the same form of words as the current version of section 37A of the *Evidence Act 1958*.
- The recommendation requires the admission of the evidence to be ‘in the interests of justice’ having regard to a number of listed factors. As

368 Submission 52.

mentioned above, the listed factors are modelled on provisions already in force in South Australia, Western Australia and Tasmania, and recommended by the NSWLRC.

- The recommendation provides that evidence of sexual activity is not admissible to support an inference that the complainant is the type of person who is likely to have consented to the sexual activity that forms the subject matter of the charge. A provision of this kind was recommended by the NSWLRC.
- The recommendation includes a provision that in assessing the distress, humiliation and embarrassment that might be experienced by the complainant in giving evidence about prior sexual activities, the court must take account of the age of the person and the number and nature of questions to be put to that person. A provision of this kind is included in the Tasmanian *Evidence Act 2001*.³⁶⁹

4.68 The provision does not allow the admission of sexual activity simply on the grounds that the evidence casts doubt on the ‘credibility’ of the complainant. Professor Bob Williams’ submission commented that he agreed with the thrust of the recommendation but that ‘there may be cases where the evidence does have substantial relevance to credit and should be admitted’.³⁷⁰ The Commission’s view is that this provision is often used to justify questioning of the complainant on issues which have little or no relevance to the question in issue at trial. If the evidence is genuinely relevant to a fact in issue the Court will have the discretion to allow its admission. This is consistent with the legislation in Western Australian and Tasmania.³⁷¹

Procedural Issues

4.69 In 4.51 we referred to changes introduced in the OPP to alert defence lawyers of the statutory requirement to make a written applications for admission of prior sexual history evidence. We recommend that the OPP should continue to follow this practice.

4.70 Section 37A of the *Evidence Act 1958* puts in place a number of mechanisms for recording applications for the admission of prior sexual history

369 *Evidence Act 2001* (Tas) s 194M(4).

370 Submission 2.

371 *Evidence Act 2001* (Tas) s 194M(4) and *Evidence Act 1906* (WA) ss 36B, 36BA and 36BC.

evidence.³⁷² However as we explain in the Interim Report, these provisions have not fulfilled the intention that they should allow ongoing monitoring of the use of prior sexual history evidence in sexual offence committals and trials. We recommend that the OPP puts in place a system for monitoring the operation of section 37A which enables an assessment of the percentage of sexual offence cases in which applications are made for the admission of prior sexual history evidence, the grounds on which such applications are based and the success rate of applications. It is suggested that the OPP commissions a researcher with appropriate expertise to design a methodology for ongoing evaluation.

! RECOMMENDATION(S)

69. Section 37A of the *Evidence Act 1958* should be amended to provide that the court shall not grant leave for the complainant to be cross-examined about sexual experience or activity (whether consensual or non-consensual) or lack of sexual experience or activity unless it is satisfied that:
- the evidence is of substantial relevance to a fact in issue; and
 - admission of the evidence is in the interests of justice having regard to the matters in Recommendations 70 and 71 below.
70. In deciding whether the admission of the evidence is in the interests of justice the judge must consider:
- whether the probative value of the evidence outweighs the distress, humiliation and embarrassment that the complainant may suffer as the result of the admission of the evidence;
 - the risk that the evidence may arouse discriminatory belief or bias, prejudice, sympathy or hostility in the jury;
 - the need to respect the complainant's personal dignity and privacy; and
 - the right of the accused to make a full answer and defence to the charge.

³⁷² Under s 37A(1) Rule (5A) of the *Evidence Act 1958* the application for the admission of the evidence must be forwarded by the DPP to the registrar at the relevant Magistrates' Court, in the case of a committal proceeding or to the Criminal Trial Listing Directorate in the case of an indictable offence. Under s 37A(6) if the Court grants leave it must state in writing the reasons for the leave and cause those reasons to be entered in the records of the Court.

RECOMMENDATION(S)

71. In assessing the distress, humiliation or embarrassment that the complainant may suffer as a result of leave being granted the court must consider the age of that person and the number and nature of questions that will be put to that person.
72. Evidence of prior sexual experience or activity should not be regarded as having substantial relevance to a fact in issue merely because of the fact that the complainant freely agreed to participate in another sexual act with the accused or with another person.
73. Evidence of the complainant's sexual activity or experience is not admissible to support an inference that the complainant is the type of person who is more likely to have consented to the sexual activity or experience that is the subject matter of the charge.
74. The OPP should continue to notify defence counsel of the need to make a written application for leave to cross-examine the complainant at least 14 days before the date listed for committal or trial, unless exceptional circumstances justify admission of the evidence without prior written application.
75. The OPP should establish a system for monitoring the operation of section 37A of the *Evidence Act 1958* which enables an assessment of the percentage of sexual offence cases in which applications are made for the admission of prior sexual history evidence, the grounds on which such applications are based and the success rate of applications.

CONFIDENTIAL COMMUNICATIONS**CURRENT RESTRICTIONS ON ADMISSION OF EVIDENCE OF CONFIDENTIAL COMMUNICATIONS**

4.71 In 1998 the *Evidence Act 1958*³⁷³ was amended to restrict the use in evidence of confidential communications³⁷⁴ between complainants and their

373 *Evidence Act 1958* Part 2, Div. 2A, inserted by the *Evidence (Confidential Communications) Act 1998*.

medical practitioners³⁷⁵ and counsellors. The purpose of the legislation is to recognise the public interest in encouraging people who have been sexually assaulted to seek therapy. The protection of confidential counselling communications may also encourage people who are sexually assaulted to report the crime to the police.

4.72 Unless the person who communicated the confidence consents, evidence of a confidential communication or a document containing a confidential communication cannot be adduced in a legal proceeding³⁷⁶ without the permission of the court.³⁷⁷ Before the evidence can be used in court the judge must be satisfied that:

- the evidence will have substantial probative value to a fact in issue;
- other evidence of similar or greater probative value concerning the matters to which the protected evidence relates is not available; and
- the public interest in preserving the confidentiality of confidential communications and protecting a protected confider from harm is substantially outweighed by the public interest in admitting into evidence, evidence of substantial probative value. (We refer to this as the ‘public interest test’.)

The court is also required to take into account ‘the likelihood, and the nature or extent, of harm that would be caused to the ‘protected confider’ (that is, the alleged victim) if the protected evidence is adduced’.³⁷⁸

4.73 There are a number of other situations in which public policy concerns have resulted in prohibition or limitations on admission of evidence which may otherwise be relevant. Examples include confidential communications between

374 ‘Confidential communication’ means a communication, whether oral or written, made in confidence by a person against whom a sexual offence has been, or is alleged to have been committed to a registered medical practitioner or counsellor in the course of the relationship of medical practitioner and patient or counsellor and client, as the case requires, whether before or after the acts constituting the offence occurred or are alleged to have occurred; ‘counsellor’ means a person who is treating a person for an emotional or psychological condition.

375 Note that information acquired by physical examination, including communications made during the examination is not protected in the context of sexual offences see *Evidence Act 1958* s 32E.

376 The meaning of these words was considered in *Atlas v DPP* [2001]VSC 209 and see Interim Report para 5.66.

377 *Evidence Act 1958* s 32C(1).

378 Procedural requirements must also be satisfied before the evidence is admitted, see s 32C(2)-(4).

lawyers and their clients,³⁷⁹ confessions made by a person to their priest which are inadmissible in criminal proceedings³⁸⁰ and information or documents relating to matters of state, which it is in the public interest to keep confidential.³⁸¹

PROBLEMS WITH THE CURRENT LAW

4.74 The Interim Report argued that reform of these provisions is necessary for two main reasons. First, the current restrictions on admission of confidential communications do not prevent a defence lawyer from subpoenaing a person to produce counselling notes, although this appears to have been the intention of the legislation.³⁸² This has resulted in frequent use of subpoenas to require counsellors to attend and give evidence or produce notes. As a result some CASAs have had to incur considerable expense in briefing lawyers to oppose the requirement to produce records. Private counsellors who are unaware that the law protects confidential counselling communications may produce records, rather than appearing in court to resist a subpoena. By contrast, in New South Wales the *Criminal Procedure Act 1986*³⁸³ requires the Court to give permission before a person can be required to produce a document recording a confidential counselling communication.

4.75 Secondly, it was suggested that the current provisions did not adequately recognise the public policy interest in encouraging people affected by sexual assault to seek counselling.

RECOMMENDATIONS IN THE INTERIM REPORT

4.76 The Interim Report identified two options for dealing with confidential counselling communications. The first option was to prohibit the production of documents recording a confidential counselling communication and the

379 See for example the provision in *Evidence Act 1995* (NSW) Part 3.10, which is based on the Uniform Evidence Act.

380 *Evidence Act 1958* s 28(1). Communications between patients and doctors are also protected in the context of civil actions.

381 This is a common law doctrine. For a discussion of ‘public interest immunity’ see for example Andrew Ligertwood, *Australian Evidence* (3rd ed, 1998) 350–68. The common law public interest immunity doctrine has been included in s 130 of the Uniform Evidence Act and see *Evidence Act 1995* (NSW) s 130.

382 *Atlas v DPP* [2001]VSC 209 and see Interim Report para 5.66.

383 *Criminal Procedure Act 1986* (NSW) ss 297, 298.

admission of evidence about the content of such communications, unless the complainant consents. This is the Tasmanian approach.³⁸⁴

4.77 The second option had three elements:

- Amending the existing law to protect communications from disclosure, as well as preventing their admission in evidence.
- Completely prohibiting use of such records in committal or bail proceedings.
- Requiring an application to be made to the court for leave to use counselling records at trial or plea proceedings; and specifying more detailed criteria for admission of counselling communications at trial or in plea proceedings.

4.78 The second approach applies in New South Wales,³⁸⁵ South Australia,³⁸⁶ and the Northern Territory.³⁸⁷ These jurisdictions prohibit admission of evidence of counselling communications in committal proceedings and only allow its admission at trial if a public interest test is satisfied. They specify the factors which must be taken into account in applying this test in greater detail than the current Victorian legislation. This approach was also recommended by the Model Criminal Code Officer's Committee.³⁸⁸

SUBMISSIONS

4.79 Of the 26 submissions which commented on this recommendation, 19 supported a complete prohibition on access to and admission in evidence of

384 *Evidence Act 2001* (Tas) s 127B. The legislation covers communication by an alleged victim of a sexual offence to the counsellor, or by the counsellor to the victim 'in the course of counselling or treatment of the victim by the counsellor for any emotional or psychological harm suffered in connection with the offence'. A counsellor is defined as 'a person whose profession or work consists of or includes the provision of psychiatric or psychological therapy to victims of sexual offences or who provides, for fee or reward or on a voluntary basis, psychiatric or psychological therapy to victims of sexual offences for or at the direction of a body or organisation that provides such therapy to such victims'.

385 *Criminal Procedure Act 1986* (NSW) ss 297, 298.

386 *Evidence Act 1929* (SA) s 67E, 67F.

387 *Evidence Act* (NT) as in force at 30 October 2002 (no further amendments) Part VIA.

388 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5: Sexual Offences Against the Person*, Report (1999) 243, also available at <http://www.law.gov.au/publications/Model_Criminal_Code/index.htm>.

counselling communications.³⁸⁹ Many submissions emphasised the importance of encouraging victims of sexual assault to seek counselling. Lloyd Davies OAM commented that:

To do justice to victims of sexual assault, Australian parliaments must follow the United States example and create by statute a status of absolute privilege for all communications between patient and psycho-therapist, which category should include counsellors. This must be done for the same reason that the common law has created an absolute solicitor–client privilege, because professional assistance cannot be delivered effectively without it. The victim’s right to confidentiality must be equated with the accused’s right to silence.³⁹⁰

4.80 Similarly, the Federation of Community Legal Centres supported the Tasmanian legislation, under which admission of counselling communications is completely prohibited. The Federation said that ‘Counselling records are systematically misused by the defence’. Further:

A significant proportion of complainants...have suffered prior sexual assaults or abuse at the hands of persons other than the accused [the recent British Crime Survey quoted in the Interim Report assessed this factor to be present in 41% of the complainant’s history]. Given that counselling records could contain details of such prior traumatic experiences this would give the defence access to highly sensitive and private information. This manifestly discourages victims from a background of child abuse. This risk of exposure may deter the complainants from reporting such incidents altogether or seeking further counselling.³⁹¹

The Federation sought the extension of confidentiality to the complainant’s school records and DHS files.

4.81 In their submission, the Loddon Campaspe CASA said that:

The importance of being able to guarantee clients confidentiality should not be underestimated. Considerable CASA resources, both financial and human (time and energy) are wasted defending subpoenas for client files. For a rural CASA this often means a trip to the County Court in Melbourne.³⁹²

389 Submissions 6, 7, 8 (qualified support), 10 (comments related to children only), 16, 19, 20, 21, 23, 24, 26, 27, 28, 30, 32, 33, 40, 44, 47.

390 Submission 10.

391 Submission 47.

392 Submission 19.

4.82 The Salvation Army's submission commented that 'subpoenaing of counselling notes should not be permitted under any circumstances'.³⁹³ These are 'client notes' and should remain confidential. Where required, they would support the preparation of a court report if required by the judge or magistrate.

4.83 By contrast, submissions from the Criminal Bar Association, the Victorian Bar and Simon Gillespie Jones argued that the present provision adequately protected confidentiality.³⁹⁴ Simon Gillespie-Jones' submission argued that an absolute prohibition on admission of evidence would 'shelter the vicious perjurer' and referred to cases where false reports had been made.³⁹⁵ In his view the complete exclusion of counselling communications could also make it impossible to question complainants about the possibility that counselling had implanted false memories of assault.

4.84 The Criminal Bar Association submission said that the disclosure of counselling notes could reveal that a complainant was mentally ill, that alleged sexual misconduct did not occur, that the complainant had a documented motive to lie or that a child's disclosure had been 'infected' by a person in authority.³⁹⁶ The Criminal Bar referred to the fact that where access is granted, it is 'usually done with the imposition of stringent conditions' such as allowing counsel to view the counselling notes on the basis of an undertaking that the information would not be passed on to the accused without the leave of the court. Their submission argued that the system works effectively 'when we trust our judges, our defence counsel and our prosecutors'. The submission disagreed with the processes proposed in the second option and suggested that the current law provided an effective method of dealing with subpoenaed material.

Taking into account the balancing exercise involved, if the balance is tipped in favour of disclosure, the worst result is that a complainant may suffer some temporary humiliation or embarrassment. But that witness goes home and does not face the prospect of going to jail. On the other hand if the scales are tipped against disclosure, then the worst result is that an innocent person may be wrongly convicted and suffer the consequences.³⁹⁷

393 Submission 33.

394 Submissions 4, 42, and 48.

395 Submission 4.

396 Submission 42.

397 Ibid.

4.85 The Victorian Bar submission accepted that it was the intention of the present legislation to prevent defence counsel getting access to counselling communications, but argued that despite its failure to prevent the counsellor being subpoenaed the present legislation was adequate.³⁹⁸ The Victorian Bar also opposed the recommendation that the legislation should set out more detailed criteria to be considered by the court in deciding whether the public interest test was satisfied.³⁹⁹

4.86 Some defence barristers have argued that it is impractical to prohibit admission of confidential communications at committal, but to allow the judge to give permission for them to be admitted at trial.⁴⁰⁰ They are concerned that if this evidence was not available at committal, but permission to admit it was granted at trial, this could result in delays in the trial process. It has also been argued that failure to allow the admission of evidence about confidential counselling communications at committal might prevent the OPP making an appropriate decision not to proceed with the trial.

4.87 The County Court submission did not oppose the second option, under which more detailed criteria for admission of counselling communications would be set out in the legislation.

RECOMMENDATIONS ON USE OF COUNSELLING COMMUNICATIONS

4.88 The Commission has decided to recommend the second option put forward in the Interim Report. This recommendation is similar to the approach taken in New South Wales, South Australia, the ACT and the Northern Territory⁴⁰¹ and broadly consistent with the recommendations of the MCCOC.

398 Submission 48.

399 Ibid.

400 Sexual Offences Roundtable Meeting held on Tuesday 28 October 2003.

401 NSW, see above n 385 and the NT see above n 387 prohibit production of documents recording protected confidences and use of such confidences in committal proceedings and apply a public interest test to the production of documents and their use at trial. South Australia see above n 386 also completely prohibits use of protected confidences at committal. The judge must determine there is a 'legitimate forensic purpose' for making a preliminary examination of the evidence and the public interest test applies to the admission of evidence at trial. In the ACT production of documents recording protected confidences and use of such confidences is prohibited in committal proceedings. In the case of a trial the judge must refuse an application for leave to require production of a document or other evidence of a protected confidence or to admit the evidence if not satisfied that there is a legitimate forensic purpose for seeking the leave. If there is a legitimate forensic purpose the

4.89 Our recommendations will allow evidence of confidential communications to be accessed by counsel and used in evidence where specified criteria are satisfied. These criteria balance the competing public interests of ensuring a fair trial for the accused and preserving the confidentiality of protected communications to the greatest extent possible. The recommendations require the court to inspect the counselling notes to determine whether the criteria for admission are met. This recognises complainants' concerns about other people becoming aware of their confidential information and is consistent with the way that public interest immunity claims are usually dealt with by courts.⁴⁰² As is the case under the existing legislation, the contents of the communication should not be disclosed to applicants until the leave application has been decided in their favour.⁴⁰³ The legislation should make it clear that this applies to defence counsel, as well as to the accused personally.

4.90 Despite the concerns expressed by the Criminal Bar Association, we have decided to recommend that confidential communications should not be admissible in committal proceedings. This was also recommended by the Model Criminal Code Officer's Committee.⁴⁰⁴ The ruling of a Magistrate about admissibility of confidential counselling information does not bind the trial judge. However there would be little point in preserving the confidentiality of the information at trial, if the defence counsel has already had access to it in committal proceedings. Where the accused is charged with an indictable offence, our recommendation will ensure that there is careful scrutiny by a County Court judge of the application for admission of the communication.

4.91 The Commission accepts that in the case of indictable offences, the failure to resolve admissibility issues at committal will mean that this issue will have to be dealt with in the County Court as part of the pre-trial process. The rights of the accused to cross-examine on a counselling communication which a judge finds admissible can be tested during this process.⁴⁰⁵

Court must then conduct a preliminary examination of the evidence to decide whether it satisfies the public interest test, see *Evidence (Miscellaneous Provisions) Act 2003* (ACT) ss 54–67.

402 See for example *Alister v The Queen* (1983) 154 CLR 404, 415–16 per Gibbs J, 431 per Murphy J, 439 per Wilson and Dawson JJ, 453 per Brennan J; see also *Hospital Contribution Fund v Hunt* (1983)76 FLR 408.

403 *Evidence Act 1958* s 32C.

404 Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5 Offences Against the Person*, Report (1999) 283.

405 Where a witness is not called at the committal hearing, the County Court may allow cross-examination of the witness in the absence of the jury: *R v Basha* (1989) 39 A Crim R 337.

4.92 The Commission does not believe this will lead to more delays than occur at present, because under the present law a defence counsel who has made an unsuccessful application for admission of the notes at committal can make another application at the trial. Nor will this process result in many cases which would otherwise have been dropped by the OPP continuing beyond the committal stage. There are only a very small number of cases in which evidence heard at committal results in the OPP abandoning the prosecution⁴⁰⁶ and an even smaller number of these are likely to occur as the result of information being obtained from the admission of counselling notes.⁴⁰⁷ Defence counsel usually seek access to counselling communications to search for information which may exculpate the accused. Failure to allow admission of counselling communications at committal is unlikely to affect the proportions of accused who plead guilty.

!	RECOMMENDATION(S)
76.	<p>A counselling communication must not be disclosed in committal proceedings. Accordingly, at committal</p> <ul style="list-style-type: none">• a person cannot be required (whether by subpoena or otherwise) to produce a document that records a counselling communication; and• evidence of a counselling communication cannot be admitted or adduced.
77.	<p>A counselling communication must not be disclosed in any trial or plea proceedings except with the leave of the court. Accordingly</p> <ul style="list-style-type: none">• a person cannot be required (whether by subpoena or otherwise) to produce a document which records a counselling communication; and• evidence of a counselling communication cannot be admitted in any trial or plea proceedings except with the leave of the court.

406 In the Commission's research on rape prosecutions and prosecutions for penetrative offences between 9% and 10% of cases were terminated by a *nolle prosequi*. In some of these cases this was because the victim did not wish to proceed. Interim Report paras 2.82–3.

407 It is possible that the failure to find exculpatory information in counselling notes could contribute to an accused deciding to plead guilty, but this is likely to be a less significant factor than many other factors in influencing the accused to plead guilty.

!

RECOMMENDATION(S)

78. A person who objects to production of a document which records a counselling communication in relation to a trial or plea proceedings cannot be required to produce the document unless
- the document is first produced for preliminary examination by the court for the purposes of ruling on the objection; and
 - the court is satisfied that:
 - the contents of the document have substantial probative value;
 - other evidence of the contents of the document or the confidence is not available; and
 - the public interest in preserving the confidentiality of the communication and protecting the confider from harm is substantially outweighed by the public interest in allowing disclosure of the communication (the public interest test).
79. The preliminary examination is to be conducted in the absence of the parties and their legal representatives, except to the extent that the court determines otherwise.
80. Evidence taken at a preliminary examination is not to be disclosed to the parties or their legal representatives, except to the extent that the court determines otherwise.
81. After undertaking the preliminary examination the court is to determine whether the confidential counselling communication should be disclosed.
82. A counselling communication cannot be adduced in evidence at a trial or in plea proceedings unless the court, after inspecting the document, is satisfied that
- the contents of the document have substantial probative value;
 - other evidence of the contents of the document or the confidence is not available; and

! RECOMMENDATION(S)

- the public interest in preserving the confidentiality of the communication and protecting the confider from harm, is substantially outweighed by the public interest in allowing disclosure of the communication (the public interest test).
83. In deciding whether the public interest test is satisfied, the court must consider
- the extent to which disclosure of the information is necessary to allow the accused to make a full defence;
 - the need to encourage victims of sexual offences to seek therapy and the extent to which such disclosure discourages victims from seeking counselling or diminishes its effectiveness;
 - whether admission of the evidence is being sought on the basis of a discriminatory belief or bias;
 - whether the victim or alleged victim objects to disclosure of the communication;
 - the attitude of the person to whom the communication relates; and
 - the nature and extent of the reasonable expectation of confidentiality and the potential prejudice to the privacy of any person.
84. The legislation should continue to apply to counselling communications whenever they are made.
85. Existing requirements which govern applications for leave and notification of the informant and the counsellor should continue to apply.

DEFINITION OF 'COUNSELLING'

4.93 The current definition of a 'confidential communication' covers a communication made to a registered medical practitioner or counsellor in the course of a therapeutic relationship. A counsellor means a person who is treating a client for an emotional or psychological condition.⁴⁰⁸ The definition of

408 *Evidence Act 1958* s 32B.

confidential communication focuses on the existence of a therapeutic relationship, rather than on the fact that the communication was made in confidence.

4.94 It is arguable that this definition is too narrow to take account of the fact that support may be provided to complainants in a variety of different ways. In some NESB and Indigenous communities, victim/survivors of sexual assault may talk confidentially to a community member or an employee of a service which does not provide counselling in the therapeutic sense. In NSW, amendments have recently been made to the *Criminal Procedure Act 1986* to extend the definition of counselling communications. Under the Act, a person can be regarded as having ‘counselled’ another person if the counsellor

has undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm and

(b) the person

(i) listens to and gives verbal or other support or encouragement to the other person, or

(ii) advises, gives therapy to or treats the other person

whether or not for fee or reward.⁴⁰⁹

4.95 In the Interim Report the Commission asked whether the current definition of counselling communications should be extended to deal with the patterns of confidential communication occurring within non-English speaking background (NESB) and Indigenous communities and whether the definition recently introduced in NSW should be adopted in Victoria.

SUBMISSIONS

4.96 Only two submissions explicitly referred to this issue. Katie Elliott supported expanding the definition to take account of cultural diversity within Victoria.⁴¹⁰ The Emile Zola Society urged ‘extreme caution’ in following the New South Wales model.⁴¹¹

4.97 The restrictions that we recommend should apply to disclosure and admission of counselling communications make it desirable to define precisely the

409 *Criminal Procedure Act 1986* (NSW) s 296(5).

410 Submission 6.

411 Submission 7.

communications to which it applies. The Commission is concerned that expanding the definition too far may make it too difficult to test claims that communications should be protected, where these were not made in the context of a therapeutic relationship and there was no particular public interest in protecting them. For these reasons we do not recommend any change to the current definition of counselling communication.

4.98 We note that the NSW *Evidence Act 1995* gives the court a broader power to exclude evidence of confidences made in the context of professional relationships.⁴¹² These provisions are not limited to confidences about sexual assault. The court's discretion to admit such evidence is less restrictive than its discretion to admit evidence of communications about sexual assault.⁴¹³ If there is a general review of the law of evidence in Victoria at some time in the future, this review should consider whether similar reforms should be made in Victoria.

! RECOMMENDATION(S)

86. If there is a general review of the law of evidence in Victoria, the review should consider whether restrictions should be placed on the admission of confidential communications made in the context of professional relationships, similar to the restrictions in ss 126A–126F of the *Evidence Act 1995* (NSW).

ADMISSIBILITY OF EVIDENCE OF OUT-OF-COURT STATEMENTS MADE BY THE COMPLAINANT OR ACCUSED

THE CURRENT LAW

4.99 Under the present law the hearsay rule usually prevents the jury from hearing evidence of out-of-court statements made by complainants or other witnesses.⁴¹⁴

412 *Evidence Act 1995* (NSW) s 126B.

413 *Criminal Procedure Act 1986* (NSW) Chapter 6, Part V Division 2 dealing with sexual assault communications privilege.

414 See J D Heydon, *Cross on Evidence* (2000) 846.

[W]itnesses, whether for the prosecution or the defence, are required to testify to what they saw, heard, smelt or felt and not to what they know because of what they have been told.⁴¹⁵

4.100 For example, if the woman tells a friend, relative or partner that she was sexually assaulted, the friend, relative or partner's evidence of the contents of the statement is usually not admissible as evidence that the alleged assault occurred.⁴¹⁶

4.101 The hearsay rule applies in both civil and criminal trials and is intended to ensure that the court only hears reliable evidence. In many situations direct evidence given on oath is more likely to be reliable than evidence given by a third person about a statement which has been made to them out of court.⁴¹⁷ The third person may not have remembered the statement accurately or may have a motive for fabricating it.⁴¹⁸

4.102 Evidence from a witness that he or she had previously made a similar statement to someone else is also excluded because it is regarded as 'self-serving' in the sense that a witness or the accused may have made such out-of-court statements⁴¹⁹ in an attempt to bolster the evidence that they give in court.

4.103 Under the common law there were some qualifications⁴²⁰ on the hearsay rule. One qualification, known as the 'recent complaint' principle, applies only in sexual assault cases.⁴²¹ Recent complaint evidence is evidence of a complaint or

415 *R v Hennessy* (1978) 68 Cr App R 419, 425.

416 For a discussion of the exceptions to this rule see below para 4.103.

417 Admissions and criminal confessions are an exception to the hearsay rule, for example a confession of having committed a sexual assault may be admissible under this exception. See Andrew Ligertwood, *Australian Evidence* (3rd ed) (1998) 580–626.

418 For a discussion of the history and modern justification of the rule see J D Heydon, *Cross on Evidence* (2000) 848–9. See also Australian Law Reform Commission, *Evidence*, Report No 38 (1987) 72.

419 J D Heydon, *Cross on Evidence* (2000) 438–40. Heydon describes it as 'the rule against narrative' or 'the rule against self-corroboration'. Heydon points out that the argument that such evidence can be manufactured should go to the weight and not the admissibility of the evidence and in any case is only relevant where the witness is a party, but suggests that the rule saves time by eliminating unnecessary evidence.

420 Strictly speaking, neither of these are 'exceptions' to the hearsay rule as they only permit evidence to be admitted to support the credibility of the complainant and not to support the truth of her statement.

421 It has been said to be a survival of the ancient principle that a rape could only be prosecuted if the woman raised a 'hue and cry' immediately after the rape occurred. J D Heydon, *Cross on Evidence* (2000) 449.

complaints made by the victim of a sexual offence, at the first opportunity after the alleged offence occurred. The complaint is not evidence of the truth of the statement, but can only be used to show consistency on the part of the complainant.⁴²² The rule reflects the expectation that a victim of sexual assault can and should complain at the first opportunity. It assumes that as a matter of human experience, victims will report the assault very quickly, an assumption that has been proven wrong by research.⁴²³

4.104 A second qualification applies where the defence suggests that a witness has 'recently invented' their evidence, for example an accusation of sexual assault.⁴²⁴ Evidence of a prior consistent statement may be admitted to refute this suggestion. The exception does not allow evidence of a prior consistent statement to be given in every situation where a person's story is attacked, but is limited to the situation where there is a suggested reason why the witness invented or was mistaken about the alleged fact and the prior consistent statement rebuts that suggestion.⁴²⁵ For example, if the defence case was that the complainant had fabricated a story that her father had sexually assaulted her because her mother was divorcing her father, her hearsay statement about the assault which was made before the parents separated would be admissible to rebut the allegation that the story was invented. Again the statement can only be used to show consistency on the part of the complainant and not to support the truth of their statement. Defence counsel are usually careful to avoid attacking the complainant's evidence in a way which will attract this principle.

MODIFICATION OF THE HEARSAY RULE IN OTHER JURISDICTIONS

4.105 The hearsay rule and its exceptions are complex and confusing. While the rule may sometimes ensure that the court has access to the 'best evidence' there are also some situations in which it excludes evidence which is likely to be both

422 Ibid 441–51.

423 Interim Report 73; Graph 3, 74, Graph 4. See also J M Fleming, 'Prevalence of Childhood Sexual Abuse in a Community Sample of Australian Women' (1997) 166 *Medical Journal of Australia* 65–8; J Anderson et al, 'Prevalence of Childhood Sexual Abuse Experiences in a Community Sample of Women' (1993) 32 *Journal of American Academy of Child and Adolescent Psychiatry* 911–19; David Finkelhor et al, 'Sexual Abuse in a National Survey of Adult Men and Women; Prevalence, Characteristics, and Risk Factors' (1990) 14 *Child Abuse and Neglect* 19–28.

424 This principle is not confined to the area of sexual assault.

425 J D Heydon, *Cross on Evidence* (2000) 453–7 and see *Nominal Defendant v Clements* (1960) 104 CLR 476.

reliable and helpful to the jury or other fact-finder.⁴²⁶ The Australian Law Reform Commission's 1987 report, *Evidence*, recommended that the rule should be retained but that legislation should be enacted to permit the admission of some first-hand hearsay evidence in criminal proceedings. The requirements which must be satisfied before the evidence is admitted were intended to cover situations in which such evidence was likely to be reliable. The Report also proposed various safeguards to ensure fairness to the accused in cases where hearsay evidence was admitted.⁴²⁷ The Commonwealth, New South Wales, Tasmania and the ACT⁴²⁸ have enacted legislation (known as the Uniform Evidence Act) based on the ALRC Report.

4.106 States that have not adopted the Uniform Evidence Act have also made changes to the hearsay rule. South Australia and Western Australia have enacted child-specific hearsay exceptions.⁴²⁹ Queensland enacted both a child-specific hearsay exception⁴³⁰ and a provision allowing admission of hearsay evidence in situations similar to those set out in the Uniform Evidence Act, where the witness is unavailable to give evidence.⁴³¹ Queensland has also recently enacted a more extensive hearsay exception applicable only in sexual assault cases. The section allows admission of evidence of any preliminary statement made by a witness in a sexual offence case, regardless of when the preliminary complaint was made. This will allow hearsay statements to be admitted in such cases, subject to a discretion in the court to exclude such evidence if it is unfair to the defendant.⁴³²

426 Andrew Ligertwood, *Australian Evidence* (3rd ed, 1998) 528.

427 Australian Law Reform Commission, *Evidence*, Report No 38 (1987), 81. See also Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) Vol 1 Chapter 13.

428 *Evidence Act 1995* (Cth) ss 62,65–7; *Evidence Act 1995* (NSW) s 62, 65–7; *Evidence Act 2001* (Tas) ss 62, 65–7. *Evidence Act 1995* (Cth) ss 4(1) and 8(4)(a) applies the Commonwealth Act provisions to proceedings in ACT courts, except to the extent they are excluded by regulation.

429 *Evidence Act 1929* s 34CA; *Evidence Act 1906* (WA) s 106H.

430 *Evidence Act 1977* (Qld) s 93A covers children and people with an intellectual disability. It is not confined to sexual assault cases.

431 *Evidence Act 1977* (Qld) s 93B, applies in 'prescribed criminal proceedings' (these cover homicides, sexual assaults and other assaults) where the witness is unavailable to give evidence about an asserted fact because they are dead or mentally or physically incapable of giving evidence.

432 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A.

PROBLEMS WITH THE CURRENT LAW

4.107 The hearsay rule and its exceptions have been criticised as inadequate, arbitrary and anomalous.⁴³³ The rule often has the effect of excluding evidence of substantive probative value. Victoria is the only State which has neither introduced a child-specific hearsay exception, nor adopted the Uniform Evidence Act provisions. We do not believe there is any justification for this difference between Victorian law and the evidence law which operates in other parts of Australia.

4.108 We also believe that the absence of an exception for first hand hearsay may prevent juries from hearing evidence in sexual assault cases, the details of which will sometimes be more accurate than direct evidence.

4.109 It is a common pattern for people who are sexually assaulted to delay in reporting the offence to the police, if they report the offence at all. Victoria Police data shows that 48.6 % of alleged rapes were reported more than a week after the event, though the majority of alleged offences were reported within 6 months.⁴³⁴ Delays in reporting are even more common for other penetrative offences, only 16.3% of which were made within a week of the alleged event occurring.

4.110 The delay between the event and the report to the police and the further delay between the report and the victim appearing in court is likely to affect the both the complainant's and the accused's memory. As the Australian Law Reform Commission commented 'the account of an event given shortly after the event will be more accurate than one given months or years after the event'.⁴³⁵ In other words, evidence of an earlier allegation of assault may be more reliable and accurate than the evidence the complainant gives in court.

4.111 Although complainants may tell others about the alleged assault long before they report it to the police, they often do not do so at the first available opportunity, so that statements which they make at a later stage are not admissible as recent complaints. Even if evidence is admissible under the recent complaint principle, it is only admissible in support of the complainant's credibility and not as truth of the complaint. Justice Roden has criticised this distinction as 'an area

433 Australian Law Reform Commission, *Evidence*, Report No 38 (1987), 81. See also *Evidence*, Interim Report No 26 (1985) paras 329–45.

434 See Interim Report 73, Graph 3.

435 Australian Law Reform Commission, *Evidence*, Report No 38 (1987) 77.

of choice gobbledegook'.⁴³⁶ It is unlikely that juries understand it. Modification of the hearsay rule to allow admission of hearsay evidence to support the truth of the allegation in circumstances where such evidence is likely to be reliable would recognise the reality that in the minds of the jury the complainant's credibility and the truth of his or her statements are inextricably intertwined.

SUBMISSIONS

4.112 The Interim Report discussed the issue of hearsay in the context of child sexual offences and considered a range of ways in which the hearsay rule could be modified, including the adoption of the Uniform Evidence Act provisions. Ultimately it recommended enactment of a child specific hearsay exception, which would apply whether the child was available or unavailable to give evidence. A modified version of this recommendation, which allows the admission of hearsay evidence only where the child is available to give evidence, is made in Chapter 5 of this Report.⁴³⁷

4.113 Submissions generally focused on the proposal to introduce a child-specific hearsay exception, without discussing the advantages and disadvantages of adopting the Uniform Evidence Act hearsay provisions. These submissions are discussed in Chapter 5. In a roundtable held by the Commission to discuss evidentiary reforms⁴³⁸ there was considerable support for applying the Uniform Evidence Act provisions in Victoria.

RECOMMENDATIONS IN THIS REPORT

4.114 The Commission believes that Victoria should introduce substantial reforms of the laws of evidence, along the lines of the provisions of the Uniform Evidence Act. However we recognise that such amendments may not be made for some time. This has made it necessary for us to consider whether to recommend modification of the hearsay rule in cases involving allegations of sexual assault, before more extensive reforms are implemented.

436 A Roden, 'Criminal Evidence—The Law and the Gobbledegook' in *Proceedings of the Institute of Criminology*, No 48 Criminal Evidence Law Reform (1981) 24, cited in Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) Vol 1, 171.

437 See below paras 5.127–8 and Recommendation 139.

438 The Roundtable on 11 February 2004 was attended by judges, academics and practising lawyers.

4.115 The former Law Reform Commission faced a similar dilemma in the context of its 1988 Report on child sexual assault. It recommended that reform of the laws of evidence ‘should occur in the context of a general review of the hearsay rules’, but that ‘if that review did not lead to general reform of the hearsay rules a special exception for offences against children should be established’.⁴³⁹ Recommendation 87 in this Report proposes a child-specific hearsay exception. Sixteen years have passed since the former Commission recommended a general review of the hearsay rule. We believe it is now appropriate to amend the hearsay rule in cases involving sexual assault of both adults and children. For the reasons set out above,⁴⁴⁰ the admission of hearsay may be particularly important in the context of sexual offences.

4.116 The features of the proposed reform are based on the Uniform Evidence Act.⁴⁴¹ They include the following:

- Where evidence is admissible at common law in support of a person’s credibility, it will also be admissible as evidence of the truth of the statement.⁴⁴²
- Where the person who made the statement is available to testify, that person may give first-hand hearsay evidence⁴⁴³ about the contents of a previous statement. So may someone else who heard the person making the statement, provided that the person spoke of the asserted facts which were fresh in their memory.⁴⁴⁴

439 Law Reform Commission of Victoria, *Sexual Offences Against Children*, Report No 18 (1988) 100, Recommendation 34.

440 See Para 4.109–11.

441 We have not proposed enactment of the provisions of the Uniform Evidence Act relating to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding.

442 *Evidence Act 1995* (Cth) s 60.

443 The provision applies only to ‘first hand hearsay’ which is ‘a previous representation that was made by a person who had personal knowledge of an asserted fact’. The person has personal knowledge if his or her knowledge was based on something the person saw, heard or otherwise perceived; see *Evidence Act 1995* (Cth) s 62.

444 *Evidence Act 1995* (Cth) s 66.

- Where the person who made the statement is not available to testify,⁴⁴⁵ the evidence will be admissible if the statement was made at or shortly after the time when the asserted fact occurred, provided circumstances make it
 - unlikely that the representation is a fabrication, or
 - highly probable that the representation is reliable, or
 - at the time, against the interests of the person who made the statement to have done so.⁴⁴⁶
- Persons should be regarded as unavailable to testify where they are mentally or physically incapable of giving evidence. (This definition of unavailability is based on a similar provision in the *Evidence Act 1977* (Qld) section 93B.)
- An accused person may adduce evidence of a confession by another person to the crime with which the accused has been charged. For example, if the person who allegedly confessed to committing the crime refuses to give evidence, the accused may call in defence someone else who heard the confession. If such evidence is adduced by a defendant and admitted, the hearsay rule does not apply to evidence of another representation about the same matter that is adduced by the prosecution.⁴⁴⁷
- If the maker of the statement is unavailable to give evidence the party who wishes to adduce the evidence must give reasonable notice in writing to the other party of the intention to adduce the evidence. This ensures fairness to the accused.⁴⁴⁸
- A previous statement will not be admissible if, at the time the statement was made, the person making the statement was not competent to give evidence about the fact because he or she was incapable of giving a rational

445 *Evidence Act 1995* (NSW) Schedule 1 Dictionary clause 4 defines the circumstances in which a person is regarded as unavailable. These include the situation where the person is dead, incompetent or cannot be found or where unsuccessful attempts have been made to compel the person to give evidence, but not where the person would be traumatised by giving evidence. Section 61 requires the person whose hearsay evidence is admitted to be competent to give evidence about the fact at the time the representation was made because they were capable of giving a rational answer to a question about a fact. By contrast *Evidence Act 1977* (Qld) 93B(1)(b) refers to a person being unavailable to give evidence because they are 'dead or mentally or physically incapable of giving the evidence'.

446 Compare *Evidence Act 1995* (Cth) s 65.

447 Compare *Evidence Act 1995* (Cth) s 65(8).

448 Compare *Evidence Act 1995* (Cth) s 67.

reply to an answer about a fact. This does not apply to a statement about the person's health, feelings, sensations, intention, knowledge or state of mind. The provision is mirrored in the Uniform Evidence Act.⁴⁴⁹ In the case of a child it would allow evidence to be given by a third person, that a child claimed to be experiencing physical discomfort or pain, although the child was not capable of replying rationally to a question (and thus was not competent to testify).⁴⁵⁰

- The court may refuse to admit hearsay evidence if the court is satisfied that it would be unfair to the defendant to admit the evidence. This is based on a similar provision in the *Criminal Law (Sexual Offences) Act 1978* (Qld).⁴⁵¹
- In a jury trial the judge must warn the jury that hearsay evidence may not be as reliable as direct evidence.

4.117 This package of recommendations will ensure that hearsay evidence of prior statements made by both children and adults which satisfies the requirements discussed above, will be admissible in sexual assault cases, subject to safeguards designed to ensure fairness to the accused. It will also be open to the accused to adduce hearsay evidence, which comes within these provisions. The fact that the evidence is hearsay may be taken into account by the jury in deciding the weight which is given to it.

4.118 We note that this could give rise to anomalies where a person is charged with both sexual offences and other offences, as hearsay evidence will only be admissible in relation to some of the charges. Since our terms of reference are confined to sexual offences we make no recommendations on this issue. Nevertheless we urge the government to consider extending the operation of these provisions beyond the area of sexual offences.

449 *Evidence Act 1995* (Cth) s 61.

450 *Evidence Act 1995* (NSW) s 61.

451 Section 4A (B). Compare *Evidence Act 1995* (NSW) s 137 which says that the court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice to the defendant.

**RECOMMENDATION(S)**

87. The *Evidence Act 1958* should be amended to allow the admission of first-hand hearsay evidence in sexual offences cases in circumstances where this evidence is admissible under sections 65 and 66 of the *Uniform Evidence Act*.
88. A person should be regarded as unavailable to give evidence for the purposes of the provision allowing admission of hearsay evidence if they are dead or mentally or physically incapable of giving evidence.
89. The court should not be able to admit hearsay evidence to prove an asserted fact if, when the representation was made, the person was not competent to give evidence about an asserted fact because he or she was incapable of giving a rational reply to a question about a fact. This should not apply to a statement made by a person about his or her health, sensations, intention, knowledge or state of mind.
90. Where evidence is sought to be adduced of a hearsay statement made by a person who is unavailable to give evidence, the person who seeks to adduce the evidence must give reasonable notice in writing to the other party of the intention to adduce that evidence. The notice must state the provision on which the party seeks to rely in arguing that the hearsay rule does not apply.
91. Where evidence of a previous representation is admitted for a purpose other than to prove the fact asserted, it should also be admissible as evidence of the truth of that fact. (This provision is based on section 60 of the *Uniform Evidence Act*).
92. The court may refuse to admit hearsay evidence if the court is satisfied that it would be unfair to the defendant to admit the evidence.
93. In a jury trial the judge must warn the jury that hearsay evidence may not be as reliable as direct evidence.

CROSS-EXAMINATION BY UNREPRESENTED ACCUSED

THE CURRENT LAW

4.119 Persons accused of a sexual offence have a fundamental right to test the evidence that is given against them by the complainant or others.⁴⁵² Under the current law, persons accused of a crime may represent themselves, rather than being represented by a lawyer. Persons charged with a sexual offence may personally question complainants about the details of the alleged offence.

PROBLEMS WITH THE CURRENT LAW

4.120 It is uncommon for a complainant to be cross-examined by the accused. However, such cross-examination has the potential to cause complainants great distress.⁴⁵³ Cross-examination in these circumstances will often be unfair and offensive to the administration of justice. An example is provided by an English trial where a complainant was questioned for six days by the alleged rapist, who wore the same clothes that he was wearing at the time of the alleged repeated attacks on the complainant.⁴⁵⁴

4.121 In sexual offence cases cross-examination will often turn on whether the complainant consented to the alleged act. It is likely to cover the behaviour of the complainant prior to the alleged act and details of the nature of sexual contact. The complainant's truthfulness will be questioned and he or she may be asked about many aspects of his or her relationship with the accused. In cases involving allegations of sexual abuse the accused will frequently be a member of the complainant's family. In these circumstances the complainant is likely to feel

452 In their submission the County Court made a strong comment to this effect: submission 52.

453 In 1987 this occurred in *R v Cremmen* (Unreported, County Court of Victoria, 1987). In that case the accused cross-examined the complainant over four days until the judge ordered that he cease; in *R v Kerbatieh* (Unreported, County Court of Victoria, Duggan J, 17 February 2003) a man charged with sexual offences personally cross-examined two complainants. One complainant gave evidence by CCTV and the other chose to give evidence in court. Victoria Legal Aid had previously provided legal representation for the accused, but the first barrister was unable to follow the instructions of the accused and the accused refused to instruct a second barrister. As far as the Commission is aware these are the only two occasions in the past 16 years when this has occurred in the County Court. However, a larger number of complainants may have been cross-examined by the accused in the Magistrates' Court.

454 *R v Edwards* (England, Central Criminal Court, Goddard J 22 August 1996). The case is discussed in NSW Law Reform Commission, above n 301, 20. The accused was convicted of two counts of rape.

particularly demeaned and humiliated by having to respond to questions about intimate sexual matters from the alleged offender. This distress may prevent the complainant giving evidence effectively.

4.122 Our recommendation that CCTV should be used routinely in sexual offence cases would marginally improve the situation for complainants, but is unlikely to alleviate the effect of being cross-examined by the alleged perpetrator. Children and people who give evidence that they have been abused by a close family member are particularly likely to be frightened about being asked questions by the person accused of abuse.⁴⁵⁵ Their fear or distress may make it impossible for them to give their evidence rationally and coherently.

4.123 The trial judge can ‘forbid or disallow any question which appears to be intended to insult or annoy, or which though proper in itself appears to the court to be needlessly offensive in form’.⁴⁵⁶ However, trial judges tend to exercise this power sparingly. In cases where the accused is self-represented, judges may be particularly reluctant to control cross-examination because of the need to be and be seen to be fair to an accused person who is unfamiliar with the legal process. It may also be difficult for a trial judge to detect words, gestures or body language that were a feature of the relationship between the complainant and the accused and that could be used by the accused to intimidate the complainant during cross-examination.

RECOMMENDATIONS IN THE INTERIM REPORT

4.124 Restrictions on personal cross-examination by the accused already exist in most Australian jurisdictions. Commonwealth legislation prohibits the accused personally cross-examining child complainants.⁴⁵⁷ New South Wales, the Northern

455 In *The Age*, 23 June 2000, Professor Chris Goddard reported on a civil action in which a young woman was cross-examined by her step-father who had been convicted of repeatedly raping her. She was asked about numerous incidents of alleged rape in a great deal of detail. She was extremely distressed, despite the fact that she was cross-examined using an audio-visual link.

456 *Evidence Act 1958*, s 40. See also s 39 which allows the court to forbid ‘indecent or scandalous questions’ unless they relate to the facts in issue or to matters necessary to be known.

457 *Crimes Act 1914* (Cth) s 15YF–15YG: In sexual offence cases a child complainant must be cross-examined by a person appointed by the court. Child witnesses can only be cross-examined by the accused with the leave of the court.

Territory, Queensland and Western Australia also impose restrictions.⁴⁵⁸ Similar provisions are in force in England,⁴⁵⁹ Scotland⁴⁶⁰ and New Zealand.⁴⁶¹

4.125 In the Interim Report the Commission recommended that there should be a legislative prohibition on the accused personally cross-examining the complainant and other 'protected witnesses'. The legislation should provide an alternative means by which unrepresented accused could test the evidence against them.

4.126 The Interim Report recommended that protected witnesses should include children under 18, persons who are complainants in other sexual offence cases brought against the accused, and persons with 'impaired mental functioning'.⁴⁶² The Interim Report also recommended that the court should have power to treat parents, siblings, or any other family members of the complainant as protected

458 *Evidence (Children) Act 1997* (NSW) s 28 (requires a child to be cross-examined by a person appointed by the court, rather than by the accused); *Evidence Act 1977* (Qld) ss 21M–21S (applies to witnesses under 16, witnesses who are intellectually impaired and for alleged victims of sexual offences. The court arranges for the appointment of a legal aid lawyer for the purposes of cross-examination of the protected witness); *Evidence Act 1906* (WA) s 106G (applies to children only; question is put by a judge); *Sexual Offences (Evidence and Procedure Act) 1983* (NT) s 5 (applies to complainants in sexual offence cases; questions are put by the judge or a person appointed by the court).

459 *Youth Justice and Criminal Evidence Act 1999* (Eng) ss 34, 35. An accused cannot cross-examine a complainant in a sexual offence case or a witness under 17. The court can also prohibit cross-examination by the accused of other witnesses. The legislation was based on United Kingdom Home Office, *Speaking Up for Justice*, Report of Inter-Departmental Working Group on the Treatment of Vulnerable and Intimidated Witnesses in the Criminal Justice System (1998) 64–5, Recommendation 58.

460 *Sexual Offences (Procedure and Evidence) (Scotland) Act 2002* (UK) s 1, inserting s 288C in the *Criminal Procedure (Scotland) Act 1995* requires an accused to be represented in certain sexual offence cases.

461 *Evidence Act 1908* (NZ) s 23F prohibits cross-examination of a child complainant or a mentally disabled complainant in a sexual offences case by the accused personally. The New Zealand Law Commission has recommended that this provision be extended to cover all complainants; New Zealand Law Commission, *Evidence*, Report 55, 1999 Vol 1, paras 414–419. It is understood that this proposal will be implemented in late 2004 by introduction of an Evidence Bill based on the Law Commission's proposed Evidence Code.

462 Interim Report para 5.143. The terminology 'impaired mental functioning' is currently used in the *Crimes Act 1958*. In Recommendation 161 below we recommend use of the term 'cognitive impairment' instead.

witnesses, if the court considers that they would suffer unnecessary distress, humiliation or intimidation if cross-examined by the accused personally.⁴⁶³

4.127 The Interim Report balanced this protection against personal cross-examination by the accused with recommendations that were intended to protect the right of the accused to a fair trial. Where an accused is self-represented in a sexual offence trial because of inability to afford legal representation, there is already provision in section 360A of the *Crimes Act 1958* for the court to order Victoria Legal Aid to provide assistance to the accused, where it is satisfied that the accused will be unable to receive a fair trial without legal representation. The recommendations in the Interim Report were intended to apply in the situation where accused are representing themselves because they are not entitled to legal aid and have not instructed a lawyer, or have declined legal aid.

4.128 In some jurisdictions the legislation requires the judge or magistrate to transmit questions from the accused to the complainant. The Interim Report suggested this approach could create a perceived conflict between the judicial officer's obligation of impartiality and their responsibility to put questions to the complainant on behalf of the accused. Instead it was recommended that the accused should be advised by the court that they cannot conduct cross-examination personally and invited to arrange legal representation. (The court could also exercise its powers to direct that the person be legally aided under section 360A of the *Crimes Act 1958*.) If the accused refuses to arrange legal representation, the Interim Report recommended that the court should direct Victoria Legal Aid to provide legal representation to the accused for the purpose only of conducting the cross-examination. A person appointed as a result of this direction should be appointed as a friend of the court for the purposes of cross-examination only. It was recommended that where this occurred the jury should be told that this is a routine practice and that no adverse inference should be drawn against the accused as the result of this arrangement.

SUBMISSIONS

4.129 The Commission's recommendations were criticised by lawyers' groups and some judges, who argued that they were inconsistent with the accused person's right to a fair trial. The County Court submission strongly opposed the recommendation, arguing that it was the fundamental right of the accused to test

463 Ibid.

the evidence against him, even if this involved the cross-examination being undertaken by the unrepresented accused himself. The County Court suggested that the problem could be overcome by use of closed circuit television in such a way as to prevent the complainant seeing the accused.⁴⁶⁴

4.130 The Criminal Bar Association raised a number of questions about the role that a lawyer acting as a friend of the court would play, when putting questions on behalf of the accused. The Association asked how the accused would ‘keep the continuity and flow of cross-examination going’ when he/she must first communicate (orally or in writing) the proposed question and referred to difficulties which would arise if the accused could not read or write in English. It was argued that the Commission’s recommendations would create an unacceptably high degree of risk of prejudice and disadvantage to an unrepresented accused.⁴⁶⁵

4.131 The Victorian Bar also expressed concerns about the Commission’s recommendations.⁴⁶⁶ While the Bar appreciated that the complainant might experience significant trauma if the accused decided to conduct his own defence because he wanted to demean and humiliate his accuser, it thought that there were practical difficulties with the Commission’s recommendation.⁴⁶⁷ The Bar said that the recommendations were ‘too sweeping a remedy for so few cases of such an accused humiliating a complainant’, where this problem could be dealt with by the trial judge exercising his or her power to control cross-examination.⁴⁶⁸ The Criminal Bar Association submission to our earlier Discussion Paper also opposed restrictions on the accused’s right to cross-examine the complainant.⁴⁶⁹

4.132 Judges Neesham, Kelly and Hart commented that

464 Submission 52.

465 Submission 42.

466 Submission 48.

467 Reference was made to the situation where there were multiple complainants and it was necessary to bring counsel in to cross-examine only some of them. The submission also commented that it was inappropriate to limit cross-examination only to general matters. This was not what was intended by the recommendation which was intended to ensure that it was unnecessary for the accused to give precise questions to the person appointed to represent him or her. See Interim Report paras 5.144–6.

468 *Evidence Act 1958* ss 39–40.

469 Submission 28 (submission to the Discussion Paper).

to deny an accused the right to appear in person and conduct his own defence according to law, is to strike at the very heart of the criminal justice system and indeed the liberty of the subject[.]

In their view the proposals under which an accused who did not exercise his right to have legal representation would be able to put questions through a legal aid lawyer would go some way towards redressing the gravity of the denial,

but not when counsel was not the choice of the accused and acting as *amicus curiae* (friend of the court).⁴⁷⁰

4.133 On the other hand, the vast majority of submissions made in response to the Discussion Paper supported the proposal that people on trial for sexual offences should be prohibited from personally cross-examining complainants. Similarly, the majority of those who commented on the recommendations in the Interim Report supported the procedures that were proposed to ensure that the accused is able to test the complainant's evidence, while also protecting the complainant from personal cross-examination by the accused.⁴⁷¹ Judge Nixon referred favourably to the ban on cross-examination already in force in Queensland and New South Wales,⁴⁷² and Judge Anderson supported the recommendations.⁴⁷³

4.134 The Domestic Violence and Incest Resource Centre 'strongly supported' and 'applauded' the proposals.⁴⁷⁴ Bendigo CASA referred to the power differential that typically exists between victims of sexual assault and perpetrators and supported recommendations giving the accused an alternative means of cross-examination.⁴⁷⁵ The Gatehouse Centre submission strongly agreed:

For children they are very often threatened by the alleged offender. Being cross-examined by them raises the issue of being threatened again and they then become the 'victim' again to this person within the Court setting.⁴⁷⁶

470 Submission 39.

471 Submissions 6, 12, 19, 20, 21, 23, 24, 25, 28, 30, 41, 44.

472 Judge Nixon, qualification for support to Submission 39.

473 Submission 49.

474 Submission 20.

475 Submission 19.

476 Submission 28.

RECOMMENDATIONS

PROHIBITING CROSS-EXAMINATION BY THE ACCUSED

4.135 In a criminal trial accused people must have the right to test all the evidence against them. While ensuring that the accused receives a fair trial is a fundamental purpose of the criminal justice system, the Commission takes the view that this right can be adequately protected without allowing the accused to personally cross-examine the complainant and other protected witnesses.⁴⁷⁷ We note that the New South Wales Law Reform Commission has recently reached a similar view.

4.136 The New South Wales Report gave three main reasons for prohibiting personal cross-examination by the accused. First, there is a public interest in ensuring that witnesses are protected from unnecessary offence or distress.

[T]he first and overwhelming element of the public interest in the administration of justice is that the accused is fairly tried. This does not mean, however, that the *interests* of the accused take priority over all other interests that may be affected by the proceedings... There is a substantial public interest in ensuring that witnesses are not subjected to procedures that might be oppressive or humiliating although they must answer all questions that fairly test their evidence. This is not only to ensure, as far as possible, that potential witnesses are not discouraged from coming forward and that actual witnesses are not bullied into giving untrue or inaccurate evidence, but also because such conduct must undermine public confidence in the administration of justice. Without these protections for witnesses, the court would be an instrument of injustice rather than an instrument for justice.⁴⁷⁸

4.137 Secondly, the New South Wales Law Reform Commission argued that the kind of questions that must be put to complainants in sexual offence cases made it inherently offensive to the administration of justice for these questions to be put by an alleged offender, given that the case against the accused could be adequately tested by having the questions put by someone else.⁴⁷⁹

477 For a similar view expressed by the European Court of Human Rights see *Croissant v Germany*, Judgment of the Court, 25 September 1992 (Series A) Vol 327.

478 New South Wales Law Reform Commission, above n 301, 45–6.

479 *Ibid* para 3.67.

4.138 Thirdly, the Commission suggested that allowing the accused to cross-examine a complainant personally could confer an inappropriate advantage on the accused.

Leaving aside those cases in which the accused is refused legal aid and cannot otherwise afford legal representation, the most likely motive for refusing representation is the desire to obtain an advantage by virtue of the intense character of direct personal confrontation. This advantage has never been part of the function of a trial or an element of fairness.⁴⁸⁰

In England, Lord Chief Justice Bingham has also recognised that allowing the accused to cross-examine the complainant may unfairly advantage the accused.⁴⁸¹

4.139 In our view these are compelling reasons for prohibiting the accused from personally cross-examining the complainant and certain other protected witnesses, provided there is an alternative method by which the evidence against the accused can be tested. The question then arises whether the alternative method of cross-examination proposed in the Interim Report is appropriate, or should be modified.

PROTECTING THE ACCUSED'S RIGHT TO QUESTION THE CASE AGAINST THEM

4.140 The accused's right to test the evidence could be protected by

- the judge putting questions on behalf of the accused; or
- the court appointing a legal representative to put the questions on behalf of the accused.

Questions are Put on Behalf of the Accused by the Judicial Officer

4.141 First, the magistrate or judge could ask the questions which the accused wishes to put to the complainant (or other protected witness). Western Australian and Northern Territory legislation requires the accused to state questions to the judge or another person approved by the court. The judge or other person then repeats the questions to the complainant.⁴⁸² We maintain the view expressed in the

480 Ibid para 3.70.

481 *R v Brown* [1998] 2 Cr App R 364 at 371.

482 *Evidence Act 1906* (WA) s106G (prohibition on personal cross-examination applies to children only); *Sexual Offences (Evidence and Procedure Act* (NT) as in force at 7 November 2002 s 5 (applies to complainants in sexual offence cases; questions are put by the judge or a person appointed by the court); see also *Evidence Act 1908* (NZ) s 23F which applies only to children. The New Zealand Law

Interim Report that this is inappropriate. The judge would be placed in a very difficult position if he/she had to rule on whether particular questions can be asked or whether they relate to inadmissible evidence or irrelevant matters. A judicial officer who questions a witness on behalf of the accused could appear to be biased. Our view that this approach should not be followed is reinforced by the fact that it has been rejected by several other policy making and law reform bodies.⁴⁸³

Questions are Put by a Court-Appointed Lawyer

4.142 Secondly, the complainant and other protected witnesses could be cross-examined by a lawyer appointed by the court solely for that purpose. This is the approach that currently applies in Queensland⁴⁸⁴ and in England.⁴⁸⁵ It was recommended by the New South Wales Law Reform Commission⁴⁸⁶ and also in this Commission's Interim Report.

4.143 The New South Wales Law Reform Commission considered whether the lawyer should be appointed to represent the accused for the whole trial, rather than solely for the purpose of cross-examination. The New South Wales Law Society argued that the lawyer should act for the accused for the whole trial. Both the New South Wales recommendations and the recommendations in our Interim Report only provide for a court-appointed lawyer to cross-examine the complainant in cases where the accused has already declined to be represented. The Commission does not consider it appropriate to limit the accused's right to self-representation to a greater extent than is necessary to protect the complainant and other protected witnesses from being cross-examined by the accused. The New South Wales Law Reform Commission Report said that appointment of counsel solely for the purposes of cross-examination had worked well in

Commission has proposed this should also apply to adult complainants see Law Commission New Zealand, *Evidence: Evidence Code and Commentary*, Report 55 Vol 2, (1999), s 95(5).

483 Queensland Law Reform Commission, *The Receipt of Evidence By Queensland Courts: The Evidence of Children*, Report No 55, 2000, 291–2; United Kingdom Home Office, above n 459, para 9.50; Scottish Executive, *Redressing the Balance: Cross-Examination in Rape and Sexual Offence Trials*, A pre-Legislative Consultation Document (2000) para 52.

484 *Evidence Act 1977* (Qld) ss 21O, 21P.

485 *Youth Justice and Criminal Evidence Act 1991* (UK) ss 34, 35, 38, 39: the provision applies to complainants and child witnesses in sexual offence cases and other witnesses in relation to whom a direction is made by the court. See also *Criminal Procedure (Scotland) Act 1995*, s 288D.

486 New South Wales Law Reform Commission, above n 301, Recommendations 4–9.

Queensland.⁴⁸⁷ For these reasons we recommend that a lawyer should only be appointed for the purpose of cross-examining the complainant and other protected witnesses.

What Should be the Role of the Court-Appointed Lawyer?

A Friend of the Court?

4.144 In the Interim Report we recommended that the court-appointed lawyer should act as a friend of the court and not as a representative of the accused. Under this approach the lawyer would owe a duty to the court, but not to the accused. This is the approach that applies under the English⁴⁸⁸ and New South Wales legislation.⁴⁸⁹ The purpose of this approach is to ensure that the lawyer is not placed in a position where there is conflict between their duty to the court and their duty to the accused, for example where the lawyer believes that questions the accused wanted to ask should not be put to the complainant, because they are harassing or offensive.

The Legal Representative of the Accused for the Purposes of Cross-Examination?

4.145 In its Report *Cross-Examination of Unrepresented Accused in Sexual Assault Proceedings* the New South Wales Law Reform Commission recommended that the role of the court appointed lawyer should extend beyond simply putting questions to the complainant on behalf of the accused. While conducting cross-examination the lawyer should have the same obligations to act on the instructions of the accused as if he or she were engaged by the accused. If the accused refused to instruct the court-appointed lawyer the lawyer's duty would be to act in the best interests of the accused. The Commission said that:

487 Ibid para 5.30. This approach was also recommended in United Kingdom Home Office, above n 457, 66.

488 *Youth Justice and Criminal Evidence Act 1999* (UK) s 38(5) provides that 'the [legal representative appointed by the court] shall not be responsible to the accused'. Note that this was contrary to the recommendation made in United Kingdom Home Office, above n 459, 67.

489 *The Evidence (Children) Act 1997* (NSW) s 28(3A) 'a person acting in the course of his or her appointment, must not independently give the accused or the defendant legal advice'.

This would place the court-appointed legal representatives in the best position to fulfil their obligations both to the client and to the court. Where the accused gives no instructions, or inadequate or perverse instructions, the court-appointed representative should simply strive to act in the best interests of the accused, as he or she would if there were a conventional retainer... Some testing of the evidence can be undertaken in the absence of instructions about events but if the accused declines to give such instructions, the possibly inadequate cross-examination is the result of the accused's decision. This is not unfair.⁴⁹⁰

4.146 Despite this recommendation, recent legislative amendments in New South Wales provide for a person appointed by the court (not necessarily a lawyer) to put to the complainant 'only the questions that the accused person requests [the person] to put to the complainant'. Section 294A of the *Criminal Procedure Act 1986* (NSW) makes it clear that the person appointed by the court 'must not independently give the accused person legal or other advice'.⁴⁹¹

4.147 In a recent trial of several men accused of sexual offences, Justice Sully questioned the workability of this provision. He criticised the fact that the court-appointed person was not required to be a lawyer (note that we do not propose that this should be the case in Victoria) and suggested there were difficulties in working out how 'the projected cross-examination should actually be conducted'.⁴⁹²

4.148 Tony Parsons, Director of Victoria Legal Aid, also thought that the court-appointed lawyer should be free to cross-examine a complainant in accordance with instructions received from the accused.

Freedom to exercise professional discretion is ethically demanded in terms of refraining from asking impermissible questions. Similarly, an advocate who sees the opportunity to benefit the accused by pursuing legitimate questions consistent with instructions is ethically bound to do so and should be permitted to do so.⁴⁹³

490 New South Wales Law Reform Commission, above n 301, para 5.38, Recommendation 7.

491 The amendments were made by *Criminal Procedure Amendment (Sexual Offence Evidence) Act 2003* s 3. Prior to this amendment the accused was only prohibited from cross-examining child witnesses. *Evidence (Children) Act 1997* (NSW) s 28.

492 *R v Mohammad Ali Khan; R v Ram Chandra Shesra; R v Mohammad Sabeem Jan Khan; R v MRK; R v MMK* (Unreported, NSW Supreme Court, Sully J, 11 September 2003) and see 'Rape Accused to Face Separate Trial', *Sydney Morning Herald* (Sydney), 12 September 2003.

493 Email from Tony Parsons to Victorian Law Reform Commission, 19 March 2003.

Our Approach

4.149 The Commission has carefully weighed the arguments in favour of and against the court-appointed lawyer acting as a friend of the court. A lawyer acting as a friend of the court would not have any obligation to advise the accused but would simply act as a mouthpiece to transmit the questions that the accused requested should be put to the complainant.

4.150 By contrast, a court-appointed lawyer regarded as the legal representative of the accused would owe a duty to the accused as well as to the court and would act on the instructions of the accused. However, such a lawyer would not be required to advise the accused on the whole of the case, but only in relation to the cross-examination of the complainant. It may be difficult for barristers appointed solely for the purpose of cross-examining the accused to decide where their responsibility to the accused begins and ends. Currently barristers are not legally liable for negligent representation of a client in court,⁴⁹⁴ but this rule is currently being challenged in the High Court.⁴⁹⁵ It has been suggested that if barristers were potentially liable for negligent representation of clients in court, it may be even more difficult for them to limit their role in acting for the accused.

4.151 Although the competing arguments about the role of the court-appointed lawyer are difficult to resolve, the Commission now takes the view that barristers appointed by the court for the purposes of cross-examining the complainant should owe the same legal obligations and ethical duties to the accused as if the accused had engaged them. However, barristers should not be obliged to advise the accused about aspects of the trial outside the context of cross-examination of the complainant. The court-appointed lawyer should also be bound by the normal ethical obligations that lawyers owe to the court. If barristers become legally liable for negligent representation of clients in court, it may be necessary to re-examine the recommended approach.

4.152 We believe that the change to the recommendation made in the Interim Report will go some way towards meeting concerns expressed by Judges Neesham, Kelly and Hart⁴⁹⁶ and the Criminal Bar Association.⁴⁹⁷ If the accused declines to instruct the court-appointed lawyer, the lawyer will have an obligation to act in

494 *Giannarelli v Wraith* (1988) 165 CLR 543.

495 The High Court challenge came out of the case of *R v D'Orta-Ekenaike* [1998] 2 VR 140. The House of Lords abolished the principle four years ago: *Arthur J S Hall & Co. v Simons* [2002] 1 AC 615.

496 Submission 39.

497 Submission 42.

the best interests of the client in cross-examining the complainant. For example they would be able to cross-examine the complainant about inconsistencies in their evidence. In this situation any inadequacy in cross-examination will not be unfair to the accused because it will be caused by the accused's failure to give instructions.⁴⁹⁸

!	RECOMMENDATION(S)
94.	In any criminal proceeding for a sexual offence, the accused may not cross-examine the complainant or a protected witness personally. (Note: Protected Witness is defined in Recommendation 101.)
95.	The court must advise the accused that legal representation is required in sexual offence cases if the complainant or a protected witness is to be cross-examined and that he or she may not cross-examine the complainant or protected witness personally. The accused must be invited to arrange legal representation and given an opportunity to do so.
96.	If the accused refuses legal representation, the court must direct Victoria Legal Aid to provide legal assistance for the purpose of cross-examination of the complainant or protected witness.
97.	A court-appointed lawyer has the same obligations as a lawyer engaged by the accused when he or she cross-examines on behalf of the accused. If the accused refuses to instruct the court appointed lawyer the lawyer is obliged to act in the best interests of the accused when cross-examining on behalf of the accused, subject to the obligations that lawyers normally owe as officers of the court.

IMPLICATIONS OF THE RULE IN BROWNE V DUNN FOR UNREPRESENTED ACCUSED

The Rule in Browne v Dunn

4.153 The rule in *Browne v Dunn*⁴⁹⁹ is intended to ensure 'fairness in adversary proceedings'⁵⁰⁰ by ensuring that a witness is given the opportunity to respond to a

498 New South Wales Law Reform Commission, above n 301, 78.

499 [1894] 6 R 67.

contradictory version of events which may be given by a witness for the other side. In a criminal trial, this means that if the defence intends to lead evidence which challenges the evidence of a prosecution witness, the defence must cross-examine the prosecution witness on the contradictory version of events, so that the prosecution witness has the opportunity to comment on it.⁵⁰¹

4.154 If the witness is not cross-examined on the contrary version of events, the judge may ensure fairness in a number of ways. The witness may be recalled to give them an opportunity to comment on the contradictory evidence or the judge may allow the evidence for the defence to be given, but tell the jury that they can take account of the fact that the witness did not have the opportunity to comment on the contradictory evidence, because they were not cross-examined on it. The prosecution may also draw the jury's attention to 'aspects of the defence case which were first put in evidence on behalf of the defence and were not squarely put to prosecution witnesses to whom they should have been put'.⁵⁰²

4.155 It has sometimes been suggested that the trial judge could also completely exclude evidence called by the defence in breach of the rule in *Browne v Dunn*.⁵⁰³ However in Victoria, the trial judge probably does not have a discretion to exclude relevant defence evidence in a criminal trial, even where the rule has been breached.⁵⁰⁴ Even if the judge does have the power to completely exclude such evidence it is unlikely that this discretion would be exercised if the accused was self-represented.⁵⁰⁵

PROBLEMS FOR UNREPRESENTED ACCUSED

4.156 We have recommended that a person accused of sexual offences should be prohibited from personally cross-examining the complainant and other vulnerable witnesses. If the accused refuses to instruct a court-appointed legal representative, the rule in *Browne v Dunn* may be breached, because the complainant may have no opportunity to respond to the contradictory case put by the accused. If, as a

500 *R v Birks* (1990) 19 NSWLR 677, 678.

501 Andrew Ligertwood, *Australian Evidence Law* (3rd ed, 1998) 506.

502 *R v Allen* [1988] VR 736, 738 per McGarvie J.

503 *R v Schneidas* (No 2) (1981) 4 A Crim R 101. A different view was taken by the NSW Court of Appeal in *R v Zorad* (1990) 19 NSWLR 91.

504 *R v Allen* [1988] VR 736.

505 In *R v Nicholas* (2000) 1 VR 356, 401–2 the Victorian Court of Appeal referred to the caution that should be exercised in applying the rule where the accused was not represented or inadequately represented.

result, the judge directs the jury to take account of the fact that the witness has not had an opportunity to refute the version of events put forward by the accused, this could be seen as unfair to an accused who did not appreciate the significance of the rule. The element of unfairness would be even greater if the court refused to allow the accused to give evidence on certain matters, though it seems most unlikely that this would occur in practice.

4.157 In its Report on *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials* the New South Wales Law Reform Commission recommended that:

An unrepresented accused should be warned in general terms about the potential application in the proceedings of the rule in *Browne v Dunn*[.]

We make a similar recommendation below.

4.158 Courts already have to deal with unrepresented accused who unintentionally breach the rule in *Browne v Dunn* when cross-examining witnesses. This is particularly likely to occur in the Magistrates' Court, which often deals with people who do not have legal representation. In *R v Birks*⁵⁰⁶ Gleeson J suggested that in such a case the judge should allow the accused to give evidence in breach of the rule and allow the prosecution to apply for permission to recall an earlier witness whose evidence is disputed, so that the witness can give evidence in chief about the matter in dispute. The Commission believes that this will often be an appropriate way of dealing with the rare situation where a witness has not had the opportunity to contradict the evidence of the accused because the accused has declined court-appointed legal representation. It is unnecessary to recommend any change to the law to permit this to be done.



RECOMMENDATION(S)

98. When the court advises the accused that legal representation is required in sexual offence cases and that he or she cannot cross-examine the complainant or a protected witness personally, the court must warn the accused about the implications of the rule in *Browne v Dunn*.

506 (1990) 19 NSWLR 677, 688.

! RECOMMENDATION(S)

99. If the accused declines to accept the legal assistance provided for this purpose, or to provide such instructions as are necessary to enable the person appointed to question the complainant or protected witness adequately or at all, he is to be taken as having foregone his right to cross-examine the complainant or protected witness.
100. The court must inform the jury that the accused is not permitted to cross-examine the complainant or a protected witness personally. If a complainant or protected witness is cross-examined by a person appointed for that purpose, the court must warn the jury that:
- the procedure is a routine practice of the court;
 - no adverse inference is to be drawn against the accused as a result of the use of the arrangement; and
 - the evidence of the witness is not to be given any greater or lesser weight because of the use of the arrangement.
101. A 'protected witness' means any child under 18, a person who is a complainant in respect of other sexual offence charges brought against the accused, and a person with impaired mental functioning, or a person who is declared by the court to be a protected witness under Recommendation 102.
102. An application may be made to the court for a parent or sibling of the accused or complainant, or any family member of the accused or complainant, to be declared a protected witness if the court considers that the person would suffer unnecessary distress, humiliation, or intimidation if cross-examined by the accused personally.

ALLEGATIONS BY MULTIPLE COMPLAINANTS

4.159 The Discussion Paper⁵⁰⁷ examined the legal principles which apply when several complainants make sexual offence allegations against the same person. Until 1997 the usual practice was for each complainant's matter to be dealt with

507 Discussion Paper paras 8.44–63.

in a separate trial, rather than for all matters to be heard in the same trial. This lengthened the criminal justice process and increased the trauma for complainants, because they sometimes had to give evidence in more than one trial.

4.160 In 1997 legislation was passed in Victoria to create a presumption that when multiple allegations are made, they will be joined on the same presentment and tried together.⁵⁰⁸ This presumption is not to be set aside simply because the evidence that can be taken into account by the jury for one count cannot be taken into account by the jury in relation to another count.

CURRENT LAW

4.161 The Commission has considered whether this legislation has achieved the purpose of reducing trauma for complainants, in sexual offence cases where it is alleged that the accused has assaulted more than one person.

4.162 To assess the effectiveness of the 1997 legislation, it is necessary to have some understanding of:

- the legal rules that govern whether allegations of sexual offences by several complainants should be heard together or separately; and
- the legal rules that limit the admission of evidence. These rules attempt to ensure that the jury decides the guilt or innocence of the accused only on the factors the law allows it to take into account. For example, these rules exclude information that is considered unfair to the accused, or irrelevant.

4.163 In particular, the rules that limit the admission of ‘propensity evidence’⁵⁰⁹ are important in determining whether offences are tried separately or together. Propensity evidence is evidence that suggests that the accused person has a general tendency to do certain things.

4.164 Accused persons are presumed to be innocent until the prosecution proves the case against them beyond reasonable doubt. If an accused is charged with several offences, the jury is required to consider each count separately, and the evidence relating to each count separately. If the jury finds the accused guilty of an offence, that finding must be based only on the evidence relating to that offence and not on other considerations. Nor may the jury assume that an accused found

508 *Crimes Act 1958* s 372 (3AA)-(3AC).

509 ‘Propensity evidence’ is described in *R v Best* [1998] 4 VR 603, 607–608 as evidence that is received by a court notwithstanding that it discloses the commission of offences other than those with which the accused is charged, or other discreditable conduct.

guilty of one offence beyond reasonable doubt is guilty of any other offence, without examining the evidence relating to that offence.

4.165 When a person is charged with sexual offences by several complainants and they are heard together, there is a risk that the jury might be tempted to use the evidence relating to one count to decide that the accused is guilty of others, even though there may be insufficient evidence for conviction of the second offence. For example, a jury may decide that the accused is the sort of person who is likely to commit such offences and for this reason infer that the accused is guilty. That is why judges have the power to divide the counts relating to each complainant so that they can be heard by different juries in separate trials.⁵¹⁰

4.166 Prior to the 1997 legislation, when a judge was deciding whether allegations by multiple complainants should be tried together, he or she had to decide whether the evidence on one count could legitimately be taken into account by the jury as propensity evidence in relation to another count. If it could not, the counts would be separated, and each complainant's matter heard as a separate trial.⁵¹¹

4.167 In Victoria in 1997 the common law rules relating to the admission of propensity evidence were replaced by section 398A of the *Crimes Act 1958*. Section 398A says that propensity evidence can be admitted if the court considers that in all the circumstances it is just to admit it, despite any prejudicial effect it may have on the accused person. This is the case even if there is a reasonable explanation of the facts which is consistent with the innocence of the accused person.⁵¹²

510 *Crimes Act 1958* s 372(3).

511 See the test laid down in the High Court case of *Hoch v The Queen* (1988) 165 CLR 292, 296 and *Pfennig v The Queen* (1995) 182 CLR 461, 465. Under the common law, the jury could take propensity evidence into account if the 'probative value' of the evidence was greater than its prejudicial effect. The probative value of a piece of evidence is the extent to which the evidence can be used by the jury to assess the probability of the existence of a particular fact in relation to a particular count. If there is a reasonable explanation of the propensity evidence that is consistent with the innocence of the accused person, the probative value of the evidence cannot outweigh its prejudicial effect.

512 This was to overcome the test applied by the High Court in cases such as *Hoch v The Queen* (1988) 165 CLR 292, 296.

ANALYSIS OF COURT OF APPEAL DECISIONS

4.168 In the Discussion Paper we analysed Court of Appeal decisions on severance in sexual offence matters involving multiple complainants, that interpret the new legislation.⁵¹³ On the basis of that analysis it appears the new legislation has made it easier for such matters to be heard together, although there will still be circumstances where the counts will be separated in order to avoid the possibility of prejudice.

4.169 We have continued that study by examining Court of Appeal decisions made after those included in the Discussion Paper.⁵¹⁴ The approach taken by the Court of Appeal appears to indicate that as long as there is sufficient similarity between the various counts, propensity evidence that may not previously have been admissible is now being admitted.

4.170 It is difficult to obtain a complete picture of what is happening with severance simply by examining Court of Appeal decisions in which severance was an issue. From the judgments it is usually possible to determine the ruling on severance that was made at trial, though not all details are available. County Court decisions are not available electronically.

4.171 The table at Appendix 3 provides insights on how the law is being applied in the Court of Appeal. However it was not possible for us to analyse:

- cases where the County Court severed the counts (ie the trials were heard separately) and the defendant was found guilty and did not appeal;
- cases where the County Court did not sever (ie the matters were heard together), the defendant was found guilty and there was no appeal, or the appeal was not on the basis of severance;⁵¹⁵ and
- cases where the County Court severed the counts and the defendant was acquitted, so there was no appeal.

4.172 Victoria is the only State to have legislated specifically around the issue of propensity and severance in sexual offence matters.⁵¹⁶

513 Discussion Paper paras 8.54–60 and Appendix 5.

514 Appendix 3 is a table of Court of Appeal decisions that we could identify were made after the new legislation came into force, including those that were considered in the Discussion Paper. The cases were identified in two ways. Firstly an electronic search of all Court of Appeal judgements between 1998 and 2003 containing the word ‘severance’ was conducted. Several additional cases were also identified by the OPP. It is acknowledged that this list is not exhaustive.

515 One is included in the table, as it came up through the electronic search of ‘severance’.

CONSULTATION AND SUBMISSIONS

4.173 In the Discussion Paper the Commission asked: are cases involving more than one complainant being heard together more frequently than was the case before the 1997 reforms? Only four responses were received.⁵¹⁷ Two responses said they could not comment on the frequency as it was not known. One said it did not appear that matters were now being heard together more often, and one said that they were.

4.174 The CASA Forum⁵¹⁸ commented that some trials are still being split, and that separate trials place pressure on the complainant not to refer to any offending behaviour in relation to other complainants. This may make the evidence appear stilted and weaken the credibility of the witness. In addition, the jury does not hear the full extent of criminality alleged against the defendant. The Criminal Bar stated that anecdotally, it appeared that the rules were being dealt with responsibly and as no two cases are identical the trial judge should retain discretion.⁵¹⁹ The OPP believes that trials involving multiple complainants are now being heard together more often, although there is considerable variation between judges. However, they also said that some matters which they believe should have been heard together were still severed in the County Court.⁵²⁰

4.175 The issue of severance was not covered in the Interim Report, and none of the submissions received to the Report raised it.

SUCCESS OF AMENDMENTS

4.176 The Court of Appeal has said that the ‘mischief’ to which the new provisions are directed is ‘the rule of practice that had developed whereby severance was almost automatically granted’.⁵²¹ From an examination of the

516 Queensland is the only other State which considers sexual offending in legislation relating to severance. However, in Queensland it is limited to the questions of collusion and suggestion in relation to similar fact evidence. See *Criminal Code Act 1899* (Qld) s 597A and *Evidence Act 1977* (Qld) s 132A. The result of the provisions is to leave the question of collusion or suggestion to the jury. The *Evidence Act 1995* (NSW) considers tendency and coincidence evidence, though not in relation to severance. The legislation states that the probative value of the evidence must substantially outweigh its prejudicial effect if it is to be admissible: ss 97, 98 and 101.

517 Submissions 7, 8, 11, 28.

518 Submission 11.

519 Submission 28.

520 Conversation with Gary Ching, Manager Sexual Offences Unit OPP, 21 April 2004.

521 *R v TJB* [1998] 4 VR 621 at 627 by Callaway JA.

reasoning applied by the Court of Appeal it is certainly apparent that in sexual offence trials involving multiple complainants, the Court starts from the presumption that the matters will be heard together.

4.177 In most Court of Appeal cases examined the County Court judge had ordered partial severance at trial and the appeal was on the basis that full severance should have been ordered, that is, all complainants should have had separate trials. In most cases the Court of Appeal denied that ground of appeal.⁵²² The predominance of partial severance may not accurately indicate what is happening in the County Court as cases in which partial severance is ordered appear to be those most likely to be appealed, on the ground that full severance should have been ordered.

4.178 In some cases it is still difficult to see why severance was ordered by the trial judge. In the case of *R v Rainsford*,⁵²³ where there were three complainants and three offences, the alleged offences all occurred on the same day either on trains or at railway stations. The first two matters, which happened in a very short space of time, were heard together. The third matter, which was identical to the first but happened later in the day, was severed. It is difficult to see how such a brief separation in time justified severance of the third offence. The point of appeal was that all three matters should have been severed, and that was refused.

4.179 However, other cases indicate the success of the amendments. In *R v Neicho* the trial judge ruled that even where evidence in relation to some counts was not admissible the matters should be heard together, and any prejudice to the accused could be overcome by directions to the jury.⁵²⁴ That ruling was not challenged on appeal. In the recent decision of *R v Papamitrou*⁵²⁵ the Court of Appeal again confirmed that the discretion to sever is not necessarily dictated by 'mutual admissibility' or the lack thereof.

4.180 *R v Papamitrou* involved six complainants. At trial the accused sought to have the presentment severed so that there would be six separate trials. The trial judge found that evidence concerning each complainant was probative in respect of the others, and that the probative value of the evidence was significant and

522 See Appendix 3.

523 [2000] VSCA 157.

524 [2003] VSCA 38.

525 [2004] VSCA 12.

outweighed its prejudicial effect. It was therefore just to admit it, and the application for severance was refused.

4.181 In its judgment, the Court of Appeal noted:

The amendments to section 372 of the Crimes Act...were introduced to ensure that trial judges carefully considered whether severance was necessary even where the judge concluded that the evidence of complainants was not ‘cross admissible.’⁵²⁶

4.182 However, the court went on to say that it is ‘a sound approach in such cases’ for the trial judge to determine whether the evidence is cross-admissible because such a determination will be a powerful factor influencing the discretion.

The capacity to ensure a fair trial for the accused must always be the dominant consideration governing the exercise of the discretion; and the more complainants there are whose evidence is not admissible in the trials affecting other complainants, the more difficult it will be for adequate directions to be given by the trial judge to avoid prejudice occurring to the accused.⁵²⁷

! RECOMMENDATION(S)

103. The current section 372 and section 398A of the *Crimes Act 1958* should not be amended.

WITNESS SUPPORT SERVICES

4.183 In the Interim Report, we discussed the importance of appropriate support for witnesses⁵²⁸ in sexual offences cases during their involvement in the criminal justice process.⁵²⁹ We recommended that increased support be made available and that the agency or agencies providing the support receive sufficient funds to enable them to service the diverse needs of witnesses, including Indigenous and non-English speaking background witnesses adequately.⁵³⁰

526 Winneke P, 18.

527 Winneke P, 19.

528 This Report discusses support for child witnesses in Chapter 5. See paras 5.20–2 and Recommendations 105–12.

529 Victorian Law Reform Commission, *Sexual Offences* Interim Report (2003) 5.151–5.

530 Ibid 238.

4.184 Submissions to the Interim Report were supportive of our Interim recommendations.⁵³¹ The Victorian Bar's support was conditional on the establishment of 'clear guidelines...to ensure that this [witness] support does not taint the process or compromise the integrity of the trial'.⁵³² Some submissions emphasised the importance of adequate resources to be allocated to witness support in order to ensure adequate regional services can be made available.⁵³³ The Federation of Community Legal Centres stressed that there should be 'a comprehensive WAS with sufficient resources to enable service provision to all complainants including rural, indigenous and NESB victims'.⁵³⁴

4.185 As we discuss in the Interim Report and in Chapter 5 of this Report,⁵³⁵ there are several agencies currently delivering support to witnesses and various ways additional services could be structured. Support to prosecution witnesses in sexual offences cases is provided by the Office of Public Prosecutions based Witness Assistance Service (WAS).⁵³⁶ Witnesses in sexual offences cases may be supported through the criminal justice system as part of the counselling services provided by the State's network of Centres Against Sexual Assault (CASAs).⁵³⁷ Although witness support is not the primary role of the CASAs, counsellor/advocates assist complainants in this respect where the need arises during counselling. In addition, a range of other services such as the primarily volunteer-staffed Court Network service, support witnesses in court.

4.186 Increased support to witnesses could be provided by increasing resources to these existing agencies or by establishing a new service. In Chapter 5 we recommend the creation of a new, independent specialist child witness support service.⁵³⁸ We consider that an independent service would alleviate defence practitioners' concerns that child witnesses assisted by the service would be unlawfully 'coached' in their testimony. In addition, the independence of the service would enable it to liaise effectively and without conflict of interest with all sectors of the criminal justice system.

531 Submissions 6, 12, 19, 22, 26, 28, 40, 42, 44, 47 and 49.

532 Submission 42.

533 Submissions 28, 40 and 47.

534 Submission 47.

535 See para 5.11.

536 See also Interim Report paras 5.153–4 and 6.31.

537 Ibid 5.152 and 6.30.

538 See paras 5.20–2 and Recommendations 105–12.

4.187 In relation to general witness support services, we are not contemplating an entirely new model because a significant and highly regarded witness support service already exists in Victoria. WAS provides support to witnesses in sexual offences cases in Victoria. Although it receives only limited funding⁵³⁹ and is not able to meet all witnesses' needs, the WAS staff have considerable experience and expertise in this specialist area and have developed effective service delivery practices.

4.188 We consider that the most effective way to enhance the provision of support to witnesses in these cases is to provide WAS with a dedicated funding stream and with increased resources to enable it to employ more staff to service more witnesses.⁵⁴⁰ It is essential for the service to have more capacity to service rural and regional areas as currently the three staff are all based in metropolitan Melbourne and, although they visit regional areas, they cannot cover the entire State. In addition, funding should be increased to enable WAS to engage specialist officers to meet the range of needs of the diverse witnesses they may be called on to support, including NESB and Indigenous witnesses as well as witnesses with cognitive impairments.

4.189 Because Recommendations 105–112 deal with witness support for children, we have confined the following recommendations to adult witnesses.

539 WAS is funded at the discretion of the OPP, from its general budget.

540 By way of comparison, the NSW Witness Assistance Service is similar in structure and function to the Victorian WAS. However, as part of a recent New South Wales government victim support initiative, the service has been increased significantly. The service now employs 34 staff, including four senior and 24 regular witness assistance officers and three Indigenous witness assistance officers. See para 5.18 for more details.

RECOMMENDATION(S)

104. A dedicated funding stream should be committed to the OPP based Witness Assistance Service to enable it to provide adequate support to all adult prosecution witnesses in sexual offences cases, both in Melbourne and in rural and regional areas.

The funding should be sufficient to enable the service to:

- meet the needs of witnesses from non-English speaking background communities;
- meet the needs of Indigenous witnesses;
- meet the needs of witnesses with differing physical and intellectual requirements;
- respond to all appropriate requests for assistance in a timely manner;
- assess the needs of witnesses for support through the criminal justice process and develop a clear plan as to how this should be done;
- either directly provide or negotiate the provision, nature and level of assistance required to ensure that the witnesses' participation in the criminal justice system is as positive as possible and that the integrity of the judicial process is upheld; and
- ensure witnesses are made aware of, and where necessary assisted to access, any assistance required for longer term support arising from either the experience of surviving an offence or any negative effects from giving evidence at court.

