

Victorian
Law Reform
Commission

Sexual Offences: Law and Procedure Discussion Paper

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The views expressed in this Discussion Paper are those of the Commission and not necessarily those of the Advisory Committee.



Terms of Reference

On 27 April 2001, the Attorney-General, The Honourable Rob Hulls MP gave the Victorian Law Reform Commission a reference:

1. To review current legislative provisions relating to sexual offences to determine whether legislative, administrative or procedural changes are necessary to ensure the criminal justice system is responsive to the needs of complainants in sexual offence cases, having regard to the findings of the:
 - Victorian Parliamentary Drugs and Crime Prevention Committee's 1995 report on *Combating Child Sexual Assault* and 1996 report on *Combating Sexual Assault Against Adult Men and Women*,
 - Rape Law Reform Evaluation Project's 1996 report into the *Crimes (Rape) Act 1991*; and
 - Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General 1999 report on *Sexual Offences Against the Person*.
2. To develop and/or coordinate the delivery of educational programs which may be necessary to ensure the effectiveness of existing and proposed legislative, administrative and procedural reforms.

Abbreviations

A Crim R	Australian Criminal Reports
ABS	Australian Bureau of Statistics
AC	English Law Reports, Appeals Cases
ALJR	Australian Law Journal Reports
ALRC	Australian Law Reform Commission
CASA	Centres Against Sexual Assault
CCTV	Closed circuit television
CLR	Commonwealth Law Reports
Cr App R	Criminal Appeals Reports
Crim LJ	Criminal Law Journal
DPP	Director of Public Prosecutions
GA Res	General Assembly Resolution (United Nations)
HCA	High Court of Australia
J, JJ	Judge, Justice (JJ plural)
LRCV	(former) Law Reform Commission of Victoria
MCC	Model Criminal Code
MCCOC	Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General
NSWLR	New South Wales Law Reports
NSWLRC	New South Wales Law Reform Commission
NZLR	New Zealand Law Reports
OPP	Office of Public Prosecutions
QB	Law Reports, Queen's Bench Division
RLREP	Rape Law Reform Evaluation Project
s, ss, sub-s	section, sections, sub-section
SCR	Canada Law Reports (Supreme Court)
UN GAOR	United Nations General Assembly Official Records
VLRC	Victorian Law Reform Commission
VR	Victorian Reports
VSC	Victorian Supreme Court
WAR	Western Australian Reports

Scope of this Discussion Paper

This Discussion Paper concerns both the substantive law of sexual offences in Victoria and the laws of procedure and evidence. The substantive law defines what are sexual offences and includes legislation and case law. Evidence and procedure laws govern the evidence which can be given in criminal trials and how trials are conducted. There are some special rules of procedure and evidence which apply to trials of people accused of committing sexual offences.

In this Discussion Paper, we deal with the major indictable sexual offences in the Victorian *Crimes Act 1958*. Indictable offences are offences that can be prosecuted before a judge and jury. Under the Crimes Act, the main indictable sexual offences are: rape, incest, unlawful sexual penetration of a child or young person, sexual penetration of a person with 'impaired mental functioning',¹ indecent assault, and indecent acts with or in the presence of a child or a person with impaired mental functioning. These offences are discussed in Chapters 5–7. We do not examine offences relating to the possession of child pornography. Nor do we examine summary offences, such as wilful and indecent exposure, which are heard in the Magistrates' Court without a jury.

Chapter 1 provides the background to the reference and identifies our approach. Chapter 2 places the reference in context by briefly outlining previous reforms to sexual offences laws and to police and court processes. Chapter 3 outlines what we know about the incidence and the reporting of sexual offences and the complainants against whom they are committed. Chapter 4 explains how sexual offences are dealt with under the criminal justice system. This Chapter also provides a discussion of what we know about the outcomes of rape trials and compares this data with previous research on rape trial outcomes. In Chapters 5–7, we examine the substantive criminal law on sexual offences in Victoria, including sexual offences committed against children and people with impaired mental functioning. Chapter 8 discusses the rules of evidence and other procedural matters relating to the prosecution and trial of sexual offence cases in Victoria. Finally, in Chapter 9 we consider modifications of, or alternatives to, the trial process.

¹ This is the term used in the *Crimes Act 1958* to refer to people whose mental function is impaired because of mental illness, intellectual disability, dementia or brain injury.

TERMINOLOGY

We refer here to some key terms used in this Discussion Paper. Some other legal terms are explained in the text and set out in the glossary, which appears in boxes embedded in the text.

Accused: Where a person has been charged with a sexual offence, we refer to him as 'the accused'.

He/she: We use the term 'he' to refer to those accused of sexual offences, 'she' to refer to adult victims/complainants and 'they' to refer to child victims/complainants. This reflects the fact that the majority of those accused of sexual offences are men and the majority of adults who report such crimes are women.

People with impaired mental functioning is the term used in the *Crimes Act 1958* to refer to people whose mental function is impaired because of mental illness, intellectual disability, dementia or brain injury.²

Sexual offences is a term used to include both crimes of sexual assault, such as rape, incest and unlawful sexual penetration, and indecent acts, which are sexual behaviours that do not involve penetration but do involve touching.

Victim/survivor and *complainant:* Where this Discussion Paper makes reference to people against whom sexual offences are alleged to have taken place, we use the term 'victim/survivor'. However, once matters enter into the criminal justice system we use the term 'complainant'. This recognises the fact that the criminal justice system assumes that an accused person is innocent of a crime unless guilt is established beyond reasonable doubt.

2 See definition of 'impaired' in the *Crimes Act 1958* s 50(1).

Chapter 1

Background to Reference

WHY A REFERENCE ON SEXUAL OFFENCES?

1.1 Rape and other sexual assault are serious crimes with devastating effects for the victims as well as their families and friends. These crimes, often perpetrated by people who are known and previously trusted, involve a loss of personal autonomy for the victims and often a fear of life.³ Women and children are the most frequent victims of sexual assault and the vast majority of perpetrators are men.

1.2 In recent years, Australian governments at both the federal and State level have worked with community groups to minimise the incidence of sexual assault and to assist victims/survivors. As we discuss in Chapter 3, the majority of sexual offences are not reported to the police, and many perpetrators do not come in contact with the criminal justice system. However, one way in which governments have responded to concerns about sexual assault has been to reform the law and criminal justice processes.⁴ In particular, changes to the law have occurred as the result of:

- a growing community awareness from the 1970s onwards, that sexual offence laws were outdated and inadequate;
- the women's movement highlighting the extent to which rape laws reflected myths and stereotypes about sexual behaviour and discriminatory attitudes to women and children; and
- the failure of the criminal justice system to respond to child sexual abuse adequately.⁵

3 Kathleen Townsend, 'National Conference on Sexual Assault and the Law', Project for Legal Action Against Sexual Assault, *Legalising Justice for All Women: National Conference on Sexual Assault and the Law* (Melbourne, 28–30 November 1995) 5.

4 These include changes to police practices, changes to the criminal law and changes to trial processes.

5 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5: Sexual Offences Against the Person—Report* (1999) (hereafter MCCOC, Report (1999))1, also available at <http://www.law.gov.au/publications/Model_Criminal_Code/index.htm>.

1.3 Changes have also been made to police procedures and trial processes in an attempt to make the criminal justice system more responsive to the needs of those who report offences to the police, or who become involved in the criminal trial process.

1.4 There are three main reasons why the Victorian Law Reform Commission (hereafter 'the Commission') has been given a reference to examine how the criminal justice system responds to the needs of complainants in sexual offence cases. Firstly, the reference reflects the Victorian Government's commitment in its Action Plan 2000–2001 to reviewing:

- the recommendations of the 1996 report of the Rape Law Reform Evaluation Project (RLREP) and the Victorian Parliamentary Drugs and Crime Prevention Committee's 1995 and 1996 reports on child and adult sexual assault; and
- the adequacy of existing legislation⁶ in maintaining the confidentiality of sexual assault counselling.

Sexual assault, together with family violence, is also a key focus of the Victorian Government's Women's Safety Strategy 2000-2003.

1.5 Secondly, it is timely to examine the effect of earlier reforms, to ascertain the extent to which their objectives have been met. Thirdly, the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC) has proposed a new Model Criminal Code on Sexual Offences Against the Person. The Commission's reference provides the opportunity to consider the extent to which the provisions of the Code should be incorporated into Victorian law.

OUR APPROACH

1.6 In this section we explain the approach which the Commission will take to the reference. In the first stage of the reference, the Commission will consider the substantive law around sexual offences. In the second stage, the Commission will deal with the wider issues raised by the implementation of that law and relevant administrative and procedural practices in the criminal justice system within the context of an assessment of the needs of complainants.

1.7 This Discussion Paper marks the first stage of the reference. In it we discuss the sexual offences set out in the Victorian *Crimes Act 1958* and the

6 *Evidence Act 1958* Part 2 Division 2A.

laws of evidence and procedure that relate to the prosecution and trial of sexual offence cases. We compare Victorian law with the proposals in the Model Criminal Code (MCC) on sexual offences against the person, and express tentative views on any further legislative reforms which may be desirable in Victoria. The Discussion Paper canvasses a number of legislative reforms and includes questions about these and other possible reforms. It also seeks information about how the current provisions are working in practice.

1.8 Changes to the substantive law do not always alter the ways in which criminal trials are conducted or make it easier for people to report sexual offences to the police.⁷ For example, research which has evaluated the effect of Victorian and other rape law reforms⁸ shows that factors such as judicial, legal profession and police attitudes to sexual offences and to complainants in sexual offence cases affect the extent to which the criminal justice system responds to the needs of complainants. Community attitudes to sexual offences are reflected in jury decision-making. These attitudes also affect victims'/survivors' willingness to report sexual assault and seek assistance and support.

1.9 Because changes to the criminal justice system do not always change the practical effect of the law, the second stage of this reference is likely to be more important than the first. During the second stage, we will consult extensively with people who are affected by the law, including victims/survivors of sexual assault who have had experience with the criminal justice system, and with groups who provide advocacy and assistance to victims/survivors. We will also talk to lawyers and judges who are involved in the criminal justice system. The goal of the second stage will be to consider the extent to which reforms made so far have effectively responded to the needs of sexual assault complainants, and to propose changes to improve the system. We will also canvass options for any educational programs that may be necessary to ensure the effectiveness of existing and proposed legislative, administrative and procedural reforms.

7 Jenny Bargen and Elaine Fishwick, *Sexual Assault Law Reform: A National Perspective* (1995) 7, 11–14; Mary Heath and Ngaire Naffine, 'Men's Needs and Women's Desires: Feminist Dilemmas about Rape Law "Reform"' (1994) 3 *Australian Feminist Law Journal* 30; and Melanie Heenan and Helen McKelvie, Rape Law Reform Evaluation Project (hereafter RLREP), *Report No 2 The Crimes (Rape) Act 1991 An Evaluation Report* (1997).

8 RLREP, above n 7; Parliament of Victoria, Crime Prevention Committee (hereafter Crime Prevention Committee), *Combating Child Sexual Assault—An Integrated Model* (1995); Parliament of Victoria, Drugs and Crime Prevention Committee (hereafter Drugs and Crime Prevention Committee), *Combating Sexual Assault Against Adult Men and Women* (1996).

LIMITS OF THE REFERENCE

1.10 The emphasis in this reference is on how the criminal justice system responds to complainants in sexual offence cases. Consequently, there are some matters relevant to sexual offences which will not be considered.

1.11 Firstly, the reference is primarily concerned with the operation of the criminal justice system. As discussed in Chapter 3, the vast majority of sexual assaults are not reported to police. However, changes to police processes, to prosecution procedures and to the criminal trial process could encourage reporting of sexual assault, and alter community attitudes to sexual violence. As part of the reference, the Commission will consider the barriers that different groups in the community may experience in gaining access to the criminal justice system.

1.12 Secondly, the reference does not examine in detail broader aspects of gender inequality which may contribute to sexual assault, although we are aware that structural inequality and power imbalances within society⁹ are factors which contribute to the over-representation of women and children among victims of sexual assault.

1.13 Thirdly, because the reference focuses on the needs of complainants, we do not examine research relating to, nor programs for, the treatment of sex offenders. We are aware, however, that there are Victorian Government initiatives in this area, including a research project being undertaken by the Victorian Community Council Against Violence, dealing with sexually offending young people.

1.14 There are several other law reform projects which have some relationship with the Commission's reference on sexual offences. These include the:

- Department of Justice review of sentencing conducted by Professor Arie Freiberg;¹⁰
- Victorian Government inquiry into street prostitution; and

9 National Committee on Violence Against Women, *National Strategy on Violence Against Women* (1993) 1. See also Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report No 69 Part I (1994) (hereafter ALRC, Report No 69 Part I) paras 2.1–2.35, also available at: <<http://www.austlii.edu.au/au/other/alrc/publications/reports/69/vol1/ALRC69.html>>.

10 Arie Freiberg, *Sentencing Review 2001: Sentencing Options: Discussion Paper* (2001), also available from: <<http://www.justice.vic.gov.au/>>.

- Victorian Government review of services for the victims of crime, chaired by Mr Bob Stensholt, MP.¹¹

1.15 Because of the work being done by these other inquiries, we do not examine sentencing for sexual offences, prostitution offences or services for victims of crime in detail. However, in the second stage of this reference, the Commission will liaise with the Committee reviewing services for victims of crime. We will also meet with any other relevant committees and organisations to discuss areas where this reference overlaps with their projects.

OUR PROCESS

1.16 When the Commission began work on the reference, we convened a small Advisory Committee to comment on the Commission's proposed approach. Members of the Advisory Committee are listed in the front of this Discussion Paper. The Advisory Committee has also provided valuable comments on an initial draft of this Discussion Paper. The views expressed in this Paper are, however, those of the Commission, not those of the Advisory Committee.

1.17 In preparing this Discussion Paper, the Commission has also made contact with a number of people working in the area of sexual offences to identify any significant issues in the substantive law. These include individuals working in Centres Against Sexual Assault (CASAs), Court Network, the Department of Justice, the Department of Human Services, relevant working groups of the Federation of Community Legal Centres, the Office of Public Prosecutions, the Office of Women's Policy, the Victorian Community Council Against Violence, Victoria Legal Aid, Victoria Police and the Witness Assistance Service.

1.18 The Commission is committed to inclusive law reform processes that give all members of the community the opportunity to express their views on areas of law that affect them. This commitment will be reflected in the research and consultations that we undertake in the course of this reference.

¹¹ Information available from <<http://www.justice.vic.gov.au>>.

1.19 The aim of the research and consultation that we undertake for the purposes of this reference will be to:

- give individuals and communities affected by sexual assault the opportunity to have a voice in the law reform process;
- identify areas where further legislative reform may be needed;
- evaluate how the law is working in practice and whether earlier reforms have been effective; and
- consider areas where educational programs may be necessary to ensure the effectiveness of current and proposed reforms.

1.20 Substantial research and consultation has been conducted in Victoria in the last decade on the experiences of victims of sexual assault.¹² We will avoid duplication of this research and attempt to fill gaps in the information that is already available. We will pay particular attention to the needs of victims from Indigenous communities, from non-English speaking backgrounds and from rural and regional areas. The Commission has decided to focus on these target groups because they have repeatedly been identified as groups that are marginalised by the criminal justice system¹³ and because there is relatively little empirical research on their experiences of the Victorian justice system.¹⁴ We also believe that reforms which make the criminal justice system responsive to the needs of these groups are likely to improve the process for all complainants.

1.21 We will use a variety of research and consultation strategies to meet the needs of these groups, including convening focus groups, and conducting individual interviews and surveys. The Commission welcomes comments on our strategies and encourages organisations and individuals to make suggestions and inform us of any research of which we are unaware.

12 See for example Kate Gilmore and Lise Pittman, Centre Against Sexual Assault, *To Report or not to Report: A Study of Victims/Survivors of Sexual Assault and Their Experience of Making an Initial Report to the Police* (1993); Crime Prevention Committee, above n 8; Drugs and Crime Prevention Committee, above n 8; and RLREP, above n 7.

13 See RLREP, above n 7, 29; Bree Cook, Fiona David and Anna Grant, *Sexual Violence in Australia* (2001) 23–24; and Parliament of Victoria, Law Reform Committee, *Review of Legal Services in Rural and Regional Victoria* (2001), also available at: <http://www.parliament.vic.gov.au/lawreform/Legal_Services_Inquiry/default.htm>.

14 Most research to date has been based on Australia-wide studies or studies from New South Wales. See for example Cook, David and Grant, *ibid*, 36–44.

Chapter 2

Previous Inquiries and Proposals to Reform

INTRODUCTION

2.1 The terms of reference for this project require the Commission to take account of previous proposals for reform to sexual offences law and processes. This Chapter outlines inquiries that have taken place in Victoria over the last decade and the proposals for reform that have resulted from those inquiries. We also refer briefly to the development of a national Model Criminal Code (MCC) on sexual offences against the person.

2.2 It is important to recognise that Victorian sexual offences legislation is seen as being at the cutting-edge of law reform, both in Australia and internationally.¹⁵ Reforms have been made over a number of years, beginning in the 1980s, in response to criticisms about the discriminatory impact of sexual offences law on women and its failure to protect sexually abused children. The changes were intended to take greater account of the realities of rape and sexual abuse, to make the trial process less daunting for complainants and to encourage a higher proportion of victims of sexual assault to report these crimes to the police.

2.3 Victorian inquiries conducted over the past twenty years include work undertaken by the:

- former Law Reform Commission of Victoria;
- Attorney-General's Legislation and Policy Branch, Department of Justice; and
- Victorian Parliamentary Drugs and Crime Prevention Committee.

¹⁵ See, for example, recommendations on legal and legislative issues in *Report of the Task Force on Sexual Assault and Rape in Tasmania* (1998) 40–1, also available at: <<http://www.women.tas.gov.au/resources/reports/sexassault.pdf>> and United Kingdom Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (2000) 2, paras 2.4, 2.6, 2.11, 2.13, 3.7, 5.4, also available at <<http://www.homeoffice.gov.uk/cpd/sou/apecgh12.pdf>>.

2.4 As a result of the implementation of many of the recommendations made by these inquiries, there have been substantial legislative, administrative and procedural changes. These changes include:

- reform of substantive criminal laws to address key issues;
- reform of laws relating to the admission of evidence in sexual offence trials, for example, evidence relating to a victim's sexual history;
- improvement of access to alternative arrangements for giving evidence, particularly for children and people with intellectual disabilities;
- improvement of investigation and treatment of victims of sexual assault such as the use of specialised police units and specialised forensic and prosecution units; and
- development and better integration of government and community-based victim support services.

2.5 At the national level, a MCC on sexual offences against the person has been developed.¹⁶ The MCC aims to enhance greater uniformity in the law across Australia's eight jurisdictions, to achieve an integrated response to sexual offences between Federal and State agencies, and to make the law more accessible and readily understood by the general community.¹⁷

VICTORIAN INQUIRIES INTO SEXUAL OFFENCES LAW

Law Reform Commission of Victoria

2.6 In 1985, the former Law Reform Commission of Victoria (LRCV) was given a reference on the reform of sexual offences law. In 1990, in response to LRCV recommendations,¹⁸ a draft Crimes (Sexual Offences) Bill was circulated dealing with rape law reform, and, in particular, sexual

¹⁶ MCOCC, Report (1999), above n 5.

¹⁷ Ibid 1–3.

¹⁸ These were made in: Law Reform Commission of Victoria (LRCV), *Rape and Allied Offences: Substantive Aspects*, Report No 7 (1987) (hereafter LRCV, Report No 7 (1987)); LRCV, *Sexual Offences Against People With Impaired Mental Functioning*, Report No 15 (1988) (hereafter LRCV, Report No 15 (1988)); and LRCV, *Sexual Offences Against Children*, Report No 18 (1988) (hereafter LRCV, Report No 18 (1988)).

offences against children and the mentally impaired.¹⁹ After extensive lobbying by the Real Rape Law Coalition²⁰ and other community groups about the status and impact of rape laws, the then Attorney-General, the Honourable Jim Kennan, referred the issue of rape law reform back to the LRCV.²¹

2.7 The LRCV undertook detailed empirical research into rape prosecutions as well as consulting with the community and experts in the field. The LRCV released a number of reports in 1991 and 1992 proposing extensive reform of Victoria's sexual offences law and the implementation of a number of procedural changes.²²

2.8 A large number of the proposed reforms, directed at providing a clear and comprehensive legislative statement of what the criminal law regards as unacceptable sexual conduct,²³ were enacted by the Victorian Parliament in the *Crimes (Sexual Offences) Act 1991* and the *Crimes (Rape) Act 1991*. These reforms made substantial changes to the rules of procedure and evidence governing court proceedings in relation to sexual offences. In addition, a number of non-legislative recommendations requiring action by the Victoria Police, the Director of Public Prosecutions (DPP) and the Attorney-General's Department were implemented.

The Rape Law Reform Evaluation Project

2.9 In 1992, the Victorian Government funded a detailed three-year evaluation of changes introduced by the *Crimes (Rape) Act 1991* as well as of relevant legislative amendments introduced by the *Crimes (Sexual Offences) Act 1991*. The Rape Law Reform Evaluation Project (RLREP) was overseen by the Attorney-General's Legislation and Policy Branch, Department of

19 See David Brereton, "Real Rape", Law and the Role of Research: The Evolution of the Victorian *Crimes (Rape) Act 1991* (1994) 27 *Australian and New Zealand Journal of Criminology* 74, 87–93; LRCV, *Rape and Allied Offences: Substantive Aspects*, Discussion Paper No 2 (1987); and LRCV, Report No 7 (1987), above n 18.

20 See Real Rape Law Coalition, *No Real Justice: The Interim Report of a Confidential Phone-in on Sexual Assault* (1991).

21 RLREP, above n 7, 4.

22 See LRCV, *Rape: Reform of Law and Procedure, Interim Report*, Report No 42 (1991) (hereafter LRCV, Interim Report No 42 (1991)); LRCV, *Rape: Reform of Law and Procedure, Appendices to Interim Report No 42* (1991) (hereafter LRCV, Appendices to Interim Report No 42 (1991)); LRCV, *Rape: Reform of Law and Procedure*, Report No 43 (1992) (hereafter LRCV, Final Report No 43 (1991)); and LRCV, *Rape: Reform of Law and Procedure, Supplementary Issues*, Report No 46 (1992).

23 LRCV, Interim Report No 42 (1991), above n 22, 15–46.

Justice and an Advisory Committee that included police, lawyers, judges and sexual assault service providers. The RLREP focused on:

- the impact of these legislative reforms on the processing of rape cases through the courts; and
- the impact of legislative and procedural reforms on victims'/survivors' experiences of the court process.

2.10 In 1995, the first RLREP report was released by the Department of Justice.²⁴ This Report, which evaluated the impact of the Police Code of Practice for Sexual Assault Cases on victims/survivors of sexual assault, found that the Code was an important mechanism for the effective management of sexual assault cases. It recommended retaining and strengthening the Code, particularly in respect of delayed reporting of past sexual assaults, and better liaison and integration with services offered by forensic medical officers and Centres Against Sexual Assault (CASAs). Other recommendations sought to enhance police knowledge of and compliance with the Code as well as training in relation to the social context of sexual assault. The Report also identified specific needs of victims/survivors from non-English speaking backgrounds and victims/survivors who are mentally impaired.

2.11 In 1997, the Department of Justice released the second RLREP report.²⁵ Focused on the impact of the legislative changes on victims/survivors of rape, this evaluation included a major study on the processing of rape prosecutions through the Victorian criminal justice system, an examination of judges' directions on consent, delays in reporting of an offence and corroboration in rape trials, and extensive interviews with legal and judicial personnel as well as victims/survivors of rape.

2.12 The RLREP findings emphasised practical improvements to the rape prosecution process and the generally positive educative effect of the legislative reforms. However, the RLREP also highlighted the trauma that continued to be experienced by victims/survivors in the rape prosecution process. To minimise this trauma and enhance the implementation of rape law reform, recommendations included changes to:

- improve the accessibility and implementation of alternative arrangements for giving evidence;
- provide clearer procedures on the use of sexual history evidence;

24 Melanie Heenan and Stuart Ross, *The Police Code of Practice for Sexual Assault Cases: An Evaluation Report* (1994).

25 RLREP, above n 7.

- provide further judicial and legal education, particularly around sexual history evidence and the trial experience;
- enhance information to and support of victims/survivors from the Office of Public Prosecutions;
- enhance information and services provided by forensic medical officers to victims/survivors; and
- make legislative amendments in respect of judges' directions to juries.

2.13 The RLREP proposals for legislative reform, which have been implemented, are referred to later in this Discussion Paper.

Victorian Parliamentary Drugs and Crime Prevention Committee²⁶

2.14 In 1993, the Victorian Parliamentary Crime Prevention Committee,²⁷ now the Parliamentary Drugs and Crime Prevention Committee, held an inquiry into the levels of rape and sexual assault cited in the 1992/93 Victoria Police *Annual Report*. In undertaking its inquiry, the Committee travelled overseas to investigate best practice in the management of sexual assault, invited written submissions and sought and received additional evidence in both public and private hearings.²⁸

2.15 The Committee's first report, *Combating Child Sexual Assault—An Integrated Model*, was released in June 1995.²⁹ The report dealt with issues surrounding child sexual assault and drew attention to significant gaps in protection offered to victims by protective workers, service providers and police systems. The report also highlighted inconsistencies in sexual assault data collection.

2.16 The Committee's recommendations focused primarily on a new integrated structure to coordinate victim and prosecution services at the operational level, the expansion of court support services and alternative arrangements for giving evidence, as well as judicial and service provider education addressing issues relevant to child sexual assault.

26 This was formerly known as the Crime Prevention Committee: *Parliamentary Committees Act 1968*, s 4A (1) (b). See also *Parliament House Completion Authority Act 1996*, s 25(2), which provides that the new Drugs and Crime Prevention Committee is to be taken as the same as the Crime Prevention Committee.

27 Established for the term of the 52nd Parliament.

28 Crime Prevention Committee, above n 8, 3–6.

29 Crime Prevention Committee, above n 8.

2.17 A second report, *Combating Sexual Assault Against Adult Men and Women*, was released in November 1996.³⁰ This report built on recommendations in the earlier report on child sexual assault and recommended, amongst other things, that uniform definitions of rape and sexual assault be established in Australian jurisdictions. In relation to meeting the needs of complainants, other recommendations included:

- providing comprehensive victim information, counselling and support services, including to male victims;
- conducting an extensive independent investigation into the nature and prevalence of sexual assault within prisons;
- expanding the Witness Assistance Service and Court Network services in metropolitan and regional centres;
- allowing victims to give evidence via alternative arrangements (for example, by closed circuit television), unless they choose otherwise;
- conducting a review in relation to limiting the examination of a victim's past sexual history in court proceedings;
- reviewing the rules of evidence and their application in relation to adult sexual offences;
- making counselling records between victims and counsellors inadmissible as evidence;
- providing compulsory and on-going judicial education in gender issues; and
- developing a comprehensive community education strategy regarding sexual assault, gender issues and the importance of consent in sexual relations, including to people from non-English speaking backgrounds and those in rural areas.

Further Reform of Victorian Sexual Offences Law

2.18 In response to both the RLREP and Parliamentary Committee reports, further changes to Victorian law on sexual offences were made in 1997 and 2000. These legislative changes included:

- broadening the definition of rape;

³⁰ Drugs and Crime Prevention Committee, above n 8.

- making it easier to deal with multiple complaints in the same trial where the accused is the same person;
- making changes to the types of directions and warnings judges may give in sexual offence trials;
- further restricting the cross-examination of complainants about their sexual history;
- making it easier for adult complaints as well as children and people with impaired mental functioning to give evidence in alternative ways; and
- limiting the introduction of confidential counselling communications between a sexual assault victim and her counsellor into trial evidence.

2.19 Chapters 5–8 refer to some of these amendments in more detail. In these chapters, the Commission invites submissions on the extent to which these legislative reforms have resulted in changes in the prosecution and trial process and on any possible further areas of legislative reform.

NATIONAL INITIATIVES

Model Criminal Code on Sexual Offences Against the Person

2.20 The need for an integrated national response to sexual offences was highlighted by the 1994 First National Conference on Child Sexual Abuse and the 1995 First National Conference on Sexual Assault, and also addressed by research undertaken on behalf of the Office of the Status of Women.³¹ The Australian Law Reform Commission (ALRC), in its report *Equality Before the Law: Justice for Women*,³² recommended that women's perspectives be sought in the development of a Model Criminal Code (MCC) on sexual offences.

2.21 In May 1999, the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCOCC) released its report, *Sexual Offences Against the Person*. The MCOCC report followed a discussion paper released in November 1996 and wide-ranging public consultation. The report sets out draft uniform legislation and canvasses the merits of the MCC in the light of current State and Territory legislation.

31 Bagen and Fishwick, above n 7.

32 ALRC, Report No 69 Part I, above n 9, para 12.10.

2.22 The provisions of the MCC have not been enacted as legislation in Victoria. One of the purposes of the reference which has been given to the Commission is to determine the extent to which provisions of the MCC should be incorporated into Victorian law.

2.23 The MCC provides a valuable benchmark for Victorian law as the MCCOC took account of State and Territory laws on sexual offences. However, while the MCCOC regarded Victorian law as a model for some purposes, there are some significant differences between the MCC and the *Crimes Act 1958*. An analysis of these differences is set out in Chapters 5–8.

Chapter 3

What We Know About Sexual Offences

INTRODUCTION

3.1 The terms of this reference require the Commission to investigate whether the criminal justice system is responsive to the needs of complainants in sexual offence cases. This Chapter provides important background information for the reference by outlining what we know about the incidence and the reporting of sexual offences and about the complainants against whom they are committed. In particular, it examines the information that is available on the prevalence and trends in sexual assault.³³

Complainant

A complainant is a person who has reported to the police that she or he is the victim of an offence.

3.2 The term 'sexual assault' is used to refer to a physical assault of a sexual nature, directed towards another person, where that person does not give consent, gives consent as a result of intimidation or fraud, or is deemed legally incapable of giving consent.³⁴ Under Victorian law, this includes the crimes of rape and unlawful sexual penetration, incest and indecent assault.

3.3 It should be noted that what we know about the sexual offences which are committed in Victoria, and about the characteristics of victims/survivors and offenders, is limited by the lack of accurate data.

3.4 This Chapter describes the process of filtering which occurs between the time sexual assaults are committed and when they are reported to the police, and between the time of a police report and the decision to charge an offender. The filtering process continues once this decision is made, when the case enters the criminal justice system. The criminal justice system and the

³³ Where possible, data on sexual assault is distinguished from data on sexual violence. 'Sexual violence' is a broader term and includes sexual threats, intimidation, and in some cases, sexual harassment. See Australian Bureau of Statistics (ABS), *Women's Safety Australia 1996*, Cat No 4128.0 (1996); and Cook, David and Grant, above n 13, 1–2.

³⁴ See ABS, *Recorded Crime Australia 1999*, Cat No 4510.0 (2000) 126.

way that rape charges are filtered throughout the prosecution process, are discussed in Chapter 4.

3.5 Despite the significant legislative and other reform designed to make the criminal justice system more responsive to the needs of complainants in sexual offence cases, there does not appear to have been an increase in the reporting of sexual offences to police by victims/survivors.

SEXUAL OFFENCES: WHAT WE KNOW

3.6 In this section, data on the prevalence and characteristics of sexual assault and other sexual offences in the Victorian and wider Australian community is drawn from a number of sources, each of which has certain limitations.³⁵ Unlike many other States,³⁶ Victoria does not currently have an independent Crimes Statistics Bureau. This makes accessing reliable data on sexual offences both within and outside the criminal justice system extremely difficult.

Prevalence

Prevalence is the number of people in the relevant population who have been a victim of given offences at least once in the relevant period. Prevalence rates are generally expressed as a percentage of the total relevant population.

3.7 At the Victorian level, a major source of data about the occurrence and characteristics of rape and other sexual offences comes from police statistics, but these record only reported offences and therefore underestimate the numbers of sexual offences which occur in Victoria. In addition, some problems with data on recorded offences have been identified and are currently the subject of a review by Victoria Police.³⁷

3.8 Specific data on sexual offences from the Magistrates' and Children's Courts is limited to proven offences and, since 1997, data on the outcomes of specific criminal offences prosecuted through the criminal justice

35 For example, the ABS 1996 Women's Safety Survey data excludes women under 18 years, disaggregation of the data is not reliable at State level, nor is rape distinguished from other sexual assault: ABS, *Women's Safety Australia 1996*, above n 33. Data recorded by the ABS is based on national statistics on crimes recorded by police: ABS, *Recorded Crime Australia 1999*, above n 34, 2. The compilation of Victoria Police statistics has been criticised by the Drugs and Crime Prevention Committee as inadequate: *Inquiry into Crimes Trends*, Second Report, June 2001 (2001) 17–20, available at: <<http://www.parliament.vic.gov.au/dcpc/List%20of%20reports.htm>>. For other limitations of national statistics see also Cook, David and Grant, above n 13, 2–4. Note that Cook, David and Grant draw on ABS data from the Women's Safety Survey and other data collected by the ABS.

36 For example, the New South Wales Bureau of Crime Statistics and Research, and the Office of Crime Statistics, South Australia.

37 This review was called in response to concerns expressed by the Drugs and Crime Prevention Committee, above n 35, 17–20.

system has not been available from the higher courts (including the Supreme and County Courts). The Commission understands that the Department of Justice is currently reviewing both the recording and accuracy of court data in Victoria.

3.9 These data limitations mean that it is difficult to compare Victorian and Australian statistics. Even at the Victorian level, there are often inconsistencies between different sets of data. As a result, it is difficult to build up an accurate picture of the incidence of sexual offences in the community or of the characteristics of reported crimes.

How Common are Sexual Offences?

3.10 Most victims do not report sexual assault and other sexual offences. This makes it difficult to know just how many people are victims/survivors of sexual offences.

3.11 The Australian Bureau of Statistics (ABS) 1996 Women's Safety Survey is generally accepted as providing the best available estimates of the incidence of sexual assault against women aged 18 years and over.³⁸ It indicates that, in Australia, in 1996:

Incidence

The incidence is the total number of given offences in a certain period. As some victims experience repeated incidents of victimisation, incidence numbers are typically higher than prevalence numbers. Rates of incidence are generally expressed as a percentage of the total relevant population.

- 1.5% of women aged 18 years and over had been sexually assaulted in the previous 12 months; and
- 15.5% of women had experienced sexual assault since they were 15.³⁹

3.12 The Victorian Crime Victimization Survey provides data that indicates that in 1999, 10,400 Victorian women aged 15 years and over had been victims of sexual assault and/or threats of sexual assault.⁴⁰ While data from this survey suggests that there has been a decrease in the incidence

38 This survey had a specific focus on physical and sexual violence against women and is accepted as providing better estimates of the prevalence of sexual assault than other crime victimisation surveys: ABS, *Women's Safety Australia 1996*, above n 33, 3. See also Cook, David and Grant, above n 13, 3.

39 ABS, *Women's Safety Australia 1996*, above n 33, 14, Table 3.7.

40 The rate for males was too low to provide an estimate. Sexual assault and threats of sexual assault are not disaggregated in this data: Department of Justice Victoria, *1999 Victorian Crime Victimization Survey* (1999) 5, 6, also available at: <<http://www.justice.vic.gov.au/>>. It should be noted that victim surveys have limitations in measuring some forms of sexual violence, which may not be perceived as crimes, and may underestimate the extent of sexual violence and sexual assault: see Cook, David and Grant, above n 13, 3–4.

of sexual assault and/or threats of sexual assault in Victoria experienced by women aged 15 years or over between 1996–99,⁴¹ other research suggests that there has also been an increased demand for services which support sexual assault victims.⁴²

What We Know About the Characteristics and Aftermath of Sexual Assault

3.13 Reliable data on the incidence and prevalence of sexual offences in the Victorian and broader Australian community is limited in the most part to adults. Most of the data on sexual offences against children, as discussed below, is limited to reported sexual offences.

3.14 We know that the occurrence of sexual assault and sexual violence more generally is significantly gendered, with women far more likely to be victims than men.⁴³ Of adults across Australia, young women aged between 18–19 years are the most likely age group to be victims of a sexual assault.⁴⁴ We also know that perpetrators of sexual assault are overwhelmingly men.⁴⁵

3.15 The so-called ‘classic’ sexual assault, where a victim is assaulted and physically injured by a stranger in a remote location, is in fact relatively rare. The majority of victims/survivors are assaulted by someone they know, receive no physical injuries and are assaulted in their homes.

3.16 The ABS Women’s Safety Survey surveyed women who had been sexually assaulted since the age of 15. In 1996, only 11% of women who were sexually assaulted, had been sexually assaulted by a stranger; that is, someone they did not know, or someone they only knew of by hearsay.⁴⁶

41 From 0.6% of Victorians aged 15 years and over in 1996, to 0.3% in 1999: Department of Justice Victoria, above n 40, 5. In 1996, the figure included male victims.

42 For example, CASA House service statistics indicate a 12.5% increase in state-wide telephone counselling contacts between July 1997–June 1998 and July 1998–June 1999. CASA House, *Statistics*, available at: <<http://www.casahouse.casa.org.au/html/statistics.htm>>.

43 For example, see Department of Justice Victoria, above n 40. See also Appendix 1, Tables 1.3 and 1.4 which deal only with recorded crimes.

44 ABS, *Crime and Safety Australia*, April 1998, Cat No 4509.0 (1999) 64, Table 6.1.

45 ABS, *Women’s Safety Survey 1996*, above n 33, 14, Table 3.7. It was estimated that in 1996, 98.4% of the perpetrators of sexual assault against women assaulted in the last 12 months were men.

46 Ibid 25, Table 3.21. For definition of stranger, see 82.

More than a quarter of victims (28%) were sexually assaulted by a previous or current partner, with another 61% being sexually assaulted by someone else they knew.⁴⁷ Well over half of the victims/survivors (61%) were sexually assaulted at home.⁴⁸ This figure excludes women sexually assaulted by their partner.

3.17 Just over a quarter of adult women victims (26%) sexually assaulted since the age of 15 were physically injured.⁴⁹ However, the emotional aftermath of sexual assault has been well documented. Victims/survivors may immediately experience terror, anguish, disgust, personal vulnerability, shock, numbness and denial. On a longer-term basis, victims/survivors can experience disturbed sleep, embarrassment, shame, depression, anxiety and sometimes guilt and self-blame.⁵⁰ We also know that many women victims/survivors of sexual assault experience a change in their day-to-day activities and a significant minority live in fear for their personal safety after a sexual assault.⁵¹

What We Know About the Reporting of Sexual Assault to the Police

3.18 Sexual assault continues to be significantly under-reported.⁵² In 1996, only 10% of women who were sexually assaulted reported the last incident to police.⁵³ Victorian data also suggests that sexual assault victims are the least likely of all crime victims to report to police.⁵⁴

47 Ibid.

48 Ibid 21, Table 3.15.

49 Ibid 20, Table 3.14.

50 Cook, David and Grant, above n 13, 27–33.

51 ABS, *Women's Safety Australia 1996*, above n 33, 43, Table 5.2.

52 Cook, David and Grant, above n 13, 20–6.

53 ABS, *Women's Safety Australia 1996*, above n 33, 29. This covered women Australia-wide. With its specific focus on sexual violence against women, including sexual assault, the Women's Safety Survey is more likely to provide reliable estimates than more general crime victimisation surveys.

54 In 1999, in Victoria, it is estimated that almost half of the victims of robbery reported that robbery to police, as did almost 30% of the victims of assault. In contrast, it is estimated that only 17% of the victims of sexual violence (including sexual assault and threats of sexual assault) said they reported those offences to police: Department of Justice Victoria, above n 40, 3. It should be noted that this estimate of reporting sexual violence cannot be directly compared with the Women's Safety Survey as the Victorian Crime Victimisation Survey data includes threats of sexual assault. It is also a general crime victimisation survey where personal assault is just one component of the whole survey: see above n 38.

3.19 In Victoria there is some evidence to suggest that reporting rates in relation to sexual violence more broadly have decreased. However, while any decrease in these reporting rates is a worrying development, data limitations make it difficult to ascertain whether this is actually the case.⁵⁵

3.20 While it appears that sexual assault victims in Victoria are less likely than victims in other Australian States and territories, and in Australia generally, to report sexual assault to police,⁵⁶ there is some concern that Victorian police data may underestimate the extent of recorded crime more generally.⁵⁷

WHY DO MOST VICTIMS NOT REPORT SEXUAL ASSAULT?

3.21 There are many social and cultural reasons why victims/survivors of sexual assault may not report this assault to the police. One factor may be the victim's/survivor's expectations of how she or he will be dealt with by the police, prosecuting authorities and courts.⁵⁸ The findings from a 1993 Centre Against Sexual Assault survey suggest that fear of police and the legal process, the fact the offender was known and/or feared by the victim, and not wanting friends or family to know, were significant reasons for not reporting sexual assault.⁵⁹

3.22 In the ABS Women's Safety Survey, the main reasons that women gave for not reporting sexual assault to police included: because they dealt with it themselves (39.1%); because it was not regarded as a serious offence (14.4%); because of shame/embarrassment (12.5%); and because the victims did not think the police could do anything (9.5%).⁶⁰

55 In Victoria it has been estimated that 37% of victims of sexual assault and threats of sexual assault reported the incident to police in 1996 compared to 17% in 1999: Department of Justice Victoria, above n 40, 14. However it should be noted that due to the low numbers for these offences, the likelihood of a statistical error is high.

56 In 1998, 21.4% of Victorian female victims of sexual assault in the last 12 months reported sexual assault to police, compared to 32.5% of victims Australia-wide: ABS, *Crime and Safety Australia* April 1998, above n 44, 93, Table 6.6.

57 The Drugs and Crime Prevention Committee believes there is a high potential for error in the extended process for recording data on the Victoria Police Law Enforcement Assistance Program (LEAP) system: Drugs and Crime Prevention Committee, *Inquiry into Crimes Trends* (2001) 20.

58 ALRC, Report 69 Part 1, above n 9, para 2.34.

59 Gilmore and Pittman, above n 12. See also Real Rape Law Coalition, *No Real Justice: the Findings of a Confidential Phone-in on Sexual Assault* (1991) 17–18, where a number of the reasons were cited.

60 ABS, *Women's Safety Australia 1996*, above n 33, 32, Table 4.6.

3.23 Research and survey data suggest that some groups in the community do not have effective access to the criminal justice system,⁶¹ and face particular barriers to reporting sexual assault.⁶² Groups identified as having particular difficulties in reporting include children and young people; people with physical, intellectual or psychiatric disabilities, people living in rural areas, Indigenous peoples and people from non-English speaking backgrounds.

3.24 The Drugs and Crime Prevention Committee has identified sexual assault in correctional institutions as a serious concern. While we believe this is an important issue, which should be addressed urgently, we do not make prisoners a specific focus of our work. Our view is that protecting prisoners from sexual assault raises questions of prison management which are beyond the scope of a broad reference on sexual offences.

3.25 As we explained in Chapter 1, our research and consultation strategy will attempt to identify the factors that affect access of particular groups to the criminal justice system. We will look particularly at the experiences of sexual assault victims in rural and regional areas, people from non-English speaking backgrounds and people from Indigenous communities. Many people in these groups (for example children and young people in rural areas) may face multiple barriers in reporting sexual offences.

WHY DO SOME VICTIMS REPORT SEXUAL ASSAULT?

3.26 A significant minority of women victims/survivors of sexual assault do report that assault to police. At a broad level, available data suggests that both the characteristics of the crime and of victims/survivors play a part in whether the sexual assault is reported. At an individual level, women may decide to report sexual assault to police because of fears they have for themselves and for others.

3.27 We know, for example, that women are more likely to report incidents perpetrated by a stranger than someone they know.⁶³ Women are also more likely to report sexual assault when they were physically injured than when they were not.⁶⁴

61 *Report of the Task Force on Sexual Assault and Rape in Tasmania* (1998) 43–6.

62 See for example Cook, David and Grant, above n 13, 20–6.

63 ABS, *Women's Safety Australia 1996*, above n 33, 32, Table 4.7.

64 *Ibid* 33, Table 4.8.

3.28 At an individual level, those victims/survivors of sexual assault who decide to make a police report may do so:⁶⁵

- to ensure their personal safety and future protection from the offender;
- because they believe that the offender should be made responsible for their actions;
- because reporting the offence may allow the victim to regain some sense of power and control; and
- because they do not want the offender to harm other people.

Reported Sexual Offences

3.29 Even when victims/survivors do report sexual offences to the police, this does not always result in offences being recorded. Further, where reported offences are recorded, alleged offenders may not be charged. The incidents of sexual assault that reach the criminal justice system therefore represent a very small number of those that have occurred.⁶⁶

3.30 In the 12-month period between July 1999–June 2000, 6,501 sexual offences were reported to and recorded by Victoria Police.⁶⁷ The most common offences recorded were indecent assault, indecent act with/or in the presence of a young person under 16, and rape.

3.31 The number of recorded rape offences in the 12-month period July 1999–June 2000 was the lowest in the five-year period since the period July 1995–June 1996. There was a steady decrease in the number of recorded non-rape sexual offences between July 1995–June 1996 and July 1998–June 1999.

3.32 Sexual offences reported to and recorded by police may be subject to fluctuations influenced by community attitudes to reporting crime, police procedures or crime reporting systems, rather than by changes in criminal behaviour.⁶⁸

65 Filomena Merlino and Katrina Dee, *What Choice Do I Have? Information for People who have Experienced a Rape or Sexual Assault* (1999), available at: <<http://www.wch.sa.gov.au/yarrow/Choices.html>>.

66 It has been estimated that only 3% of all sexual assaults reach the courts: *Report of the Task Force on Sexual Assault and Rape in Tasmania* (1998) 15.

67 Appendix 1, Table 1.1. This figure excludes the offences of wilful and indecent exposure.

68 ABS, *Recorded Crime Australia 1999*, above n 34, 4.

3.33 The 1988–89 Director of Public Prosecutions (DPP) study, undertaken by the LRCV,⁶⁹ highlighted that the police are the key filters in the prosecution process.⁷⁰ This filtering by police occurs both in terms of recording reports and the charging of alleged offenders. The Victorian Crime Prevention Committee found evidence of substantial under-recording of sexual offences that were reported to police. This reportedly occurred where police did not accept the complainant's version of events or in instances such as those where a child was considered to be too young to be a credible witness.⁷¹

3.34 There is also significant attrition between sexual assaults recorded by police and charges ultimately laid. For example, the ABS Women's Safety Survey shows that in 1996 only around 22% of reported sexual assault incidents since the age of 15 resulted in the perpetrator being charged by police.⁷² The attrition between reporting and charging may be due to the offender not being identified and located, the victim/survivor not wishing to proceed, the police believing there is not enough evidence to lay charges, or the police believing that an offence had not been committed.⁷³

3.35 In Victoria, the incidence of reported sexual assault declined slightly between 1993–99. This goes against the general trends both in New South Wales and Australia-wide.⁷⁴ However, we have already referred to some limitations in Victoria Police data collection. As noted above, recorded sexual assault data reflects both the willingness of sexual assault victims to complain, and police reporting practices.

69 LRCV, Appendices to Interim Report No 42 (1991), above n 22, Appendix 3.

70 Brereton, above n 19, 83.

71 Crime Prevention Committee, above n 8, 39. As noted in Chapter 4, a person can ask that a decision not to lay charges be reviewed by the Director of Public Prosecutions. However, this happens in relatively few cases.

72 ABS, *Women's Safety Australia 1996*, above n 33, 9, 29.

73 See Victorian Community Council Against Violence, *A Profile of Rapes Reported to Police in Victoria 1987–1990* (1991) 63–5.

74 Appendix 1, Table 1.2.

Victims of Recorded Sexual Assault

3.36 Recorded crime statistics indicate that victims of sexual assault, both in Victoria and across Australia, are overwhelmingly women, children and young people. In 1999, in Victoria, 83% of victims of recorded sexual assault were female. Women comprised 84% of sexual assault victims aged 20 years and over.⁷⁵ Children and young people aged 19 years or less, of whom 84% were female, comprised 50% of all sexual assault victims.⁷⁶

3.37 Victoria Police data analysed by the Drugs and Crime Prevention Committee suggests that, in terms of non-rape sexual offences, it is young girls aged 10–14 who are the most victimised, accounting for over 22.8% of all victims who reported to police in 1998–99.⁷⁷ In terms of rape offences, it is young women aged 15–19 who are the most victimised, followed closely by young women aged between 20–24 and 25–29. Together these groups account for over 42.8% of all victims who reported to police.⁷⁸

3.38 National crime data indicates that in Victoria, in 1999, children aged 0–14 made up 25% of all recorded sexual assaults in Victoria.⁷⁹ However, Australia-wide, children aged 0–14 years accounted for 39% of recorded sexual assaults in 1999.⁸⁰ This may suggest some considerable under-reporting and/or under-recording of sexual assault against children in Victoria.

3.39 In Victoria, national crime data suggests that the rate of recorded sexual assault against children has remained relatively constant. In 1997, there were reported sexual assaults against almost 139 children out of every 100,000 children in the 10–14 age group.⁸¹ In 1999, there were reported sexual assaults against 126 children out of every 100,000.⁸²

75 This calculation excludes victims whose age and gender is unknown: ABS, *Recorded Crime Australia 1999*, above n 34, 48, Table 4.3. Data also set out in Appendix 1, Table 1.3.

76 ABS, *Recorded Crime Australia 1999*, above n 34. Data also set out in Appendix 1, Table 1.3. Note the gender breakdown excludes victims whose sex is unknown.

77 Drugs and Crime Prevention Committee, *Benchmarking Crime Trend Data 1995–1996 to 1999–2000* (2000) 26.

78 Ibid 22. This data takes into account all recorded sexual assaults against children and adults, unlike the ABS *Crime and Safety Australia* report, which provides estimates in respect of sexual assault for adult women aged 18 years and over: Cook, David and Grant, above n 13, 10.

79 ABS, *Recorded Crime Australia 1999*, above n 34, 48, Table 4.3. Data also set out in Appendix 1, Table 1.3.

80 Ibid. Data also set out in Appendix 1, Table 1.4.

81 ABS, *Recorded Crime Australia 1997* (1998), Catalogue No 4510.0, 54, Table 4.3.

82 ABS, *Recorded Crime Australia 1999*, above n 34, 49, Table 4.3. Data also set out in Appendix 1, Table 1.5.

CONCLUSION

3.40 A significant minority of victims/survivors of sexual assault and other sexual offences decide to report offences to the police. Some assaults reported to the police proceed through the criminal justice system. Most do not. In the next Chapter we examine the outcomes of cases where rape charges are laid against offenders.

3.41 As noted above, victims of sexual assault are less likely than other victims of crimes to report to police. The serious under-reporting of the incidence of sexual assault may, to some extent, reflect community perceptions that the criminal justice system treats sexual assault victims badly.⁸³ Such under-reporting may also reflect concerns by sexual assault victims that they may not be believed, particularly where the sexual assault has not been perpetrated by a stranger and no physical injuries are received. This fear may be supported by community perceptions that women commonly make false claims of being raped or sexually assaulted,⁸⁴ despite the lack of empirical support for such views.⁸⁵

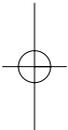
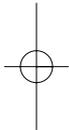
3.42 The impact of the criminal justice system, made up of police, the courts (including magistrates, judges and other court staff) and members of the legal profession (including prosecution and defence solicitors and barristers) is likely to affect individual complainants,⁸⁶ and also to contribute to community attitudes about the advantages and disadvantages of reporting sexual assault.

83 In an Australia-wide 1995 survey, 77% of respondents agreed the legal system treats rape victims badly: Department of the Prime Minister and Cabinet, Office of the Status of Women, *Community Attitudes to Violence Against Women: Executive Summary* (1995) 36.

84 For example, a significant minority of the community (34%) believe women make false claims of rape: *ibid.* These views may be shared by Victorian Police: see Melanie Heenan and Stuart Ross, above n 24, 71.

85 A 1991 study indicated that less than 2% of rape complainants were charged with making a false report: Victorian Community Council Against Violence, above n 73, 64.

86 Cook, David and Grant, above n 13, 33–4.



Chapter 4

Sexual Offences in the Criminal Justice System

INTRODUCTION

4.1 The first part of this Chapter describes the various stages of processing and filtering of sexual offences as they proceed through the criminal justice system, once police decide to press charges. Before considering these processes in detail, it is useful to explain some of the fundamental characteristics of criminal trials.

4.2 In Australia, criminal trials are 'adversarial' proceedings, involving a contest between the Crown and the accused person. In criminal proceedings, the Crown is represented by public officials who prosecute the accused on behalf of the community. The complainant is not a party, but is simply a witness for the Crown.

The Crown

The Crown is the Queen, as head of state in Victoria. In criminal proceedings, the Crown is represented by public officials who prosecute the accused on behalf of the community.

Accused

The accused person is the person charged with committing a crime.

Party

A party is a person or entity who formally participates in legal proceedings.

4.3 Historically, courts did not take an active role in adversarial proceedings. It was up to the parties to define the issues, to produce evidence and to question witnesses.⁸⁷ In recent times, the adversarial process has been modified so that the issues in dispute at trial are defined before it occurs, and the judge's control over the criminal trial process has been increased.⁸⁸

⁸⁷ This is commonly contrasted with the inquisitorial system, which operates in many European countries, where the court takes a much more active role in defining the issues, questioning the witnesses, and so on. However, there is considerable convergence between the two (at least in relation to civil proceedings). See ALRC, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) paras 1.126–1.130, also available at < <http://www.austlii.edu.au/au/other/alrc/publications/reports/89/>>.

⁸⁸ *Crimes (Criminal Trials) Act 1999* s 1. The procedures there laid down require the prosecution and the defence to identify the issues and notify the other side of these issues. The trial judge can resolve issues in dispute at a directions hearing before the trial and order either the prosecution or the defence to provide oral or written material to the court or the other side.

4.4 A criminal trial is not intended to resolve a dispute between the parties. Although the Crown makes allegations that are disputed by the accused person, the trial is ‘accusatorial’ in nature. This means that the accused person is regarded as innocent, until the Crown can prove beyond reasonable doubt that he or she is guilty of the particular offence in question.

4.5 The accusatorial system is in many respects weighted in favour of the accused person. This is due to a range of factors, including the serious consequences of conviction, a concern to protect innocent people, and the need to protect people from abuse of government power. This is reflected in the onus which is placed on the prosecution to prove its accusations ‘beyond reasonable doubt’. It is also reflected in the principle that the prosecutor has a responsibility to maintain the proper administration of justice (even to the extent of supplying the accused person with any evidence in its possession that is favourable to the accused person⁸⁹). Other examples of the structural bias in favour of the accused person are his or her right to remain silent and the principle that, if there is any ambiguity in the legislation creating an offence, the ambiguity should be resolved in favour of the accused person.

4.6 In this context, the right to a ‘fair trial’ means the right of an accused person not to be convicted except after a fair trial according to law.⁹⁰ The fairness of a trial does not traditionally involve separate consideration of fairness to anyone else, such as the complainant.⁹¹

4.7 Over recent decades, greater attention has been paid to victims of crime. For instance, in 1985 the United Nations adopted a *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.⁹² The principles in the Declaration focus mainly on treating victims with compassion and respect and on ensuring that victims are kept informed about proceedings. Another example is the introduction of a procedure in Victoria, called the Victim Impact Statement, to enable the victim of an offence to formally notify the sentencing judge or magistrate about the impact of the offence on him or her.⁹³

89 Richard Fox, *Victorian Criminal Procedure* (2000) para 2.4.3.

90 See, for example, *Dietrich v The Queen* (1992) 177 CLR 292, 299–300.

91 In *Barton v The Queen* (1980) 147 CLR 75, 101, Gibbs CJ and Mason J stated that regard must be had to ‘the interests of the Crown acting on behalf of the community, as well as to the interests of the accused’. In *R v TJB* [1998] 4 VR 621, 628, Callaway JA noted that the position of the Crown and the accused is ‘asymmetric’ and that ‘there can be no fair resolution of the issues, nor is the public interest served, unless there is a fair trial of the accused’.

92 GA Res 40/34, UN GAOR (40th session) Supp No 53 at 213, UN Doc A/40/53 (1985) available at <http://www.unhchr.ch/html/menn3/b/h_comp49.htm> .

93 *Sentencing Act 1991* ss 95A–95E.

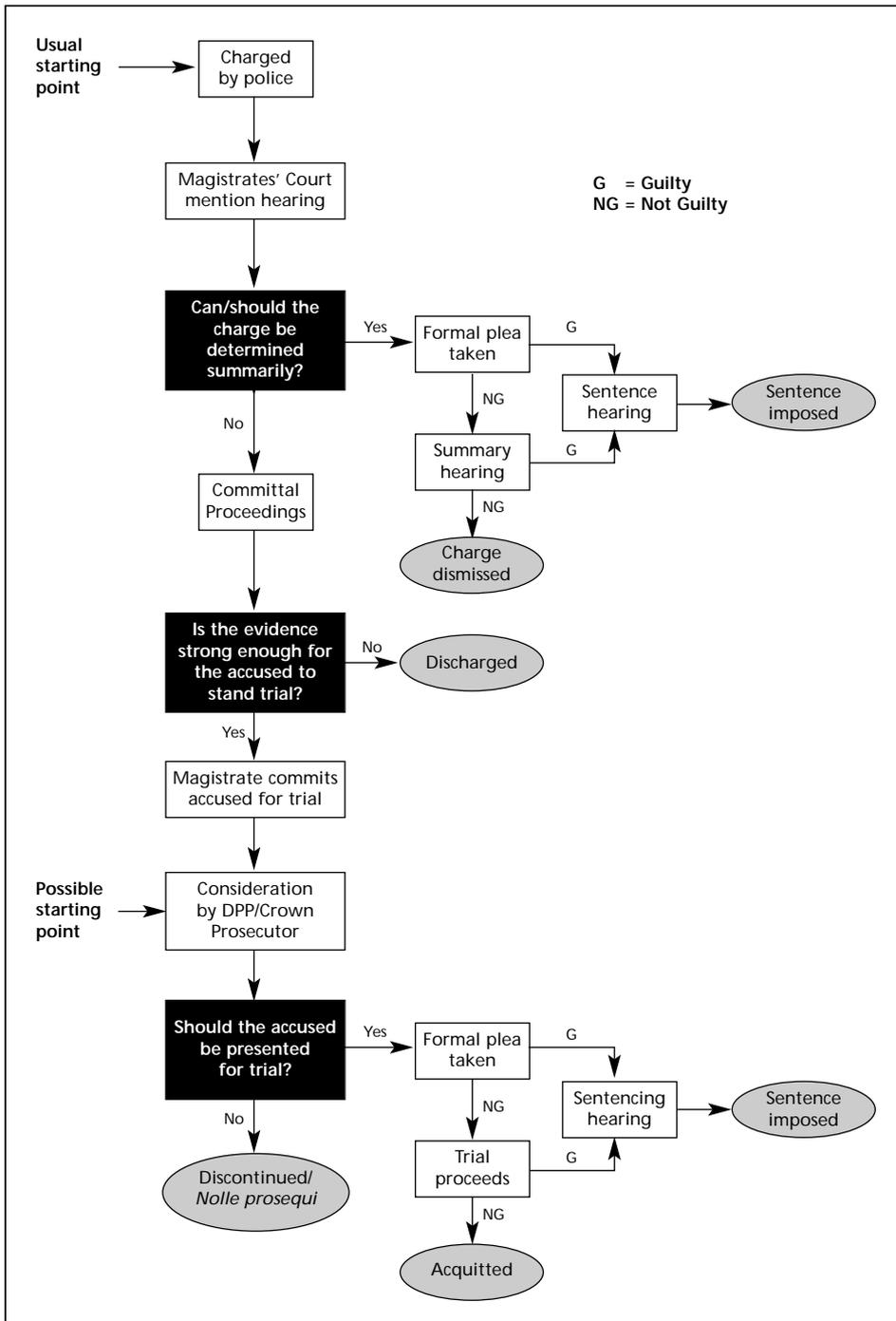
4.8 Aside from modifications such as these, the accusatorial system remains focused on fairness to the accused person. Feminist commentators have criticised this focus, particularly in respect to sexual offence cases, because it excludes victims, their families and the wider community from the criminal justice process.⁹⁴ Some commentators have argued for more fundamental changes, such as restricting judicial discretion and giving complainants a more powerful role in criminal proceedings.⁹⁵ In Chapter 9, we briefly canvass some of the possible alternatives to traditional criminal proceedings.

4.9 The second part of this Chapter outlines initial research undertaken by the Commission, with the assistance of the Office of Public Prosecutions (OPP), which examines the outcomes of rape prosecutions commenced in the 12-month period between July 1997 and June 1998 (expressed as 1997/98) and between July 1998 and June 1999 (expressed as 1998/99). The filtering and outcomes of these rape prosecutions appear to suggest that the significant law reform which has occurred over the last decade has had little direct effect on the conviction rate. However, there is evidence that there have been some changes in the types of rape matters prosecuted. The Commission is currently undertaking further analysis of those changes.

94 Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001) 105.

95 See, for example, Patricia Eastal 'Beyond Balancing' in Patricia Eastal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998).

Figure 1: How Sexual Offences are Processed in the Criminal Justice System



THE PROCESSING OF SEXUAL OFFENCES IN THE CRIMINAL JUSTICE SYSTEM

4.10 What happens after the police decide to charge an alleged offender with one or more sexual offences? The various stages in the processing of sexual offences through the criminal justice system in Victoria are illustrated in Figure 1. They are discussed in greater detail below.

Investigation and Charging

4.11 A significant proportion of sexual offences are not reported to police, as noted in Chapter 3. Indeed, it would appear that once a sexual offence is reported, the most significant filter in the criminal justice system is a decision by police to not lay charges.

4.12 The reasons that reports of sexual offences may not lead to charges being laid by police include:

- failure to identify or apprehend the alleged offender;
- the complainant withdrawing the complaint; and
- a decision by the police that there is insufficient evidence on which to proceed.

4.13 If the victim of a sexual offence does decide to report the offence to police, the police are obliged to comply with the Police Code of Practice for the Investigation of Sexual Assault as well as the Specialist Investigation Instructions for Sexual Offences.⁹⁶ The Code of Practice and the Instructions both emphasise the role of police in caring for and supporting victims of sexual offences.

4.14 When a sexual offence is reported, police normally conduct an investigation and interview the person who is suspected of committing the offence. Following the investigation, the police may decide to file a charge in the Magistrates' Court or, if the accused is under 17 years at the time of the offence, in the Children's Court. The

Charge

A charge is a formal accusation of criminal conduct.

Children's Court is a specialist tribunal dealing with criminal and welfare matters relating to children and young people.⁹⁷

⁹⁶ Victoria Police, *Operating Procedures* (revised 29 November 1999, updated to 2 July 2001), Part 5.2.3.

⁹⁷ The Children's Court, separate from the Magistrates' Court, was created by the *Children and Young Persons Act 1989*.

4.15 If the police decide not to file charges, they are required to tell the complainant that she or he can ask the OPP to review the police decision.⁹⁸

Preliminary Hearings

4.16 Once charges have been filed, the case will be listed for a preliminary hearing (called a ‘committal mention’ hearing) in the Magistrates’ Court. This will determine, among other things:

- whether the accused intends to plead guilty to the charges; and
- if there is to be a contested committal hearing. The lawyers for the accused can apply to the magistrate for permission to cross-examine the complainant.⁹⁹ The magistrate will decide whether or not to allow cross-examination, including cross-examination of the complainant. The matters which must be taken into account by the magistrate in making this decision are set out in the *Magistrates’ Court Act 1989*.¹⁰⁰ If permission to cross-examine is given there will be a committal hearing.

4.17 At an earlier stage, the police will have made a preliminary decision about whether a case should go through the committal process or be heard as a summary offence in the Magistrates’ Court. Most of the sexual offences in the *Crimes Act 1958* can be tried summarily, if the magistrate considers that the charge is appropriate to be determined summarily and the accused waives his right to a trial by jury.¹⁰¹

Summary offences

Summary offences are less serious offences which are heard before a magistrate in the Magistrates’ Court. They are said to be heard summarily.

4.18 If the magistrate considers that a case should not be dealt with summarily, it will be dealt with under the committal process.

98 Victoria Police, *Operating Procedures* (revised 3 May 2001) 5.2.3.3. See also Victoria Police, *Code of Practice for the Investigation of Sexual Assault* (2nd ed) 15, para 73.

99 *Magistrates’ Court Act 1989* sch 5, cl 13.

100 *Magistrates’ Court Act 1989* sch 5, cl 13(5)–(5B).

101 *Magistrates’ Court Act 1989* ss 25, 53 and sch 4.

4.19 The only exceptions to this are the following offences, which are indictable offences and must be heard in the County Court before a judge and jury:

Indictable offences

Indictable offences are serious offences that can be prosecuted before a judge sitting with a jury.

- rape (s 38);
- certain forms of incest (s 44);
- sexual penetration of a child under 10 years (s 45);
- sexual penetration of a child under 16 years (s 45); and
- maintaining a sexual relationship with a child under 16 years (section 47A).

In the 12-month period between July 1997–June 1998, 497 matters¹⁰² were referred to the OPP which involved one or more sexual offences.

In the 12-month period between July 1998–June 1999, 448 matters were referred to the OPP, which involved one or more sexual offences.¹⁰³

4.20 The Criminal Division of the Children's Court has the power to deal with all charges (including those for indictable offences) against children who were at least 10 years and under 17 years of age at the time of the offence,¹⁰⁴ except for homicide and attempted homicide.¹⁰⁵ When a charge relates to an indictable offence, such as rape or sexual offences, the accused young person may choose to appear in the County Court for trial by jury. A young person who is accused of an indictable offence cannot be compelled to have the matter heard and determined in the Children's Court.¹⁰⁶

102 Each matter typically relates to an accused person who has been charged with one or more offences against one or more complainants.

103 Data from the Office of Public Prosecutions PRISM database. These matters may also include those referred by police for advice by the Director of Public Prosecutions (DPP) or matters which the DPP may be asked to review where the police decide not to proceed. However, matters referred to the DPP normally include those which proceed in the Children's Court: see para 4.20.

104 The legislation refers to 'child' rather than 'young person': *Children and Young Persons Act 1989* s 3(1).

105 This includes murder, attempted murder, manslaughter, arson causing death, and culpable driving causing death: *Children and Young Persons Act 1989* s 16(1)(b). However, the Children's Court itself may decline to hear an indictable matter summarily because of its gravity and require it to be tried before a superior court: s 134(3)(b).

106 Fox, above n 89, para 3.3.3.2.

Plea Negotiation

4.21 When an accused person has been charged with an offence and then pleads guilty to a less serious offence, this can sometimes indicate that ‘plea negotiation’ has taken place between the accused person and the prosecuting authorities. Plea negotiation is where the prosecuting authorities decide not to pursue the more serious charge, in exchange for accepting a plea of guilty to the less serious offence. In other cases, the prosecuting authorities may decide not to proceed with the charge simply because there is no prospect of securing a conviction, or because the criminal acts are sufficiently covered by other charges against the accused.¹⁰⁷

Summary Hearing

4.22 Charges that are heard before a magistrate in the Magistrates’ Court are said to be heard summarily. If the charge is to be heard summarily, it is read out in court to the accused, who is asked to plead ‘guilty’ or ‘not guilty’. If he pleads guilty, the matter proceeds as a sentencing hearing, which is discussed below. If the accused pleads not guilty, the police prosecutor will present the prosecution evidence and call the prosecution witnesses.

4.23 Proceedings in the Magistrates’ Court are somewhat less formal than in the County Court, to the extent that the barristers and the magistrate do not wear wigs or robes. Otherwise, the rules of evidence and procedure are virtually the same.

4.24 The accused can give evidence, but is not required to do so. Their lawyer can cross-examine the prosecution witnesses, including the complainant. There are a number of legal restrictions on cross-examination of complainants in sexual offence cases.

4.25 Situations where the defendant does not have a lawyer raise specific issues in relation to procedure and evidence, which are discussed further in Chapter 8.

4.26 In a summary hearing, the magistrate acts as both judge and jury. The magistrate is responsible for conducting the proceedings, deciding the legal issues such as whether particular evidence is admissible or not, as well as making findings of fact and reaching a verdict of guilty or not guilty.

¹⁰⁷ See Prosecutorial Guidelines in Appendix 2.

4.27 If the magistrate finds the accused not guilty, the charge is dismissed. If the magistrate finds the accused guilty, the matter proceeds to a sentencing hearing.

Sentencing Hearing: Magistrates' Court and Children's Court

4.28 At the sentencing hearing, the prosecution provides information such as whether the offender has any prior convictions and whether there were any aggravating circumstances. The defendant's lawyer, called 'defence counsel', then addresses the court and directs the magistrate's attention to any factors that should be taken into account in relation to sentencing, which may mean that a lesser sentence is appropriate.

4.29 The complainant is allowed to prepare a formal Victim Impact Statement describing the injury, loss or damage that she has suffered as a consequence of the offence, in order to assist the court in determining the sentence to impose.

4.30 The maximum sentence that can be imposed by a magistrate for a sexual offence heard summarily is lower than the maximum that can be imposed by a County Court judge. In most cases, the maximum that can be imposed by a magistrate on any one charge is two years imprisonment.¹⁰⁸

4.31 In the Children's Court, different and less severe penalties apply to a conviction for indictable offences, including sex offences. The maximum sentence that can be imposed for an offence heard in the Children's Court is two years detention.¹⁰⁹

Committal Proceedings

4.32 If the charge is not, or cannot be, heard summarily, a committal proceeding will usually be held. The committal proceeding is a preliminary examination of the evidence by a magistrate to determine whether or not the case against the accused is strong enough to go to trial in the County Court before a judge and jury.

4.33 Special rules apply to committal proceedings involving sexual offences. In particular, the complainant's evidence is usually given in the form

¹⁰⁸ *Sentencing Act 1991* s 113.

¹⁰⁹ The maximum sentence that can be imposed on an offender under 15 years is one year detention in a youth residential centre. For offenders aged 15–18 years the maximum sentence is two years detention in a youth training centre: *Children and Young Persons Act 1989* ss 187(1), 189(2).

of a written statement or a video recording; the complainant does not usually have to give evidence orally in court.

4.34 At the end of the committal proceedings, if the magistrate concludes that the evidence is strong enough, he or she must ‘commit’ the accused to stand trial. If the evidence is not strong enough, the magistrate must order that the accused be discharged.

The Role of the Director of Public Prosecutions (DPP) and the Crown Prosecutors

4.35 The outcome of the committal proceeding will normally determine whether or not the accused will stand trial. However, the magistrate’s decision does not bind the DPP and the Crown Prosecutors. Crown Prosecutors are lawyers who appear in court on behalf of the Crown. They are required to exercise their own discretion.

4.36 The DPP and the Crown Prosecutors have the final responsibility for deciding whether or not a person should be presented for trial before a judge and jury and what particular charges or counts to list on the presentment.

4.37 For example, if a magistrate decides that there is not enough evidence to commit the accused to trial on a particular charge, the DPP would not usually present the accused for trial on that charge. However, if further evidence had become available later, or if the DPP considers that the magistrate made an error, the DPP has the power to directly present the accused for trial.

4.38 If the magistrate concludes that there is sufficient evidence for the accused to stand trial, the DPP would normally present the accused for trial. Once again, this does not bind the DPP, and in some circumstances the DPP could decide not to continue the proceedings, either by not leading any evidence at the trial or by notifying the court that the prosecution will not be continued. This is known as the entering of a nolle prosequi.

Counts

A count is an individual offence that has been charged against the accused.

Presentment

A presentment is a formal document signed by the Director of Public Prosecutions or a Crown Prosecutor, containing counts upon which the accused is to stand trial.

Nolle prosequi

To enter a *nolle prosequi* is to discontinue a prosecution after the accused has been committed to stand trial or has pleaded guilty.

4.39 The reasons for not continuing the prosecution may include situations where a key witness, such as the complainant, is not prepared to give evidence, where the accused has died, where evidence has become weaker due to delay or where the DPP considers that there is not a reasonable prospect of conviction.

4.40 Like the magistrate in a committal proceeding, the DPP and Crown Prosecutors must take into account the strength of the evidence against the accused. However, unlike the magistrate, they are also required to consider the public interest in proceeding with the matter.

4.41 It is important to note that, although the DPP and the Crown Prosecutors must have regard to the interests of the complainant, they do not act on the complainant's behalf. The DPP and the Crown Prosecutors represent the public interest on behalf of the State of Victoria (ie the Crown). In performing this role, they are required to act in accordance with guidelines that have been adopted by all of the Directors of Public Prosecutors in Australia. A copy of the guidelines is set out in Appendix 2.

Trial in the County Court

4.42 Before the trial commences, the accused is asked to plead guilty or not guilty. If the accused pleads guilty, the matter proceeds as a plea and sentencing hearing.

4.43 If the accused pleads not guilty, the prosecution and the defence will each outline their case to the jury. Usually, the prosecution and defence will present their evidence and call their witnesses. The witnesses may be cross-examined by the opposite side.¹¹⁰

4.44 After the evidence has been led, the prosecutor and the defence each give a final address to the jury. The judge then addresses the jury, summarising the evidence and the prosecution and defence cases, explaining the relevant laws and relating those laws to the evidence that has been put to the jury. The jury then retire to consider their verdict.

110 The defence does not necessarily have to present any evidence or call any witnesses, including the accused. The accused does not have to give evidence. The onus is on the Crown to prove its case beyond reasonable doubt. This means that the defence can test the Crown case, but does not have to call any evidence to disprove the Crown case.

Sentencing Hearing: County Court

4.45 A sentencing hearing in the County Court is similar to the process described above in relation to the Magistrates' Court. The only significant difference is that a County Court judge may impose a sentence up to the statutory maximum for the offence, and is not limited in the same way as a magistrate. The statutory maximum penalties for a range of sexual offences which are heard in the County Court are set out in Appendix 3. Many of these maximum penalties were increased to their current level by legislation that was introduced in 1997.

4.46 While the Crimes Act sets the maximum penalty only in terms of imprisonment, a range of other sentencing options are also available. These include sentences that are served under supervision in the community, such as the intensive correction order and the community based order.

4.47 *The Sentencing Act 1991* contains special provisions for what the Act refers to as 'serious sexual offenders'. These are offenders who have been convicted of two or more sexual offences or a sexual offence and a violent offence, for which they have received a sentence of imprisonment.¹¹¹ When sentencing a serious sexual offender, the judge is required to treat the protection of the community as the principal purpose for which the sentence is imposed. In order to achieve that purpose, he or she may impose a sentence longer than that which would otherwise be proportionate for the particular offence.

4.48 Usually, those found guilty of more than one criminal offence will receive concurrent sentences. This means that the penalties imposed will operate at the same time.¹¹² However, it is presumed that sentences for offences found to be committed by those classified as serious sexual offenders will be served cumulatively (one after the other).¹¹³

4.49 Since 1997, there have been no published data on the sentences imposed by Victoria's higher courts (the Supreme Court and the County Court). The Commission understands that the Department of Justice is currently working to rectify this situation.

111 Under the *Sentencing Act 1991*, sentences of 'imprisonment' include some sentences (such as intensive correction orders and suspended sentences) that do not involve the actual jailing of the offender.

112 *Sentencing Act 1991* s 16(1).

113 Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (1999) para 9.602.

Appeals

4.50 A person who has been found guilty can appeal against his conviction or against the severity of his sentence. If the conviction was imposed at a summary hearing in the Magistrates' Court, the offender can appeal to the County Court. The appeal is treated as a re-hearing of the matter. If the conviction was imposed at a County Court trial, the accused can appeal to the Court of Appeal on particular questions of fact or law. Unlike appeals in summary matters, these appeals are not full re-hearings of the case. If the appeal is successful, the Court can order that the matter be tried again before a different jury, or the Court can simply acquit the accused.

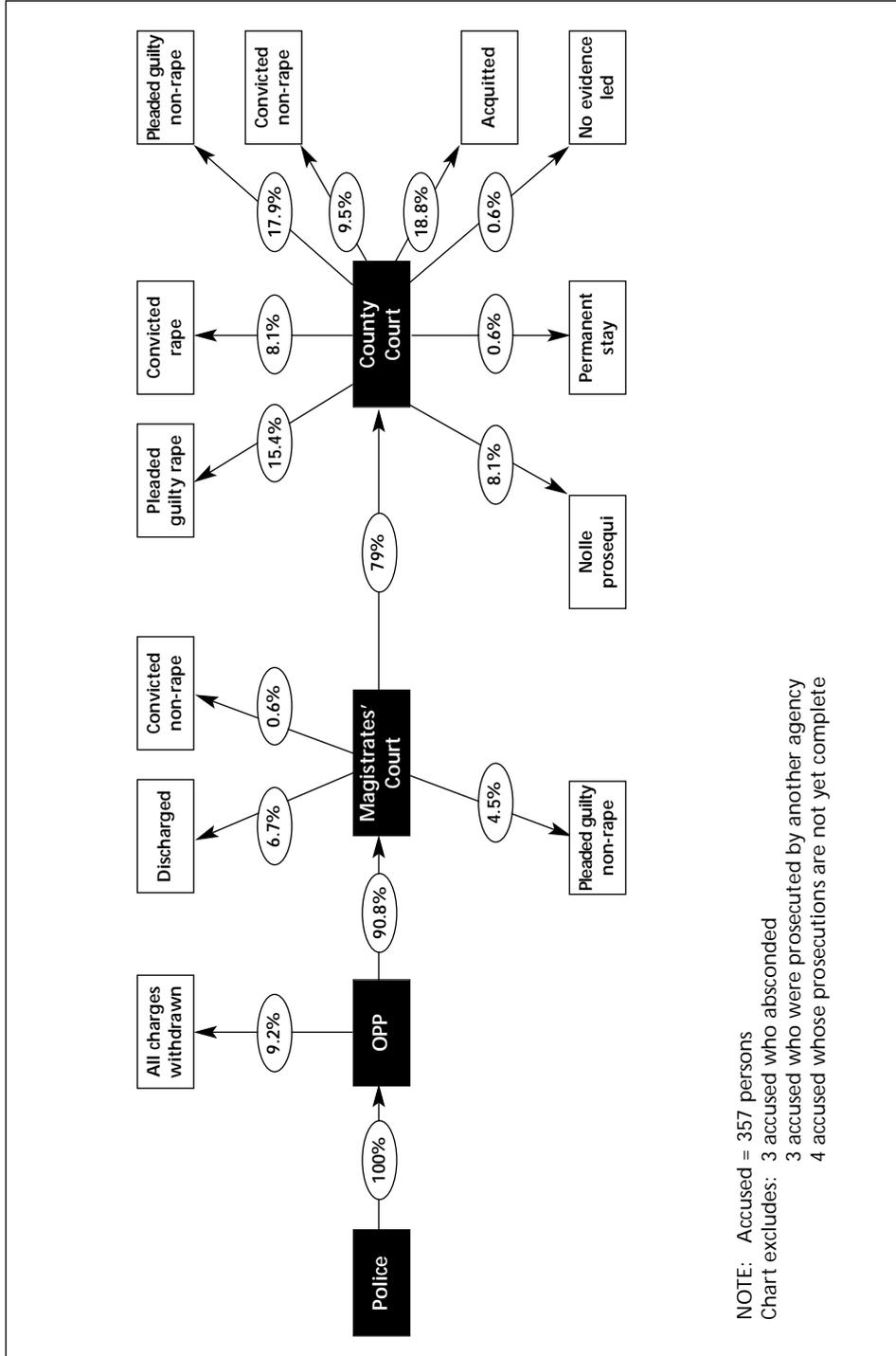
4.51 The Crown's powers to appeal are more limited. The Crown cannot appeal against a decision by the court that the accused is not guilty. This is called an acquittal. However, if an acquittal raises an important question of law, the Crown can refer that question to the Court of Appeal for an opinion. The opinion of the Court of Appeal cannot directly affect the acquittal, but it can have an impact on subsequent cases. The Crown can appeal against a sentence if it considers that there has been an error of sentencing principle or if it considers the sentence to be manifestly inadequate. If a Crown appeal against a sentence is successful, the Court of Appeal can impose a more severe sentence.

OUTCOME OF RAPE PROSECUTIONS

4.52 This section sets out the results of initial data collected by the Commission on the outcomes of rape prosecutions in Victoria commenced in the two-year period between July 1997–June 1998 (referred to as 1997/98) and July 1998–June 1999 (referred to as 1998/99). The data collected excludes Children's Court matters. This research was undertaken by the Commission with the assistance of the OPP. The methodology and tables are set out in Appendix 4.

4.53 The data collection differs from the earlier analysis of rape prosecution outcomes undertaken by the Rape Law Reform Evaluation Project (RLREP). Like the former Law Reform Commission of Victoria (LRCV), data has been collected from OPP administrative records of sexual offence matters, rather than individual files for each matter. However, only the ultimate outcome for each accused was recorded by the Commission. This means, for example, that information has not been collected about the point in the prosecution process at which an accused person pleaded guilty.

Figure 2: Prosecution Outcomes, Accused Charged with Rape Offences 1997/98–1998/99



NOTE: Accused = 357 persons
 Chart excludes: 3 accused who absconded
 3 accused who were prosecuted by another agency
 4 accused whose prosecutions are not yet complete

4.54 The outcome of recent prosecutions for rape both highlights the filtering of sexual offence cases at various points through the criminal justice system, and suggests some difficulties in securing convictions in rape offences. The Commission intends to undertake further analysis of the rape prosecution outcomes data to identify the relationship of the accused to the complainant and the time between the date of the alleged offence and referral to the OPP, and between referral to the OPP and the final outcome.

Filtering of Rape Matters

4.55 Police crime statistics indicate that in the two-year period 1997/98 and 1998/99, allegations of rape were recorded against a total of 1,200 alleged offenders.¹¹⁴ Currently, there is no reliable data that indicates how many of these people were charged with rape by the police.¹¹⁵ We do know, however, that in the same period (1997/98–1998/99), prosecutions for rape were commenced against 367 accused people.¹¹⁶ This suggests that only around a third of rape matters reported to and recorded by the police were prosecuted.¹¹⁷

4.56 The OPP prosecutions data in Figure 2 indicates that of 357¹¹⁸ accused who were referred initially for prosecution on one or more rape charges approximately a quarter were ultimately convicted for rape. As we discuss in para 4.68, this is a lower conviction rate than in earlier studies. While police data and prosecutions data cannot be directly compared, because a reported rape may not be prosecuted in the same year, this suggests that only around 7% of alleged offenders against whom a report of rape has been recorded were ultimately convicted of rape.¹¹⁹ Another 10% were found guilty, either at the Magistrates' Court or County Court, of non-rape offences.¹²⁰

114 Victoria Police, *Crime Statistics 1998/99* (2000) 14, Table 1.3. Note that the category of 'rape' includes the former offence of 'buggery' but excludes 'aggravated rape': 142, Table A.1.

115 However, police data indicates that charges were laid in 73% of the 2,626 recorded rape offences: *ibid* 12, 14, Tables 1.1, 1.3.

116 Appendix 4, Table 4.1.

117 This estimate is necessarily imprecise as reports of alleged crimes may not be prosecuted in the same year. Further alleged offenders include those who may ultimately be prosecuted in the Children's Court.

118 This number excluded 10 people who absconded, were prosecuted by another agency or whose prosecutions were not complete at the time of data collection. See Appendix 4, Table 4.1.

119 This estimate is based on 1,200 recorded reports of rape in the two year period 1997/98–1998/99 and convictions of 84 offenders for rape in matters that were referred by police in the two year period 1997/98–1998/99.

120 This estimate is based on 1,200 recorded reports of rape in the two year period 1997/98–1998/99 and convictions of 114 offenders for non-rape in matters that were referred by police in the two year period 1997/98–1998/99.

Committal Outcomes

4.57 In the two-year period 1997/98–1998/99, charges against 33 (9.2%) of 357 people charged with one or more rape offences were withdrawn prior to committal proceedings at the Magistrates' Court.

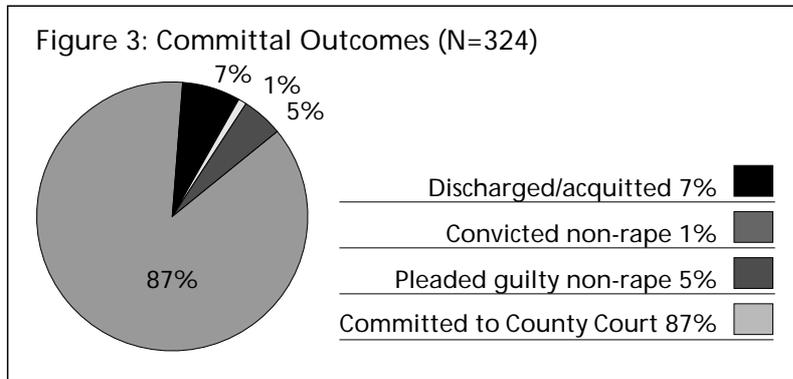
4.58 When an adult has been charged with rape, there normally will be a committal hearing before a magistrate. When a person pleads before committal to a non-rape offence, the magistrate may impose sentence in some cases. In others, the accused may be sentenced in the County Court on a non-rape offence. The 'committed to County Court' category in Figure 3 includes all those committed for sentencing and to stand trial for both rape and non-rape offences.

4.59 Of the 324 accused who were subject to a committal and/or determination at the Magistrates' Court, 282 (87%) were committed to the County Court on at least one rape and/or non-rape offence. Another 24 accused (7%) were discharged on all offences. Sixteen accused (5%) pleaded guilty to non-rape charges, which were heard and determined summarily at the Magistrates' Court. Two accused had the rape charges against them dismissed but were found to have committed non-rape offences, which were also heard and determined summarily by the magistrate.¹²¹

4.60 These outcomes are broadly consistent with rape prosecutions data collected by the former LRCV for the two-year period of 1998-89, where 90% of those subject to committal were committed on at least one rape offence.¹²²

¹²¹ Appendix 4, Table 4.1.

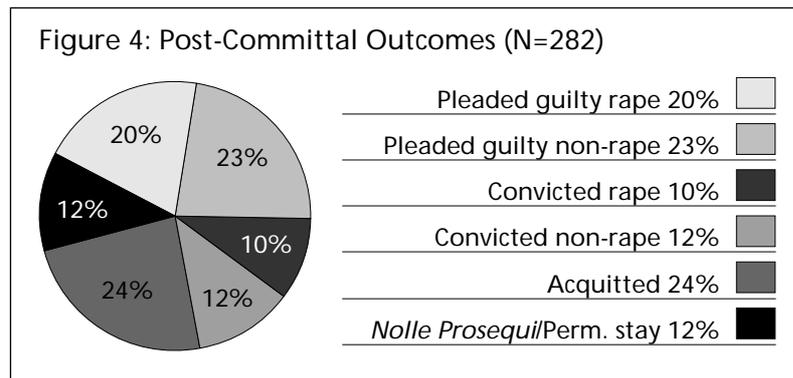
¹²² LRCV, Appendices to Interim Report No 42 (1991), above n 22, 45. Data collected by the RLREP indicated that around 90% of those subject to committal proceedings were committed on at least one rape offence: RLREP, above n 8, 14. Data from both the LRCV and the RLREP DPP studies is reproduced in Appendix 4, 4.2.



Prosecution Outcomes Following Committal

4.61 Of the 282 accused who were committed for trial, 84 (30%) were convicted of at least one rape offence, either as a result of a guilty plea or following a jury trial after they had pleaded not guilty. Ninety-eight accused (35%) were convicted of a non-rape offence, including 64 who pleaded guilty to a non-rape offence and 34 who were found guilty of a non-rape offence.

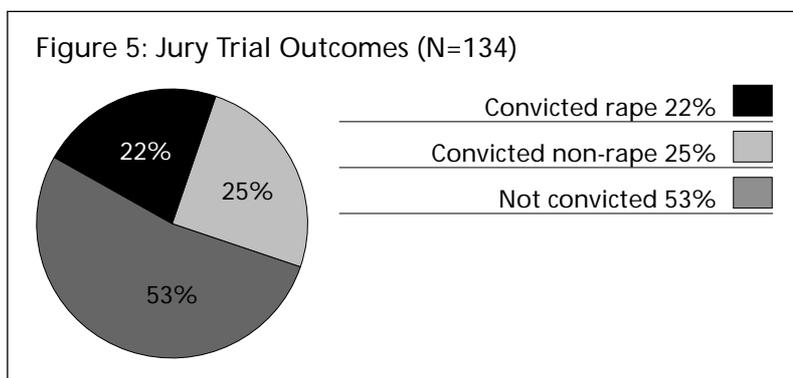
4.62 No conviction was obtained against 100 accused (36%), either because there was an acquittal, a permanent stay or the DPP entered a *nolle prosequi* and discontinued the prosecution. In two cases, the prosecutor led no evidence.



4.63 Further details were collected from the PRISM database records on the reasons for the DPP decision to enter a *nolle prosequi*. No reason was provided in three of the 29 matters where a *nolle prosequi* was entered.¹²³ Of the remaining 26 matters, the reason given in 13 matters was that there were no reasonable prospects of conviction. In another nine matters, the reasons given were that the complainant did not wish to proceed or was reluctant or unable to give evidence. In three matters, the accused had died or was unfit to plead. In the remaining matter, the reason given for the DPP decision was that after finding the accused not guilty on the charges of rape, a jury failed to reach a verdict on an alternative non-rape charge on the presentment.

Jury Trial Outcomes

4.64 In the two-year period, 134 accused pleaded not guilty to rape or were presented for a jury trial on non-rape charges to which they had pleaded not guilty, after the OPP decided to drop all rape charges.



4.65 Of the accused who pleaded not guilty, 29 (22%) were convicted of rape, 34 (25%) of non-rape offences and 71 (53%) were not convicted. This included those who were acquitted by the jury, one trial in which an acquittal was directed by the trial judge, two trials in which the prosecution led no evidence and two trials in which a permanent stay was ordered.

¹²³ In these 29 matters, applications had been made by the prosecution in 22 matters, by the defence in five matters, by the unrepresented applicant in one matter and by the Adult Parole Board in the remaining matter.

4.66 Non-conviction rates for rape or non-rape at jury trials have increased substantially since 1988–89. LRCV data indicates that in jury trials relating to 1988–89 prosecutions, 39 of 126 accused (31%) were not convicted.¹²⁴ However, non-conviction rates have remained relatively stable since 1992–93. The RLREP data indicates that in jury trials relating to 1992–93 prosecutions, 49 of 99 accused (50%) were not convicted.¹²⁵

4.67 These findings also highlight a decline since 1988–89 in rape convictions in jury trials.¹²⁶ The LRCV data indicates that in jury trials relating to 1988–89 prosecutions, 53 accused (42%) were convicted of rape.¹²⁷ The RLREP data¹²⁸ indicates that in jury trials relating to 1992–93 prosecutions, just over a third of accused (35%) were convicted of rape offences.¹²⁹

Why the Difference in Prosecution Outcomes?

4.68 There are a number of differences in overall prosecution outcomes in cases where rape was originally charged between the former LRCV DPP study, the RLREP DPP study and the Commission's 1997/98–1998/99 data collection:¹³⁰

- Convictions for rape have dropped. In 1997/98–1998/99, only 24% of accused were convicted of or pleaded guilty to rape. This compares with 36% in 1992–93 and 46% in 1988–89.
- The proportion of accused pleading guilty to rape has decreased. In 1997/98 – 1998/99, 15% of accused pleaded guilty to rape compared to 26% in 1988–89 and 22% in 1992–93.

124 See Appendix 4 Table 4.2. These figures comprise convictions for rape or non-rape, acquittals (including directed acquittals), including permanent stays. In the case of the Commission's study, it also includes cases where no evidence is led.

125 Ibid.

126 Ibid.

127 Ibid.

128 Ibid.

129 The base used to calculate these percentages is derived from Appendix 4, Table 4.2. Thus it produces different percentages from those presented in the LRCV and RLREP reports on the outcomes of jury trials.

130 The base is total matters: see Appendix 4, Table 4.2. As both are based on a census of the relevant population, the differences between the LRCV DPP study and the current study are real differences, with no possibility of them arising due to chance of selection or accuracy of estimates. (Advice from ABS to the Commission, 15 August 2001.)

- Convictions for non-rape in matters determined in either the Magistrates' Court or County Court where rape was initially one of the charges comprised 33% of prosecution outcomes in 1997/98–1998/99. While this is similar to the 1992–93 rape prosecution outcomes, it represents an increase from 27% of prosecution outcomes in 1988–89.
- Apart from guilty pleas, there has been an increase in the proportion of non-trial outcomes where charges were withdrawn before committal, charges were discharged at the Magistrates' Court, a *nolle prosequi* was entered, or no evidence was led. In 1997/98–1998/99, such non-trial outcomes comprised 25% of matters where rape was originally one of the charges, compared to 13% in 1988–89 and 11% in 1992–93.

4.69 This suggests that despite significant reform to sexual offences law in the period between the former LRCV study and the current time, changes to the substantive law have had limited impact on rape prosecution outcomes. It is unclear whether recent law reform has made the prosecutions and trial process more responsive to the needs of complainants.

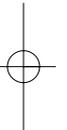
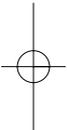
4.70 Preliminary feedback from the OPP suggests that there may be a number of reasons why conviction rates for rape and guilty pleas to rape appear to have decreased. These include an increase in matters where the complainant knew the accused, a number of older offences and, most importantly, the fact that matters previously 'filtered out' by the police are being proceeded with. This may lead to more matters that are difficult to prosecute being referred to the OPP, as well as an increase in the number of matters where the prosecutor decides that the offence of rape is not the appropriate one and the matter proceeds on other non-rape charges.

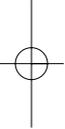
4.71 Thus, any decreases in conviction rates and guilty pleas may be due to changes in case profiles. For example, the relationship of a victim to the alleged offender/s may make it more difficult for the prosecution to prove lack of consent, while increased reporting of past sexual offences may make corroboration of evidence more difficult.¹³¹

¹³¹ The RLREP found that 'stranger' rapes were more likely to result in a conviction than when the accused is known to the complainant: RLREP, above n 7, 233. Possible contributing factors to the lower rate of conviction in 1992/93 compared with the LRCV 1988/89 study were an increase in cases in which the complainant knew the accused, including inter- and intra-family assaults, and an increase in cases where the accused admitted having contact with the complainant but denied any sexual activity took place: RLREP, above n 7, 237.



4.72 To test these assumptions, the Commission intends to investigate available data recorded by the OPP in respect to the date offences were alleged to have been committed and the relationship of the complainant to the accused. The Commission will also consult with the OPP and the Victoria Police in relation to guidelines and practices in referring matters for prosecution and their respective charging practices.





Chapter 5

General Sexual Offences

INTRODUCTION

5.1 This Chapter briefly describes the main sexual offences in the Victorian *Crimes Act 1958* in which lack of consent is an element. Sexual offences against children and young people are discussed in Chapter 6. Sexual offences against people with ‘impaired mental functioning’¹³² are discussed in Chapter 7.

5.2 This Chapter and Chapters 6 and 7 focus on the substantive criminal law, that is, the particular offences which are the subject of our reference.¹³³ Issues relating to court procedure and evidence are discussed in Chapter 8.

5.3 There have been many changes to sexual offences laws over the past two decades. We have discussed these changes in Chapter 2. The Model Criminal Code Officers Committee (MCCOC) has also examined sexual offences in considerable detail.¹³⁴ Many of the MCCOC recommendations treat Victorian sexual offences laws as a model. Therefore, we do not undertake a comprehensive comparison between sexual offences in Victoria and those in other States and Territories. The Commission’s preliminary view is that relatively few changes are required to substantive sexual offences laws in Victoria. Chapter 4 shows that there is little evidence that changes to substantive law have had a direct effect on conviction rates for sexual offences, or on the willingness of victims/survivors to report such offences to the police.

5.4 The main emphasis of the Commission’s work on this reference will be on how sexual offences laws are implemented and on identifying changes to procedures and practices which will reduce the trauma experienced by complainants during the trial process, and provide greater support to victims/survivors of sexual assault. We will consult with the community on the implementation of sexual offences laws and consider this issue in a later publication.

¹³² This expression is used in the *Crimes Act 1958*. The term ‘impaired’ is defined in s 50.

¹³³ In Chapter 1, we describe the offences which are considered in this Discussion Paper.

¹³⁴ MCCOC, *Model Criminal Code: Chapter 5: Sexual Offences Against the Person—Discussion Paper* (1996) (hereafter MCCOC, Discussion Paper (1996)); MCCOC, Report (1999), above n 5. See also paras 2.20–2.23.

5.5 This Chapter identifies some areas where changes to the substantive law may be desirable. It explains differences between the law in Victoria and the Model Criminal Code (MCC) and asks questions about possible changes. These changes could contribute to greater uniformity in the sexual offences laws across the States and Territories, which was the goal of the MCC.

Offences Covered

5.6 This Chapter discusses the indictable offences of rape, indecent assault and stalking. Indictable offences are serious offences which are heard before a judge and jury. It also deals briefly with four other indictable offences¹³⁵ which penalise conduct that does not come within the definition of rape or indecent assault.

5.7 The existence of separate rape and indecent assault offences reflects the traditional distinction made by the criminal law between penetrative and non-penetrative offences. The *Crimes Act 1958* retains the distinction between rape and non-penetrative sexual offences, but the definition of rape has been extended beyond penile penetration of a woman's vagina, to cover a broader range of non-consensual penetrative acts. Penetrative offences attract a higher maximum penalty than sexual offences which do not involve penetration.¹³⁶

5.8 The distinction which criminal law generally makes between penetrative and non-penetrative sexual offences has been criticised by some commentators, because it is said to reflect a 'male' view of sexuality, under which penetration is seen as a greater violation of the victim's autonomy than a sexual assault which does not involve penetration. The distinction between penetrative and non-penetrative assaults may not accurately reflect the severity of the effects of particular sexual assaults on some victims/survivors. Both the former Law Reform Commission of Victoria (LRCV)¹³⁷ and the MCCOC¹³⁸ considered this criticism, but recommended retaining the distinction between penetrative and non-penetrative acts. All other Australian States maintain this distinction and we do not propose that it should be changed.

135 These include the offences in ss 40, 53, 55 and 57 of the *Crimes Act 1958*.

136 See Appendix 3.

137 LRCV, Report No 7 (1987), above n 18, 15; LRCV, Interim Report No 42 (1991), above n 22, 4.

138 MCCOC, Discussion Paper (1996), above n 134, 7.

5.9 As we have discussed in Chapter 1, the main purpose of this reference is to assess the extent to which the criminal justice system responds to the needs of complainants. Because this is the focus of the Commission's work, we do not discuss offences involving consensual sexual penetration between adults who are close relatives (incest)¹³⁹ or sexual acts between adults and animals (bestiality).¹⁴⁰ Incest involving children is discussed in Chapter 6.

RAPE

5.10 The offence of rape involves penetration. The MCCOC recommended that this offence should be described as 'unlawful sexual penetration'¹⁴¹ largely because it now covers a much broader range of penetrative acts than were traditionally included within the crime of rape. The MCCOC commented that it was likely that the expression 'rape' would still 'be used in the community and, importantly, by victims, according to how they may choose to describe their experience of the crime'.¹⁴² The question whether the term 'rape' should be used has previously been discussed in Victoria.¹⁴³ We do not propose any change to the name of the offence.

5.11 The elements of rape are:

- that the physical act of penetration occurred;
- that the complainant did not consent to this act;
- that the accused intended to penetrate the victim; and
- that the accused was aware that the complainant was not consenting or might not have been consenting.¹⁴⁴

These requirements are discussed in more detail on the following page.

139 *Crimes Act 1958* s 44.

140 *Crimes Act 1958* s 59.

141 Compare MCCOC, Discussion Paper (1996), above n 134, 27.

142 MCCOC, Report (1999), above n 5, 63.

143 LRCV, Interim Report No 42 (1991), above n 22, 4.

144 *Crimes Act 1958* s 38. The MCCOC describes the first two requirements as the 'physical element of the offence' and the last two as the 'fault elements of the offence': MCCOC, Report (1999), above n 5, 67.

Penetration

VICTORIAN LAW

5.12 The first element of rape is that the act of penetration occurred. In Victoria, this covers the following types of penetration:¹⁴⁵

- the introduction (to any extent) by a person of his penis into the vagina, anus or mouth of another person, whether or not there is emission of semen;
- the introduction (to any extent) by a person of an object or a part of his or her body (other than the penis) into the vagina or anus of another person, other than in the course of a procedure carried out in good faith for medical or hygienic purposes; and
- where the offender compels a male person to penetrate the offender, or someone else, with his penis.

The term 'vagina' includes both the external genitalia, and a surgically constructed vagina.¹⁴⁶

5.13 The offence of rape also includes failure to withdraw after sexual penetration, if the accused becomes aware after penetration that the person is not consenting or might not be consenting.¹⁴⁷

Comparison with the Model Criminal Code

5.14 Like the Victorian crime of rape, the MCC offence of unlawful sexual penetration uses a broad definition of sexual penetration. It includes penetration by any part of the body, including digital penetration. It also includes penetration using objects. The MCC also includes penetration of the mouth with a penis.¹⁴⁸

145 *Crimes Act 1958* ss 35, 38. This definition also applies to the other offences involving penetration, discussed below.

146 *Crimes Act 1958* s 35. Note that the broad definition of 'vagina' combined with the definition of 'sexual penetration' means that most acts of forcible cunnilingus would be covered, as recommended in MCCOC, Report (1999), above n 5, 13. Note also that the inclusion of 'a surgically constructed vagina' covers rape of post-operative transsexuals. Note, however, that for the purposes of incest, offences against children and young people, offences against people with impaired mental functioning and offences dealt with in Part 1, Division 8E (which includes offences such as procuring sexual penetration by fraud), both the person who sexually penetrates another and the person who is penetrated, are taking part in an act of sexual penetration.

147 *Crimes Act 1958* s 38(2)(b).

148 Model Criminal Code (hereafter MCC), MCCOC, Report (1999), above n 5, 67, Appendix 2, 5.2.1.

5.15 Under the MCC, a person who is sexually penetrated by another person, knowing that the other person does not consent, is guilty of unlawful sexual penetration (the MCC equivalent offence to rape). This would cover situations where a person is forced to digitally penetrate the offender, or to insert an object into the offender's vagina or anus. These acts are not treated as rape in Victoria.

5.16 The MCCOC also recommended the introduction of a new offence called 'compelling sexual penetration'.¹⁴⁹ This offence would carry the same penalty as rape.¹⁵⁰ It would cover situations where a person compels the complainant to penetrate their own genitalia or anus, to sexually penetrate or be penetrated by a third person or to sexually penetrate or be sexually penetrated by an animal.

5.17 In Victoria, the crime of rape covers situations where the victim is compelled to penetrate a third person with his penis.¹⁵¹ However, other acts included in the MCC offence of 'compelling sexual penetration' are not treated as rape in Victoria. For example, an offender who compels the victim to penetrate the offender or another person with part of the victim's body other than his penis, or with an object, does not commit rape in Victoria. Similarly, an offender who compels the victim to penetrate him or herself cannot be convicted of rape. These situations would usually be covered by the offence of indecent assault¹⁵² or procuring sexual penetration by threats, intimidation or fraud.¹⁵³

5.18 Since most rapes are perpetrated by male offenders on female victims, these situations may be relatively uncommon.¹⁵⁴ However, the MCCOC argued that there is a similar violation of sexual autonomy whether a person is coerced to penetrate or coerced to be penetrated.¹⁵⁵ This argument is compelling. Our tentative view is that the crime of rape should be extended to cover situations where the victim is penetrated, or forced to penetrate another, regardless of the gender of the victim or the nature of the penetration. It seems

149 MCC, MCCOC, Report (1999), above n 5, Appendix 2, 5.2.7.

150 Ibid, 5.2.6.

151 *Crimes Act 1958* s 38(3).

152 See below paras 5.76–5.87. If the victim is a child, or a person with impaired mental functioning, other offences may apply.

153 This offence does not specify that the offender must penetrate the victim, and therefore could cover situations where the offender procures the victim to penetrate him.

154 This is conceded by the MCCOC: MCCOC, Report (1999), above n 5, 67.

155 Ibid.

inappropriate to use the label ‘rape’ to describe a situation where the victim is forced to penetrate him or herself or an animal. In this situation an offence of ‘compelling sexual penetration,’ which attracts the same maximum sentence as rape, may be appropriate.

? QUESTIONS

1. Should the offence of rape be expanded to cover situations where a person (whether male or female) is forced to penetrate the offender or a third person digitally, orally, or with an object?
2. Should an offence of compelling a person to engage in sexual penetration be introduced to cover situations where a person is forced to penetrate themselves, or an animal?

Consent

BACKGROUND

5.19 The key element to the offence of rape is the victim’s lack of consent to penetration. The Rape Law Reform Evaluation Project (RLREP), which examined Victorian rape trials in 1992–93, found that consent was the accused person’s main line of defence in 30% of cases. In a further 23% of cases, the main line of defence was either that the accused believed the complainant had consented, or a defence which involved a combination of consent and the accused’s belief that the complainant consented.¹⁵⁶

5.20 Feminist commentators have consistently argued that the consent element, combined with stereotypical myths about women’s sexuality, has a discriminatory impact on women. Historically, the law reflected the myth that ‘rape allegations are easy to make and difficult to disprove’, a proposition clearly inconsistent with the evidence discussed in Chapter 3, which shows that most rapes and sexual assaults are not reported.¹⁵⁷

5.21 Despite reforms to the law, rape trials still involve intense scrutiny of the complainant’s behaviour, rather than of the actions of the accused. The RLREP Report found that complainants frequently were subjected to

¹⁵⁶ RLREP, above n 7, Table 21, 191.

¹⁵⁷ Ian Leader-Elliot and Ngaire Naffine, ‘Wittgenstein, Rape Law and the Language Games of Consent’ (2000) 26 *Monash University Law Review* 48.

lengthy cross-examination about matters such as the clothing they were wearing at the time of the alleged rape and the amount of alcohol they had consumed, in order to attack their credibility and/or attempt to show that they are the kind of person who was likely to agree¹⁵⁸ to sexual penetration.¹⁵⁹

5.22 The substantive law does not require evidence that the offender used physical force against the victim. However, the RLREP Report found that juries were more likely to convict a person of rape if the victim suffered physical injury. Convictions were also more likely if the accused was a stranger,¹⁶⁰ although, as is discussed in Chapter 2, the majority of rapes are by offenders known to the victims.

5.23 During the 1980s, substantial changes were made to rape laws in many jurisdictions, in an attempt to meet criticisms about the discriminatory impact of sexual offences laws on women. One approach was to dispense with the need to prove lack of consent in certain situations. This approach was considered and rejected by the former LRCV¹⁶¹ and by the MCCOC¹⁶² because there was little evidence that it led to decreased emphasis on the complainant's behaviour. We do not discuss this approach here.

5.24 Instead, the LRCV recommended changing the law to define the meaning of consent and to require the judge to give jury directions as to the meaning of consent, if these are 'relevant to the facts in issue in a proceeding'.¹⁶³ These recommendations were implemented in 1991. We now compare these provisions with the similar, but not identical, provisions in the MCC.

Jury directions

Jury directions are instructions given by the judge to the jury, after all the evidence has been given, as to how the law applies to the facts of the case.

158 Alternatively, the cross-examination may be for the purpose of showing that the accused believed that consent was present.

159 RLREP, above n 7, Chapter 7. In part, this is because in many rape cases the accused alleges that the victim consented to penetration, but there is little circumstantial evidence on the consent issue. Ultimately, this means that the issue is whether the jury believes the complainant or the accused. However, lengthy cross-examination imposes a severe strain on many complainants and may contribute to some victims of sexual assault not reporting rape and other forms of sexual assault to the police.

160 RLREP, above n 7, 236.

161 LRCV, Interim Report No 42 (1991), above n 22, 5-8.

162 MCCOC, Report (1999), above n 5, 21-9.

163 *Crimes Act 1958* s 36.

DEFINITION

Victorian Law

5.25 Consent is defined in the *Crimes Act 1958* as ‘free agreement’ (s 36). This definition was introduced to make it clear that a conviction for rape does not require evidence that penetration was achieved by forcibly overcoming the physical resistance of the complainant.¹⁶⁴ The definition of consent is intended to protect the autonomy of people, particularly women, to decide whether to participate in an act of penetration. It differentiates between mere ‘submission’ and actual consent. The expression ‘free agreement’ makes it clear that consent is a positive state of mind and that submitting to penetration is not free agreement.¹⁶⁵

5.26 The definition also lists circumstances in which a person is not regarded to have freely agreed to an act. These circumstances are:

- submitting because of force, or the fear of force, to that person or someone else;
- submitting because of the fear of harm of any type to that person or someone else;
- submitting because she or he is unlawfully detained;
- being unable to freely agree because she or he is asleep, unconscious, or severely affected by alcohol or another drug;
- not understanding the sexual nature of the act;
- being mistaken about the sexual nature of the act or the identity of the person; or
- mistakenly believing that the act is for medical or hygienic purposes.

5.27 If the prosecution proves one of these circumstances, lack of consent is automatically established. For example, if it is shown that a person submitted to penetration because she was asleep, the jury must find that penetration occurred without the complainant’s consent.

5.28 The prosecution may lead evidence showing that the complainant did not consent to penetration, and the jury may decide that this was the case, in other circumstances.

¹⁶⁴ This was already the law before the amendment made by the Crimes (Rape) Bill 1991. However the LRCV believed that it was not well understood by the community: see LRCV, Interim Report No 42 (1991), above n 22, 9.

¹⁶⁵ Simon Bronitt and Bernadette McSherry, above n 94, 601.

Comparison with the Model Criminal Code

5.29 There are several differences between the definition of consent in Victoria and in the MCC.

FREE AND VOLUNTARY AGREEMENT

5.30 The first, relatively minor difference, is that in the MCC, the additional words 'and voluntary' are added after the word 'free'. These words stress the fact that consent involves more than submission, or failure to resist. While this change would not alter the law in Victoria, our tentative view is that the definition of consent should include the words 'and voluntary' to emphasise the autonomy of individuals to agree or not to agree to penetration.

? QUESTION

3. Should the words 'and voluntary' be added to the definition of consent?

MISTAKE ABOUT THE NATURE OF PENETRATION

5.31 The next difference relates to the words used to describe the fact that a person does not consent to penetration where she is mistaken about the nature of penetration. In Victoria, the law states that there is no consent where the victim is mistaken about the 'sexual' nature of the act. In the MCC, there is no consent where the victim is mistaken about the 'essential' nature of the act. The MCC approach may be slightly broader than the Victorian approach. For example, it could cover the situation where a woman consented to intercourse knowing that it was a sexual act, but not understanding that it could lead to pregnancy. Under the MCC, a broader group of people with some form of mental impairment might be considered to be lacking the capacity to consent to taking part in sexual activities.

5.32 Both the Crimes Act and the MCC explicitly provide that a person who agrees to penetration, believing it is for medical or hygienic purposes, is not to be taken as consenting, if that was not the purpose of the penetration from the point of view of the accused.¹⁶⁶

¹⁶⁶ This reverses the effect of *R v Mobilio* [1991] 1 VR 339, where it was held that a doctor who had subjected women to unnecessary internal vaginal examinations using an ultrasound, for the purposes of his own sexual gratification, could not be convicted of rape, because the women's mistaken belief about the reason for the examination was not a mistake about the physical nature of the act. The provision now contained in the *Crimes Act 1958* s 36(g), was inserted by the *Crimes (Sexual Offences) Act 1991*, which implemented the LRCV's recommendations in its Final Report No 43 (1991), above n 22.

MISTAKE ABOUT IDENTITY

5.33 The next difference is that in Victoria, the law provides that there is no consent where the victim is mistaken about the identity of the person with whom she engages in an act of penetration. This reflects the situation under the common law, but is not included in the MCC. For the purposes of clarity, we think that reference to this situation should be retained in the Victorian legislation.

FEAR OF HARM

5.34 In Victoria, there is no consent where a person submits to penetration because of fear of harm of any type to themselves or to anyone else. This extends beyond physical harm. For example, it could include a case where a woman submits to intercourse with an employer because he threatens to sack her if she does not. There is no equivalent to this in the MCC.

5.35 The argument in favour of treating such cases as rape is that a person who submits to penetration in these circumstances may feel that she does not have any real alternative. Because of a power imbalance between the victim and the offender, the victim's personal autonomy is compromised. There is no basis for differentiating between this case and a case where a victim submits because of fear of physical harm, because both threats result in 'submission' rather than 'free agreement' to penetration. The counter-argument is that cases like this should not be treated as rape because the complainant has agreed to penetration, albeit reluctantly. However, penetration in this situation may amount to a less serious offence.¹⁶⁷

5.36 The Commission's tentative view is that the law in Victoria should not follow the approach in the MCC. Where a complainant alleges that she submitted to penetration with the accused because he threatened to harm her or someone else if she did not, the jury should decide whether this amounts to submission without free agreement. The purpose of rape law should be to protect the freedom of an individual to agree to, or refuse to engage in, sexual penetration. The criminal law plays an important part in educating people about the boundaries between acceptable and unacceptable conduct, and should discourage the use of threats (even if they are not threats of physical harm) which cause people to submit to penetration.

¹⁶⁷ See below paras 5.105–5.106. See J Temkin, 'Towards a Modern Law of Rape' (1982) 45 *Modern Law Review* 399, 411 cited in MCCOC, Discussion Paper (1996), above n 134, 55: 'where the threat is to terminate a woman's employment, she is left with a choice, albeit an unpalatable one, as to whether to have intercourse with the defendant or not. In cases such as this where sexual choice remains but is unacceptably limited or confined, liability for an offence which is less serious than rape is appropriate.'

FRAUD

5.37 It has been proposed that when one person uses fraud to trick another person into agreeing to penetration, the law should treat this as rape.¹⁶⁸ It could be argued that nobody can freely agree to penetration if they are not fully informed about the circumstances in which penetration is to occur.

5.38 There are only a few situations where the law regards it as rape when a person obtains another person's consent to penetration by fraud. These are when the victim does not understand the sexual nature of the act (for example, because she knows nothing about sex and is told by the accused that the act is for some other purpose); and when the victim believes she is agreeing to penetration by a person other than the accused.¹⁶⁹

5.39 Arguably, the law should treat a wider range of frauds as negating consent to penetration, because if a person is defrauded into consenting, her agreement is not fully informed or free. For example, in New South Wales, a man who tricks a woman into believing that she is married to him and has sex with her may be convicted of rape.¹⁷⁰

5.40 However, this could potentially cover a very wide range of cases which should not be punished as rape. It may be more appropriate to treat some of these cases as a less serious offence.¹⁷¹ Other types of fraud may be immoral, but should not be treated as criminal. For example, should a person who lies about their personal characteristics, in order to persuade someone to have intercourse with them, be punished by the criminal law?

5.41 The Commission's tentative view is that the definition of consent should not be changed to provide that a person does not freely agree to penetration when agreement is obtained by fraud.

? QUESTION

4. Should there be any change to the definition of 'consent' to cover cases where agreement is obtained by fraud?

168 See, for example, Vicki Waye, 'Rape and the Unconscionable Bargain' (1991) 16 *Crim LJ* 94.

169 *R v Morgan* [1970] VR 337.

170 *Crimes Act 1900* (NSW) ss 61I, 61R. In NSW, this offence is called 'sexual assault'. In Victoria, the offence of procuring sexual penetration by threats, intimidation or fraud may also apply: see below paras 5.105–5.108.

171 See below paras 5.105–5.106.

JURY DIRECTIONS

5.42 The most significant aspect of the law dealing with consent is the requirement that the judge must give specific directions to the jury relating to consent. Chapter 8 deals with a range of issues relating to jury directions. However, because jury directions on consent are closely related to the elements of sexual offences, we also deal with them in this Chapter.

Victorian Law

WHAT JUDGES MUST TELL JURIES

5.43 Victoria introduced mandatory jury directions on consent in 1991.¹⁷² The law now provides that in a relevant case,¹⁷³ the judge must direct the jury about two things. Firstly, the judge must direct the jury that the fact that a person did not say or do anything to indicate free agreement to a sexual act is normally enough to show that the act took place without that person's free agreement. Secondly, the judge must give a direction that a person is not to be regarded as having freely agreed to a sexual act just because she did not protest or physically resist, or sustain physical injury, or because she freely agreed to engage with anyone in a sexual act (either earlier or on the same occasion).¹⁷⁴ The judge must relate the direction to the facts of the case to help the jury understand it.

5.44 The mandatory jury directions reinforce the emphasis on free agreement in the definition of consent.¹⁷⁵ The wording of the direction indicates that failure on the part of the complainant to say or do anything is 'normally' sufficient evidence that the complainant did not 'freely agree' to penetration. This does not mean that a person can be charged with rape simply because the complainant did not verbally agree to penetration. Other indications of consent—for example, gestures or non-verbal behaviour—may provide evidence of consent.

172 *Crimes Act 1958* s 37, inserted by *Crimes (Rape) Act 1991* s 3. The section was amended again by *Crimes (Amendment) Act 1997* s 4, which inserted the words 'If relevant to the facts in issue in a proceeding' in s 37(1), inserted the additional words beginning 'and relate any' at the end of (c) and inserted sub-section (2).

173 See below para 5.45.

174 This provision supplements the sexual history provisions in the *Evidence Act 1958* s 37A. Provisions relating to sexual history are discussed in Chapter 8.

175 See above para. 5.25.

WHEN A JUDGE HAS TO GIVE THE DIRECTION

5.45 The judge must give a jury direction in all cases where it is relevant to an issue in the proceedings. This recognises that a direction will not always be relevant. For example, a direction would not be relevant in a case involving only a dispute as to the identity of the accused.¹⁷⁶

HOW COURTS HAVE INTERPRETED THIS LAW

5.46 In *R v Laz*¹⁷⁷ the trial judge gave this direction to the jury:

Consent is a state of mind. It means free agreement. It may be evidenced by what she says and does or what she does not say or do. Evidence that the woman did not say or do anything is evidence that she did not consent.

5.47 The accused was convicted. He appealed to the Court of Appeal, arguing that this direction was unfair. The Court of Appeal decided that the mandatory jury direction only requires the trial judge to direct the jury's attention to the fact that, in general, people do not engage voluntarily in sexual activities without indicating by word and action in some way their preparedness to do so.¹⁷⁸

5.48 The Court of Appeal held that the trial judge's interpretation of what jury direction judges are required to give under the law would constitute a quite radical change to the law. The Court argued that if Parliament had intended that failure to say or do anything could be sufficient evidence of lack of consent, this would have been spelled out in the legislation more clearly.

5.49 The Commission's view is that the Court of Appeal's decision does not take sufficient account of the policy aims of the mandatory jury direction. Parliament did not require judges to give the direction in order to change the fact that the prosecution must prove beyond reasonable doubt that the complainant did not freely agree to penetration. Parliament did intend to require judges to direct juries that the failure of the complainant to do or say something is 'normally' sufficient evidence that she did not consent. An accused who does not produce evidence that the complainant said or did something indicating consent may be convicted.¹⁷⁹

176 In her Second Reading Speech for the Crimes (Amendment) Bill 1997 (9 October 1997), the then Attorney-General, Jan Wade, said that directions had been given in situations where they had no relevance to the issue at trial. For example, the direction relating to a prior sexual relationship between the accused and the complainant had been given where there was no such relationship.

177 [1998] 1 VR 453.

178 [1998] 1 VR 453, 460.

179 For discussion see David Brereton, 'Real Rape, Law Reform and the Role of Research: the Evolution of the Victorian *Crimes Act 1991*' (1994) 27 *Australia and New Zealand Journal of Criminology and the Law* 74; Bernadette McSherry, 'No Means No' (1991) 18 *Alternative Law Journal* 27.

Comparison with the Model Criminal Code

5.50 The MCC also requires judges to direct juries about consent. However, the direction specified in the MCC uses different wording to the law in Victoria. It omits the word ‘normally’ and indicates that juries should be told that a person is not to be regarded as having consented ‘just because’ of failure to say or do anything.

5.51 The MCCOC expressed concern that the jury direction required by law in Victoria may establish a presumption of lack of consent to penetration whenever a person did not say or do anything to indicate consent. This would be inconsistent with the onus borne by the prosecution in criminal trials of establishing all the elements of the offence with which the accused has been charged, including the lack of consent, beyond reasonable doubt.¹⁸⁰ The Court of Appeal’s decision in *R v Laz* makes it clear that the law in Victoria does not have this effect.

5.52 The Commission’s tentative view is that it would be inappropriate to adopt the MCC provision on jury directions as to consent. The Victorian reforms to sexual offences law were intended to give people greater protection against emotional and physical harm caused by unwanted sexual penetration and to educate members of the community about acceptable sexual conduct. Their effect was to reorientate rape law towards a more egalitarian and communicative model of sexuality, and away from the idea that the ‘normal’ pattern of heterosexual sexual behaviour involves ‘persuasion’, often amounting to coercion, on the part of men and passive acquiescence on the part of women. The approach taken to jury directions on consent in the MCC does not reflect these goals as clearly as the Victorian law.¹⁸¹

5.53 Because of the decision in *R v Laz*, it may be desirable to change the mandatory jury direction to make the intention clearer. On the other hand, attitudinal changes on the issue of consent are unlikely to be achieved by changes to the substantive law alone. Instead, it may be necessary to consider ways of educating members of the community, including lawyers and judges, to think differently about sexual behaviour and the nature of sexual autonomy. We will consider these issues in more detail during the next stage of this reference.

¹⁸⁰ MCCOC, Report (1999), above n 5, 265.

¹⁸¹ See the criticisms made by various people in submissions to the MCCOC, discussed in MCCOC, Report (1999), above n 5, 265, n 277.

? QUESTIONS

5. How are Victorian judges directing juries about consent?
6. Should the mandatory jury direction on consent be changed to make it clear that the failure of a complainant to say or do anything indicating free agreement is sufficient, of itself, to amount to evidence of lack of consent? (In other words, prima facie evidence).

The Intention of the Accused

VICTORIAN LAW

5.54 As well as proving that the accused intentionally sexually penetrated the complainant without her consent, the prosecution must also prove that the accused was aware that the complainant was not consenting, or might not be consenting.¹⁸²

5.55 In this section, we discuss three issues relating to the state of mind of the accused. These concern:

- the effect of an honest, but unreasonable, belief as to consent;
- whether a person who did not intentionally penetrate another without their consent, but was negligent as to the existence of consent, should be guilty of any offence; and
- differences between Victorian law and the MCC on other issues relating to the accused person's state of mind.

Honest but Unreasonable Belief as to Consent

5.56 In Victoria, a person cannot be convicted of rape if they acted in the belief that the complainant had consented to penetration, even if that belief is objectively unreasonable.¹⁸³ This 'subjective' approach to intention is based on the House of Lords decision in *DPP v Morgan*.¹⁸⁴

¹⁸² *Crimes Act 1958* s 38.

¹⁸³ *R v Maes* [1975] VR 541; *R v Saragozza* [1984] VR 187.

¹⁸⁴ [1976] AC 182.

5.57 The LRCV's 1991 Report recommended retention of the subjective test of intent.¹⁸⁵ The LRCV's research showed that the state of mind of the accused was rarely the main focus of rape trials. Trials tended to focus on the question of whether or not the complainant had consented to penetration, rather than on whether the accused had a mistaken belief as to consent. There was little evidence that a change to this principle would result in a higher conviction rate of people accused of rape. The report states that:

It is not surprising that the mental element is rarely the main issue in rape trials. Contrary to claims made by some critics of existing rape laws, 'mistaken belief in consent' is normally not a very attractive line of defence to run. This is because it involves a major concession by the defence, namely that the complainant may not, in fact, have been consenting.¹⁸⁶

5.58 The LRCV argued that it would be unfair to convict 'stupid or credulous' individuals in order to 'get the message across' about acceptable behaviour.¹⁸⁷ Instead, it recommended the inclusion of a provision into the *Crimes Act 1958* (s 37(1)(c)), which requires the judge to direct the jury that:

... in considering the accused's alleged belief that the complainant was consenting to the sexual act, [the jury] must take into account whether that belief was reasonable in all the relevant circumstances.

5.59 The effect of this provision is that juries have their attention drawn to the reasonableness of the alleged belief of the accused. If the belief is highly unreasonable, as was the case in *DPP v Morgan*,¹⁸⁸ where a man brought home three colleagues to have sex with his wife, telling them to ignore her protests because they were simply a pretence designed to heighten her sexual pleasure, the jury is unlikely to accept that the accused believed the complainant consented.¹⁸⁹

5.60 Like the LRCV, the MCCOC recommended retention of the subjective test for consent, coupled with provision for a jury direction along the lines contained in the *Crimes Act*.¹⁹⁰ Our tentative view is that no change should be made to this principle.

185 LRCV, Interim Report No 42 (1991), above n 22, 12-16.

186 Ibid 13.

187 Ibid 16.

188 [1976] AC 182.

189 The accused were convicted of rape in *Morgan*.

190 MCCOC, Report (1999), above n 5, 83.

? QUESTION

7. Should it continue to be the law that a person with an honest but unreasonable belief that the complainant has consented to penetration cannot be convicted of rape?

Negligence as to Consent

5.61 Some commentators have supported the introduction of an offence, carrying a lower maximum sentence than that for rape, which would permit conviction of an offender who penetrates another person without their consent, but who lacks the necessary subjective intention required for a rape conviction. An offence of this kind could penalise people who fail to take reasonable care to obtain agreement to sexual penetration from a complainant, but who did not intend to penetrate the complainant without her agreement. This offence would be comparable with other offences which punish people for criminal negligence which harms others.¹⁹¹ It would cover situations where an accused has a genuine, but unreasonable, belief in consent.

ARGUMENTS FOR A NEW OFFENCE

5.62 The argument in favour of creating such an offence is that it would recognise that unwanted sexual penetration is a significant harm. It would create an incentive for individuals to take greater care in obtaining agreement from people with whom they have sexual contact. An offence of this kind could play a role in educating people about appropriate sexual conduct, while acknowledging a difference in moral culpability between a person who penetrates another knowing of their lack of consent, and a person who is grossly careless about obtaining consent.

ARGUMENTS AGAINST CREATING A NEW OFFENCE

5.63 In its 1991 Report, the LRCV rejected the creation of such an offence, largely on the grounds that it would add to the complexity of the law. The LRCV also believed that there was a risk that the creation of a lesser offence would lead to fewer, rather than more, convictions for rape, because 'there is considerable anecdotal evidence that juries are sometimes reluctant to convict of serious offences when a less harsh alternative is available'. Such an offence could also 'lead to overly conservative prosecution practices on the

¹⁹¹ See, for example, *Crimes Act 1958* s 24.

part of the prosecuting authorities'.¹⁹² Arguably, a provision of this kind could create another form of injustice. If members of the jury cannot agree either on whether the penetration occurred without the free agreement of the complainant, or on whether the accused was aware that the complainant did not consent or might not be consenting, they could compromise by convicting the accused of negligent penetration, when the correct verdict may be an acquittal of all offences. The submissions received by the LRCV at that time did not support the creation of an offence of negligent sexual penetration.

5.64 The MCCOC proposed an offence of 'negligent sexual penetration' in its Discussion Paper.¹⁹³ However, the creation of an offence of negligent sexual penetration was not recommended in its Report for reasons similar to those given by the LRCV, and because most submissions received by MCCOC were opposed to the creation of such an offence. The Commission would welcome views on whether such an offence should be created.¹⁹⁴

? QUESTION

8. Should the *Crimes Act 1958* be amended to create an offence of negligent penetration, covering people who were guilty of a gross failure to take reasonable care to obtain consent?

Differences Between Victorian law and the Model Criminal Code

5.65 Under section 38 of the Crimes Act, a conviction for rape requires the accused to be aware that the complainant 'is not consenting or might not be consenting'. In *R v Costa*,¹⁹⁵ the Court of Appeal considered the meaning of the word 'might'. The Court held that a jury can convict a person of rape

¹⁹² LRCV, Final Report No 43 (1991), above n 22, 18–19.

¹⁹³ MCCOC, Discussion Paper (1996), above n 134, 83–7.

¹⁹⁴ There has been discussion in Denmark about whether such an offence (which did exist there before 1980) should be reinstated. The Joan Sisters, a group set up in 1975 to campaign for the rights of rape victims, support such an offence on the basis that it may result in more convictions. They argue that for rape victims, the fact that the defendant is convicted of some offence is more important than the level of punishment. See Dublin Rape Crisis Centre and School of Law, Trinity College, *The Legal Process and Victims of Rape* (1998), 196.

¹⁹⁵ Unreported, Victoria, Court of Criminal Appeal, Phillips CJ, Callaway JA and Southwell AJA, 2 April 1996, available from Butterworths Unreported Judgments, BC 9601208, 16.

if satisfied that the complainant did not consent to penetration and that the accused knew that there was a possibility that she was not consenting.¹⁹⁶

5.66 There are two differences in the way belief in consent is treated in the law in Victoria and in the MCC. These are:

- the MCC uses the word ‘recklessness’, whereas the Victorian law uses the phrase ‘might not be consenting’; and
- in the MCC, an accused person who does not think about whether the complainant consented to sexual penetration is considered to be reckless, and can be convicted of rape.

5.67 The MCC refers to the accused ‘knowing about or being reckless as to the lack of consent’.¹⁹⁷ The MCC also contains a general definition of ‘recklessness’. This states that a person is reckless as to a circumstance if they are aware of a substantial risk that the circumstance will exist, and having regard to the circumstances known to them, it is unjustifiable to take the risk.¹⁹⁸

5.68 In *R v Costa*,¹⁹⁹ the Court of Appeal criticised the use of the concept of ‘recklessness’ in jury directions in sexual offence cases, because people other than lawyers use the expression in a non-technical way. While this could perhaps be overcome by defining ‘recklessness’ in the legislation, as is done in the MCC, our tentative view is that the expression ‘might not be consenting’ in the Crimes Act is more likely to be understood by juries.

5.69 It is also arguable that the MCC definition of ‘recklessness’, under which a person is reckless if they know that there is a substantial risk that another person is not consenting to sexual penetration with them, would preclude the conviction of an accused who thought there was a possibility

196 In NSW, it has also been held that recklessness includes foresight as to the *possibility* of non-consent: see *R v Hemsley* (1988) 36 A Crim R 334. Gillies refers to this problem as one of prescribing ‘the risk level which must be established’: Peter Gillies, *Criminal Law* (4th^{ed}, 1997) 63 and discussion 63–5.

197 MCC, MCCOC Report (1999), above n 5, Appendix 2, 5.2.6.

198 *Ibid*, 5.4. In *Model Criminal Code: Chapter 2: General Principles of Criminal Responsibility—Report* (1992) 29, the MCCOC said that recklessness had been defined in terms of ‘substantial risk’ rather than in terms of probability or possibility because these terms invite speculation about mathematical chances and ignore the link between the degree of risk and running that risk in any given situation.

199 Unreported, Victoria, Court of Criminal Appeal, Phillips CJ, Callaway JA and Southwell AJA, 2 April 1996, available from Butterworths Unreported Judgments, BC 9601208, 16.

that a complainant was not consenting to penetration, but did not think there was a substantial risk of this. (This does not appear to have been the intention of the MCCOC).²⁰⁰

5.70 At common law, a person who thinks there is a possibility that another person is not consenting to penetration (not substantial risk, or probability) but goes ahead with the act of penetration, is guilty of rape.²⁰¹ Our view is that this is the correct principle, which is clearly reflected in the words of the Crimes Act.

5.71 The other difference between the law in Victoria and the MCC is that the MCC makes it clear that an accused who simply gives no thought to whether the complainant consented to sexual penetration is reckless about consent.²⁰² This is consistent with the approach taken in New South Wales to the interpretation of 'recklessness' in the context of sexual offences.²⁰³

5.72 It is not clear whether the same principle applies in Victoria. In *R v Costa*,²⁰⁴ the Court of Appeal referred to 'conscious advertence' to the possibility that the complainant did not consent to sexual penetration. This suggests that, in Victoria, the prosecution must prove that an accused did think about whether or not the complainant was consenting.

5.73 The concept of recklessness generally requires that the person accused of an offence directs their mind to the existence of a risk of harm and performs the harmful act regardless of the risk.

5.74 It could be argued that people who have not thought about the risk of doing something should not be convicted of an offence, because criminal responsibility is based on proving that a person intended to commit an offence, or, in other words, had a 'guilty mind'.

5.75 On the other hand, it is difficult to justify a distinction under which a person who gives no thought as to whether another person is consenting to sexual penetration does not commit rape, while a person who penetrates another, knowing there was a possibility that they were not consenting, does commit rape. Our tentative view is that the level of moral culpability in both

200 See above paras 5.66–5.67.

201 *R v Kitchener* (1993) 29 NSWLR 696, 701 (Carruthers J); *R v Hemsley* (1988) 36 A Crim R 334, 337 (Yeldham J).

202 MCC, MCCOC Report (1999), above n 5, Appendix 2, 5.2.6(3).

203 See *Crimes Act 1900* (NSW) s 61R and *R v Hemsley* (1988) 36 A Crim R 334; *R v Kitchener* (1993) 37 NSWLR 696; *R v Tolmie* (1995) 37 NSWLR 660.

204 Unreported, Victoria, Court of Criminal Appeal, Phillips CJ, Callaway JA and Southwell AJA, 2 April 1996, available from Butterworths Unreported Judgments, BC 9601208, 16.

of these situations is similar, therefore the legal consequences in both situations should also be the same.²⁰⁵ This distinction is also very technical.²⁰⁶ In practice, it probably has little effect on the outcome of trials. Juries are unlikely to believe an accused who says that he gave no thought to whether the complainant consented to sexual penetration.

? QUESTIONS

9. Should Victoria adopt the concept of recklessness used in the Model Criminal Code for deciding whether an accused person has the intention to commit rape?
10. Should the law be changed to make it clear that a person who does not give any thought as to whether another person is consenting to sexual penetration is guilty of rape?

INDECENT ASSAULT

Victorian law

5.76 The offence of indecent assault punishes non-consensual sexual acts which do not involve penetration. For example, a person who touches a woman's breast without her consent may be guilty of indecent assault.

5.77 The meaning of consent and requirements as to mandatory jury directions on consent, discussed above in relation to rape, also apply to indecent assault. As in the case of rape, the accused can only be convicted if he is aware that the complainant is not consenting or might not be consenting.

5.78 The offence of indecent assault does not include a definition of 'assault'. At common law, an assault occurs when a person applies physical force (even a touch is sufficient) to the victim's body, without their consent,

²⁰⁵ See *R v Kitchener* (1993) 29 NSWLR 696; see also *R v Tolmie* (1995) 37 NSWLR 660.

²⁰⁶ See the similar comment by Kirby P in *R v Tolmie* [1995] 37 NSWLR 660, 669.

or puts them in a situation where they believe that unlawful force will be applied to them.²⁰⁷ This definition probably applies to indecent assault.²⁰⁸

COMPARISON WITH THE MODEL CRIMINAL CODE: INDECENT ASSAULT OR INDECENT TOUCHING

5.79 While this offence is called indecent assault in Victoria, the MCC uses the term ‘indecent touching’.²⁰⁹ This reflects the structure of the MCC, which distinguishes between offences that involve penetration, offences that do not involve penetration but involve touching, and offences that do not involve touching and apply only to children, young people and people with impaired mental functioning.

5.80 Because the Victorian offence appears to incorporate the common law definition, it may include a wider range of sexual acts than the MCC offence of indecent touching. The MCC offence does not cover acts which do not involve touching.²¹⁰ In England, it has been held that an accused person who takes another’s hand and places it on the accused’s penis, or who exposes himself and approaches a bystander so as to put the bystander in fear that they will be touched, commits an indecent assault.²¹¹ Such a situation would not be included within the MCC offence.

5.81 A possible advantage in using the word ‘touching’ is that juries may understand it better than the word ‘assault’.

5.82 If Victoria adopted the crime of ‘indecent touching’ instead of the crime of indecent assault, it would be necessary to consider whether a lesser offence should also be introduced covering sexual acts not involving touching.²¹²

207 See Bronitt and McSherry, above n 94, 531 ff; *Fagan v Metropolitan Police* [1969] 1 QB 439, 444 (James LJ).

208 A similar view was reached in interpreting the English *Sexual Offences Act 1956*, s 14(1): see *R v Court* (1989) AC 28, 41–42 (Lord Ackner). Compare *Crimes Act 1958* s 40 which includes a definition of assault for the purpose of the offence of assault with intent to rape. The offences of assault and assault with intent to rape expressly include situations where a person threatens to assault another person. These words are not included in the offence of indecent assault. Therefore, it could be argued that the offence of indecent assault was not intended to cover situations where a person puts another person in fear of assault: see below para 5.109.

209 MCC, MCCOC Report (1999), above n 5, Appendix 2, 5.2.8.

210 Except in the case of children, young people and people with impaired mental functioning. These offences are discussed in Chapters 6 and 7.

211 *R v Rolfe* (1952) 36 Cr App R 4; *Beal v Kelley* (1951) 35 Cr App R 128.

212 If the victim is a child, the offender could be charged with committing an indecent act in the presence of a child: *Crimes Act 1958* s 47: see below paras 6.71–6.76. Similar offences apply to people providing care to mentally impaired persons: see ss 51–2.

5.83 It would also be necessary to take account of the fact that the expression 'assault' is used in several parts of the Crimes Act. If the expression 'touching' were substituted it would be desirable to use it consistently throughout the Crimes Act. The Commission would welcome views as to whether this change should be made.

SHOULD 'INDECENT' BE DEFINED?

5.84 The Crimes Act does not define the word 'indecent'. Courts have held that 'indecent' is an ordinary word in the English language and it is for the jury to decide whether the facts of a case amount to indecency.²¹³ Thus, it is normally unnecessary for the judge to explain the meaning of indecency to the jury.

5.85 The MCC defines 'indecent' as 'indecent according to the standards of ordinary people', and makes it clear that 'indecency is a matter for the jury to decide'.²¹⁴ The Commission would welcome comments on whether there is a need to define 'indecent' in the Crimes Act and whether the MCC definition is appropriate.

THE INTENTION OF THE ACCUSED

5.86 In most cases where an accused person is charged with indecent assault, the act is obviously sexual, so the question of whether the accused intended that the act should be indecent does not arise.²¹⁵ In England, courts have held that the accused must have an intention to commit an indecent act.²¹⁶ This is probably also the law in Victoria.²¹⁷

5.87 The MCC requires that the accused person must either know that the touching is indecent or be reckless with regard to that fact. As has been seen above, the MCC defines recklessness as awareness that there is a substantial risk that an act is indecent. The Commission seeks views as to whether the law in Victoria should be changed or clarified to include situations where an accused person is aware that there is a possibility that an act is indecent, or gives no thought as to whether or not it is indecent.²¹⁸

213 *R v Nazif* [1987] 2 NZLR 122, 127. It has also been said that 'indecent' conduct is conduct which would be considered indecent by 'right minded people' or 'so offensive to contemporary standards of modesty or decency as to be indecent': *R v Court* [1989] AC 28, 42 (Lord Ackner).

214 MCC, MCCOC Report (1999), above n 5, Appendix 2, 5.2.2.

215 *R v Court* [1989] AC 28, 42–3 (Lord Ackner).

216 *R v Court* [1989] AC 28.

217 This is consistent with the decision of the High Court in *He Kaw Teh* (1985) 157 CLR 523.

218 Compare the approach discussed in relation to rape, above paras 5.66–5.75.

? QUESTIONS

11. Should the crime of 'indecent assault' be changed to the crime of 'indecent touching'? If so, should it also be an offence to make someone believe that they will be indecently touched?
12. Should the term 'indecent' be defined in the *Crimes Act 1958*? If so, should the definition of 'indecent' in the Model Criminal Code be adopted in Victoria?
13. Should this crime be amended to clarify what the prosecution must prove about the intention of the accused? If so, should the prosecution be required to prove that the accused intended to commit an indecent act, or should the crime also include situations where an accused person is aware that there is a possibility that an act is indecent?

STALKING**Victorian Law**

5.88 Stalking is an offence under the *Crimes Act 1958*.²¹⁹ It has three elements:

- repeatedly behaving in a way that a reasonable person would expect to cause another person to become frightened for their safety;
- intending to physically or mentally hurt this person, or make them afraid for their safety. (A person who knows or ought to have known that their behaviour would harm or frighten the victim is taken to have this intention); and
- actually hurting or frightening the person.

5.89 The offence of stalking includes repeatedly following, watching, telephoning or emailing a person. It also covers continually going to a person's home or place of work, interfering with their property or giving them offensive material.²²⁰

²¹⁹ *Crimes Act 1958* s 21A.

²²⁰ Note that this offence also covers behaviour directed at a third person. For example, a person can be convicted of stalking a person if this behaviour was directed at a member of their family.

5.90 In *DPP v Sutcliffe*,²²¹ the Supreme Court held that this offence can have extra-territorial operation provided that there is a 'link' between an offence and Victoria. The facts of this case were that a man living in Victoria used the Internet to stalk a woman living in Canada. The Supreme Court considered that the man could be charged with this offence in Victoria because his actions were performed in Victoria.

5.91 During our preliminary consultations for this reference, members of the Victoria Police Sexual Crimes Squad informed us that they have investigated the behaviour of men who systematically spy on women, enter their homes without their knowledge and take note of their movements, often with the apparent intention of committing sexual offences at a later stage. These men have sometimes been convicted of sexual offences on previous occasions.

5.92 Members of the Squad told the Commission that this behaviour does not necessarily amount to a criminal offence under current Victorian law. The stalking offence is potentially useful in this situation. However, it is not always possible to prove all the elements of this offence. For example, the man may not have repeated this type of behaviour often enough for the requirement of the offence. If police apprehend a man doing this before the victim knows about it, she will clearly not have experienced any actual harm or fear, even though she may be in great danger. Police reported to us that convictions for stalking have sometimes been obtained in this situation on the basis that the behaviour of the accused caused a police officer to fear that the victim would be attacked. This interpretation has not been tested in a superior court.²²²

5.93 In an instance where a person surreptitiously enters a home, but does not take anything, it may not be possible to charge them with burglary.²²³

COMPARISON WITH THE MODEL CRIMINAL CODE

5.94 The MCC also includes a stalking offence.²²⁴ While it covers similar behaviour to the Victorian stalking offence, there are two differences. Firstly,

221 [2001] VSC 43, No 6562 of 2000 (Unreported, Gillard J, 1 March 2001), available at <<http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/vic/VSC/2001/43.html>>.

222 Meeting with Detective Sergeants Paul Tierney and Narelle Fraser from the Sexual Offences Squad (26 July 2001).

223 *Crimes Act 1958* s 76 requires an intention to steal, or to commit an offence involving an assault or involving any damage to the property. These factors may not be present. The common law offence of breaking and entering may be applicable. In some cases this may amount to the summary offence of indecent or offensive behaviour: *Summary Offences Act 1966* s 17(1)(d).

224 MCCOC, *Non Fatal Offences Against the Person: Report* (1998), para 5.1.22.

under the MCC the prosecution must prove that the accused engaged in this behaviour on two occasions. If this was included in Victoria, it would clarify when a person is regarded to have repeated their behaviour often enough to be charged with stalking.

5.95 Secondly, under the MCC it is not necessary to prove that the person being stalked actually feared that the offender would harm them or anyone else.²²⁵ If the Victorian offence was changed to reflect the MCC offence in this way, it would cover situations where the victim was unaware of the fact that she was being stalked by the accused.

5.96 A question which arises in this context is whether activities of the kind described above should be dealt with under a general stalking provision, or whether it would be preferable to introduce a specific offence to cover stalking for sexual purposes. The Victorian stalking offence has been criticised for being too broad.²²⁶ Adopting the MCC offence would give it an even broader effect.

5.97 Expanding this offence to cover people who stalk others as a preface to committing more serious sexual offences runs the risk of including less harmful behaviour which should not be punishable as an indictable offence.²²⁷ It also raises the question of how to achieve the right balance between enabling the police to protect women from sexual offences, and protecting the rights of people who have not committed a serious offence and may not do so.

5.98 It may be preferable to create a specific offence to cover stalking for sexual purposes, rather than to include such behaviour within a broader offence which covers many different types of situations. However, the disadvantage of requiring proof that stalking was for sexual purposes is that it could make it more difficult to obtain convictions of people involved in these activities than is the case at present. The Commission would welcome views on the most appropriate measures for dealing with behaviour which may precede commission of serious sexual offences, such as systematically watching people, entering their homes, loitering outside their homes and following them.

²²⁵ Ibid, para 5.1.23.

²²⁶ Ibid, para 5.1.23. See also Deborah Wiener, 'Stalking: Does the Law Work?' (2001) 75(8) *Law Institute Journal* 67.

²²⁷ MCCOC, ibid 51–63 discusses the difficulties in drafting a stalking offence, though it does not deal specifically with stalking for sexual purposes.

? QUESTIONS

14. Should the offence of 'stalking' be extended to cover situations where the victim does not know what the offender is doing?
15. Should 'stalking for sexual purposes' be included within a general stalking offence? If not, should a new offence be created to cover this situation?
16. What should be the elements of such an offence?

OTHER OFFENCES**Victorian Law****ADMINISTERING A DRUG WITH THE INTENTION OF SEXUALLY PENETRATING A PERSON**

5.99 It is an offence to administer a drug to a person with the intention of making them incapable of resistance and enabling the person administering the drug or another person to have sex with them.²²⁸ This offence focuses on giving a person drugs with the intention of sexually penetrating them. For example, it covers situations where an offender spikes a woman's drink with a drug, in order to have sex with her. It does not require penetration to have actually occurred.²²⁹

5.100 The prosecution must prove that the accused intended to make the complainant incapable of physical resistance to penetration. The Court of Appeal has held that this involves 'something pretty close to rendering the person unconscious'.²³⁰ It is not sufficient for the jury to be satisfied that the accused had the intention to get the complainant drunk or administer a drug to her, so as reduce her inhibitions and make her more willing to consent to sex.²³¹

²²⁸ *Crimes Act 1958* s 53.

²²⁹ A person who actually penetrates someone while they are asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing may be convicted of rape: see above paras 5.25–5.28.

²³⁰ *R v O'Connor* (1992) 59 A Crim R 278, citing the view of the trial judge in that case.

²³¹ *R v O'Connor* (1992) 59 A Crim R 278.

5.101 This is inconsistent with the concept of ‘free agreement’ which is used in Victoria to determine whether a person has been raped, or has consented to sexual penetration.²³² It would be more consistent with the concept of free agreement if this offence covered situations where a person administers a drug to another person so that they are not capable of freely agreeing to sexual penetration. There will, of course, be some situations where the offender cannot be regarded as administering the drug because the complainant administered it to herself.

5.102 It is also an offence to administer a substance to another person which is capable of substantially interfering with their bodily functions, knowing that, or not caring whether, they have not consented.²³³ The maximum sentence for this general offence is five years imprisonment, whereas the maximum sentence for administering a drug with the intention of sexually penetrating a person is 10 years imprisonment. In light of the general offence, it is doubtful whether there is a need for a separate offence covering administering a drug with the intention of sexual penetration. However, if the separate offence was repealed, it would be necessary to consider what maximum sentence was appropriate for the general offence.

5.103 Centres Against Sexual Assault (CASAs) have reported that they are becoming increasingly aware of the number of sexual assaults being committed against young women who have been out to bars and nightclubs. The CASAs have obtained funding from the Victorian Women’s Benevolent Trust to do a project on this issue. The project will consider the extent of this type of sexual violence and develop strategies to address it.²³⁴

ABDUCTING OR DETAINING A PERSON IN ORDER TO SEXUALLY PENETRATE THEM

5.104 It is an offence to abduct a person or detain them against their will with the intention of sexually penetrating them.²³⁵ Like the offence of administering a drug with the intention of sexually penetrating a person, this offence does not require the act of sexual penetration to have actually

²³² See above paras 5.25–5.28.

²³³ *Crimes Act 1958* s 19. See also s 18.

²³⁴ Information available from <<http://www.casahouse.casa.org.au/html/research/htm>>.

²³⁵ *Crimes Act 1958* s 55.

occurred. This situation is also covered by the common law offence of false imprisonment.²³⁶ Arguably, therefore, it may be unnecessary to retain a separate offence.²³⁷

PROCURING SEXUAL PENETRATION BY THREATS, INTIMIDATION OR FRAUD

5.105 It is an offence to procure a person to take part in an act of sexual penetration by threats, intimidation or fraud.²³⁸ In this context 'procure' means to induce, pressure or influence the person to take part in an act of sexual penetration, which they would not otherwise have done.²³⁹ The section does not appear to require that the accused is involved in the act of penetration. It would apply to a situation where threats or fraud result in the complainant taking part in an act of sexual penetration with a third person.

5.106 Some of the situations covered by this offence are also covered by other offences. For example, where a person threatens or intimidates a woman into having sex, so that she did not freely agree to penetration, the offender may be prosecuted for rape.²⁴⁰ If a person threatens to assault a woman if she does not have sex, but penetration does not actually occur, the offender may be charged with assault with intent to rape.²⁴¹

5.107 This offence also covers situations where a person procures another person to have sex by fraud. In a few, very limited situations, using fraud to obtain a person's consent to sexual penetration is considered rape.²⁴² However, most types of fraud do not negate consent for the purposes of rape laws. Fraud was included in this offence to cover these situations.

5.108 For example, in the case of *Papadimitropoulos v R*,²⁴³ a woman who could not speak English and had recently arrived in Australia had sex with a man who tricked her into believing they were married. The High Court held that the man could not be convicted of rape because the woman had consented

²³⁶ *R v Völlmer* [1996] 1 VR 95.

²³⁷ *Archbold Criminal Pleading, Evidence and Practice* (2001) §19–337. In some cases, the offence of kidnapping may apply: see *Crimes Act 1958* s 63A. This requires an intent to gain an advantage. Kidnapping is being reviewed by the Victorian Government as part of its current review of sentencing laws: Arie Freiberg, above n 10, 6–18.

²³⁸ *Crimes Act 1958* s 57.

²³⁹ *R v Pikos* [1967] VR 89 and see *Archbold Criminal Pleading, Evidence and Practice*, above n 237, §20–201.

²⁴⁰ See above paras 5.25–5.28.

²⁴¹ *Crimes Act 1958* s 31.

²⁴² See above para 5.38.

²⁴³ (1957) 98 CLR 249.

to penetration, although her consent was based on a mistaken belief that she was married to him. This man could now be convicted of procuring sexual penetration by fraud.²⁴⁴

ASSAULT WITH INTENT TO RAPE

5.109 It is an offence to assault, or threaten to assault, another person with the intention of raping them.²⁴⁵ This offence does not require penetration to have actually occurred. The maximum penalty for this offence is 10 years imprisonment. Assault is also an offence.²⁴⁶ The maximum penalty for assault is five years imprisonment. Given that both offences cover the same behaviour, the question arises whether it is necessary to retain a separate offence of assault with intent to rape. However, if this offence were repealed, it would be necessary to consider whether the maximum penalty for assault should be increased to cover cases of an assault with the intention of rape.

Comparison with the Model Criminal Code

5.110 The MCC does not include offences equivalent to the Victorian offences covered in this part of the Discussion Paper. Instead, it takes the approach of including within more general offences most of the situations covered by these offences. This approach includes the following offences.

- Abducting or detaining a person in order to sexually penetrate them would be covered by the broader offence of taking or detaining a person without their consent with the intention of committing an indictable offence against them;²⁴⁷
- Procuring sexual penetration by threats would be covered by the broader offence of threatening to cause serious harm;²⁴⁸
- Assault with intent to rape would be covered by the broader offences of intentionally or recklessly causing serious harm or harm;²⁴⁹ and

²⁴⁴ See above paras 5.37–5.41. For another example of the application of this offence see *R v Roy* Unreported, Victoria, Court of Criminal Appeal, Brooking, Teague and Coldrey JJ, 16 November 1993, available from Butterworths Unreported Judgments, BC 9300863, where the accused pretended he was auditioning women for a role in a film and that it was necessary for them to have sex with him to obtain that role.

²⁴⁵ *Crimes Act 1958* s 40.

²⁴⁶ *Crimes Act 1958* s 31.

²⁴⁷ MCCOC (1998), above n 224, para 5.1.30.

²⁴⁸ *Ibid* para 5.1.21.

²⁴⁹ *Ibid* paras 5.1.14, 5.1.18. Harm and serious harm are defined in paras 5.1.1 and 5.1.2.

- Administering a drug in order to sexually penetrate a person would be covered by one of the broad offences which relate to causing harm, or by the laws punishing attempts to commit an offence.²⁵⁰

5.111 The approach taken by the MCC raises the question of whether it would be preferable to prosecute activities, currently treated as specific sexual offences, under more general offences.

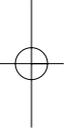
? QUESTIONS

17. Are any of the following offences also covered by any other offences?

- Administering a drug with the intention of sexually penetrating a person.
- Abducting or detaining a person in order to sexually penetrate them.
- Procuring sexual penetration by threats, intimidation or fraud.
- Assault with intent to rape.

If so, should Victoria retain those offences covered by other offences?

²⁵⁰ Ibid 103– 4.



Chapter 6

Sexual Offences Against Children and Young People

INTRODUCTION

6.1 In Chapter 5 we discussed sexual offences, including rape and indecent assault. These offences occur when a person does not consent to a sexual act. They apply to adults, young people and children. This Chapter describes the special sexual offences which apply to people who participate in sexual activities with children and young people. These offences generally apply whether or not the complainant consented.

6.2 Consent is irrelevant for these offences because they are aimed at protecting children and young people. Premature involvement in sexual activity often harms children physically and psychologically.²⁵¹ Victims of childhood sexual abuse often experience long-term effects, including low self-esteem and self-abuse, which significantly damage their lives. Where abuse involves a breach of trust by an older family member or a person in authority over the child, its long-term consequences may be psychologically devastating. While it is expected that adolescents will be involved in some sexual activity, the current law reflects the view that there should be safeguards against sexual exploitation of adolescents by adults who take advantage of young people's immaturity and dependency.

6.3 There are also a number of practical problems relating to evidence and trial procedure in sexual offences cases where the complainant is a child or young person. We deal with these issues in Chapter 8.

251 Elizabeth Ward, *Father-Daughter Rape* (1984); Australian Institute of Criminology, *Sexual Violence in Australia* (2001) 29-30; Paul Mullen and Judith Flemming, 'Long Term Effects of Child Sexual Abuse' (1988) 9 Autumn *Issues in Child Abuse Prevention*.

OFFENCES COVERED

6.4 The main offences contained in the *Crimes Act 1958* and discussed in this Chapter are:

- incest (s 44);
- unlawful sexual penetration (s 45);
- ‘maintaining a sexual relationship’ with a child or young person (s 47A);
- committing an indecent act with or in the presence of a child or young person (s 47); and
- sexual acts committed against a young person by a person in a position of care, supervision or authority over them (ss 48 and 49).

6.5 As we explained in Chapter 5, the law in Victoria differentiates between sexual offences which involve penetration and those which do not. Offences involving penetration have higher maximum penalties. Incest and unlawful sexual penetration are penetrative offences, while the ‘indecent act’ offence does not involve penetration. ‘Maintaining a sexual relationship’ with a child or young person may involve either penetrative or non-penetrative acts, as may sexual acts with a young person committed by a person with authority over them.

6.6 The Model Criminal Code (MCC) takes a different approach. It proposes the following three levels of offences against children and young people, which are intended to reflect the ‘seriousness of the physical nature of the sexual conduct that forms the basis of the offence’:²⁵² They are:

- offences involving penetration;
- offences involving indecent touching; and
- offences involving sexual behaviour which does not involve penetration or touching.

6.7 The MCC also includes offences dealing with sexual acts between young people and people with authority over them. The Commission’s tentative view is that it is unnecessary to adopt the three-level structure in Victoria. We return to this issue below.

²⁵² MCCOC, Report (1999), above n 5, 6.

AGE OF CONSENT

6.8 The offences discussed below penalise sexual activities with people below a certain age. This is commonly described as ‘the age of consent’. This expression is a little misleading, as different ages of consent apply to different offences.

6.9 Under Victorian law, children under the age of 10 can never consent to sexual penetration. For children and young people over the age of 10, the situation is more complex. In some situations, a person who is accused of committing a sexual offence against a person aged between 10 and 16²⁵³ can use the fact that they consented as a defence. For example, consent is a defence where the accused is not more than two years older than the complainant. When the accused is in a position of authority over the complainant, the age of consent for sexual penetration is 18, and for involvement in sexual activities which do not involve penetration, it is 17.

6.10 The age of consent for various sexual activities differs between States and Territories. The Model Criminal Code Officers’ Committee (MCCOC) did not recommend a particular age of consent, but suggested that the age of consent should be the same regardless of whether the sexual activity was with a person of the same or the opposite sex. This approach, which was supported by the vast majority of submissions to the MCCOC, is already the law in Victoria.

INCEST

6.11 The offence of incest punishes acts of sexual penetration between people who are related to each other.

Victorian law

6.12 In Victoria, it is an offence for a person to take part in an act of sexual penetration with a person who is their child, step-child, grandchild²⁵⁴, sibling or half-sibling.²⁵⁵ This includes the case where the child is an adopted child of the accused,²⁵⁶ or the child, adopted child, grand-child or step-child of the de facto spouse of the accused.

253 The age range is between 10 and 16, not including the age of 16.

254 Lineal descendants are covered, so that a great grand-child would also be included.

255 *Crimes Act 1958* s 44.

256 *Adoption Act 1984* s 53.

6.13 Technically, this offence applies to both of the people involved in the act of penetration.²⁵⁷ However, coercion is a defence. This means that a child or young person who is forced to have intercourse with a member of their family has a defence to the crime of incest.

Comparison with the Model Criminal Code

6.14 The MCC crime of incest covers a narrower range of relationships than the Victorian offence. It punishes penetration involving grandparents and parents and their children, and involving siblings and half-siblings. It does not include relationships based on adoption, remarriage or de facto relationships.²⁵⁸ Under the MCC, a person who sexually penetrates a child or young person who is related to them by adoption, remarriage or a de facto relationship, could be prosecuted for unlawful sexual penetration (rape) or sexual penetration of a child or young person.²⁵⁹

6.15 Historically, the crime of incest reflected religious prohibitions on sexual intercourse between family members²⁶⁰ and the belief that ‘interbreeding’ between relatives would inevitably result in the birth of ‘abnormal’ children. Today it is recognised that the scientific basis for making incest a crime is flimsy²⁶¹ and the offence is more frequently justified on the basis that it protects children and young people against sexual abuse. The law in Victoria reflects this policy by making incest applicable to family members who abuse children and young people within their family, even when they are not blood relations.

6.16 A question which arises in comparing the law in Victoria with the incest offence in the MCC is whether incest should be used to prosecute people who sexually abuse children and young people in their families. While the law in Victoria defines incest broadly, in an attempt to protect children, it may be preferable when relatives abuse children to prosecute them for rape, unlawful sexual penetration of a child under 16, or sexual penetration of a young person under the care, supervision or authority of the offender. These offences are discussed below.

²⁵⁷ *Crimes Act 1958* s 35(2).

²⁵⁸ MCCOC, Report (1999), above n 5, para 5.2.34.

²⁵⁹ See below paras 6.20–6.23.

²⁶⁰ Vincent Bailey and Sheila Blackburn, ‘The Punishment of Incest Act 1908: A Case Study of Law Creation’ (1979) *Criminal Law Review* 708; MCCOC, Report (1999), above n 5, 187–8.

²⁶¹ It is also difficult to justify making incest a crime on the basis that it may lead to the birth of children with disabilities, since most people would regard it as abhorrent to make it a crime for unrelated people with genetic defects to have children together.

6.17 A strong argument against using the offence of incest is that the offence stigmatises the victim of the offence.²⁶² As discussed above, in Victoria, this offence applies to both people involved in the act of sexual penetration, although coercion is a defence.

6.18 In Victoria, incest is an offence for adults as well as children and young people. We do not discuss adult incest in this Discussion Paper.²⁶³ However, we note that one argument in favour of retaining the offence of adult incest is that it may permit prosecution of an offender for sexual penetration occurring after the victim turned 18, when this is a continuation of earlier sexual abuse, and there is insufficient evidence to prosecute the offender for rape or sexual penetration of a child or young person.

6.19 The Commission seeks views as to whether people who sexually abuse children and young people in their families should be prosecuted for incest or whether it would be preferable to prosecute them for another offence. If the crime of incest no longer applied, it would be necessary to consider the maximum sentence for offences which involve a breach of trust of this kind.

? QUESTIONS

18. Should a person who sexually abuses a child or young person, who is a member of their family, be prosecuted for the crime of incest, or for another offence such as rape or unlawful sexual penetration of a child?
19. Should a person who sexually abuses a child or young person they are related to by adoption, marriage or because of a de facto relationship, be prosecuted for incest?
20. Would it be preferable to prosecute such people for the more general offence of unlawful sexual penetration of a child?

262 For a more detailed discussion, see Shannon Taylor, *The Legal Construction of Victim/Survivors in Parent-Child Inter-Familial Sexual Abuse Trials in the Victorian County Court in Australia in 1995* (PhD thesis, University of Ballarat, 2001).

263 The MCCOC initially proposed decriminalising incest between adults, but this approach was not followed in the MCC because of strong support for retention of the offence expressed in submissions: MCCOC, Report (1999), above n 5, 195.

UNLAWFUL SEXUAL PENETRATION OF A CHILD

Victorian Law

6.20 It is an offence for a person to take part in an act of sexual penetration with a person under the age of 16.²⁶⁴ The offence of unlawful sexual penetration of a child applies whether the person penetrates, or is penetrated by, the child or young person.²⁶⁵

6.21 A person who sexually penetrates a child or young person may be prosecuted for rape,²⁶⁶ unlawful sexual penetration of a child, or for both offences.²⁶⁷ When the person has a relationship with the child or young person which means that the offence is also incest, he may also be charged with this offence.²⁶⁸ The maximum sentence for rape of a child between 10 and 16 is higher than the maximum sentence for unlawful sexual penetration.²⁶⁹

6.22 A person accused of unlawful sexual penetration of a child aged under 10 can never rely on the child's consent as a defence.

6.23 The situation is more complex if the victim is aged between 10 and 16. A person accused of unlawful sexual penetration of a person aged between 10 and 16 can rely on the following defences:

- that they were married to the complainant.²⁷⁰ (Since in Australia people usually can marry at 18,²⁷¹ this is only likely to apply to couples married in another country, who later come to Victoria);²⁷²

264 *Crimes Act 1958* s 45.

265 *Crimes Act 1958* s 35(2).

266 See above paras 5.10–5.11.

267 See *Crimes Act 1958* s 45. A single act of penetration can only lead to a conviction for one of these offences.

268 See above paras 6.11–6.13.

269 The maximum penalty for rape, unlawful sexual penetration of a child aged under 10, and for incest where the victim is a child or young person, is 25 years imprisonment. The maximum penalty for unlawful sexual penetration of a child aged between 10 and 16 is 10 years imprisonment, or 15 years where the victim is under the care, supervision or authority of the offender: see *Crimes Act 1958* s 45.

270 Where a person aged between 10 and 16 alleges that they have been forced to have sex with someone they are married to, the alleged offender can be prosecuted for rape: see above paras 5.10–5.11.

271 *Marriage Act 1961* (Cth) s 11. Section 12 allows a person of 16 years or over to apply to a magistrate for permission to marry. The other person must be 18 years or over.

272 Under the *Marriage Act 1961* (Cth) Part VA, see particularly s 88E, such marriages may be recognised if neither party was living in Australia at the time of the marriage and it would have been valid under common law rules: see Marcia Neave, 'The New Rules for Recognition of Foreign Marriages—Insomnia for Lawyers' (1990) 4 *Australian Journal of Family Law* 190.

- that the complainant consented, and the accused believed on reasonable grounds that the complainant was aged 16 or older;
- that the complainant consented, and the accused was not more than two years older than the complainant. (The policy behind this defence is that the law should not punish young people of similar ages who have sex, as long as they both consent);
- that the complainant consented, and the accused believed on reasonable grounds that he was married to the complainant. (This could cover the case where a person went through a marriage ceremony which was actually invalid.)

BURDEN OF PROOF

6.24 We have explained that a person accused of unlawful sexual penetration of a child aged between 10 and 16 can rely on the defence that the complainant consented and he believed on reasonable grounds that the complainant was older than 16.²⁷³

6.25 In the 1984 case *R v Douglas*,²⁷⁴ the Supreme Court of Victoria decided that where an accused person relies on a defence based on facts which are 'peculiarly within his own knowledge', then the accused must convince the jury on the balance of probabilities that the defence is established. This suggests that when a person accused of unlawful sexual penetration of a child aged between 10 and 16 relies on a reasonable belief as to age, he must prove:

- that he held this belief; and
- that his belief was reasonable.

6.26 Shortly after the Supreme Court decision in *R v Douglas*, the High Court decided the case of *He Kaw Teh v The Queen*.²⁷⁵ That case involved a defence of honest and reasonable mistake of fact. In that case the High Court applied a principle that, if the defence arose on the facts in the case, the defendant did not have to prove the defence, but the prosecution had to disprove the defence.²⁷⁶

273 Or on the ground of reasonable belief of marriage.

274 [1985] VR 721.

275 (1985) 157 CLR 523.

276 See, for example, (1985) 157 CLR 523, 574–5 (Brennan J) and 592–4 (Dawson J).

6.27 Since the decision in *He Kaw Teh*, different judges have disagreed on whether the principle in *R v Douglas* still applies in Victoria,²⁷⁷ or whether it has been replaced by the principle in *He Kaw Teh*.²⁷⁸ It may be useful to clarify this issue.²⁷⁹

? QUESTION

21. If a person is charged with unlawful sexual penetration of a child or young person aged between 10 and 16, they can defend themselves on the grounds that the complainant consented, and that they believed on reasonable grounds that the complainant was older than 16 (or that they believed on reasonable grounds that they were married). Should the burden of proof in relation to this defence be clarified?

6.28 Under the MCC, the prosecution must prove that the accused did not have a reasonable belief that the complainant was older than 16.²⁸⁰ The MCC approach is consistent with general principles regarding the burden of proof in relation to defences.²⁸¹ However, it could be argued that it is difficult for the prosecution to prove sexual offences, and that the burden of negating a defence of reasonable belief about

Burden of proof

The burden of proof is the obligation of a party in a legal proceeding to prove a particular fact or allegation.

277 *R v J R Francis* (Unreported, Victoria, County Court, Hassett J, 12 December 1995).

278 *R v Gane* (Unreported, Victoria, County Court, Dyett J, 17 February 1994).

279 An important difference between *Douglas* and *He Kaw Teh* is that *He Kaw Teh* was a case in which the 'defence' was a denial of an element of the offence. The High Court concluded that an implicit element of the offence in that case was that the defendant knew a particular fact. By raising the 'defence' that he was honestly and reasonably mistaken about that fact, the defendant was raising a doubt about an element of the offence. As such, the burden remained on the prosecution to remove that doubt by proving that the defendant was not honestly and reasonably mistaken. By contrast, the defence in cases such as *Douglas* (reasonable belief in relation to the age of the complainant) is a true defence. That is, belief in the age of the complainant is not an element of the offence, but if the elements of the offence have been established, a reasonable belief can exclude liability. For this reason it is difficult to directly apply the principle stated in *He Kaw Teh* to cases such as *Douglas*.

280 MCCOC, Report (1999), above n 5, 269.

281 For example, if an accused is on trial for murder and there is a suggestion that the accused killed the victim because the accused believed that his action was necessary in self-defence, the prosecution must prove beyond reasonable doubt that the accused did not actually have that belief or that the belief was not reasonable. The accused does not have to prove the defence, even though it involves matters (the belief of the accused) that are peculiarly within his knowledge.

the age of the complainant is another obstacle to obtaining convictions in sexual offence cases involving children.

6.29 In deciding whether the accused should bear the burden of proving reasonable belief as to age, or whether the general principle should apply (as proposed by the MCCOC), it is important to remember that this defence is only available in Victoria when the complainant consented to penetration. The same issues apply to the defence of reasonable belief of marriage.

? QUESTION

22. If it is necessary to clarify the burden of proof in relation to the defence of reasonable belief as to age (or marriage):

- should the general principle proposed by the MCCOC apply (so that if the accused person raises the defence, the prosecution has to prove beyond reasonable doubt that it is not true); or
- should an accused person who seeks to rely on the defence have to prove it?

Comparison with the Model Criminal Code

6.30 We have seen that in Victoria, a person accused of unlawful sexual penetration of a person aged between 10 and 16 who relies on the defence that he reasonably believed that the complainant was older than 16, or that he was not more than two years older than the complainant, or that they were married, must also prove that the complainant consented to him sexually penetrating him or her.

6.31 The MCC also includes the offence of unlawful sexual penetration of a child.²⁸² The MCC takes a different approach to defences to this offence. Under the MCC, the consent of the complainant is never a defence to a charge of unlawful sexual penetration of a person aged between 10 and 16.²⁸³ However, it is a defence for the accused to be married to the complainant or

²⁸² MCC, MCCOC, Report (1999), above n 5, Appendix 2, 5.2.11. It does not specify particular ages, but allows the specification of a 'no defence' age (under 10 years in Victoria).

²⁸³ Ibid, 5.2.15.

to reasonably believe that they are married.²⁸⁴ It is also a defence if the accused was aged within two years of the complainant,²⁸⁵ or if the accused reasonably believed that the complainant was 16 or older.²⁸⁶

6.32 The effect is that a person who has sex with someone less than two years younger than them, without their consent, could not be charged with unlawful sexual penetration under the MCC.²⁸⁷ This approach presumably reflects the belief that rape, rather than sexual penetration of a child, is the appropriate charge where lack of consent is alleged.

6.33 By contrast, in Victoria, when a complainant who is under 16 alleges that they have not consented to sexual penetration, the accused may be charged either with rape or with unlawful sexual penetration of a child, regardless of whether the offender was within two years of the complainant's age or alleges that they believed the complainant was over 16. This gives prosecutors greater flexibility when deciding how to charge than would apply under the MCC.

6.34 It seems anomalous that under the MCC, where the accused cannot establish one of the defences discussed above,²⁸⁸ he can be charged with either rape or sexual penetration of a child. However, if the accused can argue that one of these defences applies, rape is the only possible charge. The Commission seeks views on the advantages and disadvantages of the drafting structure adopted by the MCCOC.

? QUESTION

23. Under Victorian law, it is not an offence for a person to penetrate another person aged between 10 and 16, if that person consented to sexual penetration and the accused was not more than two years older than the complainant. Under the Model Criminal Code, the defence of similarity of age applies, but consent is irrelevant in this situation. Which approach is preferable?

284 Ibid, 5.2.16.

285 Ibid, 5.2.17.

286 The MCC provides that this is not a defence to a charge of sexual penetration of a child aged under 10. Unlawful sexual penetration of a person aged between 10 and 16 is a strict liability offence (see below para 7.8 for definition). See discussion above n 279. See MCCOC, Report (1999), above n 5, para 5.2.19.

287 The same principle applies if the defence is marriage (where a rape charge is clearly appropriate if penetration occurred without consent).

288 See paras 6.31–6.32.

PERSISTENT SEXUAL ABUSE OF A CHILD

Victorian Law

6.35 It is an offence for a person to 'maintain a sexual relationship' with a person aged under 16.²⁸⁹ This offence was created to overcome problems of prosecuting people who repeatedly sexually abuse a child or young person over a period of time. One significant problem in this situation is that when a person begins to sexually abuse a child while the child is very young and abuses them frequently over several years, it is often difficult or impossible for the victim to identify the separate occasions on which they were abused.²⁹⁰

6.36 The facts of a case called *S v R*²⁹¹ illustrate this problem. In that case, a man was charged with three sexual offences against his daughter. The prosecution alleged that the three incidents occurred at a date or time which could not be specified, within the years 1980, 1981 and 1982 respectively.

6.37 The complainant gave evidence that her father had sexually abused her since she was nine or ten. He began penetrating her when she was about 14 (either in 1979 or 1980) and continued to do so approximately every two months until she left home when she was 17. In her evidence she was only able to describe two specific occasions when her father penetrated her. One occurred when she about 14, but she was unsure whether it occurred in 1979 or 1980. She could recall circumstances associated with the second occasion, but could not recall when it occurred, so the prosecution could not prove that it happened during 1980, 1981 or 1982, which were the years mentioned in the presentment.

6.38 The trial judge directed the jury that they had to be 'satisfied beyond reasonable doubt that at least on one occasion during each of the years ... there was penetration'. 'He also told them they had to decide whether on the three occasions ... the accused did have carnal knowledge of his daughter.'²⁹² He did not indicate what these three occasions were, nor did the prosecution refer to particular occasions.

289 *Crimes Act 1958* s 47A.

290 This may be particularly difficult if the abuse occurred some years previously.

291 (1989) 168 CLR 266.

292 Cited in *S v R* (1989) 168 CLR 269 (Brennan J).

6.39 The accused was convicted, and eventually appealed to the High Court. The High Court allowed his appeal. The High Court decided that for the man to be convicted of the offences, the prosecution had to identify, with certainty, the occasions which were alleged to give rise to the offences. Although it was not necessary to specify particular dates on which the offences occurred, it was necessary for the prosecution to argue the case on the basis of specific acts of intercourse occurring within the years specified.

6.40 The High Court was concerned that the failure to identify the occasions on which the alleged offences took place had deprived the accused of the opportunity to defend himself adequately. Because the prosecution did not specify the occasions on which he was alleged to have committed the offences, he could not raise a specific defence, such as an alibi.²⁹³

6.41 Because the jury had been left under the impression that if they were satisfied an act of intercourse had occurred during each of the periods mentioned in the presentment, they could convict the accused, it was possible that individual members of the jury had identified different offences as having occurred and that the jury had not reached a unanimous verdict on the occurrence of any particular event. It was also possible that the conviction had been based on the jury's view that the accused had a general propensity to commit the offences, rather than on the fact that he had actually done the acts with which he had been charged.

6.42 Ironically, if the evidence had been that only one offence had occurred in each of the relevant years, and the complainant had been able to give evidence of these acts, then the conviction would probably have been upheld. Because the complainant's evidence was that numerous acts of intercourse had occurred on many different occasions and she was unable to separate them, the conviction could not stand.²⁹⁴

6.43 The Full Court of the Supreme Court of Western Australia has suggested that 'some reform would seem desirable to cover the cases where

293 (1989) 168 CLR 266, 275. In this decision, Dawson J also pointed out that the way the case was argued made it impossible to deal with questions of the admissibility of evidence based on similar facts. Further, it is necessary for the accused to know which offence he has been charged with, so that if he is charged with the same offence again he can indicate whether he has been convicted or acquitted of it previously: 276.

294 This irony was identified in *Podirsky v R* (1990) 3 WAR 128, 136 where it was pointed out that the effect of the decision in *S v R* is that 'there is a possibility that the more acts of intercourse or other acts of sexual abuse and the greater the length of time over which they occur, the more difficult it may be to establish that any one of a series of multiple offences has been committed'.

there is evidence of such a course of conduct'.²⁹⁵ Section 47A of the Victorian *Crimes Act 1958*, which is discussed in more detail below, was the result of an amendment intended to deal with this situation.

INTERPRETATION OF THE LAW BY THE COURTS

6.44 Section 47A was first introduced in 1991.²⁹⁶ It originally applied only to offences committed by people who were in a position of care and authority over children. The prosecution was required to prove that during a particular period, the accused committed an act that amounted to a specified offence and that such an act was also committed by the accused on at least two other occasions during the period. Section 47(3) provided that 'it is not necessary to prove the dates or exact circumstances of the alleged occasions'.

6.45 In *R v KRM*, Buchanan JA in the Victorian Court of Appeal said that this offence dispensed with the need to prove particular occasions on which offences have been committed and made it unnecessary for the jury to identify the occasion of each of the three acts relied on by the prosecution. He commented that: 'Otherwise it is difficult to perceive any purpose served by enactment of the section'.²⁹⁷

6.46 However, in an appeal from this decision,²⁹⁸ the High Court interpreted this offence narrowly. McHugh J said that s 47A was to be read against the background of an adversarial criminal justice system which requires the offences with which an accused person is charged to be specified with a high degree of particularity. Section 47A meant that the prosecution did not have to prove the date or exact circumstances of the offence. However, the prosecution could not prove that the accused committed the offence by making a blanket assertion that on three or more occasions the complainant and the accused engaged in an act falling into the specified category. The prosecution still had to prove some particulars and general circumstances in sufficient detail to identify an occasion.

6.47 McHugh J commented that the Victorian Parliament could modify—even abolish—the need for particulars of criminal charges. But it would have to make its intention unmistakably clear.²⁹⁹

295 *Podirsky v R* (1990) 3 WAR 128, 136.

296 *Crimes (Sexual Offences) Act 1991 s 3*.

297 *R v KRM* (Unreported, Victoria, Court of Criminal Appeal, Phillips, Batt and Buchanan JJA, 9 June 1999), available from Butterworths Unreported Judgments, BC 9903460, 6.

298 [2001] HCA 11 (Unreported, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 8 March 2001) <http://www.austlii.edu.au/au/cases/cth/high_ct/2001/11.html>.

299 [2001] HCA 11 paras 14–16 (McHugh J).

CHANGES TO THE OFFENCE

6.48 In 1997, the offence of ‘maintaining a sexual relationship with a child’ was changed in two ways. Firstly, it was extended to cover a broader range of offences.³⁰⁰ Secondly s 47(3), which dealt with the matters which the prosecution had to prove, was also changed. It now provides that:

It is not necessary to prove an act referred to in sub-section (2)(a) or (b) with the same degree of specificity as to date, time, place, circumstances or occasion as would be required if the accused were charged with an offence constituted by that act instead of an offence against sub-section (1).

6.49 When the Attorney-General introduced these changes, she said that they were intended to overcome restrictions imposed on the section by the courts and to clarify that the degree of specificity needed to prosecute a person for this offence is not the same as that required for other sexual offences.³⁰¹

6.50 However, comments made by the High Court in *KRM v R*³⁰² about the effect of the amendments suggest that the High Court might still read them narrowly, in the same way that the Court interpreted the original version of this offence.

6.51 The High Court’s approach emphasises the entitlement of people charged with criminal offences to receive details of those offences, so they can defend themselves adequately. The effect of this approach is that it is likely to be difficult to obtain convictions of those who persistently abuse children. The MCCOC argues that its recommendations strike an acceptable balance between fairness to the accused and protecting children against sexual abuse. In the next section we compare the offence recommended in the MCC with the law in Victoria.

300 The section was amended to extend it beyond offences involving a person in a position of care or authority over a child and to make it clear that the three offences need not be the same offences. See also *KBT v R* (1997) 191 CLR 417, where the High Court interpreted the equivalent offence in Queensland in a similar way.

301 Second Reading Speech by the then Attorney-General, Jan Wade, 9 October 1997.

302 [2001] HCA 11: see, for example, McHugh J at para 17 suggesting that the amendment expresses the way the section has previously been interpreted by the Court and means that ‘the term “occasion” should be understood as referring in a general way to the circumstances accompanying the act’ and Gummow and Callinan JJ at para 68 suggesting that the purpose of the amendment was to require a degree of specificity which was not previously required. It seems difficult to justify the latter interpretation. Note that the Court was considering the legislation in its earlier form, but commented on the effect of the amendments.

Comparison with the Model Criminal Code

6.52 There are six significant differences between the offence recommended by the MCC and the Victorian offence of 'maintaining a sexual relationship with a child'. These concern:

- the name of the offence;
- the description of the offence;
- where the acts must occur;
- what the prosecution has to specify in the charge and prove at the trial;
- the level of detail that the prosecution has to prove; and
- the extent to which the accused person can subsequently be tried again for an offence involving the same complainant.

NAME OF OFFENCE

6.53 Firstly, the Victorian offence is called 'maintaining a sexual relationship'. The MCC refers instead to 'persistent sexual abuse of a child'.³⁰³ In our view, it is inappropriate to describe child sexual abuse as 'a sexual relationship'.³⁰⁴ The wording of the MCC offence is clearly preferable. The Commission's view is that this offence should be renamed 'persistent sexual abuse of a child'. We will use this term when referring to this offence below.

DESCRIPTION OF OFFENCE

6.54 The MCC does not create a new substantive offence. Instead, it makes it an offence to commit three separate sexual offences. By contrast, the law in Victoria comes closer to creating an offence of ongoing sexual abuse (although the effect of this has been read down by the courts).

Read down

To read down an Act or a court decision means to interpret the Act or decision in a narrow or restrictive rather than a broad manner.

303 MCC, MCCOC, Report (1999), Appendix 2, 5.2.14.

304 The Queensland Law Reform Commission has also recommended that the offence of 'maintaining a sexual relationship with a child' in s 229B of the *Criminal Code (Qld)* should be renamed 'persistent sexual abuse of a child': Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report 55, Part 1 (2000) Recommendation 7.1.

? QUESTION

24. Should the offence of 'persistent sexual abuse of a child' be drafted as an offence consisting of several sexual offences, or as a series of several separate acts which are also offences?

WHERE THE ACTS OCCURRED

6.55 The MCC also provides that one offence must have occurred in Victoria, but the others can have happened in another State or Territory.³⁰⁵ This is to prevent an accused person escaping conviction simply because it is not clear where he committed an offence. There is no similar provision in the Victorian offence. Victoria's criminal laws usually only apply to crimes committed in Victoria.³⁰⁶

? QUESTION

25. Should the offence of 'persistent sexual abuse of a child' be drafted to cover situations where one of the acts was committed outside Victoria?

WHAT THE PROSECUTION HAS TO SPECIFY IN THE CHARGE AND PROVE AT THE TRIAL

6.56 The MCC is more explicit than the law in Victoria in setting out the matters which the prosecution has to include in the charge, the matters it does not have to specify, how the judge should direct the jury, and what the prosecution has to prove for the jury to convict a person accused of persistent sexual abuse of a child. It provides that:

- (5) A charge of an offence against this section:
- (a) must specify with reasonable particularity the period during which the offence against this section occurred; and

³⁰⁵ MCC, MCCOC, Report (1999), Appendix 2, 5.2.14 (3).

³⁰⁶ The Queensland Law Reform Commission has recommended that this offence extend to acts committed outside Queensland: Queensland Law Reform Commission, above n 304, 84 and Recommendation 7.2. Note that the Supreme Court has held that the Victorian Parliament has the power under the *Australia Act 1986* (Cth) s 2(1) to create crimes which apply outside Victoria: *DPP v Sutcliffe* [2001] VSC 43, (Unreported, Gillard J, 1 March 2001) No 6562 of 2000. For a discussion of this case, see Greg Reinhardt, 'Stalking—extra territorial effect of legislation' (2001) 75(4) *Law Institute Journal* 77.

(b) must describe the nature of the separate offences alleged to have been committed by the accused during that period.

(6) In order for the accused to be convicted of an offence against this section:

(a) the trier of fact must be satisfied beyond reasonable doubt that the evidence establishes at least 3 separate occasions, occurring on separate days during the period concerned, on which the accused engaged in conduct constituting an offence against this Part in relation to a particular child of a nature described in the charge; and

(b) the trier of fact must be so satisfied about the material facts of the 3 such incidents, although the trier of fact need not be so satisfied about the dates or the order of those occasions; and

(c) if the trier of fact is a jury and more than 3 such occasions are relied on as evidence of the commission of an offence, all the members of the jury must be so satisfied about the same 3 incidents.

(7) In proceedings for an offence against this section, the judge must warn the jury (if any) of the requirements of subsection (6).

6.57 The law in Victoria does not contain equivalent provisions, except in relation to the matters which the prosecution does not need to specify or prove. The Commission's tentative view is that it would be helpful to set these matters out in s 47A. However, their content will depend on the policy decision which is made about the degree of specificity with which offences must be proven. We address this issue next.

? QUESTION

26. The Model Criminal Code offence of 'persistent sexual abuse of a child' states what matters the prosecution has to include in a charge, the matters which it does not have to specify, how the judge should direct the jury, and what the prosecution has to prove. Should the offence be structured this way in Victoria?

LEVEL OF DETAIL

6.58 The MCC offence provides that 'it is not necessary to prove dates or exact circumstances of the alleged occasions on which the conduct constituting the offence ... occurred'. However, it requires the charge to

‘specify with reasonable particularity’ the period during which the offence of persistent abuse occurred and to describe the nature of the separate offences alleged to have been committed ... during that period’. The jury ‘must be satisfied about the material facts of the three such incidents, although need not be satisfied about the dates or the order of those occasions’ and ‘if ... more than three such occasions are relied on as evidence of the commission of an offence, all the members of the jury must be so satisfied about the same three incidents’.³⁰⁷

6.59 In Victoria, ‘(i)t is not necessary to prove an act referred to ... with the same degree of specificity as to date, time, place, circumstances or occasion as would be required if the accused were charged with an offence constituted by that act instead of an offence under s 47A’.³⁰⁸

6.60 We have suggested that the purpose of this provision was to overcome a narrow reading of this offence by courts.³⁰⁹ Our view is that the Victorian provision creates more latitude about the degree of specification of the ‘occasions’ of abuse which is required, although, as we have seen, the High Court has suggested that the new provision should not be interpreted as having this effect.³¹⁰ If this is the case, the section may still not cover situations where the complainant alleges abuse over a lengthy period, but cannot give details of occasions and circumstances.

6.61 The MCCOC recommended that the offence of ‘persistent sexual abuse of a child’ should be introduced because it recognised that it can be difficult to prosecute people who sexually abuse children over a long period. The Commission welcomes feedback about whether the approach taken by the MCCOC is likely to overcome these problems.

6.62 We also welcome other suggestions as to how to address these issues. One possibility would be to remove the requirement of proving that an offence occurred on three separate occasions and to introduce an offence covering continuing abuse. Any such offence would clearly have to balance the protection of children from serious harm against the need to give people accused of the offence a fair opportunity to defend themselves.

307 In Victoria, s 46 of the *Juries Act 2000* permits a majority verdict to be taken in certain cases if the jury is unable to reach a unanimous verdict. If a similar provision were adopted in Victoria, it would need to be adapted accordingly.

308 *Crimes Act 1958* s 47A(3).

309 See above paras 6.34–6.41.

310 See above paras 6.51–6.52.

? QUESTIONS

27. Does the offence of 'persistent sexual abuse of a child' overcome problems in prosecuting people who sexually abuse children over a long period?
28. If not, does the offence of 'persistent sexual abuse of a child' recommended by the MCCOC achieve this?

DOUBLE JEOPARDY

6.63 As a general principle of criminal law, a person cannot be prosecuted more than once for the same crime. For example, if a person has been put on trial for rape in relation to a particular incident and is found not guilty, he cannot later be put on trial for indecent assault in relation to the same incident. This is commonly referred to as the rule against 'double jeopardy'.

6.64 A charge of maintaining a sexual relationship under s 47A can encompass all sexual offences by the accused against the complainant during the period specified in the charge.

6.65 If a person has been tried on a charge under s 47A in relation to a particular complainant, it may be unclear exactly what activities were covered by that charge if, at a later stage, the prosecution charges the person with other sexual offences involving the same complainant.³¹¹ The general rule against double jeopardy would apply; however, there may be some uncertainty as to precisely how it would apply.³¹²

6.66 The MCC expressly deals with this issue by providing that:

A person who has been convicted or acquitted of an offence against this section may not be convicted of another offence against this Part [i.e. another sexual offence] in relation to the same child that is alleged to have been committed in the period during which the accused was alleged to have committed an offence against this section. This subsection does not prevent an alternative verdict.³¹³

311 See, for example, the comments of Dawson J in *S v The Queen* (1989) 168 CLR 266, 276–7. See also Queensland Law Reform Commission, above n 304, Part 2 (2000) 444–7.

312 The accused may be able to enter a plea of 'autrefois convict' or 'autrefois acquit' (this means that they have been convicted or acquitted of the same offence on another occasion) under s 394 of the *Crimes Act 1958*.

313 MCC, MCCOC, Report (1999), Appendix 2, 5.2.14(8).

? QUESTIONS

29. Should the Victorian legislation include a provision dealing specifically with the issue of double jeopardy?
30. If so, should it be based on the provision in the Model Criminal Code, or should some other model be adopted?

INDECENT ACTS**Victorian Law**

6.67 The main sexual offence relating to children and young people which does not involve sexual penetration is committing an indecent act with, or in the presence of, a child or young person aged under 16.³¹⁴

6.68 This offence covers both sexual assaults and acts of indecency which do not involve an assault, for example photographing a child or young person in an indecent situation or making them a spectator to sexual activities between other people.

Comparison with the Model Criminal Code

6.69 There are three significant differences between this offence in Victoria and the equivalent offence in the MCC. These relate to:

- distinguishing between sexual assault and other indecent acts;
- defining indecency; and
- defences.

SEXUAL ASSAULT AND OTHER INDECENT ACTS

6.70 As already mentioned, the MCC differentiates between sexual acts involving touching and those which do not, with the former attracting a higher maximum sentence. We have already expressed the tentative view that it is not necessary to adopt this structure in Victoria.³¹⁵ In our view, Victorian

314 *Crimes Act 1958* ss 47, 49.

315 See above para 6.7.

law is flexible enough to enable courts to take into account the seriousness of each offence when sentencing people convicted of committing an indecent act (along with other relevant matters).

? QUESTION

31. Would there be any advantage in introducing separate offences for indecently touching a child or young person, and indecent acts relating to children and young people which do not involve touching?

DEFINING INDECENCY

6.71 As already seen, the MCC defines 'indecent' to mean 'indecent according to the standards of ordinary people'.³¹⁶ By contrast, in Victoria the word is not defined in legislation and it is up to juries to interpret what it means in each case.³¹⁷

? QUESTION

32. Should the expression 'indecent act' be defined? If so, how should it be defined?

DEFENCES

6.72 In Victoria, a person who is prosecuted for this offence can rely on the following defences:

- that the complainant consented, and the accused also believed on reasonable grounds that the complainant was 16 years or older;
- that the complainant consented, and the accused was not more than two years older than the complainant;
- that the complainant consented, and the accused believed on reasonable grounds that they were married.

316 See MCC, MCCOC, Report (1999), Appendix 2, 5.2.2.

317 See above paras 5.84–5.85.

6.73 The MCC provides that consent of the complainant is not a defence to this offence. Under the MCC, an accused person who was not more than two years older than the complainant, or who could convince the court or jury that he believed on reasonable grounds that the complainant was aged 16 or older, or that he was married to her, would have a defence.³¹⁸ Unlike the Victorian law, under the MCC, an accused person would not also have to prove that the complainant consented.

6.74 The effect of this appears to be that, under the MCC, when one of these defences applies, but the complainant did not consent, there is no sexual offence with which the person can be charged. For example, if a 13-year-old boy indecently touches an 11-year-old girl without her consent, the defence appears to apply. This is an anomalous result, which would not occur in Victoria.

6.75 In Victoria, the defence that the accused was not more than two years older than the complainant applies when a child under the age of 10 consents to the indecent act. When both the children are under 10 they are in any case regarded as incapable of committing a crime.³¹⁹ However, where a child aged 9 and a child of 11 are involved in sexual activity falling short of penetration, and both consent to the act, neither is guilty of an offence.³²⁰ Under the MCC, this defence does not apply if the complainant was under the age of 10.

? QUESTION

33. Should similarity of age be a defence if a child is accused of committing an indecent act with a child aged under 10?

318 See MCC, MCCOC, Report (1999), Appendix 2, 5.2.16, 5.2.17.

319 *Children and Young Persons Act 1989* s 127.

320 Note that this is not the case when there is actual penetration.

OFFENCES COMMITTED BY PEOPLE IN POSITIONS OF CARE, SUPERVISION OR AUTHORITY

6.76 Victorian law and the MCC require an age of consent higher than 16 when a person engages in sexual acts with a child or young person over whom they have supervision or authority. This is intended to deter people in authority from becoming sexually involved with young people in their care. It reflects the belief that an imbalance of power in this situation may negate the consent of a young person to take part in sexual activity.

When is a Person in a Position of Care, Supervision or Authority?

VICTORIAN LAW

6.77 The meaning of the phrase 'care, supervision or authority' is not defined in legislation in Victoria, but has been considered by the courts. It covers temporary supervision, such as a situation where a person is responsible for young people at a youth camp. It also covers established and ongoing relationships involving care, supervision or authority, where a person is in a position to exploit or take advantage of the influence which grows out of that relationship. For example, for a teacher, the relationship of care continues after a teaching period concludes and covers contact outside school hours.³²¹

COMPARISON WITH THE MODEL CRIMINAL CODE

6.78 Unlike the Victorian law, the MCC defines a person in a position of care, supervision or authority. The definition recommended in the MCC (5.2.21(2)) covers:

- school teachers and students;
- parents, including step-parents, foster parents, adoptive parents, legal guardians, legal custodians and children;
- religious instructors;
- counsellors;
- health professionals and patients; and
- police and prison officers and young people in custody.

This is an exhaustive definition.

³²¹ *R v Howes* (Unreported, Victoria, Court of Appeal, Winneke P, Brooking and Chernov JJA, 11 September 2000), available from Butterworths Unreported Judgments, BC 200005738.

6.79 Some offences which constitute the crime of incest in Victoria (for example sexual penetration of a step-child, or of the child or a step-child of a de facto partner) are included in this offence in the MCC. We have discussed above³²² whether sexual penetration of a child or young person by a step-parent or other person in a quasi-parental relationship should be treated as incest, or prosecuted under a more general offence of the kind discussed here.

6.80 The MCC definition was intended to state clearly all the people to whom this offence applies, in order to indicate the distinction between lawful and criminal behaviour.³²³ A disadvantage of this approach is that it may exclude some people involved in sexual activity with young people who do not fit within the above categories, for example, leaders of youth groups. This could be overcome by making the list non-exhaustive, although this would make the scope of the offence less clear.

6.81 By contrast, the Victorian offence is potentially broader. However, lack of clarity about the scope of relationships it covers is a possible disadvantage of the current Victorian approach.

? QUESTIONS

34. Should the law in Victoria specify the people covered by the offences relating to sexual acts with a young person aged 16 or 17 who are under their care, supervision or authority?
35. If so, what groups of people should the definition cover?

³²² See above paras 6.14–6.19.

³²³ MCCOC, Report (1999), above n 5, 167.

Sexual Penetration

VICTORIAN LAW

6.82 It is an offence for a person to take part in an act of sexual penetration with a young person aged 16 or 17 who is under their care, supervision or authority, unless the couple are married.³²⁴ The offence applies to men and women and applies whether the offender penetrates the young person or the young person penetrates them.³²⁵ For example, a female school teacher who has sex with a 16 year old male student could be convicted of this offence.

6.83 A person prosecuted for this offence can rely on the defence that the complainant consented and that they believed on reasonable grounds that the complainant was aged 18 or older; or that the young person consented and that the accused reasonably believed that they were married to the complainant. In criminal trials for this offence, defence counsel sometimes show juries a photograph of the complainant and ask jurors to consider how old she or he looks.

COMPARISON WITH THE MODEL CRIMINAL CODE

6.84 Under the MCC, a person accused of taking part in an act of sexual penetration with a young person in their care, supervision or authority could not rely on the defence that they believed on reasonable grounds that the complainant was aged 18 or over. By contrast, in Victoria, this, combined with the young person's consent, is a defence.³²⁶

6.85 The MCCOC argued that this defence should not be available because a person who has an ongoing, direct relationship of care with a young person should be required to ensure that they are above the age of consent before having sex with them.

6.86 This policy approach should be considered in light of the fact that the MCC offence includes a comprehensive definition of the groups of people covered by this offence.³²⁷ Arguably, an offence which imposes an obligation on people to find out the age of people under their care, supervision or authority, before having sex with them, would be workable as long as the groups of people the offence covers is clear. However, the law in Victoria does not clearly state which groups of people the offence covers. In this situation, it may not be workable to impose this obligation.

324 *Crimes Act 1958* s 48.

325 *Crimes Act 1958* s 35(2).

326 The applicability of *R v Douglas* [1985] VR 721, discussed above, is also an issue here.

327 See above paras 6.78–6.79.

? QUESTION

36. Should a person, prosecuted for taking part in an act of sexual penetration with a person aged 16 or 17 in their care, supervision or authority be able to rely on the defence that the complainant consented, and that they believed on reasonable grounds that the complainant was aged 18 or over?
37. Or should people be required to ensure that those over whom they have care, supervision or authority are over the age of consent before having sex with them?

Indecent Acts**VICTORIAN LAW**

6.87 It is also an offence for a person to take part in an indecent act with or in the presence of a person aged 16 or 17, over whom the person has care, supervision or authority, unless they are married. The rationale for this offence is the same as the rationale for the offence discussed above.³²⁸ It should also be noted that the age of consent is lower for this offence than for sexual penetration.

6.88 A person prosecuted for this offence can rely on the defence that the complainant consented and that they believed on reasonable grounds that the complainant was aged 18 or older; or that the complainant consented and that they reasonably believed that they were married. In considering the similar offence involving penetration, we discussed whether a person accused of this offence should be permitted to rely on the fact that they believed on reasonable grounds that the complainant was over the relevant age of consent.³²⁹ The same question arises here.

³²⁸ See above para 6.77.

³²⁹ See above paras 6.85–6.87.

? QUESTIONS

38. Should the age of consent for sexual activity with a person over whom someone is in a position of care, supervision or authority be the same, whether or not the sexual acts involve penetration?
39. Should a person, prosecuted for taking part in an indecent act with a person aged 16 or 17 in their care, supervision or authority, be able to rely on the defence that the complainant consented, and that they believed on reasonable grounds that the complainant was aged 18 or over?
40. Or should people be required to ensure that those over whom they have care, supervision or authority are over the age of consent before engaging in indecent acts with them?

OTHER OFFENCES**Victoria**

6.89 In addition to the main sexual offences involving children and young people, there are other offences directed at behaviour which facilitates or encourages children and young people to participate in sexual activity.³³⁰

FACILITATING SEXUAL OFFENCES WITH CHILDREN

6.90 It is an offence to facilitate sexual offences being committed against a child or young person.³³¹ This offence includes making travel arrangements for someone who intends to go overseas and commit sexual offences against children and young people.

6.91 The primary purpose of this section is to impose penalties on people who arrange 'sex tours' involving people travelling overseas with the intention of committing child sex offences.³³² The MCC does not deal with this offence, presumably because it had only recently been introduced when the MCCOC made its recommendations. The Commission's view is that this offence should be retained.

330 The following discussion deals with offences in the *Crimes Act 1958*. We do not deal with offences in the *Prostitution Control Act 1994*.

331 *Crimes Act 1958* s 49A.

332 *Crimes Act 1914* (Cth) Part IIIA, especially s 50 DA and DB.

OCCUPIER PERMITTING UNLAWFUL SEXUAL PENETRATION

6.92 The owner, occupier or manager of premises commits an offence if he or she induces or permits a child or young person under the age of 17 to enter or remain on the premises for the purpose of taking part in an unlawful act of sexual penetration.³³³ Until 1991, this crime applied to all acts of sexual penetration, including those which were not unlawful.³³⁴

ABDUCTING A CHILD

6.93 It is an offence to take away a person under the age of 16 against the will of their parent or guardian, with the intention that they should take part in an act of sexual penetration either with the offender or with any other person.³³⁵ It is not a defence that the child or young person consented to going with the person charged with the offence.

PROCURING SEXUAL PENETRATION OF A CHILD

6.94 It is an offence for a person to procure a person under the age of 16 to take part in an act of sexual penetration with a third person.³³⁶ A person who is prosecuted for this offence cannot rely as a defence on the fact that the child or young person agreed to have sex with the other person.

6.95 The Manager of the Sex Offences Section at the Office of Public Prosecutions has suggested that the offence should be redrafted to include the situation where the 'procuring' is for the purpose of sexual penetration with the accused, rather than with another person, and, in particular, to impose penalties on people who contact a child or young person over the Internet and arrange to meet them for the purpose of persuading them to have sex.³³⁷ If the accused engages in sexual activity involving penetration with the child or young person, he can be charged with unlawful sexual penetration.³³⁸ However, if this does not occur, there may be no offence with

333 *Crimes Act 1958* s 54.

334 *Crimes (Sexual Offences) Amendment Act 1991* s 3.

335 *Crimes Act 1958* s 56. The forerunner of this section was apparently designed to protect the fortunes of heiresses: see Bronitt and McSherry, above n 94, 571.

336 *Crimes Act 1958* s 58.

337 Issue conveyed by Gary Ching, Manager, Sex Offences Section, Office of Public Prosecutions, 18 May 2001.

338 See above paras 6.20–6.23.

which the person can be charged.³³⁹ The Manager of the Sex Offences Section also suggested that this crime should be extended to cover indecent acts as well as sexual penetration.³⁴⁰

SOLICITING ACTS OF SEXUAL PENETRATION OR INDECENT ACTS

6.96 It is an offence for a person to solicit or actively encourage a person under the age of 18 years who is under their care, supervision or authority to take part in an act of sexual penetration or an indecent act with him or another person or generally.³⁴¹ Unlike the offence of an occupier permitting unlawful sexual penetration,³⁴² this offence applies to all acts of sexual penetration, including those which are not unlawful.

PRODUCING CHILD PORNOGRAPHY AND PROCURING A CHILD TO PARTICIPATE IN MAKING CHILD PORNOGRAPHY

6.97 It is an offence to invite or procure a person aged under 18 to make or produce child pornography.³⁴³ It is also an offence to produce child pornography.³⁴⁴

Comparison with the Model Criminal Code

6.98 The MCC does not include offences equivalent to those mentioned above. However, under the MCC, where a sexual offence is committed (for example, where a 15-year-old has sex with a 30-year-old) a person who 'procured' or 'solicited' the act of sexual penetration could be charged as an accessory to the sexual offence.³⁴⁵

6.99 In 1988, the former Law Reform Commission of Victoria (LRCV) considered whether these specific offences should be retained, or whether the law relating to accessories was adequate to deal with the issue. It recommended

339 In some situations, it might be possible to charge a person with attempting to commit an offence, but if committing the offence has not occurred beyond the planning stage this offence may not be available.

340 Suggestion made by Gary Ching, Manager, Sex Offences Section, Office of Public Prosecutions, 24 August 2001.

341 *Crimes Act 1958* s 60.

342 See above para 6.92.

343 *Crimes Act 1958* s 69.

344 *Crimes Act 1958* s 68.

345 See MCC, MCCOC, Report (1999), above n 5, Appendix 1, 11.2, 11.4.

retaining the offences. It accepted the argument that even where young people engaging in the sexual activity are not committing an offence (for example, because they are similar in age) adults should not encourage or facilitate the activity.

6.100 Our discussion of the current offence of soliciting sexual penetration or indecent acts reflects this policy.³⁴⁶ By contrast, the offence of an occupier permitting sexual penetration,³⁴⁷ applies only when the act of sexual penetration is unlawful. Presumably, this is because the latter offence could otherwise cover parents who ‘permit’ a young person to have sex with their similarly aged boyfriend or girlfriend in the family home. It should be noted that it is unnecessary to retain these offences in order to cover the involvement of children in prostitution because the *Prostitution Control Act 1994* contains a number of offences relating to the involvement of children in prostitution.³⁴⁸

? QUESTION

41. Should Victoria retain any or all of the following offences:

- facilitating sexual offences with children;
- abducting a child;
- occupier permitting unlawful sexual penetration;
- procuring sexual penetration of a child;
- soliciting acts of sexual penetration or indecent acts;
- producing child pornography and procuring a child to participate in making child pornography.

42. Are any of these offences also covered by any other offences?

43. If these offences are retained, should they apply to all sexual penetration or should they only apply to unlawful sexual penetration?

³⁴⁶ See above para 6.96.

³⁴⁷ See above para 6.92.

³⁴⁸ *Prostitution Control Act 1994* s 5 (causing or inducing a child to take part in prostitution), s 6 (receiving a payment knowing it has been derived from sexual services provided by a child), s 7 (entering into an agreement under which a child is to provide sexual services for payment), s 11 (being an owner, occupier, manager or a person assisting in the management of premises who allows a child to enter or remain on premises for the purposes of taking part in an act of penetration), s 11A (being a person carrying on the business of a brothel who allows a child over 18 months to be in a brothel).

Chapter 7

Sexual Offences Against People with 'Impaired Mental Functioning'

INTRODUCTION

7.1 This Chapter deals with specific sexual offences which apply when the victims/survivors are people with 'impaired mental functioning'. We use this expression because it is used in the *Crimes Act 1958*. The Act defines impaired mental functioning as including people whose mental functioning is impaired because of mental illness, intellectual disability, dementia or brain injury.³⁴⁹ Obviously, intellectual disability, acquired brain injury and mental illness are quite distinct from each other and people with these conditions may require quite different support, care and treatment. By using the term from the Crimes Act, we do not intend to suggest that these conditions are the same.

7.2 The law assumes that a person over the age of consent has the capacity to consent to sexual penetration, unless they do not have sufficient knowledge or understanding to comprehend either that sex may involve physical penetration of the body or that penetration is an act of sexual connection, as distinct from an act of a totally different character.³⁵⁰ Thus, most people with impaired mental functioning are capable of consenting to sexual activity.

7.3 An offender who rapes or assaults a person with impaired mental functioning can, of course, be prosecuted for rape or indecent assault. However, while Victorian law provides that consent to sexual penetration means 'free agreement',³⁵¹ we have been told that there are often practical difficulties in successfully prosecuting people for sexual offences where the complainant has a mental impairment. Stereotypes about people with impaired mental functioning may mean that juries do not regard them as credible witnesses, or are reluctant to believe a complainant who has an

349 *Crimes Act 1958* s 50. Note also that 'intellectual disability' has the same meaning as in the *Intellectually Disabled Persons' Services Act 1986*.

350 *R v Morgan* [1970] VR 337, 341.

351 *Crimes Act 1958* s 36. See above paras 5.25–5.28.

intellectual disability or mental illness when they give evidence that they did not consent to having sex with the accused.

7.4 Research shows that people with an intellectual disability experience much higher levels of sexual assault than those who are not disabled.³⁵² We do not know whether people with mental illness or acquired brain injury are more vulnerable to sexual assault than those who do not have such an illness, but similar patterns may apply. People whose mental functioning is impaired may experience a high incidence of sexual assault and sexual exploitation because of their 'lack of power over resources, relationships, decision making and information and the fact that social attitudes may stigmatise them as deviant or of little value'.³⁵³

7.5 The offences discussed in this Chapter specifically concern people providing medical or therapeutic services to people with impaired mental functioning, and workers in residential facilities. The purpose of these offences is to protect people with impaired mental functioning from sexual exploitation by people with power over them.³⁵⁴ These offences apply regardless of whether the complainant consented to taking part in sexual activities.

7.6 The law concerning sexual activity with people with impaired mental functioning must balance two important policy goals.³⁵⁵ Firstly, it is necessary to protect people with mental impairments from being exploited by those in a position of power over them. However, it is also important that the law should not penalise all sexual acts involving people with impaired mental functioning. Such an approach would be inconsistent with the recognition that people in need of care because of mental illness or intellectual disability are entitled to basic human rights, including the right to participate in sexual activities.³⁵⁶ The offences discussed in this Chapter, which were introduced in 1991, attempt to balance these objectives.

352 Bernadette McSherry 'Sexual Assault against Individuals with Mental Impairment: Are Criminal Laws Adequate?' (1998) 5 *Psychiatry, Psychology and Law* 107, 108.

353 Ibid.

354 The history of such offences is traced in a ruling by Mullaly J in *R v Patterson*. See below para 7.8.

355 Law Reform Commission of Victoria, *Sexual Offences Against People with Impaired Mental Functioning*, Report No 15 (1988) 11.

356 These rights are recognised in the United Nations *Declaration on the Rights of Disabled Persons*, GA Res 3447 (XXX), 30 UNGAOR, Sup (No 34) 88–89, UN Doc A/10034 (1975), available at <<http://www.unhcr.ch/html/menu3/b/72.htm>>; *Declaration on the Rights of Mentally Retarded Persons*, GA Res 2856 (XXVI), 26 UNGAOR, Sup (No 29) 93–94 UN Doc A/8429 (1971), available at <http://www.unhcr.ch/html/menu3/b/m_mental.htm>; and *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, GA Res 46/119 (1991), available at <<http://www.unhcr.ch/html/menu3/b/68.htm>>.

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Health Professionals

7.7 It is an offence for a person who provides medical or therapeutic services to a person with impaired mental functioning to take part in an act of sexual penetration or an indecent act with that person, unless they are married or in a de facto relationship.³⁵⁷

7.8 In a case involving this offence, *R v Patterson*,³⁵⁸ Judge Mullaly ruled that in order to obtain a conviction for this offence the accused must prove the following:

- that the complainant was a person with impaired mental functioning;
- that the accused was providing medical or therapeutic services to the complainant;
- that the services related to the complainant's impairment;
- that an act of sexual penetration occurred when the accused was providing the services to the complainant (although not necessarily during the actual provision of the services);
- that the accused knew that the complainant was a person with impaired mental functioning;
- that the accused knew that he was providing medical or therapeutic services to the complainant;
- that the accused knew that the services related to the complainant's impairment; and
- that the accused knew that he was taking part in an act of sexual penetration.

The requirement in Judge Mullaly's ruling, that the prosecution must prove that the accused was aware of the impairment, is consistent with the general

Ruling.

A ruling is a decision by a judge made before or during a trial about the conduct of the trial, for example, about whether particular evidence can be admitted.

principles of criminal responsibility. It is arguable, however, that it would be justifiable to depart from this approach, to protect people with impaired mental functioning from sexual exploitation, at least where the service provider was a psychiatrist, counsellor or other person

357 *Crimes Act 1958* s 51.

358 Victoria, County Court, Mullaly J, 29 March 1999.

providing services relating to the complainant's mental condition. Legislation could be enacted imposing responsibility on specified providers of mental health services to ascertain that their patients were not mentally impaired, before engaging in sexual activity with them. The legislation could provide that in the case of people providing mental health services it is unnecessary to prove knowledge of the impairment as an element of the offence, but that the accused can rely on the defence that they honestly and reasonably believed that the patient was not mentally impaired. (In other words a new strict liability offence could be created to cover those providing mental health services who engage in sexual activity with their patients.) Such offences usually attract a lesser penalty than offences which require knowledge of the circumstances which make the act unlawful.

Strict liability offence

An offence is a strict liability offence if the Crown only has to prove that the physical elements of the offence have taken place. The Crown does not have to prove any fault element, such as a particular intention or awareness on the part of the accused.

? QUESTION

44. Does this offence adequately balance the need to protect people with impaired mental functioning against sexual assault and their right to sexual autonomy?

7.9 This offence applies only to people providing health services to someone with impaired mental functioning. It does not cover people who provide other services. For example, it does not apply to a taxi driver who engages in sexual activities with a person with a mental impairment. The limited nature of this offence reflects the policy goal of ensuring that people who have mental impairments are able to take part in sexual activity.

Workers at Residential Facilities

7.10 It is also an offence for a worker at a residential facility³⁵⁹ to take part in an act of sexual penetration or an indecent act with a resident of the facility, unless they are married or in a de facto relationship.³⁶⁰ This offence covers people who provide services to residents at a residential facility, whether as an employee or as a voluntary worker, or in any other capacity.³⁶¹ It does not cover other residents at the facility.

Consent

7.11 These sexual offences are intended to protect people with mental impairments from exploitation. Therefore, a person who is prosecuted for these offences can not generally rely as a defence on the fact that the complainant consented, unless at the time of the alleged offence the couple were married or living in a de facto relationship, or the accused believed on reasonable grounds that they were.

COMPARISON WITH THE MODEL CRIMINAL CODE

7.12 Like the former Law Reform Commission of Victoria (LRCV), the Model Criminal Code Officers Committee (MCCOC) recommended specific sexual offences to protect people who have impaired mental functioning. However, there are some significant differences between the law in Victoria and the Model Criminal Code (MCC). These relate to:

- defining mental impairment; and
- the people to whom the offence applies.

Defining Mental Impairment

7.13 Both the Victorian and MCC definitions of a person with impaired mental functioning are inclusive; they do not include an exhaustive list of conditions recognised as impairments. However, the MCCOC definition does explicitly include a person with a 'severe personality disorder'. The expression severe personality disorder is not defined in the MCC.

359 'Residential facility' means (a) an approved mental health service or (b) premises operated by any person or body (government or non-government) wholly or substantially for the purpose of providing residential services to intellectually disabled people: *Crimes Act 1958* s 50(1). 'Approved mental health service' means a service that is proclaimed under s 94 of the *Mental Health Act 1986*: s 3.

360 *Crimes Act 1958* s 52.

361 *Crimes Act 1958* s 50(1).

7.14 The absence of a definition of ‘severe personality disorder’ in the MCC may give rise to disagreement about what this means and contribute to a lack of clarity about the boundary between criminal and non criminal activities. A psychiatrist who has sex with a patient with a severe personality disorder would already be in breach of his or her ethical obligations and subject to professional sanctions, including deregistration. However, under the MCC, inclusion of people providing services to someone with a severe personality disorder would also potentially extend to other people providing other services. This is because the MCC offences have a broader reach than the Crimes Act, which, as discussed above, covers only health professionals and workers in residential facilities.

7.15 Because the definition in the Crimes Act is inclusive, it could also potentially cover people both with severe personality disorders and whose mental functioning was shown to be impaired. However, because the definition does not explicitly cover such people it is less likely to be applied to people with a severe personality disorder.

? QUESTION

45. Should the definition of a person with ‘impaired mental functioning’ be extended to explicitly cover a person with a ‘severe personality disorder’?

Coverage of the Offence

7.16 As has been discussed above, the law in Victoria contains separate sexual offences, for people providing medical or therapeutic services to people with impaired mental functioning (whether within or outside a residential setting), and for workers in residential facilities. In contrast, the MCC has only one offence covering anyone ‘who is responsible for the care of a person with a mental impairment’ who engages in sexual activity with them.³⁶²

³⁶² MCC, MCCOC, Report (1999), Appendix 2, 5.2.29 (Sexual penetration), 5.2.30 (Indecently touching), 5.2.31 (Indecent act directed at person with mental impairment).

7.17 The MCC offence covers anyone who provides medical, nursing, therapeutic or educative services to a person in connection with a mental impairment.³⁶³ It could be argued that this severely restricts the ability of people with mental impairments to engage in sexual activity. It does not require that the care provider acts in a professional capacity. Thus, it could cover, for example, a cousin who provides tutoring to a woman with a mild intellectual disability or a neighbour who provides some form of nursing care to a person with an intellectual disability.

7.18 Unlike the law in Victoria, the MCC does not include people working in residential facilities (for example, as gardeners or cleaners) who do not provide medical, nursing, therapeutic or educative services. It is arguable that people in residential facilities require a higher degree of protection than that provided by the MCC, because they are particularly vulnerable to exploitation by people who have frequent contact with them in the place where they are living.

7.19 Under the MCC, people accused of engaging in sexual activities with people with mental impairment have a qualified defence available. The consent of the person with the mental impairment is a defence if they were not unduly influenced by the fact that the person was responsible for caring for them.³⁶⁴ The MCCOC said that the purpose of this provision was to ensure that the offences did not 'arbitrarily restrict the sexual autonomy of mentally impaired persons when it comes to their carers'.³⁶⁵ A possible disadvantage of this provision is that it may provide insufficient protection against sexual exploitation to people with mental impairment.

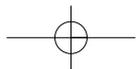
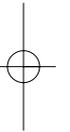
? QUESTION

46. Should a health professional or worker in a residential facility, who is prosecuted for engaging in sexual activity with a person with impaired mental functioning, be able to rely on the complainant's consent as a defence?

363 MCC, MCCOC, Report (1999), Appendix 2, 5.2.28(2).

364 Ibid 5.2.3.

365 MCCOC, Report (1999), above n 5, 181.



Chapter 8

Court Procedure and Evidence

INTRODUCTION

8.1 In Chapters 5–7 we discussed the main sexual offences under the *Crimes Act 1958*. This Chapter deals with the laws governing procedure and evidence in sexual offence proceedings, which have been extensively reformed over the past two decades. This Chapter discusses issues that have been identified in the Drugs and Crime Prevention Committee reports, the Rape Law Reform Evaluation Project (RLREP) report and the Model Criminal Code Officers' Committee (MCCOC) report.

8.2 In the first part of this Chapter, we deal with court procedures. We focus on the way in which sexual offence trials take place and examine the way in which complainants give their evidence. We also examine whether or not similar allegations made by several complainants against one person can be heard together before the same jury.

8.3 In the second part of this Chapter, we look at the rules which determine whether or not particular types of evidence (such as the sexual activities of the complainant, or counselling records relating to the complainant) can be put before the jury. (This is known as the 'admissibility' of evidence.)

8.4 In the third part, we look at what the trial judge is permitted (or required) to tell the jury about the ways in which they are to approach the evidence that is before them.

8.5 In Chapter 4, we noted that it is possible for many sexual offences to be heard by a magistrate sitting alone, rather than by a judge and jury. The rules of evidence and procedure are usually of greater significance in cases that are heard before a jury. This is because the main purpose of the rules is to ensure that a jury is not exposed to potentially unreliable or misleading information and because of the need to direct the jury about what the law is and how to apply it to the evidence that is before them. For these reasons, this Chapter focuses on cases that are heard before a jury.

8.6 Although the laws which we examine in this Chapter relate to court proceedings, their significance extends beyond those proceedings. The existence of certain procedural or evidentiary laws or practices can influence whether a particular allegation goes to trial at all, or whether the accused person will plead guilty to a particular offence.³⁶⁶ For example, a person is unlikely to be prosecuted for a sexual offence unless there is sufficient admissible evidence that is likely to lead to a conviction.

Admissible

Admissible evidence is that which is capable of being received by a court and taken into account.

COURT PROCEDURE

Alternative Arrangements for Giving Evidence

BACKGROUND

8.7 In this section we examine the laws which regulate how complainants in sexual offence cases give their evidence. In most criminal trials, the complainant is required to appear in court to give their evidence by being questioned by the prosecutor (this is referred to as giving evidence-in-chief) and by the barrister representing the accused³⁶⁷ (this is referred to as cross-examination). Following cross-examination, the complainant can be questioned again by the prosecutor (this is referred to as re-examination) in order to clarify any issues that arise in cross-examination.

8.8 In recent years, most States and Territories have introduced alternative ways for complainants to give evidence in sexual offence trials. These are intended to reduce the distress often experienced by complainants in giving evidence and to make it easier for them to do so.

8.9 In Victoria, there are two types of alternative arrangements:

- **Pre-recorded evidence.**³⁶⁸ If the complainant is under 18 years or is a person with impaired mental functioning, they can be questioned before the trial by a trained member of the police force. This questioning is recorded on audio or video tape which is then played

366 See, for example, Kathy Mack and Sharyn Anleu, 'Resolution without Trial, Evidence Law and the Construction of the Sexual Assault Victim' in Mary Childs and Louise Ellison (eds) *Feminist Perspectives on Evidence* (2000).

367 Cases in which the accused person is not represented by a legal practitioner raise particular issues. See below paras 8.29–8.43.

368 *Evidence Act 1958* s 37B.

in court as the complainant's evidence-in-chief. This means that the complainant does not have to be questioned by the prosecutor at the trial. However, the complainant must be available at the trial to be cross-examined by the defence.

- **Alternative arrangements at trial.**³⁶⁹ If the complainant is questioned at the trial, they can be allowed to make use of certain other arrangements to ensure, for example, that they do not have to be in the physical presence of the accused in court.

8.10 Each of these types of arrangements raise specific issues, which are discussed below. We also examine a number of ways in which these arrangements could be extended. At a later stage of the reference, we will examine the availability and use of the existing alternative arrangements.

ISSUES

Pre-recorded Evidence

8.11 There are two issues which the Commission believes should be considered in relation to pre-recorded evidence.

PRE-RECORDED EVIDENCE-IN-CHIEF

8.12 In Victoria, evidence-in-chief may only be given by pre-recorded video or audio tape in sexual offence trials when the complainant is a child or a person with impaired mental functioning.

8.13 In 1996, the Drugs and Crime Prevention Committee recommended that there should be an evaluation of the use of these arrangements and that, depending on the results of the evaluation, they should be extended to include all adult complainants of sexual assault.³⁷⁰

8.14 However, we are not aware of any evaluation of the existing Victorian provisions as envisaged by the Drugs and Crime Prevention Committee.

8.15 In Queensland, Western Australia and the United Kingdom, a broader group of complainants than in Victoria may record their evidence in advance. In particular, sexual offence complainants who are likely to suffer severe emotional trauma or to be intimidated if they are required to give

³⁶⁹ *Evidence Act 1958 s 37C.*

³⁷⁰ Drugs and Crime Prevention Committee (1996), above n 8, Recommendation 35, 127.

evidence at trial, may pre-record their evidence.³⁷¹ The New Zealand Law Commission has also recommended that witnesses in criminal trials (not just complainants in sexual offence trials) should be able to pre-record their evidence.³⁷²

8.16 Arguments in favour of pre-recording evidence are that it:

- minimises distress to the complainant, by providing a tape of evidence that can be used both in committal proceedings³⁷³ and at trial;
- increases the accuracy of the complainant's evidence (because the evidence is given soon after the events are said to have occurred and is given in less stressful circumstances);³⁷⁴
- promotes an earlier resolution of cases (if the recorded evidence is strong, the accused person may be more inclined to plead guilty, and if the recorded evidence is extremely weak or flawed, the case may be discontinued at an early stage); and
- improves trial procedures (for instance, the judge can view the recording before it is played to the jury to ensure that any evidence which cannot legally be placed before the jury is edited from the tape).³⁷⁵

Committal proceedings

A committal proceeding is a preliminary proceeding to determine whether or not there is sufficient evidence for the accused person to be put on trial.

8.17 One argument that is sometimes made against allowing all complainants in sexual offence cases to pre-record their evidence is that, if the videotape becomes an exhibit in the trial, the jury may be able to replay it repeatedly and may therefore give undue significance to it when making their decision. This may result in more weight being given to minor discrepancies

371 *Evidence Act 1977* (Qld) s 21A(1); *Evidence Act 1906* (WA) ss 106I, 106K, 106R and Schedule 7; *Youth Justice and Criminal Evidence Act 1999* (UK) ss 27, 28; *Prisoners and Criminal Proceedings (Scotland) Act 1993* (UK) s 33.

372 New Zealand Law Commission, *Evidence of Children and Other Vulnerable Witnesses*, Preliminary Paper 26 (1996) 40 and *Evidence*, Report 55 (1999) 118–19.

373 See above paras 4.32–4.34.

374 Note that this may now be slightly less important than was the case in the past, because of strict deadlines that were introduced in 1999 in relation to sexual offence prosecutions. See below n 381.

375 These arguments have mainly been made in the context of child complainants. See Chris Corns, 'Videotaped Evidence of Child Complainants in Criminal Proceedings: A Comparison of Alternative Models' (2001) *Criminal Law Journal* 75; Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report 55 (Part 2) (2000); Andrew Palmer, 'Child Sexual Abuse Prosecutions and the Presentation of the Child's Story' (1997) 23 *Monash University Law Review* 171.

between the recorded evidence and any later evidence that may be given in court. This may in turn lead to some accused people who were actually guilty of the offence being found not guilty.

8.18 Another issue which may need to be considered is whether or not the complainant should also be able to record their cross-examination in advance of the trial. When the complainant gives their evidence-in-chief in response to questions from the prosecutor, the prosecutor can take the complainant through the series of events, giving them a chance to say what happened. If this process occurs immediately before the complainant is cross-examined, it can enable them to gain confidence and to get used to the process of giving evidence. If the evidence-in-chief is recorded long before the trial, when the matter does go to trial, the complainant will not have had the same opportunity to become accustomed to the process and will have to go 'cold' into cross-examination by the accused person's barrister. We also examine this issue in more detail below.

? QUESTIONS

47. At present, children and people with impaired mental functioning can record their evidence-in-chief before trial. Should the law be changed to enable the evidence-in-chief of all complainants in sexual offence cases to be recorded prior to the trial?
48. If so, should any restrictions be imposed on adult complainants who want to pre-record their evidence?

PRE-RECORDED CROSS-EXAMINATION OF THE COMPLAINANT

8.19 The Drugs and Crime Prevention Committee tentatively suggested that there be further investigation of the possibility of recording the cross-examination of child complainants prior to the trial.³⁷⁶

³⁷⁶ Crime Prevention Committee, above n 8, 194–5.

8.20 In Western Australia³⁷⁷ and the United Kingdom³⁷⁸ it is possible in some circumstances for all of the complainant's evidence (in other words, their evidence-in-chief, cross-examination and any re-examination) to be recorded at a special hearing prior to the trial. The Queensland Law Reform Commission³⁷⁹ and the Tasmanian Law Reform Commissioner³⁸⁰ have also recommended pre-recording all of the complainant's evidence, including cross-examination.

8.21 The same arguments as those identified above in favour of pre-recording evidence-in-chief also apply to cross-examination. It could be argued that if the complainant's evidence-in-chief is recorded before the trial, it would be desirable for her to be cross-examined at the same time, and that pre-recording of cross-examination could significantly limit the distress often experienced by complainants. On the other hand, the time limits which now apply to sexual offence committals and trials may weaken the argument that pre-recording of cross-examination provides a means by which complainants can be cross-examined while events are fresh in their minds.³⁸¹

8.22 An argument against permitting cross-examination to be pre-recorded is that, until the accused knows the prosecution case against him, it may be difficult for his legal representative to conduct a meaningful cross-examination of the complainant, who is the prosecution's key witness. Committal proceedings provide some opportunity for the accused to find out the prosecution case, but the prosecution is not obliged to make total disclosure of its case at committal.³⁸² The prosecution is not obliged to disclose its case until at least 28 days prior to the trial.³⁸³

377 *Evidence Act 1906* (WA) s 106I (child complainants) and s 106R (complainants with a physical or mental impairment or who are likely to suffer severe emotional trauma or be so intimidated or distressed as to be unable to give evidence satisfactorily).

378 *Youth Justice and Criminal Evidence Act 1999* (UK) ss 28, 16 (evidence likely to be diminished by reason of the age or incapacity of the complainant) and s 17 (evidence likely to be diminished by reason of fear or distress on the part of the complainant).

379 Queensland Law Reform Commission, above n 304, Part 2 (2000) Recommendation 9.3, 180–2.

380 Law Reform Commissioner of Tasmania, *Child Witnesses*, Report 62 (1990) Recommendations 4, 5.

381 Schedule 5 of the *Magistrates Court Act 1989* was amended in 1999 to provide that committal proceedings for a sexual offence must commence within three months of the filing of a charge (in relation to other offences the relevant period is six months). If the accused person is committed to stand trial, s 359A of the *Crimes Act 1958* provides that the trial must commence within three months (in relation to other offences, the relevant time period is twelve months: see Crimes (Procedure) Regulations 1994 r 7).

382 Richard Fox, *Victorian Criminal Procedure* (2000) 183, n 14.

383 *Crimes (Criminal Trials) Act 1999* s 6.

? QUESTIONS

49. Should all of a complainant's evidence (evidence-in-chief, cross-examination and re-examination) be able to be recorded prior to the trial?
50. If so, should this apply to all sexual offence complainants, or only to complainants who fall within particular categories (such as children and complainants with impaired mental functioning)?

Alternative Arrangements at Trial

8.23 Even if the provisions enabling evidence to be pre-recorded were extended to cover all complainants and to cover cross-examination, there would still be some circumstances in which the complainant may be required (or may choose) to give evidence at the trial rather than to record evidence before the trial.

8.24 The *Evidence Act 1958* currently allows the following alternative arrangements in sexual offence trials:³⁸⁴

- The complainant may give their evidence from another room by closed circuit television (CCTV).
- If CCTV is not used, a screen can be erected in the court so that the accused is not in the complainant's line of vision.
- A person providing emotional support may sit beside the complainant while they are being questioned.
- The barristers can be required to remove their wigs and to sit rather than stand while questioning the complainant.
- The judge can specify that only certain people are allowed to be in court while the complainant is being questioned.

8.25 Our focus in this Discussion Paper is on whether changes need to be made to the law. In the second stage of the reference we will examine how these provisions work in practice. However, we would welcome submissions at this stage on the extent to which it is possible, in practice, for complainants to obtain access to equipment such as screens or CCTV and on the extent to which these alternative arrangements are actually being used by complainants in sexual offence cases.

384 *Evidence Act 1958* s 37C.

? QUESTIONS

51. Does the use of alternative arrangements for giving evidence minimise the trauma for sexual offence complainants in committal hearings and trials?
52. Are complainants aware of the availability of alternative arrangements for giving their evidence in sexual offence trials?
53. If not, who should be responsible for informing complainants of the availability of alternative arrangements for giving evidence in sexual offence trials?
54. If alternative arrangements for giving evidence in sexual offence trials are available, to what extent is each of the alternative arrangements listed above being used?

8.26 It is important to note that the use of the alternative arrangements listed above is at the discretion of the court. The alternative arrangements are not available as a matter of course.

8.27 In 1996, the Drugs and Crime Prevention Committee expressed a view that it should be the complainant's decision to use alternative arrangements. The Committee recommended that the *Evidence Act 1958* be amended to allow complainants in sexual offence cases to give evidence via alternative arrangements, unless they choose otherwise.³⁸⁵

? QUESTION

55. If complainants are giving evidence at trial, should the use of alternative arrangements be available to them as a matter of course, rather than at the discretion of the court?

Resource Implications

8.28 We note that the provision of alternative arrangements for giving evidence, particularly in the form of videotape or by CCTV, requires substantial funds and that an expansion of their use in the ways discussed above is likely to depend on additional funds being made available to the relevant agencies.

³⁸⁵ Drugs and Crime Prevention Committee (1996), above n 8, Recommendation 31, para 8.5.1.

Cross-Examination of the Complainant by the Accused in Person

BACKGROUND

8.29 All people accused of crimes are allowed to be represented in court by lawyers. If an accused person cannot afford to pay for a lawyer, they may apply to Victoria Legal Aid. If the accused person does not satisfy certain guidelines, Victoria Legal Aid can refuse to provide a lawyer. However, if the court considers that the accused person's trial would be unfair if they do not have legal representation, the court has the power to order Victoria Legal Aid to provide a lawyer.³⁸⁶

8.30 In most sexual offence trials, the accused person either pays for his own lawyer or has a lawyer provided by Victoria Legal Aid. If an accused person wants to represent himself, he cannot generally be prevented from doing so.³⁸⁷

8.31 In 1996, the Drugs and Crime Prevention Committee expressed concern that a person who is accused of committing a sexual offence against a complainant may be able personally to cross-examine the complainant about the alleged offence.

8.32 The Committee noted that legislation which allows a complainant to give their evidence by CCTV provides some protection from the possible experience of being cross-examined by the accused, because it means that they do not have to be in the physical presence of the accused when he is asking them questions. The Committee suggested that, in cases when this process overly distresses the complainant, the court should appoint an independent intermediary to provide a protective filter between the accused and the complainant.³⁸⁸

8.33 This topic was not examined by the RLREP or the MCCOC. As far as we are aware, a person accused of a sexual offence has not cross-examined the complainant in Victoria, although there is nothing to prevent this occurring in the future.³⁸⁹

386 *Crimes Act 1958* s 360A.

387 *R v Woodward* [1944] 1 KB 118.

388 Drugs and Crime Prevention Committee (1996), above n 8, 138.

389 In one case where it appeared that this might occur, legal representation was provided to the accused on a pro bono (not for fee) basis.

ISSUES

8.34 The issue which the Commission needs to examine is whether existing safeguards are sufficient to protect complainants from unnecessary distress, or whether any further safeguards should be introduced.

8.35 As we have seen, the complainant in a sexual offence trial can be cross-examined through CCTV, instead of having to be present in court.³⁹⁰ The use of CCTV may reduce some of the distress for a complainant; however, it is unlikely to eliminate the distress for the complainant of being questioned in detail about the alleged offence by the person who is said to have committed it.

8.36 Another way of protecting complainants would be for the trial judge to exercise his or her power to forbid questions that are indecent or scandalous,³⁹¹ that are intended to insult or annoy, or are needlessly offensive in form.³⁹² Again, while this may reduce some of the distress, it is likely that the process of being questioned by the accused in person may be extremely distressing for some complainants, even if the questions asked by the accused are not in themselves indecent, scandalous, intended to insult or annoy, or needlessly offensive in form.

8.37 The suggestion by the Drugs and Crime Prevention Committee was that the accused should be required to put his questions to the complainant through an independent intermediary appointed by the court,³⁹³ who would convey the questions to the complainant in the same way that an interpreter conveys questions to a witness who speaks a language other than English. The Committee did not suggest that the intermediary should be a legal practitioner. Victorian courts do not currently possess the power to appoint an intermediary of the type suggested by the Drugs and Crime Prevention Committee.

8.38 The United Kingdom Parliament recently passed legislation that prohibits a person who is accused of committing a sexual offence from personally cross-examining the complainant.³⁹⁴ The court must now invite the accused person to obtain legal representation. If the accused person does

390 See above paras 8.23–8.27 for a more detailed discussion of this and other alternative arrangements for giving evidence.

391 *Evidence Act 1958* s 39.

392 *Evidence Act 1958* s 40.

393 Drugs and Crime Prevention Committee (1996), above n 8, 138.

394 *Youth Justice and Criminal Evidence Act 1999* (UK) Chapter 2.

not obtain legal representation, the court must consider whether it is necessary, in the interests of justice, for the complainant to be cross-examined by a legal representative appointed by the court to represent the interests of the accused.³⁹⁵

8.39 Although the legal practitioner is appointed by the court to cross-examine the complainant in the interests of the accused, the legislation states that the legal practitioner is not responsible to the accused.³⁹⁶

8.40 It might be argued that the accused person is presumed to be innocent, and that prohibiting him from cross-examining the complainant in person suggests that he is in fact guilty of the offence. Appointing an intermediary or a legal practitioner to cross-examine the complainant could 'demonise' the accused in the eyes of the jury.

8.41 The possibility of prejudice could be reduced if the trial judge was required to warn the jury that they must not make any assumption about the guilt or innocence of the accused person on the basis of the use of such arrangements. Such warnings are required under the United Kingdom legislation.³⁹⁷ Similar warnings are already in use in Victoria when complainants give evidence through alternative arrangements such as CCTV.³⁹⁸

8.42 In 2000, the Queensland Law Reform Commission recommended that the Queensland Parliament adopt legislation similar to the legislation that has been adopted in the United Kingdom, to restrict the right of an accused person, who is not represented by a legal practitioner, to cross-examine a child and to provide the court with the power to appoint a legal practitioner to conduct the cross-examination on behalf of the accused person.³⁹⁹

8.43 The power to appoint a lawyer (rather than an intermediary who is not a lawyer) has the advantage that lawyers are officers of the court and are not obliged to simply transmit all questions posed by the accused person. A lawyer is expected to be aware of legal restrictions on the questions that may be put to a complainant, and to refrain from putting such questions. In some circumstances, the complainant's response to a question could result in the jury being discharged and a new trial having to be ordered. The use of a lawyer to question the complainant could minimise this risk.

395 *Youth Justice and Criminal Evidence Act 1999* (UK) s 38(3).

396 *Youth Justice and Criminal Evidence Act 1999* (UK) s 38(5).

397 *Youth Justice and Criminal Evidence Act 1999* (UK) s 39.

398 *Evidence Act 1958* s 42V.

399 Queensland Law Reform Commission, above n 304, Part 1 (2000) 32–58.

? QUESTIONS

56. Should Victoria adopt legislation prohibiting a person who is on trial for a sexual offence from personally cross-examining the complainant?
57. If so, should the court be required to appoint a legal practitioner to cross-examine the complainant in place of the accused person?

Allegations by Multiple Complainants**BACKGROUND**

8.44 In 1995, the Drugs and Crime Prevention Committee expressed a concern that, when several children make separate sexual offence allegations against the same person, those allegations are commonly heard in separate trials, rather than being heard together in one trial. This may drag out the criminal justice process and increase trauma for complainants. The Committee recommended that legislation should be enacted to create a presumption that, when multiple allegations are made, they should be heard together.⁴⁰⁰

8.45 In 1997, the Victorian Parliament passed legislation to implement the Crime Prevention Committee's recommendation.⁴⁰¹ The legislation creates a presumption that if the prosecutor joins two or more counts on the one presentment, those counts are to be tried together.

8.46 The legislation goes on to state that this presumption is not to be rebutted (set aside) simply because the evidence that can be taken into account by the jury in relation to one count cannot be taken into account by the jury in relation to another count.

400 Crime Prevention Committee (1995), above n 8, 176–8. The recommendation was endorsed in the RLREP, above n 7, 252.

401 *Crimes Act 1958* s 372 (3AA)–(3AC).

ISSUES

8.47 The issue to be considered by the Commission is whether this legislation has been effective in increasing the responsiveness of the criminal justice system to complainants.

8.48 To understand the purpose of the 1997 legislation and to assess its effectiveness, it is necessary to have some understanding of the relationship between:

- the legal rules which govern whether allegations of separate sexual offences should be heard in one trial or should be heard separately; and
- the legal rules which limit the admission of evidence. (These are intended to protect a jury from reaching a decision about the guilt of the accused, which is based on factors which the law does not allow the jury to take into account because it is unfair to the accused or seen as irrelevant.)

8.49 In particular, the rules which govern whether alleged offences should be tried separately are related to the rules which limit the admission of 'propensity evidence'.⁴⁰²

8.50 The 'presumption of innocence' is a fundamental principle of criminal law.⁴⁰³ It requires the jury to start on the basis that the accused is innocent of the particular offence that they are considering. It then requires the jury to examine the evidence that they have heard on that count, and to reach a conclusion based on that evidence.

Propensity evidence

Propensity evidence is that which shows that the accused person has a general tendency to do certain things.

It is wrong for the jury to find the accused person guilty of a particular offence if the finding is not based on the evidence relating to that count, but upon other considerations, such as a suspicion that the accused is the sort of person who is likely to commit a sexual offence.

8.51 Where a person is charged with separate sexual offences against several complainants there is a risk that, if the same jury hears all of the counts, it might use evidence relating to an offence charged in one count to decide that the person has also committed a different offence, even though there may be insufficient evidence to support a conviction for the second offence. The jury may not properly examine the evidence relating to the

402 'Propensity evidence' is described in *R v Best* [1998] 4 VR 603, 607–8 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.

403 The term 'presumption of innocence' can be misleading and should be used with care. See John Heydon, *Cross on Evidence* (2000) 208–9 and Bronitt and McSherry, above n 94, 114–15.

second offence, but may simply conclude that the accused is guilty of the second offence because he is the sort of person who is likely to have committed such an offence. To avoid this risk, judges have power to divide the counts so that they are heard by separate juries in separate trials.⁴⁰⁴

8.52 Prior to the 1997 legislation, when a judge was considering whether or not an accused person should have separate trials for different counts, the judge usually had to decide whether the evidence on one count could legitimately be taken into account by the jury as propensity evidence in relation to the other count. If it could not, the counts would be separated unless the judge considered that possible unfairness to the accused person could be overcome by a direction to the jury to disregard evidence relevant to one count when considering another count.

8.53 The principle that was laid down by the High Court to guide trial judges in deciding whether propensity evidence could be taken into account⁴⁰⁵ resulted in separate trials being ordered in most sexual offence cases involving multiple complainants.⁴⁰⁶

8.54 In Victoria, the rules relating to the admission of propensity evidence were replaced in 1997 by legislation (section 398A of the *Crimes Act 1958*).⁴⁰⁷ 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.⁴⁰⁸

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

405 *Hoch v The Queen* (1988) 165 CLR 292, 296; *Pfennig v The Queen* (1995) 182 CLR 461, 485. Under the common law, the jury can take propensity evidence into account if the 'probative value' of the evidence is greater than its prejudicial effect. (The probative value of a piece of evidence is the extent to which the evidence could be used by the jury to assess the probability of the existence of a particular fact in relation to a particular count.) The above cases indicate that, 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.

406 If the trial judge considered that there was a possibility of factors such as collusion between the complainants, there would be a reasonable explanation consistent with the innocence of the accused, so the prejudicial effect of the propensity evidence would outweigh its probative value and the counts would almost invariably be separated.

407 Section 398A was prompted by a concern that the function of considering the possibility of factors such as collusion involves an assessment of the credibility of a witness, and that this function should be left to the jury: Victoria, *Parliamentary Debates*, Legislative Assembly, 9 October 1997, 431–2 (Jan Wade, Attorney-General).

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

8.55 The Court of Appeal has suggested that section 398A requires the judge to compare the strength of the evidence⁴⁰⁹ against the risk of an unfair trial. It suggested that the judge is required to make a value judgment about whether the strength of the evidence is such that 'fair minded' people would think that the public interest in putting all the relevant evidence of guilt before the jury must have priority over the risk of an unfair trial.⁴¹⁰

8.56 The approach taken by the Court of Appeal in a number of cases⁴¹¹ under the new legislation 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 treated as admissible in Victoria.

8.57 In cases where the evidence on one count is entirely admissible in relation to other counts, there is now no question that the counts should be heard together. If evidence relating to one complainant is only partially admissible to prove counts involving other complainants, s 398A requires the trial judge to start from the presumption that the counts can all be tried together. The judge should not depart from the presumption simply because some of the evidence admissible for one count is not admissible for another. Instead, he or she must consider the reasons why the evidence is not admissible and the extent to which any unfairness to the accused can be overcome by a direction from the judge to the jury.

8.58 For example, suppose that the accused is being tried for sexual assaults on A and B. Evidence relating to the offence against A may be inadmissible on the count involving B simply because it is completely irrelevant to the count involving B. In such a case, it may be easy for the judge to direct the jury that, when considering the count involving B, it is to disregard the evidence on the first count involving A. Such a direction is likely to be accepted by the jury as according with common sense.

8.59 In other cases, it may be more difficult for a judge to explain to a jury that it should ignore evidence relating to an alleged offence against A when considering an alleged offence against B. This is likely to be the case when the evidence is relevant to the offence against B (as well as the offence against A) but its admission creates the possibility that the accused person may not receive a fair trial on the charge relating to B. Here it may be difficult for

409 The probative value of evidence that more than one complainant has made similar sexual offence allegations against the same person rests on the improbability that more than one complainant would independently make up such allegations if they were not true: *R v Best* [1998] 4 VR 603, 610, 616.

410 *R v Best* [1998] 4 VR 603, 617.

411 See Appendix 5.

the jury to follow the direction that it should take account of the evidence as far as A is concerned, but disregard it when considering the alleged offence against B (even though the evidence is also relevant to B). The courts have noted that such a direction is especially unlikely to be effective in the context of offences that arouse strong emotions, such as sexual offences against children.⁴¹² In this situation, the trial judge may consider it appropriate for the offences to be tried separately.

8.60 The Court of Appeal suggested in *R v TJB*⁴¹³ that, although section 372 creates a presumption against hearing counts separately, there may be relatively few sexual offence cases in which multiple counts would not be separated, if evidence on one count is not admissible under the propensity evidence test in relation to another count.⁴¹⁴ Subsequently, the Court of Appeal has emphasised that each case will depend on its facts, that the new provisions were predicated on the assumption that juries will heed appropriate warnings given to them by the trial judge, and that it should not lightly be assumed that juries are incapable of following the judge's instructions.⁴¹⁵ In our preliminary consultations, we have been told that it is now less common for offences involving multiple complainants to be tried separately and that section 372 seems to be working fairly well.⁴¹⁶

CONCLUSION

8.61 The Crime Prevention Committee and the RLREP recommended legislative change to ensure that, when allegations of sexual assault are made against one person by a number of children, those allegations are not separated but are heard together in one trial.

8.62 One of the main reasons for the practice of separating such trials was the rule developed by the High Court regarding the admissibility of propensity evidence.

8.63 That rule was changed by Victorian legislation in 1997. On the basis of recent decisions by the Court of Appeal, it appears that the effect of that

412 *De Jesus v The Queen* (1986) 61 ALJR 1, 3, 7, 10; *R v TJB* [1998] 4 VR 621, 631.

413 [1998] 4 VR 621, 631.

414 Of course, as noted above, the introduction of s 398A means that propensity evidence is now admissible more often than was previously the case.

415 *R v KRA* [1999] 2 VR 708.

416 Consultation with Crown Prosecutors and solicitors from Victoria Legal Aid and the Office of Public Prosecutions (OPP). In contrast, volunteers from Court Network expressed a perception that counts were still commonly separated in sexual offence cases involving multiple complainants.

legislation has been to make it easier for such matters to be heard together, although there will still be some circumstances where the counts will be separated in order to avoid the possibility of prejudice.

8.64 In the absence of a detailed study of severance rulings by the County Court, it is not possible to establish conclusively whether or not these changes to the law have had a significant impact on the practice. Nevertheless, the Commission would welcome submissions on this matter.

? QUESTION

58. Are cases involving more than one complainant being heard together more frequently than was the case before the 1997 reforms?

THE ADMISSIBILITY OF PARTICULAR TYPES OF EVIDENCE

Evidence of Sexual Activities of the Complainant

BACKGROUND

8.65 In the past, complainants in sexual offence cases were routinely cross-examined about their sexual activities and experience. This practice contributes to victims of rape and other sexual offences experiencing the trial process as one where they are victimised all over again. Questions about prior sexual experience also reflect the assumption that women who are not 'chaste' are likely to lie if they claim they are sexually assaulted and/or the assumption that sexually experienced women are not entitled to the protection of the criminal law. In Victoria, the *Evidence Act 1958* was amended in 1976⁴¹⁷ with the introduction of section 37A to restrict cross-examination of complainants about their prior sexual history.

417 *Rape Offences (Proceedings) Act 1976*.

8.66 Section 37A has been reviewed on a number of occasions.⁴¹⁸ The RLREP⁴¹⁹ identified a number of ways in which the section was not operating effectively and recommended that s 37A be amended. This recommendation was implemented by an amendment made to s 37A in 1997. The RLREP's findings and recommendations and the amendment are discussed in more detail below.

8.67 Subsequently, the MCCOC examined different legislative approaches to the admission of evidence about the complainant's prior sexual history. In particular, the MCCOC compared the Victorian approach and the New South Wales (NSW) approach. In Victoria, the judge can grant permission to allow admission of sexual history evidence in certain situations. In NSW, a stricter approach, which usually prohibits admission of such evidence, applies. MCCOC examined the arguments for and against the mandatory approach adopted in NSW, and concluded that the discretionary approach followed in Victoria is preferable.⁴²⁰ Since that time, the New South Wales Law Reform Commission (NSWLRC) has reviewed the NSW legislation and recommended further changes.⁴²¹

ISSUES

8.68 The first issue for us to consider is whether the problems identified by the RLREP have been remedied in Victoria by the 1997 changes. If they have not, the second issue is whether Victoria should follow the approach recommended by the NSWLRC, or amend the legislation in some other way.

8.69 At the time of the RLREP study, s 37A prevented a judge from granting permission to cross-examine a complainant about their sexual activities, or to put evidence before the jury about the sexual activities of the complainant, unless the judge was satisfied about certain matters. The judge

418 The Drugs and Crime Prevention Committee examined s 37A and noted concerns that the section was not adequately protecting complainants. The Committee recommended that the section be reviewed: Drugs and Crime Prevention Committee, above n 8, Recommendation 32, 124-6. The Committee also expressed a concern that s 37A applies only to evidence of sexual activity with persons other than the accused; however, in doing so it appears that the Committee was not aware of an amendment to s 37A made in 1991.

419 The study examined 242 cases from 1992 and 1993 and interviewed 47 barristers, 8 solicitors, 18 County Court judges, 13 magistrates and 37 complainants.

420 MCCOC, Report (1999), above n 5, 223-45.

421 New South Wales Law Reform Commission (hereafter NSWLRC), *Review of Section 409B of the Crimes Act 1900*, Report 87 (1998) available at <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r87chp6>>. The report was tabled in the New South Wales (NSW) Parliament in June 1999, but its recommendations have not been implemented in NSW.

must be satisfied that the evidence has 'substantial relevance to facts in issue' or is a 'proper' matter for cross-examination because it is relevant to whether or not the complainant is a trustworthy witness.

8.70 The section says that evidence about the complainant's sexual activities⁴²² should not be treated as 'substantially relevant' to the facts because of any inferences it may raise as to the complainant's 'general disposition'. This means that evidence that the complainant has had sexual experiences is irrelevant in deciding whether or not she agreed to have sex with the accused.

8.71 In addition, the complainant's prior sexual history is not a proper matter for cross-examination about the complainant's trustworthiness unless there are special circumstances as a result of which the evidence 'materially impairs confidence in the reliability of the complainant's evidence'. This means that the complainant's sexual activities are not to be used to throw doubt on whether they are telling the truth, unless the circumstances clearly throw doubt on the reliability of their evidence.

8.72 An example would be where the complainant claimed they had never met the accused. Here it would be relevant to cross-examine the complainant about a prior sexual relationship with the accused, as this would throw doubt on the rest of the complainant's story.

8.73 Despite these provisions, the RLREP study found that (in 1992-93):

- sexual history evidence was considered to be relevant in a significant proportion of cases;
- in many cases, judges and magistrates granted permission without any genuine scrutiny of the arguments or discussion of the relevance of the material;
- in a large number of cases, complainants were cross-examined about their sexual history even though permission had not been obtained from the court to do so; and
- practitioners, judges and magistrates were not well versed in how the section was supposed to operate.

8.74 The RLREP recommended that a lawyer who wants to question a complainant about their sexual history should be required to make a written application seeking permission from the judge to do so, before the proceedings commence. It recommended that the application should state

422 The section uses the words 'was accustomed to engage in sexual activities'.

how the material is said to be substantially relevant to the issues in the case.⁴²³
This recommendation was implemented by amendments made in 1997.⁴²⁴

8.75 The Commission is interested in discovering whether these amendments have resulted in changes in practice since the RLREP report was published.

? QUESTIONS

59. Does the current law operate effectively to ensure:

- that the judge's permission is always obtained before a complainant is cross-examined about their sexual activities, or evidence of such activities is put before the jury; and
- that the judge's permission is only granted after the arguments in favour of and against admission of the evidence have been carefully examined?

A More Structured Discretion

8.76 If the section is not considered to be working as intended, it may be desirable to consider the approach recommended by the NSWLRC, which noted that:

Sexual offence proceedings have been particularly susceptible in the past to sexist assumptions by the judiciary about what is 'relevant'. For this reason, although we maintain that is the fairest means of assessing admissibility, we have adopted an approach in our recommended reformulation which guides the exercise of the judicial discretion in order to guard against inappropriate decisions.⁴²⁵

423 Recommendation 12, 157–8. The RLREP also recommended that its research findings should be read and considered by judges, magistrates, barristers and prosecutors: RLREP, above n 7, Recommendations 13–15, 158–9. The Commission will examine this recommendation as part of the implementation stage of our review of sexual offences.

424 *Crimes (Amendment) Act 1997* s 9(2).

425 NSWLRC, above n 421, para 6.112.

8.77 The NSWLRC recommended that, as is the case in Victoria, evidence of a complainant's sexual activities would only be admissible if the judge grants leave. Leave could only be granted if:

Probative value

Probative value is the extent to which the evidence can be used by a jury to assess the probability of whether a particular fact occurred.

- the court is satisfied that the evidence has significant probative value to a fact in issue or to the complainant's credibility as a witness; and
- the probative value of this evidence substantially outweighs the danger of prejudice to the proper administration of justice.

8.78 Unlike the Victorian provisions, the provisions proposed by the NSWLRC go on to state that, in deciding whether these conditions are met, the judge must consider:

- the interests of justice, including the right of the accused to make a full answer and defence;
- the distress, humiliation, or embarrassment which the complainant may suffer as a result of leave being granted;
- the risk that the evidence may unduly arouse discriminatory belief or bias, prejudice, sympathy or hostility in the jury;
- the need to respect the complainant's personal dignity and privacy;
- whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case; and
- any other factor which the judge considers relevant.

8.79 The effect of these conditions is that the judge has to weigh the probative value of the evidence against various other factors, including the effect on the complainant.

8.80 As in Victoria, the provision recommended by the NSWLRC goes on to state that evidence of a complainant's sexual experience or activity is not admissible to support an inference that, just because the complainant has engaged in sexual activity or has had sexual experience, the complainant:

- is the type of person who is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
- is less worthy of belief.

8.81 In addition, as in Victoria, the provisions recommended by the NSWLRC set out detailed procedural requirements which must be complied with in order to admit evidence of a complainant's sexual activities.

? QUESTIONS

60. If further law reform is needed to prevent inappropriate cross-examination of complainants about their sexual activities, should Victoria follow the approach recommended by the New South Wales Law Reform Commission?
61. If not, what form should it take?

Confidential Counselling Notes

BACKGROUND

8.82 In sexual offence cases, the accused person's lawyers often seek access to information about counselling or medical treatment (such as treatment by a psychologist or psychiatrist) received by the complainant.

8.83 The purpose may be to establish that the complainant has had a psychiatric disorder, to explore the influence of counselling on the complainant's memory of the alleged sexual offence and/or to discover inconsistencies in their evidence. In many cases, the main purpose is to find evidence to undermine the complainant's credibility as a witness.⁴²⁶

8.84 There are a variety of ways in which the accused person's lawyers could obtain such information. One way is for the lawyers to approach the counsellor directly. Our preliminary consultation indicates that many counsellors and medical practitioners are not aware of their right (or do not have the resources) to object to the disclosure or use of their confidential notes. If the counsellor refuses to provide the information, the lawyers can apply to the court for an order (called a subpoena) requiring the counsellor

Subpoena

A subpoena is an order from a court requiring a person to provide a document or to appear in court to answer questions.

⁴²⁶ Simon Bronitt and Bernadette McSherry, 'The Use and Abuse of Counselling Records in Sexual Assault Trials: Reconstructing the "Rape Shield"?' (1997) 8 *Criminal Law Forum* 259, 261.

to provide the information. The court can issue a subpoena if the accused person's lawyers establish a 'legitimate forensic purpose' for obtaining the information.

8.85 If the accused person's lawyers obtain the information, the extent to which they can use it as evidence in court is subject to the general rules of evidence. This means that the evidence can only be used if it is relevant to the case. It cannot be used for a 'hearsay' purpose (in other words, the counsellor's notes about something that the complainant said to the counsellor cannot be used to prove that what the complainant said to the counsellor is true).

8.86 In a few cases, it may be appropriate for information about a complainant's mental state to come before the court. However, it has been suggested that the practice of seeking medical or counselling records may be a response to the introduction of laws, such as s 37A of the *Evidence Act 1958*, which restricts admission of evidence about the sexual activities of complainants. It is claimed that obtaining counselling records has become an alternative means for defence lawyers to indirectly introduce evidence about a complainant's sexual behaviour or 'morals'.⁴²⁷

8.87 This topic was not examined by the RLREP; however in 1996, the Drugs and Crime Prevention Committee expressed concern about the emerging practice of defence lawyers seeking access to the confidential counselling or medical files of sexual offence complainants.

8.88 In 1998, the Victorian Parliament introduced legislation⁴²⁸ to restrict the use of confidential communications made between complainants and their counsellors as evidence in sexual offence trials. The Victorian approach requires the judge to apply a public interest test when considering whether or not to permit such communications to be used as evidence.

8.89 The Victorian provisions were drafted while this issue was being examined by the MCCOC. There have been some further legislative developments in other Australian jurisdictions since the MCCOC released its recommendations.

⁴²⁷ Anne Cossins and Ruth Pilkinton 'Balancing the Scales: The Case for the Inadmissibility of Counselling Records in Sexual Assault Trials' (1996) *University of New South Wales Law Journal* 222, 235.

⁴²⁸ *Evidence Act 1958* Div. 2A, inserted by the *Evidence (Confidential Communications) Act 1998*.

ISSUES

8.90 In this section, we will examine the Victorian provisions in light of the MCC. We will also consider the policy issues arising from further developments that were not examined by the MCCOC. Finally, we examine whether or not the discretionary approach (requiring the judge to have regard to the public interest) to confidential counselling communications should be replaced by a mandatory prohibition against the production or use of those communications.

Counselling that is not Related to the Alleged Offence

8.91 The Victorian provisions apply to communications made between the complainant and a counsellor⁴²⁹ in the course of a relationship between them as counsellor and client, *whether before or after* the acts constituting the offence occurred or are alleged to have occurred.⁴³⁰ In other words, the provisions apply regardless of whether the counselling relationship had any connection with the offence.

8.92 By contrast, the MCC provisions apply only to communications made in the course of a relationship in which the counsellor is counselling or treating the complainant for any emotional or psychological harm suffered *in connection with the offence*.⁴³¹

8.93 The MCCOC report does not comment on this difference. The broad approach adopted in Victoria has also been adopted in New South Wales.⁴³²

? QUESTION

62. At present, Victorian law protects confidential counselling communications involving the complainant, made before or after the alleged offence occurred. Should the law instead reflect the approach taken in the Model Criminal Code, which only protects the complainant's confidential counselling communications which were made in connection with the alleged offence?

429 The Victorian provisions apply to medical practitioners as well as to counsellors.

430 *Evidence Act 1958* s 32B(1).

431 MCC, MCCOC, Report (1999), above n 5, Appendix 2, 5.2.47(1).

432 *Criminal Procedure Act 1986* (NSW) s 148(2).

Restriction of Access as Opposed to Restriction of Use

8.94 Under the Victorian legislation, evidence that discloses a confidential communication can only be placed before a jury if the judge gives leave to do so. The legislation sets out certain matters that the judge must consider when deciding whether or not to permit the evidence to be used in court. In particular, it requires the judge to be satisfied that the public interest in allowing the evidence to be used substantially outweighs the public interest in preserving the confidentiality and protecting the complainant from harm.

8.95 However, this restriction only applies when a defence lawyer, who has obtained the counselling notes, wants to use the notes as evidence in court. The provisions do not prevent a defence lawyer from using a subpoena to obtain the notes from the counsellor. In other words, when the defence apply to the court for access to a counsellor's records under a subpoena, the judge is not required to apply the same public interest test as when the defence are seeking to use the records as evidence.⁴³³ This means that, even though the defence lawyer cannot actually use the notes themselves as evidence, the defence lawyer could use information from the notes in less direct ways, such as when deciding what questions to ask the complainant in cross-examination. This may be contrary to the intention of the Attorney-General in her Second Reading Speech when the legislation was introduced into Parliament.⁴³⁴

8.96 That intention may have been reflected more effectively in the MCC, which provides that the public interest test applies both to the obtaining and to the use of the notes as evidence in court.⁴³⁵ To gain access to information based on confidential counselling, the defence must first satisfy a threshold test. If that test is satisfied, the counsellor can be required to produce his or her records to the court. The court must then examine the documents. Having examined the documents, the court may only permit the defence to have access to the documents if the public interest test is satisfied.

8.97 If the defence have obtained the documents (whether directly from the counsellor or by a subpoena) and decide that they wish to use them as evidence, the judge must again apply the public interest test. The documents may only be used as evidence if the public interest test is satisfied.

433 *Atlas v DPP* [2001] VSC 209.

434 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 March 1998, 548 (Jan Wade, Attorney-General); but see *Atlas v DPP* [2001] VSC 209, paras 54–9.

435 MCC, MCCOC, Report (1999), above n 5, Appendix 2, 5.2.49(2). This approach has also been followed in New South Wales: *Criminal Procedure Act 1986* (NSW) s 150.

Preliminary Proceedings and Trial Proceedings

8.98 Under the Victorian provisions, the same restrictions apply regardless of whether the confidential counselling documents are sought to be used in preliminary proceedings (such as committal proceedings or bail applications) or in the trial.

8.99 Under the MCC, different restrictions apply depending on whether the documents are sought to be used in preliminary proceedings or in the trial. The MCC provides:

- an absolute prohibition on the production of counselling communication records in preliminary criminal proceedings; and
- a limited immunity at trial and sentence hearings.

8.100 The main reason which the MCCOC gives for completely prohibiting disclosure of confidential communications in preliminary proceedings is that, if records were allowed in at this preliminary stage, this would undermine restrictions on admitting these communications at trial.⁴³⁶ Excluding communications at committal also minimises the cost and length of proceedings, since it is not necessary for the court to hear arguments about whether the communication should be admitted.⁴³⁷ It is also said that a court considering preliminary proceedings does not generally have enough information to decide whether the confidential communication should be admitted.⁴³⁸

Mandatory Prohibition

8.101 A number of agencies and individuals⁴³⁹ have argued that defence counsel should never be able to access a complaint's counselling records or to use those records as evidence. It is argued that there should be no balancing exercise between the rights of the complainant and counsellors to privacy of their counselling records, and the rights of the accused to a fair trial. Centres Against Sexual Assault (CASAs) in Victoria are particularly critical of the current law. In addition, in some cases they have incurred considerable expense in briefing lawyers to oppose admission of counselling notes. If these communications could never be admitted in evidence this expense would be saved.

436 MCCOC, Report (1999), above n 5, 283.

437 Bronitt and McSherry, above n 94, 289.

438 New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 November 1999, 1595 (Jeff Shaw, Attorney-General).

439 Victorian submissions to the MCCOC which supported a total immunity included those from the Office of Women's Affairs, the Department of Justice, Centres Against Sexual Assault and the Victorian Community Council Against Violence: MCCOC, Report (1999), above n 5, 281, n 302.

8.102 In Tasmania, following a recommendation of the 1998 Report of the Task Force on Sexual Assault and Rape in Tasmania,⁴⁴⁰ the Government introduced draft legislation⁴⁴¹ which provides that a person could not be required to produce a document recording a counselling communication and that such a communication is not admissible in any preliminary criminal proceedings, trial or sentencing proceedings. The only exceptions provided for in the draft legislation are:

- information obtained as a result of a physical examination of a victim in connection with the offence;
- a communication made for the purpose of criminal proceedings arising from the commission of the sexual offence;
- a communication made in furtherance of the commission of a crime such as perjury; and
- a victim impact statement made for sentencing purposes.

8.103 Arguments for a mandatory prohibition include that this:

- protects the integrity of the client/counsellor relationship;
- preserves the complainant's confidentiality and their psychological and physical health;⁴⁴² and
- ensures the administration of justice is not undermined by:⁴⁴³
 - the perpetuation of myths associated with women who allege sexual assault; and
 - the 're-victimisation' of complainants by the criminal justice system.

440 *Report of the Task Force on Sexual Assault and Rape in Tasmania* (1998), Recommendation 20, para 3.9.

441 Evidence Amendment Bill 2001 (Tas) cl 6.

442 Annie Cossins, 'Tipping the Scales in Her Favour: The Need to Protect Counselling Records in Sexual Assault Trials' in Patricia Eastal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 102. See also MCCOC, Report (1999), above n 5, 277–8.

443 See Anne Cossins and Ruth Pilkinton, above n 427, 222, 264.

8.104 It is also argued that the possibility that counselling notes may become available to the defence discourages victims from reporting sexual assault and results in some offenders escaping prosecution.⁴⁴⁴

8.105 The major objection to a total immunity is that the protection of the confidentiality of the counselling relationship would automatically take precedence over the right of the accused to seek access to documents relating to the counselling relationship. The main argument for at least a limited disclosure of counselling records is that lack of access may mean the accused does not get a fair trial, and that if counselling records are relevant to an issue in a trial then a search for the truth requires that they be made available.⁴⁴⁵

8.106 What impact would a total immunity on the disclosure of counselling communications in sexual assault trials have in practical terms? While the MCCOC report concluded that the public policy reasons supported some protection of sexual assault counselling records,⁴⁴⁶ it rejected a total immunity for such records because this could result in accused people making applications to prevent the trial proceeding and would increase the prospects of successful appeals against a conviction.⁴⁴⁷ However, it has also been suggested that legislation which allowed the judge to suspend or discontinue a sexual assault trial where non-disclosure could infringe an accused person's right to a fair trial, would strike a balance between the rights of the complainant and the rights of the accused.⁴⁴⁸ This would expose the conflict between protecting the privacy of the complainant and ensuring a fair trial, rather than masking it by a judicial discretion, which may favour the accused.⁴⁴⁹

444 In a Canadian Supreme Court decision, *R v Osolin* [1993] 4 SCR 595, L'Heureux-Dube J noted (in a dissenting judgment) that: *[R]outine disclosure of medical records and unrestricted cross-examination upon disclosure threaten to function very unfairly against anyone who has undergone mental or psychiatric therapy, whatever the precipitating event or nature of the treatment, as compared to other members of the public. Such persons would be subject to an invasion of their privacy not suffered by other witnesses who are required to testify. They may have to answer to details of their personal life reflected in their records and effectively overcome a presumption, most often entirely unfounded, that their medical history is relevant to their credibility and ability to testify on the matter in issue.*

445 Bronitt and McSherry, above n 94, 271–3.

446 MCCOC, Report (1999), above n 5, 279.

447 Ibid 283.

448 Bronitt and McSherry, above n 94, 286–91.

449 Ibid.

? QUESTIONS

63. Are confidential communications involving the complainant routinely obtained and used as evidence in sexual offence proceedings?
64. If the existing discretionary approach is retained, should the law be changed:
- so that, when the judge is considering whether or not to require a counsellor to provide confidential communications (such as counsellor's notes) to the lawyers for the accused, the judge must apply the same public interest test that he or she currently has to apply when deciding whether or not to permit those communications to be used in court as evidence?
 - to prevent the lawyers for the accused from using confidential communications as evidence in preliminary proceedings (such as committal proceedings) as well as in the trial?
65. Alternatively, should the law provide a mandatory prohibition on the production and use of confidential communications?

JUDGE'S COMMENTS AND DIRECTIONS TO THE JURY**General Background**

8.107 Once the evidence has been put before the jury, the prosecutor, defence counsel and the judge each address the jury in turn. The judge's address to the jury is referred to as the judge's 'charge'.

8.108 In his or her charge, the judge is required to explain the relevant laws. The judge is also required to assist the jury by summarising the evidence, explaining how the law applies to the evidence, and summarising the arguments put by the prosecutor and the defence.

8.109 It is the jury and not the judge who decides whether or not a person should be found guilty of an offence. For this reason, the judge must explain to the jury that they must comply with his or her directions to them about the law, but that, since it is their role to decide what the facts are, they may accept or reject as they see fit any comments he or she might make about the facts.

8.110 Judges' charges set out the elements of the particular offence. Issues which relate to the elements of offences and what judges may say about them are discussed in Chapters 5–7.⁴⁵⁰ In this part of the Discussion Paper, we focus on three other issues which may arise in sexual offence trials. The first two are already covered by s 61 of the *Crimes Act 1958*. These relate to:

- judges' comments about the effect of delayed reporting of a sexual offence on the complainant's credibility; and
- directions about the absence of independent evidence.

8.111 The RLREP and the MCCOC made comments and recommendations on some or all of these.

8.112 The third issue concerns possible changes to the scope of judges' charges and the form in which they are made. This issue was not dealt with by the RLREP or the MCCOC. However, it relates to other issues dealt with by them and has been raised by a number of commentators.

Comments About Delay in Relation to the Credibility of the Complainant

BACKGROUND

8.113 Historically, certain facts have been regarded by the law to reflect on the 'credibility' of a woman who said she had been raped or indecently assaulted. Credibility is concerned with whether or not the complainant's evidence is accurate and honest. Until recent reforms, if a woman was raped, but did not tell anyone about the rape when she had an opportunity to do so, her allegations were presumed to be false.⁴⁵¹ In *Kilby v The Queen*,⁴⁵² the High Court said that the failure of the complainant to report the rape promptly may be an important factor when a jury is deciding on the credibility of the complainant.⁴⁵³

8.114 Most sexual offence complaints made to police in Victoria are made within 24 hours of the alleged offence.⁴⁵⁴ Even so, numerous studies have demonstrated that there are clear reasons why some victims of sexual assault

450 For directions in relation to consent, see above paras 5.19–5.75.

451 *R v Lillyman* [1896] 2 QB 167, 171.

452 (1973) 129 CLR 460.

453 *Ibid* 469.

454 RLREP, above n 7, 41.

do not immediately report the offence (if indeed they report it at all). These may include feeling traumatised, ashamed or frightened, having little faith in the criminal justice system, or not wishing family, friends or colleagues to know about the incident.⁴⁵⁵

8.115 In 1988, the former Law Reform Commission of Victoria (LRCV) recommended that the judge should be required to warn the jury that there may be good reasons for a delay in making a complaint. The LRCV noted that the jury would still be able to take the delay into account in deciding whether the complainant's evidence was reliable.⁴⁵⁶

8.116 This recommendation was adopted in 1991 when the Victorian Parliament amended section 61 of the *Crimes Act 1958*⁴⁵⁷ to provide that, if delay in making a complaint was raised in the course of a trial, the judge was required:

- to warn the jury that delay in complaining does not necessarily indicate that the allegation is false; and
- to inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in complaining about it.⁴⁵⁸

8.117 The RLREP examined the provision, identified concerns about its operation and recommended that it be amended. Section 61 was amended in 1997. The RLREP's findings, recommendations and the amendment are discussed in more detail below.

8.118 The MCCOC also examined this issue. It recommended the inclusion of a provision that is substantially the same as the Victorian provision that was in force prior to 1997. The MCCOC did not examine the 1997 amendments to that provision.

ISSUES

8.119 The issue for the Commission to consider is whether the changes made to the law in 1997 have overcome the problems identified by the RLREP.

455 See, for example, MCCOC, Report (1999), above n 5, 258–9.

456 LRCV, *Rape and Allied Offences: Procedure and Evidence*, Report No 13 (1988) 46–8.

457 *Crimes (Sexual Offences) Act 1991*, which inserted s 61(1)(b) into the *Crimes Act 1958*.

458 *Crimes Act 1958* s 61(1)(b).

8.120 The RLREP studied 27 judges' charges given in trials between 1992–94. The key finding was that some judges gave directions that in the researchers' view were contrary to the spirit of the law.

8.121 The RLREP recommended that:⁴⁵⁹

- the law should make it clear that the judge's direction must be given in a way that makes sense in the circumstances of the case and that judges should refrain from making comments that reflect the assumption that immediate reporting is more consistent with a genuine report of rape; and
- Parliament should consider re-wording the delay warning because, by stating that delay does not *necessarily* indicate falsity, the law implies that there is reason to suspect that late complaints may be false.

8.122 The 1997⁴⁶⁰ amendments removed the word 'necessarily'⁴⁶¹ and added a new sub-section (3) which prevents the judge from commenting on the reliability of the complainant in a case where there has been a delay in reporting 'if there is no reason to do so in the particular proceeding in order to ensure a fair trial'.

8.123 Under these provisions, the trial judge must now determine whether or not, in order to ensure a fair trial, there is reason to make any other comments beyond the comment that there may be good reasons why a victim of a sexual offence might delay in complaining about it. Clearly, every case depends on its particular facts. However, in *R v TJB*, the Court of Appeal indicated that, at least in cases where the complainant was a child when the offence is alleged to have been committed, the only comment that the trial judge should normally make is that there may be good reasons for the delay.⁴⁶² This approach is consistent with the purpose of the amendment.

8.124 Although the section requires a judge to tell the jury that there may be good reason for a delay, it does not prevent a judge commenting on delay where the facts of the particular case show that it is directly relevant to the reliability of the complainant's evidence.

8.125 For example, in the case *R v Mazzolini*,⁴⁶³ the Court of Appeal thought it was appropriate to add a comment on the reliability of the

459 RLREP, above n 7, Recommendations 34, 35.

460 *Crimes (Amendment) Act 1997*.

461 *Crimes Act 1958* s 61(1)(b).

462 *R v TJB* [1998] 4 VR 621, 634.

463 [1999] 3 VR 113.

complainant's evidence. In that case, the accused was charged with having sexually penetrated the complainant when she was 14. The accused and the complainant were in a consensual sexual relationship when the complainant was 16 (in other words, when she was above the age of consent). The complainant's parents strongly disapproved of the relationship. The allegation that the accused sexually penetrated her when she was 14 arose only after the relationship had ended and after several months of intense questioning and pressuring by her parents. In those circumstances, the Court of Appeal indicated that the trial judge should not simply tell the jury that there might be good reasons for the delay, but that the interests of justice required a comment along the following lines:

You may take [the complainant's] delay in complaining into account in deciding whether to accept [her] evidence, but you should also remember that there may be good reasons why a victim of a sexual assault may delay or hesitate in complaining about it.⁴⁶⁴

8.126 A direction of this kind is described as a 'balanced' direction, because it refers not only to possible reasons for delay, but also tells the jury it can take delay into account.

8.127 The Commission is not aware of any cases in which the Court of Appeal has considered how these provisions apply to adult complainants. Before the amendment, a trial judge was normally required to give the jury a 'balanced direction' similar to the direction mentioned in *R v Mazzolini* above.⁴⁶⁵ The new sub-section 61(3) was intended to modify this position, so that in cases involving delay, the trial judge normally tells the jury that there may be a good reason for the delay. This applies to both adult and child complainants. Whereas previously it was necessary to show a reason why the balanced comment *should not* be given in a particular case, it is now necessary to show a reason why the jury should be told that they can take delay into account in assessing the reliability of the complainant's evidence.

CONCLUSION

8.128 Prior to 1997, it was a general practice to inform juries that delay by the complainant in bringing forward their allegations was a 'considerable factor' for them to take into account when deciding on whether the complainant's evidence should be believed.

⁴⁶⁴ *R v Mazzolini* [1999] 3 VR 113, 128–9 (referring to *R v TJB* [1998] 4 VR 621).

⁴⁶⁵ *R v Miletic* [1997] 1 VR 593, 603–4.

8.129 Under current Victorian law, if the issue of delayed complaint is raised, the trial judge is required to tell the jury that there may be good reasons why a victim of a sexual assault might delay or hesitate in complaining about it.

8.130 Depending on the circumstances of the case, the trial judge may be required (if it is necessary to do so in order to ensure a fair trial) to balance this comment with a comment that the jury may take the complainant's delay in complaining into account when they are deciding whether to accept their evidence. The circumstances in which this is done are discussed briefly above.

8.131 This position is consistent with the recommendations of the former LRCV⁴⁶⁶ and the MCCOC.⁴⁶⁷

8.132 The RLREP was concerned that, in order for s 61 to have its intended effect, judges must refrain from making comments that maintain the assumption that 'immediate reporting is more consistent with a genuine report of rape'.⁴⁶⁸

? QUESTIONS

66. The current law requires judges to inform juries that a complainant may have good reasons to delay reporting of a sexual offence, but in instructing the jury, the judge may comment on the relevance of delay in assessing the complainant's reliability, where it is necessary to ensure a fair trial. How are trial judges applying these provisions?
67. Is the current law working effectively?

466 LRCV, above n 456, 48.

467 MCCOC, Report (1999), above n 5, 261.

468 RLREP, above n 7, 339.

Directions About the Absence of Independent Evidence to Support the Complainant's Allegations

BACKGROUND

8.133 This part of the Discussion Paper examines the situation where the complainant's allegations are not supported by any corroboration. Depending on the circumstances of the case, corroboration could, for example, include evidence from another witness about the circumstances

Corroboration

Corroboration is evidence from a source independent of a witness that supports the witness's evidence.

surrounding the offence that tends to confirm the complainant's account, evidence that the accused has lied about relevant matters,⁴⁶⁹ or DNA evidence.

8.134 As a general principle, if a witness says that a fact occurred and the jury believes the witness, the witness' testimony is sufficient to prove that fact, even if the fact is disputed and there is no other evidence to prove it. Despite this general principle, some categories of witnesses have, historically, been treated as likely to be unreliable. These include complainants in sexual offence cases, and children.⁴⁷⁰ Thus, in sexual offence trials, the trial judge would automatically warn the jury that, although they were permitted to rely on the evidence of the complainant, they should be extremely cautious before doing so and that it would be dangerous for them to convict the accused on the basis of that evidence alone.⁴⁷¹

8.135 The practice of routinely warning juries about relying on the uncorroborated evidence of complainants in sexual offence trials was based on assumptions that the evidence of women in relation to sexual offences was intrinsically unreliable, that women were prone to fabricate allegations of sexual offences out of jealousy, spite, regret, or even 'for no reason at all' and that such allegations are 'very easy to fabricate but extremely difficult to refute'.⁴⁷²

469 Provided that it is not necessary to rely on the evidence to be corroborated in order to establish that the accused is lying: *Edwards v The Queen* (1993) 178 CLR 193, 208, 211.

470 They also included accomplices and people charged with treason.

471 See, for example, *Kelleher v The Queen* (1974) 131 CLR 534, 542.

472 See, for example, the comments of Salmon, LJ in *R v Henry* (1968) 53 Cr App R 150, 153.

8.136 The distress and humiliation that many complainants in sexual offence cases are subjected to is now well documented,⁴⁷³ and there is little evidence to substantiate the view that allegations of sexual offences are readily fabricated.⁴⁷⁴

8.137 In 1980, the Victorian Parliament passed legislation⁴⁷⁵ abolishing the practice of automatically giving these warnings in sexual offence cases. The Second Reading Speech stated that the warnings are discriminatory and inappropriate and that the issue of the complainant's credibility should be left to the determination of the jury.⁴⁷⁶

8.138 In 1991, the Victorian Parliament passed a further package of sexual offence reforms,⁴⁷⁷ which included new provisions dealing with the issue of corroboration. The RLREP examined these provisions and identified some difficulties with their operation, which are discussed in more detail below. It recommended that they be amended to make it clear that judges must not comment on the reliability of complainants' evidence on the basis of features that are common to the majority of sexual assaults.⁴⁷⁸

8.139 The MCCOC recommended that a judge must not suggest to a jury that the law regards complainants in sexual offence cases (whether adults or children)⁴⁷⁹ as an unreliable class of witness. The MCCOC emphasised that its recommendation only related to warnings based on complainants as a class, and that it did not restrict the right of a judge to comment on the evidence in a particular case.⁴⁸⁰

ISSUES

8.140 The issue for the Commission to consider is whether the current restrictions on what a judge may say to a jury in circumstances where the complainant's evidence is not corroborated are sufficient, or whether further restrictions are required.

473 See, for example, RLREP above n 7, 249–50.

474 Victorian Community Council Against Violence, *A Profile of Rapes Reported to the Police in Victoria 1987–1990* (1991) 65–9. This study found that less than 2% of complaints of rape result in the complainant being charged with making a false report to police.

475 *Crimes (Sexual Offences) Act 1980*, which inserted s 62 into the *Crimes Act 1958*. In 1991, s 62 was repealed and replaced with s 61 of the *Crimes Act 1958*.

476 Victoria, *Parliamentary Debates*, Legislative Assembly, 5 December 1980, 4460 (Robert MacLellan, Minister for Transport).

477 *Crimes (Sexual Offences) Act 1991*.

478 RLREP, above n 7, 341.

479 MCCOC, Report (1999), above n 5, Recommendations 251, 255.

480 Ibid.

8.141 The relevant parts of section 61 provide:

- (1) On the trial of a person for [a relevant sexual offence] —
 - (a) the judge must not warn, or suggest in any way to, the jury that the law regards complainants in sexual cases as an unreliable class of witness; and
 - (b) [...]
- (2) Nothing in sub-section (1) prevents a judge from making any comment on evidence given in the proceeding that it is appropriate to make in the interests of justice.
- (3) Despite sub-section (2), a judge must not make any comment on the reliability of evidence given by the complainant in a proceeding to which sub-section (1) applies if there is no reason to do so in the particular proceeding in order to ensure a fair trial.

8.142 In order to understand the effect of this provision, it is necessary to understand its history and its relationship with broader principles underlying judges' charges in cases that rest on the uncorroborated evidence of one witness.

8.143 Section 61 largely affirms the position laid down by the High Court in *Longman v The Queen*.⁴⁸¹ This case considered the effect of earlier provisions that simply abolished the requirement to warn juries that it is unsafe to convict the accused on the uncorroborated evidence of the complainant. The High Court accepted that the purpose of such legislation was to prevent juries being given warnings reflecting the view that complainants in sexual offence cases were more likely to be unreliable than witnesses in other cases. However, the Court said that this did not remove a requirement to warn the jury if it is necessary to do so to avoid a miscarriage of justice arising from the circumstances of the particular case.

8.144 The *Longman* case must be considered in light of the principles applying to jury warnings generally. These underlying principles have been most clearly stated by the High Court in cases where it was argued that there were particular categories of witnesses in relation to whom warnings should automatically be given.

8.145 In those cases (not all of which have involved sexual offences), the High Court has moved away from the earlier approach of formulating particular

481 (1989) 168 CLR 79.

warnings for particular categories of witnesses. Instead it has said that:

A warning is needed when there is a factor legitimately capable of affecting the assessment of evidence of which the judge has special knowledge, experience or awareness and there is a perceptible risk that, unless a warning about that factor is given, the jury will attribute to an important piece of evidence a significance or weight which they might not attribute to it if the warning was given.⁴⁸²

8.146 In *Longman*, the defendant was on trial for sexual offences against a young child that were said to have occurred over 20 years previously. The trial judge had simply told the jury to consider the relative credibility of the complainant and the defendant. The High Court unanimously agreed that this jury direction was insufficient, because of the circumstances of the case.

8.147 The majority of the High Court thought that the case required a specific warning to the jury because it was a matter within the special knowledge, experience or awareness of the judge that, due to the delay, the defendant could not adequately test the evidence of the complainant. If the allegations had been made soon after the alleged incidents, it would have been possible in cross-examination to explore the circumstances in which they were alleged to have occurred and possibly to bring forward evidence throwing doubt on the complainant's story or confirming the defendant's denial. The loss of this opportunity affected whether the accused would receive a fair trial. In their view, the jury would not necessarily have been aware of the significance of this aspect of the delay unless they received a proper warning from the judge.⁴⁸³

8.148 In summary, under Victorian law, trial judges should not routinely warn juries that it would be dangerous to convict a person charged with a sexual offence based solely on the complainant's uncorroborated evidence. However, a warning may sometimes be appropriate because of the particular facts of the case, where the trial judge's special knowledge or experience indicates this is necessary to ensure a fair trial.

8.149 In its review of the 1991 reforms, the RLREP examined 27 directions given to juries in rape trials between 1992–94.⁴⁸⁴ It considered that 11 of those directions were effectively corroboration warnings, in that the directions implied that the jury ought to look for evidence, independent of the complainant, before convicting the accused. The research concluded that

482 *Carr v The Queen* (1988) 165 CLR 314, 325. See also *Bromley v The Queen* (1986) 161 CLR 315.

483 *Longman v The Queen* (1989) 168 CLR 79, 91, 108.

484 RLREP, above n 7, 21, 293–340.

such warnings were typically given in the following circumstances:

- when the allegations were very old and the complainant was very young at the time of the alleged offence;
- when it is a bare case of 'oath against oath' (that is, where the only evidence in the case comes from the complainant and the accused); or
- when it is open to the jury to think that 'she is making it up, or has some other purpose' for reporting the incident.⁴⁸⁵

8.150 The RLREP recommended a further amendment to section 61 to make it clear that judges must not comment on the reliability of complainants' evidence on the basis of features that are common to the majority of sexual assaults. This recommendation was based on a view that the exercise of this discretion is directed at protecting the accused from being unjustly convicted. In the view of the RLREP, it does not take into account the need to accommodate complainant's rights in calculating what is in the interests of justice.⁴⁸⁶

8.151 The RLREP considered that circumstances such as the absence of corroborating evidence and delay in bringing a complaint are common features of a sexual offence case and that they 'should not prompt the use of further safeguards for the accused (in the form of judicial comment on the reliability of the complainant's evidence) than are already provided by the rules and procedures of the criminal justice system'.⁴⁸⁷

8.152 In 1997, s 61 was amended by adding sub-s (3) stating that:

Despite sub-section (2), a judge must not make any comment on the reliability of evidence given by the complainant in a [sex offence proceeding] if there is no reason to do so in the particular proceeding in order to ensure a fair trial.

8.153 This provision goes further than was recommended by the MCCOC, which simply recommended a provision that prohibits judges from giving a general warning about the unreliability of complainants in sexual offence cases as a category of witness. The MCC provision reflects the Victorian provision prior to the amendment in 1997. The MCCOC did not comment on the 1997 amendments.

485 RLREP, above n 7, 340.

486 See above paras 4.6–4.8.

487 RLREP, above n 7, 340–1.

HOW IS SECTION 61(3) OPERATING?

8.154 The Court of Appeal has made it clear that a warning is no longer required simply because the complainant's evidence is uncorroborated and the case is one of 'oath against oath'. In *R v Costin*,⁴⁸⁸ the Court of Appeal stated that 'to hold that such a warning is necessary solely because the complainant's evidence is uncorroborated would seem to fly in the face of section 61(1)'.⁴⁸⁹ The court in that case held that a *Longman* warning is only required when there is some *additional* circumstance, the full significance of which the jury is unlikely to be aware, without a proper warning from the judge.

8.155 Although a *Longman* warning is not supposed to be akin to a direction from the judge to the jury to find the accused not guilty,⁴⁹⁰ a strongly worded warning by a trial judge may be seen by the jury as a direction to acquit. The practical effect of a warning of this kind is that a trial judge may, in effect, take over the function of the jury. This danger is significant if the particular circumstances that are seen as warranting the giving of a warning are ones that are clearly for the jury to decide and are not within the 'special knowledge, experience or awareness' of judges.⁴⁹¹

8.156 The practical dilemma was stated by Ormiston, JA in *R v Mazzolini*:

As defence counsel catalogue the variety of 'special' circumstances seen by appellate judges (including, I confess, myself) as requiring warnings in particular cases, so trial judges will retreat to the safety of issuing Longman warnings for every such circumstance and every faintly analogous circumstance, making 'clear the caution to be exercised in the light of those circumstances': Robinson at [26]. Juries will not be left to resolve ordinary though serious issues of fact about which they must be and are always told to be satisfied beyond reasonable doubt. Instead they will become 'punch-drunk' with a miscellany of indiscriminate warnings in trials of sexual offences, such as will suggest, as before, that a complainant's testimony is indeed unreliable. Since the issue seems only (or almost only) to arise on trials for sexual offences (and appeals therefrom), the impression might be given, if the distinction

488 [1998] 3 VR 659.

489 [1998] 3 VR 659, 663.

490 See comments of Winneke P in *R v Hyatt* [1998] 4 VR 182, 189.

491 In a recent decision, the High Court said that a warning was necessary on the basis of factors such as the absence of a threat by the accused to the complainant and the court's impression that there was a 'degree of suggestibility' on the part of the complainant: *Robinson v The Queen* (1999) 197 CLR 162, [25]-[26]. It is very difficult to see how the factors identified by the High Court in that case lie within the special knowledge and experience of judges rather than jurors.

emphasised in the preceding paragraph [between circumstances that it is well within the ability of the jury to assess for themselves, and those the full significance of which may be more apparent to the judge] is not maintained, that judges are again, by a back door, treating complainants in such cases as ordinarily unreliable witnesses, thus prompting yet another bout of statutory amendments. Bearing in mind that the jury is the constitutional body entrusted with the duty of resolving issues of fact in criminal trials, it can only be where principle requires additional instruction to the jury that it is proper to interfere further with that function.⁴⁹²

8.157 Appendix 6 of this Discussion Paper contains tables setting out all sexual offence cases heard by the Court of Appeal between 1997–2000 in which it was argued that the trial judge had failed to give a *Longman* warning or had given an inadequate *Longman* warning.

8.158 There were two cases in which no *Longman* warning had been given. In one of those cases, defence counsel had specifically asked the trial judge not to give the warning because in giving the warning the judge would have drawn the jury's attention to evidence that could amount to corroboration if it was accepted by the jury. In both cases the Court of Appeal held that no warning was required.

8.159 In the remaining 14 cases, a warning had been given. The argument on appeal was whether the warning was inadequate.

8.160 In seven cases, the Court held that the warning was not sufficiently emphatic. Six of those cases were in 1997 and 1998. There was one case in 1999 in which the warning was considered to be not sufficiently emphatic, and no cases in 2000. Notably, there were two cases in which the Court of Appeal suggested that the warning was too emphatic.

8.161 The small number of appeals on the ground that no *Longman* warning was given (as opposed to appeals on the ground that the warning given was inadequate), and the two cases in which the warnings were suggested to be too emphatic, might indicate that some trial judges are 'retreating to the safety' of issuing *Longman* warnings too readily.

492 [1999] 3 VR 113, 130.

? QUESTIONS

68. Do trial judges frequently warn juries that it may be dangerous or unsafe to convict (*Longman* warnings) in circumstances where the law does not require a warning to be given?
69. Are any further changes to the law required to prevent this occurring?

Should Victoria Adopt a New Approach to Jury Instructions Generally?

8.162 A broader question that underpins many of the issues dealt with in this Discussion Paper is whether juries are able to understand and apply the instructions given to them by the trial judge.

8.163 The trial judge's charge is given orally. Aside from summarising the evidence given in the trial, the charge will contain an explanation of the elements of the offence or offences that are being tried and various warnings and instructions about the burden and standard of proof, the way in which certain evidence can be used, and inferences that the jury is permitted to draw if they find that certain facts have been proven. It is very rare for any explanations or instructions to be given to the jury in writing, although if jurors want to take notes during the judge's charge they are usually allowed to do so.

8.164 In many cases, the instructions to the jury can involve very subtle distinctions between legitimate and illegitimate uses of evidence. In some circumstances, the jury will be told to do something (such as to disregard evidence) that is likely to strike the jurors as being contrary to 'common sense'. Unless these instructions are clear and comprehensible, there is a particular risk that jurors will find them difficult to understand and apply.

8.165 In addition to these difficulties, the way in which the instructions are given can also make it difficult for jurors to fully comprehend what they are being told to do. Many commentators have identified the use of legal jargon and convoluted sentences in jury instructions as significant barriers to understanding.⁴⁹³

493 See, for example, Laurence Severance, 'Toward Criminal Jury Instructions that Jurors can Understand' (1984) 75 *Journal of Criminal Law & Criminology* 198, and Robert Charrow and Veda Charrow, 'Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions' (1979) *Columbia Law Review* 1306.

8.166 There has been little research on the extent to which jurors in Victoria actually understand and apply the instructions given to them.⁴⁹⁴ A recent study of jurors in New Zealand found that many jurors did not understand the nature or significance of a number of the standard instructions from the judge about the way in which they were to approach the evidence. This finding is consistent with other studies (predominantly in the United States) which indicate that, although jurors typically pay close attention to the judge and earnestly endeavour to perform their functions, they have a poor understanding of concepts which lawyers assume to be central to their tasks, and of subtle directions that require them to conditionally accept evidence for one purpose but not for another purpose.⁴⁹⁵

8.167 In the absence of further Australian research, it is difficult to know with confidence whether these findings would be applicable here. Australian courts have recently acknowledged the research from other jurisdictions and have suggested that the presumption that juries understand their instructions is based more on pragmatic considerations than on any confidence that the presumption is true.⁴⁹⁶

8.168 Assuming that juries in sexual offence cases do have difficulty understanding and applying the instructions given to them by the trial judge, two possible avenues for reform have been suggested:

- The range of matters dealt with in charges to the jury could be significantly reduced. Many of the matters that are currently dealt with in a judge's charge could be left to the common sense of the jury.
- The way in which jury charges are delivered could be changed. The charge could continue to deal with the same range of matters, but the charge could be made more accessible through steps such as simplifying the language used in the charge and providing the jury with a written summary of key elements of the charge.

8.169 The first of these approaches was advocated by the former Director of Public Prosecutions for Victoria (now Flatman J of the Supreme Court of Victoria) in an article published in 1998.⁴⁹⁷ In that article, Flatman and Bagaric argue that the directions that judges are required to give to juries are

494 In 1998, the Victorian Department of Justice conducted a survey of 471 jurors in criminal trials; however, that survey did not specifically ask about jurors' comprehension of instructions given to them by the judge.

495 See the studies cited in *Zoneff v The Queen* (2000) 200 CLR 234, paras 65–7.

496 *Zoneff v The Queen* (2000) 200 CLR 234, para 65; *KRM v The Queen* [2001] HCA 11, para 111.

497 Geoffrey Flatman and Mirko Bagaric 'Juries: Peers or Puppets—The Need to Curtail Jury Instructions' (1998) 22 *Criminal Law Journal* 207.

so numerous and expansive that they may pose a risk to the independent deliberations of juries. They favour a minimal, general-purpose charge which merely conveys to the jury:

- the need for a unanimous decision on whether the accused is guilty of the offence as charged;
- the standard of proof that is required;
- that they may reach their decision only on the basis of the evidence that was put before them; and
- the elements of the offence or offences, and any defences that are open on the evidence.

8.170 In the authors' view, the judge should not summarise the arguments of the prosecution and the defence and should not make any comments on the facts. They also argue that the judge should not attempt to highlight the dangers inherent in some types of evidence (such as uncorroborated evidence of a complainant in a sexual offence case).

8.171 One argument against this approach is that some of the material which must be included in jury directions is intended to overcome the effects of myths about the way victims of sexual offences normally behave (for example, the myth that a delay in reporting an alleged offence throws doubt on the reliability of the complainant). If requirements relating to these and other matters were removed, some juries might be influenced by inappropriate stereotypes.

8.172 Another argument that has been made against this approach is that if jurors are not given specific instructions about various issues and are simply left to apply their own common sense they might apply 'illogical intuitive reasoning'.⁴⁹⁸ To a degree this objection is misplaced, in that it does not allow for the proposition that in many cases the distinction between 'logical' reasoning and 'intuitive' reasoning is not clear-cut.⁴⁹⁹ It might be more accurate to say that a judge's task is not to exclude the use of intuition by the jury, but to prevent the jury from certain forms of erroneous reasoning.

8.173 Assuming that the law continues to require that judges give juries instructions on various matters, these will be of no use if the jury is not able to understand and apply them.

⁴⁹⁸ *Zoneff v The Queen* (2000) 200 CLR 234, para 68.

8.174 Victorian judges have themselves compiled a set of sample directions to be used in the County Court and Supreme Court.⁵⁰⁰ The Commission is not aware of how frequently these are used. In its review of jury services, the Law Reform Committee of the Victorian Parliament recommended that model jury instructions should be developed through a multi-disciplinary approach using the expertise of lawyers (to ensure legal accuracy), psycholinguists (to ensure that the language used is comprehensible) and psychologists (to test comprehensibility).⁵⁰¹ As with the existing sample directions, they would simply be a guide to be adapted by the trial judge to suit the circumstances of each case. We also note that judges in some courts routinely provide juries with written material and a small number of judges are giving visual presentations which set out elements of the offences being considered.⁵⁰²

? QUESTIONS

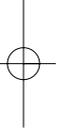
70. Should the range of matters dealt with in jury directions be limited, so that greater reliance is placed on the common sense of juries?
71. Are there any changes which could be made to ensure that jury directions and charges are understood by juries?

499 For instance, a sexual offence case might depend on the jury's assessment of the credibility of the complainant. The defence may point to matters, such as inconsistencies in the complainant's statements about what happened, which they say raise a reasonable doubt about the credibility of the complainant's allegations. The jury's conclusions about whether they believe the allegations and about whether there are any reasonable doubts might depend on a range of factors including the complainant's demeanour in the witness box and the extent to which the jury considers that the inconsistencies are explicable in the complainant's favour or not (in some circumstances a story based on a carefully constructed lie may be more consistent than a recollection of a real event that occurred when the complainant was in a state of extreme distress). The resolution of such questions is unlikely to be reducible to the orderly path of a strict logical progression from premise to conclusion, and is more likely to involve an 'intuitive synthesis' of all of the relevant elements. The term 'intuitive synthesis' is used by the courts themselves to describe the process by which they determine what sentence to impose, a task which Victorian courts have long said cannot be reduced to a mechanical application of strict logic.

500 Justice I Gray and Judge W Kelly, *Collected Directions in Criminal Trials*.

501 Law Reform Committee, *Jury Service in Victoria*, Final Report (1997) Vol 3, 122, para 2.210.

502 Judge Mary Ann Yeats, 'Using PowerPoint in Charging Juries' (Paper presented at Australian Institute of Judicial Administration, Technology for Justice Conference, Melbourne, 8–10 October 2000).



Chapter 9

Alternative Responses to the Trial Process

INTRODUCTION

9.1 In Chapter 4 we explained how the criminal justice system, which is an 'adversarial' system, applies to the prosecution of sexual offences in Victoria. The case for the Crown is presented by a prosecutor. The complainant is a prosecution witness. The accused is usually represented by lawyers, called defence counsel. The complainant is not a party to the case and is not represented by their own lawyer.

9.2 The Drugs and Crime Prevention Committee and the Rape Law Reform Evaluation Project (RLREP), referred to throughout this Discussion Paper, both concluded that the current trial system is not adequately responsive to the needs of many complainants in sexual offence cases.⁵⁰³ Many of the questions asked throughout this Discussion Paper also raise issues about the responsiveness of the system to the needs of complainants.

9.3 In this Chapter we consider ways in which the system might be changed to improve responsiveness. We look at whether complainants should have their own legal representation in certain circumstances, and at alternative legal responses to sexual offences, outside the traditional trial and sentencing system.

LEGAL REPRESENTATION FOR COMPLAINANTS

9.4 In its 1991 review of rape laws and procedures, the former Law Reform Commission of Victoria (LRCV) considered whether complainants should be given the right to separate legal representation.⁵⁰⁴ The LRCV pointed out that legal representation could potentially start when a complainant reports being raped or sexually assaulted. The complainant's lawyer could give advice on the rights and choices complainants have during the investigation and trial processes, and communicate with police and

503 Crime Prevention Committee, above n 8; Drugs and Crime Prevention Committee, above n 8; RLREP, above n 7.

504 LRCV, Interim Report No 42 (1991), above n 22, paras 77–82.

prosecutors on behalf of the complainant. This might make these processes less traumatic, and result in more complainants exercising their rights, such as the right to use alternative arrangements when giving evidence.⁵⁰⁵

9.5 The LRCV concluded that the most cost-effective option for providing complainants with basic legal advice would be to strengthen the capacity of Centres Against Sexual Assault (CASAs) to provide basic legal advice and information, by the appointment of a legal education officer. The LRCV emphasised that this issue should be reconsidered once its recommendations had been implemented and their impact assessed.⁵⁰⁶

9.6 The Office of Public Prosecutions (OPP) currently runs a Witness Assistance Service which provides legal information to victims of all types of offences. This service employs three social workers who service all of Victoria. Last year, this service was used by 319 children who were complainants in sexual offences cases. This was almost three times as many children as used the service the previous year. The OPP attributed the increase to training courses run to make lawyers aware of the service.⁵⁰⁷

9.7 Complainants could also be given legal representation during the committal and trial process. This might enhance a complainant's sense of participation in these processes, so that they feel more like a party, instead of simply being a witness.⁵⁰⁸

9.8 The LRCV concluded that complainants should not be legally represented during court proceedings on the basis that this could complicate the trial, confuse juries and undermine the prosecution case. The LRCV also expressed concern that allowing complainants to have legal representation during the trial would be likely to cause longer trials.⁵⁰⁹

9.9 Another criticism of giving complainants legal representation is that it may jeopardise the fairness of the trial for the accused person.⁵¹⁰ Certainly, the introduction of a third independent party into the court process would significantly change the current structure of criminal trials.

505 See above paras 8.7–8.28.

506 LRCV, Interim Report No 42 (1991), above n 22, para 82.

507 Victoria, Office of Public Prosecutions, *Annual Report 1999–2000*, 85.

508 LRCV, Interim Report No 42 (1991), above n 22, para 79.

509 Ibid, para 80.

510 Ireland, Department of Justice, Equality and Law Reform, *The Law on Sexual Offences: A Discussion Paper* (1998), para 5.6.2.

9.10 The Australian Law Reform Commission (ALRC) and the Human Rights and Equal Opportunity Commission (HREOC) also considered whether complainants should be separately represented as part of their joint review of children and legal processes.⁵¹¹ They concluded that if other measures to protect child complainants from trauma during trials proved inadequate, the use of separate legal representation should be 'seriously considered'.⁵¹²

9.11 An Act recently passed by the Irish Parliament gives adult complainants in certain, very serious sexual offence cases, the right to separate legal representation in limited circumstances. In Ireland, as in Victoria, a defendant who wants to lead evidence or cross-examine the complainant about their sexual history is required to apply to the court for permission to do so.⁵¹³

9.12 The Act gives the complainant the right to participate as a party to this application, represented by a lawyer. The complainant must also be informed of these rights and given a reasonable time to arrange representation.⁵¹⁴ This Act was introduced in response to a Discussion Paper published by the Department of Justice, Equality and Law Reform.⁵¹⁵

9.13 This development occurred in response to several reports which argued for separate legal representation for victims in sexual offence cases.⁵¹⁶ Most recently, in 1998 the Dublin Rape Crisis Centre and Trinity College School of Law published a research report which examined the use of separate legal representation for rape victims in a number of European countries.⁵¹⁷ Most of these countries have inquisitorial legal systems, although Denmark, where the criminal justice system is a hybrid of the adversarial and inquisitorial models, also has separate legal representation for victims of sexual offences and all other crimes.⁵¹⁸ In these countries, victims of rape can claim victim's compensation during the criminal trial.

511 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997).

512 Ibid para 14.131.

513 The circumstances in which the sexual history of a complainant can be used as evidence in Victorian courts are examined in Chapter 8 of this Discussion Paper: see paras 8.65–8.81.

514 *Criminal Law (Rape) Act 1981* (Ire) s 4A, inserted by the *Sex Offenders Act 2000* (Ire).

515 Ireland, Department of Justice, Equality and Law Reform, above n 510, paras 5.6, 5.8.

516 Ireland, Working Party on Legal and Judicial Process, *Report* (1996) 87; Ireland, Department of Justice, Equality and Law Reform, above n 510, 42.

517 Dublin Rape Crisis Centre and School of Law, Trinity College, above n 194.

518 Ibid, 188–205. For a discussion of the differences between the adversarial and inquisitorial models, see ALRC, above n 87.

9.14 Historically, the victim was appointed their own lawyer to represent them during the compensation claim part of the trial. However, in many countries the role of the victim's lawyer has expanded. The role of the victim's lawyer differs from country to country, but includes all or some of the following.

9.15 Before the trial, the victim's lawyer could:

- sit with the victim while the police interview them;
- give the victim feedback about the investigation, including whether the accused has given a statement to police, whether the accused will be prosecuted, any changes to the charge and the consequences of this, the plea, whether the accused is granted bail and if so, what conditions are imposed on him;
- examine the evidence.

9.16 During the trial, the victim's lawyer could:

- be present in court throughout the trial;
- speak on behalf of the victim;
- apply for alternative arrangements for giving evidence;
- object to questions which the prosecution and the defence ask the victim;
- cross-examine the accused;
- make submissions on the law;
- call certain witnesses on behalf of the victim;
- address the court on whether the accused is guilty, the victim's compensation claim, and the sentence.

9.17 The report by the Dublin Rape Crisis Centre and the Trinity College School of Law found that lack of information about the progress of the investigation before the trial was a significant source of trauma to rape victims. It recommended that all rape victims should be entitled to legal representation as soon as they reported being raped and that police should be required to tell all victims who reported being raped about this right.⁵¹⁹

9.18 The report also found that victims who had separate legal representation were much more satisfied with the trial process than those

519 Ibid, Recommendation 2.

who did not.⁵²⁰ It recommended that victims be entitled to their own lawyer. The victim's lawyer could apply for the victim to give evidence using an alternative arrangement, make submissions on the admissibility of evidence about their sexual history and object to unduly hostile cross examination.⁵²¹

9.19 The cost of legal advice would be a real obstacle to complainants exercising a right to separate legal representation. In Ireland, complainants in sexual offences cases qualify for legal aid.⁵²²

? QUESTIONS:

72. Are there any circumstances where complainants in sexual offence cases should be represented by lawyers during trials?
73. Is there any other way that complainants could be supported or assisted with legal information and representation?

ALTERNATIVE TYPES OF PROCEEDINGS

9.20 Over the last few years, a number of States and Territories in Australia have introduced a range of new ways of dealing with criminal offences. These new proceedings focus on increasing the involvement of offenders, victims and local communities in sentencing offenders. They also focus on dealing with underlying factors which contribute to offending, such as drug addiction and mental illness.⁵²³ Examples of these alternative proceedings include specialised courts, such as Indigenous courts and drug courts, and victim-offender conferences.

9.21 So far, these types of alternative proceedings have been used mainly for offences which are less serious than rape and sexual assault. Yet, as we discussed in Chapter 3⁵²⁴ of this Discussion Paper, only a small number of sexual offences in Victoria are reported to police and dealt with by courts. This raises the question of whether there is any scope to adapt or

⁵²⁰ Ibid 17.

⁵²¹ Ibid, Recommendations 3, 4, 5.

⁵²² *Civil Legal Aid Act 1995* (Ire) s 26(3). See also *ibid*, Recommendation 4.

⁵²³ The terms used to describe these programs in the legal literature are 'restorative justice' and 'therapeutic jurisprudence'.

⁵²⁴ See above paras 3.18–3.28.

integrate any aspects of these alternative types of proceedings, to make the criminal justice system more responsive to the needs of complainants in sexual offences cases.

9.22 In this section of the Discussion Paper we briefly describe these alternative proceedings. We consider the advantages of traditional trial and sentencing processes, and some issues which are likely to arise in adapting them for use in relation to sexual offences.

New Courts

9.23 In Florida in the United States, a special court dealing with sexual offences cases was established in 2001.⁵²⁵ Many Australian States have also introduced courts which focus on particular offences, although none has established a court specifically to hear sexual offences cases.

9.24 For example, South Australia operates a Family Violence Court through its Magistrates' Court. It hears applications for domestic violence restraining orders, and criminal charges relating to domestic violence. A Women's Worker provides support and advice to women applying for domestic violence restraining orders. The Family Violence Court also refers men appearing in relation to both domestic violence restraining orders and criminal charges to a 12-week program aimed at stopping their violent behaviour. Referral is based on men acknowledging their violent behaviour and the harm it causes, and demonstrating that they want to stop being violent. Men who are referred to the program are granted bail and the court proceedings are suspended while they participate.⁵²⁶

9.25 Other new courts focus on specific underlying problems of individual offenders. For example, in Victoria and South Australia, the Magistrates' Court also runs a diversion program for people with impaired mental functioning who are charged with a minor, summary offence. People can nominate themselves to participate in the program, or be referred to it by police, a lawyer, magistrate or mental health service agency. When a person is referred to the program, their case is adjourned and a psychiatric service attached to the court assesses them. The service arranges for health services such as counselling and medication, and may also arrange housing. The magistrate monitors their progress and takes it into account in deciding the

525 J Dahlburg, 'Unique Court for Sex Crime Victims' *Los Angeles Times* (Los Angeles, United States of America), 6 August 2001, 6.

526 For more information about the program, see <http://www.courts.sa.gov.au/courts/magistrates/violence_intervention.html>.

outcome of their case.⁵²⁷ New South Wales also has a scheme for psychiatric assessment of offenders at some local courts.⁵²⁸

9.26 Drug courts are another example of this new type of court. New South Wales, Queensland, South Australia and Western Australia are all currently running trial Drug Courts. New South Wales is also running a separate pilot Youth Drug Court.⁵²⁹

9.27 Other new courts focus on particular communities. For example, Magistrates' Courts in South Australia set aside regular court sitting days to sentence adult Aboriginal offenders. The magistrate sits off the bench and the offender sits at the bar table with their lawyer and may also have a relative sit with them. Members of the offender's family and community are encouraged to attend court. The offender, their family and community members, and the victim are able to address the magistrate. An Aboriginal Justice Officer works in the court and assists the offender and members of the Aboriginal community with queries about the court. The Aboriginal Justice Officer or a senior Aboriginal person also advises the magistrate on cultural and community matters.⁵³⁰

9.28 The Victorian Department of Justice is currently consulting with the Aboriginal community about developing a Koori court in this State, as part of the Victorian Aboriginal Justice Agreement.⁵³¹ The consultation process is considering a number of different models, including the South Australian model, conferencing⁵³² and circle sentencing.⁵³³

9.29 In many indigenous communities in North America, circle sentencing courts are used to sentence offenders. Circle sentencing involves the active participation of the victim, the offender and members of local communities who discuss with the sentencing judge how to heal the victim

527 For more information see <http://www.courts.sa.gov.au/courts/magistrates/court_interv_officers.html> and Australian Broadcasting Corporation (ABC) Radio National, *The Law Report*, 'Mental Health and the Law' (14 March 2001) transcript available at <<http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s259679.htm>>. This program is currently being evaluated by the South Australian Office of Crime Statistics.

528 Arie Freiberg, 'Problem-oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 7, 12.

529 Ibid 6–10.

530 For more information see <http://www.courts.sa.gov.au/courts/magistrates/aboriginal_court_days.html>.

531 The Victorian Aboriginal Justice Agreement was developed by the Department of Justice, Aboriginal Affairs Victoria and Victoria's Aboriginal communities and was launched in May 2000. For more information see <http://www.dhs.vic.gov.au/annrep/1999_2000/html>.

532 See below paras 9.32–9.33.

533 Meeting with Angela Cannon, Director—Projects, Department of Justice (30 July 2001).

and how to rehabilitate or treat the offender. The circle also discusses the extent of similar offences in the community, the causes, consequences, and what the community can do more broadly to prevent similar offences. The circle develops a sentence plan and reconvenes several months later to consider the offender's progress.

9.30 The New South Wales Aboriginal Justice Advisory Council has proposed a trial circle sentencing court in New South Wales, arguing that involving local communities in the sentencing process helps make punishment culturally relevant and that Indigenous offenders are more likely to accept and respond to sentences which they feel come from within their own community.⁵³⁴

9.31 These new courts try to identify and deal with offenders' underlying problems. The judges who sit on the courts closely supervise offenders. These courts also try to involve offenders, victims and communities more in court processes and to facilitate cooperation between government and community agencies in providing services. The courts may also work with each other. For example, Magistrate Iuliano, who presides over the South Australian program for people with impaired mental functioning, reported working with the South Australian Family Violence Court when dealing with a person who had a severe brain injury and was charged with a domestic violence offence.⁵³⁵

Victim-Offender Conferences

9.32 Victim-offender conferences are less formal than court proceedings. Conferences are attended by the offender and the victim, each with support people. A convenor facilitates a discussion about the impact of the offence on the victim and the participants agree on an outcome plan for the offender to complete. The goals of conferencing are to:

- require offenders to take responsibility for the harm their offences have caused;
- encourage offenders, victims of crime and communities to participate in decisions about how to deal with the aftermath of decisions about offences; and
- find ways to repair the harm resulting from offences, including harm to relationships.⁵³⁶

534 New South Wales, Aboriginal Justice Advisory Council, *Circle Sentencing: Involving Aboriginal Communities in the Sentencing Process*, Discussion Paper (1999).

535 Arie Freiberg, above n 528, 2–3.

536 Heather Strang, *Restorative Justice Programs in Australia*, Criminology Research Council (2001) 2, available at <<http://www.aic.gov.au/crc/oldreports/strang/html>>.

9.33 All States and Territories in Australia, including Victoria, have victim-offender conferences of some sort.⁵³⁷ Most programs focus on young offenders, although the Australian Capital Territory, Queensland and Western Australia are currently conducting programs for adult offenders. Conferences are generally available for offenders who commit less serious offences, such as indecent language, theft and possessing small amounts of drugs.⁵³⁸ South Australia is the only Australian jurisdiction which permits young offenders who have committed sexual offences to be dealt with by a victim-offender conference.⁵³⁹ Sexual offences are also covered in the New Zealand program for young offenders.⁵⁴⁰ In all other jurisdictions, offenders who commit sexual offences are excluded from conferencing.⁵⁴¹

Other Alternatives

9.34 Victims of sexual offences can apply to the Victims of Crime Assistance Tribunal (VOCAT) for financial assistance.⁵⁴² To be eligible, the sexual offence must have been reported to police within a reasonable time and the victim must apply for assistance within two years of the offence, although the VOCAT may grant extensions. The maximum amount of financial assistance the VOCAT can award is usually \$60,000. Adults who had sexual offences committed against them as children may be eligible for special financial assistance.⁵⁴³

9.35 The Victorian Government is currently conducting a review into government-funded support services for victims of crime, including the financial assistance provided by the VOCAT.⁵⁴⁴ Therefore, we have not included it in this review of the law relating to sexual offences.

537 For a summary of restorative justice programs currently operating in Australia, see *ibid* 6–28.

538 The Victorian restorative justice program is the only exception to this. It is not used in relation to minor offences and focuses on offenders who are at risk of re-offending and progressing through the juvenile justice system: *ibid* 10.

539 *Ibid* 12–13, 15.

540 *Ibid* 35.

541 See, for example, *Young Offenders Act 1997* (NSW) s 8(2)(d).

542 The Victims of Crime Assistance Tribunal (VOCAT) was established by the *Victims of Crime Assistance Act 1996*. The VOCAT also provides financial assistance to victims of other types of violent crimes.

543 <[http://www.magistratescourt.vic.gov.au/Victims of Crime Assistance Tribunal](http://www.magistratescourt.vic.gov.au/Victims%20of%20Crime%20Assistance%20Tribunal)>.

544 <[http://www.justice.vic.gov.au/Review of Services for Victims of Crime](http://www.justice.vic.gov.au/Review%20of%20Services%20for%20Victims%20of%20Crime)>.

9.36 The Law Commission of Canada recently completed a report which assessed the advantages and disadvantages of different legal responses to child abuse in Canadian institutions.⁵⁴⁵ As well as criminal trials and victim compensation schemes, the Commission examined civil proceedings under which the victim sues the offender; ex gratia payments to victims by governments; inquiries by ombudsmen, children's commissions and broader public inquiries; truth commissions; community initiatives and redress programs run by institutions themselves.

9.37 In Australia, the Queensland Government has held a public inquiry into the abuse of children in orphanages and detention centres in Queensland.⁵⁴⁶

9.38 While these alternatives tend to be designed to respond to particular instances of sexual abuse, it may be that aspects of these proceedings can be applied more broadly.

DISCUSSION

Adapting Features of the Alternative Proceedings for Sexual Offences

9.39 The existing new courts and restorative justice programs mainly deal with offences which are much less serious than sexual offences. In general, they have jurisdiction over offenders who have pleaded, or been found, guilty, or admitted guilt informally. These are not the types of cases which most require a new approach in the area of sexual offences.

9.40 The fact that the new courts and restorative justice programs focus on dealing with the offender's underlying problems requires that these problems can be identified and treated, and requires a high level of inter-agency collaboration in delivering treatment services.

Domestic Violence Courts

9.41 Critics of domestic violence courts argue that domestic violence should be treated in the same way as other forms of violence. It is argued that dealing with domestic violence outside the main criminal justice system

545 Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, Report, (2000).

546 Queensland, Commission of Inquiry into Abuse of Children in Queensland Institutions, *Report* (1999).

treats domestic violence less seriously than other types of violence.⁵⁴⁷ The same can be said for sexual offences.

9.42 On the other hand, proponents of domestic violence courts argue that court processes which recognise that many victims want to maintain their family unit and stay within it are likely to encourage reporting and reduce the incidence of these offences.⁵⁴⁸

EFFECTIVENESS

9.43 These alternative types of proceedings are still developing and many are being run as trials or pilots. They are often much more resource-intensive than traditional sentencing courts. For example, circle sentencing courts often take up to five times longer to sentence an offender than conventional courts.⁵⁴⁹ There has not been any long-term evaluation of their effectiveness.⁵⁵⁰ It is not yet clear whether they are effective at reducing re-offending, or if so, whether their cost is offset by the savings.

9.44 Aboriginal Court Day in South Australia has resulted in many more Aboriginal people attending court.⁵⁵¹ Australian evaluations of participant satisfaction with restorative justice programs have found a high level of satisfaction for both offenders and victims of crime.⁵⁵² However, given that existing restorative justice programs focus primarily on less serious offences, it cannot be assumed that complainants in sexual offence cases would find restorative programs equally satisfactory.

PARTICIPATION

9.45 Unlike conventional courts, these proceedings encourage the victim and community members to participate.⁵⁵³ For example, the Indigenous court

547 Arie Freiberg, above n 528, 13–14.

548 Ibid.

549 Aboriginal Justice Advisory Council, above n 534, 7.

550 Arie Freiberg, above n 528, 16–17; Heather Strang, above n 536, 38.

551 The attendance rate for this court has been over 80%, while the attendance rate for Aboriginal people in other courts tends to be below 50%: <http://www.courts.sa.gov.au/courts/magistrates/aboriginal_court_days.html>.

552 See Heather Strang, above n 536, 6–27 for a summary of evaluations of the various Australian conferencing schemes. See also ABC Radio National, above n 527, which includes a short interview discussing an evaluation of a mental health court in the United States.

553 Arie Freiberg, above n 528.

operating in South Australia is advised by a senior member of the local Aboriginal community, and victims of crime are also able to address the court.⁵⁵⁴

9.46 It has been argued that there is a risk that alternative proceedings which are based on direct participation by offenders and interaction between offenders and complainants risk ‘re-victimising’ victims of crime.⁵⁵⁵ The risk of revictimisation of complainants in sexual offences cases is an important consideration in assessing whether any proposed change to the criminal justice system is responsive to the needs of complainants.

9.47 Also related to this feature is the fact that the success of these courts and programs requires broad community support and involvement.⁵⁵⁶ Commentators have argued that one problem with restorative justice programs currently operating in Australia has been the failure to negotiate or consult with Indigenous communities and ‘ethnic’ communities when implementing programs.⁵⁵⁷ It is important to consult with local communities when designing restorative justice programs, as well as on implementation issues.

ROLES OF LAWYERS

9.48 The collaborative approach used in new courts requires the prosecution and defence to operate as a team. This is vastly different to their traditional, adversarial relationship.⁵⁵⁸

9.49 The role of the offender’s lawyer in these new courts is less clear. In traditional criminal court cases, the lawyer representing the accused person is to present the defence case. If the accused person is convicted, their lawyer’s role is to present evidence about why the offender should receive a less harsh penalty. In the new courts and restorative justice programs, should the lawyer work towards the least harsh outcome for the offender, or the outcome which is in the offender’s best interests? While commentators argue that lawyers representing offenders in these new courts should focus on facilitating the

554 Ibid 14–15.

555 Heather Strang, above n 536, 35–6.

556 Aboriginal Justice Advisory Council, above n 534, 7–8.

557 Heather Strang, above n 536, 36–7, 39.

558 Arie Freiberg, above n 528, 19.

most appropriate treatment for their clients,⁵⁵⁹ anecdotal evidence suggests that in relation to restorative justice programs, some lawyers may focus on their traditional role.⁵⁶⁰

EXPERTISE

9.50 One advantage of proceedings which focus on particular offences, offenders or communities is that the judge, magistrate or convenor who runs the proceeding develops a high level of specialisation and expertise.⁵⁶¹

9.51 The alternative proceedings can also harness expertise more broadly. For example, South Australia's Family Violence Court is an inter-agency initiative involving the Courts Administration Authority, the Department of Corrective Services, the Department of Human Services, South Australia Police and the Salvation Army.⁵⁶² The court diversion program for people with impaired mental functioning also operating in South Australia employs staff with clinical experience and also draws on inter-agency cooperation between the Department of Justice and the Department of Health.⁵⁶³ South Australia's Aboriginal court days also draw on the experience of members of local Aboriginal communities.⁵⁶⁴

? QUESTIONS:

74. Should the Commission examine more closely any of the alternative responses to the current trial process discussed in this Chapter?
75. Are there any other alternatives we should look at?

559 Arie Freiberg, above n 528, 19; ABC Radio National, above n 527.

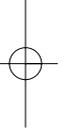
560 NSWLRC, *Sentencing: Young Offenders*, Issues Paper 19 (2001), para 2.38.

561 ABC Radio National, above n 527. The highly specialised nature of the work also has human resources implications. Stress, boredom and burn-out a problem in some new courts: see Arie Freiberg, above n 528, 18–19.

562 Arie Freiberg, above n 528, 17; <http://www.courts.sa.gov.au/courts/magistrates/violence_intervention.html>.

563 <http://www.courts.sa.gov.au/courts/magistrates/court_interv_officers.html>.

564 <http://www.courts.sa.gov.au/courts/magistrates/aboriginal_court_days.html>.



Appendices to Discussion Paper

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Appendix 1: Recorded Sexual Offences

TABLE 1.1
SEXUAL OFFENCES RECORDED BY VICTORIA POLICE 1995/96–1999/00

Offence	95/96	96/97	97/98	98/99	99/00
Rape	1,237	1,358	1,180	1,469	1,144
Indecent assault	3,581	3,423	3,245	3,086	2,069
Indecent act with/in presence of a child under 16	1,449	1,013	1,406	1,126	1,215
Sexual penetration of a child 10–16	642	460	506	655	986
Incest	758	715	730	539	328
Sexual penetration of a child under 10	350	373	616	423	386
Gross indecency ⁵⁶⁵	401	514	666	415	263
Other	61	82	104	91	110
Total	8,479	7,938	8,453	7,804	6,501

Source: Victoria Police, *Crime Statistics 1999/2000* (Provisional) (2000)

⁵⁶⁵ Gross indecency is no longer an offence.

TABLE 1.2
SEXUAL ASSAULT RECORDED BY POLICE 1993–99

Victims (Victims per 100, 000 persons)							
	1993	1994	1995	1996	1997	1998	1999
Victoria	2,829 (63.3)	2,833 (63.1)	2,799 (62.0)	2,774 (60.8)	2,832 (61.5)	2,988 (64.2)	2,789 (59.2)
NSW	3,797 (63.3)	4,608 (76.0)	4,156 (67.8)	4,957 (79.9)	4,663 (74.3)	4,504 (71.1)	4,425 (69.0)
Australia	12,186 (69.0)	12,722 (71.3)	12,962 (71.7)	14,401 (78.6)	14,138 (76.3)	14,336 (76.6)	14,074 (74.2)

Source: Cook, David and Grant (2001) and ABS, *Recorded Crime Australia 1999*⁵⁶⁶

TABLE 1.3
VICTORIA: VICTIMS OF SEXUAL ASSAULT BY SEX AND AGE GROUP 1999

Age	Males	Females	Percentage for whom sex not specified	Total persons	% of total persons
0-9	96	191	3	290	10.4
10-14	67	332	1	400	14.3
15-19	67	633	2	702	25.2
20-24	57	321	4	382	13.7
25-34	75	415	4	494	17.7
35-44	50	240	2	292	10.5
45-54	15	90	0	105	3.8
55-64	8	15	0	23	0.8
65 and over	3	12	0	15	0.5
Not specified	12	58	16	86	3.1
Total	450	2,307	32	2,789	100.0

Source: ABS, *Recorded Crime Australia*⁵⁶⁷

566 1994–97 data from compilation in Cook, David and Grant, above n 13, 5. 1998 and 1999 data from ABS, *Recorded Crime Australia 1999*, above n 34, 12-13, Tables 1.3, 1.4.

567 ABS, *Recorded Crime Australia 1999*, above n 34, 48, Table 4.3.

TABLE 1.4
AUSTRALIA: VICTIMS OF SEXUAL ASSAULT BY SEX AND AGE GROUP 1999

Age	Males	Females	Percentage for whom sex not specified	Total persons	% of total persons
0-9	778	1,854	13	2,645	18.8
10-14	489	2,280	6	2,775	19.7
15-19	379	2,652	19	3,050	21.7
20-24	191	1,278	10	1,479	10.5
25-34	297	1,680	13	1,990	14.1
35-44	117	854	4	975	6.9
45-54	43	328	4	375	2.7
55-64	13	78	1	92	0.7
65 and over	9	77	0	86	0.6
Not specified	85	251	271	607	4.3
Total	2,401	11,332	341	14,074	100.0

Source: ABS *Recorded Crime Australia 1999*⁵⁶⁸

⁵⁶⁸ ABS, *Recorded Crime Australia 1999*, above n 34, 48, Table 4.3.

TABLE 1.5
VICTORIA: VICTIMISATION RATE⁵⁶⁹ FOR SEXUAL ASSAULT BY
SEX AND AGE GROUP 1999

Age	Male	Female	Total persons
0-9	29.63	62.20	45.96
10-14	41.33	213.89	126.05
15-19	40.58	399.89	217.08
20-24	32.47	190.83	111.13
25-34	20.55	112.63	67.35
35-44	13.93	65.92	40.38
45-54	4.84	28.81	16.87
55-64	3.82	7.15	5.49
65 and over	1.15	3.55	2.51
Total⁵⁷⁰	19.31	96.85	59.19

Source: ABS, *Recorded Crime Australia 1999*⁵⁷¹

569 The victimisation rate is the number of sexual assault victims per 100,000 persons.

570 Includes persons for whom age and sex not specified.

571 ABS, *Recorded Crime Australia 1999*, above n 34, 49, Table 4.3.

Appendix 2: Prosecutorial Guidelines⁵⁷²

All Australian Directors of Public Prosecutions have agreed upon a common set of principles to be used in determining the question as to whether or not a prosecution should be commenced or, if commenced, should be permitted to proceed. These principles are constantly reviewed at regular meetings of the Conference of Australian Directors of Public Prosecutions and are amended from time to time. Although in some jurisdictions these criteria are expressed in different language, they do not differ in substance. As at 30 June 1993, they were as hereunder.

The Criteria Governing the Decision to Prosecute

1. Sir Hartley Shawcross, Q.C., then Attorney-General, stated to the House of Commons on 29 January 1951:

“It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should prosecute ‘whenever it appears that the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest.’ That is still the dominant consideration.” (H.C. Debates, Vol.483, col.681, 29 January 1951).

This statement is equally applicable to the position in Australia. The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue with some vigour those cases worthy of prosecution.

572 From Appendix A, Director of Public Prosecutions Victoria, *Annual Report 1999–2000*, (2000) 65–71.

2. The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, wrong decisions not to prosecute, both tend to undermine the confidence of the community in the criminal justice system.

3. The initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution. A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the alleged offender. (The term "alleged offender" includes a Defendant or an accused person.)

4. When deciding whether the evidence is sufficient to justify the institution or continuation of a prosecution the existence of a bare prima facie case is not enough. Once it is established that there is a prima facie case it is then necessary to give consideration to the prospects of conviction. A prosecution should not proceed if there is no reasonable prospect of a conviction being secured. In indictable matters this test presupposes that the jury will act in an impartial manner in accordance with its instructions.

5. The decision whether there is a reasonable prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the alleged offender and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course, there can never be an assurance that a prosecution will succeed. Indeed, it is inevitable that some will fail. However, application of this test dispassionately after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and the useless expenditure of public funds.

6. When evaluating the evidence regard should be given to the following matters -

- (a) Are there grounds for believing the evidence may be excluded bearing in mind the principles of admissibility at common law and under statute? For example, prosecutors will wish to satisfy themselves that confessional evidence has been properly obtained. The possibility that any evidence might be excluded should be taken into account and, if it is crucial to the case, may substantially affect the decision whether or not to institute or proceed with a prosecution.
- (b) If the case depends in part on admissions by the alleged offender, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the alleged offender?
- (c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the defendant, or may be otherwise unreliable?
- (d) Has a witness a motive for telling less than the whole truth?
- (e) Are there matters that might properly be put to a witness by the defence to attack his or her credibility?
- (f) What sort of impression is the witness likely to make? How is the witness likely to stand up to cross-examination? Does the witness suffer from any physical or mental disability that is likely to affect his or her credibility?
- (g) If there is conflict between eyewitnesses, does it go beyond what one would expect and hence materially weaken the case?
- (h) If there is a lack of conflict between eyewitnesses, is there anything that causes suspicion that a false story may have been concocted?
- (i) Are all the necessary witnesses available and competent to give evidence, including any who may be abroad? Is any witness likely to obtain an exemption from giving evidence pursuant to s.400 Crimes Act 1958?
- (j) Where child witnesses are involved, are they likely to be able to give sworn evidence or, if not, is there corroboration in some material particular by some other evidence implicating the alleged offender?
- (k) If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the alleged offender? Where two or more alleged offenders are charged together, is there a realistic prospect of the proceedings being severed? If so, is the admissible evidence sufficient to prove the case against each alleged offender should separate trials be ordered?

7. Having satisfied himself or herself that the evidence is sufficient to justify the institution or continuation of a prosecution, the prosecutor must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued. It is not the rule that all offences brought to the attention of the authorities must be prosecuted.

8. The factors that can properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. While many public interest factors militate against a decision to proceed with a prosecution, there are public interest factors that operate in favour of proceeding with a prosecution (for example, the seriousness of the offence, the need for deterrence). In this regard, generally speaking the more serious the offence, the less likely it will be that the public interest will not require that a prosecution be pursued.

9. Factors that may arise for consideration either alone or in combination in determining whether the public interest requires a prosecution include:

- (a) The seriousness or, conversely, the triviality of the alleged offence or that it is of a 'technical' nature only;
- (b) Any mitigating or aggravating circumstances;
- (c) The youth, age, intelligence, physical health, mental health or special infirmity of the alleged offender;
- (d) The alleged offender's antecedents and background;
- (e) The staleness of the alleged offence;
- (f) The degree of culpability of the alleged offender in connection with the offence;
- (g) The obsolescence or obscurity of the law;
- (h) Whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;
- (i) The availability and efficacy of any alternatives to prosecution;
- (j) The prevalence of the alleged offence and the need for deterrence, both personal and general;

- (k) Whether the consequences of any resulting conviction would be unduly harsh and oppressive;
- (l) Whether the alleged offence is of considerable public concern;
- (m) Any entitlement of the State, the victim or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken;
- (n) The attitude of the victim of the alleged offence to a prosecution;
- (o) The likely length and expense of a trial;
- (p) Whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;
- (q) The likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;
- (r) Whether the alleged offence is triable only on indictment;
- (s) The necessity to maintain public confidence in such basic institutions as the Parliament and the courts. The applicability of and weight to be given to these and other factors will depend on the particular circumstances of each case.

10. As a matter of practical reality, the proper decision in many cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. Although there may be mitigating factors present in a particular case, often the proper decision will be to proceed with a prosecution and for those factors to be put to the court in mitigation at sentence. Nevertheless, where the offence is not so serious as plainly to require prosecution the prosecutor should also apply his or her mind to whether the public interest requires a prosecution to be pursued.

11. Special considerations apply to the prosecution of juveniles. Prosecution of a juvenile should always be regarded as a severe step, and generally speaking, a much stronger case can be made for methods of disposal which fall short of prosecution unless the seriousness of the offence or the circumstances of the juvenile concerned dictate otherwise. In this regard, ordinarily the public interest will not require the prosecution of a juvenile who is a first offender in circumstances where the offence is not serious.

12. In deciding whether or not the public interest warrants the prosecution of a juvenile, regard should be had to such of the factors set out in paragraph 8 as appear to be relevant, but particularly to -

- (a) The seriousness of the offence;
- (b) The age and apparent maturity and mental capacity of the juvenile;
- (c) The available alternatives to prosecution, such as a caution, and their efficacy;
- (d) The sentencing options available to the relevant Children's Court if the matter were to be prosecuted;
- (e) The juvenile's family circumstances, particularly whether the parents of the juvenile appear able and prepared to exercise effective discipline and control over the juvenile;
- (f) The juvenile's antecedents, including the circumstances of any previous caution the juvenile may have been given, and whether they are such as to indicate that a less formal disposal of the present matter would be inappropriate;
- (g) Whether a prosecution would be likely to be harmful to the juvenile or be inappropriate, having regard to such matters as the personality of the juvenile and his or her family circumstances.

13. A decision whether or not to prosecute must clearly not be influenced by:

- (a) The race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
- (b) Personal feelings concerning the offender or the victim;
- (c) Possible political advantage or disadvantage to the Government or any political group or party; or
- (d) The possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

Appendix 3: Sentences for Major Sexual Offences

TABLE 3.1
VICTORIAN STATUTORY PENALTIES FOR SEXUAL OFFENCES

Maximum term of imprisonment	Offences
25 years	Rape
	Sexual penetration of a child under 10. ⁵⁷³
	Incest (involving penetration of a child by a parent, step-parent, etc). ⁵⁷⁴
	Maintaining a sexual relationship with a child under the age of 16.
15 years	Sexual penetration of a child aged between 10 and 16 by a person exercising care, supervision or authority over the child. ⁵⁷⁵
10 years	Sexual penetration of a child aged between 10 and 16. ⁵⁷⁶
	Sexual penetration of a 16 or 17 year old child by a person exercising care, supervision or authority over the child.
	Sexual penetration of a person with impaired mental functioning or a resident of a facility for people with an intellectual disability.
	Indecent assault.
	Indecent act with child under the age of 16.
5 years	Indecent act with a person with impaired mental functioning or a resident of a facility for people with an intellectual disability.

573 The substantive offence in the *Crimes Act 1958* s 45 refers to the 'sexual penetration of a child under the age of 16'. However provision is made for differential sentences in s 45(2) in respect to the sexual penetration of a child under the age of 10, the sexual penetration of a child aged between 10 and 16 by a person exercising care, supervision or authority over the child, and the sexual penetration of a child aged between 10 and 16.

574 Different sentences apply where the victim is an adult or where the act of incest involves siblings:
Crimes Act 1958 s 44.

575 As above n 573.

576 As above n 573.

Appendix 4: Rape Prosecutions Outcomes

METHODOLOGY

The Director for Public Prosecutions (DPP) is responsible for the conduct of all committals in Victoria and thus the Office of Public Prosecutions (OPP) is involved in the prosecution of indictable offences referred by the police.

The OPP provided the Commission with access to its PRISM database in which records of all matters referred to the OPP are kept. (A matter relates to an accused person who has been charged with one or more offences against one or more complainants.) A database query undertaken by the OPP identified all matters in which a sexual offence had been referred to the OPP in the years 1997/98 and 1998/99. As the OPP does not prosecute sexual offence matters that proceed in the Children's Court, the data collected excludes such matters.

The Commission then identified all matters in which a rape offence had been, at least initially, charged and referred to the OPP. Through a manual interrogation of the PRISM database records, a final outcome for each of these matters at the stage at which that outcome occurred was identified. Outcomes relate to accused persons rather than the offences with which an accused was charged. For example, in cases where an accused person was acquitted of several charges but convicted of one charge, the outcome was recorded as a conviction. Information about the point in the prosecution process at which an accused person pleaded guilty was not collected. Further, the recording of outcomes gave precedence to rape offences. For example, if an accused person was convicted of both rape and non-rape offences, the outcome was recorded as a rape conviction.

Matters referred for DPP advice by the police, or for DPP review requested by a complainant after police decided not to proceed and that did not proceed any further, were excluded. Duplicate files were also excluded from the data analysis.

The data collected for 1997/98 and 1998/99 is set out in Table 4.1. The total data for both years is set out in Table 4.2, which also compares data from the former Law Reform Commission of Victoria (LRCV) and the Rape Law Reform Evaluation Project (RLREP).

TABLE 4.1
PROSECUTIONS OUTCOMES: ACCUSED CHARGED WITH
RAPE OFFENCES 1997/98 AND 1998/99

Outcomes	1997/98		1998/99	
	No.	%	No.	%
Pre-Committal				
Charges withdrawn	24	12.2	9	5.3
Magistrates' Court				
Discharged/acquitted	8	4.1	16	9.4
Committed non-rape ⁵⁷³	1	0.5	1	0.6
Pleaded guilty non-rape ⁵⁷⁴	10	5.1	6	3.5
County Court				
Pleaded guilty rape	26	13.3	29	17.0
Pleaded guilty non-rape	28	14.3	36	21.1
Convicted rape	16	8.2	13	7.6
Convicted non-rape	22	11.2	12	7.0
Acquitted/ found not guilty	34	17.3	32	18.7
Directed acquittal	1	0.5		0.0
Permanent stay	1	0.5	1	0.6
<i>Nolle prosequi</i>	22	11.2	7	4.1
No evidence led	1	0.5	1	0.6
Other				
Accused absconded	1	0.5	2	1.2
Prosecuted by another agency	1	0.5	2	1.2
Incomplete		0.0	4	2.3
Total Matters	196	100.0	171	100.0

573 These matters were determined as summary matters in the Magistrates' Court.

574 These matters were determined as summary matters in the Magistrates' Court.

A COMPARISON OF RAPE PROSECUTIONS OUTCOMES

Table 4.2 below compares the outcomes from the Commission's collection of data on prosecution outcomes where the accused was initially charged with rape, with those of the LRCV and the RLREP.

It should be noted that the Commission data collection differs from earlier analyses of rape prosecution outcomes undertaken by the LRCV and the RLREP in a number of respects.

- The Commission data has been collected from OPP PRISM database records of sexual offence matters rather than individual prosecution case files for each matter as undertaken in the RLREP.⁵⁷⁵ The LRCV data was obtained from administrative records maintained by the OPP, which also contained information on the accused.⁵⁷⁶
- The Commission data draws on OPP PRISM database records of rape prosecutions initiated in Victoria in the two years 1997/98 and 1998/99. The LRCV data draws on the outcomes of all known rape cases in the two years 1988 and 1999.⁵⁷⁷ The RLREP data draws on a sample of rape prosecutions initiated in 1992 and 1993 and 22 rape cases where the accused was charged in 1991 but proceedings occurred in 1992.⁵⁷⁸
- The Commission data collection recorded only the ultimate outcome for each accused. Any changes in offences over the prosecution process, such as where rape charges were dropped in favour of non-rape charges, were not recorded. In contrast both the LRCV and the RLREP data collection made it possible to record details of any changes in offences against the accused at several stages in the prosecutions process.

The LRCV and RLREP data has been extracted and set out in Table 4.2 below to enable meaningful comparisons to be made with the Commission data. While the data is comparable, it does not necessarily reflect the various analyses undertaken by LRCV and RLREP in the text of their respective reports.⁵⁷⁹

⁵⁷⁵ RLREP, above n 7, 15.

⁵⁷⁶ LRCV, Appendices to Interim Report No 42 (1991), above n 22, 36.

⁵⁷⁷ Ibid 51.

⁵⁷⁸ See RLREP, above n 7, 17-18.

⁵⁷⁹ See for example the LRCV analysis of jury trial outcomes in which only those matters in which the accused was tried on rape were included: LRCV, Appendices to Interim Report No 42 (1991), above n 22, 49-51. However, comparisons can be made between the Commission and LRCV data in the current study by including those matters in which the accused was convicted of non-rape offences: see n 583 below.

TABLE 4.2
RAPE PROSECUTIONS OUTCOMES

Outcomes	LRCV ⁵⁸⁰		RLREP ⁵⁸¹		VLRC	
	1988–89		1992–93		1997/98–1998/99	
	No.	%	No.	%	No.	%
Pre-Committal						
Charges withdrawn	20	7.5	8	3.3	33	9.2
Magistrates' Court						
Discharged/acquitted	10	3.7	5	2.1	24	6.7
Committed non-rape			2 ⁵⁸²	0.8	2	0.6
Pleaded guilty non-rape	18	6.7	20	8.2	16	4.5
County Court						
Pleaded guilty rape	70	26.1	53	21.8	55	15.4
Pleaded guilty non-rape	19	7.1	43	17.7	64	17.9
Convicted rape	53	19.8	35	14.4	29	8.1
Convicted non-rape	34 ⁵⁸³	12.7	15	6.2	34	9.5
Acquitted/ found not guilty	37	13.8	46	18.9	66	18.5
Directed acquittal	1	0.4	3	1.2	1	0.3
Permanent stay	1	0.4			2	0.6
<i>Nolle prosequi</i>	5	1.9	13	5.3	29	8.1
No evidence led					2	0.6
Total Matters	268	100.0	243	100.0	357	100.0

580 LRCV, Appendices to Interim Report No 42 (1991), above n 22, 40, Table 1. Cases going to the Children's Court, cases returned to police, incomplete cases and cases where the accused absconded are omitted from Table 4.2 above.

581 RLREP, above n 7, 14, Figure 1. Cases going to the Children's Court and cases involving accused who were unfit to plead which appear in Figure 1 are excluded from Table 4.2 above. Figure 1 also excludes two accused who had absconded and four accused who were acquitted of the rape offence and pleaded to a non-sexual offence.

582 One of these accused was committed on non-sexual offences only. The other pleaded guilty to some sexual offences. See RLREP, above n 7, 163.

583 This category includes 11 accused who were committed on a non-rape offence only, and three accused who were committed on a rape offence but presented for trial for a non-rape offence only. The remaining 20 accused in this category were presented for trial on rape offences, but convicted only of non-rape offences. See LRCV, Appendices to Interim Report No 42 (1991) above n 22, 40, Table 1, n 53. Note that Figure 1 shows 13 (not 11) committed for non-rape offences including non-sexual offences: *ibid* 39, Figure 1. It appears that two of these prosecutions were not finalised at the time the data was collected.

Appendix 5: Court of Appeal Decisions: Severance of Counts

Name of case	No. of counts at trial	No. of complainants	Evidence at trial admissible?	Result: should severance have been ordered?
<i>R v TJB</i> [1998] 4 VR 621	24	3	No (see note below)	(See note below)
<i>R v KRA</i> [1999] 2 VR 708	8	2	Some	No
<i>R v D</i> [1999] VSCA 148	11	3	Yes	No
<i>R v GAE</i> [2000] 1 VR 198	28	3	Some (Court not unanimous on admissibility)	No
<i>R v Mitchell</i> [2000] VSCA 54	28	9	Yes	No
<i>R v Rainsford</i> [2000] VSCA 157	2	2	Not clear	No

Note: *R v TJB* was the first Victorian Court of Appeal decision to consider the effect of s 372(3AA)–(3AC). The decision was handed down in conjunction with *R v Best*, a decision concerning the admissibility of propensity evidence under the new section 398A. The two decisions must be read together. In *R v TJB* the trial judge had ruled that evidence in relation to each complainant was not mutually admissible. The Court of Appeal was prepared to accept this ruling as correct for the purposes of deciding the appeal and ordering a retrial; however, the Court noted (at 634) that:

- if at the retrial the evidence was considered to be mutually admissible under s 398A, the counts would not be severed;
- if the evidence was not considered to be mutually admissible, it would be within the discretion of the judge hearing the retrial to sever the counts.

Appendix 6: Court of Appeal Decisions: *Longman* Warnings

The following tables contain all Victorian Court of Appeal cases in which it was argued that the trial judge had failed to give a *Longman* warning or that the warning given was inadequate. The cases were identified by an electronic search of all judgments between 1997–2000 containing the word ‘Longman’.

TABLE 6.1
LONGMAN WARNINGS 1997

Name of case	Adult or child complainant?	<i>Longman</i> warning given?	If given, was the warning considered adequate?	Notes
<i>R v Johnson</i>	Both	Yes	No	
<i>R v Costin</i>	Adult	No	None required	
<i>R v Newcombe</i>	Child	Yes	Yes	Warning may have been too emphatic.
<i>R v Robertson</i>	Child	Yes	No	Not sufficiently emphatic (10 year delay, uncharged acts).
<i>R v McKellin</i>	Child	Yes	No	Failure to direct jury about delay: not in <i>Longman</i> sense (ie forensic difficulty for accused) but in <i>Kilby</i> sense (delay reflecting upon credibility of the complainant).

TABLE 6.2
LONGMAN WARNINGS 1998

Name of case	Adult or child complainant?	Longman warning given?	If given, was the warning considered adequate?	Notes
<i>R v Jolly</i>	Child	Yes	No	Not sufficiently emphatic (3 year delay). Doubt subsequently cast on the correctness of this decision (<i>R v Mazzolini</i>)
<i>R v Hyatt</i>	Child	Yes	No	Not sufficiently emphatic (36 year delay)
<i>R v DJT</i>	Child	Yes	Yes	
<i>R v Vandrine</i>	Child	Yes	No	Not sufficiently emphatic (14 year delay)
<i>R v DSJ</i>	Child	Yes	Yes	
<i>R v PJJ</i>	Child	Yes	Yes	
<i>R v Arundell</i>	Child	No		Not given at request of counsel, for fear that the warning may have emphasised facts that the jury could have accepted as corroboration.

TABLE 6.3
LONGMAN WARNINGS 1999

Name of case	Adult or child complainant?	Longman warning given?	If given, was the warning considered adequate?	Notes
<i>R v Bang</i>	Adult	Yes	Yes	May have been too emphatic
<i>R v Mazzolini</i>	Child	Yes	Yes	
<i>R v NRC</i>	Child	Yes	No	Very young child. No real possibility for defence counsel to cross examine.

TABLE 6.4
LONGMAN WARNINGS 2000

Name of case	Adult or child complainant?	Longman warning given?	If given, was the warning considered adequate?	Notes
<i>R v Martin</i>	Child	Yes	Yes	Warning was emphatic: there was no substance in the appeal point.

Appendix 7: Questions

Chapter 5 Sexual Offences

Rape

1. Should the offence of rape be expanded to cover situations where a person (whether male or female) is forced to penetrate the offender or a third person digitally, orally, or with an object?
2. Should an offence of compelling a person to engage in sexual penetration be introduced to cover situations where a person is forced to penetrate themselves, or an animal?

Consent

3. Should the words 'and voluntary' be added to the definition of consent?
4. Should there be any change to the definition of 'consent' to cover cases where agreement is obtained by fraud?
5. How are Victorian judges directing juries about consent?
6. Should the mandatory jury direction on consent be changed to make it clear that the failure of a complainant to say or do anything indicating free agreement is sufficient, of itself, to amount to evidence of lack of consent? (In other words, prima facie evidence).
7. Should it continue to be the law that a person with an honest but unreasonable belief that the complainant has consented to penetration cannot be convicted of rape?
8. Should the *Crimes Act 1958* be amended to create an offence of negligent penetration, covering people who were guilty of a gross failure to take reasonable care to obtain consent?
9. Should Victoria adopt the concept of recklessness used in the Model Criminal Code for deciding whether an accused person has the intention to commit rape?
10. Should the law be changed to make it clear that a person who does not give any thought as to whether another person is consenting to sexual penetration is guilty of rape?

Indecent assault

11. Should the crime of 'indecent assault' be changed to the crime of 'indecent touching'? If so, should it also be an offence to make someone believe that they will be indecently touched?
12. Should the term 'indecenty' be defined in the *Crimes Act 1958*? If so, should the definition of 'indecent' in the Model Criminal Code be adopted in Victoria?
13. Should this crime be amended to clarify what the prosecution must prove about the intention of the accused? If so, should the prosecution be required to prove that the accused intended to commit an indecent act, or should the crime also include situations where an accused person is aware that there is a possibility that an act is indecent?

Stalking

14. Should the offence of 'stalking' be extended to cover situations where the victim does not know what the offender is doing?
15. Should 'stalking for sexual purposes' be included within a general stalking offence? If not, should a new offence be created to cover this situation?
16. What should be the elements of such an offence?

Other offences

17. Are any of the following offences also covered by any other offences?
 - Administering a drug with the intention of sexually penetrating a person.
 - Abducting or detaining a person in order to sexually penetrate them.
 - Procuring sexual penetration by threats, intimidation or fraud.
 - Assault with intent to rape.If so, should Victoria retain those covered by other offences?

Chapter 6

Sexual Offences Against Children and Young People

Incest

18. Should a person who sexually abuses a child or young person, who is a member of their family, be prosecuted for the crime of incest, or for another offence such as rape or unlawful sexual penetration of a child?
19. Should a person who sexually abuses a child or young person they are related to by adoption, marriage or because of a de facto relationship, be prosecuted for incest?
20. Would it be preferable to prosecute such people for the more general offence of unlawful sexual penetration of a child?

Unlawful sexual penetration of a child

21. If a person is charged with unlawful sexual penetration of a child or young person aged between 10 and 16, they can defend themselves on the grounds that the complainant consented, and that they believed on reasonable ground that the complainant was older than 16 (or that they believed on reasonable grounds that they were married). Should the burden of proof in relation to this defence be clarified?
22. If it is necessary to clarify the burden of proof in relation to the defence of reasonable belief as to age (or marriage):
 - should the general principle proposed by the MCCOC apply (so that if the accused person raises the defence, the prosecution has to prove beyond reasonable doubt that it is not true); or
 - should an accused person who seeks to rely on the defence have to prove it?
23. Under Victorian law, it is not an offence for a person to penetrate another person aged between 10 and 16, if that person consented to sexual penetration and the accused was not more than two years older than the complainant. Under the Model Criminal Code, the defence of similarity of age applies, but consent is irrelevant in this situation. Which approach is preferable?

Persistent sexual abuse of a child

24. Should the offence of 'persistent sexual abuse of a child' be drafted as an offence consisting of several sexual offences, or as a series of several separate acts which are also offences?
25. Should the offence of 'persistent sexual abuse of a child' be drafted to cover situations where one of the acts was committed outside Victoria?

26. The Model Criminal Code offence of 'persistent sexual abuse of a child' states what matters the prosecution has to include in a charge, the matters which it does not have to specify, how the judge should direct the jury, and what the prosecution has to prove. Should the offence be structured this way in Victoria?
27. Does the offence of 'persistent sexual abuse of a child' overcome problems in prosecuting people who sexually abuse children over a long period?
28. If not, does the offence of 'persistent sexual abuse of a child' recommended by the MCCOC achieve this?
29. Should the Victorian legislation include a provision dealing specifically with the issue of double jeopardy?
30. If so, should it be based on the provision in the Model Criminal Code, or should some other model be adopted?

Indecent acts

31. Would there be any advantage in introducing separate offences for indecently touching a child or young person, and indecent acts relating to children and young people which do not involve touching?
32. Should the expression 'indecent act' be defined? If so, how should it be defined?
33. Should similarity of age be a defence if a child is accused of committing an indecent act with a child aged under 10?

Offences Committed by People in Positions of Care, Supervision or Authority

34. Should the law in Victoria specify the people covered by the offences relating to sexual acts with a young person aged 16 or 17 who are under their care, supervision or authority?
35. If so, what groups of people should the definition cover?
36. Should a person, prosecuted for taking part in an act of sexual penetration with a person aged 16 or 17 in their care, supervision or authority be able to rely on the defence that the complainant consented, and that they believed on reasonable grounds that the complainant was aged 18 or over?
37. Or should people be required to ensure that those over whom they have care, supervision or authority are over the age of consent before having sex with them?

38. Should the age of consent for sexual activity with a person over whom someone is in a position of care, supervision or authority be the same, whether or not the sexual acts involve penetration?
39. Should a person, prosecuted for taking part in an indecent act with a person aged 16 or 17 in their care, supervision or authority, be able to rely on the defence that the complainant consented, and that they believed on reasonable grounds that the complainant was aged 18 or over?
40. Or should people be required to ensure that those over whom they have care, supervision or authority over are over the age of consent before engaging in indecent acts with them?

Other Offences

41. Should Victoria retain any or all of the following offences:
 - facilitating sexual offences with children;
 - abducting a child;
 - occupier permitting unlawful sexual penetration;
 - procuring sexual penetration of a child;
 - soliciting acts of sexual penetration or indecent acts;
 - producing child pornography and procuring a child to participate in making child pornography.
42. Are any of these offences also covered by any other offences?
43. If these offences are retained, should they apply to all sexual penetration or should they only apply to unlawful sexual penetration?

Chapter 7

Sexual Offences Against People with 'Impaired Mental Functioning'

44. Does this offence adequately balance the need to protect people with impaired mental functioning against sexual assault and their right to sexual autonomy?
45. Should the definition of a person with 'impaired mental functioning' be extended to explicitly cover a person with a 'severe personality disorder'?
46. Should a health professional or worker in a residential facility, who is prosecuted for engaging in sexual activity with a person with impaired mental functioning, be able to rely on the complainant's consent as a defence?

Chapter 8 Court Procedure and Evidence

Pre-recorded Evidence

47. At present, children and people with impaired mental functioning can record their evidence-in-chief before trial. Should the law be changed to enable the evidence-in-chief of all complainants in sexual offence cases to be recorded prior to the trial?
48. If so, should any restrictions be imposed on adult complainants who want to pre-record their evidence?
49. Should all of a complainant's evidence (evidence-in-chief, cross-examination and re-examination) be able to be recorded prior to the trial?
50. If so, should this apply to all sexual offence complainants, or only to complainants who fall within particular categories (such as children and complainants with impaired mental functioning)?

Alternative Arrangements at Trial

51. Does the use of such alternative arrangements for giving evidence minimise the trauma for sexual offence complainants in committal hearings and trials?
52. Are complainants aware of the availability of alternative arrangements for giving their evidence in sexual offence trials?
53. If not, who should be responsible for informing complainants of the availability of alternative arrangements for giving evidence in sexual offence trials?
54. If alternative arrangements for giving evidence in sexual offence trials are available, to what extent is each of the alternative arrangements listed above being used?
55. If complainants are giving evidence at trial, should the use of alternative arrangements be available to them as a matter of course, rather than at the discretion of the court?

Cross-examination of the Complainant by the Accused in Person

56. Should Victoria adopt legislation prohibiting a person who is on trial for a sexual offence from personally cross-examining the complainant?
57. If so, should the court be required to appoint a legal practitioner to cross-examine the complainant in place of the accused person?

Allegations by Multiple Complainants

58. Are cases involving more than one complainant being heard together more frequently than was the case before the 1997 reforms?

The Admissibility of Particular Types of Evidence

59. Does the current law operate effectively to ensure:

- that the judge's permission is always obtained before a complainant is cross-examined about their sexual activities, or evidence of such activities is put before the jury; and
- that the judge's permission is only granted after the arguments in favour of and against admission of the evidence have been carefully examined?

60. If further law reform is needed to prevent inappropriate cross-examination of complainants about their sexual activities, should Victoria follow the approach recommended by the New South Wales Law Reform Commission?

61. If not, what form should it take?

Confidential Counselling Notes

62. At present, Victorian law protects confidential counselling communications involving the complainant, made before or after the alleged offence occurred. Should the law instead reflect the approach taken in the Model Criminal Code, which only protects the complainant's confidential counselling communications which were made in connection with the alleged offence?

63. Are confidential communications involving the complainant routinely obtained and used as evidence in sexual offence proceedings?

64. If the existing discretionary approach is retained, should the law be changed:

- so that, when the judge is considering whether or not to require a counsellor to provide confidential communications (such as counsellor's notes) to the lawyers for the accused, the judge must apply the same public interest test that he or she currently has to apply when deciding whether or not to permit those communications to be used in court as evidence?
- to prevent the lawyers for the accused from using confidential communications as evidence in preliminary proceedings (such as committal proceedings) as well as in the trial?

65. Alternatively, should the law provide a mandatory prohibition on the production and use of confidential communications?

Judge's Comments and Directions to the Jury

66. The current law requires judges to inform juries that a complainant may have good reasons to delay reporting of a sexual offence, but in instructing the jury, the judge may comment on the relevance of delay in assessing the complainant's reliability, where it is necessary to ensure a fair trial. How are trial judges applying these provisions?
67. Is the current law working effectively?

Directions About the Absence of Independent Evidence to Support the Complainant's Allegations

68. Do trial judges frequently warn juries that it may be dangerous or unsafe to convict (*Longman* warnings) in circumstances where the law does not require a warning to be given?
69. Are any further changes to the law required to prevent this occurring?

Should Victoria Adopt a New Approach to Jury Instructions Generally?

70. Should the range of matters dealt with in jury directions be limited so that greater reliance is placed on the common sense of juries?
71. Are there any changes which could be made to ensure that jury directions and charges are understood by juries?

Chapter 9

Alternative Responses to the Trial Process

Legal Representation for Complainants

72. Are there any circumstances where complainants in sexual offences cases should be represented by lawyers during trials?
73. Is there any other way that complainants could be supported or assisted with legal information and representation?

Alternative Types of Proceedings

74. Should the Commission examine more closely any of the alternative responses to the current trial process discussed in this Chapter?
75. Are there any other alternatives we should look at?