



Victorian
Law Reform
Commission

Sexual Offences Interim Report

Victorian Law Reform Commission

GPO Box 4637
Melbourne Victoria 3001
Australia
DX 144 Melbourne, Vic

Level 10
10-16 Queen Street
Melbourne Victoria 3000
Australia

Telephone +61 3 8619 8619
Facsimile +61 3 8619 8600
TTY 1300 666 557
1300 666 555 (within Victoria)
law.reform@lawreform.vic.gov.au
www.lawreform.vic.gov.au

CALL FOR SUBMISSIONS

The Victorian Law Reform Commission invites your comments on this Interim Report and seeks your responses to the recommendations and questions that are raised. If you wish to make a submission to us on this reference, you can do so by mail, email, phone, fax or in person. If your submission is in writing, there is no particular form or format you need to follow. If you prefer to make a submission by phone or in person, contact the Commission and ask to be put through to one of the researchers working on the Sexual Offences reference. You can send your written submissions by post, or by email to <law.reform@lawreform.vic.gov.au>.

If you need any assistance with preparing a submission, please contact the Commission. If you need an interpreter, please contact the Commission.

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DEADLINE FOR SUBMISSIONS: 30 JUNE 2003

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**The Hon. Rob Hulls MP
Attorney-General
55 St Andrews Place
MELBOURNE Vic 3002**

GPO Box 4637
Melbourne Victoria 3001
Australia
DX 144 Melbourne

Level 10
10-16 Queen St
Melbourne Victoria 3000
Australia

Telephone + 61 3 8619 8619
Facsimile + 61 3 8619 8600
Freecall 1300 666555
www.lawreform.vic.gov.au

Dear Attorney-General

Sexual Offences: Interim Report

On behalf of the members of the Commission I am pleased to present the Interim Report relating to the reference on Sexual Offences.

The Interim Report makes recommendations for legislative, administrative and procedural changes to ensure that the criminal justice system takes sufficient account of the needs of victims in sexual offences cases. The Commission intends to consult further on the recommendations contained in the Report and to provide you with a Final Report which takes account of the results of those consultations.

Yours sincerely

**Professor Marcia Neave
Chairperson**

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Preface

This Interim Report describes current sexual offences law and practice and makes recommendations for legislative, procedural and administrative changes which are intended to encourage people to report sexual offences and make the criminal justice system more responsive to their needs. Much of the Report deals with changes to procedure and evidence which are intended to reduce the stress experienced by many complainants, make it easier for them to give evidence and improve the quality of their evidence. The Interim Report also discusses the possible advantages of establishing a specialised list in the County Court to hear sexual offences cases. In addition the Report recommends changes to the substantive law of rape and to some other sexual offences.

The recommendations in this Interim Report will provide the basis for further consultation. The Commission intends to publish a Final Report which takes account of responses to these recommendations. The Final Report will also deal with some issues not covered in this Interim Report, for example issues relating to the committal process, some aspects of jury directions in sexual offences cases and the law which governs separation of trials in cases involving multiple complainants.

The production of this Interim Report has been a team effort. All three Research and Policy Officers who worked on the reference made a significant contribution to the final product. Sangeetha Chandrashekeran took primary responsibility for Chapters 7 and 8, Nicky Friedman was responsible for much of Chapter 6 and some sections in Chapter 4. Dr Melanie Heenan drafted Chapter 2 and was responsible for the initial drafting of much of Chapter 3. Padma Raman, the Chief Executive Officer of the Commission, co-ordinated consultations with members of non-English speaking communities and Indigenous communities and also drafted sections of Chapter 3. Those who contributed to the analysis of police and prosecution statistics are set out in the acknowledgement section below. Trish Luker undertook the difficult task of editing the Interim Report, and was also primarily responsible for the research and drafting of the section on cross-examination by an unrepresented accused in Chapter 5. Lorraine Pitman proofread the Interim Report. A team of staff assisted in the production of the Report including Julie Bransden, Simone Marrocco and Ronli Sifris.

The work of the Commission was underpinned by an Advisory Committee, whose members commented on processes and policy issues and on the recommendations in this Interim Report. Recommendations on judicial education are based on the work of a Judicial Education Committee established by the Commission. Members of the Advisory Committee and the Judicial Education Committee are listed below. I am most grateful for the assistance of the many members of these committees, who responded quickly to queries and requests for comment. Recommendations on prosecutor training reflect discussions with Paul Coghlan, the Director of Public Prosecutions, and Kay Robertson, the Solicitor for Public Prosecutions. The Lance Reichstein Foundation provided funding to assist groups making submissions to the Commission, which was indispensable in providing access to information which would otherwise have been unavailable.

ACKNOWLEDGEMENTS

Advisory Committee

Marg D'Arcy, Manager, CASA House

Gary Ching, Office of Public Prosecutions

Maria Dimopoulous, Myriad Consultants

Phil Grano, Villamanta Community Legal Centre

Karen Hogan, Coordinator, Gatehouse Centre

Acting Senior Sergeant Sandy James, Victoria Police, Sexual Offences and Child Abuse Coordination Office

Thérèse McCarthy, Director, Community Relations, Federal Court of Australia (until 09/02); (current) Consultant for TMA Consult

Lisa McMeeken, Inspector, Victoria Police

Pam O'Neill, Co-ordinator, Barwon Centre Against Sexual Assault

Judge Margaret Rizkalla, County Court of Victoria

Judge Meryl Sexton, County Court of Victoria

Dr Caroline Taylor, Post Doctoral Research Fellow, University of Ballarat

Lisa Thorpe, Chair, Elizabeth Hoffman House

Dr Alison Young, Department of Criminology, University of Melbourne

Judicial Education Committee

Judge Graham Anderson, County Court of Victoria
The Honourable Justice Stephen Charles, Supreme Court of Victoria
Judge Jennifer Coate, President, Children's Court of Victoria
Justice Linda Dessau, Family Court of Australia
Lisa Hannan, Magistrates' Court of Victoria
Judge Margaret Rizkalla, County Court of Victoria
Judge Meryl Sexton, County Court of Victoria
Lyn Slade, Chief Executive, Judicial College of Victoria
Judge Tom Wodak, County Court of Victoria

I would like to thank, in particular, the many victim/survivors of sexual assault who shared difficult and painful experiences with the Commission, and displayed great enthusiasm and faith in the process of law reform. I also acknowledge the generosity of the many service providers who shared their experiences of the criminal justice system with the Commission.

I would like to thank members of the Commission's advisory bodies who have made an invaluable contribution to the Commission's work. I am extremely grateful for the thoughtful comments on drafts provided by the following people: Their Honours Judge Sexton and Rizkalla, Gary Ching from the Sexual Offences Unit of the Office of Public Prosecutions, Marg Darcy, Co-ordinator of CASA House, Maria Dimopoulos of Myriad Consultants, Dr Karen Hogan of the Gatehouse Centre, Thérèse McCarthy of TMA Consult, Dr Bernadette McSherry of Monash University, Dr Caroline Taylor of the University of Ballarat, Professor Jenny Morgan and Professor Alison Young of Melbourne University, and Inspector Lisa Mc Meeken and Acting Senior Sergeant Sandra James of Victoria Police.

Maria Dimopoulos, a consultant on diversity issues, provided valuable assistance to the Commission in our consultations with non-English speaking background communities and Lisa Thorpe and Rose Solomon of Elizabeth Hoffman House provided vital links to, and advice on, consultation strategies with Indigenous communities. Patsie Frawley and Ian Parsons assisted us in organising our consultation on people with cognitive impairments. The Lance Reichstein Foundation provided the funding which made it possible for the Islamic Women's Welfare Council, Elizabeth Hoffman House and the Disability Discrimination Legal Service to contribute to the Commission's work and Chris Momot, the

Executive Officer of the Foundation, co-ordinated the groups' interaction with the Commission.

I also acknowledge the contributions and support of Paul Coghlan, the Director of Public Prosecutions, Kay Robertson, the Solicitor for Public Prosecutions, Carl Barbaro and Dung H Van of the Office of Public Prosecutions, Lyn Slade, the Chief Executive of the Judicial College of Victoria and of all members of the Judicial Education Committee. I am also grateful to Victoria Police for providing us access to the statistical data for analysis and inclusion in the Interim Report. Danielle Tyson contributed to the collection of data; Stuart Ross provided advice on statistics and Kristen Diemer undertook the statistical analysis for Chapter 2. The recommendations in the Report are, of course, the responsibility of the Commission.

Professor Marcia Neave AO
Chairperson and Commissioner

Contributors

Authors

Sangeetha Chandrashekeran

Nicky Friedman

Melanie Heenan

Professor Marcia Neave AO

Editor

Trish Luker

Victorian Law Reform Commission

Chairperson

Professor Marcia Neave AO

Part-time Commissioners

Her Honour Judge Jennifer Coate

The Honourable Justice David Harper

Professor Felicity Hampel SC

Professor Sam Ricketson

Paris Aristotle AM

Chief Executive Officer

Padma Raman

Operations Manager

Kathy Karlevski

Policy and Research Officers

Sangeetha Chandrashekeran

Kate Foord

Nicky Friedman

Melanie Heenan

Siobhan McCann

Jamie Walvisch

Legal Research and Information Officer

Trish Luker

Librarian

Julie Bransden

Administrative Officers

Naida Jackomos

Simone Marrocco

Lorraine Pitman

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's 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	Appeal Cases (United Kingdom)
ACT	Australian Capital Territory
ALJR	Australian Law Journal Reports
ALO	Aboriginal Liaison Officer
ALR	Australian Law Reports
ALRC	Australian Law Reform Commission
ANZJ Crim	Australian and New Zealand Journal of Criminal Law
BC	Butterworths Cases
CASA	Centre Against Sexual Assault
CCTV	closed circuit television
CCU	Crisis Care Unit
CIU	Criminal Investigations Unit
CJ	Chief Justice
d	clause
CLR	Commonwealth Law Reports
Cr App R	Criminal Appeal Reports
Cth	Commonwealth
CWP	Child Witness Project
CWS	Child Witness Service
DNA	Deoxyribonucleic acid
DPP	Director of Public Prosecutions
ER	English Reports
et al	and others
FMO	Forensic Medical Officer
eg	for example
HL	House of Lords
HREOC	Human Rights and Equal Opportunity Commission
ibid	in the same place (as the previous footnote)
i.e.	that is
ITP	Independent Third Person
IWDVS	Immigrant Women's Domestic Violence Resource Centre

J	Justice (JJ plural)
JA	Appeal Justice
LEAP	Law Enforcement Assistance Program
Mass Ann	Annotated Laws of Massachusetts
MCC	Model Criminal Code
MCCOC	Model Criminal Code Officers Committee
n	footnote
NAPCAN	National Association for the Prevention of Child Abuse and Neglect
NESB	non-English speaking background
NFPA	no further police action
NOD	no offence detected
NSW	New South Wales
NSWCA	New South Wales Court of Appeal
NSWLR	New South Wales Law Reports
NSWLRC	New South Wales Law Reform Commission
NT	Northern Territory
OPA	Office of the Public Advocate
OPP	Office of Public Prosecutions
para	paragraph
PRISM	Prosecution Recording and Information Systems Management
Qd R	Queensland Reports
Qld	Queensland
RLC	Regional Liaison Committee
RLREP	Rape Law Reform Evaluation Project
RSC	Revised Statutes of Canada
S Ct	Supreme Court (United States)
s	section (ss pl)
SA	South Australia
SASR	South Australian State Reports
sch	schedule
SCR	Supreme Court Reports
SECASA	South East Centre Against Sexual Assault
SIU	Sexual Investigation Unit
SOCA	Sex Offences and Child Abuse (Unit)
SPSS	Statistical Package for Social Sciences
Tas	Tasmania

UK	United Kingdom
v	versus (said as 'and')
VATE	video and audio taped evidence
VCCAV	Victorian Community Council Against Violence
VMC	Victorian Multicultural Commission
vol	volume
VR	Victorian Reports
VSC	Supreme Court of Victoria
WA	Western Australia
WAS	Witness Assistance Service
WLR	Weekly Law Reports



TERMINOLOGY

We list below some of the key terms used in this Interim Report, and explain the significance of the terminology.

Victim/survivor: Throughout this Interim Report, we use the expression ‘victim/survivors’ to refer generally to people against whom sexual offences are alleged to have taken place. This is not intended to pre-judge the issue of whether an alleged offender will be convicted of the offence, but to acknowledge the reality and effects of sexual assault on adults and children who experience it. The term ‘survivor’ also gives emphasis to the enormous strength demonstrated by victims as they go on to ‘survive’ the experience of assault. However, if the discussion relates to matters occurring within the context of a trial or a pre-trial process, we use the term ‘complainant’.

He/she: We use the pronoun ‘he’ to refer to a person accused of sexual offences, ‘she’ to refer to adult victim/survivors and generally ‘they’ to refer to child victim/survivors. 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.

Sexual abuse/sexual assault: While the literature in this area commonly refers to child sexual abuse, we have chosen to use the term assault in order to maintain consistency with offences against adults. We recognise that not all sexual offences against children and young people are legally defined as assault. When referring to literature or research which uses the term abuse, we have maintained the use of this term.

Cognitive impairments/impaired mental functioning: In Chapter 3 we use the expression ‘cognitive impairments’ to describe a range of disabilities which have an impact upon people’s ability to understand and process information. It includes intellectual disability, acquired brain injury and mental illness. The expression is not a technical or diagnostic definition, rather it is designed to focus on the impact of the impairment upon cognitive ability. The Commission recognises that intellectual disability, acquired brain injury and mental illness

are quite distinct from each other and people with these conditions may require quite different levels of support, care and treatment. The features of these illnesses or disabilities are varied and can manifest in diverse ways. For example, mental illness can encompass mild forms of intermittent depression, as well as more ongoing and acute symptoms that severely impact upon an individual's mental functioning and aspects of daily living.

Likewise, some people have mild intellectual disabilities and others more severe or profound disabilities which impact on their cognitive ability and day-to-day functioning. By using the expression 'cognitive impairments' we do not intend to suggest that these disabilities are the same.

In Chapters 6 and 8 when discussing substantive offences and the rules of evidence we do not use the expression 'cognitive impairments'. Instead, we use the expression 'impaired mental functioning', primarily because this is the term 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. At times, we will also describe people with 'impaired mental functioning' as people with 'mental impairments'.

Non-English speaking background (NESB): We use the term 'non-English speaking background (NESB)' to refer to immigrant and refugee communities in Victoria. The Commission recognises that government agencies are increasing use 'culturally and linguistically diverse' (CALD) to refer to immigrant and refugee communities. However, we have chosen to use NESB to maintain consistency with the Discussion Paper and because participants in some consultations expressed a preference for this term.

Executive Summary

SCOPE OF THE REVIEW

The terms of reference for the sexual offences review require the Commission to investigate whether legislative, administrative or procedural changes are necessary to ensure that the criminal justice system takes sufficient account of the needs of complainants in sexual offences cases.

WORK ALREADY UNDERTAKEN

The Commission published a Discussion Paper in December 2001, *Sexual Offences: Law and Procedure*.¹ The Discussion Paper discussed the extensive changes which had been made to the law during the 1990s and sought responses to questions about possible changes to the law of sexual offences. The Commission received 75 submissions from a wide range of people and organisations.

CONSULTATIONS

The Commission undertook extensive consultations in order to consider the extent to which earlier reforms have achieved their intended purposes and to propose any further changes which may be necessary. Our processes placed emphasis on obtaining the views of groups which face particular barriers to participation in the criminal justice process, including people from Indigenous communities, people from non-English speaking backgrounds and people with cognitive impairments.

OVERVIEW OF THIS INTERIM REPORT

The Interim Report spans the entire criminal justice process, from disclosure to reporting, to interviewing and charging, through to prosecution and complainants' experiences in court. The recommendations it contains are intended to encourage people to report sexual offences, and to make the criminal justice system more sensitive to the needs of complainants in such cases.

1 Victorian Law Reform Commission, *Sexual Offences—Law and Procedure: Discussion Paper* (2001) (hereafter Discussion Paper).

Many of the recommendations relate to procedural and evidentiary matters, but we also propose some changes to the substantive law of sexual offences. The recommendations are intended to indicate the general direction of the Commission's research on the issues raised in the reference and will provide the basis for further consultation. A Final Report will be published which takes account of responses to these recommendations.

EMPIRICAL RESEARCH ON REPORTING RATES AND PROSECUTION OUTCOMES

Since the publication of the Discussion Paper, the Commission has analysed:

- Victoria Police data to examine trends in reporting of sexual offences over an eight year period between 1994–2000; and
- Office of Public Prosecutions data to examine the outcomes of prosecutions for penetrative offences other than rape during 1997–99. These offences include incest and sexual penetration of a child under 16 years.

Police Statistics on Reported Sexual Offences

The Commission found that:

- The numbers of rapes and penetrative offences other than rape reported to police between 1994–95 and 2001–02 have remained relatively constant.
- There has been a decline in the rate of people reporting sexual assault in Victoria, from 63.3 per 100,000 head of population in 1993 to 53.7 in 2001.
- The majority of people reporting rape or other penetrative offences are women and girls and the majority of alleged offenders are male. The median age at which reported rapes occurred was 20 years.
- Over 80% of victims who reported a rape or other penetrative offence knew the offender.
- A third of all reports of penetrative offences other than rape concerned family members such as parents, step-parents, siblings and other relatives. The median age of victims at the time of the offence was 12 years.
- Just over half of the rapes were reported within a week of the alleged offence, but 11.5% of the rapes over the eight year period were reported five years after the alleged event.

- Delays in reporting were much more common for penetrative offences other than rape. Over 41% of offences reported over an eight year period were made at least two years after the offence.

Prosecution Outcomes

In relation to prosecution outcomes for penetrative offences other than rape, the Commission found that:

- Only around 14.5% of cases, or less than 1 in 7 reports, of penetrative offences other than rape that are reported to and recorded by police ultimately proceed to prosecution.
- A high proportion of the 258 accused who were prosecuted in the period 1997–99 for penetrative offences were committed to stand trial (223 or 86.4%).
- Of the 258 matters where the accused were prosecuted for penetrative offences other than rape, 116 or 44.9% were convicted of at least one penetrative offence through pleading guilty or being found guilty at trial.
- The overall conviction rate for prosecutions of penetrative offences other than rape that proceeded beyond the Magistrates' Court was 52%. This is 22% higher than the proportion of rape cases proceeding beyond the Magistrates' Court that resulted in conviction. A possible reason for this higher conviction rate is that police filter out cases involving penetrative offences other than rape, unless there is a strong chance of conviction.
- 25.6% of matters that proceeded beyond the Magistrates' Court resulted in no conviction for any offence. The corresponding figure for rape prosecutions that failed to result in convictions was 36%.²
- Pleas of guilt for penetrative offences other than rape increased from 57.6% in 1997 to 64.5% in 1999. In 1997, the proportion of trials that resulted in guilty verdicts was 21.2%. By 1999 this had increased slightly to 25.8%.³

2 Victorian Law Reform Commission, above n 1, 45.

3 The raw figures relied upon here are relatively small and should therefore be treated with caution.

POLICE RESPONSE

Police are the first point of contact between those who decide to report sexual assault and the criminal justice system. Police play a critical role in ensuring that the system is responsive to those who report sexual offences. The way people are treated by the police will often determine whether they feel able to continue with the legal process or whether they decide to withdraw their complaints.

The introduction of a Police Code of Practice for the Investigation of Sexual Assault Cases in 1992 was an important step in ensuring an appropriate balance between the requirements of investigating an offence and providing adequate support to victim/survivors during the criminal justice process.

Overall, the Code appears to be working well. The Commission has made recommendations which are intended to build on the important gains that have been made in responding more appropriately to the needs of victim/survivors of sexual assault.

The major recommendations relate to:

- clarifying some aspects of the operation of the Code;
- changing police practices to ensure a more consistent approach to the process of authorising briefs;
- mandatory provision of written reasons whenever a decision is made not to continue with an investigation or not to lay charges;
- changing the structure of investigation units. We propose that a detective or Criminal Investigation Unit (CIU) member should be attached to some Sexual Offences and Child Abuse (SOCA) units. The CIU member should work exclusively on investigating sexual offences reported to SOCA units and preparing briefs of evidence;
- providing information for victim/survivors who report sexual offences. Multilingual materials should outline the basic steps involved in reporting sexual assault to the police, relevant contact details and the principles of the Code of Practice.

We also recommend improvements to police training including:

- enhancing training for general duties police about how to respond appropriately to victims of sexual offences; and

- including information in training on sexual assault for members of SOCA units and CIUs which addresses the social context of sexual offences; the barriers that victims often face in reporting offences; and the particular barriers to reporting which are faced by some groups in the community such as Indigenous people; people from non-English speaking backgrounds; and people with cognitive impairments.

IMPROVING THE CRIMINAL JUSTICE SYSTEM

During our consultations, complainants identified multiple barriers to participating in the criminal justice process, including their marginalised role in decision-making, lack of information about the process, the difficulties in obtaining information about the progress of cases, the public and intimidating environment of the courtroom, the effect of delays in the process which make it difficult for them to get on with their lives, the lack of sensitivity displayed by some lawyers and judges, and the effect of aggressive, insulting and offensive cross-examination. Our research and consultations show that the substantial legal reforms made in Victoria during the late 1980s and early 1990s have not always operated in the way intended.

Achieving systemic changes within the criminal justice system is a difficult process. The implementation of changes intended to make the system more responsive to the needs of complainants will require some change to the practical operation and culture within which court proceedings are conducted. The Commission believes that discussion and education which fosters cultural change within the criminal justice system is an essential component of the reference. Lawyers, magistrates and judges are likely to be more responsive to the needs of complainants, and to perform their role more effectively, if they understand the context in which sexual offences commonly occur and the psychological and social aspects of sexual offences which affect complainants.

The major recommendations relate to:

- provision of continuing education to prosecutors in sexual offences cases; and
- provision of a program for judges and magistrates to facilitate discussion of issues which commonly arise in sexual offences committals and trials, by the Judicial College of Victoria.

Both prosecutor and judicial training should include information on the social context in which sexual offences occur, including:

- the emotional, psychological, and social impact of sexual assault on victim/survivors;
- the effect of such offences on victims and the particular problems that complainants may experience in giving evidence; and
- how sexual assault affects people from groups which typically experience disadvantage and discrimination, for example Indigenous women.

The Interim Report also discusses the possible advantages of establishing a specialist sexual offences jurisdiction in Victoria. South Africa has a specialist sexual offences court and New South Wales is experimenting with a specialist court to try sexual offences against children.

Specialisation could:

- create greater awareness among judges and court staff about the needs of sexual offences complainants;
- foster willingness among judges and court staff to develop specialised procedures to meet these needs;
- make it easier to identify and support complainants from marginalised sections of society, who feel powerless within the existing court process—in the long term this could encourage more people to report offences;
- allow the development of case management procedures to improve the ways in which sexual offences trials are run, for example by reducing delays;
- provide an opportunity to develop support services for complainants alongside the criminal justice process;
- reduce complainants' fears of testifying; and
- symbolize the fact that sexual offences are taken seriously by the criminal law.

The Commission seeks views on the possible advantages and disadvantages of adopting this approach.

REDUCING THE STRESS OF GIVING EVIDENCE

Giving evidence is very stressful for complainants in sexual offences cases. The need to confront the person alleged to have assaulted them, the difficulties of talking about the circumstances surrounding the assault, and the embarrassment of being questioned in public about sexual matters, can make committals and trials traumatic and intimidating experiences for complainants.

Steps have been taken to reduce the impact of giving evidence in sexual offences trials. These include:

- alternative arrangements for complainants to give evidence, for example giving evidence from another room via closed-circuit television (CCTV);⁴
- restrictions on cross-examination of complainants on their sexual activities;⁵
- restrictions on the admission of evidence about the content of communications between complainants and their counsellors.⁶

Despite these measures, complainants continue to report serious difficulties in testifying and cross-examination. There is also evidence that restrictions on admission of evidence of sexual activity are not always implemented.

The major recommendations include :

- CCTV should no longer be regarded as an ‘alternative’ method of giving evidence, but should be the standard way in which complainants in sexual offences cases give evidence at committal or trial;
- where CCTV cannot be used, or an order is made that the complainant should give evidence in court, a screen is to be used to remove the defendant from the complainant’s direct line of vision;
- evidence about complainants’ sexual activities should only be admissible where it has significant probative value to a fact in issue, and where the

4 *Evidence Act 1958 s 37C.* This section also refers to other measures designed to assist complainants, for example s 37C(3)(c) provides for allowing counsel to remain seated and not robed and allowing support people to sit next to complainants while they are giving evidence to provide them with emotional support, and s 37C(3)(b) provides for erection of screens in courtrooms so that complainants do not have to see the accused.

5 *Evidence Act 1958 s 37A.*

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

probative value of this evidence substantially outweighs the danger of prejudice to the proper administration of justice. In deciding whether the probative value of the evidence sought to be admitted substantially outweighs the danger of prejudice to the proper administration of justice, the judge must have regard to a range of factors including the rights of the accused, the harm that may be suffered by the complainant, and the risk that the evidence may unduly arouse discriminatory belief or bias, prejudice, sympathy or hostility in the jury.

The chapter also considers two alternative options for dealing with confidential counselling communications.

- *Option 1:* Under this option there would be a blanket prohibition on access to and admission in evidence of confidential counselling communications.
- *Option 2:* Under this option access to and admission in evidence of confidential counselling communications would be prohibited at committal or in bail proceedings. It would be necessary to apply to the court for permission to use counselling records at trial or plea proceedings. More detailed criteria for admission of counselling communications at trial or in plea proceedings would be set out in the legislation.

Jury Warnings

Currently, judges are required to warn the jury of *particular* circumstances which could potentially result in a miscarriage of justice. Where there has been a significant delay in reporting sexual offences, a jury must be warned about the dangers of convicting the accused because of the difficulties the accused may have in testing the evidence given by the complainant. However, it appears that warnings may be given in cases where the law does not require it. The Commission is also concerned that the expression ‘dangerous to convict’ may be interpreted by juries as a direction not to convict (though this is not its intention).

The main recommendations are that:

- the judge must not warn the jury that it is dangerous to convict or unsafe to convict in the absence of corroboration; and
- the circumstances where a jury warning on delay must be given should be restricted to situations where the accused can show a specific disadvantage caused by the delay, rather than a hypothetical disadvantage.

Cross-examination by Unrepresented Accused

In general, people who are accused of crimes have the right to represent themselves in court. In sexual offences cases this may involve accused cross-examining people who they are alleged to have assaulted. Unlike the situation in some other states, there is no prohibition on people who have been charged with sexual offences personally cross-examining complainants in Victoria. Complainants in sexual offences cases are likely to endure significant distress if they are questioned in detail about the alleged offences by the very person who is said to have committed them.

The main recommendations are that:

- a person charged with a sexual offence should be prohibited from personally cross-examining complainants and other ‘protected witnesses’;
- if an unrepresented defendant wishes to cross-examine a complainant or other protected witness, the court must invite the defendant to seek legal representation. If the defendant does not obtain legal representation, the court must order Victoria Legal Aid to appoint a lawyer solely for the purpose of cross-examining the complainant or other protected witnesses;
- if the accused refuses to arrange legal representation or to accept legal assistance provided by Victoria Legal Aid,⁷ or does not cooperate with the lawyer appointed for this purpose, he should be taken to have declined to cross-examine the complainant.

The Commission considers that the balance between ensuring an accused is not denied the right to cross-examine witnesses, and protecting complainants and protected witnesses from unnecessary humiliation, distress or intimidation is achieved by providing the accused with legal assistance to conduct the cross-examination.

⁷ If an accused person who is receiving legal assistance from Victoria Legal Aid refuses the assistance of one lawyer and wishes to obtain the services of another, this request is considered in light of its reasonableness. It is at the discretion of Victoria Legal Aid as to whether to provide an alternative legal practitioner, taking into consideration whether there is to be increased cost and any other reasons considered relevant.

MAKING THE SYSTEM MORE RESPONSIVE TO THE NEEDS OF CHILDREN

Our criminal justice process was designed for adults and has historically been ‘deeply suspicious of child witnesses’.⁸ Children are usually unfamiliar with the confrontational questioning style which is an essential part of the adversarial process. The deficiencies of the criminal justice system may result in parents or carers deciding not to report offences to the police, or in decisions being made not to charge an accused person because the child or other complainant is unable to withstand the pressure of giving evidence.

The main recommendations are that:

- Specialist child witness support should be provided to child witnesses, their parents, guardians or carers in sexual offences cases, both within Melbourne and in rural and regional areas.
- Support for child witnesses should include: appropriate needs assessment; information provision about the pre-trial and trial process; accompanying child to court; providing appropriate psychological and welfare support, and referral to services, where appropriate.
- The prosecution should be able to make an application for a special hearing at which all the testimony of a child witness is recorded. The special hearing should be attended by a judge, the accused and counsel for the prosecution and defence.
- The special hearing process should also be available for witnesses with impaired mental functioning.

Competence

The law regarding the capacity of child witnesses to testify is complex and may create obstacles to the child testifying. The test of competency for giving sworn evidence may involve an inquiry into the child’s religious beliefs. Children in Victoria may be unable to give sworn evidence, even though they are capable of

8 Nicholas Bala, Kang Lee, Rod Lindsay and Victoria Talwar, ‘A Legal & Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses’, (2000) 38 *Osgoode Hall Law Journal* 409, 412. The writers refer to the Canadian legal system but the comment also pertains to other common law jurisdictions.

understanding that they should tell the truth, because the present competency test probably requires them to understand the religious significance of taking an oath. Children may be incompetent to give unsworn evidence because they do not ‘understand the duty of telling the truth’⁹ even though they are able to accurately communicate information which is relevant to the charge.

Recommendations in relation to competence are that:

- the test for competence to give evidence on oath should be that witnesses:
 - are able to understand questions put to them as witnesses and give answers to them which can be understood; and
 - understand that they are obliged to give truthful evidence.
- people who are not competent to give sworn evidence should be able to give unsworn evidence if they can understand questions put to them as witnesses and give answers to them which can be understood.
- people who are not capable of giving comprehensible answers to a question about a fact should not be competent to give evidence about that fact, but may be competent to testify about other facts.
- in cases involving allegations of child sexual assault, the court should be able to seek a report from an independent and appropriately qualified expert to determine the child’s competence to give sworn or unsworn evidence.

Hearsay

In Victoria, the rule against hearsay evidence prevents a fact from being established by calling a witness to give evidence about a statement made out of court. The main reason that hearsay evidence is excluded is that it is often less reliable than direct evidence.

The rule prevents a jury hearing evidence about the initial complaint of sexual abuse by a child, although this may be crucial in assessing the veracity of the allegation. For example, it will usually prevent evidence of a complaint of abuse by a child to a parent, teacher, doctor or parent, or of what the child said in response to an investigation of alleged abuse, being used as evidence of the truth of the

9 JR Spencer and Rhona H Flin, *The Evidence of Children—The Law and the Psychology* (2nd ed, 1990), 54.

statement. Many allegations of child abuse are not prosecuted, either because the child is incompetent to testify or is too traumatised to testify. If evidence of the child's various statements, to family, police, counsellors etc could be used as evidence of the truth of the statement, a higher proportion of offenders could be charged and convicted. In the United States, many jurisdictions have changed the hearsay rule to allow admission of evidence of hearsay statements of children in sexual offences cases. Some Australian states have also modified the rule, either generally, or in the context of offences against children.

The Commission recommends that:

- evidence of a child's hearsay statements regarding the facts in issue should be admissible to prove the facts in issue in any criminal case involving child sexual assault allegations, where:
 - the child is under 16; and
 - the court, after considering the nature and contents of the statement, is of the opinion that the evidence is of sufficient probative value to justify its admission.
- a person may not be convicted solely on the basis of hearsay evidence admitted under this exception to the rule against hearsay.

THE OFFENCE OF RAPE AND THE MEANING OF CONSENT

One of the aims of sexual assault law reform over the last decade has been to displace the powerful myths about sexual roles by providing a legislative statement of appropriate standards of sexual interaction. The most significant changes to the law have been the introduction of a statutory definition of consent and the mandatory jury directions on consent. Consent now means 'free agreement' and includes a non-exhaustive list of circumstances in which a person cannot freely agree to an act. This includes circumstances where a person is asleep, unconscious, or so affected by alcohol or other drugs as to be incapable of freely agreeing; is unlawfully detained; or is incapable of understanding the sexual nature of the act. Despite these changes to the substantive law stereotypical images of 'real rape' victims are still widely-circulated in the courtroom and used to assess the behaviour of female complainants before, during and after the assault.

Jury Directions on Consent

Problems concerning the meaning of consent have arisen in contexts where the victim is sexually penetrated or indecently assaulted while asleep, unconscious or unaware due to intoxication. In such cases a judge will be required to 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. The Commission is concerned that despite the direction there are still cases in which the communicative model of sexual relations is being undermined. For this reason the Commission recommends that the jury direction be strengthened to make it clear that the failure of a complainant to say or do anything indicating free agreement at the time that the act occurred is sufficient, of itself, to amount to evidence of lack of free agreement.

Changes to the Mental Element

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. In Victoria, a person cannot be convicted of rape if he acted in the belief that the complainant had consented to penetration, even if that belief is objectively unreasonable.

The Commission is concerned that the subjective mental element can be used to reverse the communicative model of consent which was established by earlier reforms. The argument that the accused had an honest but unreasonable belief in consent allows an accused to escape punishment for causing a serious harm even though he could have avoided penetrating the complainant without her consent by taking a small step such as asking her whether she agreed to sex or by verifying the meaning of a gesture or remark.

The Commission recommends that the subjective mental element for rape should be changed to ensure that an accused cannot escape culpability because he holds an honest but unreasonable belief in consent. The Commission supports moving towards a more objective approach to the mental element. An objective approach would focus less on the honesty of an accused's belief and more on the reasonableness of the belief. There are a variety of ways in which this can be applied. The Commission seeks responses to the following three options.

- *Option 1:* Changing the requirement that the accused had a subjective intention to penetrate the complainant without her consent to an objective mental element. Under this approach, the accused would be guilty of rape if a reasonable person would have realised that the complainant was not consenting.
- *Option 2:* Removing the requirement to prove awareness of non-consent as an element of rape and introducing a defence of mistaken belief in consent. Under this approach, if the accused raised mistaken belief in consent as a defence, the prosecution would be required to prove, beyond reasonable doubt, that the belief was neither honest nor reasonable.
- *Option 3:* Removing awareness of non-consent as an element of rape and introducing a defence of honest belief that the complainant was consenting. Where an accused alleged honest belief in consent the judge would have to be satisfied that there was sufficient evidence of the existence of such a belief before the defence of honest belief be considered by the jury. The accused would be unable to use the defence where he failed to take reasonable steps to ascertain consent *or* where he did not turn his mind to the possibility that the person was not consenting.

The Commission invites a response to these options.

CHANGES TO OTHER SUBSTANTIVE OFFENCES

Incest

The Commission believes that significant changes are required to the current offence of incest to ensure that the offence more effectively responds to the reality of sexual assault within the family. The proposed changes are intended to reduce the stigma for victims associated with the term ‘incest’; challenge the perception that children can consent to intra-familial sexual penetration; recognise intra-familial sexual abuse of children as a serious form of sexual violation, and a violation of trust and respect; and prevent victims of intra-familial sexual abuse from being co-charged, or seen as accomplices to the act of sexual penetration.

INTRA-FAMILIAL SEXUAL PENETRATION

The Commission recommends the creation of three offences of intra-familial sexual penetration. These offences are currently treated as incest under section 44 (1), (2) and (4).

- An offence which covers a person who takes part in an act of sexual penetration with his or her child, step-child or lineal descendant. This offence applies regardless of the age of the child.
- An offence which covers a person who takes part in an act of sexual penetration with the child or step-child or lineal descendant of his or her de facto spouse, where the person penetrated is under 18.
- An offence which covers an act of sexual penetration by a person of a child under 18 whom he knows to be his sister, half-sister, brother or half-brother.

PERSISTENT SEXUAL ABUSE OF A SIBLING

The Commission proposes a further offence to cover acts of sexual penetration between adult siblings, where the penetration is a continuation of sexual assault which occurred when the complainant was a child. This proposed offence focuses primarily on the abusive context within which the sexual penetration occurs rather than the blood relationship between the two siblings. The aim of this provision is to apply the criminal sanctions which now cover acts of sexual penetration between adult siblings to situations where the accused has sexually abused his or her sibling before the victim was 18 years of age, through to adulthood. In such cases, consent has effectively been vitiated through long-standing sexual abuse.

This provision will cover circumstances where sexual intercourse between siblings commences when the victim turns 18, but where prior to that, the accused has engaged in sexual contact with the victim. The proposed provision would mean that the prosecution does not have to prove with such a high degree of particularity the date or exact circumstances of the acts that occurred when the victim was under the age of 18 years.

COMPELLING OFFENCES

Under section 38 of the *Crimes Act 1958*, a person commits the crime of rape if that person compels a male person to sexually penetrate the offender or another person with his penis, or compels a person not to withdraw his penis from the

offender or the other person. The section does not cover the situation where a male victim is compelled to penetrate the offender or a third person other than with his penis or where a female victim is forced to sexually penetrate the offender or a third person. The invasion of the victim's autonomy is the same whether a person is compelled to penetrate another person with a penis or in some other way.

The Commission recommends that section 38 should be amended to extend the crime of rape to cover situations where the victim is forced to sexually penetrate another person, regardless of the gender of the victim or whether the penetration is penile, digital, oral or by an object.

It is also recommended that a new offence should be created to cover the case where a person (the offender) compels another person (the victim) to sexually penetrate the victim or to sexually penetrate or be penetrated by an animal.

SEXUAL OFFENCES AGAINST PEOPLE WITH IMPAIRED MENTAL FUNCTIONING

The law plays an important symbolic function, setting out the appropriate balance between state protection of vulnerable people and the right to sexual autonomy. It is important to ask whether the law, in its current state, has struck the appropriate balance between these competing principles.

Under section 51 of the *Crimes Act 1958* it is an offence for a person who provides medical or therapeutic services to a person with impaired mental functioning to take part in a sexual act with that person. Under section 51(4), the offence applies only where the services relate to the mental impairment. Section 52 makes it an offence for a worker (including a voluntary worker) at a residential facility to take part in a sexual act with a resident of the facility.

The Commission believes that social changes over the last decade or so, such as de-institutionalisation, necessitate a change to the legislation to protect people with impaired mental functioning against exploitation by people who provide services outside residential facilities. The high incidence of sexual assault of people with mental impairments, and the low levels of reporting, suggest that the law must continue to set high standards of conduct for those working in programs or facilities which provide services to people with impaired mental functioning. The Commission also recommends changes to section 51 in relation to providers of medical and therapeutic services.

The Commission recommends that :

- a person working at a facility or in a program which provides services to people with impaired mental functioning, who takes part in a sexual act with a person whom he or she knows has impaired mental functioning, should be guilty of an indictable offence.
- a person providing medical or therapeutic services to a person with impaired mental functioning who takes part in a sexual act with a person should be guilty of an indictable offence. It should not be necessary to prove that the person providing the services knew of the impairment, *where the services related to the impairment*.
- A new offence should be created to cover the situation where the medical or therapeutic services provided do not relate to the mental impairment. *Where the services do not relate to the mental impairment*, for example, where the services are provided by a dentist or by a doctor who is treating the victim for a condition unrelated to the impairment, the service provider must be aware of the victim's mental impairment before he can be convicted of the offence.

SEXUAL OFFENCES AGAINST CHILDREN AND YOUNG PEOPLE

Care, Supervision and Authority Offences

Under section 48 of the *Crimes Act 1958*, it is an offence for a person to take part in an act of sexual penetration with a 16- or 17-year-old to whom he or she is not married and who is under his or her care, supervision or authority. Under section 49, it is an offence for a person to commit, or be in any way party to, the commission of an indecent act with or in the presence of a 16-year-old, to whom he or she is not married and who is under his or her care, supervision or authority. The consent of the child is not a defence to a charge under these sections, unless the person in the position of care believed, on reasonable grounds, that the child was above the relevant age or that he or she was married to the child.

The Commission recommends that:

- sections 48 and 49 should include a *non-exhaustive* list of the relationships covered by the section, including the relationships of:
 - teacher and student;

- foster parent, legal guardian, and the child for whom they are caring;
 - in the case of section 49 (which penalises non-penetrative sexual acts), parents, including step-parents and adoptive parents and their children;
 - religious instructors;
 - employers;
 - youth workers;
 - sports coaches;
 - counsellors;
 - health professionals and young people who are patients; and
 - police and prison officers and young people in custody.
- the age of consent for sexual activity with a person over whom someone is in a position of care, supervision and authority should be 18 years, regardless of whether the sexual acts involve sexual penetration.

Procuring and Soliciting Offences

Section 58 of the *Crimes Act 1958* makes it an offence for a person to ‘procure’ a child under 16 years to take part in an act of penetration outside marriage with another person or to procure a person to take part in an act of penetration outside marriage with a child under 16 years. It has been argued that these provisions may be inadequate to deal with certain circumstances where a child is approached for sexual purposes, but sexual contact does not occur. The police, in particular, are concerned about the problem of children being approached and groomed for sexual purposes over the internet.

Some overseas jurisdictions have created a separate offence to cover internet-specific circumstances. The Commission has rejected the approach of creating an internet-specific offence. In our view, the criminality of the conduct should not be based on the medium used by the alleged offender to prepare the child to participate in sexual activity.

The Commission recommends that:

- section 58 should be expanded to include ‘soliciting’ as well as procuring and the current offence of soliciting contained in section 60 should be repealed. The addition of the word ‘soliciting’ will broaden the application of the section 58 provision. Where an offer is made to a child to participate in some form of sexual activity, or the child is urged or persuaded by an adult to take part in sexual acts, this will be sufficient to constitute an offence. A person should only be culpable once he or she has formed the intent to commit a specific wrongful act or series of acts. Where no particular act or acts are contemplated no offence will be committed.
- the new offence in section 58 should not be confined to procuring or soliciting to take part in an act of penetration, but should cover indecent acts as well.

Inclusion of Objects and Interpretation Clauses

The consultations and research undertaken by the Commission indicate that despite significant reforms to the substantive law of rape and other sexual offences, there is still a need for education of participants in the criminal justice system about the social context and serious nature of sexual assault. The Commission believes that an interpretation clause at the beginning of the provisions on sexual offences in the *Crimes Act 1958* will assist in clearly stating the social problem that the legislation seeks to address, and the principles that the legislation endeavours to uphold.

The Commission recommends that:

- the *Crimes Act 1958* should include a statement of the aims of the sexual offences provisions such as:
 - (i) upholding the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity;
 - (ii) protecting children and people with impaired mental functioning from sexual exploitation.
- the *Crimes Act 1958* should also contain an interpretative clause which requires the court to consider the unique character of sexual assault and the unique way in which sexual assault affects the lives of victims. In particular, courts must have regard to the high incidence of sexual violence within society and the fact that:

- sexual offences are significantly under-reported;
- women and children are overwhelmingly the victims of sexual assault;
- offenders are commonly known to victims; and
- sexual offences occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.

Recommendations and Questions

Chapter 2: Reported Sexual Offences and Prosecution Outcomes

1. The Department of Justice should convene a working party comprising representatives of Victoria Police, the Office of Public Prosecutions, the courts and other relevant stake-holders, to establish an integrated process for the collection of reliable statistics relating to sexual offences, which should include:
 - the incidence of offences in Victoria;
 - the characteristics of victims and offenders, including racial and cultural background and age;
 - police reports and prosecution rates for such offences; and
 - prosecution outcomes and the factors which may affect them;

and should permit tracking of offences from the time of report until the matter is concluded.

Chapter 3: Improving Police Responses

Barriers to Reporting Sexual Assault by Victim/Survivors with Cognitive Impairments

2. In order to ensure consistent standards of practice for Independent Third Persons when working with victims of sexual assault, the Office of the Public Advocate should develop an accredited training program. The training program should include input from CASAs and other community organisations who work closely with victim/survivors of sexual assault who have a cognitive impairment.

Relationship Between Centres Against Sexual Assault and Victoria Police

3. The meaning of the requirement that people reporting a recent sexual assault should be taken to the nearest Centre Against Sexual Assault or hospital Crisis Care Unit should reflect the principles upon which the Police Code of Practice for Sexual Assault Cases was first based. The Code should be interpreted to

ensure victims receive continuity of care and to optimise their future access to counselling services.

4. The Police Code of Practice for Sexual Assault Cases should be complied with in all cases. Police should be made aware that the guidelines apply for any sexual assault, regardless of when the assault occurs. The Code should also be activated whether or not medical attention or a forensic medical examination is required.
5. The Sexual Assault Liaison Committee should consider the most appropriate means of ensuring that police and forensic medical officers are familiar with accurate interpretation of the Code's guidelines, including the inclusion of material in training sessions, redistributing copies of the Code, and issuing 'refresher' documents that clearly state the position on these issues.

Improving the Police Response to Reports of Sexual Offences

6. Victoria Police should enhance training and develop refresher courses for general duties police in the various regions and divisions to ensure they have a thorough knowledge of the provisions of the Code and can respond appropriately to victims of sexual offences.
7. Training on sexual assault for members of Sexual Offences and Child Abuse Units and Criminal Investigation Units should address the social context of sexual offences, including:
 - the characteristics of most offences, offenders and victims;
 - the short-term and long-term impact of sexual assault on victim/survivors;
 - the barriers that victims often face in reporting offences; and
 - how the laws and procedures relevant to sexual offences operate in practice.
8. Police training should take account of the diversity of victims' needs and the particular barriers to reporting which are faced by some groups in the community. Training initiatives should discuss best practice models for responding to sexual assault of:
 - Indigenous people ;
 - people from non-English speaking backgrounds; and
 - people with cognitive impairments.

9. Victoria Police should work collaboratively with Centres Against Sexual Assault (CASAs) to develop training packages that ensure police members understand the role of CASAs and can benefit from their experience of working directly with victim/survivors.
10. Victoria Police should engage consultants and/or representatives from non-English background community organisations who are recognised by communities as having expertise or training experience in culturally-appropriate sexual assault service responses.
11. Victoria Police should engage consultants and/or representatives from Indigenous community organisations who are recognised by Indigenous communities as having expertise or training experience in culturally-appropriate sexual assault service responses.
12. Information on police processes should be made available to victims at police stations. Materials should outline the basic steps involved in reporting sexual assault to the police, the contact details of local Centres Against Sexual Assault and Sexual Offences and Child Abuse Units, the principles of the Code of Practice for the Investigation of Sexual Assault, and the options victims have in making a statement. These materials should be provided in a range of languages.
13. Regional Liaison Committees should assist in the development of these materials and ensure the materials are kept updated and a ready supply is available at police stations at all times.
14. Where the Criminal Investigation Unit has principal carriage of the investigation, this process should include the officer-in-charge of the relevant Sexual Offences and Child Abuse (SOCA) Unit, or the individual SOCA members, being consulted about any decision made against authorising the brief for further investigation.
15. The Code of Practice for the Investigation of Sexual Assault should be amended to state that, as a matter of course, written reasons must be provided to the victim where a decision is made not to continue with an investigation or not to lay charges.
16. Training for Criminal Investigation Unit members on responding to sexual assault victims should include information on the reasons why victims may feel unable to continue with a police report, or request that the investigation be discontinued. This training could usefully be included in a training session developed by the Centres Against Sexual Assault in collaboration with the Sexual Offences and Child Abuse Units Coordination Office.

17. The Commission recommends that Victoria Police should consider establishing Sexual Investigation Units in all metropolitan divisions where the caseload reaches a pre-determined threshold. The processes of selection for Criminal Investigation Unit members appointed to Sexual Investigation Units and their tenure and lines of accountability, should be clearly established by Police Command.
18. Where Regional Liaison Committees have been established, a Criminal Investigation Unit member from the appropriate division should be nominated to regularly attend the meetings.
19. Where no Regional Liaison Committee currently exists, a Criminal Investigation Unit member should be nominated to contact the local Centre Against Sexual Assault (CASA) on a quarterly basis to discuss any problems or issues that have emerged. These contacts should be formalised to the extent that there is agreement by the parties in how to respond to the issues raised, and to feedback to the CASA or police on what action was taken.

Chapter 4: Increasing the Responsiveness of the Criminal Justice System

Changing the Culture

20. The Commission supports the provision of a regular continuing education program by the Office of Public Prosecutions for prosecutors in sexual offences cases. As well as promoting discussion on legal and practice issues, the objectives of the program should include information on:
 - the emotional, psychological, and social impact of sexual assault on victim/survivors, including how the assault may be experienced by people who have already experienced discrimination because of their language and ethnicity, and how this may affect complainants in giving their evidence;
 - the social context in which sexual offences occur, including the outcomes of empirical research on the incidence and circumstances in which sexual assaults occur;
 - the advantages of meeting with complainants before the hearing and advising them about what will happen when they give their evidence;
 - the use of closed-circuit television (CCTV) by witnesses;

- referral services which can assist complainants by providing court support and preparing them for what will happen in court; and
- steps which prosecutors can take to protect complainants from offensive, unfair or irrelevant cross-examination.

Judicial Education

21. The Judicial College of Victoria should offer a program for judges and magistrates to facilitate discussion of issues which commonly arise in sexual offences committals and trials, particularly issues relating to the exercise of judicial discretions, intervention during cross-examination and directions or warnings to juries.

22. The program should include information on:

- the social context in which sexual offences occur, including the outcomes of empirical research on the incidence and circumstances in which sexual assaults occur;
- the emotional, psychological and social impact of sexual assault on victim/survivors, including how the assault may be experienced by people who have already experienced discrimination because of their language and ethnicity, and how this may affect complainants in giving their evidence;
- the effect of such offences on victims and the particular problems that complainants may experience in giving evidence;
- how sexual assault affects people from groups which typically experience disadvantage and discrimination, for example Indigenous women; and
- the background to and application of any legislative changes arising from the report on this reference.

A Specialised Approach

Question:

The Commission seeks views on the establishment of a specialist sexual offences jurisdiction.

Chapter 5: Reducing the Stress of Giving Evidence

Alternative Arrangements for Giving Evidence

23. Section 37 of the *Evidence Act 1958* should be amended to provide for the routine use of closed-circuit television (CCTV) by adult complainants in sexual offences trials.
24. The prosecution should be able to apply for an order that the complainant should give evidence in the courtroom. The judge should have the power to make that order only if the court is satisfied that the adult complainant is able and wishes to give evidence in the courtroom.
25. Every effort should be made to install appropriate CCTV facilities in all courts in which sexual offences proceedings are held. Where facilities are unavailable, cases should be relocated.
26. Where CCTV cannot be used, or an order is made that the complainant should give evidence in court, a screen is to be used to remove the defendant from the complainant's direct line of vision, except where the magistrate or judge is satisfied that the complainant does not wish a screen to be used for this purpose.

The Admissibility of Certain Types of Evidence

27. Section 37A of the *Evidence Act 1958* should be amended to make it clear that it covers both consensual and non-consensual sexual activities.
28. Section 37A of the *Evidence Act 1958* should be amended to provide that the court shall not grant leave for complainants to be cross-examined about their sexual activities unless it is satisfied that:
 - the evidence has significant probative value to a fact in issue (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); and
 - the probative value of this evidence substantially outweighs the danger of prejudice to the proper administration of justice, taking into account the matters in Recommendation 30 below.
29. In deciding whether the probative value of the evidence sought to be admitted substantially outweighs the danger of prejudice to the proper administration of justice, the judge must have regard to:

- the distress, humiliation or embarrassment which complainants 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 complainants' personal dignity and privacy; and
 - the right of the accused to make a full answer and defence.
30. Substantial probative value will not be established merely because of the fact that the complainant engaged in a sexual act with the accused or another person on an earlier occasion.

Confidential Counselling Communications (2 options)

Option 1: Prohibiting Disclosure and Admissions

31. A counselling communication must not be disclosed in criminal proceedings. Accordingly,
- a person cannot be required (whether by subpoena or otherwise) to produce a document which records a counselling communication; and
 - evidence of a counselling communication cannot be admitted in evidence in any criminal proceedings.

Option 2: Modifying Rules on Disclosure and Admission

32. A counselling communication must not be disclosed in preliminary criminal proceedings (bail or committal proceedings). Accordingly, in preliminary proceedings:
- a person cannot be required (whether by subpoena or otherwise) to produce a document which records a counselling communication; and
 - evidence of a counselling communication cannot be admitted or adduced.
33. A counselling communication must not be disclosed in any trial or plea proceedings except with the leave of the court. Accordingly,
- a person cannot be required (whether by subpoena or otherwise) to produce a document which records a counselling communication; and
 - evidence of a counselling communication cannot be admitted in any trial or plea proceedings.

except with the leave of the court.

34. A person who objects to production of a document which records a counselling communication in relation to a trial or plea proceedings cannot be required to produce the document for inspection by the court unless:

- the document is first produced for preliminary examination by the court for the purposes of ruling on the objection; and
- the court is satisfied that:
 - the contents of the document have substantial probative value,
 - other evidence of the contents of the document or the confidence is not available, and
 - the public interest in preserving the confidentiality of the communication and protecting the confider from harm, is substantially outweighed by the public interest in allowing disclosure of the communication (the public interest test).

35. The preliminary examination is to be conducted in the absence of the parties and their legal representatives, except to the extent that the court determines otherwise.

36. Evidence taken at the preliminary examination is not to be disclosed to the parties or to their legal representatives, except to the extent that the court determines otherwise.

37. After undertaking the preliminary examination the court is to determine whether the confidential counselling communication should be disclosed.

38. A counselling communication cannot be adduced in evidence at a trial or in plea proceedings unless the court, after inspecting the document, is satisfied that:

- the contents of the document have substantial probative value;
- other evidence of the contents of the document or the confidence is not available; and
- the public interest in preserving the confidentiality of the communication and protecting the confider from harm, is substantially outweighed by the public interest in allowing disclosure of the communication (the public interest test).

39. In deciding whether the public interest test is satisfied, the court must consider:

- the extent to which disclosure of the information is necessary to allow the accused to make a full defence;
- the need to encourage victims of sexual offences to seek therapy and the extent to which such disclosure discourages victims from seeking counselling or diminishes its effectiveness;
- whether admission of the evidence is being sought on the basis of a discriminatory belief or bias;
- whether the victim or alleged victim objects to disclosure of the communication;
- the attitude of the person to whom the communication relates; and
- the nature and extent of the reasonable expectation of confidentiality and the potential prejudice to the privacy of any person.

40. The legislation should continue to apply to counselling communications whenever they are made.

41. Existing requirements which govern applications for leave and notification of the informant and the counsellor should continue to apply.

Questions:

Is the current definition of counselling communication adequate to deal with the patterns of confidential communication occurring within culturally and linguistically diverse communities?

If not, how should the definition be changed?

Jury Directions

42. On a trial of a person for an offence under *Crimes Act 1958* Part 1, Division (8A), (8B), (8C), (8D) or (8E):

43. Where the judge is satisfied that the accused has in fact suffered some specific forensic disadvantage (as opposed to some general or potential forensic disadvantage), due to a substantial delay in reporting, the jury may be given a warning to the effect that it must carefully weigh the complainant's evidence against the fact that, due to the passing of time, the accused may have found it

difficult to secure evidence that may have assisted his or her defence, had the complaint been made more promptly.

Cross-Examination by Unrepresented Accused

44. In any criminal proceeding for sexual offences, the accused may not cross-examine the complainant or a protected witness personally.
45. The court must advise the accused that he may not cross-examine the complainant or protected witness personally, and invite the accused to arrange representation if he wishes the complainant or protected witness to be cross-examined.
46. If the accused refuses legal representation, the court must direct Victoria Legal Aid to provide legal assistance for the purpose of cross-examination of the complainant or protected witness. A person appointed by Victoria Legal Aid is appointed as a friend of the court for the purpose of cross-examination only.
47. The person appointed may question the complainant or protected witness only about the general matters the accused requests be put to the complainant or protected witness, subject to the ordinary rules governing cross-examination of complainants or other witnesses.
48. Guidelines for the conduct of lawyers who are appointed as friends of the court should be developed after consultation with the courts, the Victorian Bar, Victoria Legal Aid, the Office of Public Prosecutions and the Law Institute of Victoria.
49. If the accused declines to accept the legal assistance provided for this purpose, or to provide such instructions as are necessary to enable the person appointed to question the complainant or protected witness adequately or at all, he is to be taken as having foregone his right to cross-examine the complainant or protected witness.
50. The court must inform the jury that the accused is not permitted to cross-examine the complainant or a protected witness personally. If a complainant or protected witness is cross-examined by a person appointed for that purpose, the court must warn the jury that
 - the procedure is a routine practice of the court;
 - no adverse inference is to be drawn against the accused as a result of the use of the arrangement; and
 - the evidence of the witness is not to be given any greater or lesser weight because of the use of the arrangement.

Support for Witnesses in Sexual Offence Cases

51. Support should be made available to assist adult complainants in sexual offences cases, both within Melbourne and in rural and regional areas.
52. An adequate witness support service for adult complainants in sexual offence cases should have the capacity to:
 - meet the needs of witnesses from culturally and linguistically diverse communities;
 - meet the needs of people with differing physical and intellectual requirements;
 - respond to all appropriate requests for assistance in a timely manner;
 - assess the needs of witnesses for support through the criminal justice process and develop a clear plan as to how this should be done;
 - either directly provide or negotiate the provision, nature and level of assistance required to ensure that the witnesses' participation in the criminal justice system is as positive as possible and that the integrity of the judicial process is upheld; and
 - ensure witnesses are made aware of, and where necessary assisted to access, any assistance required for longer-term support arising from either the experience of surviving an offence or any deleterious effects from giving evidence at court.

Chapter 6: Making the System More Responsive to the Needs of Children

Making it Easier for Children to Give Evidence

53. Improved support should be provided to child witnesses and, where appropriate, their parents, guardians or carers in sexual offences cases, both within Melbourne and in rural and regional areas.
54. The purpose of this support should be to facilitate child witnesses' more effective and credible participation in the criminal justice process, while protecting their well being.
55. The support should be appropriate for children from non-English speaking backgrounds and with differing physical and intellectual requirements.

56. Specialist child witness support should be provided by professional staff with accredited expertise in relation to the developmental needs and capacities of children and an understanding of the requirements of the criminal justice system in relation to the prosecution of sexual offences.
57. The support should be delivered by an agency with the capacity to ensure there is appropriate continuity of care for child witnesses and their families. Where circumstances require it, there should be appropriate collaboration with other agencies providing services.
58. Support for child witnesses should include:
- assessing the requirements of the individual child witness and coordinating the appropriate program for the child and for parents, guardians or carers;
 - keeping the child and their parents, guardians or carers informed of the progress of the case and liaising and advocating with prosecutors, solicitors and police on behalf of the child;
 - explaining the court process and preparing the child, parents, guardians or carers for the experience of giving evidence;
 - accompanying the child to court or arranging for a court companion of the child's choice;
 - providing appropriate psychological and welfare support to children, including their parents, guardians or carers; and
 - making necessary referrals for children and families, guardians or carers to therapeutic counselling, medical care and other services necessary.
59. Child-friendly facilities should be provided for children within court complexes, including in interview areas and waiting rooms.

Questions:

What is the most effective means of providing support to child witnesses? In particular:

- *Should child and adult witness support services be separated, or provided by the same organisation?*
- *Should a child witness service independent of the Office of Public Prosecutions be established?*

What procedural changes should be introduced to ensure that defence counsel has sufficient knowledge of the prosecution case to enable cross-examination of child witnesses at a special hearing?

What processes should be implemented to ensure that child witnesses whose first language is not English can testify effectively at a special hearing?

60. Section 37 of the *Evidence Act 1958* should be amended to provide for the prosecution to make application for a special hearing at which all the testimony of a child witness is recorded. The special hearing should be attended by a judge, the accused and counsel for the prosecution and defence. The child should give evidence by closed-circuit television.
61. The child's recorded evidence should be admissible in the same way as evidence given orally in a hearing.
62. The special hearing process should also be available for witnesses with impaired mental functioning.
63. The Director of Public Prosecutions should develop guidelines indicating when the prosecution should make applications for a special hearing.
64. Police should continue to make video and audio-taped evidence of statements given by children and those with impaired mental functioning. A working committee should be established to develop an independent evaluation of the VATE process. This committee should include representatives from Victoria Police, Office of Public Prosecutions, Office of the Public Advocate, and other key stakeholders.
65. Section 37 of the *Evidence Act 1958* should be amended to provide for the routine use of closed-circuit television by child witnesses in sexual offences trials.
66. The prosecution should be able to apply for an order that the alternative arrangement not be used. The judge should have the power to make that order only if the court is satisfied that the child is able and wishes to give evidence in court.
67. Every effort should be made to install appropriate closed-circuit television facilities in all courts in which sexual offences proceedings are held. Where facilities are unavailable, cases should be relocated where practical.

Questions:

What arrangements should be made to facilitate the use of closed-circuit television, when the witness requires an interpreter?

Should a time limit be imposed for the period between committal mention and committal?

What other measures should be taken to ensure that delays in the criminal justice system are minimised for child witnesses?

68. The Chief Judge of the County Court should arrange for the development of guidelines and procedures to minimise waiting times for child witnesses in sexual offences cases.
69. Child witnesses should not be required to attend court until the time they are required to testify.

Changes to Evidence Law

70. Section 23 of the *Evidence Act 1958* should be amended to provide that all witnesses, regardless of age, should be presumed competent to give sworn evidence.
71. The test for competence to give evidence on oath should be that witnesses:
- be able to understand questions put to them as witnesses and give answers to them which can be understood; and
 - understand that they are obliged to give truthful evidence.
72. People who are not competent to give sworn evidence should be able to give unsworn evidence if they can understand questions put to them as witnesses and give answers to them which can be understood.
73. People who are not capable of giving comprehensible answers to a question about a fact should not be competent to give evidence about that fact, but may be competent to testify about other facts.
74. In cases involving allegations of child sexual assault, the court should be able to seek a report from an independent and appropriately qualified expert about the child's competence to give sworn or unsworn evidence.
75. Evidence of a child's hearsay statements regarding the facts in issue should be admissible to prove the facts in issue in any criminal case involving child sexual assault allegations, where:

- the child is under 16; and
- the court, after considering the nature and contents of the statement, is of the opinion that the evidence is of sufficient probative value to justify its admission.

76. A person may not be convicted solely on the basis of hearsay evidence admitted under this exception to the rule against hearsay.

Chapter 7: The Offence of Rape and the Meaning of Consent

Changes to Provisions on Consent

77. The mandatory jury direction on consent should be changed as follows:

'The fact that a person did not say or do anything to indicate free agreement to the particular sexual act at the time that the act occurred is evidence that the act took place without that person's free agreement.'

Should the Mental Element for Rape be Changed?

78. The Commission recommends that the law of rape should be changed to ensure that an accused cannot escape culpability because he held an honest but unreasonable belief in the complainant's consent.

Proposed Models (3 options)

Option 1: An Objective Fault Element for Rape

79. A person commits rape if:

- (a) he or she intentionally sexually penetrates another person without that person's consent; and
- (b) (i) is aware that the person is not consenting or might not be consenting;
or
(ii) a reasonable person would, in all the circumstances, have been aware that the person was not consenting or might not be consenting.

Option 2: Following the Code States' Approach

80. A person commits rape if he or she intentionally sexually penetrates another person without that person's consent.

81. It is a defence to a charge of rape if the accused held an honest and reasonable belief that the complainant was consenting to the sexual penetration.

Option 3: Adopting the Canadian Approach

82. A person commits rape if he intentionally sexually penetrates another person without that person's consent.
83. It is a defence to a charge of rape that the accused held an honest belief that the complainant was consenting to the sexual penetration. However where an accused alleges that he believed that the complainant consented to the sexual penetration, a judge must be satisfied that there is sufficient evidence of the existence of such a belief before the defence of honest belief can be considered by the jury.
84. The defence is not available where:
- (i) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting;
or
 - (ii) the accused did not turn his or her mind to the possibility that the person was not consenting.

Intoxication

Question:

What is the best way to address the issue of self-induced intoxication in the context of sexual offences? For example, should the reasonable person be a sober person? Or, should an accused be unable to rely on the defence of belief in consent where this belief arose from self-induced intoxication?

Chapter 8: Changes to Other Sexual Offences

Incest

Question:

What name should be given to offences involving intra-familial sexual penetration?

85. An offence of intra-familial sexual penetration should be created, in place of the existing offence of incest:

- A person must not take part in an act of sexual penetration with a person whom he or she knows to be his or her child or other lineal descendant or his or her step-child.
 - A person must not take part in an act of sexual penetration with a person under the age of 18 whom he or she knows to be the child or other lineal descendant or the step-child of his or her de facto spouse.
 - A person must not sexually penetrate a person under the age of 18 whom he or she knows to be his or her sibling.
86. Consent should not be a defence to the above intra-familial sexual penetration offences.
87. A person who takes part in a prohibited act of intra-familial sexual penetration under the coercion of the other person who took part in that act is not guilty of an offence.
88. In all proceedings for offences of intra-familial sexual penetration it shall be presumed in the absence of evidence to the contrary:
- that the accused knew that he or she was related to the other person in the way alleged; and
 - that people who are reputed to be related to each other in a particular way are in fact related in that way.

Definition: Sibling means a sister, half-sister, brother or half-brother.

89. A new offence should be created to make it an offence where:
- (1) the accused took part in act of sexual penetration of his or her sibling when the sibling was 18 years or older; and
 - (2) the accused took part in one or more acts which would constitute an offence under *Crimes Act 1958* section 38 (rape), section 44 (sexual penetration of a person under the age of 18 years by a sibling); section 45 (sexual penetration of a child under 16); section 47 (indecent act with a child under 16); section 48 (sexual penetration of a 16- or 17-year-old under the care, supervision and authority of the accused); section 49

(indecent act with a 16- or 17-year-old¹⁰ under the care, supervision and authority of the accused); or the ‘compelling sexual penetration offence’ (see below).

90. It is not necessary to prove an act referred to in sub-section (2) 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).
91. A prosecution for this offence must not be commenced without the consent of the Director of Public Prosecutions.

Definition: Sibling means a sister, half-sister, brother or half-brother.

Compelling Offences

92. Section 38(3) of the *Crimes Act 1958* should be amended to include, within the crime of rape, the situation where:
- a person (the offender) compels another person (the victim) to sexually penetrate the offender or a third person, irrespective of whether the person who is penetrated consents to the act; or
 - a person (the offender) prevents a person who has sexually penetrated the offender or a third person from ceasing to sexually penetrate the other person, irrespective of whether the person who is penetrated consents to the act.
93. Section 38(4) should be amended by removing the word ‘male’.
94. The *Crimes Act 1958* should be amended to create a new offence of compelling sexual penetration, with the same penalty that applies to rape. The offence would apply where a person (the offender) compels another person (the victim) to sexually penetrate the victim or to sexually penetrate or be penetrated by an animal.

Sexual Offences Against People with Impaired Mental Functioning

95. The definition of ‘impaired’ in section 50 of the *Crimes Act 1958*, which includes, but is not limited to, an impairment because of mental illness, intellectual disability, dementia or brain injury, should not be changed.

¹⁰ Section 49 currently covers only the case where the child is 16 years old. In para 8.65 below, we propose that section 49 should also include the case where the child is 17, to make the care supervision and authority offences consistent.

96. Section 51 of the *Crimes Act 1958* should be amended so that:

- it is an offence for a person who provides medical or therapeutic services to a person with impaired mental functioning to engage in a sexual act with that person;
- where the medical or therapeutic services are related to the impaired mental functioning, it is unnecessary for the prosecution to prove that the accused was aware of the person's impaired mental functioning. However, the accused can raise the defence that they had an honest and reasonable belief that a person did not have a mental impairment;
- where the medical or therapeutic services are not related to the impaired mental functioning, the service provider is not guilty of the offence unless he or she was aware that the person's mental functioning was impaired.

These offences should not apply where the person with the impaired mental functioning is the spouse or de facto spouse of the person providing the services.

97. A person working at a facility or in a program which provides services to people with impaired mental functioning, who takes part in a sexual act with a person whom he or she knows has impaired mental functioning, should be guilty of an indictable offence.

98. Sections 51 and 52 should not include a limited defence of consent, along the lines recommended by the Model Criminal Code Officers Committee.

Sexual Offences Against Children and Young People

99. Sections 48 and 49 should include a non-exhaustive list of the relationships covered by the section including the relationships of:

- teacher and student;
- foster parent, legal guardian, and the child for whom they are caring;
- in the case of section 49 (which penalises non-penetrative sexual acts), parents, including step-parents and adoptive parents and their children;
- religious instructors;
- employers;
- youth workers;
- sports coaches;
- counsellors;
- health professionals and young people who are patients; and
- police and prison officers and young people in custody.

100. The age of consent for sexual activity with a person over whom someone is in a position of care, supervision and authority should be 18 years, regardless of whether the sexual acts involve sexual penetration.

101. The defence of reasonable belief that the young person was aged 18 years or more should continue to apply.

102. Section 60 of the *Crimes Act 1958* 'Soliciting Acts of Sexual Penetration or Indecent Acts' should be repealed.

103. Section 58 of the *Crimes Act 1958* should be amended to make it an offence for:

- a person aged 18 years or over to solicit or procure a child under the age of 16 to take part in an act of sexual penetration or an indecent act outside marriage with him or her or another person;
- a person over 18 years to solicit or procure another person to take part in an act of sexual penetration or an indecent act outside marriage with a child under the age of 16;
- a person over 18 years to solicit or procure a 16- or 17-year-old child to whom he or she is not married and who is under his or her care,

supervision or authority to take part in an act of sexual penetration or an indecent act with him or her or another person.

104. The section should also provide that:

- a person in Victoria who solicits or procures a child outside Victoria to take part in sexual penetration or an indecent act, which if committed in Victoria would be an offence, is guilty of this offence;
- a person outside Victoria who solicits or procures a child outside Victoria to take part in an act of sexual penetration or indecent act in Victoria is guilty of this offence.

Inclusion of Objects and Interpretation Clauses

105. The *Crimes Act 1958* should include a statement of the objectives of Part 1 subdivisions 8A to 8G in the following terms:

The aims of subdivisions 8A to 8G are:

- (i) to uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity; and*
- (ii) to protect children and people with impaired mental functioning from sexual exploitation.*

106. The Act should also contain an interpretative clause in the following terms:

In interpreting subdivision 8A to 8G the court is required to consider the unique character of sexual assault and the unique way in which sexual assault affects the lives of victims. In particular, the court must have regard to the high incidence of sexual violence within society and the fact that:

- sexual offences are significantly under-reported;*
- women and children are overwhelmingly the victims of sexual assault;*
- offenders are commonly known to victims; and*
- sexual offences occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.*

107. A similar interpretative clause should be included in the *Evidence Act 1958* to apply to provisions relevant to sexual offences trials, including Part 2 Division IIA, sections 37A to 37C and sections 39 to 41.

Chapter 1

Introduction

SCOPE OF THE REFERENCE

1.1 Rape, child sexual assault and other sexual offences are serious crimes. These crimes, which are often perpetrated by people known to the victims and/or their families and involve serious breaches of trust, can have long-lasting and destructive effects on victim/survivors and their families. The terms of reference for the review require the Commission to investigate whether legislative, administrative or procedural changes are necessary to ensure that the criminal justice system takes sufficient account of the needs of complainants in sexual offences cases.

WHAT IS COVERED IN THIS INTERIM REPORT?

1.2 This Interim Report is intended to provide an overview of the progress of the reference to date. It includes:

- an explanation of our consultation process; and
- a description of our completed research findings and identification of areas where the Commission will be doing further research.

1.3 It also seeks responses to:

- some questions about the practical operation of the system; and
- a series of recommendations.

1.4 The recommendations are intended to indicate the general direction of the Commission's research on the issues raised in the reference. Many of the recommendations relate to procedural and evidentiary matters, but we also propose some changes to the substantive law of sexual offences.

1.5 Following publication of the Interim Report, the Commission will consult further on the recommendations. The comprehensive package of recommendations to be included in the Final Report will be influenced by the responses we

receive. We will also be working on the implementation of practice changes with relevant groups, for example Victoria Police, prosecution and defence lawyers, judges and Centres Against Sexual Assault (CASAs).

1.6 There are a number of other matters which were raised in our consultations, which are not covered in this Interim Report. These include:

- the effect of committal hearings on complainants in sexual offence cases, particularly those involving offences against children;

Committal hearing

A committal hearing (or proceeding) is a hearing to determine whether there is sufficient evidence to require the person charged with a criminal offence to stand trial. It is commonly referred to simply as the 'committal'.

- the long delays which are said to occur between the decision to charge an offender and the trial, particularly in regional and country areas;
- the additional stress placed on complainants in country areas because of lack of privacy; many complainants said that they found it very difficult to participate in a committal or trial in the area in which they live;
- issues relating to the length, complexity and comprehensibility of jury directions in sexual offences cases; and
- the law concerning separation of trials in cases involving allegations by multiple complainants.

1.7 The Commission is undertaking further research on some of these issues and may make recommendations about them in the Final Report. In particular we are involved in a joint project on jury directions with the Australian Institute of Judicial Administration. The results of this research and any consequent recommendations will be included in the Final Report.

THE PROCESS

Discussion Paper

1.8 In December 2001 the Commission published a Discussion Paper, *Sexual Offences: Law and Procedure*¹¹ which described the sexual offences in the *Crimes Act 1958* and some of the evidentiary and procedural rules which govern the

11 Victorian Law Reform Commission, *Sexual Offences—Law and Procedure: Discussion Paper* (2001) (hereafter Discussion Paper).

conduct of sexual offences trials. The Commission established an Advisory Group to provide advice on the legal issues covered in the Discussion Paper. The Paper discussed the extensive changes which have been made to the law during the 1990s and sought responses to questions about possible changes to the law of sexual offences.

Submissions

1.9 The Discussion Paper called for submissions on the existing law of sexual offences and on procedural and evidentiary issues. We received 75 submissions from a wide range of people and organisations, including legal agencies and organisations which provide assistance to victims and members of the public, some of whom wrote of their own experiences as victim/survivors of sexual assault. Some individuals and groups met informally with Commission staff to express their views, rather than making a formal submission. Their views were recorded, checked with the person or group making the comments and then treated as submissions. The Commission has found this a helpful way to obtain the views of people who would not otherwise feel able to make a formal submission. We refer to information obtained from submissions throughout this Interim Report.

Advisory Committee

1.10 The Discussion Paper indicated that in the second stage of its work the Commission would be seeking more information on the experiences of victim/survivors of sexual offences in the criminal justice system and on the extent to which earlier law reform has been reflected in changes in the approach and practices of police, lawyers and the judiciary. Following the publication of the Discussion Paper the Commission established a new advisory committee to advise us on these issues. The Advisory Committee includes workers from CASAs and other consultants, the Gatehouse Centre, members of Indigenous communities and non-English speaking background (NESB) communities and others who have worked with communities which have particular difficulty in reporting sexual offences to the police or giving evidence in court. It also included police, lawyers, two County Court judges and academics, all of whom have extensive expertise in aspects of sexual offences law.

Consultations

WHY CONSULT?

1.11 Inclusive and effective community consultation is an essential part of the law reform process. The high prevalence of sexual offences, and the fact that these offences often go unreported, makes it particularly important that members of the community have the opportunity to have a say about how the criminal justice system is working and whether changes are necessary. Since the publication of the Discussion Paper the Commission has undertaken extensive consultations in order to consider the extent to which earlier reforms have achieved their intended purposes and to propose any further changes which may be necessary. We have also been involved in discussions with those working in the criminal justice system in order to encourage changes to existing procedures and practices before our work on this project is completed. The information obtained from these processes has shaped the recommendations in this Interim Report.

THE CONSULTATION PROCESS

1.12 The consultation process has included the following meetings and discussions.

- Meetings with members of the public, including victim/survivors of sexual offences, some of whom had been complainants in sexual offence trials.
- Meetings with members of Victoria Police, who are key participants in the prosecution of sexual offences and usually a victim's first point of contact with the criminal justice system. The Commission consulted members of various Sexual Offences and Child Abuse (SOCA) units, detectives involved in investigating offences, police research and policy staff and police training specialists.
- Visits to regional and rural Victoria including extensive consultations conducted in Warrnambool and Mildura with service providers, stakeholder representatives and community groups in relation to the incidence and prosecution of sexual offences within their communities.
- Meetings with the Director of Public Prosecutions, the Solicitor for Public Prosecutions, the Manager of the Sexual Offences Unit in the Office of Public Prosecutions, magistrates, the Criminal Bar, Crown prosecutors, solicitors from Victoria Legal Aid, and some court registrars.

- Several consultations with coordinators and counsellor/advocates from Centres Against Sexual Assault (CASAs). The Commission also conducted a series of focus groups with CASA counsellor/advocates in metropolitan and regional locations, focusing specifically on the factors that influence victims' decisions to report or not report sexual offences.
- Meetings with other organisations which provide services to victims of sexual offences, for example the staff of the Witness Assistance Service located in the Office of Public Prosecutions, representatives from the Victims Referral and Assistance Service, and representatives of the Court Network service.
- A roundtable discussion to explore alternatives to the criminal justice system¹² being implemented in other jurisdictions, particularly in dealing with children who are sexual offenders.
- Meetings with forensic medical officers.

1.13 As part of our consultation process we have sought to identify the barriers which some groups in the community experience in reporting sexual offences to the police or participating in the criminal justice system. In the Discussion Paper the Commission indicated that we would pay particular attention to the problems experienced by people from Indigenous communities, from regional and rural areas and from non-English speaking backgrounds. To gain information on these problems Commission staff met with organisations representing Indigenous people, and women from non-English speaking backgrounds, and held roundtables with representatives of these groups. The Commission also met with a number of agencies to gain a better understanding of the significant barriers people with cognitive impairments experience in reporting sexual offences and negotiating other aspects of the criminal justice system.

CONSULTATION WITH INDIGENOUS COMMUNITIES

1.14 The Commission's consultation strategy was based on the principle that consultations with Indigenous community members must be led and controlled by Indigenous people. The Commission engaged a consultant with experience in

12 Participants discussed whether certain restorative justice principles such as victim/offender conferencing and diversion to treatment programs may be usefully applied to sexual offences cases. A major focus of the discussion was the challenge of maintaining a victim-focused approach when diversionary practices are contemplated.

working with Indigenous organisations in the area of sexual assault¹³ to consult with communities around Victoria, to determine a process for discussing law reform in this context and to advise the Commission on the best way to proceed.

1.15 The Commission is conscious that the issue of sexual violence is currently being explored by many Indigenous organisations and agencies responsible for formulating policy within Indigenous communities. Projects concerning this issue are underway at both state and federal government levels, and Indigenous organisations and community members have repeatedly been asked to give their time and experience in discussions of the issue of sexual violence. We have met with some of the agencies and individuals engaged in this work and benefited from their analysis of some of the issues affecting Indigenous communities.

1.16 Much of the work being done by these agencies documents the extent and causes of the problems of sexual violence experienced by Indigenous people. The Commission therefore decided to focus on articulating responses to problems which have already been identified. We formed an alliance with Elizabeth Hoffman House, an Indigenous women's refuge, and in October 2002 the Commission and Elizabeth Hoffman House co-hosted a roundtable discussion on 'Appropriate Responses to Sexual Assault in Indigenous Communities', held at Parliament House. A great deal of work was done to identify appropriate leaders and workers to attend the forum as well as to ensure adequate regional and rural representation. The roundtable was facilitated by Lisa Thorpe and was very well attended.¹⁴ Some of the themes that emerged from the roundtable and other consultations are outlined in Chapter 3.

CONSULTATION WITH PEOPLE FROM NON-ENGLISH SPEAKING BACKGROUND COMMUNITIES

1.17 There has been on-going consultation with people from non-English speaking background (NESB) communities throughout the reference. Initially we invited representatives of organisations working with diverse communities to participate in an advisory committee and assist us to develop a strategy for dialogue with the communities with which they have contact.

13 Lisa Thorpe, Chair, Elizabeth Hoffman House.

14 Participants in the meeting indicated a strong desire for a further meeting to take place where only Indigenous people were present. The Commission is supportive of this initiative and will keep abreast of developments and provide further information on progress in the Final Report.

1.18 After the publication of the Discussion Paper, the Commission invited submissions to the reference from specific organisations in NESB communities. Some written submissions were received and the Commission held consultations with members of various organisations.

1.19 In consultations the Commission drew on the expertise of service providers from a range of services (for example, resettlement, domestic violence services) who come into contact with victim/survivors from NESB communities.¹⁵ The Commission has worked closely with the Immigrant Women's Domestic Violence Service (IWDVS) and benefited significantly from that organisation's experience in this area.

1.20 In acknowledgement of the great diversity within NESB communities, the Commission formed a partnership with the Victorian Multicultural Commission (VMC). In August 2002, the Commission and the VMC co-hosted a roundtable session at Parliament House. We relied on the expertise of the VMC and service provider organisations to identify people who work with sexual assault victim/survivors within various communities who might participate in the discussion.¹⁶ The roundtable was attended by these representatives of stakeholder organisations and by Victoria Police and the Department of Justice. The outcomes from these consultations and the roundtable are outlined in Chapter 3.

CONSULTATIONS ON SEXUAL ASSAULT OF PEOPLE WITH COGNITIVE IMPAIRMENTS

1.21 People with cognitive impairments are generally recognised to be at greater risk of sexual offences than people without impairments. Sexual offences usually occur in the victim's place of residence and are most often committed by a person known to the victim and in a position of trust or authority. Sexual offences against people with cognitive impairments are rarely reported.

1.22 The Commission wrote a draft Issues Paper which canvassed some of the key issues within the criminal justice system facing victim/survivors of sexual

15 This approach was taken because of the high level of under-reporting of sexual assault in NESB communities, and the obstacles faced by NESB women and children when accessing the criminal justice system and mainstream sexual assault service providers.

16 The roundtable discussion was hosted by Maria Dimopoulos. The Commission was assisted by Maria Dimopoulos in the development and organisation of the roundtable discussion, and with the broader consultations with NESB communities and service providers.

assault with cognitive impairments, and proposed options for legal and/or procedural reforms. The Commission then hosted a preliminary consultation with representatives from key stakeholder groups. These representatives provided feedback on the draft Issues Paper and helped to design the format and content for two roundtable discussions. Two further roundtable discussions were then held: the first attended by representatives of advocacy groups and the second attended by personnel working in the criminal justice system, and other representatives of legal agencies. Participants in the discussions used the draft Issues Paper as a starting point, and developed options for reform of both the substantive law and procedure.

1.23 The roundtable discussions focused on a range of issues spanning the entire criminal justice system from disclosure to reporting, to interviewing and charging, through to prosecution and experiences in court. Community education and training for personnel in criminal justice agencies was also a key feature in discussions. The outcomes of these discussions are reported in this Interim Report.

OTHER CONSULTATIONS

Lance Reichstein Foundation Project

1.24 The Lance Reichstein Foundation assisted three organisations to make important contributions to this reference by funding the Islamic Women's Welfare Council, Elizabeth Hoffman House and the Disability Discrimination Legal Service to undertake research and provide input into the Commission's work. Each of the groups designed its own process for consultation with service providers working with victim/survivors and in some instances with victim/survivors themselves. Each group produced a publication outlining its process and significant findings, and suggested reform strategies. We are most grateful for the part which the Lance Reichstein Foundation played in supporting this process.

CONSULTATION OUTCOMES

1.25 This extensive consultative process, together with the information contained in submissions, has provided the Commission with valuable information about the factors which influence individuals in deciding whether or not to report sexual offences to the police and about the experiences of those who have reported offences and given evidence in a criminal trial. It has informed the

Commission on the problems which members of some groups have with the operation of the criminal justice system. Together with other quantitative research being undertaken by the Commission it has assisted in directing the focus of the reference and the issues explored in this Interim Report. More details about information obtained from our consultations is included in later chapters of this report and particularly in Chapters 3 and 4.

Other Research

1.26 The qualitative information obtained from consultations has been supplemented by information obtained from literature reviews, from the Commission's own research, and from two recent doctoral theses. The first thesis, by Dr Melanie Heenan,¹⁷ was based on courtroom observation of 34 Victorian rape trials during 1996–98, including 10 cases tried in regional areas. Observations were supplemented by an analysis of case files compiled by prosecutors and a study of some Court of Appeal decisions. The thesis provides important information on the conduct of defence and prosecution lawyers and judges and on the extent to which recent law reforms have actually affected courtroom practices. The second thesis, by Dr Shannon Caroline Taylor,¹⁸ examined transcripts of 14 Victorian cases, involving allegations of parent–child rape and sexual assault, that went to trial in the County Court in 1995. Again the thesis discusses what actually happens in criminal trials, making particular reference to the way that particular evidentiary rules are applied and to the ways in which complainants in cases involving allegations of child sexual assault are cross-examined by defence counsel.

1.27 Research on prosecution outcomes in cases involving 'penetrative offences' other than rape is discussed in Chapter 2. Ongoing research includes:

- an assessment of factors influencing police decisions as to whether to lay charges where a sexual offence has been reported;
- an analysis of the factors influencing conviction and acquittal outcomes in rape prosecutions;

17 Melanie Heenan, *Trial and Error: Rape, Law Reform and Feminism* (PhD Thesis, Monash University, 2001).

18 Shannon Caroline Taylor, *The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court Australia in 1995* (PhD Thesis, University of Ballarat, 2001).

- the effectiveness of section 37A of the *Evidence Act 1958*, which requires defence barristers to apply in writing for leave to cross-examine complainants on their sexual activities;¹⁹ and
- an analysis of judges' directions to juries in rape trials.

Outcomes of this research will be discussed in the Final Report.

1.28 Changes to practice are sometimes prompted by consultations occurring during the law reform process, even before formal recommendations are made. Following discussions between the Commission and the Director of Public Prosecutions, the Solicitor of Public Prosecutions and solicitors in her office, a continuing education program has been introduced for prosecutors in sexual offences cases. This program is likely to result in some changes in practice which may improve the trial experience for complainants. The Commission supports this development and makes recommendations on prosecutor training later in the Interim Report.

OUTLINE OF THIS INTERIM REPORT

1.29 Chapter 2 reports the Commission's research findings on the characteristics of rapes and other 'penetrative offences' reported to the police. It also examines the outcomes of prosecutions for penetrative offences other than rape. These prosecutions mostly involve allegations of childhood sexual assault such as incest.

1.30 Chapter 3 is the first of several chapters which consider the processing of sexual offences in the criminal justice system. The Chapter argues that improving police processes may help to encourage victim/survivors to report sexual offences and contains recommendations designed to achieve this effect. Some of the matters covered include:

- the barriers faced by victim/survivors reporting sexual assault to police;
- the particular difficulties faced by Indigenous victim/survivors and victim/survivors from non-English speaking backgrounds when deciding whether to report offences or to participate in the criminal justice process;

19 Prosecutors need not apply in writing but must apply for leave to ask questions on this matter.

- the development and operation of the Police Code of Practice that structures the response to victim/survivors who report sexual assault to police; and
- current issues with respect to the investigation of sexual offences.

1.31 The chapter concludes by endorsing the establishment of new sexual investigation units that are intended to ensure that the needs of victim/survivors are met throughout the reporting stage as well as improve the quality and continuity of police investigations.

1.32 Chapter 4 examines ways in which the culture of the criminal justice system could be changed to improve the treatment of victims of sexual offences, without prejudicing the right of an accused person to a fair trial. This chapter canvasses the establishment of a specialist list, with associated services, and trained judges and prosecutors to deal with sexual offences. It also makes recommendations relating to:

- judicial education on sexual assault; and
- prosecutor training, to ensure more sensitive responses to victims and to encourage prosecutors to ensure that provisions designed to protect victims (for example section 37A of the *Evidence Act 1958*, which is intended to prevent cross-examination about prior sexual experience except in specified situations) are applied in practice.

1.33 Chapter 5 deals with changes to the criminal trial procedure in sexual offence cases. It makes recommendations on:

- alternative arrangements for giving evidence;
- further amendment of section 37A of the *Evidence Act 1958*, to ensure cross-examination on sexual history provisions work as they were intended;
- admission of evidence about the content of communications between complainants and their counsellors in sexual offence trials; and
- the warnings which trial judges give juries (*Longman* warnings).

1.34 Our consultations have shown that child complainants of sexual assault find the criminal trial process particularly difficult. Chapter 6 makes recommendations for procedural and evidentiary changes to meet the needs of children and to ensure that the effects of the sexual assault are not exacerbated by the criminal trial process. Recommendations cover:

- improving support for child witnesses;
- alternative methods for children and other vulnerable witnesses to give evidence at committal and trial;
- issues relating to the competence of child witnesses; and
- relaxation of the hearsay rule, in cases involving child witnesses.

1.35 Chapter 7 contains recommendations relating to the offence of rape, and to consent in sexual offences cases. It considers a radical proposal for reform of the offence of rape proposed by two academics, Dr Peter Rush and Dr Alison Young. The chapter discusses the arguments for and against their proposal and recommends that this approach should not be adopted. The chapter goes on to recommend significant changes to the substantive law of rape and to jury directions on consent.

1.36 Chapter 8 considers changes to a number of other substantive offences. It deals with:

- the offence of incest;
- the offence of compelling sexual penetration of the accused or another person;
- offences covering sexual offences with people with mental impairments;
- offences covering sexual acts by people in positions of care, supervision and authority; and
- the offence of procuring sexual penetration of a child under the age of 16 years.

The chapter also proposes that an interpretation section should be included in the *Crimes Act 1958* setting out the objectives of sexual offences laws.

Chapter 2

Reported Sexual Offences and Prosecution Outcomes

OUTLINE OF RESEARCH PROGRAM

2.1 In order to report on this reference, the Commission requires reliable information on how the laws of sexual offences are working in practice. While consultations provide us with valuable qualitative information, it has also been important to obtain quantitative data about the operation of the criminal justice system. Unfortunately no reliable data on the outcomes of prosecutions in sexual offence cases is routinely available. This has made it necessary for the Commission to undertake empirical work to investigate the processing of sexual offence cases through the criminal justice system. The first part of this chapter examines sexual offences reported to police. It considers whether there has been any change in the numbers of reports being made to police, or in the types of cases more likely to proceed beyond the initial investigation.

2.2 The second part of the chapter analyses the outcomes of prosecutions for penetrative sexual offences other than rape, that were prosecuted during 1997–99.²⁰ This adds to the Commission's preliminary work in analysing outcomes of rape prosecutions over the same period, which was reported in the Discussion Paper.²¹ The study also looks at the factors which may be influencing case outcomes. In particular, the Commission examined the relationship between complainants and the accused, the age of the complainant and the location of the trial, to see whether these factors affect the likelihood of convictions or acquittals for penetrative offences other than rape. Factors affecting outcomes of rape prosecutions will be discussed in the Final Report.

20 Both the LEAP data and the prosecutions outcome data discussed in this chapter refer to financial years.

21 Victorian Law Reform Commission, *Sexual Offences—Law and Procedure: Discussion Paper* (2001) (hereafter Discussion Paper), 41–9.

2.3 Other research which is being undertaken by the Commission, and which will be completed prior to publication of the Final Report, includes:

- an in-depth analysis of cases that were ‘filtered out’ of the system—where no charges were laid or where the initial complaint of rape was withdrawn; and
- focus group discussions with police to explore current issues in relation to the reporting of sexual offences and the charging of alleged offenders.

POLICE STATISTICS ON REPORTED SEXUAL OFFENCES

2.4 In the Discussion Paper, the Commission referred to some of the difficulties in reliably assessing the incidence and prevalence of sexual offences. Currently, the only consistent measures are police statistics on the numbers of sexual offences that are reported each year. In Victoria, few studies have monitored reporting behaviour over extensive periods of time. An exception was the Victorian Community Council Against Violence (VCCAV) study that examined all rape offences reported to police during 1987–90.²² This research comprehensively mapped the demographics of rape incidents by reporting on the characteristics of rape victims, offenders and offences over a three year period. It also examined the features of those cases where no charges were laid or where the police had decided against proceeding with any further investigation.

2.5 A study undertaken by David Brereton and Gary McCole looked at samples of police files in relation to reports of sexual assault on children during 1986–87.²³ The study examined the characteristics of offences,²⁴ offenders and victims. However, this research was principally geared towards investigating how cases were processed from the time of report through to the investigative stage, and examining which factors were more likely to result in a brief being authorised for prosecution.

22 Victorian Community Council Against Violence, *A Profile of Rapes Reported to the Police in Victoria 1987–1990* (1991).

23 David Brereton and Gary McCole, ‘Obstacles to Prosecution in Child Sexual Assault Cases: A Report on Some Victorian Data’, Law Reform Commission of Victoria, *Sexual Offences Against Children: Research Reports* (1988) 43–60.

24 The study defined sexual assault to include any act involving actual or attempted penetration, indecent assault, or gross indecency.

2.6 Since this research, there has been no in-depth analysis of trends in reported sexual offences in Victoria. The Commission therefore sought to:

- track trends in reporting for both rape and non-rape offences over an eight year period; and
- obtain some information on the characteristics of victims who report offences to the police.

2.7 These statistics must be treated with caution because most sexual assaults are neither reported²⁵ nor prosecuted. There is also some evidence to suggest that not all reports of sexual offences are actually *recorded* by police.²⁶ This means that statistics of reported sexual offences grossly under-estimate the extent of the problem. Nevertheless, police statistics remain an important source of information for assessing whether there has been any change in how frequently sexual offences are being reported. They also provide some measure of how confident victim/survivors might feel in seeking a response through the criminal justice system.²⁷

25 Crime victimisation surveys periodically assist with providing more accurate information on the incidence of sexual assault because the figures rely on both reported and unreported crimes. The Discussion Paper detailed some of the findings from recent surveys that consistently show higher victimisation rates of sexual assault than appear in police statistics. In 1996, the Women's Safety Survey, conducted by the Australian Bureau of Statistics (ABS), estimated that only 10% of women who were sexually assaulted reported the last incident to police: Australian Bureau of Statistics, *Women's Safety Australia 1996*, Cat No 4128.0 (1996). According to the *1999 Victorian Crime Victimisation Survey*, victims of sexual violence are the least likely to report to police when compared with victims of other person related crime such as robbery and non-sexual assaults: Department of Justice (1999) 3. See also the recent British Home Office Crime Survey for the United Kingdom equivalent: Andy Myhill and Jonathan Allen, *Rape and Sexual Assault of Women: The Extent and Nature of the Problem: Findings from the British Crime Survey*, Home Office Research Study 237 (2002) 49.

26 Parliament of Victoria, Drugs and Crime Prevention Committee, *Combating Sexual Assault Against Adult Men and Women* (1996), 39. Previous research conducted by the former Law Reform Commission of Victoria also revealed the extent to which police play a filtering role in terms of determining which cases will be authorised for prosecution: Law Reform Commission of Victoria, *Appendixes to Interim Report No 42* (1991) Appendix 3. See also 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. More recently, the *Review of Victoria Police Crime Statistics* also noted that 'discretion is a key element' in decisions about whether to record a particular event as a crime: Carlos Carcach and Tony Makkai, Australian Institute of Criminology Research and Public Policy Series, No. 45 (2002) 7.

27 As noted in the Discussion Paper, the reporting of sexual offences is likely to be influenced by changes in community attitudes at certain periods of time, or by changes in police recording practices.

2.8 Research has identified the kinds of factors which influence some victims to report sexual offences. For example, victims are more likely to go to the police if they are assaulted by a stranger than if they are assaulted by someone known to them. They are also more willing to come forward if they have been physically injured or other evidence is available to support their allegations. Victims may also be prompted to report for fear of others being offended against by the same perpetrator.²⁸

2.9 Our consultations and other studies have also identified barriers which influence whether certain groups will ever see the criminal justice system as offering a meaningful response to their experience, or as a system that can genuinely take account of difference and diversity. For example, Indigenous women have spoken about the lack of culturally appropriate services to support women through the reporting process and trial,²⁹ culturally insensitive attitudes of non-Aboriginal personnel within the criminal justice system and institutional racism,³⁰ the fear of not being believed by the police and courts, and lack of knowledge of legal rights.³¹

2.10 These experiences also resonate for victim/survivors from non-English speaking backgrounds (NESB) whose perceptions of police and other authority figures may be influenced by experiences both within Australia and from their countries of origin. Women from NESB communities also told us they felt let down by mainstream service providers who continue to fail to meet their specific

Consequently changes in reported offences are unlikely to reflect any real change in the levels of offending behaviour.

28 This is often the case for victim/survivors who are offended against by family members where there are fears that other siblings will also be assaulted.

29 Lisa Thorpe, Rose Solomon, Maria Dimopoulos, 'From Shame to Pride: Access to Sexual Assault Services for Indigenous People', Consultations Outcomes Report and Recommendations for Elizabeth Hoffman House (unpublished, 2002); Kate Gilmore and Lise Pittman, *To Report or Not to Report: A Study of Victim/Survivors of Sexual Assault and their Experience of Making an Initial Report to the Police*, CASA House (1993) 25–6.

30 Department of Aboriginal and Torres Strait Islander Policy and Development, *Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (2000) 221–4, 227–37, 244–8); Queensland Department of Public Prosecutions, *Indigenous Women within the Criminal Justice System* (1996); Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996) 95.

31 Edie Carter, *Aboriginal Women Speak Out About Rape and Child Sexual Abuse: A Report of an Adelaide Survey, October 1985–May 1986 Conducted in the Aboriginal Community* (1987); Department for Women, *ibid* 95. Department of Aboriginal and Torres Strait Islander Policy and Development, *ibid* 236.

needs. Feelings of shame and embarrassment, and fears about how people in their communities might respond also act as powerful disincentives to disclosure.³² Chapter 3 includes draft recommendations about police training which attempt to address some of these issues.

Sexual Offences Reported to Victoria Police: 1994–2002

2.11 This section uses data compiled by Victoria Police to examine trends in reported sexual offences over an eight year period, 1994–2002. It considers whether there have been any changes in reporting behaviour or in the characteristics of reported offences.

2.12 The research separates police reports of rape from reports of sexual offences involving other penetrative acts, such as incest and offences involving the sexual penetration of children under 16 years.³³ We took this approach for two reasons. First, analysing research on sexual assault often excludes incest and other penetrative offences, so little is known about reporting trends for these offences. Secondly, the Commission has also examined the prosecution outcomes for non-rape offences. Separating police reports of rape from reports of other penetrative sexual offences therefore allows assessment of how many reported *non*-rape penetrative sexual offences result in prosecutions.

2.13 In 1993, a new system was introduced by the police for recording crime across the state. Known as the Law Enforcement Assistance Program (LEAP), the database allows police in the field to provide consistent and relatively detailed information on reported crime which is available centrally and readily processed.

2.14 Using LEAP data, Victoria Police publish annual crime statistics reports which include information on reported rapes and non-rape offences.³⁴ These publications contain some demographic data with respect to victims and alleged offenders. Additional information was supplied to the Commission by Victoria

32 Consultation with Victoria Police Migrant Liaison Officers, 31 July 2002; Consultation with Immigrant Women's Domestic Violence Service, 27 March 2002; Victorian Multicultural Commission and Victorian Law Reform Commission roundtable discussion on long term strategies to deal with sexual assault in non-English speaking background communities, 23 August 2002. See also Rhonda Cumberland, Melanie Heenan, and Marg Gwynne, *Who's On Trial?: A Legal Education & Training Kit for CASA Workers Advocating for Victim/Survivors of Sexual Assault* (1998) 26 and Gilmore and Pittman, above n 29, 25–6.

33 See Appendix 2 for a complete list of offences included in this database.

34 For example, Victoria Police, *Crime Statistics 2000/02* (2003).

Police through LEAP to assist with the research.³⁵ The findings reported below track trends in reporting practices from the time LEAP was first introduced. Particular attention is paid to any changes in reporting figures and other offence characteristics such as victim and offender age, relationship, the location of offences, and the timing of reports. Information with respect to the status of investigations following reports of sexual offences was also examined over the eight year period.

NUMBERS OF REPORTED RAPES AND OTHER SEXUAL OFFENCES: 1994–2002

2.15 Graph 1 shows the number of rapes and penetrative offences other than rape reported by victims³⁶ to Victorian Police over the eight year period of the study. A total of 7686 rapes and 6450 other penetrative offences were reported to police over this period. Most of these reports involved a single offender. With the exception of 1998–99 the yearly figures have remained relatively constant.³⁷ The possible reasons for the increase in this year are discussed below.³⁸

2.16 However, these numbers do not allow for population increases over the same period. According to the Australian Bureau of Statistics (ABS), in Victoria, the proportion of persons reporting sexual assault per 100,000 head of population has decreased from 63.3 in 1993 to 53.7 in 2001.³⁹ By contrast, during the same period, the actual number of victims of sexual assault recorded for the whole of

35 The Commission would gratefully like to acknowledge the assistance provided by Victoria Police, in particular Uma Rao, Michael Nieuwesteeg and Craig Darragh from the Statistical Services Division, Specialist Operations, Victoria Police. While data was provided by Victoria Police, the analysis documented here is the work of the Commission.

36 The data reported throughout this section of the chapter is victim-based. A victim who has reported more than one sexual offence will still be counted as one case.

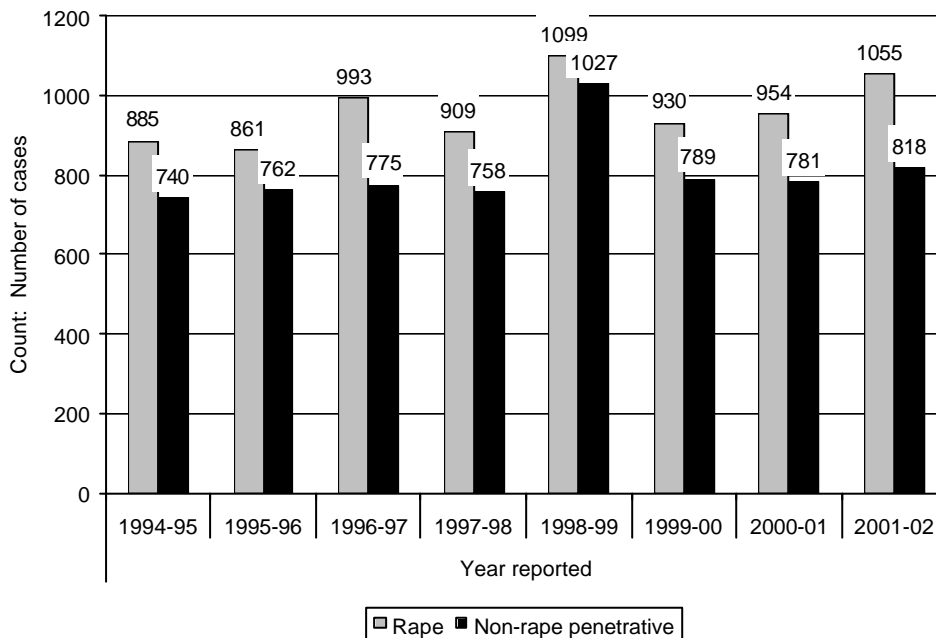
37 Note that there are some differences between this data and the data reported in the Discussion Paper. The latter was based on the figures published by Victoria Police in their annual report on crime statistics. For the purposes of this research, the Commission used LEAP statistics to construct a victim-based database rather than look at the numbers of reports or offences. Note that all data relates to financial year periods.

38 See below para 2.19.

39 Australian Bureau of Statistics, *Recorded Crime Australia 2001*, Catalogue 4510, 19. Note that this rate covers all sexual assaults. A 'sexual assault' is defined as a physical assault of a sexual nature, directed towards another person where there is no consent, or consent is given as a result of intimidation or fraud, or the person is unable to give consent because of youth or temporary or permanent incapacity. By contrast, the numbers in Graph 1 cover only rape and penetrative offences other than rape.

Australia increased by 37%, with the rate of victimisation increasing from 69 to 86 per 100,000 population.⁴⁰

GRAPH 1: NUMBER OF PEOPLE REPORTING RAPE AND NON-RAPE



PENETRATIVE OFFENCES IN VICTORIA: 1994–2002

2.17 The latest ABS figures indicate that Victoria has the third lowest rate of reported sexual assault in Australia.⁴¹ It would be encouraging if this lower reporting rate reflected a lower rate of offending behaviour. Unfortunately, it is more likely to reflect fluctuating changes in attitudes to reporting which have occurred over this period. The results of the 1998 ABS Crime Victimisation Survey indicate that this is likely to be the case. At that time, Victoria was

⁴⁰ Ibid 6, 15.

⁴¹ Ibid 8. In Tasmania the rate is 42.5 per 100 000. It is 43.9 per 100 000 in the ACT.

reported as being amongst the three States estimated to have the highest prevalence rates for sexual assault in Australia.⁴²

2.18 There is evidence that campaigns aimed at encouraging victims to come forward and report sexual assault affect the numbers of those who do so. As Graph 1 shows, the numbers of both rape and non-rape penetrative offences reported to police increased in 1998–99. For rape, the number of reports increased by 190 from the previous year; for other sexual offences, the numbers were also considerably higher with an increase of 269 over a 12 month period.

2.19 It is difficult to say with any certainty what caused the surge in reports for this particular year. Over the past decade in Victoria, police and other community driven campaigns aimed at encouraging victims to come forward and report sexual assault have tended to result in a substantial rise in reported incidents.⁴³ In May 1998, Centres Against Sexual Assault (CASAs) undertook research into the nature, incidence and prevalence of sexual assault. As part of their research, CASAs conducted an anonymous phone-in which gave victim/survivors an opportunity to speak confidentially about their experiences of sexual assault. The research was well publicised through the media in the lead up to the phone-in. Information was provided about the nature and realities of sexual assault, the barriers to reporting and the right of victims to seek legal redress. The increase in reported sexual assaults may have been a result of this campaign which encouraged some victims to speak out about their experiences and consider their legal options. The subsequent decline in rates of reporting, as indicated by the ABS,⁴⁴ may be the result of less publicity encouraging people to report sexual assault. It could also reflect lack of confidence that offenders will be charged and convicted.

CHARACTERISTICS OF VICTIMS AND OFFENDERS

CULTURAL BACKGROUND

2.20 In Chapter 1 we suggested that people from Indigenous communities and from non-English speaking backgrounds face particular barriers in reporting sexual assault. The LEAP database provides some limited scope for recording

42 Australian Bureau of Statistics, *Crime and Safety Survey*, Catalogue 4509.0, April 1998, 64.

43 David Brereton and Stuart Ross, 'An Epidemic of Violence?: Changing Patterns in Reported Rapes in Victoria', (1997) *Australian Journal of Social Issues*, 129–45.

44 See above para 2.16.

information about the racial and ethnic background of those who report sexual assault, but this discretionary field is often not completed. This has made it impossible to accurately assess the proportions of Indigenous women or women from particular non-English speaking background (NESB) communities who report sexual assault. A similar problem arises in relation to people with intellectual disabilities or mental illnesses.

AGE AND SEX

2.21 Victoria Police data shows that the median age at which reported rapes occurred remained remarkably constant over the eight year period at 20 years. For penetrative offences other than rape, the median age at the time of the alleged offence was 12 years of age, indicating that the majority of these sexual offences involve children or young people.⁴⁵ Men and boys who reported rape or non-rape penetrative offences tended to be younger than women and girls at the time the offences were alleged to have occurred. For rape, the median age for women was 21 years versus 16 years for men. For other penetrative offences, the median ages were 13 for females and 10 for males. The median age for alleged offenders was considerably older, at 30 years for rape and 33 years for other penetrative offences.

2.22 Almost 90%⁴⁶ of reports of rape (6811) were made by women and girls, as compared with 10.7% of reports made by men and boys (820).⁴⁷ Consistent with the gendered nature of these crimes, offenders were overwhelmingly male with 98.1% of rapes and 96.6% of reports of other penetrative offences being recorded against men.

2.23 The numbers of men who reported a rape offence increased from 89 in 1994–95 to 137 in 2001–2 (see Table 1). These figures are consistent with the views of some CASA counsellors who in their discussions with the Commission

45 This is not unexpected given that most of these offences relate to children. These include incest and sexual penetration offences against people under 16 years of age. The latest published ABS crime statistics reported that persons aged 15–19 years were over four times more likely to be the victim of a sexual assault. The figures also showed the sexual assault victimisation rate for children aged 14 years or under to be twice the rate for the total population: *Recorded Crime* (2001) 10.

46 All percentages reported in this chapter are rounded to one decimal place.

47 Relying on Victoria Police data, the Drugs and Crime Prevention Committee reported that young women aged between 15–19 were the group most likely to be the victims of rape, followed by young women aged 20–4 and 25–9: Drugs and Crime Prevention Committee, *Benchmarking Crime Trend Data 1995–1996 to 1999–2000* (2000) 22.

suggested that adult men who are the victims of rape are now more likely to seek access to support services.⁴⁸

TABLE 1: REPORTED RAPES BY SEX OF VICTIM 1994–2002⁴⁹

Year of report		Victim's sex	
		Female	Male
1994–95	N	788	89
	Column %	11.6%	10.9%
	Row %	89.9%	10.1%
1995–96	N	759	91
	Column %	11.1%	11.1%
	Row %	89.3%	10.7%
1996–97	N	867	114
	Column %	12.7%	13.9%
	Row %	88.4%	11.6%
1997–98	N	800	105
	Col %	11.7%	12.8%
	Row %	88.4%	11.6%
1998–99	N	1006	90
	Col %	14.8%	11.0%
	Row %	91.8%	8.2%
1999–00	N	826	98
	Col %	12.1%	12.0%
	Row %	89.4%	10.6%
2000–01	N	852	96
	Col %	12.5%	11.7%
	Row %	89.9%	10.1%
2001–02	N	913	137
	Col %	13.4%	16.7%
	Row %	86.9%	13.1%
Total	N	6811	820
	Col %	100.0%	100.0%

Missing cases = 55

48 For a detailed overview of the findings from the focus groups with CASAs, see Chapter 3.

49 All percentages used in this chapter are rounded to one decimal place.

2.24 Overall, women and girls continued to make up the majority of those who report other penetrative sexual assaults (5033 or 78.9%), although men and boys were more likely to report these offences (1348 or 21.1%) than they were to report rape (820 or 10.7%).⁵⁰ There were no marked increases in reporting of penetrative offences over the eight year period for either male or female victims.

RELATIONSHIP BETWEEN VICTIMS AND ALLEGED OFFENDERS

2.25 Our analysis of the LEAP database revealed a large number of reported offences (40.5%) where no information was recorded about the relationship between the victim and the offender.⁵¹ Because these were a significant proportion of the offences considered, the findings reported here must be treated with caution. However it should be noted that the findings were generally consistent with previous studies.

2.26 The relationship between the person reporting and the alleged offender differs between the rape and non-rape offences, although most victims who reported a sexual offence over the eight year period knew the alleged offender. Reports of rape were more likely than other penetrative offences to involve offenders who were acquaintances, current/former partners, or former/current boyfriends (57.8% of rape offences compared with 26.6% of other penetrative offences). For other penetrative sexual offences, the relationship was more likely to be familial. Over half of the alleged offenders (55.5%) were recorded as a parent/step-parent, sibling or another person with a lineal connection to the victim.⁵² The corresponding figure for rape was just 9.7%.

50 There were 69 reports of penetrative offences where information with respect to the victim's sex was not recorded.

51 When a crime has been reported, police members are required to complete an L2A Incident Report; however, it is not mandatory that each individual section of the form is completed. The section that deals with the 'association of victim to offender' is a discretionary field and police are not obliged to record the information. Hence there was a total of 5720 (40.5%) records where this information was simply not available.

52 This is in part a reflection of the nature of penetrative offences other than rape. These include incest, which requires a familial relationship between offender and victim. Where there is a familial relationship, the alleged offender is usually charged with incest, even if the circumstances could justify a charge of rape.

TABLE 2: REPORTED SEXUAL OFFENCES BY ASSOCIATION OF VICTIM TO OFFENDER: 1994–2002

Relationship between victim and alleged offender		Rape	Penetrative offence	Total
Parent/child	N %	103 2.3%	780 19.9%	883 10.5%
Step parent/child	N %	73 1.6%	561 14.3%	634 7.5%
Other lineal relationship	N %	192 4.3%	504 12.9%	696 8.3%
Sibling	N %	67 1.5%	331 8.4%	398 4.7%
Spouse	N %	196 4.4%	0 0.0%	196 2.3%
De facto	N %	167 3.7%	4 0.1%	171 2.0%
Lesbian domestic partner	N %	1 0.0%	0 0.0%	1 0.0%
Former spouse/de facto	N %	233 5.2%	4 0.1%	237 2.8%
Boy/girl friend	N %	322 7.2%	168 4.3%	490 5.8%
Former boy/girl friend	N %	28 0.6%	0 0.0%	28 0.3%
Acquaintance	N %	1648 36.7%	865 22.1%	2513 29.9%
Neighbour	N %	13 0.3%	23 0.6%	36 0.4%
Co-resident	N %	184 4.1%	104 2.7%	288 3.4%
Other known	N %	343 7.6%	381 9.7%	724 8.6%
Employer/employee	N %	77 1.7%	19 0.5%	96 1.1%
Police	N %	6 0.1%	0 0.0%	6 0.1%
Other law enforcement	N %	1 0.0%	2 0.1%	3 0.0%
Unknown stranger	N %	840 18.7%	176 4.5%	1016 12.1%
Total	N %	4494 100%	3922 100%	8416 100%

Missing cases = 5720

2.27 Of the 8416 people who reported rape or another penetrative offence over the eight year period, for whom a relationship category was known, 1016 or 12.1% of victims had no prior knowledge of the offender ('unknown stranger'). This is almost certainly an underestimate of the incidence of sexual assault by unknown offenders.⁵³ A decade ago, the VCCAV study reported that as many as 39% of recorded incidents involved assaults by strangers.⁵⁴ More recently, the 1996 Women's Safety Survey found that a quarter of the women who had reported to police in the previous 12 months had been assaulted by unknown offenders.⁵⁵

2.28 Across relationship categories for reported rapes, women and men were equally likely to be offended against by strangers, family members and others 'known' to them.⁵⁶ The only significant difference was for rape offences perpetrated by current/former partners or boyfriends. Almost all of those who reported a rape in this context were women or girls (932 or 23.2% of women compared to 12 or 2.7% of men).

2.29 Fifty-nine per cent (1813) of the total number of female victims who reported penetrative offences other than rape identified the perpetrator as a family member, compared with 42.5% (349) of the total number of male victims.⁵⁷ Reports involving other known offenders were more common for men than women (50.5% versus 31.4%).

2.30 The types of relationships that exist between the person reporting the offence and the alleged offender changed over the eight year period.⁵⁸ For reported rapes, the category of known offender almost doubled from 222 (9.8%) in 1994–95 to 415 (18.3%) in 2001–02. Likewise, the proportion of stranger rapes reported increased from 76 (9.0%) to 132 (15.7%). The proportion of reports

53 Police may be recording 'strangers' under two possible categories—'unknown' and 'no relationship'. It is also possible that police are also less likely to complete the relevant field of 'association between victim and offender' in situations where the identity of the offender is unknown.

54 Victorian Community Council Against Violence, above n22, 26.

55 Australian Bureau of Statistics, *Women's Safety Australia 1996*, above n 25, 29.

56 'Known' offenders include acquaintances, co-residents, employers, neighbours and a category referred to in LEAP as 'other known'. The data reported here is based on 4020 women and girls and 444 men and boys where the relationship and sex were recorded.

57 The data reported here is based on 3069 women and girls and 822 men and boys where the relationship and sex of the victim were recorded.

58 These figures are based on 4494 reports of rape where relationship and year of report were recorded.

against intimate partners, such as spouse, de facto or boyfriend also increased from 94 (9.9%) in 1994–95 to 155 (16.4%) in 2001–02.⁵⁹

2.31 For penetrative offences, the largest increase appeared in the category for intimate partners, where in 1994–95 only 14 (8.0%) reports were made to police compared with a total of 36 (20.5%) by 2001–02. Further analysis of these figures revealed that 33 of the 36 cases related to offences allegedly committed by boyfriends, where any charges will have likely concerned sexual penetration of a person under the age of 16.⁶⁰

LOCATION⁶¹

2.32 Most sexual offences occur in the home, most commonly in the home of the victim or the offender. Just on two thirds of reported rapes (4710 or 66.4%) and 85.8% (or 4540) of penetrative offences were recorded as occurring within a home or private residence.⁶² More than a quarter (26.1% or 1851) of reported rapes were alleged to have been committed in a more public context, such as in a park or bushland, or at or near a car park. However, only 8.7% (or 462) of penetrative offences occurred in these locations.

59 Only 8.4% of the reported rapes included in the VCCAV research involved current or former partners or boyfriends: Victorian Community Council Against Violence, above n 22, 26. In 1996, the ABS Women's Safety Survey indicated that approximately 16% of the offences reported over the past 12 months had involved a previous partner: above n 25, 29.

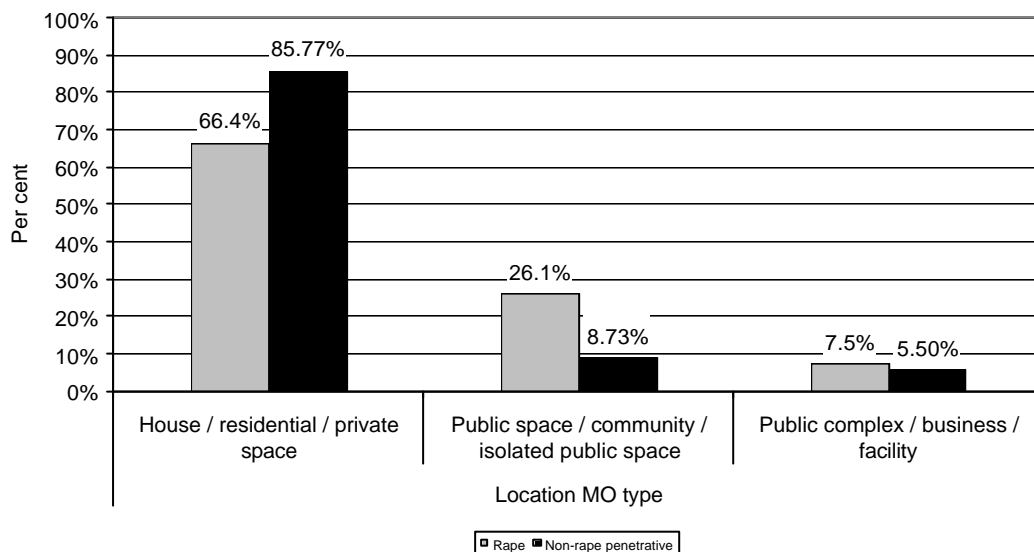
60 In all but 2 of these 36 reports, the victim was aged 16 years or under.

61 The categories for 'location of offence' used by Victoria Police are extensive, with over 90 different combinations. For the purposes of the Commission's research, the fields were collapsed into three broad categories: private, public/community space, and public complex/business/facility.

62 These figures are based on 7090 reports of rape and 5293 reports of other penetrative offences by victims. There were 1753 or 12.4% of reports where information about the location of the offence was missing.

GRAPH 2: SEXUAL OFFENCES BY LOCATION: 1994–2002

Missing Cases=1753



2.33 A majority of rape offences that were reported as having occurred in a private residence were committed by family members or current/former partners, whereas almost 60% of reported rapes by unknown offenders occurred in a more public context. Penetrative offences other than rape showed a similar pattern. Apart from ‘stranger related’ offences, an overwhelming proportion of these offences were committed in a private setting.

TIME TAKEN TO REPORT TO POLICE⁶³

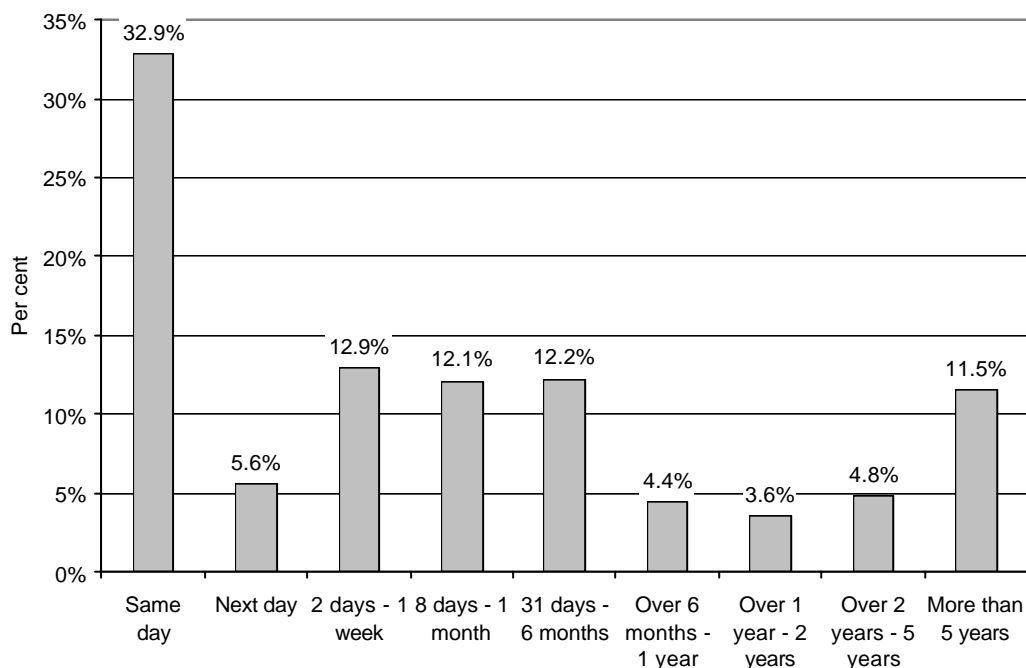
2.34 The time taken to report is significantly shorter for rape than for other penetrative offences. Just over half of the rape offences were reported within a week of the alleged offence occurring (3943 or 51.4%). The number of reports made six months after the offence then drops to less than 5% and remains static for each year following. However, there is then an increase in the total number of

63 This section relies on 7676 reports of rape and 6424 reports of other penetrative offences by victims. There were 36 reports where offence category and the time taken to report was missing.

reports being made five years after the event was alleged to have occurred (884 or 11.5% of the total number of reports made over the eight year period).⁶⁴ This contrasts significantly with the reporting practices in Victoria a decade earlier, where the VCCAV noted just 1.7% of reports being made of offences alleged to have occurred five years prior to the police being notified.⁶⁵ Our analysis shows that people are now more willing to report sexual offences that occurred some years ago, perhaps because they have more confidence that the criminal justice system will recognise that a crime has occurred.

64 Interestingly, the figures also showed that of the males who notified police during the eight year period, 30.5% were reporting rape offences that occurred five or more years ago. This compared with just 9% of women or girls who reported after the same period.

65 Victorian Community Council Against Violence, above n 22, 28.

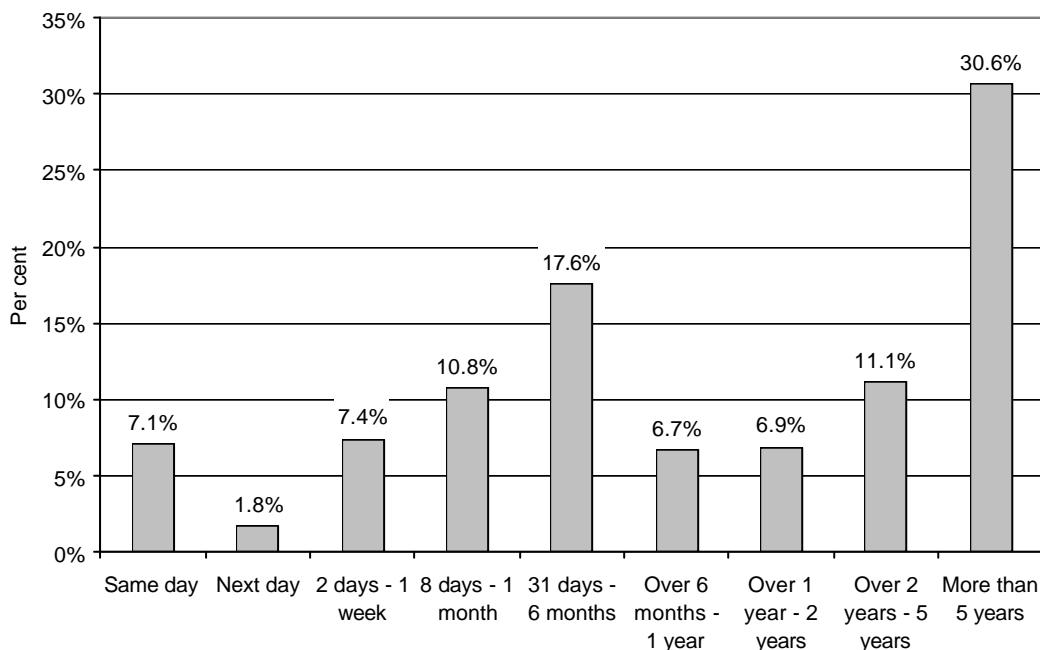
GRAPH 3: TIMING OF REPORT—RAPE: 1994–2002

2.35 Graph 4 shows that delays in reporting are far more common for other penetrative sexual offences. Only 1046 (or 16.3%) of reports were made within the week following the offence(s). Well over a third of all reports over the eight year period (2682 or 41.7%) were made at least two years following the offence. Approximately 31% of these reports related to events that occurred more than five years ago. It is likely that some of the differences here reflect the characteristics of the data set. As stated above, a large proportion of penetrative offences other than rape were alleged to have been perpetrated by family members against children or young people, who may well have been subjected to multiple offences over a long period of time.⁶⁶ Reports in these contexts are less likely to be made

⁶⁶ As many as 70% of reports made five or more years after the event involved allegations against family members. This is calculated on the basis of 3907 reports where information on the relationship between victim and offender and the timing of reports was recorded.

contemporaneously because of the difficulties that children and many adult survivors experience in disclosing childhood sexual assault. It is important that the criminal justice system takes account of the common pattern of delay in reporting such assaults. This delay is inconsistent with the traditional legal view that ‘real’ victims are likely to report offences promptly.⁶⁷

GRAPH 4: TIMING OF REPORT—PENETRATIVE OFFENCES OTHER THAN RAPE: 1994–2002



2.36 In the most recent year of LEAP data, however, there appears to have been a decline in the extent to which victims are reporting older assaults. Reports of offences five or more years old dropped from 98 (11.1%) in 1994–95 to 79 (7.5%) in 2001–02 for rape, and from 224 (30.3%) in 1994–95 to 211 (25.9%) in 2001–02 for other penetrative sexual offences. These are the lowest reporting figures for this category over the entire eight year period. It is possible that adult

67 Marg D'Arcy, *Speaking the Unspeakable: Nature, Incidence and Prevalence of Sexual Assault in Victoria*, CASA House (1999) 45–6.

survivors of childhood sexual assault are becoming less willing to report assaults. This could perhaps reflect police advice to people reporting childhood sexual assault that it is difficult to obtain convictions in such circumstances. It is also consistent with the decline in recorded sexual assaults in Victoria.

STATUS OF INVESTIGATION

2.37 Studies have consistently shown how few reports of sexual offences ever result in charges being laid against offenders.⁶⁸ While a proportion of offenders may escape being charged because they cannot be identified or located, in most situations the final decision not to charge an offender or to proceed with further investigation will be made by the police.

2.38 Because of concerns about the extent to which reports are ‘filtered out’ of the system prior to prosecution, the Commission was keen to examine whether there had been any change in how rape and other sexual offences were being processed at the reporting stage.

2.39 The LEAP database compiles information on the status of the investigation relevant to each crime report that is recorded on the system. The Commission investigated whether there had been any change over the eight years in the numbers of:

- complaints being withdrawn;
- reports where ‘no offence is detected’; and
- reports where the ‘offender is processed’.

It was also important to consider the extent to which the characteristics of reports influenced the status of investigations.

2.40 These three categories require some explanation. Once a report is made, the victim may decide against pursuing any further police action, or the police may determine on the basis of the evidence available that an investigation should

68 In Victoria, the VCCAV study found that just over a quarter of reported rape incidents examined between 1987–90 (392) resulted in no further action being taken. They determined that 131 of these cases did not proceed as a direct result of police decisions: above n 54, 30. A study conducted by Melanie Heenan and Stuart Ross also looked at charging decisions in their research examining the police response to reports of recent sexual assault. They found that charges had been laid in only 27 out of 118 (22.9%) cases, although they did note that charges were pending further investigation in another 24 of the incidents they examined (20.3%): *The Police Code of Practice for Sexual Assault Cases: An Evaluation Report*, Rape Law Reform Evaluation Project, Report No.1 (1994) 76.

not be pursued. In the first instance, the victim is asked to sign a statement withdrawing the complaint.⁶⁹ In the second, the police will record the outcome of the report as 'no offence detected' (NOD).

2.41 The third category of 'offender processed' represents those reports where some police action was taken, including cases where the report resulted in charges being laid. However it also includes cases where an alleged offender was questioned by police but no charges were laid, or the offender was cautioned or advised that he may be charged by summons at a later date.⁷⁰ This means that the number of 'offenders processed' does not correspond with the proportion of reports that resulted in the offender actually being charged.⁷¹

2.42 The findings show that approximately half of the rapes reported to police over the study period were recorded as 'offender processed'. While there has been a slight decline since the mid 1990s, where the proportion had sat at about 58%, over the past four years this figure has remained constant between 47% and 51% of reports. The proportion of reports for other penetrative offences where the offender was processed has decreased by about 10 percentage points over the eight year period of the study. However, the rate at which offenders were processed for these offences is significantly higher than that for rape.⁷² In 1994–95, nearly 82% of offenders were processed for penetrative offences other than rape as compared

69 Centres Against Sexual Assault suggest there are a range of reasons why victim/survivors withdraw their complaints, including pressure from family members or concerns about how a criminal prosecution might impact on personal relationships. Counsellors also identified factors related to how the system currently operates which work against victims feeling that they can withstand the demands of the system, such as delays in proceedings and/or fears about going to court. See Chapter 3 for further discussion. The Commission will also be conducting further research with respect to this issue through the focus groups with police and the examination of case narratives regarding the factors that influence whether or not investigations proceed to the charging stage. See below para 3.5.

70 The Victoria Police crime statistics also include a category of 'other' under offender processed which includes where a complaint is withdrawn or where the alleged offender is underage, insane or deceased, or where a warrant is issued. See Victoria Police, *Crime Statistics 2000/2001*. For the purposes of the Commission's review, however, the figures for 'complaints withdrawn' were provided separately.

71 Reports of rape and other penetrative offences may not be 'processed' in the same year.

72 The estimate provided by David Brereton and Gary McCole of a 40% prosecution rate for recorded reports of child sexual assault during 1986–87 was also encouraging, especially given that their figures were based on actual numbers of offenders charged as opposed to merely 'processed': see above n 23.

with just 58% for rape. By the year 2001–02, the percentages of offenders processed were 72.6% versus 47.4% respectively.⁷³

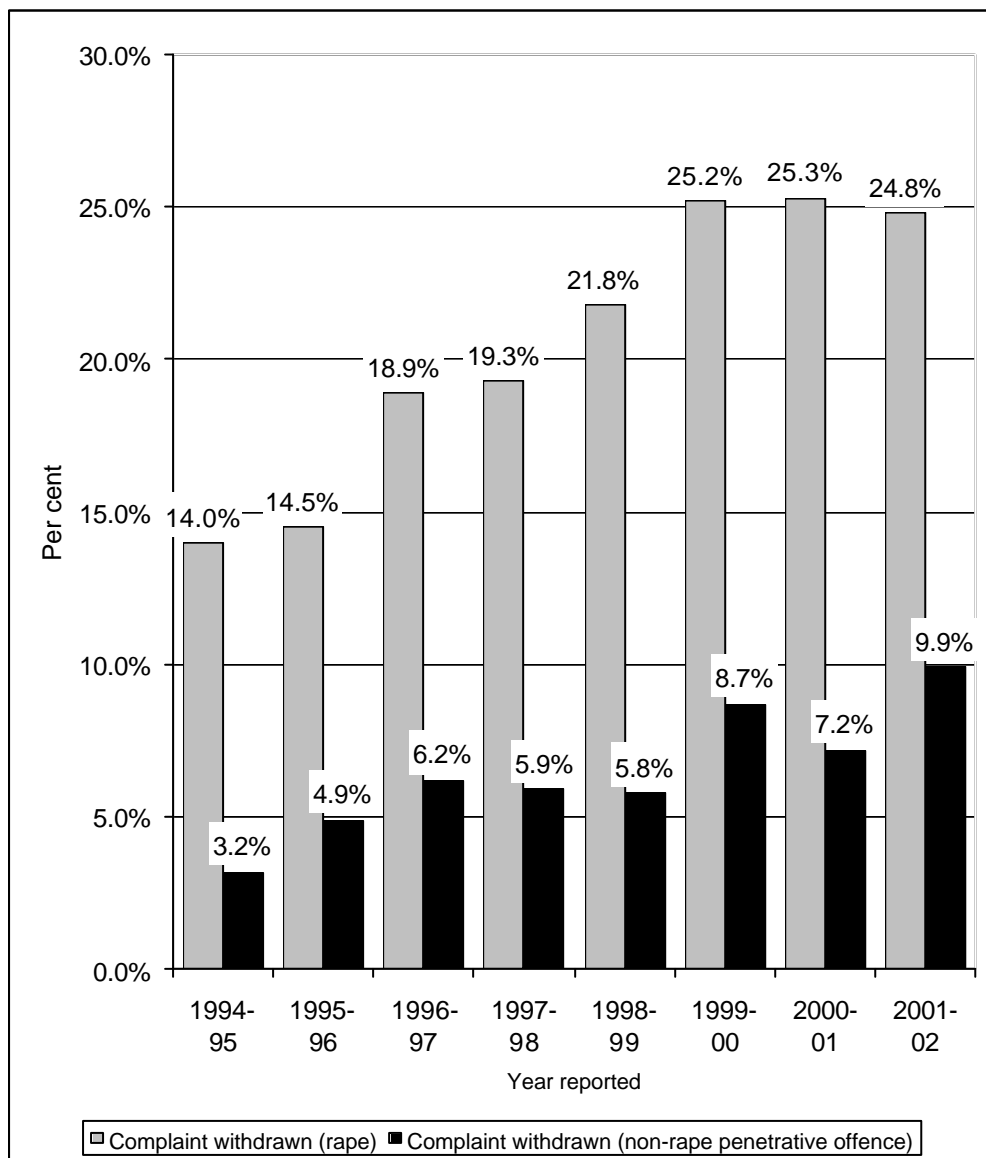
2.43 There was a significant shift over the eight year period in the proportion of reported rapes that resulted in a complaint being withdrawn. Complaints withdrawn increased from 124 (14%) of reported cases in 1994–95 to 262 cases (24.8%) in 2001–02. In other words, the most recent figures suggest that as many as a quarter of all reports of rape were finalised by people withdrawing their complaint.⁷⁴ Similarly, while fewer reports of other penetrative offences appeared to be withdrawn overall, the proportions increased over the review period from 24 cases (3.2%) in 1994–95 to 81 cases (9.9%) in 2001–02.⁷⁵

73 These findings should, however, be compared in light of the information published by Victoria Police in their annual crime statistics reports on the ‘method of processing’ alleged offenders. For 2001–02, the proportions of offenders who were arrested for rape and non-rape offences is shown to be approximately 20%, significantly less than the arrest rate for other person-related crime: Victoria Police, *Crime Statistics 2000/01* (2002) 41.

74 The Police Code of Practice makes clear that even where a victim requests no further action be taken, police are obliged to inform her or him that police may nevertheless proceed with the investigation: Victoria Police, *Code of Practice for the Investigation of Sexual Assault*, (2nd ed, 1999) Guidelines 22 and 24, 8.

75 The distribution of outcomes according to complaints withdrawn and no offence detected should be considered in light of the direction given to police by the Code of Practice to avoid using the words ‘No Offence Detected’. Where a decision has been made to discontinue the investigation, police are urged to instead finalise the matter using the category of ‘complaint withdrawn’: *ibid*, Guideline 29, 9.

**GRAPH 5: COMPLAINTS WITHDRAWN FOR RAPE AND NON-RAPE OFFENCES:
1994–2002**



2.44 By contrast, the number of reports resulting in no offence detected (NOD) remained reasonably static. The proportion of NODs for reported rapes ranged from about 8–11% as compared with 1–3% for other penetrative offences. Hence, while reports of rape were more likely than other penetrative offences to be resolved in this way, there was little fluctuation across the eight years.⁷⁶

2.45 The Commission plans to examine these cases more closely by examining the casebook narratives completed by individual police members after a report has been made.⁷⁷ These casebook entries provide a more detailed account of the investigative process and the reasons why a certain outcome resulted.⁷⁸ At this stage, however, the LEAP figures suggest that certain types of cases may be more likely to result in a complaint being withdrawn. For example, there has been a steady upturn in the numbers of complaints of rape against ‘known’ offenders being withdrawn. A similar but less striking increase is also evident for rapes by partners/boyfriends. For reports of penetrative offences other than rape, there has been a recent increase in family-related offences being withdrawn where the offender is ‘known’ to the victim.

Conclusion

2.46 The following points can be made in summary.

- The numbers of rapes and penetrative offences other than rape reported to police between 1994–95 and 2001–02 have remained relatively constant, except in 1998–99 where there was a significant increase in both categories of offence.
- There has been a decline in the rate of people reporting sexual assault in Victoria, from 63.3 per 100,000 head of population in 1993 to 53.7 in 2001.
- The majority of people reporting rape or other penetrative offences are women and girls and the majority of alleged offenders are male.
- Over 80% of victims who reported a rape or other penetrative offence knew the offender.

76 There was one anomalous year in 1998–99 for penetrative offences other than rape when the percentage of reports classified as ‘no offence detected’ went up to 8.2%.

77 The findings from this research will be presented in the Final Report.

78 See Chapter 3 for further discussion.

- The proportion of reported rapes against current/former partners increased from approximately 10% to 16.4% during 1994–2002.
- A third of all reports of penetrative offences other than rape concerned family members such as parents, step-parents, siblings and other relatives.
- Just over half of the rapes were reported within a week of the alleged offence, but 11.5% of the rapes over the 8 year period were made five years after the alleged event.
- Delays in reporting were much more common for penetrative offences other than rape. Over 41% of offences reported over an eight year period were made at least two years after the offence.
- Approximately half of all rapes reported to police over the eight year period were recorded as ‘offender processed’. A much higher proportion of penetrative offences other than rape are disposed of in this way (between 75–78%). However this category of dispositions includes cases where some police action was taken, but no charge was laid.

PROSECUTION OUTCOMES

Aims of the Study

2.47 This section sets out the results of a study conducted by the Commission into prosecution outcomes for *penetrative sexual offences other than rape* that proceeded in Victoria over a two year period, between 1997–98 and 1998–99.

2.48 In the Discussion Paper, the Commission focused on the number of *rape* prosecutions that commenced in the same two year period. Our preliminary analysis⁷⁹ suggested that:

- only around a third of alleged rape offenders for whom a matter was reported to and recorded by police were prosecuted;
- of the 357 accused against whom the OPP initially proceeded on one or more rape charges, about a quarter were ultimately convicted through pleading guilty or being found guilty at trial;

⁷⁹ The Commission intends to track the processing of these cases in more detail in order to consider the kinds of factors that may influence prosecution outcomes for rape cases such as the complainant’s age and relationship to offender. The results of this study will be published in the Final Report.

- of the 282 accused who were committed for trial, 84 (30%) were convicted of at least one rape offence, either as a result of pleading guilty or where a jury found them guilty at trial. 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 at trial;
- 100 of the accused (36%) received no conviction for any offence as a result of a jury finding the accused not guilty, a permanent stay, no evidence being led by the prosecution, or because the OPP discontinued the prosecution.

2.49 There is no equivalent information on the outcomes of prosecutions for non-rape offences in Victoria. While the research undertaken by Brereton and McCole in the mid-1980s looked at the proportion of cases that ultimately resulted in prosecution, this study did not differentiate between penetrative and non-penetrative offences and did not report on prosecution outcomes.⁸⁰

2.50 The remainder of this chapter considers the findings of a prosecution outcomes study for non-rape penetrative offences undertaken by the Commission. The study compares outcomes for the two categories of offences.

2.51 Before outlining the results of this research, the following section briefly explains the various stages involved in the processing of sexual offences through the criminal justice system.

The Criminal Justice Process⁸¹

Summary and indictable offences

Summary offences are less serious offences which are heard before a magistrate in the Magistrates' Court. They are said to be heard summarily. Indictable offences are serious offences that can be prosecuted before a judge sitting with a jury.

2.52 An offender who is charged with a sexual offence will be required to appear in the Magistrates' Court. If the case involves summary offences, the matter will be resolved as a summary hearing or plea before a magistrate. If the case involves indictable offences, and the accused

pleads not guilty, a preliminary hearing will be held at the Magistrates' Court. This is known as a committal proceeding. The purpose of a committal proceeding is to establish whether there is sufficient evidence for the case to be heard by a

80 Brereton and McCole, above n 23.

81 The steps involved in the processing of sexual offences through the criminal justice system were outlined in some detail in the Discussion Paper, above n 21, 33–41.

judge and jury. The magistrate will decide whether or not the complainant will be required to give evidence and be cross-examined at the committal proceeding.

2.53 If the magistrate decides there is a strong enough case, the accused will be ordered to stand trial at the County Court. The accused may decide to plead guilty at this stage, in which case there will be a hearing to determine the sentence. If the accused does not do so, he or she will be tried for the offence. At the trial, the prosecution must prove the guilt of the accused beyond reasonable doubt on the basis of the evidence. The complainant will be cross-examined by a defence barrister who is acting on behalf of the accused. After all the evidence is presented, the prosecution and the defence will deliver their closing arguments to the jury. The judge follows with directions about what the law is in relation to each offence. The jury will then be asked to consider their verdict. Alternatively, the accused may plead guilty to the offences, in which case either the magistrate or a judge will determine an appropriate penalty.

2.54 If the jury finds the accused guilty of an offence, he or she has the right to appeal against that conviction and/or the sentence imposed. The prosecution does not have a right of appeal against an acquittal. The prosecution can however appeal against a sentence that is considered manifestly inadequate.

ACCESSING THE DATA

2.55 The Prosecution Recording and Information Systems Management (PRISM), is the database used by the Office of Public Prosecutions to record information on each case file. Details about the case are entered by individual solicitors at various stages of the prosecution process. This includes information about the accused and other witnesses, court dates and locations, the legal personnel involved, the number and types of offences being prosecuted, and the outcomes of the various proceedings.

2.56 Using PRISM, the Commission asked the OPP to identify all matters in which an accused had been charged with at least one penetrative offence other than rape, where the case was referred to the OPP, between June 1997 and June 1999.⁸² Researchers also recorded information relevant to individual counts. For example, an accused person may be prosecuted for six counts of incest and other counts of non-sexual assaults against one complainant, but only be convicted of one offence. Alternatively, the case may involve an accused who is being prosecuted for multiple

Matter

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

Count

A count refers to an individual charge arising from an allegation; an accused may be prosecuted for a number of counts.

offences involving several complainants. Analysis of the individual counts can more accurately take account of the different outcomes that may result from a single matter or case.

2.57 An electronic coding sheet was developed by the Commission to record specific information in relation to each of these matters using the PRISM database. The coding sheet allowed for the collection of details such as:

- the gender and relationship between the complainant and the accused;
- the age of the complainant(s);
- the number of complainants involved;
- the number of charges or counts the accused faced;
- when the prosecution commenced;
- the location of the proceedings; and
- the outcome of the proceedings.

2.58 The data was recorded by researchers directly from the PRISM database onto the electronic coding sheet. Analysis of the data was later undertaken using the SPSS (Statistical Package for Social Sciences) software package.

82 The Commission did not ask the OPP to distinguish matters according to specific offence types. The criterion was that the prosecution must have involved at least one 'penetrative offence'. The findings therefore do not specify whether there are differences between the prosecution process or outcomes for incest versus offences involving sexual penetration.

LIMITATIONS OF USING PRISM

2.59 The main purpose of PRISM is to assist legal personnel in tracking the progress of individual prosecutions. This placed some limitations on the Commission's research. Unfortunately there is considerable variation in how comprehensively PRISM records are maintained. Where a case proceeded to trial, or where an accused pleaded guilty in the County Court, solicitors tended to enter more information onto the system. However, where the case did not proceed beyond a committal hearing, or where a solicitor was perhaps less experienced in using the system, the details were not always entered.

2.60 There also appear to be some differences in terms of how solicitors were interpreting the fields in PRISM. For example, PRISM makes provision for solicitors to record information about when the assault took place. However, it appears that some solicitors have understood this field to relate to the year in which the proceedings commenced. This means that we could not reliably report information about the time between the offence and the charge. Nor were we able to answer other important research questions, such as how the timing of the assault and any delay in reporting may affect the prosecution outcome.

2.61 The advantage of using PRISM was that it enabled the Commission to investigate large numbers of prosecutions over a two year period in a relatively short time frame. The disadvantage was that it meant that data limitations prevented us from obtaining reliable information on some issues. By contrast, the two previous Victorian studies relied on examining individual case files.⁸³

NUMBERS OF PROSECUTIONS INITIATED JUNE 1997–JUNE 1999

2.62 'Penetrative sexual offences' principally involve offences of incest and sexual penetration of children and young people under 16 years of age.⁸⁴ These offences are treated differently by the law for a range of social and historical reasons.⁸⁵ In the case of these offences, consent is not an element of the offence

83 Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure, Appendixes to Interim Report No 42* (1991); Melanie Heenan and Helen McKelvie, *The Crimes Rape Act 1991: An Evaluation Report*, Report No 2, Rape Law Reform Evaluation Project, Department of Justice (1997) (hereafter RLREP).

84 See Appendix 2 for a complete list of the offences included. Children's Court matters are excluded.

85 Shannon Caroline Taylor, *The Legal Construction of Victim/Survivors in Parent–Child Intrafamilial Sexual Abuse Trials in the Victorian County Court Australia in 1995* (PhD Thesis, University of Ballarat, 2001) .

that must be proven by the prosecution.⁸⁶ The prosecution must nevertheless prove that:

- it was the offender who committed the offence;
- there was sexual penetration; and
- the offender intended to sexually penetrate the complainant.

2.63 The OPP identified a total of 258 matters or cases that proceeded against an individual offender between June 1997–June 1999 where the charges related to a penetrative sexual offence other than rape. It was not uncommon for the accused in these cases to be prosecuted on multiple counts. Specifically, in almost a third of the matters examined (66 or 30%), the accused was presented on between 6–10 counts.⁸⁷ In 25% of cases (55), prosecutions proceeded against accused on more than 10 separate counts. However, matters with multiple counts did not necessarily involve cases with more than one complainant. In fact, in over half the matters where there were six or more counts (56.2%) the case involved a single complainant.⁸⁸

2.64 According to the LEAP figures compiled by Victoria Police, 1785 people reported penetrative offences other than rape during 1997–98 and 1998–99. While we cannot say on the basis of the police data how many of these reports resulted in charges being laid,⁸⁹ we can nevertheless compare this with the 258 prosecutions that were initiated during the same period. These figures suggest that only around 14.5% of cases, or less than 1 in 7 reports of penetrative offences other than rape, that are reported to and recorded by police, ultimately proceed to prosecution.⁹⁰ By contrast, around 1 in 5.5 reports of rape by an alleged victim resulted in prosecution.⁹¹ The lower proportion of reports of penetrative offences

86 See, for example, *Crimes Act 1958* s 44(5) in relation to incest and s 46(2) in relation to the sexual penetration of a child aged between 10–16.

87 There were 38 matters (14.7%) where information about the number of counts involved in the case was missing.

88 The accused in these cases were more likely to be fathers/step-fathers (38.5%), other family members or relatives (21.5%) or a family friend (20%).

89 It should also be noted that reported offences may not be prosecuted in the same year.

90 It should be noted that reports of sexual offences may not correlate with those prosecuted within the same year.

91 This has been calculated by comparing the number of police reports made by people during 1997–98 and 1998–99 (n=2008) with the number of people who were prosecuted on at least one charge of rape (367 prosecutions were reported in the Discussion Paper) during the same two year period. The ratio

which result in prosecution may reflect the difficulties of prosecuting those who assault family members and young people.

NUMBER AND GENDER OF COMPLAINANTS

2.65 In 175 out of the 258 matters examined (67.8%), the case related to a single complainant.⁹² Unlike prosecutions for rape, however, a significant number of prosecutions for penetrative offences involved more than one alleged victim. While most of these cases involved allegations by two complainants (37 or 14.3%), there were other matters where multiple complainants were represented. For example, in 13 cases (5%), the offences related to six different complainants.⁹³ Overall, a total of 448 complainants were represented across the 258 matters examined, involving 296 women and 152 men.

AGE OF COMPLAINANTS AT THE TIME OF THE PROCEEDINGS⁹⁴

2.66 Just over a third of complainants (88 or 34.1%) involved in prosecutions for penetrative offences were 15 years or younger at the time the proceedings were initiated. The median age for female and male complainants was 17 years and 18 years respectively.

2.67 There is clearly a substantial gap between the median age at which most offences were alleged to have occurred and the timing of prosecutions.⁹⁵ The LEAP data indicated that the median age at which reported penetrative offences

reported here of 1 in 5.5, however, is less than the proportion reported in the Discussion Paper, where it was suggested that around one-third of persons reported as offenders are prosecuted: above n 1, 43. However, this was based on Victoria Police *Crime Statistics 1998/1999*, Table 1.3, which counts the number of alleged offenders in the relevant years (n=1220), rather than the number of persons reporting the offence.

92 This is in contrast to the numbers of counts rather than the numbers of matters discussed above para 2.63.

93 The largest number of complainants involved in a single case was 16.

94 This section relies on matter-based data. In cases involving multiple victims, a single complainant was nominated. A decision was made to isolate the complainant who had the closest relationship to the accused. This single complainant–accused pair subset of data is used for analysis on age and the relationship between complainants and the accused.

95 The Commission was unable to use PRISM to compare the timing of offences with the timing of reports and of prosecutions. Certain inferences can be drawn however using the information obtained through LEAP statistics and the age of complainants at the time of prosecutions.

occurred in the years 1997–88 and 1998–99 was 12 for girls and 10 for boys.⁹⁶ The difference between the median age at which the offence occurred and the age of the complainant at the time of prosecution largely reflects the extent of delay in reporting penetrative sexual offences. As previously discussed,⁹⁷ the police statistics compiled through LEAP indicate that 31% of reports of penetrative offences concerned offences that were alleged to have occurred more than five years ago. This is reflected to some extent in the numbers of prosecutions involving adult complainants. Indeed, a fifth of the complainants (53 or 20.5%) involved in prosecutions for penetrative offences were 36 years and older. Almost two thirds of these cases (24 out of 37 or 64.9%) involved allegations against immediate family members or other relatives. Once again these figures may highlight the particular difficulties faced by victims of childhood sexual assault in disclosing sexual offences against close family members and their reluctance to consider a criminal justice response.

GENDER OF THE ACCUSED

2.68 As is the situation for rape cases, almost all of the accused prosecuted during the two year period were men (97.7%). However, there were six women (2.3%) who were prosecuted for penetrative offences. In four of these cases, two male complainants were involved; in one case, a single female complainant; and in the final case, the prosecution involved allegations relating to one female and one male complainant.

2.69 The outcomes for these cases were as follows. In two cases, the charges were withdrawn. Solicitors had noted in both cases that the mental health of the women accused had impacted on the OPP's preparedness to prosecute. In three cases the women accused had pleaded guilty, and in the sixth case a jury had found the woman accused guilty of two counts involving non-penetrative sexual offences against two young men.

96 The data reported at paragraph 2.21 is based on LEAP figures for an eight year period. The medians calculated here are specifically based on the two years in question.

97 See above para 2.35.

RELATIONSHIP BETWEEN COMPLAINANTS AND THE ACCUSED⁹⁸

2.70 In slightly more than 62% of matters where the relationship between the complainants and accused could be established,⁹⁹ the context was familial. In 85 out of the 227 cases where the relationship was known (37%), the accused was the father or step-father of the complainant.¹⁰⁰ The other common relationship category for accused prosecuted for penetrative offences was that of family friend (30 matters or 13.2%).

2.71 Further analysis of the relationship categories was also conducted for prosecutions involving multiple complainants. In a quarter of matters (21 matters or 25%) where the alleged perpetrator was a parent or step-parent, and in almost a third of matters where the relationship was otherwise familial (18 or 32.1%), the case involved more than one complainant.

2.72 Friends (9 matters or 4%), acquaintances (13 matters or 5.7%), and former/current boyfriends (7 matters or 3.1%) also figured within 29 of the matters prosecuted during this period. It is likely that these cases will have involved offences of sexual penetration of a child under 16 years.

2.73 Given that most penetrative offences (such as incest and offences involving the sexual penetration of children under 16 years) are committed by people either related to or well known to the victim, it is not surprising that the number of prosecutions involving allegations against strangers was negligible (3 matters or 1.3%). The small number of prosecutions in cases involving strangers meant that it was not possible to make a statistically valid comparison between conviction rates in cases where the alleged offender was a stranger and cases where the alleged offender was a family member.

OUTCOMES OF PROSECUTIONS FOR PENETRATIVE OFFENCES

2.74 This section sets out the results for the outcomes of the 258 matters that were prosecuted during 1997–98 and 1998–99. In brief, the findings suggest that a significant proportion of the cases examined through PRISM resulted in

98 See above n 94.

99 There were 31 matters (12%) where PRISM contained no information about the relationship between the complainant and the accused.

100 In one other case, the alleged offender was the mother of two male complainants.

convictions for penetrative offences, either through the accused pleading guilty (33.7%), or as a result of the jury finding the accused guilty (11.2%).

TABLE 3: PROSECUTION OUTCOMES

Prosecution outcome	Frequency	Per cent
Pre-Committal		
Charges withdrawn	9	3.5%
Magistrates' Court		
Discharged/acquitted	7	2.7%
Pleaded guilty penetrative offence	1	0.4%
Pleaded guilty other offence	6	2.3%
Found guilty other offence	2	0.8%
Found guilty offence unknown	1	0.4%
Committed for trial	2	0.8%
Result not reached	1	0.4%
County Court		
Pleaded guilty penetrative offence	87	33.7%
Pleaded guilty other offence	34	13.2%
Found guilty penetrative offence	29	11.2%
Found guilty other offence	16	6.2%
Acquitted/found not guilty penetrative offence	25	9.7%
Acquitted/found not guilty other offence	7	2.7%
<i>Nolle prosequi</i>	25	9.7%
No evidence led	1	0.4%
Other		
Incomplete	4	1.6%
Missing information	1	0.4%
Total matters	258	100%

2.75 As reported in the Discussion Paper, less than a quarter of prosecutions for rape resulted in rape convictions.¹⁰¹ However, the conviction rate for other penetrative offences is considerably higher than the conviction rate for rape. Several factors may contribute to this higher conviction rate. First, unlike the law relating to rape, with offences involving incest or other penetrative assaults where the complainant is under 16 years of age, consent is not an element of the offence that must be proven by the prosecution. This requirement may make it more difficult to obtain convictions in rape cases, than in some cases involving penetrative offences other than rape. Second, the process of ‘filtering’ which operates to exclude cases from prosecution where the charge is unlikely to succeed may be more rigorous for these cases than for cases involving allegations of rape. If people against whom allegations are made are only prosecuted where there is a high probability of conviction, this may result in a higher conviction rate for this category of offence overall. Third, a higher proportion of persons charged with this category of offence plead guilty than the proportion of persons who plead guilty to rape charges. This issue is discussed in more detail below.

PROSECUTIONS RESOLVED AT THE MAGISTRATES’ COURT

2.76 There were only nine matters where all charges against the accused were withdrawn prior to the case commencing in the Magistrates’ Court. In seven of these cases, the accused was the parent or step-parent of the complainant, or another close relative. The complainants in five of these cases were also very young—between 6–10 years of age. It is possible that these cases were withdrawn because of the difficulties associated with very young children giving evidence, or due to the complainant or her or his family indicating that they did not wish to proceed. It is also possible that the OPP decided against initiating a prosecution given that, unless the accused had made admissions, there was little chance of conviction in these cases.¹⁰²

2.77 Of the 249 matters that proceeded, 20 were resolved at the Magistrates’ Court.¹⁰³ The magistrate discharged or acquitted the accused in seven of these cases. While the accused men in these matters had originally been charged with a

101 Only 15.4% of the accused pleaded guilty to rape and just 8.1% were found guilty by a jury.

102 See Brereton and McCole, above n 23, 53.

103 There were four matters where the outcome of the prosecution was unclear. In two cases, the accused were awaiting trial after a magistrate had found there was enough evidence for the case to proceed to the County Court. In two other matters, the result of the case was unclear or missing.

penetrative offence, the prosecution commenced on the basis of non-penetrative counts only.¹⁰⁴ Three out of the seven cases involved parents or step-parents, one was the brother-in-law of the complainant and one was the mother's de facto. The ages of the complainants in these matters varied considerably, from under 5 years to 36 years and older. Clearly, without examining the individual case files for these matters it is not clear why the magistrate decided to discharge or acquit the accused.

2.78 In six matters the accused pleaded guilty to other offences. In all six cases the accused was a family member, in three cases a parent or step-parent, while the remaining two involved a grandfather and uncle. These cases may well have been the subject of some pre-hearing negotiation with the prosecution where any penetrative offences were dropped in favour of resolving the matter pre-trial by the accused agreeing to plead guilty to less serious sexual offences.¹⁰⁵

2.79 In two matters the magistrate found the accused guilty of other offences, and the complainant was the child or step-child of the accused in both cases.

2.80 In only one matter did the accused plead guilty to a penetrative offence at the Magistrates' Court. While penetrative offences such as incest and charges of sexual penetration cannot usually be dealt with at the Magistrates' Court, there was one matter where the accused decided to plead guilty to two offences after the committal proceeding was underway. The accused pleaded guilty in the Magistrates' Court to one count of sexual penetration of a young woman aged between 16–17 years who was under his care, supervision and authority,¹⁰⁶ and one count of committing an indecent act.

SUMMARY

2.81 The following points can be made in summary:

- Only around 14.5% of cases, or less than one in seven reports of penetrative offences other than rape that are reported to and recorded by police, ultimately proceed to prosecution.

104 Indeed, the prosecutions may not have included a sexual assault at all. The researchers did not record the nature of the 'other' offences'.

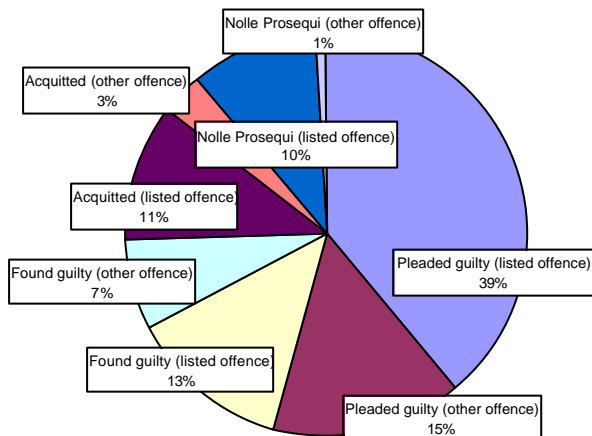
105 'Less serious' in terms of the maximum penalty involved.

106 This offence can be determined summarily. See the *Magistrates' Court Act 1989* s 53(1A).

- A high proportion of the 258 accused who were prosecuted for penetrative offences were committed to stand trial (223 or 86.4%).
- Of the 258 matters where the accused were prosecuted for penetrative offences other than rape, 116 or 44.9% were convicted of at least one penetrative offence through pleading guilty or being found guilty at trial.
- Of the 223 matters that proceeded beyond the Magistrates' Court, 87 (39%) of the accused pleaded guilty to at least one penetrative offence while a further 29 (13%) were found guilty. The overall conviction rate was therefore 52%. This is 22% higher than the proportion of rape matters that proceeded beyond the Magistrates' Court where the accused pleaded guilty or was found guilty.
- A further 22.4% (50) were convicted of other sexual or non-sexual offences either through pleas of guilt (34 or 15.2%) or as a result of jury verdicts of guilt (16 or 7.2%).
- There were a total of 57 out of the 223 matters (25.6%) that proceeded beyond the Magistrates' Court where the prosecution resulted in no conviction, either because there was a full acquittal involving one or more penetrative offence(s) (11.2%), the accused were found not guilty of non-penetrative offences (3.1%),¹⁰⁷ or the OPP discontinued the prosecution (11.2%). The corresponding figure for rape prosecutions that failed to result in convictions was 36%.¹⁰⁸

107 At some stage prior to the trial, a decision will have been made in these cases that the accused will only go to trial on non-penetrative offences.

108 Discussion Paper, above n 1, 45.

GRAPH 6: PROSECUTIONS OUTCOMES POST-COMMITTAL¹⁰⁹**PROSECUTIONS THAT WERE DISCONTINUED POST-COMMITTAL**

2.82 Of the 258 matters examined, a *nolle prosequi* was entered by the OPP in 25 matters (9.7%), 23 in relation to prosecutions involving penetrative offences, and two in relation to other sexual or non-sexual offences. This figure was roughly equivalent to the Commission's research on rape prosecutions where 29 or 10.1% of cases were discontinued.¹¹⁰

Nolle prosequi

To enter a *nolle prosequi* is to discontinue a prosecution after the accused has been committed at the Magistrates' Court to stand trial.

2.83 A *nolle prosequi* may be entered following an application by the defence to the OPP or it may be that the OPP decides to discontinue the prosecution. At least statistically, there was nothing to distinguish the circumstances of these cases in terms of the ages of the complainants, or the nature of their relationships with the accused men. Without examining the individual case files for these matters, it is therefore difficult to say what may have prompted these decisions. The PRISM

¹⁰⁹ N = 223. Figures in the chart have been rounded.

¹¹⁰ Although this figure has increased from the earlier Victorian Evaluation Study, where the proportion of rape cases where a *nolle prosequi* was entered was just 5%. See RLREP, above n 83, 48.

database contained some additional notes in relation to the reasons why in 12 of the 25 matters the case did not proceed. Some of these related to the victim where, for example, there was some indication that she or he may not have wished to proceed with the court process. In other instances, the notes suggested that evidentiary problems had prompted the decision.

FACTORS INFLUENCING WILLINGNESS TO PLEAD GUILTY

2.84 Accused who are being prosecuted for penetrative sexual offences are twice as likely to plead guilty than are those prosecuted for rape. While there may well have been a range of factors that influenced the particular outcome in these cases, the data suggests that prosecutions involving fewer charges were more likely to prompt guilty pleas being entered. Although the figures did not reach statistical significance, it is still important to note that over half the accused who pleaded guilty (47 out of 86¹¹¹ or 54.7%) were facing five or fewer charges. This finding may be explained by what happens during the plea bargaining process, where successful negotiations often depend on the prosecution's willingness to reduce the number of charges or counts being initiated.¹¹²

2.85 According to the two previous Victorian rape prosecutions studies, one of the best predictors of a guilty plea is whether or not the accused made any admissions. While PRISM does not contain the details about the original interview of the accused by the police, there is evidence to suggest that particular relationship categories are more likely to result in guilty pleas to penetrative offences other than rape. In the Victorian Rape Law Reform Evaluation Project, for example, almost a third of the accused who pleaded guilty to a sexual offence other than rape were recorded as the father, step-father, or other relative to the complainant.¹¹³ In the current study, slightly more than half of the accused who pleaded guilty to a penetrative offence (50.6%) involved parents or step-parents (28 or 32.2%) or other family members or relatives (16 or 18.4%).¹¹⁴

111 There was one case where information about the number of counts was unknown.

112 The Rape Law Reform Evaluation Study reported that two thirds of the accused who entered a plea of guilty to a rape charge did so after the prosecution agreed to have the charges against them reduced in number or altered in nature. See RLREP, above n 83, 172–3.

113 Ibid 177.

114 There is also evidence to suggest that complainants in these cases are more likely to agree to a change in the number or nature of charges if it means they will be spared the anguish of having to appear in court and give evidence against their father or step-father.

Complainants in these cases were likely to be younger, with a median age of 16 compared with 17 years for the total number of complainants involved in prosecutions for penetrative offences.

FACTORS INFLUENCING TRIAL OUTCOMES

2.86 A total of 65 trials involving prosecutions for at least one penetrative offence were held in Victoria throughout the two year period. On the basis of PRISM data alone, there is little to distinguish the characteristics of cases that went to trial or to explain why one trial resulted in a conviction while another ended in acquittal.¹¹⁵ Nevertheless, the following observations can be made.

- There were 25 trials that resulted in the accused being acquitted of all charges including at least one penetrative offence.
- In 29 trials the jury found the accused guilty of at least one penetrative offence.
- In 11 trials the accused was prosecuted for at least one penetrative offence but found guilty of other non-penetrative sexual offences only.
- The outcome of trials involving penetrative offences did not appear to be influenced by the relationship between the complainant and the accused. The relationship category that predominantly figured in the trials was again familial. The complainant was the child/step-child or other relative of the accused in 17 of the trials that resulted in acquittals and 18 trials where there was a conviction for a penetrative offence. In 7 out of the 11 trials where the jury found the accused guilty of an 'other offence' (sexual offence but non-penetrative), the accused was again in a close familial relationship with the complainant.
- The relatively small number of cases made it impossible for us to identify the relationship between matters that resulted in convictions for penetrative offences and the age of the complainant at trial. While the age of complainants at the time of the proceedings was fairly evenly distributed across the categories, there were a higher proportion of trials that resulted in guilty verdicts where complainants were children aged between 11–15 years. Of those complainants who were aged 15 years or younger, there

¹¹⁵ The figures are also too small to analyse using the standard statistical tests. For example, when trial outcome is considered with categories of the complainant's age, a number of cells are left with raw numbers less than 5.

were convictions in 64% of cases (23% found guilty and 41% pleaded guilty). For complainants 16 years and over, offenders were convicted in 55.9% of cases (11% found guilty and 44.9% pleaded guilty).

- There were 31 out of the 65 trials (47.7%) that involved complainants who were 21 years of age or older at the time of the proceedings. The outcomes for these matters were relatively even with 13 out of 25 resulting in full acquittals, 11 out of 29 in guilty verdicts for penetrative offences, and 7 out of 11 in guilty verdicts for other sexual offences.

2.87 In exploring the kinds of factors that may influence trial outcome, the Rape Law Reform Evaluation Project considered whether location of the trial was important. The researchers were provided with data that recorded the rates of conviction versus acquittal across the regional areas of Victoria over a ten year period. They found that certain regions had a disproportionately higher acquittal rate than trials heard in Melbourne.¹¹⁶ The current study also considered the acquittal rate against the location of trials in Melbourne versus regional areas. The figures generated through the current study were considerably smaller given that the data relied on just two years of prosecutions.

2.88 Information about the location of the trial was available for all but one of these matters. Just on 71.7% or 38 of the trials were held in Melbourne, leaving just 28.3% or 15 which proceeded in seven different regional areas dispersed across the State.

2.89 Few conclusions can be drawn in terms of these findings given the small numbers of trials involved. Nevertheless there was nothing to indicate that trial outcome was being influenced by where the trial was held. Of the 15 regional trials, 11 resulted in convictions against the accused for at least one penetrative offence while four matters ended in acquittals. In Melbourne, the outcomes were about even with juries finding the accused guilty in 18 matters and not guilty in 20.

2.90 There is some indication, although caution must be exercised given the small numbers involved, that accused are proportionally more likely to be found guilty by a jury in regional areas as opposed to Melbourne based trials (28.2% versus 18%).

116 RLREP, above n 83, 237.

CONCLUSION

2.91 There are differences between the prosecution outcomes for rape, which were reported in the Discussion Paper, and prosecution outcomes for penetrative offences other than rape. Compared with rape, a lower proportion of penetrative offences other than rape reported to the police result in a prosecution, although a higher proportion of those prosecuted for penetrative offences other than rape plead guilty or are convicted after a trial. This suggests that police play a significant role in filtering out penetrative offences which are unlikely to be successfully prosecuted. The low reporting rate and low prosecution rate for such offences may result in many offenders against children escaping criminal sanction. To some extent this may be attributable to criminal procedures which make it difficult for children (particularly young children) to testify in sexual offence cases.

2.92 The consultations reported in Chapter 3 suggest that people from Indigenous communities and people with non-English speaking backgrounds have serious difficulties in reporting sexual crimes to the police and/or giving evidence in court. Unfortunately this information cannot be supplemented by data on the ethnicity of those who report sexual assault, because such information is usually not collected by Victoria Police. The roundtable held by the Commission with workers providing services to victim/survivors from NESB communities¹¹⁷ identified lack of systematised data collection on the racial and ethnic background of survivors as a significant problem, which prevented the establishment of appropriate services. When this information was recorded (as is possible under the LEAP system) it was often based on inadequate criteria and was often simply based on the person's appearance. There are obvious sensitivities about collecting information on the ethnicity of victims of crime, which would need to be resolved through consultation with the various relevant communities. However the availability of such information could assist in the development of police strategies to support people in these communities who wish to report offences, and in the planning of appropriate services.

2.93 Data is also lacking on the numbers of people with cognitive impairments who are the victims of sexual assault.

2.94 Existing data does not allow reliable conclusions to be drawn about the way in which these and other factors affect prosecution outcomes. In the

117 See below paras 3.12–3.23.

Commission's view there is a need for more detailed data collection to cover such matters. The availability of this information would make it possible to evaluate the success of strategies which the government may choose to adopt to improve the situation for victim/survivors of sexual assault after this reference is completed.

2.95 In the meantime, the Commission will be undertaking additional research on factors affecting police decisions about whether to charge alleged offenders and the factors affecting prosecution outcomes in rape cases.



RECOMMENDATION

1. The Department of Justice should convene a working party comprising representatives of Victoria Police, the Office of Public Prosecutions, the courts and other relevant stake-holders, to establish an integrated process for the collection of reliable statistics relating to sexual offences, which should include:

- the incidence of offences in Victoria;
- the characteristics of victims and offenders, including racial and cultural background and age;
- police reports and prosecution rates for such offences; and
- prosecution outcomes and the factors which may affect them;

and should permit tracking of offences from the time of report until the matter is concluded.

Chapter 3

Improving Police Responses

INTRODUCTION

3.1 Despite significant reforms to the law of sexual offences over the past two decades in Australia, it is still the case that most people who experience sexual assault do not report the crime to the police. As the figures on the incidence and prevalence of sexual assault show, those who report sexual assault are literally *speaking* what continues to be, for most victim/survivors, the *unspeakable*.¹¹⁸ While national figures suggest that Victoria may be among the states and territories with a higher rate of disclosure for sexual assault,¹¹⁹ the rate at which victim/survivors are reporting sexual assault to the police may actually be diminishing.¹²⁰

3.2 This chapter deals with a range of issues concerning the reporting of sexual assault, and considers some of the barriers faced by victim/survivors who decide to report offences to the police. We pay particular attention to the experiences of victim/survivors from non-English speaking backgrounds and victim/survivors who are Indigenous. Many Indigenous people and people from non-English speaking backgrounds have deep-seated concerns about the capacity of the criminal justice system to uphold their rights and accommodate their needs. The system's deficiencies have also been particularly marked for people with cognitive impairments, where levels of under-reporting remain extremely high, and the prospects of conviction for cases that do proceed to court remain very low.

3.3 The chapter goes on to consider the mechanisms which currently exist to respond to those victim/survivors who do decide to report offences. It outlines the history and development of the Victoria Police Code of Practice for the

118 This was the expression used in the title of a report published by CASA House in 1999: Marg D'Arcy, *Speaking the Unspeakable: Nature, Incidence and Prevalence of Sexual Assault in Victoria* (1999).

119 Australian Bureau of Statistics, *Crime and Safety Survey*, Catalogue 4509.0, April 1998, 64. This reports crime victimisation figures.

120 Australian Bureau of Statistics, *Recorded Crime Australia 2001*, Catalogue 4510, 19. Victoria has the third lowest rate of reported sexual assault in Australia.

Investigation of Sexual Assault Cases—the protocol that was intended to consolidate a coordinated response by police, Centres Against Sexual Assault (CASAs) and forensic medical care to victims of sexual assault who require crisis care. This section considers the important principles underlying the Code, describes the main features of the protocols, and briefly outlines the findings from an earlier evaluation. It goes on to examine how well the Code is currently working to provide an appropriate response to victim/survivors 10 years after it was introduced, including issues in relation to the processes for reporting and investigation. We also explore the status of working relationships between Victoria Police and CASAs.

3.4 The chapter makes recommendations that are intended to build on the important gains that have been made in responding more appropriately to the needs of victim/survivors of sexual assault.

3.5 This Chapter draws on four main sources of information:

- Three roundtable discussions focusing on issues relevant to Indigenous communities, NESB communities, and people with cognitive impairments. These targeted consultations were undertaken in recognition of the unique difficulties experienced by victim/survivors from these groups in accessing justice.
- Five separate focus groups¹²¹ which were conducted with CASAs¹²² to explore the issues that impact on victim/survivors' decisions to report to police.¹²³ This research represents the first in a series of focus group discussions that the Commission will also undertake with police from Sexual Offence and Child Abuse (SOCA) Units and detectives from

121 Two metropolitan and three regional CASAs were nominated by the Victorian Centres Against Sexual Assault Forum to participate in the focus group discussions, which occurred during July–September 2002. Participants in these discussions requested that they remain anonymous.

122 The focus group discussions with Victoria Police are scheduled for May 2003 and will be discussed in the Final Report. They will be conducted with police in both metropolitan Melbourne and at certain regional divisions across Victoria.

123 Prior to the focus groups discussions, counsellor/advocates were asked to speak directly with victim/survivors (where appropriate) about their thoughts and experiences on the issue of reporting, and to also draw on their individual and collective experience of working within CASAs.

Criminal Investigations Units (CIU). The focus groups will each explore the current issues with respect to reporting and sexual assault.¹²⁴

- In addition to the focus groups, CASAs were individually asked to comment on their current working relationships with Victoria Police. They were also asked about their perceptions of how well the Code of Practice is working to provide victims with an appropriate response following a report of sexual assault.
- Submissions and consultations with victim/survivors and community organisations that have been ongoing throughout the duration of the reference.

BARRIERS TO REPORTING SEXUAL ASSAULT

3.6 This section examines the factors which influence victim/survivors' decisions whether to report or not to report sexual assault to the police. The first part draws mainly on the issues raised by CASAs during the focus group discussions, as well as submissions made to the Commission. The second part focuses on the specific problems experienced by non-English speaking background (NESB) and Indigenous victim/survivors, and victim/survivors with cognitive impairments, in reporting sexual assault to the police. The barriers that these victim/survivors face in reporting sexual assault are compounded by a range of systemic factors such as institutional racism, cross-cultural misunderstanding and negative myths and stereotypes. These issues emerged mainly from roundtable discussions held with Indigenous and NESB community representatives, as well as those held with advocacy groups and legal representatives on issues relevant to people with cognitive impairments.

Factors Influencing Victim/Survivors' Decisions

3.7 There are a range of factors that victim/survivors have identified as influencing their decisions about whether or not to report their experiences of

124 The material presented throughout this chapter therefore reflects the particular perspectives of CASA counsellor/advocates whose role it is to provide victim/survivors with appropriate therapeutic support and advocacy in responding to the emotional and social impact and consequences of sexual assault. Their perceptions are based on their work with large numbers of victim/survivors, many of whom attend their services without ever having had any contact with police or the criminal justice system. In this sense, their perspectives offer some unique insights into what prompts some victim/survivors to engage with the reporting process and what deters others from reporting.

sexual assault to the police. During focus group discussions, counsellor/advocates listed a range of reasons why victim/survivors might choose to make police reports. They spoke of how reporting provides victim/survivors with an avenue through which they might begin to 'seek justice', or to have some acknowledgement that 'what's happened to them is a crime'. For others it was a way of ensuring their experience has been 'put [on] the public record'.

3.8 Improvement in police management of sexual assault reports over the past decade was also acknowledged by CASA workers as a factor in victims' decisions to report to police. One experienced counsellor/advocate noted how this kind of procedural improvement had resulted in the role of police being routinely activated once an initial report is made.

It seems to me that there's a system in place now and it somehow flows better for people now than it did...so reporting is almost in the logic of it. You have to stop it [the reporting process]. Whereas in the past you had to start the system going to report. It's almost like reporting is part of it and now you have to take a step to not keep it going that way. Whether it's the Code kicking in or police being better trained...

3.9 Pressure from family members to proceed with a formal complaint was cited as a reason why victim/survivors sometimes feel compelled to report. Interestingly, each of the focus groups identified the enormous responsibility victims often feel to protect others from experiencing abuse. Reporting is therefore a way to 'curb further offending by the perpetrator (as in inter-generational abuse), or to prevent an offender from assaulting someone else in the community'.

3.10 There have been a range of reasons identified as to why victim/survivors may decide against reporting sexual offences to police. One of the fundamental barriers to reporting is that victim/survivors are not aware that the assault against them was a crime and therefore do not consider it a matter for police. In a submission to the Commission a survivor wrote:¹²⁵

125 Submission 16.

I think the most important point to make is that for a few years, I didn't know what had happened to me was rape. I also want to say words cannot possibly convey the impact the experiences had, and the weight that I carry with me everyday as a result. I hadn't given it a name until I met a woman who had been through the exact same thing. She was with her boyfriend and he didn't stop when she asked him to and she called it rape and that shocked me. This was a few years after it happened to me.

Other victim/survivors do not want to become involved with the criminal justice system because they say that they feel ashamed or because they think the matter should be kept private. Alternatively, they view the assault as something they can deal with themselves, rather than pursuing it through the legal system. These reasons are often given in contexts where the offender is the victim's partner, former partner or a relative.

3.11 During the focus group discussions, counsellor/advocates emphasised that victim/survivors frequently expressed fears about reporting. These include their fears of:

- reprisals by offenders;¹²⁶
- what will happen to families (where offenders are family members);
- going to court or being cross-examined;
- how the community will respond (particularly in regional areas);¹²⁷
- being blamed or being held responsible; and
- being disbelieved.

126 In a recent report by CASA House, safety was identified as a key factor in decisions both to report and not to report. Where survivors feel safe and do not fear other assaults, they are more likely to report: Haley Clark, *Sexual Assault and the Criminal Justice System: as told by Counsellor/Advocates*, CASA House (2002), 9.

127 One counsellor/advocate said that 'the jungle drums in [a certain regional town] were big...which reinforces the silencing of sexual assault'.

Barriers to Reporting for Victim/Survivors from Non-English Speaking Backgrounds¹²⁸

3.12 People from non-English speaking backgrounds face significant barriers to reporting sexual assault. In consultations undertaken by the Commission, the following factors were raised as impediments to accessing justice:

- lack of culturally and linguistically appropriate service provision;
- lack of culturally-relevant community education resources and information about legal rights, the operation of the criminal justice system and available support services;
- uncertainty about residency status for migrant and refugee women;
- shortage of female interpreters who are trained to deal with the law and to handle sensitive topics relating to sexual assault;
- a high level of social and financial dependency upon sponsors where victim/survivors are sponsored migrants;
- absence of culturally-sensitive police processes when handling reports of sexual assault from NESB victim/survivors;
- concerns about the lack of privacy and confidentiality associated with disclosure of sexual assault; and
- fear of a negative response from the community after disclosure and reporting, particularly where the offences occurred within their family.

3.13 VLRC consultations highlighted the fact that many of these barriers have been evident for some time, yet there has been little significant change to make the criminal justice system more responsive to the needs of NESB

128 The Commission employed a range of consultation strategies to discuss sexual assault in NESB communities. Consultation involved a range of community organisations and government agencies, such as the Immigrant Women's Domestic Violence Service (IWDVS), the Ethnic Communities Council of Victoria (ECCV), the Victorian Multicultural Commission (VMC) and the Multicultural Liaison Unit of Victoria Police. In August 2002, the Commission and the Victorian Multicultural Commission co-hosted a roundtable discussion called 'Progressing Responsive Strategies to Address Sexual Assault in Non-English Speaking Background Communities' which was attended by representatives of a range of 'stakeholder' organisations. The Commission is also indebted to the advice and work of Maria Dimopoulos. See in particular 'NESB women, Sexual Assault and the Law' principally written by Maria Dimopoulos in Rhonda Cumberland, Melanie Heenan and Marg Gwynne, *Who's On Trial? A Legal Education and Training Kit for CASA Workers Advocating for Victim/Survivors of Sexual Assault* (1998) 24–8.

victim/survivors. In the roundtable co-hosted by the Commission three priority areas were identified: data collection, culturally appropriate service delivery and community education.

LACK OF CULTURALLY-APPROPRIATE SERVICE PROVISION

3.14 The Commission was told that in many instances neither the police nor sexual assault service providers are responding in a culturally appropriate manner to the needs of NESB victim/survivors. The need for culturally-appropriate service provision was seen as essential to increasing confidence in the system and ensuring that reporting rates to police and/or other services increased.

3.15 Participants in the roundtable identified an absence of appropriate agency protocols for dealing with people from NESB backgrounds as a key factor. Workers from CASAs who attended focus group discussions agreed that changes to police protocols and procedures had done little to increase the confidence that NESB victim/survivors might have in the criminal justice system. This suggests that more needs to be done to increase police awareness of the difficulties that some people may face in reporting a sexual assault, and to ensure culturally-appropriate responses to people from NESB communities who do report offences. The Commission believes that the police response to reports of sexual assault would benefit from working collaboratively with existing specialist units within Victoria Police, such as the Multicultural Liaison Unit and the SOCA Units. Police training should be conducted in collaboration with consultants and/or representatives from NESB community organisations who are recognised as having expertise or training experience in culturally-appropriate sexual assault service delivery.¹²⁹

3.16 In the consultations, some ethno-specific and multicultural organisations reported that while they were increasingly responding to issues of sexual assault within their communities, and in some instances providing direct support to victim/survivors, staff had limited training in the area of sexual assault and no additional resources. The Commission heard that existing sexual assault service providers appeared to not have enough staff who are adequately trained in delivery of counselling services to victim/survivors from NESB backgrounds and that there

129 The Immigrant Women's Domestic Violence Service and the Victorian Aboriginal Child Care Agency are working with Victoria Police to provide training sessions in the current SOCA Units training course.

is a need for greater dialogue and collaboration between multicultural and ethno-specific services, and mainstream sexual assault services.

3.17 Some participants in the roundtable expressed a preference for the use of bilingual staff in sexual assault services, rather than interpreters:¹³⁰

[Sexual assault] is a sensitive issue and women have great difficulty when they do disclose sexual abuse...they find it very difficult to work through interpreters...[F]rom all our experience, what has worked so far for them is working through bilingual staff because they can relate on a one-to-one level with someone who they feel can understand the culture (and) language they speak and will be able to understand why they are saying what they are saying: the same sentences can have different connotations and different meanings for a person of a different cultural background. They feel that a bilingual worker will be able to work with them more sensitively.

Other participants supported the development of an ethno-specific sexual assault service:

We need to really seriously—community education aside—look at how to respond to migrant women who are sexually abused. We need to really seriously develop a model that does not exist anywhere else that really helps. I wanted that as a social worker 20 years ago—and [still did] when I left a year ago—to be able to send somebody who disclosed that they were sexually abused to a service that responded firstly to their gender needs, their cultural needs, their linguistic needs and...I knew that they were going to be looked after if they had children—to be taken to a safe area—and...I knew that there was going to be legal assistance for them to go through the maze, and good coppers to look after them to take them to the women's hospital, to do the investigation and dig up the evidence. You have two tiers: you have the police and you have the welfare sector. We need to come up with something that is far better than what we have now.

3.18 The Commission supports further discussions around the development of a best practice model for service response for NESB victim/survivors of sexual assault.

130 Victorian Law Reform Commission and Victorian Multicultural Commission roundtable discussion, 23 August 2003.

LACK OF COMMUNITY EDUCATION

3.19 One of the strongest themes in our consultations with NESB communities was the need for community education and information provision to ensure a greater understanding of current laws and an awareness of victim/survivors' rights. Some workers expressed the view that raising awareness of rights without appropriate support from specialist and mainstream services would create false expectations that could further re-victimise victim/survivors. For this reason community awareness-raising campaigns must go hand-in-hand with training for criminal justice personnel and service providers about culturally-appropriate responses.

3.20 Participants at the roundtable identified a range of existing education initiatives on violence against women that need greater coordination. It was suggested that an audit of community education strategies in relation to sexual violence in NESB communities would assist in developing models for future community education.¹³¹

LACK OF DATA

3.21 As discussed in Chapter 2, there is very little information available on the incidence of sexual assault in NESB communities. Participants at the roundtable discussion conducted with the VMC felt that this lack of information significantly affects the capacity of the criminal justice system and service providers to respond to sexual assault in NESB communities. As one participant commented:¹³²

We should look at some strategies that go across organisations for ways in which the information can be shared while protecting the privacy and confidentiality of the clients with which organisations are working, but sharing this information with each other. I suppose I have attempted to make use of some information and data from a number of organisations and have had (the)...experience...of being unable to access the information, and that makes it very difficult to address the issues that the women need to have addressed.

131 The Commission will be hosting a forum in June 2003 to discuss existing models of community education on sexual violence in NESB communities.

132 Victorian Law Reform Commission and Victorian Multicultural Commission roundtable discussion, 'Progressing Responsive Strategies to Address Sexual Assault in Non-English Speaking Background Communities', Transcript, Parliament House, 23 August 2002.

3.22 Participants identified some of the complexities surrounding data collection on ethnicity and/or cultural background, including the difference between ethnicity and nationality and the fear of racism which may result from the identification of ethnicity. Given some of the sensitivities, it was agreed that there was an urgent need for courts, police and the non-government sector to work collaboratively in developing common standards for the collection of language and ethnicity data. It was agreed that any framework for data collection should state clearly that it is designed to improve the effectiveness of outcomes rather than to stigmatise groups. In Chapter 2 we made recommendations relating to data collection. The Commission intends to pursue this issue with the Victorian Multicultural Commission and the Department of Justice.

3.23 The recommendations which appear at the end of this chapter are intended to improve police awareness of the particular difficulties faced by NESB victim/survivors when reporting sexual assault.

Barriers to Reporting for Indigenous Victim/Survivors¹³³

3.24 Research indicates that rates of sexual violence are very high in some Indigenous communities. Despite this, Indigenous victim/survivors of sexual assault rarely report to police.¹³⁴ Indigenous workers and community members participating in the focus groups held by the Commission said that the problem of sexual assault was widespread and ‘endemic’ and that very few victim/survivors reported to police.¹³⁵ Inappropriate service responses, fear of police, and

133 The barriers to reporting faced by Indigenous victim/survivors outlined here emerge from two consultative processes. The first was a project undertaken by Elizabeth Hoffman House in partnership with CASA House to identify strategies that would assist CASAs to better meet the needs of Indigenous victim/survivors of sexual assault, and identify effective training and education strategies for both mainstream and Indigenous workers in their efforts to respond appropriately to the Indigenous people who seek their assistance. Focus groups were held with Indigenous workers/community members and mainstream sexual assault providers in three regions: East Gippsland, Barwon and Metropolitan Melbourne. The second process was a roundtable discussion entitled ‘Appropriate Responses to Sexual Assault in Indigenous Communities’ co-hosted by Elizabeth Hoffman House and the Commission, held at Parliament House, 18 October 2002.

134 Some studies suggest that the level of under-reporting of sexual assault by Indigenous women and children is as high as 88%: see Judy Atkinson, ‘Violence in Aboriginal Australia: Colonisation and Gender’ (1990) 14 *The Aboriginal and Torres Strait Islander Health Worker* 5, 23.

135 Elizabeth Hoffman House, *From Shame to Pride: Sexual Assault Services for Indigenous People: A Partnership Project Between Elizabeth Hoffman House and CASA House: Consultation Outcomes Report and Recommendations*, 21–2.

institutional racism within the criminal justice system were key factors deterring victims from reporting the matter or seeking assistance.¹³⁶ Culturally-sensitive support services were identified as crucial to reduce the fear of further victimisation by perpetrators and their families, or by the criminal justice system itself. Respondents expressed a need for Indigenous-specific sexual assault services, as well as more culturally-appropriate models within mainstream services.

3.25 In the focus groups conducted with CASA workers, counsellor/advocates acknowledged the difficulties they face in providing culturally-relevant services to Indigenous victim/survivors, and expressed a need to undertake more training in this area. There were, nevertheless, reports of some successful links established with local Aboriginal services and/or communities. Two regional CASAs had outreach posts at local Aboriginal community services where counsellors were available once a week to provide support and information. This had led to an increase in disclosures of sexual assault in these areas.

3.26 The role of the Aboriginal Liaison Officer (ALO) within Victoria Police was recognised by some participants at the roundtable discussion as potentially useful in developing culturally-appropriate strategies for Indigenous victims of sexual assault. An increase in Aboriginal police officers employed within the ALO and throughout the police force was identified as a strategy for long-term improvement in relations between Aboriginal people and the police.

3.27 The following priority areas emerged from the roundtable in responding to the needs of victims of sexual assault in Indigenous communities:

- a coordinated Indigenous-specific service response that includes legal, health and counselling services;
- community education about prevention and dealing with sexual assault;
- a holistic approach to the problem of sexual violence, that recognises interconnected kinship and family structures;
- recognition of the close relationship between domestic violence and sexual assault; and
- greater involvement by Indigenous people in developing culturally-appropriate strategies for police to respond to sexual assault of Indigenous people.

3.28 The recommendations which appear at the end of this chapter are intended to improve police awareness of the particular difficulties faced by Indigenous victim/survivors when reporting sexual assault.

Barriers to Reporting by Victim/Survivors with Cognitive Impairments¹³⁷

3.29 People with cognitive impairments are reluctant to report incidents of sexual assault for a variety of reasons. Many of the reasons are related to the social context within which victims live. The following factors are important.

- Dependency on the state, families or caregivers for everyday needs. Dependency, coupled with the unwillingness of some government and non-government agencies to recognise the public nature of sexual assault, leads to a denial of its existence and an unwillingness to intervene.¹³⁸
- Restricted social lives and experience which impacts upon the level of understanding of acceptable boundaries of social relations, and legal rights.¹³⁹ Victims may not disclose or report sexual assault if they do not recognise it as a crime.
- Myths surrounding people with cognitive impairments often result in their rights to sexual expression being compromised. Myths can also be used to suggest that victims of sexual assault who have cognitive impairments are not credible or are sexually provocative.¹⁴⁰

137 The Commission worked with a consultant, Ms Patsie Frawley, to develop a consultation strategy to identify some of the key issues within the criminal justice system facing victims of sexual assault who have cognitive impairments. The Commission conducted a preliminary consultation with key 'stakeholders'. This resulted in the production of an issues paper which informed two separate roundtables. A roundtable attended by representatives of advocacy groups was held on 19 September 2002. The issues identified at this roundtable were incorporated into the legal roundtable which was attended by representatives from criminal justice agencies, such as police, prosecutors and judges and was held on 26 September 2002.

138 Moira Carmody and Joan Bratel, 'Vulnerability and Denial: Sexual Assault of People with Disabilities', Jan Breckenridge and Moira Carmody (eds) *Crimes of Violence: Australian Responses to Rape and Child Sexual Abuse* (1992).

139 Ibid.

140 Ibid; Department for Women, *Reclaiming Our Rights: Access to Existing Police, Legal Support Services for Women with Disabilities or who are Deaf or Hearing Impaired who are Subject to Violence* (1996).

- Lack of access to information on sexuality and sexual rights.¹⁴¹
- Limited written and verbal skills may prevent victims from disclosing abuse.¹⁴²

3.30 A recurring theme at the roundtables was the lack of education available to people with cognitive impairments which would enable them to safely disclose and report sexual assault. The Commission heard that in certain situations, where women did not have sufficient awareness about their rights and did not understand the abusive context which they were in, the experience of mandatory reporting of sexual assault to police by the Department of Human Services can be quite traumatic. At the advocacy roundtable one worker told the Commission:

...[I]f a woman is placed in a far more powerful position, and informed about the process and what her options are—we may see some better outcomes from the law too.¹⁴³

3.31 The roundtables also noted that carers needed greater training to recognise when sexual assault had occurred. The response by staff, families and caregivers to disclosures and the collection of any evidence that might add support to the allegations are crucial to the delivery of services and the criminal justice response. A 1996 study conducted by the National Council of Intellectual Disability found that family members and staff working with the intellectually disabled in residential services felt that they lacked the skills and training required to recognise and report abuse.¹⁴⁴

3.32 Victim/survivors of sexual assault with cognitive impairments face the impediments to reporting sexual assault that other victims face, such as embarrassment, shame, and powerlessness.¹⁴⁵ However, they must also manage additional problems such as misconceptions about their credibility, their memory and their presentation as witnesses; difficulties communicating with police, lawyers and judges who are untrained in dealing with people with cognitive

141 Carmody and Bratel, above n 138.

142 Moira Carmody, *Sexual Assault of People with an Intellectual Disability* (1990).

143 Advocacy Roundtable 19 September 2002, Domestic Violence and Incest Resource Centre representative.

144 Conway, Bergin and Thornton (1996) *Abuse and Adults with an Intellectual Disability Living in Residential Services: A Report to the Office of Disability*.

145 See Australian Bureau of Statistics, *Women's Safety Survey* (1996) 32.

impairments; and lack of appropriate information about the criminal justice process.

3.33 One response to the problems experienced by people with cognitive impairments in the criminal justice system was the creation of an Independent Third Person (ITP) Program in Victoria in 1988.¹⁴⁶ The ITP program is designed to provide assistance and support to people with intellectual disabilities or 'mental impairments' during police interviews. Police must contact the Office of the Public Advocate (OPA) for an ITP if they believe that a victim of sexual assault has a 'mental impairment' or an intellectual disability. The ITP program is run by the OPA, and ITPs are volunteers. The ITP role is not seen to include advocacy. The role of the ITP is recognised in both the Police Operating Procedures and the Police Code of Practice for the Investigation of Sexual Assault.

3.34 There are currently approximately 225 ITPs operating in Victoria. The OPA recorded 112 interviews conducted by ITPs for sexual assault and rape during 2001–02.¹⁴⁷ The most recent evaluation of the ITP program conducted by Lampshire and Rolfe in 1995 found that the ITP program worked well in reducing an interviewee's anxiety; being a source of protection in relation to a real or perceived fear of being physically assaulted; and ensuring that police clarified questions the interviewees did not understand.¹⁴⁸

The report found the following problems with the program:

- a lack of clarity around the role of the ITP;
- limitations on the available skills and experience in communication;
- a lack of understanding of the role of the police;
- a tendency to use untrained ITPs; and

146 Kelly Johnson, Ruth Andrew and Vivian Topp, *Silent Victims, A Study of People with Intellectual Disabilities as Victims of Crime* (1988); Office of the Public Advocate, *Finding the Way. The Criminal Justice System and the Person with Intellectual Disability* (1987); Office of the Public Advocate and Attorney-General's Department (1988) *The Right to be Heard*.

147 Office of the Public Advocate data provided by Lisa Morrison, Coordinator of Independent Third Person Program. Please note that the data relates to the number of interviews. Several interviews may have occurred in relation to the same victim and alleged offence.

148 Lampshire and Rolfe, *The Independent Third Person Program—Evaluation*, Department of Health and Community Services Victoria. (1995) iii.

- a failure on behalf of police to recognise when an ITP was needed.¹⁴⁹

3.35 Since the 1995 evaluation, the following improvements have been made to the ITP program.¹⁵⁰

- The ITP program is now staffed by a full-time and part-time coordinator which has enabled work to be undertaken in the development of policies and guidelines for ITPs.
- A review of recruitment and selection criteria for ITPs was completed in 2001.
- A review of training has been undertaken and induction and ongoing training have been developed as mandatory requirements for ITPs.

3.36 The need for a person to assist victims with cognitive impairments when reporting to police was well-recognised at the Commission's roundtables. However, the role of the ITP was identified as an ongoing issue at the advocacy roundtable held on 19 September 2002. The main criticism was that the expectations of ITPs as volunteers are too high and the complexity of the role of the ITP is not recognised in current structures and processes. There was strong support for the ITP program to be better resourced, and for the ITP training to be accredited. There was support for the scope of the role of the ITP to be reviewed. In particular, some participants supported the ITP being trained to perform a greater advocacy role when dealing with the police.¹⁵¹



RECOMMENDATION

2. In order to ensure consistent standards of practice for Independent Third Persons when working with victims of sexual assault, the Office of the Public Advocate should develop an accredited training program. The training program should include input from CASAs and other community organisations who work closely with victim/survivors of sexual assault who have a cognitive impairment.

149 Ibid.

150 Information provided by Lisa Morrison, Coordinator, Independent Third Person Program.

151 The Intellectual Disability Resource Service in NSW, for example, have encouraged advocacy to be included in the role of the third person. New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Policing Issues*, Discussion Paper 29 (1993) [6.14] available from <www.lawlink.nsw.gov.au/lrc.nsf/pages/DP29CHP6>.

3.37 When victim/survivors with cognitive impairments do report sexual assault, the Commission was told that police continue to have difficulties in correctly identifying whether a person has an impairment and the nature of that impairment. If police officers lack the necessary skills and knowledge to accurately identify a cognitive impairment, they cannot implement the appropriate procedures, no matter how comprehensive police guidelines may be for dealing with victims or offenders with impairments.

3.38 Another problem identified during consultations was the use of inappropriate communication techniques when dealing with victim/survivors with cognitive impairments. This applies to all personnel within the criminal justice system, in particular police, prosecutors and judges. The following factors have been identified in research as contributing to the difficulties experienced by intellectually disabled people¹⁵² when being questioned by the police:

- difficulty in understanding the language used by police;¹⁵³
- difficulty with reading;¹⁵⁴
- fear of authority;¹⁵⁵
- lack of guidelines for police interviews;¹⁵⁶
- susceptibility to influence by authority figures and to suggestive questioning;¹⁵⁷
- difficulty with questions concerning times and dates;¹⁵⁸ and
- common misconception by police that communication strategies for the intellectually disabled are the same as for children.¹⁵⁹

152 Research on the difficulties experienced by people with mental illnesses, dementia or brain injuries when being interviewed by the police is limited.

153 Johnson, Andrew and Topp, above n 146, 52.

154 Ibid.

155 Ibid, 38.

156 Ibid, 53.

157 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Policing Issues*, Discussion Paper 29 (1993), Chapter 6: Police Investigations, para 6.4, available from: <www.lawlink.nsw.gov.au/lrc.nsf/pages/DP29CHP6>.

158 Ibid.

159 Mark Brennan and Roslin Brennan, *Cleartalk, Police Responding to Intellectual Disability* (1994), 51–8.

3.39 The ITP can help to address some of the difficulties listed at the stage when a statement is made. Victim/survivors continue to experience difficulties after this point in the investigation, for example, when police inform complainants of decisions not to proceed, or during pre-court preparation.

3.40 Since 1996 in Victoria, the use of video- and audio-taped evidence (VATE) for victims of sexual assault with mental impairments has minimised some of the problems associated with taking and endorsing police statements.¹⁶⁰

3.41 Nevertheless, there has not been an independent evaluation of VATE that focuses on victims' experiences of the process. During the consultations, the Commission was told that the majority of VATE tapes are not used at trial.¹⁶¹ In Chapter 6, the Commission recommends an independent evaluation of VATE.¹⁶²

3.42 The Commission believes that the most appropriate way to improve police responses to victim/survivors with cognitive impairments is through training. The SOCA Unit police training is recognised as having the most information on the needs of victims with cognitive impairments.¹⁶³ Other Victoria Police training courses, such as the Constables Course, the Crimes Courses and the Sexual Crimes Squad training could also benefit by drawing on aspects of the SOCA

160 In 1991 the *Crimes (Sexual Offences) Act 1991* s 11(1) amended section 37B of the *Evidence Act 1958* to allow evidence-in-chief of witnesses for the prosecution in sexual offence cases to be given in the form of an audio or video recording of questions put to the witness by a 'prescribed person'. In 1996, a state-wide system of pre-trial video and audio recording was introduced by Victoria Police. For difficulties in making a statement see Georgina Connelly and Jennifer Keilty, *Making a Statement: An Exploratory Study of Barriers Facing Women with Intellectual Disabilities When Making a Statement about Sexual Assault to the Police* (2000).

161 Any specific problems that prosecutors identify with the quality of VATE tapes are communicated via the existing liaison committee between Victoria Police and the Office of Public Prosecutions regarding VATE statements. This is a committee to monitor the outcome of VATE statements used in judicial proceedings that meets quarterly. The SOCA Unit Coordination office then feed back this information directly to SOCA Unit members who made the VATE tape. The VATE unit at the SOCA units coordination office is responsible for monitoring the quality of VATE statements.

162 See Recommendation 74.

163 The SOCA Units course provides two and a half hours training on 'Intellectual Disability and Communication Failure', and one and a half hours on 'Mental Illness'. There is also a full day spent conducting VATE interviews with mentally impaired persons and another day training and exercises on guidelines for VATE. The training on intellectual disability and mental illness is conducted by a worker from the Department of Human Services (DHS). The training in 2002 on ITPs was conducted in cooperation with the Office of the Public Advocate.

Unit training. The Commission makes recommendations on improvements to police training later in this chapter.¹⁶⁴

3.43 Some of the barriers to reporting identified in this section arise from factors other than the police processes and cannot be overcome simply by focusing on the police. However, implementation of the recommendations on training would enhance police understanding of the difficulties faced by victim/survivors of sexual assault and the barriers they need to overcome. This should encourage police responsiveness to initial inquiries and, in the longer run, may encourage more victim/survivors and their families to report sexual offences to the police. In the next section of this chapter we deal with police responses after an offence is reported.

PROVIDING AN APPROPRIATE POLICE RESPONSE

3.44 The first point of contact between victim/survivors of sexual assault and the criminal justice system is usually made when they decide to report the assault to the police. Police play a critical role in ensuring that the system is responsive to those who report sexual offences. The way people are treated by the police will often determine whether they feel able to continue with the legal process or whether they instead decide to withdraw their complaint. Victim/survivors' experiences with the police may also affect how other victims feel about pursuing a criminal justice response.

3.45 Over the past decade in Victoria there have been considerable changes and improvements in the police management of sexual offences.¹⁶⁵ Most notably, the introduction of a Police Code of Practice for the Investigation of Sexual Assault Cases in 1992 marked an important step in recognising that the police response and the requirements of any subsequent investigation must be appropriately balanced with the need of victim/survivors to be adequately supported through the criminal justice process. The Code of Practice has been evaluated once since it

164 See in particular Recommendation 10.

165 However, in recent years there is some evidence to suggest that the rates of reporting have actually plateaued. The number of reported rapes and other penetrative assaults in Victoria, for example, has remained relatively constant over the past eight years. See above para 2.15.

was introduced. However since that occurred in 1993,¹⁶⁶ there has been no independent review of its operation.

3.46 As part of this reference, the Commission is undertaking two stages of research into police responses to reports of sexual assault. The first stage, which is reported below, involved conducting focus groups with five CASAs on factors affecting victim/survivors' decisions to report sexual assault. The second stage of research, which is yet to be completed, will involve focus group discussions with police from Sexual Offence and Child Abuse (SOCA) Units and detectives from Criminal Investigations Units (CIU) on responses to reporting, and an examination of casebook narratives completed by individual police members after a report has been made.

3.47 This section begins by describing the background to the current framework for police handling of reports of sexual assault. It then examines perceptions by CASA workers about working relationships with police, and discusses difficulties with the operation of the Code identified in focus groups.

The Police Code of Practice

3.48 The development of the Code of Practice emerged out of the previous Law Reform Commission of Victoria's reference on rape offences, which placed an emphasis on exploring how the reporting process could be improved for victim/survivors of sexual assault. While considerable efforts had been made by Victoria Police throughout the 1980s to provide a more sensitive approach to victims, there were still a number of problem areas. The principal concern was the extent to which police members often prioritised the needs of any investigation over and above ensuring that victims received immediate counselling support and medical care. For example, women were often required to make a full statement about what occurred or were taken back to the scene of the assault prior to any consideration being given to their need for emotional support or medical care. Victim/survivors also felt that police were sometimes unsympathetic or insensitive to what they had been through and seemed to treat them as if they were 'just another piece of evidence'. Some victims also felt that some police, particularly the detectives, questioned their credibility or were openly sceptical about whether the assault had actually occurred.

166 See Melanie Heenan and Stuart Ross, *Police Code of Practice for Sexual Assault Cases: An Evaluation Report*, Report No 1, Rape Law Reform Evaluation Project, Department of Justice, (1994).

3.49 A working party was established by the previous Commission consisting of representatives from Victoria Police, counsellor/advocates from CASAs and forensic medical officers. Their brief was to develop a set of protocols that aimed to clarify the roles and responsibilities of the police and other agencies in providing an appropriate response to victims of sexual assault. The parties agreed that the Code's 'fundamental principle' should start with treating the care of 'the victim [as] the number one priority'.¹⁶⁷ In this way, the Code symbolised a new approach to thinking about sexual assault which placed the emphasis on developing a best practice model that could help to reduce the trauma experienced by victim/survivors in reporting sexual assault to the police.

3.50 The aims of the Code of Practice are to:

- provide a coordinated approach to the handling of sexual assault cases (regardless of the age or gender of the victim) by Victoria Police, CASAs and other victim assistance programs;
- increase the confidence of sexual assault victims and the public in police management of sexual assault cases so as to increase the reporting of sexual offences;
- increase the apprehension of offenders;
- maximise successful prosecutions; and
- minimise trauma experienced by sexual assault victims during the investigative process.

3.51 The Code consolidates an approach to sexual assault that recognises as critical the point at which victim/survivors make their initial disclosure. The central mechanism that drives the police response in this context is a requirement that victim/survivors receive immediate crisis care¹⁶⁸ after reporting sexual assault to the police, or at the very least within two hours after the arrival of the first

167 Victoria Police, *Code of Practice for the Investigation of Sexual Assault* (2nd ed, 1999) 1.

168 Crisis care is provided by counsellor/advocates working at CASAs. Specially designed crisis-care facilities were established by the CASAs at specific hospitals to allow for a coordinated approach for responding to the needs of victim/survivors of recent sexual assault that is both private and non-clinical. At the crisis-care unit, victim/survivors are offered crisis counselling, advocacy support, and medical care or a forensic medical examination. A separate room is also available for the attending police. (See Kate Gilmore and Lise Pittman, *Breaking the Silence—To Report or Not to Report: A Study of Victim/Survivors of Sexual Assault and Their Experiences of Making an Initial Report to the Police*, CASA House, (1993) 16.

police member.¹⁶⁹ The significance of crisis care in the context of recent sexual assault is widely recognised in the field. According to CASAs 'it is often the quality of care provided to the victim at the point of crisis [that] will have a critical influence on her long term well being'.¹⁷⁰ It will almost certainly also affect victim/survivors' willingness to proceed with making a police report.¹⁷¹

KEY FEATURES

3.52 In an operational sense, the Code distinguishes the steps that ought to be taken by police members when responding to reports of sexual assault, and includes (in chronological order) guidelines for:

- members who receive the initial reports;
- procedures to follow for victims who decide against any further police action;
- members who are first on the scene;
- community policing squad members (now SOCA Units);
- members who are interviewing sexual assault victims; and
- investigators.

3.53 The key features of the Code attempt to ensure that all police members remain conscious of their obligation to treat victims of sexual assault with sensitivity and respect. In particular, they emphasise how important it is for police to:

- allow the victim as much control as possible over the situation;
- never presume an allegation of rape is false until it is thoroughly investigated;
- consider the range of emotional responses that victims may have following an experience of sexual assault;
- provide victims with copies of their statements as soon as possible; and

169 See Victoria Police, above n 167, Guidelines 5, 43, 65.

170 CASA House, *The Counsellor/Advocate's Role in the Provision of Crisis Care to Victims of Sexual Assault*, Rationale Paper No. 3 (1987) 4.

171 Law Reform Commission of Victoria, *Rape: Reform of the Law and Procedure: Interim Report No 42* (1991) 17.

- keep victims informed about the progress of the investigation and any decisions made.

3.54 Revisions to the Code in 1999 included:

- specifying the importance of police providing an interpreter of the same sex as the victim to assist in cross-cultural communication from the time of the initial report through to the conclusion of the investigation; and
- clarifying the roles and responsibilities for personnel providing support to victims who have intellectual disabilities or who are ‘mentally impaired’.

3.55 The Code also established a framework for managing breaches of its guidelines where the response of both police and CASA workers could be the subject of a formal complaint. The Code contains provisions for monitoring adherence to its guidelines. It also requires CASAs and police to establish regional liaison committees where any problems with the Code can be raised openly and resolved at the local level.

EVALUATION

3.56 An evaluation of the Code undertaken in 1993 revealed that when the guidelines were followed, victims often received a professional and sensitive response from police, counsellors and forensic medical officers. A significant proportion of victim/survivors surveyed also spoke positively about their contact with police, particularly Community Policing Squad members (now SOCA Units).¹⁷² Nevertheless, there were a number of concerns that emerged in the evaluation including: a lack of knowledge of the Code, especially amongst detectives and uniformed members, and problems with police perceptions of the Code, as well as a number of occasions where there appeared to be a lack of compliance with the Code’s guidelines. Most disturbing was the extent to which police readily disclosed high levels of scepticism towards victims’ complaints, often prior to any investigation having been initiated.¹⁷³ Victoria Police were responsive to many of the recommendations and were committed to strengthening its operation through more targeted training initiatives being developed. Since the evaluation, however, there has been no detailed examination of the processing of

¹⁷² Heenan and Ross, above n 166, 77.

¹⁷³ Ibid 71.

sexual assault reports. Nor has there been any further review of how well the Code of Practice is working 10 years after its introduction.

3.57 In recent years there appears to have been a greater willingness on behalf of victims of sexual assault to disclose. During the focus group discussions, each of the CASAs spoke of the significant increase in demand for services and the waiting periods that victims are often forced to face before being provided with counselling support. However, as previously noted, this has not necessarily translated into an increased preparedness on behalf of victim/survivors to report to police.

Statewide Steering Committee on Violence Against Women

3.58 Recently, Victoria Police announced a commitment to developing a new strategy for responding to the issue of violence against women. This followed a comprehensive review of police practices in the areas of domestic, or family, violence and sexual assault through undertaking a series of consultations with police members and service providers. The strategy is designed to:

...provide a platform from which tasks can be actioned, mechanisms established and relationships built to substantially improve, in a sustainable manner, the attitudes, processes, policies and structures of Victoria Police. This will allow Victoria Police to be a leader in meeting the diverse needs and expectations of all victims and the community in addressing violence against women.¹⁷⁴

3.59 This includes a statewide approach to dealing with issues such as training, data collection, operational procedures and increased police accountability in responding to reports of sexual assault and domestic violence.¹⁷⁵ It is hoped that this process will help victims 'feel confident that their report will lead to a seamless service from police and other agencies and services'.¹⁷⁶ The research reported in this chapter will further assist this process by acknowledging where there have been substantial areas of improvement in service delivery by police, while also helping to identify what else could be done to improve the quality of the police response.

174 Victoria Police, *A Way Forward: Violence Against Women Strategy: A Summary of the Review into all Matters Related to Violence Against Women* (August 2002) 5.

175 Ibid. The strategy includes 25 recommendations designed to improve the police response to both sexual assault and domestic violence.

176 Ibid, 'Message from the Chief Commissioner' (2002) 1.

RELATIONSHIP BETWEEN CENTRES AGAINST SEXUAL ASSAULT AND VICTORIA POLICE

3.60 As part of the research examining the police response to victim/survivors, Commission researchers conducted a survey of fourteen CASAs to discuss their perceptions of the current working relationships between their agencies and the police.¹⁷⁷ In particular, CASAs were asked about:

- whether regional liaison committees had been established with local police;
- how well the Code of Practice was working; and
- how breaches of the Code were generally dealt with.

Regional Liaison Committees

3.61 Nine of the 14 CASAs have established regional liaison committees (RLCs) in their areas. The committees are mostly constituted by the CASA Coordinator, counsellor/advocates and local SOCA Unit members. Some CASAs have secured the involvement of CIU members, and in one metropolitan service, a representative from the Sexual Crimes Squad (formerly the Rape Squad) also attended. Forensic medical officers and some local general practitioners involved in the part-time provision of forensic services are also involved in attending the committee meetings held by some CASAs.

3.62 Most committees evolved within a year or two of the Code having been introduced and meetings were generally held quarterly. For other CASAs, a committee had been established once the service had been expanded to include crisis care for recent victim/survivors. In one regional area, a committee made up of CASA workers and local police have already been meeting for well over a decade. The police in this region had been integral to the initial establishment of the service.

3.63 Overall, the impression given by CASAs is that regional liaison committees serve as a good ‘networking opportunity’ to build on, or maintain, good relationships with local police—being ‘about information sharing’, ‘touching base’ and ‘a space to review the current situation’. Most CASAs described the

¹⁷⁷ The Gatehouse Centre was not approached in this context given that the service is directed exclusively at child victims of physical, emotional and sexual abuse, whereas other agencies and institutions are routinely involved in providing a crisis-care response.

meetings as a forum for discussing wider issues relevant to the delivery of services to victim/survivors or the operation of the Code, rather than an environment through which to raise specific instances of non-compliance, or complaints related to individual police members. Other CASAs felt that the committee meetings were a useful forum to raise particular issues if there had been a number of problem incidents of a similar nature. One CASA also suggested that problems between the various divisions of police might also be addressed at a meeting. For example, where SOCA members have taken issue with the approach or involvement of CIU members at a crisis-care unit, it has been useful for the matter to be raised by CASA at a RLC to avoid creating unnecessary tension between police sections.

3.64 Four out of the five CASAs who did not have RLCs were regional services. The size of the region and the number of police stations that exist within each division may make it difficult to establish an RLC for these areas. Representatives from SOCA units on such a committee would have to travel considerable distances from a number of locations to attend meetings. Each of these services felt that there were less onerous and less formal avenues in place for dealing with any problems that arose. They tended to rely on making direct contact with the SOCA units involved. The one metropolitan service that did not have a committee nonetheless felt that the method they used for managing concerns that arose with police was extremely effective and less confrontational. For this reason, the Commission does not recommend that additional RLCs be created at this stage.

Current Issues with the Code

3.65 Five of the fourteen CASAs said there had been no specific problems with police or with the operation of the Code over the past 12 months. They indicated that the Code 'generally works very well', and that good CASA-police relationships (particularly with SOCA units) meant that few problems emerged. Some regional CASAs which do not offer a crisis-care service felt that the Code was less relevant for them. As one CASA representative said: 'We have limits on our service which means the process outlined in the Code for dealing with recent sexual assaults cannot be observed'. At the same time, these services had often adapted the principles of the Code to make arrangements with local police for the best way to organise referrals.

3.66 Some other CASAs, however, identified problems that had arisen with the Code in recent times. These included:

- different views regarding which CASA should be attended;
- when crisis care ought to be coordinated; and
- problems with the police response.

WHICH CASA SHOULD BE ATTENDED?

3.67 The metropolitan CASAs each talked about the current interpretation of paragraph 5 of the Code which refers to the victim being taken to the ‘nearest CASA or hospital Crisis Care Unit (CCU) as soon as possible’ (emphasis added). The problem appears to lie in differing perceptions about how ‘nearest CASA’ ought to be interpreted. Police say they have generally understood the guideline to mean nearest to where the report was made, or nearest to where the offences occurred. In contrast, CASAs have routinely interpreted the guideline to mean nearest to where the victim resides. Service boundaries between CASAs were originally intended to provide greater access to ongoing counselling support for victims. This has also been the approach taken by the statewide sexual assault telephone crisis service that is responsible for coordinating an after-hours crisis-care service. The location for the HCCU is determined by first establishing where the victim resides.

3.68 Differences in interpretation of this guideline have recently created tension between Victoria Police and CASAs. For example, police may take a woman victim who was sexually assaulted in Frankston, but who lives in Footscray, to the South East CASA (Monash Medical Centre). It would obviously be difficult for her to access follow-up counselling at South East CASA as opposed to Western CASA (which is located in Footscray). However, according to the police, the demands on their resources means it may make more sense from their perspective to transfer the victim to the crisis-care unit at South East CASA, and may also minimise travel time for the victim/survivor in the period shortly after the assault.

3.69 The development of the Code was intended to explicate, with some specificity, the importance of a crisis-care response providing victim/survivors with continuity of care after the initial report. The working group involved in the original development of the Code accepted the proposition that victim/survivors were far more likely to access follow-up counselling with a service with which they

have already had some contact.¹⁷⁸ Moreover, if the original contact point is close to where the victim/survivor resides, it is likely to maximise the possibility that victim/survivors will access the service.¹⁷⁹

3.70 It has also come to the attention of the Commission that forensic medical officers (FMOs) have, on occasion, also been playing a role in determining which CCU should be attended. According to CASAs, where FMOs are already in attendance at one CCU examining a victim of sexual assault, they will sometimes refuse to attend at another, if a second ‘call-out’ for sexual assault occurs. For example, an FMO may be conducting a medical examination at Monash Medical Centre (South East CASA), and receive a call from police concerning a report made in the city. The FMO would then normally be required to attend at the CCU at the Royal Women’s Hospital (CASA House). On occasion, according to CASAs, the FMO has refused to attend at the other CCU and directed police to convey the victim to the CCU where the FMO is already in attendance. This is clearly not in line with the Code of Practice.

3.71 The Commission understands that this issue is to be given priority within the terms of reference of the newly established Sexual Assault Liaison Committee, which will include representatives from CASAs, the Victorian Institute of Forensic Medicine, the Victorian Forensic Science Centre, the Sexual Crimes Squad, the Office of Public Prosecutions, the SOCA Units Co-ordination Office, and other key stakeholders. The Commission supports this process. However, the Commission is concerned that important principles upon which the Code was first developed may be subject to change or reinterpretation in order to manage what could be transitory difficulties with resources, or the result of decisions being made by local metropolitan divisions.

178 This rationale is also firmly established within various schools of crisis intervention theory when considering best practice models for the development of the counselling relationship.

179 At the time of the evaluation, the research did not reveal any lack of consensus around how the Code should be interpreted on this point.



RECOMMENDATION

3. The meaning of the requirement that people reporting a recent sexual assault should be taken to the nearest Centre Against Sexual Assault or hospital Crisis Care Unit should reflect the principles upon which the Police Code of Practice for Sexual Assault Cases was first based. The Code should be interpreted to ensure victims receive continuity of care and to optimise their future access to counselling services.

WHEN SHOULD CRISIS CARE BE ARRANGED?

3.72 There is also some disagreement about whether the Code should apply in situations where there has been a sexual assault, but where a medical examination may not be required, for example, where the victim has been indecently assaulted, or where there is an assault with intent to commit rape and there are no physical injuries. The Commission has been told that some police do not regard the Code as applicable in this situation.

3.73 The Code of Practice is clear on this point. The guidelines state that the police should use the Code when responding to reports of rape, indecent assault and 'other forms of sexual assault', and that they should also be applied 'regardless of when an assault occurs'.¹⁸⁰ The Code was never intended to be limited to situations where a forensic response or medical attention is required. On the contrary, it was designed to coordinate a response to victim/survivors that placed counselling and emotional support at a premium. It was also the point at which victims would be informed about their legal and medical options so that they could exercise some choice or make decisions for themselves about what steps they might take next in the process.

3.74 This was identified as a problem in the evaluation of 1993 where there were a small number of cases reported of police having independently decided that no medical examination was required, and then failing to notify CASA of the need for crisis-care attendance.¹⁸¹ Victims in these contexts were therefore denied access to immediate counselling support or medical care that may well have been

¹⁸⁰ Victoria Police, above n 167, 1.

¹⁸¹ Heenan and Ross, above n 166, 94–5.

required. The Code was subsequently amended to state that the ‘forensic medical officer is the only person who can make the decision as to whether a medical examination ought to be conducted’.¹⁸²

3.75 Given the sensitivities of this issue, it is also not uncommon for victim/survivors to sometimes hesitate in disclosing the full nature of the assault when they first contact the police. Victim/survivors may feel more able to describe the extent of what occurred in the context of a crisis-care response, where they can speak more privately to a counsellor.



RECOMMENDATIONS

4. The Police Code of Practice for Sexual Assault Cases should be complied with in all cases. Police should be made aware that the guidelines apply for any sexual assault, regardless of when the assault occurs. The Code should also be activated whether or not medical attention or a forensic medical examination is required.
5. The Sexual Assault Liaison Committee should consider the most appropriate means of ensuring that police and forensic medical officers are familiar with accurate interpretation of the Code’s guidelines, including the inclusion of material in training sessions, redistributing copies of the Code, and issuing ‘refresher’ documents that clearly state the position on these issues.

RESPONDING TO BREACHES OF THE CODE

3.76 All of the CASAs who participated in the survey were aware that they could lodge an incident report to complain about breaches of the Code’s guidelines. However, incident reports were only ever used as ‘a last step’, where the issues ‘cannot be resolved any other way’, or when a breach is too serious to merely have a conversation’. Some CASAs reported that they had literally never had sufficient cause to lodge an incident report in relation to the police. One other regional CASA indicated that they would be unlikely to ever lodge a formal incident report for fear of ‘a breakdown in working relationships’. The coordinator described how their relationships with police had been built up over

182 Victoria Police, above n 167, 11.

many years and stressed how important it was for them to find alternative approaches for resolving any problems: 'We don't just see the police in the context of the service; they are members of the community. We interact with them on a range of levels both in and out of the workplace.'

3.77 Some CASAs which had used incident reports as a means of dealing with breaches of the Code described the police as generally responsive to the process. One metropolitan CASA described a recent situation of having lodged several complaints over a short period of time in relation to the conduct of SOCA Unit members. The SOCA Coordination Unit responded quickly and took primary responsibility for examining the complaints. The CASA coordinator said they were 'satisfied with the response and felt that the issues had been dealt with appropriately'.

3.78 By contrast, another CASA felt they received 'varying responses' following the lodgement of incident reports. The coordinator indicated one example of submitting an incident report after police had refused to take a statement from a male victim who had an intellectual disability, because they were not satisfied that any crime had been committed. According to this CASA, the follow-up from the divisional heads of the SOCA Unit did not adequately address the specific instance, although there was some commitment made by police that the situation would not be repeated. In the future, statements would always be taken and a determination about the future laying of any charges would reside with the divisional officer-in-charge.

3.79 Centres Against Sexual Assault were also asked about other strategies they might employ to address any concerns that arise with police, apart from lodging a formal incident report. Without exception, coordinators suggested that their main strategy for dealing with problems with the police response was to address them directly. This would generally involve a phone contact with the senior sergeant of the SOCA Unit. According to one metropolitan service:

The main approach is an informal one. But it works really well...the OIC [Officer-in-Charge] is extremely responsive to any concerns we have...it's a relationship that's valued...I contact the OIC by phone and discuss the incident. There is usually a discussion with the member or members and a response is fed back to us.

3.80 This approach was echoed by a number of other CASAs who were confident that maintaining 'an open dialogue with police' was the most effective means for ensuring an ongoing commitment to improving the situation for

victims. One coordinator suggested that employing a 'more softly, softly approach' had meant that a range of issues could be 'discussed off-the-record' which invariably meant that issues were resolved more quickly and efficiently. Centres suggested that these less formal measures for managing any issues that arose with police had fostered a greater commitment by them to be involved in other CASA-related activities. For example, CASAs suggested it was now easier to secure the participation or involvement of police in the development of new programs or campaigns that targeted issues in relation to sexual assault or violence against women.

3.81 By contrast, CASAs felt that problems with CIU members could not be addressed using these less formal strategies alone. The relationships were often 'fairly distant' and had simply not developed to the extent that CASAs could confidently expect an adequate response based on informal contact being made with the heads of CIU divisions. The potential for improved relationships between CASAs and CIUs was evidenced by two services which had established workable lines of communication with the senior sergeants of the CIU divisions. However, according to the coordinators of these services, these depended on a range of factors coming together, such as the sergeant having had reasonable exposure to the issues surrounding sexual assault, the length of time they have occupied the position, and the value they placed on maintaining good-will between their two agencies.

3.82 A recent report published by CASA House also revealed some additional problems with the Code. According to research with counsellor/advocates, there were four areas of the Code where problems with compliance were identified. These were summarised as follows: placing investigatory needs above the care of the victim; not providing a police member of the same sex as the victim/survivor to take the statement;¹⁸³ not maintaining regular contact with victim/survivors about the progress of the investigation; and not always referring victim/survivors to a CASA.

3.83 The Code of Practice states that 'unless the victim otherwise requests, a SOCA member of the same sex should conduct the interview and take a full

183 An unpublished Victoria Police report makes reference to this issue highlighting the difficulties associated in meeting this guideline. According to police, female SOCA unit members are not always available to take statements. In regional areas, there are even fewer women SOCA unit members occupying positions. The report also suggests that victims are less inclined to be concerned about the sex of the interviewing police member as long as they are treated sensitively and professionally.

statement' from the victim.¹⁸⁴ During various consultations with the Commission, CASAs reported that given the level of intimate detail that is required, female victim/survivors often expressed a preference for female police members to take their statements. This was also the position taken by some victim/survivors who made submissions to the Commission.¹⁸⁵ In addition, the police also identified the issue of male victims requesting access to a female interviewing member. Currently the Code directs that a male interviewing member is obliged to take the statement if the report involves an assault against a man or boy. The police suggest, in these situations, some flexibility should be exercised when interpreting this guideline.

SUMMARY

3.84 In summary, the following points can be made concerning the relationship between Victoria Police and Centres Against Sexual Assault.

- Over the past decade the working relationships between CASAs and police have generally improved. Most CASAs have been able to establish an effective and ongoing dialogue with local SOCA units through the regional liaison committees.
- Centres Against Sexual Assault spoke highly of their working relationships with local SOCA units. Indeed, some CASAs were unable to identify any problems with respect to the SOCA response to victim/survivors who had accessed their service over the past 12 months.
- The Code of Practice continues to provide the basis for an efficient, professional and appropriate response to a majority of victim/survivors.
- There are nevertheless some outstanding problems that relate to the current interpretation of some of the guidelines which require immediate attention.
- There are additional concerns with the attitudes of some police, particularly CIU members. These issues will be further explored in the next section.

184 Victoria Police, above n 167, Guideline 54, 13.

185 Submissions 16 and 26.

Investigating Reports

3.85 Studies have consistently documented the high rate of attrition following reports of sexual assault.¹⁸⁶ The data reported in Chapter 2 suggests that only around one in five and a half reports of rape and less than one in seven reports of incest or offences involving charges of sexual penetration of children under 16 years ultimately proceed to prosecution.¹⁸⁷ Moreover, there is evidence to suggest that the reporting rate of sexual assault may actually be waning, with the proportion of victims reporting sexual assault, per 100,000 head of population, decreasing from 63.3 in 1993 to 53.7 in 2001.¹⁸⁸

3.86 The research reported in Chapter 2 also revealed an increase in the numbers of complaints being withdrawn by victim/survivors following their initial reports. Almost a quarter of rapes (24.8%) recorded by police during 2001–02 were withdrawn, 138 more reports than had been recorded in 1994–95.

3.87 These findings were consistent with the views expressed by CASAs during the focus groups. Most counsellor/advocates reported that investigations rarely resulted in charges being laid or briefs being authorised by the police for prosecution. One counsellor/advocate commented that, ‘the most common experience is for there to be a statement made [by the victim/survivor] and [for] nothing else [to] follow...the most prevalent process is that they just don’t proceed’. This failure to proceed was mainly understood to reflect the broader difficulties faced by sexual assault victim/survivors in the context of a criminal justice system that requires evidentiary proof of the assault having occurred. This was especially the case for victim/survivors of past sexual assault whom counsellor/advocates said were often greatly disappointed by being told that no charges would be laid.

3.88 Where police cannot lay charges because they are restricted by the substantive law, it is important that this is communicated effectively to complainants at an early stage. This will ensure that the complainant does not have her expectations raised through the process. For example, the Commission heard from a victim/survivor of sexual abuse perpetrated by her then husband

186 See for example Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure, Appendixes to Interim Report No 42* (1991).

187 See 2.37–2.44.

188 Australian Bureau of Statistics, above n 39, 19. Note that this rate covers both penetrative and non-penetrative sexual offences.

during 43 years of marriage.¹⁸⁹ The police did not lay charges for sexual assault saying that there was insufficient evidence. The victim/survivor requested a review of this decision from the Office of Public Prosecutions (OPP). The OPP told her that there was no prospect of conviction and advised her that prior to 1986, rape in marriage was not an offence, and therefore most of the allegations made could not be prosecuted.¹⁹⁰

3.89 There was some concern expressed about an apparent lack of consistency in the outcomes of investigations. One counsellor noted how ‘charges might be laid in certain contexts and not others even where there are strong similarities in the actual cases’. Inconsistent responses most often occurred in circumstances where the evidence for the allegations rested solely on the victim’s word. The Commission was told by a victim/survivor that her initial report in 1996 of sexual assault did not result in charges being laid.¹⁹¹ The police told her, ‘You are in no condition for a rape trial’, and then suggested she return ‘in 10 to 20 years’. The victim/survivor reported the same incidents in 2001 at another police station and her statement formed the grounds for a prosecution on more than ten counts of sexual offences.

3.90 Workers from CASAs all agreed on the importance of police communicating with victims directly about decisions that are made about the future of investigations. There were a number of examples provided by counsellors of victims not being adequately informed about why an offender was not charged with an offence, and how this often translated into victims feeling disbelieved – ‘for them emotionally it feels like he’s got away with it, and there is no justice and the system sucks...you go and do the right thing and then nothing happens and they feel like he’s got away with it...’. As one counsellor/advocate suggested, ‘they need a humanised way of communicating to victims that there may be difficulties for cases to proceed’.

189 Submission 40.

190 In Victoria until 1986 there existed a marital rape immunity. A husband could not be prosecuted in relation to sexual offences committed upon his spouse. The *Crimes (Amendment) Act 1985* s 10 amended sub-section 62(2) of the *Crimes Act 1958*. Sub-section 62(2) now states: ‘The existence of a marriage does not constitute, or raise any presumption of, consent by a person to an act of sexual penetration with another person or to an indecent assault (with or without aggravating circumstances) by another person.’

191 Submission 22.

3.91 At present the victim must request reasons for the decision not to charge the alleged offender. Counsellors felt that it would be useful if there were written reasons provided to victims as a matter of course, so that there is some transparency about why some cases proceed and others are viewed as having no reasonable prospect of conviction.

3.92 Some counsellors described occasions where considerable efforts were made by SOCA members to ensure victim/survivors had a clear understanding of why the case could not proceed. Victim/survivors in these contexts were less likely to view the outcome as being related to some particular feature of the allegations or as indicative of the police simply not believing them. The Commission believes that this issue should be addressed in police training.

3.93 Issues were also raised about the reluctance of some police to take a 'no further police action' (NFPA) statement from a person who reports a sexual assault. Some victims may want to report the offence so that police are aware of the offender, but do not feel able to continue with the criminal justice process. Counsellors talked about how reporting an offence but then making an NFPA statement might be '[the client's] objective from the outset' or, as one counsellor suggested 'it's sometimes more about a need to have it recorded somewhere...for a lot of clients [making a police report] can be extremely powerful. The view of CASAs is that victims should always have the opportunity to withdraw the complaint or make an NFPA statement.

3.94 A small number of victim/survivors who made submissions or attended consultations held by the Commission¹⁹² described situations where police either threatened to lay, or in fact initiated, charges against them for making a false report, after they had indicated their reluctance to proceed with a police report. In two instances, the case involved victim/survivors who had intellectual disabilities. In each of these instances, the women withdrew from further counselling.

3.95 For victim/survivors of recent assault, there is sometimes very little opportunity to consider whether reporting is really the option they want to pursue:

192 The CASA House report also suggested that this situation has led some victim/survivors to feel that the only way of preventing the continuation of an investigation is to claim their original allegations were false, leaving them vulnerable to a criminal charge of making a false report. See Haley Clark, above n 126, 15.

The air surrounding recent assaults means that the response often snowballs and victims feel compelled to keep going especially given the resources put in, like they've had a medical examination...they feel they have to report.

3.96 Frustration with the time taken to bring the matter to court may also contribute to some victim/survivors' decisions not to continue:

There's no doubt that delays in terms of court processes are the sorts of things that do wear people down and lead them to want to get out.

3.97 The problem of delays with investigations was a common theme for many of the victim/survivors who made contact with the Commission and has been identified as a recurring issue in previous research looking at the police management of sexual assault cases. This was sometimes part of a broader failure by detectives to keep victims informed about the progress of the investigation. On other occasions, victims felt frustrated at not being told, or being helped to understand, the particular reasons for the delay. This almost certainly adds to the stress and anxiety victims often feel as they await the outcome of investigations. In this context, withdrawing their initial complaint may be a way for victims to regain a sense of control, or at least predictability, about the next stages of their lives.

3.98 Victim/survivors from NESB backgrounds who report sexual assault often experience a long and drawn out process. This is due in part to a shortage of adequately trained female interpreters who are equipped to handle reports of sexual assault.¹⁹³ The Commission was told in consultation that police sometimes rely on family members or friends to interpret during an investigation or when taking statements. Communication difficulties are experienced by victim/survivors from NESB backgrounds throughout the investigation phase. The Commission was told that interpreters are not often used beyond the reporting stage. Basic information that is easily accessed by other victim/survivors is often unavailable to NESB victim/survivors. For example, there is no automatic provision for NESB victim/survivors to have their statements translated into their first language. The statement functions as the principal source of evidence throughout each stage of the criminal justice process. It is imperative that a victim/survivor have a copy of her statement for the prosecution process to prepare her.

193 Notes of meeting with Immigrant Women's Domestic Violence Service, 27 March 2002.

SUMMARY

3.99 In summary, the following points can be made in relation to the police investigation of reports of sexual offences.

- Most reports do not result in charges being laid.
- Counsellor/advocates from CASAs say that victims are sometimes given 'false promises' about the offender being brought to justice.
- There appears to be a lack of consistency when police consider whether briefs will be authorised for charges to be laid and for prosecutions to be initiated.
- Police do not routinely provide written reasons explaining why a decision is made not to proceed with further investigation or to lay charges.
- Victims withdraw their complaints for a range of complicated reasons that may have to do with their treatment by police, or their fears about the implications of pursuing a criminal justice response, or the lengthy delays in bringing the offender to court.
- Victims sometimes face difficulties in wanting to withdraw their complaints where police exercise their authority to pursue investigations in spite of the victim's wishes.
- There are lengthy delays in the processing of investigations.

How Victim/Survivors Experience the Police Response

3.100 During the focus group discussions, counsellor/advocates were also asked directly about victim/survivors' experiences with police. Their comments covered victims' experiences with general duties police, with police in SOCA units and with members of CIUs.

3.101 Some counsellor/advocates expressed concerns about the response of general duties members of the police to reports of assault. This response was identified as particularly critical given that they are quite often the first point of contact for victims following an initial report. One CASA coordinator described a woman in a regional area approaching the police member on the main desk and being told there was no one available who could assist her. She was told that she would need to come back to the police station the next day. No information was given to her in relation to a CASA, nor did the member make any arrangements in terms of follow-up contact. Another CASA worker gave an example of a woman

who was kept waiting for five hours at the station before she was spoken to by police.

3.102 Counsellor/advocates thought most difficulties of this kind could be addressed through training for general duties members on responding to reports of sexual assault. Workers also felt that general duties members were not sufficiently familiar with the Code of Practice, or the aspects of it that were particularly relevant to them during the initial stages of reporting.

3.103 Despite these concerns, counsellor/advocates thought victims usually had a positive experience in terms of police treatment, and particularly their treatment by SOCA unit members. Victims' experience with SOCA unit members was often more favourable than their experience with other sections of the police. The units were said to be 'more exposed to the issues' and 'less prone to accepting the myths about sexual assault'. One counsellor/advocate surmised that 'SOCA members understand the sensitivities, the vagaries, the subtleties' in relation to the issues surrounding sexual assault.

3.104 Each CASA relayed examples of members being particularly sympathetic, sensitive, and/or flexible in their response to victim/survivors, and even more importantly, their concern to ensure the victim felt believed. Other counsellor/advocates described how a more flexible approach by police members was providing greater incentive for people to go ahead with making a full statement to police. According to CASAs, SOCA members in some regions were prepared to meet with victims who are initially ambivalent about reporting and discuss the various options available to them. During these discussions, police outline the implications of reporting versus their choice to make a NFPA statement. One counsellor/advocate described how this kind of positive police contact had resulted in a woman reconsidering her initial decision not to report.

3.105 Nevertheless, counsellors were concerned about what appeared to be on occasion a lack of consistency in the quality of the police response.¹⁹⁴ Specifically, workers felt that victims' experiences were often dictated more by the attitudes of individual members who may or may not have an understanding of how to respond appropriately to disclosures. One worker felt the situation was best described by simply acknowledging there are 'good [police] and the not so good

194 Counsellor/advocates at CASA House also spoke about the extent to which police attitudes towards victims remained 'hit and miss': Clark, above n 126, 14.

ones', although he added that there were clearly 'some great police out there—some people who are incredibly sensitive...[and] incredibly respectful'.

3.106 While counsellor/advocates who had worked in the field for some years noted a distinct improvement in the approach of CIU detectives in responding to sexual assault, victim/survivors still spoke less favourably of their contact with them. Workers generally felt the problems still stemmed from the investigation taking precedence over the victim's welfare. There were also examples of CIU members adopting an adversarial approach when dealing with victims. Counsellor/advocates went on to describe how devastating this was for a victim/survivor when confronted by someone accusing them of lying—'Clients are just blown away by that...and they [the CIU members] don't soften it by saying, "Look, I know this might be difficult, but I have to ask you this".'

3.107 Other CASAs noted the difficulties that emerge when the victim has developed a good relationship with SOCA members and is suddenly handed over to a detective in charge of the investigation:¹⁹⁵

It can be a big shock to a victim if they had a good experience with SOCA unit members to then be faced by a non-supportive investigator.

3.108 Despite these criticisms, CIU members in some regions were said to be well versed in how to work respectfully with victim/survivors throughout the investigation. There were also other factors associated with making a police report that counsellor/advocates felt made the process all the more 'harrowing and traumatic for victims', so that 'they [the police] might be doing everything possible [but] it's just such a terrible, exposing experience'.

SUMMARY

3.109 According to CASAs, victim/survivors' experiences of reporting to police could variously be characterised as:

- often positive, especially in relation to their contact with SOCA unit members who were variously described as often sensitive, flexible, and generally more attuned to the issues;
- providing a better balance between supporting people through the criminal justice process and satisfying the requirements of the investigation, with

195 Ibid 18.

some CIU members taking better account of the needs of the victim during the investigation;

- still inconsistent and dependent upon individual personalities;
- sometimes negative where CIU members continued to adopt more adversarial positions that resulted in victims feeling disbelieved; and
- difficult, because of delays in investigations and victims feeling generally uninformed about what was happening, and about the next steps in the process.

IMPROVING THE POLICE RESPONSE TO REPORTS OF SEXUAL OFFENCES

3.110 The Commission has developed a series of recommendations aimed at further improving the police response to reports of sexual assault. Broadly they relate to:

- enhancing police training in relation to sexual assault;
- providing a more uniform or consistent approach to decisions about the outcomes of investigations;
- establishing specialised Sexual Investigation Units to exclusively respond to sexual assault reports; and
- improving the working relationships between CIUs and CASAs.

Developing Police Training Models Specific to Sexual Assault¹⁹⁶

3.111 In addition to the introduction of a Code of Practice, important improvements to the police response to sexual assault, and the treatment of victim/survivors, have been facilitated by police receiving special training about the issues in relation to sexual assault. As was the case with the earlier evaluation, victim/survivors continue to generally speak positively about their contact with SOCA police (formerly the Community Policing Squads). The Commission believes that the approach to training SOCA members could be adapted and/or

¹⁹⁶ Victoria Police have developed a range of training programs specifically related to sexual offences (these are detailed in Appendix 4). Commission researchers were able to observe some of this training over the past six months. This included training provided to both SOCA members and newly appointed CIU members who are required to attend Detective Training School.

extended to police members in other divisions or sections. There are also some outstanding areas that could usefully be included in the current program for SOCA units which would enhance SOCA members' response to the needs of victim/survivors who face particular difficulties in reporting sexual assault.

3.112 Training of recruits includes a module on basic responses to sexual assault victims and on the Code of Practice. There are no 'refresher' courses aimed at general duties members who have been in the field for some time. For SOCA members, a detailed training syllabus has been developed by the SOCA Coordinator's Office.

3.113 The Commission believes that there is a need to develop additional training components for general duties police to keep them up-to-date on issues relating to sexual assault and enable them to respond sensitively and appropriately to victims who make decisions to report sexual assault. Training should include a component on the factors which may make it difficult for a person to proceed with a complaint, the particular difficulties experienced by women from some communities and the support they may need if they are to continue with a complaint. Local SOCA units could be involved in providing training to general duties members.

3.114 The Commission also believes that some components of SOCA training should be incorporated into training for CIU members. The primary objective of police training on sexual assault should be to assist members to respond more appropriately to the needs of those who report sexual offences, for example by improving police understanding of the nature of sexual assault, the barriers to reporting which may be faced by some groups in the community, and the kinds of factors that influence victim/survivors' decisions whether or not to report the offences.

3.115 Some of the concerns of victim/survivors could be met by giving them more access to information which enables them to make informed decisions about whether to report assaults and the process which will follow if they choose to do so. Because police are often the first point of contact, such information should be visible and accessible at police stations as well as at CASAs.



RECOMMENDATIONS

6. Victoria Police should enhance training and develop refresher courses for general duties police in the various regions and divisions to ensure they have a thorough knowledge of the provisions of the Code and can respond appropriately to victims of sexual offences.
7. Training on sexual assault for members of Sexual Offences and Child Abuse Units and Criminal Investigation Units should address the social context of sexual offences, including:
 - the characteristics of most offences, offenders and victims;
 - the short-term and long-term impact of sexual assault on victim/survivors;
 - the barriers that victims often face in reporting offences; and
 - how the laws and procedures relevant to sexual offences operate in practice.
8. Police training should take account of the diversity of victims' needs and the particular barriers to reporting which are faced by some groups in the community. Training initiatives should discuss best practice models for responding to sexual assault of:
 - Indigenous people ;
 - people from non-English speaking backgrounds; and
 - people with cognitive impairments.
9. Victoria Police should work collaboratively with Centres Against Sexual Assault (CASAs) to develop training packages that ensure police members understand the role of CASAs and can benefit from their experience of working directly with victim/survivors.

10. Victoria Police should engage consultants and/or representatives from non-English background community organisations who are recognised by communities as having expertise or training experience in culturally-appropriate sexual assault service responses.
11. Victoria Police should engage consultants and/or representatives from Indigenous community organisations who are recognised by Indigenous communities as having expertise or training experience in culturally-appropriate sexual assault service responses.¹⁹⁷
12. Information on police processes should be made available to victims at police stations. Materials should outline the basic steps involved in reporting sexual assault to the police, the contact details of local Centres Against Sexual Assault and Sexual Offences and Child Abuse Units, the principles of the Code of Practice for the Investigation of Sexual Assault, and the options victims have in making a statement. These materials should be provided in a range of languages.
13. Regional Liaison Committees should assist in the development of these materials and ensure the materials are kept updated and a ready supply is available at police stations at all times.

Developing a Consistent Approach to Dealing with Investigations and Outcomes

3.116 We have referred to an apparent lack of consistency in how police respond to reports of sexual offences.¹⁹⁸ The recommendations below are intended to ensure a more consistent process in authorising briefs of evidence in sexual assault matters. They also seek to give people who report sexual assault more information about the reasons for a police decision to discontinue an investigation or not proceed with a charge.

197 The SOCA Unit is already working with the Victorian Aboriginal Child Care Agency and Immigrant Women's Domestic Violence Service in providing training sessions in the current SOCA Unit training course.

198 See above para 3.105.

3.117 As part of the *Violence Against Women Strategy—A Way Forward*, Victoria Police have similarly included a recommendation for a consistent approach to be taken to the process of authorising briefs that will ensure greater accountability to victims.¹⁹⁹



RECOMMENDATIONS

14. Where the Criminal Investigation Unit has principal carriage of the investigation, this process should include the officer-in-charge of the relevant Sexual Offences and Child Abuse (SOCA) Unit, or the individual SOCA members, being consulted about any decision made against authorising the brief for further investigation.
15. The Code of Practice for the Investigation of Sexual Assault should be amended to state that, as a matter of course, written reasons must be provided to the victim where a decision is made not to continue with an investigation or not to lay charges.
16. Training for Criminal Investigation Unit members on responding to sexual assault victims should include information on the reasons why victims may feel unable to continue with a police report, or request that the investigation be discontinued. This training could usefully be included in a training session developed by the Centres Against Sexual Assault in collaboration with the Sexual Offences and Child Abuse Units Coordination Office.

Establishing Specialised Sexual Investigation Units

3.118 Identifying ways of improving the investigative process also remains critical if there is to be a commitment to ensuring victim/survivors have greater access and confidence in a criminal justice response to assault. One option that has come to the attention of the Commission is the establishment of specialist units.

3.119 Victoria Police have already piloted Sexual Investigation Units (SIUs) in certain districts. The unit involves attaching a detective or CIU member to the existing SOCA Unit who works exclusively on investigating sexual offences

¹⁹⁹ See Victoria Police, *A Way Forward—Violence Against Women Strategy: A Summary of the Review into all Matters Related to Violence Against Women* (August 2002) 7.

reported to SOCA and prepares briefs of evidence. The SIUs deal with all sexual offences that do not involve very recent assaults (i.e. more than 72 hours post the assault). The model has been successfully piloted in a number of metropolitan divisions throughout the 1990s. In particular, reviews of the model have highlighted the benefits to victims in dealing with a single office or station.

3.120 In areas where there is no SIU, people who report sexual offences initially have most contact with SOCA unit members who are likely to have taken their full statement in relation to the offences and will maintain contact with them. The file is then handed over to a CIU division which is responsible for the progress of the investigation and for informing the victim about any charges laid. It is at this point that victims often describe experiencing difficulties with police and in particular, CIU members.

3.121 Sexual Investigation Unit models would help to address some of the problems that have been identified with the investigative process, such as lengthy delays in investigations and failing to keep victims adequately informed about the progress and/or outcomes of investigations. More serious problems have also been identified by SOCA members who suggest there are some CIU members who will simply not prioritise sexual offences or put cases, and particularly sexual offences which occurred some time ago, 'to the bottom of the pile'.²⁰⁰ Other members have said there were some CIU members who they were reluctant to brief at all given their general approach to sexual offences.

3.122 The SIU model improves the police response to sexual offences by ensuring:

- there is continuity for victims in providing one point of contact with police;
- detectives are trained on how to respond more appropriately to victims of sexual assault;
- there is continuity across the investigation;
- the length of investigations is significantly reduced;

200 It is important to note however that CIU members are required to attend to a variety of investigations and can often have competing and urgent demands on their time. Sexual Investigation Unit models would also help to address this problem.

- detectives develop specialist expertise which can improve the prosecutorial success in certain cases (for example, where the offences being investigated relate to assaults that occurred many years ago);
- briefs of evidence are of a higher quality which can result in a better quality of evidence in court;
- admissions by alleged offenders may be made more frequently; and
- fewer victims may withdraw their complaints.

3.123 There are also benefits for SOCA unit members in working alongside detectives when taking victims' statements and in assisting with investigations and the preparation of briefs of evidence.

3.124 The success of the model clearly depends on a range of factors, such as processes for selecting CIU members, structuring appropriate lines of accountability and adequate resourcing of SIU units.

3.125 The Commission believes that more general application of the SIU model could improve the processing of sexual assault reports and the experience of sexual assault victim/survivors.



RECOMMENDATION

17. The Commission recommends that Victoria Police should consider establishing Sexual Investigation Units in all metropolitan divisions where the caseload reaches a pre-determined threshold. The processes of selection for Criminal Investigation Unit members appointed to Sexual Investigation Units and their tenure and lines of accountability, should be clearly established by Police Command.

Improving the Relationship Between Criminal Investigation Units and Centres Against Sexual Assault

3.126 The establishment of SIUs will help to strengthen working relationships between members of Criminal Investigation Units and Centres Against Sexual Assault. However, not all regions will have a SIU. Another way of improving such relationships and giving CIU members insights into the issues which arise in investigating sexual offences would be for a member of the relevant CIU to regularly attend and contribute to the regional liaison committee meetings.



RECOMMENDATIONS

18. Where Regional Liaison Committees have been established, a Criminal Investigation Unit member from the appropriate division should be nominated to regularly attend the meetings.
19. Where no Regional Liaison Committee currently exists, a Criminal Investigation Unit member should be nominated to contact the local Centre Against Sexual Assault (CASA) on a quarterly basis to discuss any problems or issues that have emerged. These contacts should be formalised to the extent that there is agreement by the parties in how to respond to the issues raised, and to feedback to the CASA or police on what action was taken.

Chapter 4

Increasing the Responsiveness of the Criminal Justice System

INTRODUCTION

4.1 Chapter 3 discussed police responses to people who report sexual offences and made recommendations to enhance police training and procedures in sexual assault cases. This chapter is divided into two parts.

4.2 The first part of the chapter describes the outcomes of consultations with complainants about their experiences of the criminal justice system. It reveals wide-spread dissatisfaction about the way that the criminal justice system treats those who report sexual offences.

4.3 The second part of the chapter argues that the changes to procedure and evidence laws which are proposed in later chapters of this Interim Report are unlikely to meet their objectives, unless they are also accompanied by changes to the culture of the criminal justice system. The chapter contains recommendations which are intended to support systemic changes in the criminal justice process, to ensure that complainants in sexual offences cases, as well as those who are accused of offences, are treated fairly and with dignity.

COMPLAINANTS' EXPERIENCES OF THE CRIMINAL JUSTICE PROCESS

4.4 During the late 1980s and early 1990s substantial reforms were made to procedure and evidence in sexual offences cases. The outcomes of our research and consultations suggest that these reforms have had limited success in improving the experience of complainants in sexual offence cases. Complainants in sexual offences cases, and support workers, have repeatedly told us about the difficulties of participating in the criminal justice process. Although people rarely report offences without being aware of the difficulties of engaging with the criminal justice system, the reality of the experience is often much worse than anticipated. One woman commented that: 'it took me longer to get over the court experience

than the actual rape, I was treated as the criminal.’²⁰¹ The traumatising effect of the court process on complainants is often referred to as ‘secondary victimisation’.

4.5 Our consultations suggest that many victims of sexual assault do not believe that the legal system will treat them justly. As one woman commented:²⁰²

I have made the choice to share my experience with the Law Reform Commission because I want to be able to believe in the judicial system. Even though the system has failed me, I would like it to be improved for the women that follow in my footsteps. I do not understand the gulf that stands between the law and justice, or why I have been made to carry the burden of society’s shortcomings. The legal system is flawed, conviction rates for men who assault women drop, while the laws continue to be broken. Sadly, I am aware the world is far from perfect, for this reason, I acknowledge the importance of having a legal system. No matter how cumbersome or flawed it may be, it is the only one there is. This is why I have chosen to share my experience.

4.6 The fear of victim/survivors that they will be treated unfairly contributes to low reporting rates for sexual assault and to unwillingness to participate in the criminal justice process. As a result many perpetrators of sexual assault are not reported or charged with offences. Ultimately this reduces public trust in the criminal law and the courts. As Professor Stephen Parker has warned, public confidence in the courts may be crucial to their successful operation:

Legal systems in modern liberal democracies rely ultimately on public confidence and the consent of the governed. That confidence and consent may drain away over apparently small matters which, when accumulated, constitute a predominantly negative image of the courts.²⁰³

Sexual assault is, of course, not ‘an apparently small matter’ and unfortunately many of the organisations and individuals with whom we spoke found their experience of the criminal justice system very damaging.

4.7 People and organisations we consulted identified multiple barriers to participating in the criminal justice process, including the marginalised role of complainants in decision-making, lack of information about the process, the difficulties in obtaining information about the progress of cases, the public and

201 Real Rape Law Coalition, *No Real Justice: An Interim Report of a Confidential Phone-in on Sexual Assault* (1991) 45.

202 Submission 16.

203 Stephen Parker, *Courts and the Public*, Australian Institute of Judicial Administration (1998) 6.

intimidating environment of the courtroom, the effect of delays in the process which make it difficult for complainants to get on with their lives, the lack of sensitivity displayed by some lawyers and judges, and the effect of aggressive, insulting and offensive cross-examination.

Marginalisation

4.8 In Australia, criminal trials are adversarial proceedings, involving a contest between the State and the accused person. The State, which is represented by a prosecutor, is required to prove the case against the accused person beyond reasonable doubt. The defence attacks the State's case by presenting evidence on behalf of the accused. Each side cross-examines witnesses put forward by the other side in an effort to discredit them or at least minimise the impact of their evidence. The accused has the right not to testify and, accordingly, not to face cross-examination. The role of the judge is to sit as an impartial arbiter. Complainants in sexual offences cases are witnesses for the prosecution and not parties to the case. Accordingly, they are called to testify by the prosecution and cross-examined by the defence.

4.9 During our consultations, it became clear that some complainants are unaware of this fundamental aspect of the system and felt a lack of control over the decisions made in the process of prosecution. For example, some complainants did not understand that it was the role of the prosecutor to make decisions on matters such as the number of offences with which the accused should be charged and whether some charges should be dropped in return for the defendant agreeing to plead guilty to others. Even complainants who were aware of the way the system operates found it difficult to accept their limited role as witnesses in trials, and the disparity between the right to silence for the accused and the complainants' obligation to tell their story repeatedly, and to be cross-examined on every aspect of it.²⁰⁴

Communication

4.10 Complainants who receive accurate information about how the criminal justice system operates and are informed about the progress of cases throughout

204 See, for example, Submissions 16, 39, 50 and 75.

the committal and trial process are less likely to feel marginalised by the criminal justice system.

4.11 In recent years some changes have been made to ensure that complainants receive better information about prosecution processes. It is normal Office of Public Prosecutions (OPP) practice for the OPP solicitor and the prosecutor to arrange to meet with the complainant prior to any proceedings going ahead.²⁰⁵ A number of other agencies may be involved in providing the victim with information about the progress of the case including Victoria Police, the Office of Public Prosecutions, the Witness Assistance Service in the OPP and Centres Against Sexual Assault who may be providing counselling and advocacy services to the complainant. Some complainants said that these processes were effective and they felt well informed.²⁰⁶

4.12 However, despite these various avenues for contact, other complainants reported an ongoing problem with communication. During our consultations, complainants reported, for example, that they were not informed of hearing dates; they were given very short notice of committal and trial dates; they met the prosecutor for the first time on the day of the trial; and they had no sense of what was expected of them in court. Women from non-English-speaking background (NESB) communities reported that there was a lack of culturally and linguistically relevant general information about the legal system and about their legal rights. Problems caused by this lack of information were heightened if they became involved as complainants in sexual offences cases.

4.13 In many cases, at some stage of the criminal justice process, the prosecution will enter into plea negotiations with the defendant and his representative and the matter will be finalised in this way. Many complainants and their families did not understand the plea negotiation process and felt that it was inadequately explained to them. In one case a complainant was at court prepared for cross-examination when a plea was accepted and the matter concluded. She felt strongly that a plea should not be accepted at such a late stage. She told the Commission that having mentally prepared herself to testify, and having waited at

205 Witnesses are advised in a letter from the OPP and it is stated in an accompanying brochure, *Now You Are A Witness*, that they may be contacted by the OPP to arrange a meeting with the OPP lawyer. The brochure also invites contact with the Witness Assistance Service should witnesses have any queries regarding the case or require support.

206 For example Submission 74.

court, the matter ended abruptly due to the plea negotiation.²⁰⁷ Some complainants did not have the significance of maximum sentences explained to them and were shocked that the sentence levied was so much lower than the applicable maximum; this was particularly the case where the offender received a suspended sentence.²⁰⁸

4.14 The Commission's view is that prosecution processes should recognise the right of complainants to be fully informed about the progress of cases including when court dates are scheduled, when they will need to appear, what is likely to occur at court and what is involved in giving evidence, as well as about plea negotiations and case outcomes.

Delays

4.15 The Commission was told that the long delays that may occur at almost every stage of the criminal justice process cause significant distress for complainants. Complainants and service providers described the confusion and additional anxiety caused by delay. Waiting 'to go to court' is often very stressful. Many complainants hope that participating in the criminal justice process will bring about some sense of 'closure' for them, but when the process is prolonged, this is impossible. Speedy resolution of the case is particularly important for children who have been victims of sexual offences. As well as causing stress for the complainant, the time lapse also impairs the victim/survivors' ability to recall the details of the assault or to 'function to their full capacity as a witness'.²⁰⁹

4.16 We were told that delays are a particular problem in regional areas where the County Court sits for only short periods on a circuit basis. If a matter is not ready to proceed during one sitting it must wait until the next session of the court, which may not be for some months. During our regional consultations we were told about delays in finalising complex sexual offences cases, particularly those involving child victim/survivors, and constant adjournments because circuit judges are often unable to complete the caseload during the individual circuit session.²¹⁰

207 Submission 18.

208 Submission 18.

209 Haley Clark, *Sexual Assault and the Criminal Justice System: as told by Counsellor/Advocates*, CASA House (2002), 21.

210 See, for example, Submissions 53, 57 and 60.

4.17 Most aspects of the pre-trial process for sexual offences cases are subject to statutory time limits.²¹¹ However, the prescribed time limits can be extended if certain criteria are met. When a complainant needs to use the services of an interpreter, the proceedings are sometimes delayed further because appropriately accredited interpreters are not available. Women from non-English speaking backgrounds find it particularly difficult when every stage of the legal process is drawn out and their participation is hampered by a lack of relevant information, service provision and translation services.

Testifying

4.18 Complainants reported three major concerns about testifying: seeing the accused; talking about harrowing and extremely personal matters in a public and intimidating forum; and enduring cross-examination, which may be lengthy and arduous.²¹²

4.19 A number of procedural and evidentiary reforms have been made in an attempt to meet these concerns. These include legislative changes allowing certain complainants to testify using closed-circuit television (CCTV) or allowing use of a screen to block complainants' view of the accused, provisions restricting cross-examination of complainants about their sexual activities and restrictions on the admission of evidence from counselling communications. The effectiveness of provisions restricting admission of certain evidence depends on compliance by defence counsel or, where this does not occur, objections by the prosecution and enforcement of the rules by the magistrate or judge. Complainants told us that these safeguards are often ignored in practice.²¹³

4.20 The court has power to forbid questions which it regards as 'indecent or scandalous', 'unless they relate to the facts in issue or to matters necessary to be

211 A committal mention hearing must be held within three months of the commencement of proceedings and a trial must commence within three months of the committal hearing. However, no time limit is prescribed between committal mention and committal hearing. This omission can lead to that stage of the process becoming drawn out: see below para 6.79.

212 For example, Dr Caroline Shannon Taylor cites a case she observed where the victim/survivor faced 1018 questions, 820 of which were from the defence barrister. In this case, the accused faced no questions. She cites numerous examples of a similar nature: Shannon Caroline Taylor, *The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court Australia in 1995* (PhD Thesis, University of Ballarat, 2001), n 7, 229.

213 See below paras 5.16–5.22.

known in order to determine whether or not the facts in issue existed'.²¹⁴ Under section 40 of the *Evidence Act 1958*, the court is required to 'forbid or disallow any question which appears to it to be intended to insult or annoy, or which though proper in itself appears to the court needlessly offensive in form'. Complainants said that prosecution lawyers often failed to object to offensive or unfair cross-examination. They were also critical of the failure of judges to prevent defence counsel harassing them or cross-examining them on irrelevant issues. Many complainants felt that lawyers and judges did not understand the traumatic effect of having to describe the circumstances of the assault and being cross-examined on intimate matters. According to many of those who made submissions, much of the difficulty associated with the process of giving evidence was a result of the lines of argument put forward by defence counsel and the manner, as well as the content, of their questioning. For example, one complainant who was a child at the time of the trial said:

To this day I still feel traumatised by him [defence barrister] in how he treated me during cross-examination. Here was this guy in his 40s and a girl 15, and he was trying to totally dominate me, to belittle me, to try to push me down, break me down, and the fact that in a way I didn't break down, that made him angry and he challenged me even more because he wanted me to break down and give in. He continuously made me repeat graphic details of the sexual abuse which made it very distressing. I had the flashbacks of what happened to me in my mind and he tried to make the court believe that it was impossible that the assaults occurred. I had to constantly back myself up and say that what happened to me was the truth. I just remember him getting so angry at me.²¹⁵

4.21 Part of the difficulty of being a witness is the requirement to give evidence according to the complex and technical rules of what is admissible in legal proceedings. At times, key parts of a complainant's story are not allowed to be introduced as evidence because they are inadmissible. Several complainants told us that the limitations on what they could talk about made it difficult to describe what actually happened to them and this caused them great distress.

214 *Evidence Act 1958* s 39.

215 Submission 18.

He had hit me before (in March 2000 and had been sentenced to 14 days suspended for 12 months) but this could not be mentioned. How do you justify fear and intimidation when you can't mention prior abuse?²¹⁶

As with police statements, there is very little opportunity during examination or cross-examination to explain why you reacted in certain ways...All of this results in the jury not being given a clear picture of what has happened at the time of the offence, and in the past relationship.²¹⁷

I was on the stand under oath to tell the truth, the whole truth and nothing but the truth. Yet the legal system did not allow me to do that.²¹⁸

Language of the Courtroom

4.22 According to a report compiled by Mark Brennan and Roslin Brennan, 'Justice is most readily available to those who are articulate, confident and in control of the linguistic environment in which they find themselves.'²¹⁹

4.23 Court processes are unfamiliar to complainants, and legal personnel generally use jargon which is difficult for laypeople to understand. One third of the respondents to a 1995 survey of complainants involved in sexual offences cases in NSW had trouble understanding what happened in court, identifying in particular, legal terminology and arguments used.²²⁰ Narrative flow is disrupted because testimony given must comply with the rules of evidence and because prosecution and defence counsel seek to bolster their line of argument through their witnesses' testimony and then to discredit the opposing witnesses in cross-examination.

4.24 The problems of legal language and cross-examination are heightened for child witnesses who are developmentally less able to cope with even ordinary adult language.²²¹ Although attempts have been made to reduce stress for children who

216 Submission 26.

217 Ibid.

218 Submission 29.

219 Mark Brennan and Roslin Brennan, *Clartalk, Police Responding to Intellectual Disability* (1994), 79.

220 NSW Bureau of Crime Statistics and Research, *The Criminal Justice Response to Sexual Assault Victims* (1996) 52.

221 Brennan argues that 'In a trial, language and linguistic choice are exploited, independent of legal issues and constraints, to build themes. These themes include the following: children are inclined to tell lies; children have difficulty distinguishing fact from fantasy; children suffer from poor memory and devious

are complainants in sexual offences cases,²²² there are still multiple barriers to their effective involvement.

4.25 For complainants from NESB communities, the experience of giving evidence, particularly cross-examination, often involves added complexities. The formal and technical language used in the courtroom is accessible to very few lay people and this inaccessibility is exacerbated for those for whom English is not a first language. Magistrates, lawyers and judges sometimes ask inappropriate questions that show a lack of cultural sensitivity. Appropriate interpreters are not always available, particularly in regional areas or for complainants from small or new and emerging communities, and not all communication difficulties are straightforward linguistic ones. Some languages lack terminology related to sexual offences and in some cultures the discussion of intimate matters in public is unacceptable. Cultural differences in non-verbal communication such as eye contact and smiling can be misunderstood and undermine the credibility of a witness in the eyes of a magistrate, judge or jury. The length and repetitiveness of cross-examination can be particularly strenuous when the witness' first language is not English. The process of taking the oath is strongly influenced by Christian values and, for many witnesses in our diverse society, taking a religious oath or having to state a preference for making an affirmation can be confusing and stressful.²²³

4.26 The language of the courtroom poses particular obstacles for complainants with cognitive impairments. A threshold problem concerns the lack of accurate and timely identification of the existence of an impairment. A witness' cognitive impairment can remain undetected or misdiagnosed and accordingly, the witness' particular requirements are not accommodated. Even when the impairment is correctly identified, there are aspects of court procedure that act as severe barriers to the effective participation of witnesses with cognitive impairments. The model

motives. The object of these themes is to undermine the credibility of the witness. Mark Brennan, 'The Battle for Credibility—Themes in the Cross Examination of Child Victim Witnesses', (1994) 7 *International Journal for the Semiotics of Law* 51–73, 51, 65.

222 For example the recording of their original statement to the police by video and audio taped evidence (VATE), the opportunity to give their evidence by closed circuit television, the right to have a support person present: see the detailed discussion of experiences of child witnesses in Chapter 6.

223 A variety of religious texts are available for witnesses to use when swearing the oath. However, there are many religions and cultures that consider it either irrelevant or inappropriate to swear an oath in a secular context on a religious text. Victorian Parliament Law Reform Committee, *Inquiry into Oaths and Affirmations with Reference to the Multicultural Community* (2002) 79–96. See below paras 6.84–6.92.

of communication our courts use, where information is elicited in a question and answer format, is a limited form of communication²²⁴ and is not necessarily the best one for witnesses with cognitive impairments. For example, people with intellectual disabilities may have particular difficulty with leading or lengthy questions, questions which are spoken rapidly or those which contain many concepts or double negatives.²²⁵

4.27 Many Indigenous victim/survivors of sexual offences do not consider the criminal justice system an appropriate avenue for the delivery of justice. Much of this distrust stems from the history of the role of the police and the legal system in enforcing colonial policies.²²⁶ For those who do participate in the system, aspects of the trial process, particularly the adversarial nature of the proceedings, can be alienating.

OUR APPROACH

4.28 The first part of this chapter has provided a brief overview of the problems and barriers which may be experienced by complainants in sexual offences cases. This section makes the case for systemic reforms which are intended to address some of these problems.

4.29 Some of the issues identified by complainants are an integral part of an adversarial process. For example, the issue of marginalisation of complainants in sexual offences cases where they are not parties, but witnesses for the Crown. However this marginalisation could be largely overcome by more effective communication between prosecutors and complainants.

4.30 Other problems identified by complainants are considered in later chapters of this report. Earlier reforms have sometimes been designed to address them. However, legislative changes have not always operated in the way intended because of attitudinal barriers within the criminal justice system. Historically, the role of courts has focused on adjudication. It is only relatively recently that courts

224 See Brennan, above n 221, 24.

225 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues*, Discussion Paper 35 (1994) [7.14].

226 Elizabeth Hoffman House, 'From Shame to Pride: Sexual Assault Services for Indigenous People: A Partnership Project Between Elizabeth Hoffman House and CASA House: Consultation Outcomes and Recommendations' (unpublished) 5.

have begun to take account of the views of court users,²²⁷ in order to respond to their needs.²²⁸

4.31 Lawyers may also resist procedural or administrative changes because they are concerned that reforms designed to meet the needs of complainants may undermine the presumption of innocence or prevent the accused from receiving a fair trial. Concerns of this kind may not be based on evidence or may reflect unfamiliarity with a process which is working well elsewhere. For example, we have found that provisions allowing complainants in sexual offence cases to give evidence by CCTV are often not used because some prosecutors believe that juries are less likely to convict the accused if the complainant gives evidence in this way. Defence lawyers may also oppose applications for permission for a complainant to give evidence by alternative means because they believe that such a process is unfair to the accused.²²⁹ In one case, the President of the Court of Appeal suggested that the admission of pre-recorded video-taped or audio-taped evidence of children in sexual offences cases (which was authorised by legislation in 1991)²³⁰ is potentially unfair to defendants, because it involves the evidence of young children being presented as 'a pre-recorded package' and without witnesses having been sworn and giving evidence orally to the jury. The President was particularly critical of this process because he thought that in some situations it meant that the right of the accused to cross-examine the child 'will become little more than empty rhetoric where it cannot be realistically achieved because of the extreme youth of the person whose evidence-in-chief is given by way of pre-recorded interview'.²³¹ The emphasis which our adversarial system places on zealous advocacy may also result in some prosecutors believing that it is inappropriate to focus on the needs of complainants.

4.32 Later chapters in this report make recommendations for changes to rules of evidence and procedure. However past experience shows that such reforms are unlikely to make the system more responsive to the needs of complainants unless

227 See, for example, Parker, above n 203, 50.

228 For example the Federal Court of Australia has established a number of user groups which consider policy and operational issues.

229 See, for example, Submission 66.

230 *Evidence Act 1958* s 37.

231 *R v NRC* [1999] 3 VR 537. The President conceded that there would be some cases where the evidence was pre-recorded where there would be no unfairness to the accused arising from the use of a video- or audio-taped evidence (VATE) tape, because the child would be capable of being cross-examined: 552.

they are accompanied by change to the practical operation and culture within which court proceedings are conducted.²³² The effectiveness of our recommendations for procedural and evidentiary changes will depend to a large extent on support from those working in the criminal justice system, in particular police, prosecutors, defence counsel and the judiciary.

4.33 The Commission believes that discussion and education which fosters cultural change within the criminal justice system is an essential component of this reference. Changing the culture of the criminal justice system involves changing the distinctive customs and outlook of prosecution and defence lawyers, magistrates, judges and others involved in the process of a criminal prosecution. Lawyers, magistrates and judges are likely to be more responsive to the needs of complainants, and to perform their role more effectively, if they understand the context in which sexual offences commonly occur and the psychological and social aspects of sexual offences which affect complainants. For example, provision of information about the barriers faced by Indigenous people and NESB people in participating in the criminal justice process could help prosecutors to elicit information from witnesses more effectively. Education which addresses stereotypes and misconceptions about people from particular groups could assist both judges and prosecutors to behave appropriately and sensitively, without affecting the fairness of the trial for the accused.

4.34 The next section contains recommendations which are intended to bring about systemic changes to the culture within which sexual offences laws currently operate. They include proposals for:

- prosecutor training to increase prosecutor awareness of the needs of complainants and how to reconcile these needs with their obligation to conduct the prosecution case fairly and effectively;
- judicial education to familiarise judicial officers with the reasons for reforms and their relevance to the conduct of sexual offences trials; and
- the creation of a specialist sexual offences list in the County Court.

4.35 We do not believe that any of the recommendations in this Interim Report are inconsistent with the presumption of innocence or with the goal of

232 For a discussion of various paradigms for a criminal justice system see Arie Freiberg, 'The Tectonic Plates of the Criminal Justice System—Responding to Pressure Points or Collision Course?', *Institute of Public Administration* (2002).

ensuring that the accused receives substantive and procedural justice. Reforms intended to take account of the needs of complainants are not of themselves antithetical to the rights of the accused. As Justice Deane recognised in the High Court decision in *Dietrich v R*,²³³ the requirement that a trial is fair requires consideration of the 'interests of the Crown acting on behalf of the community as well as to the interests of the accused'. Similarly, in *Jago v District Court* Justice Brennan commented that:²³⁴

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

CHANGING THE CULTURE

Prosecutor Education

4.36 There is now greater recognition of the role that prosecutors can play in improving the criminal justice response to victims when prosecuting sexual offences cases.²³⁵ In court, the conduct of prosecutors can have a significant impact on how the case is run. The primary role of the prosecutor as representative of the State is to ensure that the evidence in support of the prosecution case is presented systematically and fairly. Prosecutors are also responsible for:

233 (1992) 177 CLR 292.

234 (1989) 168 CLR 23, 49.

235 For example, pre-hearing meetings between prosecutors and victims were introduced to try and reduce the level of stress victims might feel in knowing what to expect in terms of the court process and in having some contact with the legal profession entrusted with the conduct of their case. During the Rape Law Reform Evaluation Project, prosecutors identified a range of benefits to meeting with complainants prior to any court appearance, including a better quality of evidence and, more importantly, an opportunity to demystify the process and explain the proceedings: Melanie Heenan and Helen McKelvie, *The Crimes Rape Act 1991: An Evaluation Report*, Report No 2, Rape Law Reform Evaluation Project, Department of Justice (1997) (hereafter RLREP), 253–62.

- making applications for the victim to use alternative arrangements for giving evidence;
- objecting to the admission of prior sexual history evidence, where appropriate;
- making applications to protect the complainant from irrelevant, harassing or insulting cross-examination; and
- drawing the jury's attention to legislative provisions relevant to the prosecution case, for example the legal definition of consent.

4.37 Research has indicated that prosecutors often vary in their practical approach to the conduct of sexual offences cases. The findings from the Rape Law Reform Evaluation Project (RLREP) revealed a lack of consistency in the levels of knowledge and approach to the current laws and procedures governing sexual offences,²³⁶ the scope of the provisions prohibiting sexual history questions,²³⁷ and the extent to which prosecutors regard it as appropriate to take a proactive role in protecting the complainant during cross-examination.²³⁸

4.38 In her observation of Victorian rape trials,²³⁹ Heenan gave examples of experienced prosecutors who successfully relied on the current provisions about consent²⁴⁰ and were attuned to the strategies often used by defence barristers to introduce sexual history evidence.²⁴¹ However, in other cases, prosecutors did not object to irrelevant or offensive cross-examination of complainants, were less likely to recognise breaches of the sexual history provisions,²⁴² and less adept at relying on the Crimes Act definition of consent in ways that might have assisted them in presenting the prosecution case.²⁴³

4.39 The Commission met with the Solicitor for Public Prosecutions, the Director of Public Prosecutions and their staff, to discuss the implications of these

236 Ibid 312, 324, 326.

237 Ibid 121–34.

238 Ibid 217.

239 Melanie Heenan, *Trial and Error: Rape, Law Reform and Feminism* (PhD Thesis, Monash University, 2001).

240 Ibid 250–1.

241 Ibid 198, 202–3.

242 Ibid 226–9.

243 Ibid 258.

findings. The Office of Public Prosecutions (OPP) has taken the initiative of arranging a program for prosecutors to assist them when they appear in sexual offences cases. In particular, the OPP is developing a strategy to promote discussions and information-sharing among prosecutors about 'best practice' approaches and strategies for dealing with issues which commonly arise in sexual offence cases.

4.40 Four training seminars for prosecutors have been developed. The first seminar discussed some of the practice issues relevant to prosecuting sexual offences and provided information on empirical findings about the conduct of trials. One of the Commission's research officers, Melanie Heenan, presented her research findings at this seminar. Three other seminars have been scheduled on technical aspects of sexual offences law.²⁴⁴ The Commission believes that it would also be useful for prosecutor training to incorporate sessions on how complainants are affected by sexual assault and the ways in which prosecutors could minimise the impact of the court system on sexual assault complainants.

244 The specific topics were relationship and propensity evidence (*Crimes Act 1958* s 398A); the issue of severance (s 372) and jury directions or warnings.



RECOMMENDATION

20. The Commission supports the provision of a regular continuing education program by the Office of Public Prosecutions for prosecutors in sexual offences cases. As well as promoting discussion on legal and practice issues, the objectives of the program should include information on:
- the emotional, psychological, and social impact of sexual assault on victim/survivors, including how the assault may be experienced by people who have already experienced discrimination because of their language and ethnicity, and how this may affect complainants in giving their evidence;
 - the social context in which sexual offences occur, including the outcomes of empirical research on the incidence and circumstances in which sexual assaults occur;
 - the advantages of meeting with complainants before the hearing and advising them about what will happen when they give their evidence;
 - the use of closed-circuit television (CCTV) by witnesses;
 - referral services which can assist complainants by providing court support and preparing them for what will happen in court; and
 - steps which prosecutors can take to protect complainants from offensive, unfair or irrelevant cross-examination.

JUDICIAL EDUCATION

4.41 Judicial officers are generally well aware that the criminal justice process is extremely difficult for complainants. Many of the 18 County Court judges interviewed for the purposes of the 1996 Rape Law Reform Evaluation Report²⁴⁵ referred to the harrowing nature of sexual offences trials for complainants and

245 RLREP, above n 235.

some said that they did as much as possible to minimise the complainant's ordeal. Similarly, the 13 magistrates who were interviewed acknowledged the impact of trials on complainants. Judicial officers often speak of the practical difficulties which they encounter in ensuring that the committal and trial process is fair to the accused, while at the same time recognising and responding to the problems faced by complainants, within the confines of an adversarial criminal justice process.

4.42 During the course of this reference, discussions with judicial officers have enabled us to identify a number of areas of practical difficulty which arise in sexual offences committals and trials. Some examples include:

- magistrates deciding whether to permit cross-examination of a complainant at the committal stage;
- cross-examination of a complainant by an unrepresented or self-represented accused;
- determining the competence of child witnesses;
- deciding when to intervene in cross-examination of a child witness, for example, because the child appears to be confused by the questions or appears to feel bullied;
- deciding whether to intervene in cross-examination of a complainant or another witness who has a mental impairment;
- determining whether to grant an application to allow cross-examination of a complainant on her prior sexual activity;
- deciding whether a complainant should be able to give her evidence by alternative means, for example, by closed-circuit television;
- intervening to prevent offensive cross-examination;
- considering whether a *Longman* warning should be given, particularly in situations where it is debatable whether a warning is required by law; and
- directing juries in sexual offences cases.

4.43 Most of these areas involve the exercise of judicial discretion. Judicial education programs on sexual offences could provide a forum for judges and magistrates to discuss the approach they take to these issues. Judicial education could expose judges and magistrates to research findings about sexual offences and the behaviour of offenders and complainants, and help to overcome myths and stereotypes which may influence judicial decision-making. It could also make judges aware of the ways that sexual assault may be experienced by people who

already experienced disadvantage or discrimination because of their language or ethnicity, and promote more sophisticated responses to these issues. If the recommendations in this Interim Report are implemented, a judicial education program would also provide the opportunity for judicial officers to be informed about the reasons for these changes and to discuss the application of the new provisions.

4.44 To facilitate judicial education on issues relating to sexual offences, the Commission invited a number of judges and magistrates with experience in judicial education, to join a judicial education committee. The Chief Executive Officer of the Judicial College of Victoria, Lyn Slade, was also invited to join the committee. The committee has prepared a draft program, which has been proposed to the College. It is contemplated that experienced judges and magistrates would play a major role in offering the program, and that others with expertise in the area of sexual offences would also be involved.

4.45 The proposed program is now being considered by the College. The Commission hopes that the program will be offered to Victorian judges later in 2003. The Commission envisages that this program would be offered regularly and would supplement other judicial education on these issues which is already provided within the Magistrates' and County Courts.



RECOMMENDATIONS

21. The Judicial College of Victoria should offer a program for judges and magistrates to facilitate discussion of issues which commonly arise in sexual offences committals and trials, particularly issues relating to the exercise of judicial discretions, intervention during cross-examination and directions or warnings to juries.
22. The program should include information on:
 - the social context in which sexual offences occur, including the outcomes of empirical research on the incidence and circumstances in which sexual assaults occur;
 - the emotional, psychological and social impact of sexual assault on victim/survivors, including how the assault may be experienced by people who have already experienced discrimination because of their language and ethnicity, and how this may affect complainants in giving their evidence;
 - the effect of such offences on victims and the particular problems that complainants may experience in giving evidence;
 - how sexual assault affects people from groups which typically experience disadvantage and discrimination, for example Indigenous women; and
 - the background to and application of any legislative changes arising from the report on this reference.

A SPECIALISED APPROACH

4.46 There is a considerable amount of specialisation within the Australian court system. Some courts specialise in relation to areas of the law, while others deal with particular groups of people. The creation of the Family Court of Australia at the federal level was intended to address problems arising from family conflict and marriage breakdown. At the State level the creation of children's courts acknowledges the special needs of children who commit criminal offences

or are in need of protection. Victoria has recently been piloting a number of other specialised magistrates' courts. A specialist Drug Court is currently being piloted in the Melbourne suburb of Dandenong, and a Koori Court in Broadmeadows and at Shepparton. The Attorney-General has also announced his intention to pilot a domestic violence court.²⁴⁶

4.47 Some overseas jurisdictions have established specialist courts to deal with sexual offences cases. In South Africa, the first sexual offences court was established at Wynberg Magistrates' Court in 1993, in response to advocacy on the part of women's organisations to improve the treatment of rape victims within the criminal justice system.²⁴⁷ The Wynberg Magistrates' Court deals only with sexual offences against women and children. Its aims are to decrease the secondary trauma to victims of sexual abuse, to increase the reporting of sexual offences by providing a specialised service to victims, and to increase the conviction rate and sentencing of perpetrators. The Court is equipped with a CCTV room and employs a social worker who provides support services to children. Since the establishment of the first sexual offences court in Wynberg, a number of additional courts have been opened in the Western Cape region. The South African Department of Justice believes that the Court has been successful and is setting up sexual offences courts in other parts of the country.

4.48 In Australia, New South Wales is now experimenting with a specialist jurisdiction for child sexual assault prosecutions, based on a recommendation of the Legislative Council Standing Committee on Law and Justice in its *Report on Child Sexual Assault Prosecutions*.²⁴⁸ This recommendation was modelled on a proposal by the New South Wales Director of Public Prosecutions to the Committee to pilot a specialist child sexual assault court.²⁴⁹ The pilot project recommended by the Committee included the following features:

246 For other examples of specialist courts see Arie Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 7.

247 See Lulama Dikweni Mastoera Sadan, Shaamela Cassiem, *Pilot Assessment: The Sexual Offences Court in Wynberg & Cape Town and Related Services*, South African Law Commission, *Sexual Offences: Process and Procedure*, Volume 2, Discussion Paper 102, Project 107 (2001); Kelley Moults, *The Court Door May be Open, but What Lies Behind those Doors? An Observation of the Workings of the Wynberg Sexual Offences Court* (Bachelor of Social Sciences (Honours) in Criminology, University of Cape Town.

248 New South Wales Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report No 22 (2002), Recommendation 43 [7.38].

249 Ibid [7.1–7.8].

- judicial officers, prosecutors and court staff should be selected on the basis of interest and specialised training in child development and child sexual assault issues;
- the courts should be equipped with high standard electronic facilities for the use of special measures (i.e. CCTV) and staff should be trained in the use of the equipment;
- pre-trial hearings should be held to determine the special needs of the child and the child's readiness to proceed; and
- there should be appropriate child-friendly facilities, furnishings and schedules.

4.49 The Committee's report emphasised that one of the purposes of the pilot project would be to examine whether the recommended features would improve the experience of child sexual assault complainants. It recommended that the pilot project should be carefully evaluated.²⁵⁰ The Attorney-General has announced that the specialist jurisdiction will be piloted initially in the western suburbs of Sydney at Parramatta, Penrith and Campbelltown local and district courts. The pilot project will run for a period of 28 months, ending in August 2005.

4.50 One of the goals of establishing a specialist sexual offences jurisdiction would be to provide a more supportive environment for complainants. Specialisation could:

- create greater awareness among judges and court staff about the needs of sexual offences complainants;
- foster willingness among judges and court staff to develop specialised procedures to meet these needs;
- make it easier to identify and support complainants from marginalised sections of society who feel powerless within the existing court process; in the long term this could encourage more people to report offences;
- allow the development of case management procedures to improve the ways in which sexual offences trials are run, for example by reducing delays;
- provide an opportunity to develop support services for complainants alongside the criminal justice process;

250 Ibid [7.39].

- reduce complainants' fears of testifying; and
- symbolise the fact that sexual offences are taken seriously by the criminal law.

4.51 Specialisation could also contribute to the development of expertise in the substantive law and procedures relevant to sexual offences cases. It would recognise the significant differences between the sexual offences law and procedure and other areas of the criminal law, including:

- differences in the rules of evidence, for example the provisions restricting cross-examination on prior sexual history and the admission of confidential counselling information;
- provisions allowing use of alternative methods of giving evidence;
- in cases involving child sexual offences, the requirement to hear evidence from children; and
- distinctive rules relating to the jury directions that must be given in sexual offence trials.²⁵¹

4.52 Specialisation could also contribute to uniformity and predictability in the exercise of judicial discretion on matters such as the admission of prior sexual history. It could allow the development of judicial experience in tailoring appropriate sentencing options for offenders and provide an opportunity to evaluate the success of treatment programs for offenders.²⁵²

FEATURES OF A SPECIALISED JURISDICTION

4.53 The Commission has conducted preliminary research into the potential for the establishment of a specialist sexual offences jurisdiction in Victoria. The following two possible models have been identified.

251 The law relating to jury warnings in this area has now become extremely complex. In *R v BWT*, Justice Wood identified ten separate warnings that NSW law required to be given to juries in sexual offences cases. Justice Wood referred to 'the potentially bewildering array of considerations, some of which may appear highly technical, if not inconsistent to the lay mind and which, in any event are likely to vex the experienced trial lawyer', which make directing a jury in a sexual offence case a 'somewhat formidable task': (2002) 54 NSWLR 241, 251. There is a similar problem in Victoria.

252 There is a range of sentencing options which could include directing an accused to participate in a treatment program.

- The establishment of a new stand-alone court with jurisdiction to hear criminal cases involving defendants charged with sexual offences and other associated offences. The jurisdiction of the Court could include summary sexual offences, indictable offences triable summarily (which are currently heard in the Magistrates' Court) and indictable offences (which are now tried in the County Court). The Court could develop pre-trial procedures for handling indictable offences, which could include changes to the committals in the area of sexual offences.
- The establishment of a specialist sexual offences list in the County Court, or in both the Magistrates' Court and the County Court. Judicial officers who expressed an interest in this area of law, and had received some specialised education on trying sexual offences cases, would be assigned to these lists for a defined period.

4.54 Both these approaches have advantages and disadvantages. A stand-alone sexual offences court could be equipped to accommodate the specific needs of complainants from Indigenous and NESB communities, children and people with cognitive impairments more effectively than is possible within the mainstream court system. Such a court could develop specialised procedures and support services for complainants in sexual offences cases, which the structure and management system of an existing court might find difficult to accommodate. A separate court with both Magistrates' and County Court jurisdiction could develop pre-trial procedures for handling indictable offences, which could include changes to the committal process in the area of sexual offences.

4.55 On the other hand, a separate court with a criminal jurisdiction limited to sexual offences may be seen as marginalising sexual offences and treating them as less significant than other serious offences. Such a court could have difficulty in attracting appropriately qualified judicial officers. It is likely that many lawyers interested in a judicial appointment would prefer a case load covering a broader range of issues.

4.56 Lawyers could also be concerned that a specialist sexual offences court which aims to be more responsive to the needs of complainants may appear to be biased against offenders. It would be crucial to ensure that the court's emphasis on acknowledging and meeting the needs of complainants did not compromise the fairness of the trial process or the presumption that the accused is innocent until proven guilty. The alternative approach of establishing a specialist sexual offences list would be consistent with the approach taken in some other areas of law. In the

Victorian Supreme Court, homicide cases are heard by judges experienced in this area of the law. There are also several specialised lists in the County Court.

4.57 A specialist sexual offences list might incorporate protocols for handling sexual offences. The Magistrates' Court of Victoria has implemented a series of protocols to systematise the handling of family violence and stalking matters. Where possible, these matters are to be managed separately from the general court list. The protocols direct that at court complexes (and other courts where possible) family violence and stalking matters are to be listed on a dedicated day or days and heard in a dedicated courtroom away from other matters listed that day. Courts with support services are directed to list in a way that optimises the assistance those services can provide. On hearing days, the person affected reports to a separate area of the court, away from other matters where possible. Some of these features may be adapted to a specialist sexual offences list.

4.58 The establishment of a separate sexual offences list would almost certainly require fewer resources than the establishment of a specialist court, but would provide a basis for encouraging judges to participate in judicial education on sexual offences and to develop expertise in running sexual offence trials.

4.59 Evidence in sexual offence trials is often very disturbing. Judges sitting on such cases should have opportunities for 'debriefing' along similar lines to that made available to sexual assault counsellors. Such support could be provided within the framework of a specialist court or to judges presiding over a sexual offences list.

4.60 The Commission will be undertaking further research and consultation to investigate the advantages and disadvantages of a specialist approach to sexual offence cases, the features that such an approach should incorporate and the best means of achieving specialisation. In the meantime we are anxious to receive views on the matters discussed above. The creation of a specialist sexual offences jurisdiction will be discussed in more detail in the Final Report.

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QUESTION

The Commission seeks views on the establishment of a specialist sexual offences jurisdiction.

Chapter 5

Reducing the Stress of Giving Evidence

INTRODUCTION

5.1 This chapter considers the effect of earlier procedural and evidentiary reforms which were intended to overcome stereotypes about victims of sexual offences and to reduce the trauma which many complainants experience when giving evidence in court. The chapter examines the laws which:

- provide alternative arrangements for complainants to give evidence, for example giving evidence from another room via closed-circuit television (CCTV);²⁵³
- restrict cross-examination of complainants on their sexual activities;²⁵⁴
- restrict admission of evidence about the content of communications between complainants and their counsellors;²⁵⁵ and
- restrict the use of warnings given by trial judges about the dangers of relying on the uncorroborated evidence of complainants.²⁵⁶

In this chapter, we make recommendations for changes to these provisions with the intention of increasing their effectiveness.

5.2 In addition, the chapter makes recommendations to prevent people accused of sexual offences from personally cross-examining complainants and to enhance services which provide witness support for complainants.

253 *Evidence Act 1958* s 37C. This section also refers to other measures designed to assist complainants, for example s 37C(3)(c) provides for allowing counsel to remain seated and not robed and allowing support people to sit next to complainants while they are giving evidence to provide them with emotional support, and s 37C(3)(b) provides for erection of screens in courtrooms so that complainants do not have to see the accused.

254 *Evidence Act 1958* s 37A.

255 *Evidence Act 1958* Part 2 Div 2A.

256 *Crimes Act 1958* s 61.

5.3 It is important to recognise that such changes will only go some of the way towards changing the way criminal trials are conducted. The recommendations for change made in this chapter must be combined with systemic changes of the kind discussed in Chapter 4, if they are to achieve the intended effect. Otherwise, the law reforms proposed in this chapter are unlikely to result in any significant change to the treatment of victim/survivors in sexual offence proceedings.

ALTERNATIVE ARRANGEMENTS FOR GIVING EVIDENCE

Closed-circuit Television and Screens

CURRENT LAW

5.4 Chapter 4 outlines some of the problems which complainants have experienced in the criminal justice process. While many witnesses find giving evidence in court difficult, it is particularly stressful for complainants in sexual offences cases. The need to confront the person alleged to have assaulted them, the difficulties of talking about the circumstances surrounding the assault, and the embarrassment of being questioned in public about sexual matters, can make committals and trials traumatic and intimidating experiences for complainants. In 1991, section 37C of the *Evidence Act 1958* introduced provisions which were intended to make it easier for complainants to give their evidence. Under these provisions, the court may itself allow, or a party may ask the court to direct, the use of alternative arrangements. Under these provisions a witness may be allowed to give evidence from a place other than the courtroom, by means of closed-circuit television (CCTV), and screens may be used to remove the defendant from the witness' direct line of vision.

EVALUATION

5.5 The use of CCTV and screens by adult complainants is currently the exception rather than the rule. The Rape Law Reform Evaluation Project reported in 1996 that 19 out of 133 complainants (14.3%) gave evidence by CCTV at the committal stage. The majority of those who used CCTV at committal stage were under 18 (14 out of 19). Closed-circuit television was used a little less frequently at trial. Ten out of 98 complainants gave evidence by CCTV. Seven of these were

children, two were adult women with an intellectual disability and the other complainant was an adult woman without a disability.²⁵⁷

5.6 Information from our consultations suggests that CCTV is used more frequently at committals than at trials, although some magistrates may refuse to allow complainants to testify through CCTV at committal because they believe that the absence of a jury reduces the ordeal of testifying in open court for complainants. It is rare for adults to give evidence by CCTV at trial.²⁵⁸ The Witness Assistance Service of the Office of Public Prosecutions commented that it was rare for a witness over the age of 12 to be allowed to testify from the CCTV facility.²⁵⁹ The extent to which screens are used varies in different areas of Victoria, but is relatively unusual.

5.7 Although section 37C of the *Evidence Act 1958* allows the use of CCTV to be initiated by the trial judge, this occurs rarely. Prosecutors are sometimes reluctant to seek the use of CCTV because they believe that this may reduce the chance of the accused being convicted. Despite this reluctance, judges and magistrates generally believe that CCTV works well.

5.8 In 1996, the Rape Law Reform Evaluation Project reported that 10 of the 11 magistrates who had experience with use of CCTV were very positive about the facility. The remaining magistrate recognised that it made it easier for victims to give evidence but was concerned that it might reduce the impact of the witness's evidence. Two of the judges interviewed who had experience of the use of CCTV had similar concerns and another judge felt that the jury might weigh evidence given in this way differently from other evidence, which could sometimes be unfair to the accused and sometimes unfair to the witness. However, the majority of judges who had seen the CCTV facility being used were pleased with the way it operated. A Western Australian evaluation of routine use of CCTV or removable screens for child witnesses also reported favourably on these arrangements.²⁶⁰

257 Melanie Heenan and Helen McKelvie, *The Crimes Rape Act 1991: An Evaluation Report*, Report No 2, Rape Law Reform Evaluation Project, Department of Justice (1997) (hereafter RLREP), 56–9, 61–3.

258 Submission 72.

259 Submission 67.

260 Ministry of Justice, *Child Witnesses and Jury Trials: An Evaluation of the Use of Closed Circuit Television and Removable Screens in WA* (1995). For a more detailed discussion of the findings see below para 6.75.

5.9 In 1996, the Victorian Parliamentary Drugs and Crime Prevention Committee recommended that all complainants in sexual offences cases should give evidence via alternative arrangements (for example by using CCTV), unless they chose otherwise.²⁶¹ In Western Australia (WA) the legislation provides for the routine use of CCTV by child complainants in sexual offences cases, except where the child is able and wishes to give evidence in the presence of the defendant.²⁶² In the Australian Capital Territory (ACT), CCTV is routinely used for both adult and child witnesses in sexual offences cases and for adult complainants.²⁶³ The routine use of CCTV could substantially alleviate the traumatic effect for complainants giving evidence in a sexual offences trial, without prejudicing the rights of the accused.

5.10 When section 37C of the *Evidence Act 1958* was introduced, some defence lawyers were concerned that the use of alternative arrangements would prejudice the accused person's right to a fair trial.²⁶⁴ As far as the Commission is aware, there is no clear empirical data which supports either defence or prosecution beliefs about the effect of the use of alternative arrangements on the outcome of committals or trials.²⁶⁵ Audio and video links are now widely used throughout society and courts are increasingly receiving evidence by audio or video link, in civil and criminal trials.

RECOMMENDATIONS

5.11 The Commission recommends that CCTV should no longer be regarded as an 'alternative' method of giving evidence, but should be the standard way in

261 Parliament of Victoria, *Combating Sexual Assault Against Adult Men and Women* (1996) Recommendation 31, 123.

262 *Evidence Act 1906* (WA) ss 106N, 106O. As an alternative, the court can order the defendant to be held in a separate room and the evidence to be transmitted to the defendant by video link.

263 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 6. The court can order that the person gives evidence in court if the witness prefers to do so, the proceedings will be unreasonably delayed if this does not occur, or there is a substantial risk that the court will be unable to ensure that the proceedings are conducted fairly if this does not occur.

264 Some counsel for the accused believe that objecting to the use of CCTV will benefit their client: see Submission 61.

265 See a summary of the literature in JR Spencer and Rhona H Flin, *The Evidence of Children—The Law and the Psychology* (2nd ed, 1990) 107–11; compare this with Gail Goodman et al, 'Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions' in Ray Bull (ed) *Children and the Law* (2001). The latter research seems to indicate a greater reluctance on the part of juries to convict when child witnesses testified via CCTV.

which complainants in sexual offences cases give evidence at committal or trial. Prosecutor training (which we have recommended in Chapter 4) should include familiarisation of prosecutors in the use of CCTV when they examine complainants.

5.12 As is the case in the ACT²⁶⁶ and for child witnesses in WA, complainants who wish to should be able to testify in court. Our recommendation permits an application to be made to the judge for a complainant to give evidence-in-chief and/or be cross-examined in court in these circumstances. Where the complainant gives evidence in court, a screen should be used to remove the defendant from the complainant's direct line of vision. The ACT legislation also provides for complainants' evidence to be given in court, if there is a substantial risk of the court being unable to ensure that the proceedings are conducted fairly if evidence is given by CCTV. In our view this method of giving evidence does not have the capacity to affect the defendant's right to a fair trial. For this reason we do not recommend a similar exception.

5.13 In its present form, *Evidence Act 1958* section 37C applies to all witnesses in sexual offences cases and is not confined to complainants. The recommendations set out below provide for routine use of CCTV for adult complainants in sexual offences cases. In the case of adult witnesses in sexual offences cases, other than complainants, the existing discretion to order the use of CCTV will continue to apply. In Chapter 6 we make a similar recommendation for all child witnesses in sexual offences cases. This is similar to the approach in the ACT.

266 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 6.



RECOMMENDATIONS

23. Section 37 of the Evidence Act 1958 should be amended to provide for the routine use of closed-circuit television (CCTV) by adult complainants in sexual offences trials.
24. The prosecution should be able to apply for an order that the complainant should give evidence in the courtroom. The judge should have the power to make that order only if the court is satisfied that the adult complainant is able and wishes to give evidence in the courtroom.
25. Every effort should be made to install appropriate CCTV facilities in all courts in which sexual offences proceedings are held. Where facilities are unavailable, cases should be relocated.

USE OF SCREENS

5.14 Section 37C of the *Evidence Act 1958* permits use of screens to remove defendants from the witnesses' direct line of vision. We have been told that courts in regional areas do not always have access to screens and that even where they do, they are not always used.²⁶⁷ The architecture of courtrooms in country areas does not always allow for effective use of screens. If use of CCTV becomes mandatory there will be no need to use screens in the vast majority of cases. In most situations, CCTV will be available to the court. However, use of screens may be necessary where CCTV is not available or where complainants wish to give evidence in court.

²⁶⁷ A survey undertaken by the VLRC showed that of the 32 Victorian Magistrates' Courts for which information was provided, only 10 (31.3%) are fitted with screens. Those screens are rarely used (in committal hearings for sexual offences cases with adult complainants testifying), according to 30% of respondents. See Appendix 3.

**RECOMMENDATION**

26. Where CCTV cannot be used, or an order is made that the complainant should give evidence in court, a screen is to be used to remove the defendant from the complainant's direct line of vision, except where the magistrate or judge is satisfied that the complainant does not wish a screen to be used for this purpose.

SPECIAL HEARINGS

5.15 In WA, children who are alleged to be the victims of sexual offences may give evidence-in-chief and be cross-examined at a special hearing which is held before the trial, in the absence of the jury. In these cases the child normally gives evidence by CCTV. The child's evidence is video-recorded and played at the trial, so that it is unnecessary for the child to appear. If, for some reason, a re-trial is necessary, the child's recorded evidence can be replayed at the new trial. In Chapter 6 we propose the use of special hearings for children and people with impaired mental functioning.

THE ADMISSIBILITY OF CERTAIN TYPES OF EVIDENCE**Prior Sexual Activity****CURRENT LAW**

5.16 In the past, complainants in rape trials were subjected to detailed and lengthy cross-examination about their sexual behaviour. Legislation which limits questions to relevant matters and requires the court to prohibit offensive and insulting questions²⁶⁸ did not adequately safeguard complainants against irrelevant and harassing cross-examination. Cross-examination of complainants about their sexual activities reflects the myth that women who are sexually experienced are likely to lie about rape and/or the assumption that only 'chaste' women are entitled to the protection of the criminal law. Cross-examination on prior sexual activity in sexual offences trials humiliates and degrades complainants and can make women feel as if they are being assaulted again. Fear of cross-examination

268 See, for example, *Evidence Act 1958* ss 39 and 40.

about their prior sexual experience may contribute to the reluctance of many women to report sexual offences to the police.

5.17 All jurisdictions in Australia have legislated to restrict the admissibility of evidence about complainants' sexual activities. Initially, in most jurisdictions, the provisions applied only to sexual activities with people other than the accused. Today, the majority of States have also restricted admission of evidence of prior sexual activity with the accused.²⁶⁹

5.18 In Victoria the first legislation restricting cross-examination was introduced in 1976.²⁷⁰ Further restrictions on cross-examination have been imposed since that time. Since amendments to section 37A of the Evidence Act in 1991, an application must be made to the magistrate or judge for permission to cross-examine complainants on their sexual activities with the accused or any other person.

5.19 Under section 37A(1), the court is to forbid any questions and exclude evidence on 'the general reputation of the complainant with respect to chastity'. The court can only give permission to admit evidence on the complainant's sexual activities where the evidence has 'substantial relevance to facts in issue' or is a

269 In the Northern Territory (NT) and the ACT, the restriction applies only to evidence about sexual activity with a person other than the accused. In the NT, the court cannot give leave for admission of such evidence unless the judge is satisfied that the evidence has substantial relevance to the facts in issue. Evidence of events which are substantially contemporaneous with an alleged offence are to be regarded as having substantial relevance: *Sexual Offences (Evidence and Procedure Act)* (NT) s 4. In the ACT, the court cannot give leave for admission of the evidence unless the judge is satisfied that to refuse to allow the evidence to be adduced or the question asked would prejudice the fair trial of the accused person: *Evidence Act 1971* (ACT) s 76G. In New South Wales, the legislation covers sexual activities with both the accused and others; some exceptions apply: *Criminal Procedure Act 1986* (NSW) s 105. In Queensland, it includes sexual activity with both the accused and other people, unless it relates to acts which are 'substantially contemporaneous' with the offence with which the defendant has been charged or is part of a sequence of events that explains the circumstances in which the alleged offence occurred: *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4. In South Australia it covers sexual activities with both the accused and others, other than 'recent sexual acts' with the accused: *Evidence Act 1929* (SA) s 34I. The court can only grant leave for admission of the evidence if it is of substantial probative value or would in the circumstances be likely to materially impair confidence in the reliability of the evidence of the alleged victim and its admission is required in the interests of justice. A similar approach applies in Tasmania and WA: *Evidence Act 2001* (Tas) s 194M; *Evidence Act 1906* (WA) s 36B.

270 The *Evidence Act 1958* was amended by the *Rape Offences (Proceedings) Act 1976* which introduced s 37A to restrict cross-examination of complainants about sexual activities with people other than the accused. The section was amended in 1991 to include sexual activities with the accused.

‘proper’ matter for cross-examination because it is relevant to whether the complainant is a trustworthy witness.²⁷¹

5.20 Section 37A(4) provides that evidence which relates to or tends to establish the fact that the complainant was accustomed to engage in sexual activities shall not be regarded as:

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

5.21 In its examination of reported rape cases in the period 1992–93, the Rape Law Reform Evaluation Project found that these restrictions were not working as intended. In particular, the report stated that:

- sexual activity evidence was admitted after application in a significant proportion of cases (18.8% of complainants at committal and 39.8% of complainants at trial);²⁷²
- evidence about sexual activity was often admitted without any genuine scrutiny by the magistrate or trial judge of how the evidence was said to be substantially relevant to the particular issues in dispute or to the accused’s defence;²⁷³ and
- in a high proportion of cases complainants were cross-examined about their sexual activities without an application being made (46.6% of complainants who gave oral evidence at committal and 30.6% of all complainants who gave evidence at trial).²⁷⁴

5.22 As a result of these findings, section 37A was further amended to require that the application to the judge or magistrate be made in writing and given to the Director of Public Prosecutions 14 days before the date fixed for cross-examination at committal or 14 days before the date listed for the trial. The application must set out the initial questions the defence wishes to ask the

271 *Evidence Act 1958* s 37(2)(3)(a). It can also be taken into account in sentencing: s 37A(3)(b).

272 RLREP, above n 235, 122, 127.

273 Ibid 157.

274 Ibid 124, 134.

complainant, the scope of questions which will follow and in what way the evidence sought to be elicited from the questioning has substantial relevance to facts in issue or why it is proper matter for cross-examination.²⁷⁵ Where the court grants leave it must state in writing the reasons for granting the leave and cause those reasons to be entered in the records of the court.²⁷⁶

EVALUATION

CROSS-EXAMINATION ON SEXUAL ACTIVITY

5.23 In the Discussion Paper we asked for comments on how the new provisions restricting cross-examination about prior sexual history were working in practice. In its submission, the Criminal Bar Association suggested that the provisions were working well and that lawyers were complying with the requirement to obtain leave.

Judges do not simply ‘rubber stamp’ applications for leave; they hear arguments and then rule. There is no evidence to suggest the abuse of this process by counsel and the judiciary.²⁷⁷

5.24 By contrast, others consulted by the Commission said that cross-examination on sexual activities was still occurring in circumstances falling outside section 37A.²⁷⁸ We were also told that defence barristers have become adept at asking questions which indirectly address the complainant’s prior sexual experience. For example, one complainant who spoke to the Commission was asked about a pregnancy termination, without objection from the prosecution or intervention from the judge.²⁷⁹

5.25 Empirical research supports the information we obtained from consultations. Heenan’s study of 34 rape trials showed that evidence of the complainant’s sexual history, proclivities or sexual reputation was admitted in 26 out of 34 (76.5%) cases. Interestingly, on the majority of occasions where evidence about the complainant’s prior sexual activities was admitted, cross-examination was more likely to be about the complainant’s activities with people other than the

275 Section 37A(5).

276 Section 37A(6).

277 Submission 28.

278 See, for example, Submissions 5, 16, 18, 26, 56, 58, 60 and 72.

279 Submission 16.

accused, rather than with the accused, even though it is likely to be more difficult to show that evidence about sexual activity with a person other than the accused is of 'substantial relevance' to the facts in issue than evidence about sexual activity with the accused.²⁸⁰

5.26 Although there was a small number of cases where prosecution objections, combined with a strict interpretation of the legislation by the trial judge, resulted in refusal of defence counsel's application to question the complainant, it is of particular concern that Heenan's findings show an increase in the admission of sexual activity evidence since the legislation was amended in 1997. Table 4 below compares the percentage of trials in which sexual activity evidence was admitted in her study,²⁸¹ compared with the percentage of trials examined for the RLREP in 1992–3.²⁸²

280 Melanie Heenan, *Trial and Error: Rape, Law Reform and Feminism* (PhD Thesis, Monash University, 2001), 186. Evidence related to sexual activity with the accused was introduced on 14 of 36 occasions and with a person other than the accused on 22 occasions.

281 In 1989, the former Law Reform Commission of Victoria also researched admission of prior sexual history evidence. When this research was undertaken, s 37A did not cover cross-examination about the complainant's prior sexual experience with the accused. The results are therefore not directly comparable with those in Table 4. In addition, the research reported percentages of complainants cross-examined, rather than percentages of trials in which such cross-examination occurred. Twenty-three per cent of complainants who were involved in a trial were questioned about their prior sexual history, following a successful application to admit this evidence. A further 6% of complainants were asked sexual history questions at trial without the prior approval of the trial judge.

282 The figures quoted here differ from those above at 5.21, which deals with the percentage of complainants who were questioned about prior sexual history.

TABLE 4: ADMISSION OF PRIOR SEXUAL HISTORY

Comparative studies of sexual evidence admitted²⁸³	Number of trials in which prior sexual history admitted	%
RLREP ²⁸⁴ (n=90) ²⁸⁵	48	53.3%
Heenan (n=34)	26	76.5%

5.27 Heenan points out that complainants may be cross-examined about a number of different areas of their prior sexual history. Applications may be made for permission to cross-examine in relation to some of these areas, but not others. For example, in the 26 trials where evidence about sexual activity was admitted, it was introduced on 36 separate occasions.

[I]n any one trial a complainant might be asked, with the permission of the trial judge, to recount the first occasion on which she had sexual relations with the accused (successful application). She might then be asked, without any permission being sought, to detail the nature of a previous allegation of rape she made to the police, which would constitute a breach of the provisions.²⁸⁶

5.28 In some of these cases, cross-examination about sexual activity was clearly irrelevant to the defence and outside section 37A. Such questions were humiliating to the complainant and were intended to appeal to the discriminatory stereotype that simply because the complainant had agreed to have sex with another man or men, she therefore must have consented to have sex with the accused. One example in Heenan's thesis was particularly disturbing. The complainant in one of the trials she observed was subjected to lengthy and offensive questioning about sexual activity she allegedly engaged in with men other than the accused on occasions prior to the alleged rape. The defence

283 The table shows the number of trials where sexual history evidence was admitted, i.e. it excludes committals.

284 The RLREP reported the number of complainants who were asked questions about prior sexual history at trial. The figure in this table regarding the number of trials was obtained by re-analysing the data collected for the RLREP.

285 Heenan, above n 280, Appendix 2, 410.

286 Ibid 186.

successfully argued in applying for leave that the accused's knowledge of the complainant's activities with these other men, who were friends of the accused, would have influenced his forming an honest belief that she would be likely to also have sex with him. The complainant denied she had ever had any sexual contact with these other men, and also denied that she had consented to having any sexual contact with the accused. Yet the complainant was made to respond to detailed questions about the specifics of these 'sexual encounters' with the friends of the accused.²⁸⁷

5.29 Heenan's research also showed that the requirement that an application be made²⁸⁸ before complainants can be questioned about their sexual activities was not always applied in practice. On nine of the 36 occasions when the complainant was questioned, no application was made and in two other situations it was not clear whether an application had been made.²⁸⁹ During the period of Heenan's research, the legislation was amended to require that an application be made in writing prior to the committal proceeding and/or trial, and that it set out specified matters.²⁹⁰

5.30 The legislation goes on to outline the specific steps that must be carried out in forwarding the written applications to the Director of Public Prosecutions (DPP) within prescribed time periods. In the case of a committal hearing, the DPP must send a copy of the application to the registrar at the appropriate Magistrates' Court, or in the case of a trial, to the criminal trial listing directorate, together with a copy of the presentment.

5.31 It was not anticipated that these provisions would necessarily reduce the extent to which sexual activity evidence was admitted in sexual offences cases. However, it was intended to prevent wide-ranging cross-examination of women's

287 Dr Caroline Taylor's thesis also shows how the sexual activities of the complainant were used to discredit her in the context of incest trials. In one case, DNA evidence showed that two of the complainant's three children were those of her father. Defence counsel managed to have the DNA evidence excluded, but in cross-examination of the complainant used DNA evidence to show that the third child had been fathered by another person, in order to discredit the complainant: Shannon Caroline Taylor, *The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court Australia in 1995* (PhD Thesis, University of Ballarat, 2001) 255.

288 The requirement that the application be made in writing did not come into operation until part way through Heenan's research.

289 Heenan, above n 280, 189.

290 See *Evidence Act 1958*, s 23, 37A.

sexual history with no regard to how the questioning met the threshold tests outlined in the legislation. In addition, the legislation provided a mechanism for ongoing monitoring of the use of sexual activity evidence in sexual offences trials.

5.32 The Commission has made some preliminary inquiries into the effect of the new provisions by asking the Solicitor for Public Prosecutions to provide information about written applications to cross-examine complainants about their sexual activities. We were informed that no separate record is kept of cases in which the defence has applied for permission to cross-examine on the complainant's sexual activities,²⁹¹ although such applications might be contained in individual case files. The Office of Public Prosecutions (OPP) commented that, contrary to the new section, applications might still be made orally during a committal or trial. Section 37A(5C) only permits the court to dispense with the requirement that an application be made in writing 'because of the existence of exceptional circumstances'. We were also unable to obtain any record of written applications from the criminal trial listing directorate, or any record of the reasons for granting leave which are required to be entered in court records under section 37A(6).

5.33 There was some suggestion that these provisions may have been superseded by the introduction of new legislation that allows for the routine holding of pre-trial directions hearings.²⁹² These hearings are principally designed to resolve questions of law and procedure before the proceedings get underway, in order to improve the efficiency of the courts. If sexual activity applications are being heard and determined at directions hearings then the separate process prescribed through section 37A of lodging written applications may now be unnecessary.

5.34 Prior to preparation of the Final Report for this reference, the Commission will undertake further research to determine if section 37A applications are being made at pre-trial hearings. Irrespective of the results of this research, the Commission considers it vital that the operation of the provisions restricting the admission of sexual activity evidence be properly and routinely monitored. A process must be devised that ensures that there is pre-hearing determination of the issues which requires barristers to articulate in writing how it is that the evidence they seek to admit reaches the prescribed threshold test. There

291 Letter from the Solicitor for Public Prosecutions, 16 August 2002.

292 *Crimes (Criminal Trials) Act 1999* s 5.

must also be a workable system for ensuring the process of determination remains a transparent one.

5.35 The Commission notes that the DPP has recently decided that in cases where complainants are called to give evidence at committal or trial, the solicitor handling the case in the OPP will write to the defence informing them of the procedural requirements imposed by section 37A and that they will have to show exceptional circumstances to justify admission of the evidence without a prior written application.²⁹³ The Commission welcomes this change and hopes that it will result in better compliance with the legislation. The Commission intends to explore some options for nominating a central body that would take responsibility for the collection of section 37A applications and decisions, and report annually on their operation.

OTHER PROBLEMS

5.36 Our research also indicates that some complainants have been asked about previous non-consensual sexual activities.²⁹⁴ Such cross-examination may cover allegations of sexual assault which have not resulted in the alleged offender being charged and allegations where the offender has been charged and convicted. It is usually intended to attack the complainant's credibility, by suggesting that a person who has been a victim of sexual assault may be particularly unreliable or prone to making false allegations.²⁹⁵ Alternatively, the defence may suggest that a complainant may have developed a 'victim mentality' which could explain the making of a false or mistaken allegation against the accused. Some defence counsel

293 *Evidence Act 1958 s 37A(5B)*.

294 In *Suresh v R* (1998) 72 ALJR 769, counsel successfully applied to cross-examine the complainant about her prior sexual experiences under the *Evidence Act 1906* (WA). At the time the alleged offences occurred, the complainant was aged between 8 and 9½ years. The accused, an adult, suggested that the complainant had engaged in sexually explicit behaviour. For other examples see Heenan, above n 280, 193.

295 See, for example, *R v S* (Unreported, County Court of Victoria, November 1995, Campton J) discussed in Shannon Caroline Taylor, "And Now Your Honour, For My Next Trick"... Yet Another Defence Tactic To Construct the Mad, Bad Colluding Mother and Daughter in Intra-Familial Sexual Assault Trials' [2000] 14 *Australian Feminist Law Journal* 121. In the case, the complainant's brother had been convicted of sexual abuse of the complainant. Defence counsel relied on information about prior sexual abuse contained in the complainant's counselling files in order to claim that the complainant was suffering from a mental illness which led to her making a false allegation, but was able to prevent the jury from being told about the fact that the brother had been convicted in respect of some of these allegations.

and judges appeared to believe that questioning about past assaults is not covered by the restriction on admissibility in section 37A.²⁹⁶

5.37 There may be a small number of cases where such questioning is justified (for example, because it is suggested that a child has mistaken the identity of the perpetrator of abuse). However, in many cases, the effect of this interpretation of section 37A is that women who have been sexually assaulted in the past are subjected to cross-examination about the prior assault or about incidents of sexual abuse in childhood, in circumstances where the cross-examination has no relevance to the facts or the complainant's credibility and in situations where questioning about consensual sex would not be permitted. This interpretation of the section has the potential to victimise complainants coming from families with a history of child abuse, and is likely to discourage people who have been repeatedly victimised throughout their lives from reporting sexual crimes.²⁹⁷ If section 37A does not cover prior non-consensual sex, such complainants could be indiscriminately and routinely cross-examined about earlier allegations of abuse.

5.38 The original purpose of section 37A was to overcome discriminatory assumptions that sexually experienced women are inclined to lie about sexual assault. However, in our view, the section now plays an important role in protecting all complainants against cross-examination about sexual matters which have no relevance to the alleged offence. It follows that any provisions restricting questioning on prior sexual activities should apply to both non-consensual and consensual sex. While the legislation, as currently drafted, appears to cover non-consensual activities, this matter should be put beyond doubt. Moreover, unless there are very specific links that can be demonstrated between the occurrence of

296 See the case reported in Heenan, above n 280, 192–4. The complainant had previously reported multiple rapes perpetrated by men she had met at a hotel. The trial judge took the view that no application under s 37A was necessary. In three other cases the trial judges required defence counsel to make an application under s 37A.

297 See, for example, *R v S* (Unreported, County Court of Victoria, November 1995, Campton J) discussed in Taylor, above n 287, 237. In this case, the young woman was questioned at length about every incident of alleged abuse by her brother in a trial of her father for incest. The brother had previously pleaded guilty to offences against the sister. See also Patricia Easta, *Voices of the Survivors* (1994), which makes reference to a large proportion of the interviewees speaking of multiple experiences of sexual assault throughout their lives. A recent British Crime Survey found that 41% of the women who reported sexual victimisation had experienced sexual assault in the past on multiple incidents (two or more); Andy Myhill and Jonathon Allen, *Rape and Sexual Assault of Women: The Extent and Nature of the Problem: Findings from the British Crime Survey*, Home Office Research Study No 237 (2002), 31.

past sexual assaults and the events in question, the evidence should not be interpreted as meeting the threshold test of substantial relevance.

OPTIONS

5.39 The Commission has considered three main legislative models for restricting admission of evidence of complainants' sexual activities.

- Retaining the current approach, under which the judge or magistrate has a broad discretion to permit admission of sexual activity evidence where it is substantially relevant to the facts or is a proper matter for cross-examination as to the complainant's credit.
- Prohibiting the admission of sexual activity evidence, unless it fits within specified categories defined in the legislation. This is the model which currently applies in New South Wales.²⁹⁸ The court has a discretion to decide whether the evidence in these categories should be admitted, and must be satisfied that the probative value of the evidence outweighs any distress, humiliation or embarrassment the complainant may suffer as a result of its admission.
- Imposing additional limits on the discretion to admit evidence of sexual activity. These could require the evidence to have significant probative value in relation to the facts in issue and provide that the court, in exercising its discretion, must be satisfied that the probative value of the evidence outweighs the distress, humiliation and embarrassment the complainant may suffer if the evidence is admitted. This approach has been adopted in Western Australia and Tasmania.²⁹⁹ Along similar lines, the New South Wales Law Reform Commission (NSWLRC) proposes that evidence which has significant probative value to a fact in issue, or to the complainant's reliability, should only be admissible if the probative value of the evidence outweighs prejudice to the proper administration of justice.³⁰⁰ The NSWLRC proposed that the factors to be taken into

298 *Criminal Procedure Act 1986* (NSW) s 105.

299 See *Evidence Act 1906* (WA) s 36BC; *Evidence Act 2001* (Tas) s 194M.

300 New South Wales Law Reform Commission, *Reform of Section 409B*, Report 87 (1998). Note that Recommendation 2, which proposes amendment of the existing s 409B, allows admission on the grounds that the evidence has significant probative value to a fact in issue or to credit.

account in considering whether this is the case should be enunciated in the legislation.

The arguments in favour of, and against, each of these approaches are briefly discussed below.

RETAINING THE CURRENT APPROACH

5.40 The Model Criminal Code Officers Committee (MCCOC) supported the retention of a discretionary model, stating that:

[I]n light of the undoubted difficulties encountered with the New South Wales model, and the fact that the rest of Australia and indeed the rest of the world, has rejected the mandatory model, the Committee remains attracted to a strictly circumscribed discretionary model.³⁰¹

5.41 The Victorian Law Reform Commission does not support retention of the current discretionary model because it does not appear to be working effectively. Section 37B could provide more effective protection to complainants if the provisions requiring applications for cross-examination to be made in writing were actually enforced, and if prosecutors objected more consistently to questioning which contravened the provision. Prosecutor training on these issues may enhance the effectiveness of the provision.

5.42 However, as the NSWLRC commented, ‘sexual offence proceedings have been particularly susceptible in the past to sexist assumptions by the judiciary about what is relevant’.³⁰² Retention of a broad criterion of ‘substantial relevance’ for admission of sexual history evidence will continue to allow values which discriminate against sexually active women to influence judicial decision-making. As Justice L’Heureux Dubé commented in her dissenting judgment in *Seaboyer*:

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

302 New South Wales Law Reform Commission, above n 300, 156.

Any relevancy decision is particularly vulnerable to the application of private beliefs whether the test be one of experience, commonsense or logic...There are certain areas of enquiry where experience, commonsense or logic are informed by stereotype and myth...[Sexual offences] law has been particularly prone to the utilisation of stereotype in determination of relevance...and again this appears to be the unfortunate concomitant of a society which, to a large extent, holds these beliefs.³⁰³

THE NEW SOUTH WALES MODEL

5.43 New South Wales has taken a different approach to the admissibility of sexual activity evidence. Rather than conferring a broad power on the court to admit evidence which is 'substantially relevant' to the facts, or reflects on the credit of the complainant, the *Criminal Procedure Act 1986* prohibits the admission of evidence falling outside certain defined categories.³⁰⁴

5.44 Under section 105 of the *Criminal Procedure Act 1986*, sexual history evidence, which is evidence 'that the complainant has or may have had sexual experience or a lack of sexual experience or has or may have taken part or not taken part in a sexual activity', is only admissible if it comes within one of six exceptions. It must also be shown that 'the probative value of the evidence outweighs any distress, humiliation or embarrassment which the complainant might suffer'.

5.45 Under section 105, evidence is only admissible if:

- it concerns matters occurring at or about the time of the alleged offence and is of events alleged to form part of a connected set of circumstances in which the alleged offence was committed;
- it is evidence of an existing or recent relationship between the accused or complainant at or about the time of the offence;
- the accused is alleged to have had intercourse with the complainant but does not concede that intercourse has occurred and such evidence is relevant to whether the presence of semen, pregnancy, disease or injury is attributable to intercourse between the accused and the complainant;

303 *R v Seaboyer; R v Gayme* [1991] 2 SCR 577, 586.

304 The relevant provisions were originally in the *Crimes Act 1900* (NSW), s 409B. They were based on Michigan legislation; see New South Wales Law Reform Commission, above n 300, 92.

- it relates to whether at the time of the commission of the alleged offence the complainant had a disease that, at any relevant time, was absent in the accused;
- it relates to whether at any relevant time there was an absence of a disease in the complainant that was present in the accused at the time of commission of the alleged offence;
- it is relevant to whether the allegation that the offence was committed was first made following a realisation or discovery of disease or pregnancy in the complainant, which took place after the commission of the alleged offence; or
- where sexual history evidence has been raised by the prosecution and the accused person might be unfairly prejudiced if the complainant could not be cross-examined in relation to the relevant matter.

5.46 The argument in favour of the approach taken in NSW is that it creates certainty about the situations in which evidence of prior sexual history is admissible, as well as giving complainants more effective protection against irrelevant questioning. The argument against this approach is that limiting cross-examination to situations which come within defined categories could result in a person being unjustly convicted, because it is impossible for the legislation to accurately specify all the situations in which the evidence may be relevant.³⁰⁵

5.47 In 1996, the NSWLRC was asked to review the operation of these provisions, following criticism of the operation of section 409B of the *Crimes Act 1900* (the provision preceding section 105B).³⁰⁶ The Commission's review was prompted by concerns that the exclusion of evidence falling outside the situations outlined in the legislation might prejudice the accused's right to a fair trial. Critics of the legislation argued that the approach of defining the situations in which evidence of sexual history was admissible could prevent accused people from relying on evidence which is highly relevant to their defence. Most of the

305 For a discussion of the case law on these provisions see MCCOC, above n 301, 229–33.

306 New South Wales Law Reform Commission, above n 300. The Report refers to *Grills v R*; *PJE v R* (Unreported, High Court of Australia, No S8/96, S154/95, 9 September 1996). The case is reported less comprehensively in (1996) 70 ALJR 905. See also *Berrigan v R* (Unreported, High Court of Australia, S159/94, 23 November 1995). In both cases, the High Court refused special leave to appeal, and *HG v R* (Unreported, High Court of Australia, No S128/97, 19 May 1998). The NSW Supreme and District Courts were also critical of the section: see New South Wales Law Reform Commission, above n 300, 42.

situations said to give rise to problems were cases where the complainant was a child and the accused denied the abuse had occurred.³⁰⁷ Cases said to be problematic included situations where:

- the accused wanted to rely on evidence that a child had been abused by someone other than the accused to explain why the child demonstrated signs of abuse or had knowledge of sexual matters;
- the accused wished to argue that the complaint was a fabrication and to rely on the fact that the complainant had made prior allegations of sexual assault which were allegedly false;³⁰⁸ and
- the complainant was a child who had previously been subjected to abuse by a person other than the alleged offender, and the defence wished to suggest that they had mistakenly blamed the accused rather than the real perpetrator.³⁰⁹

5.48 Submissions from some judicial officers and public defenders suggested that the exclusion of evidence in cases involving adult complainants³¹⁰ would rarely operate unfairly against the accused. However the NSWLRC considered that the provision had the potential to prejudice the right of the accused to a fair trial in cases where the accused wishes to rely on the fact that the complainant had previously been sexually abused by someone else or made allegations of abuse.³¹¹ The only safeguards against this would be:

307 Ibid 45.

308 For example, *R v M* (1993) A Crim R, 549. Note however the difficulties of showing that they are actually false: see above n 297.

309 New South Wales Law Reform Commission, above n 300, 45–58.

310 One example of a situation in which it was suggested that unfairness could occur was where the complainant was a sex worker and the accused wished to argue that the complainant had consented to sex but alleged rape when he had refused to pay her. It was also argued that the exclusion of prior sexual history evidence could be problematic where an accused argued that the fact that the complainant had sex with other men had led him to believe she had consented to sex.

311 New South Wales Law Reform Commission, above n 300, 112–13.

a decision not to prosecute, a decision on the part of the prosecution not to lead certain evidence, and possibly, an appellate decision to quash a conviction and enter an acquittal. These safeguards are less than satisfactory. On the other hand, they may have the result that a person is not prosecuted for the alleged commission of an offence because of the unfair consequences of the legislation, or that a jury's verdict is overturned on the basis of evidence that has been untested at trial.³¹²

5.49 The NSWLRC considered whether the section should be amended by expanding the categories of admissible evidence to include evidence of earlier 'false' allegations of sexual assault or allegations of sexual abuse. It rejected this option. There was a danger that the court may give undue probative value to evidence of a false allegation to discredit the complainant, when it could not be established whether allegations of prior assault were in fact true or false,³¹³ or where there was little basis for claiming that the allegation was in fact false. 'There may also be a risk that this evidence will give rise to prejudice and misconceptions about women and sexual assault complainants generally, in a way which wrongly influences the court's evaluation of the facts.'³¹⁴ The NSWLRC was also concerned that:

If [the section] is amended to allow evidence of sexual abuse and previous 'false' allegations of abuse, it is possible that some complainants will suffer greater distress in giving evidence as the result of being questioned on these issues. That distress should not be trivialised or disregarded. In some cases, and for some complainants, perhaps particularly children, cross-examination may be extremely traumatic.³¹⁵

5.50 By contrast to concerns expressed about the rigidity of the section, many women's organisations argued that the provision should be retained because it was more effective in preventing the admission of irrelevant prior sexual history evidence than legislation which gave judges a broader discretion to allow questioning about prior sexual history. These groups suggested that, if anything, the statutory categories of admissible evidence had been interpreted too liberally by the courts. For example, a review conducted by the NSW Department for

312 Ibid 113.

313 Ibid 49–50.

314 Ibid 115.

315 Ibid 113.

Women³¹⁶ said that the provision allowing admission of evidence of a recent relationship with the accused had been used to justify admission of evidence about relationships which ended some years before the alleged offence. An example is the case of *Henning*,³¹⁷ where the complainant alleged she had been abducted and sexually assaulted by the appellant and five other men. She had suffered serious physical injuries. The appellant's application to cross-examine the complainant about alleged intercourse he had with the complainant while she was at school and since leaving school, was unsuccessful at trial, but on appeal it was held that this came within the 'relationship' exception and was admissible.³¹⁸

5.51 On balance, the Victorian Law Reform Commission does not favour a rules-based approach of the kind contained in the NSW *Criminal Procedure Act 1986*. Nor does it favour the adoption of such a provision for adult complainants alone. The NSWLRC considered and rejected the option of confining the section to adults. It decided that it would be too complex to have two different regimes for governing admission of evidence about prior sexual history and that some of the exceptions applicable to children might also apply to some cases involving adult complainants.³¹⁹ We agree that the rules-based approach is too inflexible and could occasionally result in the exclusion of clearly relevant evidence, even though it would operate fairly in the majority of cases. At the same time, we think it is vital to find a way to give complainants better protection against harassing and irrelevant questioning than is available under the current Victorian legislation. The approach favoured by the NSWLRC is a more acceptable alternative.

ADDITIONAL LIMITS ON DISCRETION

5.52 The NSWLRC considered several ways the legislation could be amended to ensure that the evidence which was genuinely relevant to the accused's defence

316 Department for Women (1996) *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault*.

317 *Henning* (Unreported, New South Wales Court of Criminal Appeal, No 406/88; 426/88; 436/88; 425/88; 437/88, 11 May 1990), cited in New South Wales Law Reform Commission, above n 300, 70.

318 The primary ground on which the appeal court determined that the line of questioning was relevant and admissible was that it was relevant to the complainant's credibility as a witness. In her evidence-in-chief, the complainant testified that she had seen the appellant only once during the years since leaving school. The evidence the appellant sought to introduce in cross-examination (of an ongoing sexual relationship between them) was held to be relevant to the complainant's credit. The court subsequently considered whether the evidence was also admissible on the grounds of the 'relationship exception'.

319 New South Wales Law Reform Commission, above n 300, 139–42.

could be admitted, without opening up possibilities for complainants to be harassed by cross-examination about their prior sexual activities. Instead of defining factual situations in which evidence was admissible, 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 should only be granted if:

- 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 (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); and
- the probative value of this evidence substantially outweighs the danger of prejudice to the proper administration of justice.

5.53 The NSWLRC model also specified the factors which the court must consider in weighing the probative value of the evidence against the argument in favour of its admission. These include:

- 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.

5.54 As is currently the case in Victoria, the provision recommended by the NSWLRC states 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.

5.55 The provisions recommended by the NSWLRC set out procedural requirements which must be complied with in order to admit evidence of complainants' sexual activities. These go further than the requirements currently applicable under section 37A of the Victorian *Evidence Act 1958*, which requires an application to be made in writing for permission to ask questions about prior sexual history.

5.56 Along similar lines, Western Australia and Tasmania have legislated to require the probative value of the evidence to be weighed against the effect of its admission on complainants. Under the Western Australian *Evidence Act 1906*,³²⁰ the court cannot give permission for use of evidence relating to the sexual experiences of the complainant unless it is satisfied that:

- the evidence has substantial relevance to the facts in issue; and
- the probative value of the evidence outweighs the distress, humiliation or embarrassment which the complainant might suffer as a result of its admission.

The Tasmanian legislation is similar.³²¹

5.57 Neither Western Australia nor Tasmania allows admission on the basis that evidence of prior sexual activity or experience is relevant to credibility. For example, the Tasmanian *Evidence Act 2001* states that:³²²

Evidence does not have direct and substantial relevance to a fact or matter in issue if it is relevant only to the credibility of the person against whom the crime or offence is alleged to have been committed.

RECOMMENDATIONS

5.58 On balance, the Commission believes that evidence about complainants' sexual activities should only be admissible where it has significant probative value to a fact in issue, as is the case in Western Australia and Tasmania. This change will provide greater protection to complainants against irrelevant and harassing cross-examination about prior sexual history than the current provisions, while still allowing admission of evidence which is relevant to the case of the defence.

320 *Evidence Act 1906* (WA) s 36BC. There are similar provisions in *Evidence Act 2001* (Tas) s 194M.

321 *Evidence Act 2001* (Tas) s 194M.

322 *Evidence Act 2001* (Tas) s 194M(3).

We also support legislative provisions referring to the factors which the court must weigh in deciding whether the evidence should be admitted, along the lines recommended by the NSWLRC. These factors allow the court to take account of 'any other matter which the judge considers relevant' in deciding whether leave should be granted. In the view of the Commission, this provision would leave open the possibility that sexual activity evidence could be introduced inappropriately. Thus our recommendation does not incorporate a similar provision.



RECOMMENDATIONS

27. Section 37A of the Evidence Act 1958 should be amended to make it clear that it covers both consensual and non-consensual sexual activities.
28. Section 37A of the Evidence Act 1958 should be amended to provide that the court shall not grant leave for complainants to be cross-examined about their sexual activities unless it is satisfied that:
 - the evidence has significant probative value to a fact in issue (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); and
 - the probative value of this evidence substantially outweighs the danger of prejudice to the proper administration of justice, taking into account the matters in Recommendation 30 below.
29. In deciding whether the probative value of the evidence sought to be admitted substantially outweighs the danger of prejudice to the proper administration of justice, the judge must have regard to:
 - the distress, humiliation or embarrassment which complainants 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 complainants' personal dignity and privacy; and
 - the right of the accused to make a full answer and defence.
30. Substantial probative value will not be established merely because of the fact that the complainant engaged in a sexual act with the accused or another person on an earlier occasion.

5.59 As a general principle, evidence of an accused person's prior convictions cannot be admitted in evidence to show that the accused is guilty of the crime charged.³²³ This principle is set out in section 399(5) of the Victorian *Crimes Act 1958*. However, exceptions to the principle allow an accused to be questioned about previous convictions 'where the nature or conduct of the defence is such as to involve imputations on the character of the...witnesses for the prosecution'.³²⁴ Questioning a complainant about her prior sexual history in such a way as to 'involve imputations on her character' could theoretically allow the prosecution to question the accused about prior convictions under this provision. In practice, however, the exception is rarely, if ever, used in this way³²⁵ and the court has a discretion to prevent cross-examination of the accused about their character.³²⁶ The court may do so if the information is unduly prejudicial to the accused.

5.60 Some jurisdictions have now modified these principles to allow evidence of the accused's prior convictions for sexual offences to be admitted, if the accused applies successfully for the admission of evidence of the prior sexual experience of the complainant. In Scotland, under the *Sexual Offences (Procedure and Evidence) (Scotland) Act 2000*, where the accused successfully applies for permission to question the complainant about prior sexual history, the prosecution must place before the judge evidence of the accused's convictions for sexual offences, or for offences which contain a substantial sexual element.³²⁷ Evidence on prior convictions must be put before the jury, or be considered by the judicial officer, unless the accused objects.³²⁸ The main basis for the objection is that it would be contrary to the interests of justice to take account of the conviction, but the court

323 *Makin v Attorney-General* [1894] AC 57, 65. For a discussion of this very complex principle and the exceptions which allow admission of evidence about other criminal acts, see Andrew Ligertwood, *Australian Evidence* (3rd ed, 1998), Chapter 31.

324 This does not apply where the witness is the accused's wife or former wife or husband or former husband.

325 When the accused's line of cross-examination may result in the accused losing the benefit of the shield against being questioned about previous convictions, the court may have a duty to warn the defence that this is the case: *Carroll v R* [1964] Tas SR 76. Even if there is no such duty a warning is normally given. See also Melanie Heenan, *Trial and Error: Rape, Law Reform and Feminism* (PhD Thesis, Monash University, 2001), 212. In one of the trials she observed, the prosecutor applied under this section to admit evidence of an accused's prior conviction for murder after the entire defence had focused on launching a 'gratuitous character assassination' against the complainant using her sexual history.

326 *Phillips v R* (1985) 159 CLR 45, 51.

327 *Sexual Offences (Procedure and Evidence) (Scotland) Act 2002* s 275A(1).

328 *Sexual Offences (Procedure and Evidence) (Scotland) Act 2002* s 275A(2).

must presume, unless the contrary is shown, that it is in the interests of justice to admit the conviction.³²⁹

5.61 The Commission has considered whether similar legislation should be enacted in Victoria. On balance we have rejected this approach. The fact that the accused has previously been convicted of a sexual offence is not directly relevant to the question as to whether he has committed the offence with which he has been charged. The criminal law should not incorporate a 'tit for tat' principle allowing admission of such evidence, simply because the court has allowed the admission of evidence about the prior sexual activities of the complainant which has significant probative relevance to a fact in issue.

5.62 If such a provision were enacted it would be necessary to impose some restrictions on its operation. For example, if the accused was a child when previously convicted, or if the previous conviction was a very old one, evidence of the prior conviction should not be admitted. It would also be necessary to require the judge to warn the jury that the fact that the accused had previously been convicted of a sexual offence did not necessarily mean that he was guilty of the offence with which he had been charged.

CONFIDENTIAL COUNSELLING COMMUNICATIONS

Current Law

5.63 In sexual offence cases, the accused person's lawyer often seeks access to information about counselling or medical treatment (such as treatment by a psychologist or psychiatrist) that the complainant may have received either prior to or following an experience of sexual assault. The purpose is to establish whether there is information contained in the counsellor's notes about the complainant's emotional state, including why she decided to report the assault, as well as to compare her recollection of the details of the events with what she subsequently told the police and the courts. In most cases, the main objective is to find evidence which can be used to question the complainant's credibility as a witness.³³⁰

329 *Sexual Offences (Procedure and Evidence) (Scotland) Act 2002* s 275A(4) and (7).

330 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.

5.64 In 1998, legislation³³¹ was enacted in Victoria to restrict the use of confidential communications³³² between complainants and their counsellors as evidence in sexual offences trials. Evidence of a confidential communication or a document containing a confidential communication cannot be admitted without the permission of the court.³³³

5.65 Before the evidence can be used in court the judge must be satisfied that:

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

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

EVALUATION

5.66 The current provisions deal with the use of the confidential communication as evidence in court. However the *Evidence (Confidential Communications) Act 1998* was intended to prevent defence counsel obtaining access to counselling notes, as well as to prevent the content of counselling communications being used as evidence, unless the court gave permission.³³⁴ The legislation, as drafted, did not achieve this outcome. In the case of *Atlas v DPP*,³³⁵

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

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

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

334 See the Second Reading Speech Victoria, *Parliamentary Debates*, Legislative Assembly, 19 March 1998, 548 (Jan Wade, Attorney-General); cf *Atlas v. DPP* [2001] VSC 209, paras 54–59.

335 [2001]VSC 209; see also *R v Youngs* [1999] NSWCA 166 (7 July 1999).

the Victorian Supreme Court decided that the current legislation did not prevent a defence lawyer from using a subpoena to require a person to merely *produce* counselling notes to the court.³³⁶ When deciding whether counsellors should be required to produce their notes, the judge does not have to apply the same public interest test as when an application is being made to the court for permission to have the records actually used in evidence.³³⁷ If the notes are produced to the court the defence lawyer will normally seek the court's permission to inspect them.³³⁸ If he or she is able to obtain access to the notes, the information from the notes can be used in indirect ways, for example, to enable defence counsel to decide what questions to ask the complainant in cross-examination.

5.67 During our consultations, sexual assault counsellors expressed considerable concern about defence lawyers subpoenaing counsellors in order to obtain access to their confidential counselling notes. Submissions expressed varied views about the frequency of this practice. For example, the joint submission of the Gatehouse Centre for the Assessment and Treatment of Child Abuse and the South East Centre for Sexual Assault suggested that this does not occur often.³³⁹ On the other hand, the submission from the CASA Forum commented that:

It is our experience that defence lawyers routinely subpoena counselling notes, although they have not generally been successful with notes from CASAs because we have a policy of defending all subpoenas. However we are aware that a more generalist counselling service and private counsellors can and do hand over notes more frequently. There is a need for more general information and education about the provisions of the [legislation].³⁴⁰

5.68 A number of CASAs told us that they had incurred considerable expense in briefing lawyers to oppose the requirement to produce counselling records. Counsellors' concern that records may be subpoenaed may also result in only very limited records being kept or records being kept only in coded form.

336 Justice Bongiorno held that the prohibition on notes being 'adduced' in evidence applied only to the giving of evidence in the legal proceeding and not to the collection of information by lawyers as part of preparation for a trial.

337 *Atlas v. DPP* [2001] VSC 209.

338 There is no right to inspect the documents, and even if the court allows inspection, it may do so on specified conditions.

339 Submission 8.

340 Submission 11.

5.69 It seems likely that defence lawyers' practices vary across different regional areas. If the defence succeeds in using a subpoena to gain access to counselling notes in a particular case, it may use this as a routine defence strategy in future cases. By contrast, an unsuccessful attempt to subpoena notes may discourage the lawyer from doing this again. Subpoenas may also be more commonly used to gain access to notes in rural areas where it is perhaps less likely that services will have the resources to be able to effectively resist subpoenas on every occasion.

5.70 The majority of submissions which commented on this issue³⁴¹ suggested that the restrictions in the *Evidence Act 1958* should apply to the production of documents as well as to the use of notes in evidence. The Commission agrees with this view.³⁴² The present situation, under which defence counsel may subpoena the counsellor to produce the notes and then apply to the court to inspect the notes, is contrary to the spirit of the legislation.

Proposed Reforms

5.71 We have suggested that the legislation should extend to protect counsellors from being required to disclose their notes in response to subpoenas. It is arguable that other reforms are necessary as well. In this section we consider two options for changing the legislation protecting confidential counselling communications, namely:

- prohibiting use of confidential counselling communications; or
- modifying the current provisions to provide more effective protection for confidential counselling communications.

341 See Submission 7, which criticises the current law, but does not comment on particular reform proposals, and Submissions 8, 9, 10, 13 and 14. The Criminal Bar Association submission did not support the application of this test.

342 MCCOC, above n 301, Appendix 2, 5.2.49(2). The Model Criminal Code applies a threshold test to determine whether the communication can be disclosed. The application for leave must be in writing, must identify a legitimate forensic purpose and must satisfy the court that there is an arguable case that disclosure would materially assist the accused's defence. If this threshold test is satisfied, the court must then examine the material to determine whether the public interest in ensuring the accused receives a fair trial outweighs the public interest in preserving the confidentiality of the communication. For the factors which must be considered in determining whether this is the case. A similar approach applies in New South Wales under the *Criminal Procedure Act 1986* (NSW) s 150.

OPTION 1 – PROHIBITING DISCLOSURE AND ADMISSION

5.72 Tasmania has enacted legislation which completely prohibits the admission of counselling communications by victims of sexual offences in evidence at committal or trial, unless the victim consents.³⁴³

5.73 A number of individuals and organisations who made submissions to the Model Criminal Code Officers Committee supported a prohibition along the lines of the Tasmanian legislation.³⁴⁴ The Advisory Committee established by the Victorian Law Reform Commission for this reference also supported a complete prohibition on admission of confidential counselling communications. The Commission received three submissions supporting a complete prohibition of production and use of confidential communications.³⁴⁵

5.74 People who disclose sexual assault to counsellors often want this information to be kept completely confidential. The argument in favour of a complete prohibition on disclosure, except where the person consents to it, is that it would ensure that victims of sexual assault could seek psychological support and speak freely to counsellors, without fearing that the content of the communication could be exposed. This may be particularly important for complainants who have experienced sexual abuse prior to the sexual offence for which the accused is being tried, who may be concerned about invasion of their privacy or fear exposure of earlier examples of sexual assault or childhood sexual abuse. They may be concerned about anyone, including a judge, having access to details about previous episodes of assault. A prohibition on admission of such evidence could

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

344 Victorian submissions which supported this approach were made by CASA and the Victorian Community Council Against Violence: MCCOC, above n 301, 281.

345 Submission 7, 10 (the Domestic Violence and Incest Resource Centre supported a complete prohibition on the use of counselling communications in preliminary proceedings as an alternative) and Submission 69. See also Submission 8 which appears to be arguing for exclusion, subject to the right to waive confidentiality, which, as the submission contemplates, that prohibition would continue to permit.

help to prevent complainants feeling that they are victimised by the criminal justice system and may encourage victims to report sexual assault to the police.³⁴⁶

5.75 Other arguments in favour of a complete prohibition are that it would prevent defence counsel making routine applications to admit such evidence and save counselling services the expense of briefing barristers to oppose applications. If this model were applied in Victoria, the legislation would need to cover both production of the notes and their admission in evidence.

5.76 The strongest argument against this option is that it could be unfair to the accused. A number of submissions expressed this concern.³⁴⁷ For example, the Criminal Bar Association argued that limiting the discretion of the judge to admit the evidence would:

undermine confidence in the administration of justice... Grave injustice can occur when a person is denied access to material that would exculpate him/her if that material were exposed.³⁴⁸

Similarly, Ms B Lee argued that ‘the person who has had alleged sexual abuse allegations against them has the right to produce to the court any evidence that is vital to prove his innocence’.³⁴⁹

5.77 A complete prohibition on access to notes might result in some people who are convicted at trial being able to successfully appeal against their conviction.³⁵⁰

346 See 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, 264.

347 See Submissions 9, 12, 13, 14, 23 and 28.

348 Submission 28, 25.

349 Submission 12.

350 Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001) 286–91. Bronitt and McSherry have suggested that prohibition on the admission of such evidence could be combined with legislation which allows the judge to stay a sexual assault trial, where non-disclosure of the confidential communication would infringe an accused person’s right to a fair trial. A provision of this kind would make transparent the conflict between protecting the complainant’s confidentiality and ensuring that the accused receives a fair trial.

**RECOMMENDATION—OPTION 1**

31. A counselling communication must not be disclosed in criminal proceedings. Accordingly,

- a person cannot be required (whether by subpoena or otherwise) to produce a document which records a counselling communication; and
- evidence of a counselling communication cannot be admitted in evidence in any criminal proceedings.

OPTION 2: MODIFYING RULES ON DISCLOSURE AND ADMISSION

5.78 This option has three elements which involve:

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

PROTECTING COMMUNICATIONS FROM DISCLOSURE

5.79 Both the Model Criminal Code and the NSW *Criminal Procedure Act 1986*³⁵¹ have provisions requiring the court to give permission before a person is required to produce a document recording a confidential counselling communication.

5.80 In NSW, a person who objects to the production of a document recording a confidential counselling communication cannot be required to produce it,³⁵² unless the court inspects the document and the court is satisfied that the tests for production are satisfied.³⁵³ These require that the contents of the document have

351 *Criminal Procedure Act 1986* (NSW) Part 7.

352 *Criminal Procedure Act 1986* (NSW) s 149(1).

353 *Criminal Procedure Act 1986* (NSW) s 150.

substantial probative value, that other evidence of the contents of the document or the confidence is not available, and that the public interest in preserving the confidentiality of the communication and protection of the confider from harm is substantially outweighed by the public interest in allowing inspection of the document. The court must take into account the likelihood, nature and extent of harm that would be caused to the person making the communication if the document is produced for inspection.³⁵⁴

5.81 If the defence has obtained the documents (for example directly from the counsellor or by a subpoena to which the counsellor has not objected) and wishes to use the notes, the judge must apply the same test to determine whether the notes can be used in evidence.³⁵⁵

5.82 A slightly different process regulates production of counselling notes under the Model Criminal Code.³⁵⁶ A person who wishes to require production of counselling notes for inspection by the court must satisfy a threshold test, which requires them to apply in writing for permission for the document to be produced or the communication to be disclosed. The application must identify a legitimate forensic purpose for seeking permission and satisfy the court that there is an arguable case that the evidence of the counselling communication would assist the defendant in his defence.³⁵⁷ If these requirements are satisfied the court must undertake a preliminary examination of the evidence before it decides whether it should give permission for it to be used. The tests which must be satisfied before the communication can be used are discussed in more detail below.

5.83 This approach ensures that defence barristers must particularise the information they believe is contained within the file, and how that information will genuinely assist the accused in his defence.

354 *Criminal Procedure Act 1986* (NSW) s 150(1) and (2).

355 *Criminal Procedure Act 1986* (NSW) s 149.

356 MCCOC, above n 301, 281.

357 A similar threshold test applies in South Australia: *Evidence Act 1929* (SA) s 67F.

PROHIBITING ADMISSION AT COMMITTAL AND REQUIRING PERMISSION AT TRIAL

5.84 This option would also include imposing:

- an absolute prohibition on defence counsel gaining access to counselling records and prohibiting admission of such records as evidence in preliminary criminal proceedings (committal and bail proceedings); and
- a requirement that the court give permission before records are used at trial or in plea proceedings. The court is required to apply the public interest test.

5.85 This approach was recommended by the MCCOC. New South Wales,³⁵⁸ South Australia³⁵⁹ and the Northern Territory³⁶⁰ have followed the approach recommended by MCCOC. In these jurisdictions use of counselling communications in preliminary proceedings is prohibited and the permission of the court is required before they can be admitted in evidence at trial.

5.86 The MCCOC report argues that it would be inappropriate to give a magistrate the discretion to allow admission of such communications at committal because this would undermine restrictions on admitting these communications at trial.³⁶¹ A blanket exclusion of confidential communications in preliminary proceedings would reduce the cost and length of committal proceedings, by preventing the court having to hear arguments about whether the communication should be admitted.³⁶² At committal, a magistrate does not usually have sufficient information to decide whether the confidential communication should be admitted.³⁶³

5.87 Most submissions which commented on this issue supported the MCCOC approach. The only submissions which opposed a prohibition on the use of confidential counselling records at the committal stage were made by the Law Institute of Victoria and the Criminal Bar Association. The Law Institute

358 *Criminal Procedure Act 1986* (NSW) ss 149, 150.

359 *Evidence Act 1929* (SA) s 67F.

360 *Evidence Act* (NT), as in force at 30 October 2002, s 56B.

361 MCCOC, above n 301, 5, 283.

362 Bronitt and McSherry, above n 350, 289.

363 New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 November 1999, 1595 (J W Shaw, Attorney General).

submission argued that if there was relevant evidence in confidential counselling notes it was preferable for it to be disclosed in preliminary proceedings rather than waiting until the trial stage.

5.88 A prohibition on the use of counselling records in preliminary proceedings can also be justified because such proceedings are concerned only with whether ‘the evidence is of sufficient weight to support a conviction for the offence with which the defendant has been charged’.³⁶⁴ Limits are placed on the cross-examination of witnesses at committal.³⁶⁵ Preliminary proceedings in the Magistrates’ Court³⁶⁶ do not require the magistrate to decide between competing versions of the facts. The MCCOC approach does not prejudice the accused person’s defence at trial because the accused can still apply for leave to have the confidential communication admitted in evidence at trial, where the court will apply the public interest test.

MORE DETAILED CRITERIA

5.89 The third element of this option would require the imposition of more detailed criteria controlling the grant of leave for disclosure and admission in evidence of counselling communications at trial. We have seen that in Victoria the court can only give permission for counselling communications to be admitted in evidence if it is satisfied, on the balance of probabilities, that the evidence has substantial probative value to a fact in issue, that other evidence of similar or greater probative value concerning the matters to which the protected evidence relates is not available, and that the public interest in preserving the confidentiality of confidential communications and protecting a protected confider from harm is substantially outweighed by the public interest in admitting the evidence.

5.90 The Model Criminal Code (MCC) contains more detailed criteria about the factors which the court must take into account in making its decision. The factors listed are:

- the extent to which disclosure of the information is necessary to allow the accused to make a full defence;

364 *Magistrates’ Court Act 1989*, Sch 5, cl 23.

365 *Magistrates’ Court Act 1989*, Sch 5, cl 13.

366 See Victorian Law Reform Commission, *Sexual Offences—Law and Procedure: Discussion Paper* (2001) (hereafter Discussion Paper), 34.

- the need to encourage victims of sexual offences to seek therapy and the extent to which such disclosure discourages victims from seeking counselling or diminishes its effectiveness;
- whether the evidence will have substantial probative value to a fact in issue and whether other evidence of similar or greater probative value is available;
- the likelihood that the disclosure will affect the outcome of the case;
- whether admission of the evidence is being sought on the basis of a discriminatory belief or bias;
- whether the victim or alleged victim objects to disclosure of the communication;
- the attitude of the alleged victim to whom the communication relates; and
- the nature and extent of the reasonable expectation of confidentiality and the potential prejudice to the privacy of any person, including the extent to which any interest in confidentiality has been attenuated by the passage of time, or the occurrence of any intervening event since the counselling communication was made and the extent to which admission of the evidence would infringe a reasonable expectation of privacy.³⁶⁷

5.91 The South Australian legislation³⁶⁸ enumerates similar factors to those listed in the MCC, which must be considered by the court.

5.92 The factors listed in the MCC could be incorporated into Victorian legislation. If this approach were followed we would not support inclusion of a criterion in relation to the attenuation of confidentiality by the passage of time between the communication and the time when it is sought to be used. A complainant may have had counselling many years previously about childhood sexual abuse by a family member, and may be concerned that this should not be disclosed. Here the passing of time seems to weaken, rather than strengthen, the claim that evidence of the communication should be admitted. We note that this criterion is not mentioned in the South Australian legislation.

³⁶⁷ MCCOC, above n 301, MCC 5.2.52.

³⁶⁸ *Evidence Act 1929* (SA), s 67F(6). The NT legislation also provides for a preliminary process, but does not impose a test which must be satisfied before the court can gain access to the evidence. See *Evidence Act* (NT) as in force at 30 October 2002, ss 56C, 56D.

**RECOMMENDATIONS—OPTION 2**

- 32. A counselling communication must not be disclosed in preliminary criminal proceedings (bail or committal proceedings). Accordingly, in preliminary proceedings:**
- a person cannot be required (whether by subpoena or otherwise) to produce a document which records a counselling communication; and
 - evidence of a counselling communication cannot be admitted or adduced.
- 33. A counselling communication must not be disclosed in any trial or plea proceedings except with the leave of the court. Accordingly:**
- a person cannot be required (whether by subpoena or otherwise) to produce a document which records a counselling communication; and
 - evidence of a counselling communication cannot be admitted in any trial or plea proceedings
- except with the leave of the court.
- 34. A person who objects to production of a document which records a counselling communication in relation to a trial or plea proceedings cannot be required to produce the document for inspection by the court unless:**
- the document is first produced for preliminary examination by the court for the purposes of ruling on the objection; and

**RECOMMENDATIONS—OPTION 2 (CONTINUED)**

- the court is satisfied that:
 - the contents of the document have substantial probative value,
 - other evidence of the contents of the document or the confidence is not available, and
 - the public interest in preserving the confidentiality of the communication and protecting the confider from harm, is substantially outweighed by the public interest in allowing disclosure of the communication (the public interest test).

35. The preliminary examination is to be conducted in the absence of the parties and their legal representatives, except to the extent that the court determines otherwise.
36. Evidence taken at the preliminary examination is not to be disclosed to the parties or to their legal representatives, except to the extent that the court determines otherwise.
37. After undertaking the preliminary examination the court is to determine whether the confidential counselling communication should be disclosed.
38. A counselling communication cannot be adduced in evidence at a trial or in plea proceedings unless the court, after inspecting the document, is satisfied that:
 - the contents of the document have substantial probative value;
 - other evidence of the contents of the document or the confidence is not available; and

**RECOMMENDATIONS—OPTION 2 (CONTINUED)**

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

DEFINITION

SHOULD THE CONCEPT OF ‘COUNSELLING’ BE EXTENDED?

5.93 The current definition of a ‘confidential communication’ covers a communication made to a registered medical practitioner or counsellor in the course of a therapeutic relationship. A counsellor means a person who is treating a client for an emotional or psychological condition.³⁶⁹ The definition of confidential communication focuses on the existence of a therapeutic relationship, rather than on the fact that the communication was made in confidence.

5.94 It is arguable that this definition is too narrow to take account of the range of approaches taken to counselling in some communities, where people may seek support from services which do not provide counselling in the therapeutic sense. In NSW, amendments have recently been made to the *Criminal Procedure Act 1986* to extend the definition of counselling communications. Under the Act, a person can be regarded as having ‘counselled’ another person if the counsellor³⁷⁰

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

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

(b) advises, gives therapy to or treats the other person
whether or not they are paid to do so.

5.95 The Commission acknowledges that the ‘counselling communications’ provision should not be so wide as to cover all communications made in confidence by victim/survivors of sexual assault to others. However, we would appreciate hearing views as to whether the current definition of counselling communications is appropriate to deal with the patterns of confidential communication occurring within non-English speaking background (NESB) and Indigenous communities and whether the definition recently introduced in NSW should be adopted in Victoria.

369 *Evidence Act 1958* s 32B.

370 *Criminal Procedure Act 1986* (NSW) s 148(5).

SHOULD OTHER COMMUNICATIONS BE COVERED?

5.96 The Model Criminal Code provisions which prohibit access to confidential counselling communications in preliminary proceedings and require leave for their use at trial, apply only to communications connected with the alleged offence. By contrast, the Victorian, NSW³⁷¹ and NT³⁷² provisions apply to confidential counselling communications which are not connected with the particular offence, for example, communication relating to earlier sexual assaults. This approach was supported by all submissions made to the Commission which commented on this issue, other than the submission from the Criminal Bar Association. The justification for the current approach was eloquently expressed by Justice L'Heureux Dubé, in the Supreme Court of Canada, where she said:³⁷³

[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.

5.97 During consultations for this reference, the Commission was told that defence counsel frequently seek to discredit complainants by referring to the fact that they have seen a psychologist or psychiatrist, or to the fact that they have previously disclosed incidents of sexual abuse. The Commission's preliminary view is that the legislation should continue to require leave for admission at trial of confidential counselling communications, whether or not the communication was connected with the alleged offence.

371 *Criminal Procedure Act 1986* (NSW) s 148(2). The NSW provisions are not confined to counselling about sexual offences.

372 *Evidence Act* (NT) as in force at 30 October 2002, s 56.

373 See *R v Osolin* [1993] 4 SCR 595. Justice L'Heureux Dubé dissented in this case.



QUESTIONS

Is the current definition of counselling communication adequate to deal with the patterns of confidential communication occurring within culturally and linguistically diverse communities?

If not, how should the definition be changed?

JURY DIRECTIONS

Longman Warnings

CURRENT LAW

5.98 The Discussion Paper³⁷⁴ described the use made of corroboration warnings in sexual offences proceedings. In the past, juries were routinely warned that they should be very cautious in relying on the uncorroborated evidence of women who make allegations of sexual assault and that it would be dangerous to convict the accused on the basis of that evidence alone. This practice was based on assumptions about women being particularly prone to lie about sexual assault out of revenge, jealousy, or in a bid to protect their reputations, or possibly for no reason at all.

5.99 The Discussion Paper also referred to judicial comments about delay in reporting a rape or other sexual assault. Historically, the fact that a woman did not tell anyone about the rape as soon as she had an opportunity to do so was seen as reflecting on the credibility of her account. In *Kilby v R*,³⁷⁵ the High Court said that the failure of a complainant to report a rape promptly may be an important factor when deciding on the credibility of the complainant.

5.100 There is considerable research showing that it is relatively common for victims of rape to delay in reporting the offence, if indeed they report at all. In research conducted by the Commission on rape offences reported to and recorded

374 See above n 366, paras 8.133–8.161.

375 *Kilby v R* (1973) 129 CLR 460.

by police, just over half were reported within a week of the alleged offence occurring. However, a considerable proportion of rapes were reported after this period.³⁷⁶ Delays commonly occur in reporting penetrative offences other than rape (for example incest and sexual penetration of a child). Less than 20% of these reports were made within the week following the offence(s) and well over a third of all reports over the eight year period studied were made at least two years following the offence.³⁷⁷ In 1988, the former Law Reform Commission of Victoria recommended that judges in sexual offences cases should be required to warn the jury that there might be good reasons for a delay in reporting.³⁷⁸

5.101 Section 61 of the *Crimes Act 1958* amended the law by providing that:

- judges must not warn the jury that the law regards complainants in sexual offence cases as an unreliable class of witness;
- if evidence is given, a question is asked of a witness or a statement is made in the course of an address on evidence which tends to suggest that there was delay in reporting the alleged offence the judge must tell the jury that there may be good reasons why a victim of a sexual assault may delay or hesitate in complaining about it.

5.102 However, judges maintain a discretion to comment on the reliability of the complainant's evidence in the particular case if they consider it is appropriate to do so in the 'interests of justice'.³⁷⁹

5.103 The provision that prevents judges warning juries that complainants in sexual offence cases are an unreliable class of witness was consistent with the High Court decision in the case of *R v John Henry Longman*.³⁸⁰ The case considered the effect of earlier legislation which abolished 'any rule or practice' which requires the judge to warn juries that it was unsafe to convict an accused on the basis of the

376 See above para 2.34.

377 Interestingly, the figures also showed that of the male complainants who notified police during the eight year period, 30.5% were reporting rape offences that occurred five or more years ago. This compared with just 9% of women or girls who reported after the same period.

378 Law Reform Commission of Victoria, *Rape and Allied Offences: Procedure and Evidence*, Report No 13 (1988) 46–8.

379 See section 61(2) of the *Crimes Act 1958* which states that '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'.

380 (1989) 168 CLR 79.

uncorroborated evidence of the complainant.³⁸¹ The High Court accepted that the purpose of the legislation was to prevent indiscriminate warnings about it being unsafe to convict an accused on the uncorroborated word of a sexual assault complainant, the vast majority of whom are women. However, there was unanimous agreement that the provisions should not remove the requirement for judges to warn the jury of *particular* circumstances which could potentially result in a miscarriage of justice.

A warning may be required because of the circumstances of the case other than, albeit in conjunction with, the sexual character of the issues which the alleged victim's evidence is tendered to prove.³⁸²

5.104 Longman was on trial for sexual offences against his step-daughter that were alleged to have occurred some 23 years prior to any disclosure. After his conviction, the NSW Court of Appeal affirmed the trial judge's refusal to warn the jury about the dangers of convicting the accused on the basis of the significant delay in reporting the offences. In the appeal from this decision, however, the High Court ruled that a warning should have been given because of the delay in prosecution which had deprived the defendant of the ability to test the allegations which had been made against him, and which he would have had if there had been no delay.

Had the allegations been made soon after the alleged event, it would have been possible to explore in detail the alleged circumstances attendant upon its occurrence and perhaps to adduce evidence throwing doubt upon the complainant's story or confirming the applicant's denial... The jury should have been told that, as the evidence of the complainant could not be adequately tested after the passage of more than twenty years, it would be dangerous to convict on that evidence alone, unless the jury, scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy.³⁸³

381 The relevant section was the *Evidence Act 1906* (WA) s 36BE.

382 *Longman v The Queen* (1989) 168 CLR 79, 87.

383 *Longman v The Queen* (1989) 168 CLR 79, 91 per Brennan, Dawson and Toohey JJ. Justice Deane's judgment also relied on the fact that the touching was non-violent, the complainant had been six years old at the time and that on each occasion she said she had woken from sleep to find the accused touching her. Justice Deane referred to the possibility that the child was fantasizing and her possible difficulty in distinguishing fantasy from reality. These factors, combined with the lapse of time between

5.105 The importance of judges *warning* the jury of this factor as opposed to merely commenting on it was highlighted by Kirby J in *Crampton v The Queen*.³⁸⁴

Comment will simply remind the jury of matters frequently within common experience which they may ordinarily be taken to know but might have forgotten or overlooked. *Warnings* derive from the special experience of the law. The specific difficulties that an accused will have, in circumstances of significant delay, in defending himself or herself in a criminal trial, include securing evidence (comprising now scientific as well as lay evidence) and gathering information promptly with which to test and challenge the evidence of the accuser...The jury need the assistance of the trial judge to warn, from the law's long experience, that trials with such potentially grave consequences for liberty and reputation need to be fought with forensic weapons.

5.106 In the Discussion Paper,³⁸⁵ the Commission asked two questions in relation to the use of *Longman* warnings. The first concerned how frequently juries were being warned against the dangers of convicting an accused charged with sexual offences, in circumstances that fell outside the criteria prescribed through the original High Court decision. The second issue queried the need for further legislative change to section 61 that might limit the use of *Longman* warnings in sexual offences trials.

5.107 These questions were asked because of the Commission's concern that *Longman* warnings may be given in cases where it is not required, according to the High Court decision. Trial judges may believe it is preferable to give a warning, in order to avoid the possibility that the accused might successfully appeal the conviction, making a retrial necessary. Although a *Longman* warning does not amount to a direction to the jury to acquit the accused, in practice such a direction may be seen by the jury as requiring them to find the accused not guilty. In effect, this may result in the judge taking over the function of the jury. This is particularly the case if the circumstances in which *Longman* warnings are given are expanded beyond the situation considered in *Longman* to be within 'the special

the alleged offence and the complaint required the giving of a warning. See also the comments of McHugh J along similar lines.

384 *Crampton v R* (2000) 206 CLR 161, 208, 209. See also Hayne J, 211–12. See also *Doggett v The Queen* (2001) 208 CLR 343.

385 Discussion Paper, above n 366, 162.

experience of the law' to matters which the jury should be left to decide, albeit with the assistance of comments from the judge.

RESEARCH ON THE USE OF LONGMAN WARNINGS

5.108 The Commission's preliminary research into the use of corroboration warnings was reported in the Discussion Paper. It focused on cases heard by the Court of Criminal Appeal between 1997–2000 where it was argued that the conviction was unsafe given the failure by the trial judge to give a *Longman* warning, or to give a warning that was 'sufficiently emphatic'. Of the 16 appeals, two were based on the grounds that no warning was given. Neither was successful. However, in seven cases the appeals were successfully argued on the basis of the warning being inadequate.³⁸⁶ The convictions were overturned and new trials ordered.

5.109 What this research cannot shed light upon, however, is the extent to which trials that are the subject of strong *Longman* warnings result in acquittals. Heenan's empirical study of rape trials found that corroboration warnings about the danger of convicting on the basis of the complainant's evidence alone were given in nine out of 33 trials observed between 1996–98.³⁸⁷ The jury acquitted the accused of rape in five of the nine cases. A lengthy delay in the initial complaint was used as the principal grounds for issuing the warning in six of the nine trials.

386 Ibid, Appendix 6: Court of Appeal Decisions: *Longman* Warnings, 198–200.

387 Melanie Heenan, *Trial and Error: Rape, Law Reform and Feminism* (PhD Thesis, Monash University, 2001), 159.

TABLE 5: LONGMAN WARNINGS

Use of corroboration warnings issued by the trial judge	No. of trials	Percentage
No corroboration warning/caution given	16	48.5%
Diluted version; jury directed to look for supportive evidence	8	24.2%
Strong corroboration warning given ('dangerous to convict')	9	27.3%
TOTAL	33	100%

Missing case=1

5.110 Heenan reports that the warning was consistently premised on the commentary provided in *Longman*:

...it is my duty to inform you that it would be dangerous to convict the accused of any of the offences charged on the evidence of the complainant alone, unless after having scrutinised her evidence closely, and with great care and paying heed to the strong warning it is my duty to give you, you are satisfied beyond reasonable doubt of its truth and accuracy.³⁸⁸

5.111 In two of the nine trials, Heenan suggests that the terms of the *Longman* direction were so forcefully delivered by the trial judge that the jury would have felt that they had little option but to acquit. In one trial, the warning was prefaced with a series of remarks about the tide of community sentiment being unfairly skewed toward believing rape victims. The jury was warned that a conviction might be both dangerous and a miscarriage of justice, given the delay in prosecution and the impact this would have had on the capacity of the accused

388 Ibid 166–7.

men to prepare an adequate defence.³⁸⁹ The jury acquitted the accused 40 minutes later. Another trial with a similarly strongly worded warning from the trial judge, close to the time in which the jury were asked to retire and consider their verdict, resulted in a full acquittal within 20 minutes.³⁹⁰

5.112 Heenan's research also provides examples of three trials where *Longman* warnings were given in cases where complaints were made close to the time of the offences and where there was other prosecution evidence capable of supporting the complainant's allegations.³⁹¹ In other words, there was evidence to suggest that the judicial scope for giving *Longman* warnings had moved beyond the bounds of the original High Court decision.

5.113 The High Court further consolidated its position on *Longman* warnings through the more recent decisions in both *Crampton*³⁹² and *Doggett*.³⁹³ In *Crampton*, the judge in the original trial advised the jury of the difficulties that might arise for an accused who is charged with sexual offences where there has been a significant delay in complaint.³⁹⁴ She also made reference to the reduced capacity of the complainants to accurately recall precisely what might have occurred. However, Her Honour also referred to the particular circumstances of the case and the nature of the accused's defence, which was a complete denial of the offences.

5.114 According to Justices Gaudron, Gummow and Callinan, however, these directions were wholly deficient in alerting the jury to the effect of delay and the absence of corroboration. The High Court took the opportunity to re-emphasise the obligation of trial judges to give the direction in emphatic terms:

In short, the denial to an accused of the forensic weapons that reasonable contemporaneity provides, constitutes a significant disadvantage which a judge must recognise and to which an unmistakeable and firm voice must be given by appropriate directions.³⁹⁵

389 There were two accused men in this trial.

390 Heenan, above n 387, 167–8.

391 Ibid 169.

392 *Crampton v The Queen* (2000) 206 CLR 161.

393 *Doggett v The Queen* (2001) 208 CLR 343.

394 The indecent acts were alleged to have occurred in 1978 and were reported in 1997.

395 *Crampton v The Queen* (2000) 206 CLR 161, 181.

5.115 The decision in *Doggett* also indicates a tendency to expand the circumstances in which a *Longman* warning must be given. Doggett was charged with five counts of indecent dealings and two counts of attempted rape against his de facto wife's daughter, when she was between eight and 15 years old. The complainant told her mother about the alleged offences in 1986, and the complainant's mother confronted the alleged offender two years later, but a police report was not made until 1998. As part of the police investigation, the complainant agreed to tape record a phone conversation with Doggett during which he made certain admissions. On all accounts, the accused was apologetic for what had happened, although there were different interpretations put forward at trial to explain the context of his statements. In effect, the accused maintained that it was he who had been the subject of the complainant's childhood infatuation with him.

5.116 Despite defence counsel deciding for strategic reasons against making a request for a *Longman* direction, the High Court held that the failure by the trial judge to give the warning had denied the accused a fair trial. While the taped telephone conversation was capable of corroborating the complainant's version of events, according to Justices Gaudron and Callinan, this 'did not relieve the trial judge of the obligation to give a *Longman* direction'.³⁹⁶ They criticised various aspects of the evidence of the complainant to justify this view, including the issue of delay. In their view, the accused had been denied the opportunity to harness the 'forensic weapons' that may have been available to him had he been defending the allegations in close proximity to the events.³⁹⁷ Justice Kirby indicated, even more emphatically, that the principles in *Longman* extended beyond the factual circumstances of the original case. He again emphasised that it is the forensic dangers that give rise to providing the jury with the warning, not the presence or absence of corroboration. Indeed, he suggested *Longman* might apply 'even in strong prosecution cases' and that:

396 *Doggett v The Queen* (2001) 208 CLR 343, 355, Gaudron and Callinan JJ.

397 In the dissenting judgments of Justices Gleeson and McHugh, both suggested that delay should not of itself necessarily provoke a *Longman* direction. Moreover, for McHugh, the 'powerful evidence of corroboration' provided by the telephone conversation fundamentally distinguished *Doggett* from *Longman*, and no such warning ought to have been given.

Quite apart from consideration of legal authority, there are in my view strong reasons of legal principle and policy to restrain the Court from diminishing the ambit of the rule in *Longman*.³⁹⁸

5.117 In both *Longman* and *Crampton*, the loss of forensic opportunities caused by delay, coupled with an absence of corroboration, were the factors which resulted in the High Court deciding that the judge should have cautioned the jury about the dangers of convicting the accused. The approach taken in *Doggett*, where evidence corroborating the complaint (the telephone conversation) was available, seems to substantially widen the category of cases that may now potentially be the subject of strong directions from the trial judge regarding the dangers of convicting in sexual offences cases.

5.118 Justice Wood discussed this expanded basis for requiring a *Longman* warning in the recent NSW decision of *R v BWT*. In particular, he questioned the extent to which the mere fact of delay automatically placed the accused at a disadvantage in terms of mounting his defence.³⁹⁹ According to Justice Wood, the High Court decisions involve:

an irrebuttable presumption that the delay *has* prevented the accused from adequately testing and meeting the complainant's evidence; and that, as a consequence, the jury must be given a warning to that effect irrespective of whether or not the accused was in fact prejudiced in this way.⁴⁰⁰

He went on to comment that:⁴⁰¹

[T]he difficulty which I have with this proposition is that it elevates the presumption of innocence, which must be preserved at all costs, to an assumption that the accused was *in fact* innocent, and that he or she might have called relevant evidence, or cross-examined the complainant in a way that would have rebutted the prosecution case, had there been a contemporaneity between the alleged offence and the complaint or charge.

398 *Doggett v The Queen* (2001) 208 CLR 343, 380, Kirby J.

399 Justice Wood was also unconvinced that the impact of delay on prosecutions fell within some category of specialised knowledge of trial judges that can only be remedied by alerting juries to the 'dangers of convicting' due to some perceived disadvantage the accused may have suffered.

400 *R v BWT* (2002) NSWLR 241, 247, Wood J.

401 *R v BWT* (2002) NSWLR 241, 247, Wood J.

5.119 The combined effect of decisions such as *Crampton* and *Doggett* is that a high proportion of sexual assault cases will require strong judicial warnings in relation to corroboration. This is particularly the case for trials involving children, or adult victim/survivors of childhood sexual assault, where it is not uncommon for there to have been a delay in any initial disclosure or in going to the police. These are also the cases where there is often little independent evidence to substantiate the events having occurred, apart from the victim's own testimony.

5.120 Interestingly, this notion of 'presumptive prejudice' in the context of delayed prosecutions was considered by the High Court in a different legal context in the same year as *Longman*. In *Jago*, the accused had been charged with insurance fraud in 1981 in relation to offences that were alleged to have been committed between 1976 and 1979. However, the prosecution did not proceed until 1987, at which time Jago unsuccessfully applied for a stay in the proceedings. He argued that his right to a fair trial was seriously compromised by the inordinate delay in bringing the matter to court. An application to the NSW Court of Criminal Appeal was dismissed.

5.121 The High Court unanimously agreed that the accused had been disadvantaged by the 'undue delay' in the proceedings. However, Their Honours remained collectively unconvinced that the fact of delay necessarily deprived the accused of receiving a fair trial. In their view, any prejudice he suffered could be cured by the trial judge giving appropriate directions about the deleterious impact of a long delay on the accused's defence. Justice Toohey's judgment is particularly relevant. His Honour firmly rejected the appellant's (the accused's) suggestion that delay had caused some irrevocable 'presumptive prejudice' to his defence. Instead, Justice Toohey highlighted the failure by Jago's lawyers to point to any 'actual prejudice' experienced by the accused as a result of delay in the prosecution. He went on to state that:

[T]he appellant has not pointed to any particular aspect of the delay which has prejudiced his defence or which otherwise would make it unfair to him for the charges to proceed.⁴⁰²

5.122 It seems that in *Jago* the High Court was concerned to ensure that any unfairness that is said to flow from a delay in the proceedings can reasonably be

402 *Jago v District Court* (1990) 168 CLR 23, 73.

articulated and assessed. Justice Wood concurred in his judgment in *BWT*, where he suggests that:

...a somewhat less emphatic and invariable direction should be given in relation to the effects of delay, where the aspect of prejudice remains a possibility, rather than an actuality, demonstrated either upon the evidence, or because the delay involved could be fairly regarded as inordinate.

5.123 The Commission agrees with these sentiments. While we accept that the impact of a delay in complaint may place *some* accused at some *specific* disadvantage in preparing their defence, the accused should be able to indicate how he has suffered particular disadvantage in defending his case. We are also of the view that the expression 'dangerous to convict' may be interpreted by juries as a direction not to convict (though this is not its intention) and should not be used.

5.124 The recommendations below limit the circumstances where *Longman* warnings must be given to situations where the accused can show a specific disadvantage caused by the delay, rather than a hypothetical disadvantage.



RECOMMENDATIONS

42. On a trial of a person for an offence under Crimes Act 1958 Part 1, Division (8A), (8B), (8C), (8D) or (8E):
- the judge must not warn, or suggest in any way to the jury that the law regards complainants in sexual offences cases as an unreliable class of witness; and
 - the judge must not warn the jury that it is dangerous to convict or unsafe to convict in the absence of corroboration.
43. Where the judge is satisfied that the accused has in fact suffered some specific forensic disadvantage (as opposed to some general or potential forensic disadvantage), due to a substantial delay in reporting, the jury may be given a warning to the effect that it must carefully weigh the complainant's evidence against the fact that, due to the passing of time, the accused may have found it difficult to secure evidence that may have assisted his or her defence, had the complaint been made more promptly.

CROSS-EXAMINATION BY UNREPRESENTED ACCUSED

Background

5.125 In general, people who are accused of crimes have the right to represent themselves in court. In sexual offences cases this may involve the accused cross-examining people who they are alleged to have assaulted. Unlike the situation in some other States, there is no prohibition on people who have been charged with sexual offences personally cross-examining complainants in Victoria. While it is possible for complainants in sexual offences proceedings to be cross-examined through CCTV, this is unlikely to eliminate the distress for complainants of being questioned in detail about the alleged offences by the people who are said to have committed them.

5.126 In the Discussion Paper, the Commission provided an overview of some of the issues concerning cross-examination of complainants by the accused and

asked whether Victoria should enact legislation restricting the right of an accused person who is not represented by a lawyer to cross-examine the complainant.⁴⁰³ Some jurisdictions have enacted such legislation because cross-examination by the accused in sexual offences cases has the potential to cause unnecessary distress or humiliation to complainants.⁴⁰⁴

5.127 The vast majority of respondents supported the proposal that Victoria should adopt legislation prohibiting people who are on trial for sexual offences from personally cross-examining complainants. Two respondents, the Criminal Bar Association and the Law Institute of Victoria,⁴⁰⁵ opposed this proposal on the grounds that it presents the risk of prejudice to the accused. The Criminal Bar Association argued that legal aid should be more readily available.

5.128 Similarly, the majority of respondents agreed that if there were to be a prohibition, the court should be required to appoint a legal practitioner to cross-examine the complainant in place of the accused person. The Law Institute of Victoria agreed that provision of a legal practitioner might be acceptable if the practitioner is representing the accused and does so for the remainder of the proceedings.⁴⁰⁶

5.129 The Discussion Paper commented that, as far as the Commission was aware, a person accused of sexual offences had not cross-examined a complainant in Victoria, but that there was nothing to prevent this occurring in the future.⁴⁰⁷ In a recent County Court case,⁴⁰⁸ a man charged with a number of sexual offences personally cross-examined two complainants. One complainant gave evidence by CCTV and the other chose to give evidence in court. Victoria Legal Aid had previously provided legal representation for the accused, but the first barrister appointed was unable to follow instructions to ask the questions specified by the accused and the accused refused to instruct a second barrister. We have also

401 Discussion Paper, above n 366, paras 8.29–8.43.

404 For example, Parliament of Victoria, Drugs and Crime Prevention Committee, *Combating Sexual Assault Against Adult Men and Women* (1996) 138. The Committee recommended that complainants make the decision to use alternative arrangements and that the *Evidence Act 1958* be amended to allow for complainants to give evidence via alternative arrangements, unless they choose otherwise: Recommendation 31, para 8.5.1.

405 Submissions 23 and 28.

406 Submission 23.

407 Discussion Paper, above n 366, para 8.33.

408 As the matter had not been resolved at the time of publication, the case is not cited.

become aware of a 1987 case in which the accused cross-examined the complainant over four days until the judge ordered that he cease.⁴⁰⁹

5.130 On 11 March 2003, the Attorney-General asked the Commission to report as quickly as possible on the issue of self-represented defendants in sexual offences cases. The Commission delivered its report on this aspect of sexual offences reform on 21 March 2003.⁴¹⁰

Other Jurisdictions

WHO IS PROTECTED?

5.131 In a number of other jurisdictions in Australia and overseas, recent legislative amendments prevent accused people in sexual offences cases from cross-examining complainants personally. Restrictions on cross-examination by the accused in sexual offences proceedings are currently imposed by Commonwealth legislation and in the Northern Territory, New South Wales, Queensland and Western Australia. Such prohibitions also exist in the United Kingdom.

5.132 The provisions preventing cross-examination by the accused vary in their coverage. In some jurisdictions they are not confined to sexual offences trials. In some jurisdictions the prohibition applies only to the cross-examination of children, while in others it extends more broadly. In the Commonwealth jurisdiction there is a prohibition on unrepresented defendants cross-examining child complainants in person. Cross-examination of child witnesses requires the leave of the court.⁴¹¹ In New South Wales, there are restrictions on the questioning of child witnesses in any criminal proceeding or civil proceeding arising from the commission of a personal assault.⁴¹² In Western Australia, an

409 *R v Cremmen* (Unreported, County Court of Victoria, 1987).

410 The recommendations in that Report are also included in this Interim Report.

411 *Crimes Act 1914* (Cth) s 15YF and YG.

410 *Evidence (Children) Act 1997* (NSW) s 28. The New South Wales Law Reform Commission is currently examining the issue of cross-examination of complainants by unrepresented accused in sexual offences proceedings and has published an Issues Paper: *Questioning of Complainants by Unrepresented Accused in Sexual Assault Trials*, Issues Paper 22 (2002). A Report including recommendations will be published by mid-2003.

unrepresented accused is prohibited from cross-examining a child under the age of 16 in any criminal proceedings.⁴¹³

5.133 In Queensland, people accused of sexual offences are prohibited from cross-examining ‘protected witnesses’ in person.⁴¹⁴ ‘Protected witnesses’ are defined as witnesses under the age of 16, intellectually impaired witnesses and alleged victims of prescribed special offences who the court considers would be likely to be disadvantaged as witnesses or to suffer severe emotional trauma.⁴¹⁵

5.134 In South Australia, there is protection of ‘vulnerable witnesses’ through the use of alternative arrangements,⁴¹⁶ but no prohibition on unrepresented accused cross-examining complainants in person.

5.135 In the Northern Territory, unrepresented defendants in sexual offences trials are prohibited from cross-examining complainants in person.⁴¹⁷ There are also provisions providing alternatives for ‘vulnerable witnesses’, including alleged victims of sexual assault.

5.136 In the United Kingdom, no person charged with a sexual offence may cross-examine an alleged victim who is the complainant or a ‘protected witness’. Protected witnesses include complainants and witnesses who are children under the age of 17.⁴¹⁸ The court also has the power to prohibit the accused from cross-examining particular witnesses if it appears that the quality of evidence given by the witness is likely to be diminished if the cross-examination is conducted by the accused, if the quality of evidence is likely to be improved if the accused is prohibited from conducting the cross-examination, and if it would not be contrary to the interests of justice to impose the prohibition. In making this decision, the court must have regard to a range of factors, including any views expressed by the witness, the nature of the questions likely to be asked, any

413 *Evidence Act 1906* (WA) s 106G.

414 *Evidence Act 1977* (Qld) ss 21M, 21N; introduced under the *Criminal Law Amendment Act 2000* (Qld).

415 Recommendations prohibiting the cross-examination of children or witnesses who are intellectually impaired were made by the Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report 55 (2000).

416 *Evidence Act 1929* (SA) s 13.

417 *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5.

418 *Youth Justice and Criminal Evidence Act 1999* (UK) ss 34 and 35.

behaviour on the part of the accused during proceedings and any relationship between the witness and the accused.⁴¹⁹

WHAT ARE THE ARRANGEMENTS?

5.137 Alternative arrangements for cross-examination vary between jurisdictions. In the Commonwealth jurisdiction, questions must be put to a child complainant or witness by a person appointed by the court.

5.138 In Queensland, the court must advise unrepresented defendants that they may not cross-examine protected witnesses personally and require them to advise the court by a particular date if they have arranged for legal representation or do not want the protected witness to be cross-examined. If the court does not receive such notice by the date specified, it must make an order that free legal assistance be provided by Legal Aid Queensland. The assistance provided is for the purposes of cross-examination only. The court must give the jury any warning it considers necessary to ensure that the person charged is not prejudiced by any inference that might be drawn.

5.139 In Western Australia, an unrepresented defendant who wishes to cross-examine a child under 16 must first state the question to the judge or a person approved by the court, who is then to repeat the question accurately to the child.

5.140 In New South Wales, questions to child witnesses must be put by a person appointed by the court, unless the court considers it is not in the interests of justice to appoint such a person.⁴²⁰ The person appointed must ask the child only the questions the defendant requests and must not independently give legal or other advice.

5.141 In the Northern Territory, questions must be put to the judge, or another person approved by the court, who must then repeat the question accurately to the complainant. The judge must issue a warning to the jury.

Proposals

5.142 The Commission proposes that a person charged with a sexual offence should be prohibited from personally cross-examining complainants and other

419 *Youth Justice and Criminal Evidence Act 1999* (UK) ss 36(2) and (3). For further information and discussion of the United Kingdom legislation, see Discussion Paper, above n 366, [8.38–41].

420 *Evidence (Children) Act 1997* (NSW) s 28.

‘protected witnesses’. In our view it is necessary to extend this protection beyond the complainant in the particular case.

5.143 Complainants are not the only witnesses who are likely to be subject to distress, humiliation and/or intimidation if subjected to cross-examination by the accused. Witnesses who themselves are complainants in other cases involving the defendant may be similarly affected. For example, where a defendant is being tried for sexual offences against one complainant and has been charged with other sexual offences against another member of a family or household, or offences against more than one complainant at a school or other institution in separate proceedings,⁴²¹ the defendant should not be able to personally cross-examine these other witnesses. Similarly, children, and people with cognitive impairments may be distressed, humiliated or intimidated if cross-examined by an unrepresented accused. The Commission proposes the prohibition on cross-examination by the accused should extend to these categories of witnesses. It also proposes that the court should have power to treat a parent or sibling, or any other family member of the complainant, as a protected witness, if the court considers that the person would suffer unnecessary distress, humiliation or intimidation if cross-examined by the accused personally.

5.144 Our proposals provide an alternative means by which defendants can exercise their right to cross-examine. If an unrepresented defendant wishes to cross-examine a complainant or other protected witness, the court must invite the defendant to seek legal representation. If the defendant does not obtain legal representation, the court must order Victoria Legal Aid to appoint a lawyer solely for the purpose of cross-examining the complainant or other protected witnesses. This is similar to the case in Queensland, where the court must arrange for the provision of free legal assistance from Legal Aid Queensland, unless the defendant arranges for his own legal representation or does not want the protected witness to be cross-examined.⁴²² The Commission recommends that a lawyer provided by Victoria Legal Aid should be appointed for the purposes of the cross-examination only. The lawyer appointed is to question the complainant or protected witness only about matters on which the defendant instructs, and any such questioning is

421 The Commission believes that a similar provision could be considered in the context of family violence, where an application for an apprehended violence order is contested, and where it is common for both parties to be unrepresented.

422 *Evidence Act 1977 (Qld)* s 21O(2).

subject to the ordinary rules of evidence relating to cross-examination of complainants and protected witnesses.

5.145 If the accused refuses to arrange legal representation or to accept legal assistance provided by Victoria Legal Aid,⁴²³ or does not cooperate with the lawyer appointed for this purpose, he should be taken to have declined to cross-examine the complainant generally, or about matters other than those on which he instructed the lawyer.

5.146 The Commission considers that the balance between ensuring an accused is not denied the right to cross-examine witnesses, and protecting complainants and protected witnesses from unnecessary humiliation, distress or intimidation is achieved by providing the accused with legal assistance to conduct the cross-examination. It is intended that the lawyer should act as a friend of the court in putting the questions, rather than as the accused person's legal representative. This is similar to the situation under the United Kingdom *Youth and Criminal Evidence Act 1999*, which states that the legal practitioner is not responsible to the accused.⁴²⁴ The lawyer's legal and professional responsibilities would be owed solely to the court, and not to the accused as well. The lawyer would not have any general duty to advise the accused. If the accused wished the lawyer to put questions which were inadmissible in the opinion of the lawyer, the lawyer's obligation would be to seek a ruling from the court. This would mean that the lawyer would not be placed in a situation where a conflict arose between instructions from the client as to the questions which should be asked, and the lawyer's professional and ethical judgment that the question should not be asked. We propose that guidelines for the conduct of lawyers who are appointed as friends of the court should be developed after consultation with the courts, the Victorian Bar, Victoria Legal Aid, the Office of Public Prosecutions and the Law Institute of Victoria.

5.147 The Commission does not propose that the court should transmit questions from the accused to the complainant, as happens in the Northern Territory. This approach would create a potential or actual conflict between the

423 If an accused person who is receiving legal assistance from Victoria Legal Aid refuses the assistance of one lawyer and wishes to obtain the services of another, this request is considered in light of its reasonableness. It is at the discretion of the Victoria Legal Aid as to whether to provide an alternative legal practitioner, taking into consideration whether there is to be increased cost and any other reasons considered relevant.

424 Section 38 (5).

impartiality of the judicial officer and the judicial officer's role in putting questions on behalf of an accused, and may create an impression of unfairness. An apparent conflict could arise between the judicial officer's role in ruling on the admissibility of questions and in putting questions on behalf of the accused. In a jury trial, if questions were put by the judge, a jury could gain the impression that the court approved of, or agreed with, the matters the accused wanted to question the complainant about. The process might give greater validity to the defence, as revealed by the questions, than would be the case if the questions came from the defendant's legal representative.

5.148 Another disadvantage of this approach is that it might not adequately protect the complainant from humiliation, distress or intimidation. Unless the accused was required to submit proposed questions to the judge in writing, complainants would have to listen to the accused asking the questions before the judicial officer ruled whether they could be put, and would then hear the relevant questions repeated by the judicial officer.

5.149 In cases where the court orders that a complainant or other protected witness is cross-examined by a lawyer appointed for that purpose, any concern about the possibility of prejudice to the accused on the part of the jury could be reduced by requiring a warning to the jury that they must not draw any adverse inference against the accused person by reason of the appointment of a lawyer to question the complainant. This is already the case in Victoria in relation to the use of alternative arrangements such as CCTV. Other jurisdictions have similar provisions. In Queensland, the court must provide any warning it considers necessary to ensure the defendant is not prejudiced by any inference that might be drawn. In the Northern Territory, the judge must give a warning to the jury to the effect that the procedure is routine, no adverse inference is to be drawn against the accused as a result of the use of the arrangement, and the evidence of the witness is not to be given any greater or lesser weight.⁴²⁵

5.150 The Commission's research and consultation indicate that cross-examination of complainants and other witnesses by defendants in person has the potential to cause unnecessary distress and humiliation. The following recommendations are intended to meet these concerns.

425 *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5; *Evidence Act* (NT) s 21A (3).



RECOMMENDATIONS

44. In any criminal proceeding for sexual offences, the accused may not cross-examine the complainant or a protected witness personally.
45. The court must advise the accused that he may not cross-examine the complainant or protected witness personally, and invite the accused to arrange representation if he wishes the complainant or protected witness to be cross-examined.
46. If the accused refuses legal representation, the court must direct Victoria Legal Aid to provide legal assistance for the purpose of cross-examination of the complainant or protected witness. A person appointed by Victoria Legal Aid is appointed as a friend of the court for the purpose of cross-examination only.
47. The person appointed may question the complainant or protected witness only about the general matters the accused requests be put to the complainant or protected witness, subject to the ordinary rules governing cross-examination of complainants or other witnesses.
48. Guidelines for the conduct of lawyers who are appointed as friends of the court should be developed after consultation with the courts, the Victorian Bar, Victoria Legal Aid, the Office of Public Prosecutions and the Law Institute of Victoria.

RECOMMENDATIONS

49. If the accused declines to accept the legal assistance provided for this purpose, or to provide such instructions as are necessary to enable the person appointed to question the complainant or protected witness adequately or at all, he is to be taken as having foregone his right to cross-examine the complainant or protected witness.
50. The court must inform the jury that the accused is not permitted to cross-examine the complainant or a protected witness personally. If a complainant or protected witness is cross-examined by a person appointed for that purpose, the court must warn the jury that
 - the procedure is a routine practice of the court;
 - no adverse inference is to be drawn against the accused as a result of the use of the arrangement; and
 - the evidence of the witness is not to be given any greater or lesser weight because of the use of the arrangement.

SUPPORT FOR WITNESSES IN SEXUAL OFFENCE CASES

5.151 This chapter has proposed a number of procedural changes which are intended to reduce the ordeal of testifying at committal or trial. The Commission believes that it is also crucial that witnesses in sexual offences cases receive appropriate support throughout their involvement in the criminal justice process. The provision of witness support could minimise the trauma and stress of giving evidence, improve the standard of complainants' evidence and contribute to public confidence in the court system.

5.152 As we explained in Chapter 2, Centres Against Sexual Assault (CASAs) provide counselling, support and advocacy for victim/survivors of sexual assault, which includes providing support during the criminal justice process if the person decides to report the offence to the police. The Victorian Court Information and Welfare Network Inc (Court Network) also provides support for people appearing

in Victorian courts. This program involves volunteers, trained and coordinated by professional staff who support defendants, victims and other witnesses at court.

5.153 In addition, there is a Witness Assistance Service located at the Office of Public Prosecutions (OPP), which provides information and support to ensure that witnesses in criminal trials are made aware of the processes they are likely to experience, and are kept informed about the progress of their cases.⁴²⁶ This service has three staff, all social workers based in Melbourne, who also travel to regional areas when required. The Witness Assistance Service does not receive separate funding, but derives its resources from the OPP. Its funding is vulnerable to reduction if other calls on the budget of the OPP make this necessary. Few Indigenous complainants access the Witness Assistance Service and although increasing numbers of women from culturally and linguistically diverse backgrounds have been in contact with the service over the last year or two, the numbers are still low. Support available to women from these communities is relatively limited and is exacerbated by the lack of appropriate interpreters.⁴²⁷ Women who come from countries with an inquisitorial style legal system, or where witness support services are not available, will not necessarily understand the purpose and function of such a service. Without information that explains the role of witness support in the context of the adversarial system, women are unlikely to take full advantage of the service.

5.154 While we have been told that the Witness Assistance Service provides excellent support for witnesses in sexual offence cases, the size of the service means that there is inadequate support for people in regional areas and that not all those who would benefit from witness support of this kind can gain access to it. An adequate witness support service for complainants in sexual offence cases should have the capacity to:

- respond to all appropriate requests for assistance in a timely manner;
- assess the needs of the witness for support through the criminal justice process and develop a clear plan as to how this should be done;
- either directly provide or negotiate the provision, nature and level of assistance required to ensure that the witness' participation in the criminal

426 For more details about the service see below para 6.33.

427 Submission 67.

justice system is as positive as possible and that the integrity of the judicial process is upheld; and

- ensure witnesses are made aware of, and where necessary assisted to access, any assistance required for longer term support arising from either the experience of surviving an offence or any deleterious effects from giving evidence at court.

5.155 In the Commission's view, there is a need to increase the level of support provided to both adult and child witnesses in sexual offence cases. In Chapter 6 we discuss the special needs of child witnesses and make recommendations about the characteristics of an effective service for children. At present the Department of Justice is negotiating the transfer of victim services to the Department of Human Services. For this reason, we do not consider it appropriate to make recommendations about how adult witness support services should be provided. More detailed recommendations may be made in our Final Report.



RECOMMENDATIONS

51. Support should be made available to assist adult complainants in sexual offences cases, both within Melbourne and in rural and regional areas.
52. An adequate witness support service for adult complainants in sexual offence cases should have the capacity to:
 - meet the needs of witnesses from culturally and linguistically diverse communities;
 - meet the needs of people with differing physical and intellectual requirements;
 - respond to all appropriate requests for assistance in a timely manner;
 - assess the needs of witnesses for support through the criminal justice process and develop a clear plan as to how this should be done;
 - either directly provide or negotiate the provision, nature and level of assistance required to ensure that the witnesses' participation in the criminal justice system is as positive as possible and that the integrity of the judicial process is upheld; and
 - ensure witnesses are made aware of, and where necessary assisted to access, any assistance required for longer-term support arising from either the experience of surviving an offence or any deleterious effects from giving evidence at court.

Chapter 6

Making the System More Responsive to the Needs of Children

INTRODUCTION

6.1 Chapter 5 makes recommendations which are intended to reduce the difficulties for complainants giving evidence in sexual offences cases. The recommendations in this chapter are intended to make the criminal justice system more responsive to the particular needs of children who are required to give evidence in sexual offences cases.

The Extent of Child Sexual Assault

6.2 In Chapter 2, we discussed police data on incest and other penetrative offences against children. This data shows that between 1994 and 2002 there were 6450 reports of such offences against children in Victoria. The median age of children against whom offences were reported was 12 years.⁴²⁸

6.3 As is the case for data involving offences against adults, police data significantly underestimates the number of children and young people who are sexually assaulted. Children and young people are even less likely to report offences than adults. Some children are not aware that sexual assault is a crime.⁴²⁹ Sexual assault of children occurs in secret and the perpetrator is usually a person with whom the child has a pre-existing relationship, which makes it easier for them to secure the victim's silence. Many children do not tell anyone about sexual assault because they are concerned that reporting it will damage other family relationships.

6.4 According to the National Clearinghouse on Child Abuse, there is no rigorous Australian research which indicates the numbers of Australian children

428 See above paras 2.21.

429 Submissions 16 and 18.

who are actually affected by sexual abuse.⁴³⁰ The main sources of information are statistics of *reported* sexual abuse which are kept by state community services departments and by police.

6.5 The Australian Institute of Health and Welfare collates annual child protection data from each state's community services departments. This information gives an indication of the incidence of child abuse reported to authorities and the rates of substantiated cases. In Victoria, in 2000–01, there were 36 966 notifications of child abuse⁴³¹ and, of the finalised cases, 7608 substantiations⁴³² involving 7201 children.⁴³³ Of the 7608 substantiated cases, 591 involved sexual abuse as the main type of abuse. These 591 cases involved 574 victims, 352 of whom were girls and 211 boys.⁴³⁴

6.6 Many incidents of sexual assault reported to police or welfare authorities do not result in the alleged perpetrator being charged. In Chapter 2 we discuss the filtering process that operates after a report of a sexual offence has been made to the police. Less than one in seven of the penetrative offences other than rape which are reported to the police ultimately proceed to prosecution. Many of these offences involve sexual assault against children.⁴³⁵

6.7 These statistics suggest that one of the goals of law reform should be to increase reporting rates of offences against children and young people. Law reform should also aim to increase the proportion of cases in which those alleged to have committed offences are charged and to secure conviction of those who are guilty of offences, so that they do not continue to assault children. While it cannot be assumed that all those charged with sexual offences against children are guilty,

430 David Finkelhor, in analysing child sexual abuse in the United States, suggests that at least 20 per cent of girls and 5–10 per cent of boys are sexually abused during childhood: David Finkelhor, 'Current Information on the Scope and Nature of Child Sexual Abuse' (1994) 4(2) *The Future of Children* 31, 37.

431 In Victoria, the definition of a notification is broader than in other states. Note that these statistics largely exclude sexual abuse by strangers, which will not normally result in a child protection application.

432 A notification is substantiated if after investigation it is concluded that the child has been, is being or is likely to be abused, neglected or otherwise harmed: Australian Institute of Health and Welfare, *Child Protection Australia 2000–01*, 3.

433 A child may be the subject of more than one notification.

434 In 11 cases, the victim's gender is not recorded.

435 The proportion of non-penetrative offences such as indecent assault which do not result in prosecution may be even higher.

there are many aspects of the criminal justice system which contribute to perpetrators of child sexual assault not being charged, or being tried but not convicted of the offences they have committed. Principles of evidence which preclude children from giving evidence, or result in the exclusion of evidence of disclosures of sexual assault, may affect decisions as to whether an alleged offender should be charged, as well as the outcome of trials.

Children's Experience of the Criminal Justice Process

6.8 In Chapter 3, we describe how complainants and support organisations have told us they experience the criminal justice system. The problems described in Chapter 3 are compounded for children and young people. From the initial interview with the police, through the investigation process, committal and eventual trial, child complainants are questioned repeatedly by a series of strangers about difficult and intimate matters, in language that they may find difficult to understand.

6.9 Child victims of sexual assault are often emotionally damaged.⁴³⁶ This fragility, together with their limited understanding and experience, may make testifying even more intimidating than it is for adults. As the United Kingdom Home Office stated in relation to the use of video-recorded evidence:⁴³⁷

Most children are disturbed to a greater or lesser extent by giving evidence in court. The confrontation with the accused, the stress and embarrassment of speaking in public especially about sexual matters, the urgent demands of cross examination, the overwhelming nature of courtroom formalities and the sense of insecurity and uncertainty induced by delays make this a harmful, oppressive and often traumatic experience. Moreover, because children are less clearly able to understand the reason for the demands which are placed upon them and have fewer developed intellectual and emotional resources than adults to help them cope with these, the effects are generally agreed to be peculiarly injurious and very often long-lasting.

6.10 These barriers are likely to be more intimidating and difficult to negotiate for children who come from cultures with different legal traditions from those of

436 Louise Dezwirek Sas, David A Wolfe and Kevin Gowdey, 'Children and the Courts in Canada' in Bette L Bottoms and Gail Goodwin (eds), *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law* (1996) 88.

437 (United Kingdom Home Office, *Report of the Advisory Group on Video-Recorded Evidence* (1989) 15.

the Australian legal system and with different cultural expectations about how children should behave or respond to authority. Participating in the criminal justice process is likely to be particularly daunting for some Indigenous children and children from non-English speaking backgrounds. Stress is also likely to be exacerbated for some refugee and immigrant children who may have already suffered trauma as a result of fleeing or leaving their country of origin.

6.11 Our criminal justice process was designed for adults and has historically been ‘deeply suspicious of child witnesses’.⁴³⁸ Cross-examination is intended to provide a safeguard against children being ‘coached’ to give evidence which is false. However, ironically, it may sometimes result in children becoming so confused or intimidated that they falsely withdraw evidence about sexual assault that did occur.

6.12 Children are usually unfamiliar with the confrontational questioning style which is an essential part of the adversarial process. They are likely to have great difficulty with cross-examination, which involves questioning them repeatedly on matters of detail, in order to demonstrate minor inconsistencies in their evidence.⁴³⁹ In her research on 14 interfamilial sexual abuse trials, Dr Caroline Taylor showed how defence barristers attack the credibility of witnesses, including children, by relying on ‘the narrow and selective use of minor errors in evidence’.⁴⁴⁰ Her examples included repeated questioning of children about sequences of times and dates, about the precise length of time during which penetration continued and/or the precise extent to which the child’s vagina was penetrated by the defendant’s penis.⁴⁴¹ In 2 of the 14 cases she examined, ‘the level of defence aggression was extreme with a marked absence of judicial intervention’.⁴⁴²

438 Nicholas Bala, Kang Lee, Rod Lindsay and Victoria Talwar, ‘A Legal & Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses’ (2000) 38 *Osgoode Hall Law Journal* 409, 412. The writers refer to the Canadian legal system but the comment also pertains to other common law jurisdictions.

439 For more discussion of this issue see below para 6.84.

440 Shannon Caroline Taylor, *The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court Australia in 1995* (PhD Thesis, University of Ballarat, 2001) 322.

441 Ibid 335–6.

442 Ibid 353.

6.13 During the Commission's consultations with child victim/survivors, their parents and grandparents and service providers, the following observations were made.

- The system is 'geared for adults'⁴⁴³ and has little regard for the needs of children.
- There is a lack of assistance for child witnesses.⁴⁴⁴
- Inadequate information is provided about the progress of cases.⁴⁴⁵
- Long delays in legal processes are extremely stressful for children.⁴⁴⁶
- Long waiting times at court before testifying are difficult for children and their families.⁴⁴⁷
- There are inadequate courtroom facilities for children forced to wait long periods.⁴⁴⁸
- The need to repeat the story many times to many different people is traumatic⁴⁴⁹ and often makes it difficult for children to recover from the abuse.
- Children find long, repetitive and aggressive cross examination stressful.⁴⁵⁰ Such cross-examination may result in children withdrawing true allegations of abuse because they are confused or harried.
- 'There is no psychological consideration of the experience of children in the process. It is often a very long process which is particularly difficult for children, young women and people with disabilities. Prosecutors do not object. There's a sense that you can't change the rules for children.'⁴⁵¹

6.14 It is likely that the current criminal justice process emotionally harms children and young people who have already been damaged by sexual assault. In

443 Submission 25.

444 Ibid.

445 Submission 57.

446 Submission 39.

447 Information provided by the Witness Assistance Service and Court Network.

448 Ibid.

449 Submission 39.

450 Submissions 18 and 68.

451 Submission 72.

addition, the deficiencies of the criminal justice system may result in parents or carers deciding not to report offences to the police, or in decisions being made not to charge an accused person because the child or other complainant is unable to withstand the pressure of giving evidence. In cases where a person guilty of child abuse is not charged or convicted, the perpetrator may continue to abuse other children.

Proposals for Procedural and Evidentiary Reforms

6.15 The problems which children and young people experience in giving evidence have led some commentators to propose that cases involving alleged sexual abuse of children should no longer be tried on an adversarial basis, and that the only effective way of protecting children against offensive and harassing cross-examination is to establish an entirely different criminal justice process.⁴⁵²

6.16 The reforms discussed in this chapter do not propose abandonment of the adversarial system. Rather, the recommendations are designed to improve the experience of child witnesses and make it easier for them to give evidence within the framework of the existing system. Such reforms have already been considered by a number of law reform bodies in Australia and overseas. The Law Reform Commission of Western Australia in 1991,⁴⁵³ the Australian Law Reform Commission (ALRC) and Human Rights and Equal Opportunity Commission (HREOC) in 1997,⁴⁵⁴ the United Kingdom Home Office in 2000,⁴⁵⁵ the Queensland Law Reform Commission in 2000,⁴⁵⁶ the South African Law Commission⁴⁵⁷ and the New South Wales Legislative Council Law and Justice Committee in 2002,⁴⁵⁸ have all proposed evidentiary and procedural reforms

452 Submissions 29, 36, 67 and 68 support radical change of the system when child victims are involved.

453 Law Reform Commission of Western Australia, *Evidence of Children and Other Vulnerable Witnesses* (1991).

454 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).

455 United Kingdom Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (2002).

456 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No 55 (2000).

457 South African Law Commission, *Executive Summary: Discussion Paper of Sexual Offences* (2002); *Sexual Offences: Process and Procedure Volumes 1–4, Discussion Paper No 102*, Project 107 (2001).

458 New South Wales Legislative Council Standing Committee on Law and Justice Committee, *Report on Child Sexual Assault Prosecutions*, Report No 22 (2002).

designed to recognise the needs of children. Issues addressed by many or all of these inquiries include the pre-recording of child witnesses' testimony, the use by child witnesses of closed circuit television (CCTV), the use of specialists to support child witnesses during their criminal justice experience, the rules determining children's competency to give sworn and unsworn evidence, and exceptions to the hearsay rule to admit evidence of a child witness' out of court complaint.⁴⁵⁹

6.17 In Western Australia, where most of the Law Reform Commission recommendations have been implemented, measures which support child complainants and reduce their stress in giving evidence appear to have resulted in increased reporting rates. According to the coordinator of the Child Witness Service,⁴⁶⁰ public awareness of the improved processes has meant that parents of sexually-abused children are more willing to report abuse and permit their children to give evidence at a criminal trial.

6.18 This chapter draws on the work of these law reform bodies and on legislative changes already made in other Australian jurisdictions. It contains recommendations intended to:

- enhance support for child complainants and other child witnesses;
- provide alternative arrangements for children to give evidence;
- reduce delays in cases involving child sexual abuse and limit the time that children have to wait to give evidence during a trial;
- amend the competency requirements which should apply to child witnesses; and
- relax the hearsay rule to allow admission of some out of court statements made by children.

6.19 Although the chapter is primarily concerned with children and young people, some of the recommendations also apply to people with mental illnesses or intellectual disabilities.

459 For an overview of recent reforms see John E B Myers, 'A Decade of International Reform to Accommodate Child Witnesses: Steps Toward a Child Witness Code' in Bette L Bottoms and Gail Goodwin (eds), *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law* (1996) 221–65.

460 Information provided by Child Witness Service Coordinator, Rachel Manley, 7 October 2002.

MAKING IT EASIER FOR CHILDREN TO GIVE EVIDENCE

6.20 The primary purpose of the reforms discussed in this section is to ensure that children are supported and protected throughout their experience of the criminal justice system. Another benefit of the proposed reforms is that they may ensure that the court hears higher quality evidence than it is likely to hear if a child witness is frightened or confused.

Support for Child Witnesses

6.21 Research demonstrates that appropriate preparation and support of child witnesses helps to minimise the trauma experienced by child witnesses.⁴⁶¹

SPECIALIST CHILD WITNESS SERVICES

6.22 In Australia, specialist child witness services have been established in Queensland and Western Australia. The Queensland Child Witness Support Program is run by a non-government organisation called Protect All Children Today. The program relies largely on volunteer workers, trained by professional staff. The Western Australian Child Witness Service (CWS) was established in 1995 in response to recommendations by the Western Australian Law Reform Commission.⁴⁶²

6.23 The premises of the Western Australian CWS are purpose-designed for the mostly young clients serviced and the staff are trained to work with children. The services provided include preparation and support of children and other vulnerable witnesses, research on the needs of child witnesses and the provision of education regarding the requirements and characteristics of these witnesses for the police, prosecutors and the judiciary. Witnesses are referred to the CWS by police when charges are laid. An initial assessment of the witness's needs and capacity is conducted and several meetings with service staff then take place throughout the processing of the witness's case. Information and education are provided regarding the criminal justice process, including the giving of evidence and the roles of various personnel. Tours of the court are arranged and introductions to solicitors and barristers are organised. The witnesses are also involved in stress management

461 London Family Court Clinic Child Witness Project, *Reducing the System-Induced Trauma for Child Sexual Abuse Victims Through Court Preparation, Assessment and Follow-Up* (1991) 120.

462 The Law Reform Commission of Western Australia, above n 453, 88.

and self esteem enhancement programs, in order to assist them to manage their roles in the process. The CWS is involved in assessing witnesses' suitability for giving pre-recorded evidence and liaises with the Department of Public Prosecutions if an application is required.

6.24 In Western Australia, children do not appear in court but testify using CCTV. The CCTV facility is located at the premises of the CWS, so the majority of witnesses assisted by the service will give evidence at the service itself. Children who are waiting to testify do so in the CWS premises, where support personnel, activities, videos and games are available.⁴⁶³ This is said to significantly reduce the stress that children and their families can experience when waiting to give evidence.

6.25 The joint ALRC/HREOC report, *Seen and Heard: Priority for Children in the Legal Process*, advocated 'child witnesses' right to assistance, support and preparation for the experience of giving evidence'⁴⁶⁴ and endorsed the Western Australian CWS as an appropriate model for the provision of this service. The report advocated the establishment of specialist child witness support units, staffed by counsellors, to provide 'individualised assistance to children appearing as witnesses in civil and criminal proceedings' including:

- explaining the court process and preparing the child for the experience of giving evidence;
- keeping the child informed of the progress of the case and liaising with prosecutors, solicitors and police on behalf of the child;
- accompanying the child to court or arranging for a court companion of the child's choice; and
- making necessary referrals for the child and his or her family to therapeutic counselling, medical care and other services necessary to assist the child.⁴⁶⁵

6.26 Both the Queensland Law Reform Commission's report on the evidence of children⁴⁶⁶ and the South Australian Child Protection Review⁴⁶⁷ supported a Western Australian style support service for child witnesses.

463 Christine Eastwood and Wendy Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System*, (2002) 53.

464 Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, above n 454, Recommendation 106, 339.

465 Ibid.

6.27 Specialist child witness services have also been established in other countries. In Israel, the assistance program is run by a non-government organisation, the Israeli National Council for the Child. It provides assistance and support through the interrogation and court process for child victims of violent or sex crimes. Each child assisted by the centre has a volunteer (usually a law student) appointed to serve as the child's personal companion throughout the process. The program has been favourably evaluated⁴⁶⁸ and it appears to fulfil its principal aim of alleviating the child's stress and fear and assisting her/him to receive relevant services and benefits during the legal process.

6.28 In Canada, a specialist child witness service, the London Family Court Clinic Child Witness Project (CWP) was established in 1988 with the main aims of demystifying the courtroom through education, reducing the fear and anxiety related to testifying through stress reduction, and empowering the children through emotional support and system advocacy.⁴⁶⁹ The program includes education about the criminal justice process, court procedures, legal terminology and the oath, as well as a stress reduction component. Evaluations show that the education component of the program benefits child witnesses by⁴⁷⁰

(a) educating them about court procedures, (b) by helping them deal with their stress and anxieties related to the abuse and to testifying, (c) by helping them give full evidence on the stand, and (d) by providing an advocacy role on their behalf with the other mandated agencies in the criminal justice system.

6.29 The stress reduction component has also been favourably evaluated. Children who participated in the program displayed significantly fewer generalised fears and specific abuse-related fears than a control group, and their parents rated the program very highly as a method of reducing their children's fears.⁴⁷¹

466 Queensland Law Reform Commission, above n 456, 88.

467 Robyn Layton, *Our Best Investment—A State Plan to Protect and Advance the Interests of Children*, Government of South Australia Child Protection Review (2003), Recommendation 101, [15.27].

468 Vered Windman, 'Child Victims Assistance Project', Paper presented at the Youth and Family World Congress, Melbourne, 29 October 2002.

469 Louise Dezwirek Sas, David A Wolfe and Kevin Gowdey, 'Children and the Courts in Canada' in Bette L Bottoms and Gail Goodwin (eds), *International Perspectives on Child Abuse and Children's Testimony* (1996) 88.

470 Ibid 91.

471 Ibid 92.

Through self-report measures, children also described this component favourably, indicating that they felt understood by their therapist, felt less afraid, believed they knew more about how the system worked, and felt they would be good witnesses.

CURRENT SUPPORT FOR CHILD WITNESSES IN VICTORIA

6.30 Unlike the jurisdictions described above, Victoria does not have a service providing specialist support for child witnesses.⁴⁷² However, support is currently provided to child victim/survivors of sexual offences by a variety of agencies including Centres Against Sexual Assault (CASAs), particularly the Gatehouse Centre,⁴⁷³ based at the Children's Hospital, and South East Centre Against Sexual Assault (SECASA), which is affiliated with the Monash Medical Centre. Where children attending a CASA for counselling become involved as complainants in the criminal justice system, the CASA is involved in supporting the children and their families through that process. This role includes conveying information about what to expect from the process, preparing children for the experience of testifying in court, and debriefing, support and liaison with police and other agencies.

6.31 Support is also available to child and adult complainants as well as other prosecution witnesses from the Witness Assistance Service (WAS), which is based in and funded by the Office of Public Prosecutions (OPP). At present the service has three staff, all social workers, based in Melbourne, who also travel to regional areas when required. The purpose of WAS is to support witnesses through the criminal justice process, rather than to provide therapeutic services to adults and children who have experienced sexual assault. The Witness Assistance Service provides information and support to ensure witnesses are made aware of their rights and the processes they are likely to experience, and to ensure that they are kept aware of the progress of their cases. For complainants in sexual offences cases, the service provides assistance including the organisation of pre-committal and pre-trial conferences where the complainant can meet the OPP solicitor and the prosecutor (if available), tours of the courtroom, explanation of processes and the roles of the various personnel, ongoing liaison with the OPP on the complainant's behalf where required, assistance with compensation claims, explanation of

472 This section is specifically concerned with witness support and does not address the range of other services provided to victim/survivors of sexual offences.

473 The Gatehouse Centre also assists child victims of physical abuse.

outcomes of trials or plea negotiations, liaison with other agencies providing assistance to witnesses, arrangements for interpreters and introduction to other court support services such as the Victorian Court Information and Welfare Network Inc (Court Network). The service also liaises with the OPP regarding applications for special arrangements such as the use of CCTV to assist children and other eligible witnesses.

6.32 Court Network also provides support for people appearing in Victorian courts. This program involves volunteers, trained and coordinated by professional staff, providing support to defendants, victims and other witnesses at court.

IMPROVING SUPPORT FOR CHILD WITNESSES IN VICTORIA

6.33 During the Commission's consultations, many people told us that they had found the support provided by the Witness Assistance Service (WAS) in the Office of Public Prosecutions very helpful.⁴⁷⁴ However, it is obvious that the current service cannot provide adequate levels of support for all child witnesses in sexual offences cases, particularly when it is also expected to provide support to adult witnesses. The current level of staffing means that many children in regional areas do not have any access to witness support. Due to their limited resources, the WAS is rarely able to provide direct support by attending court with individual witnesses. In addition, the survival of the service and maintenance of its current staffing depends on the continuing availability of funding from the OPP, which cannot be guaranteed. The voluntary Court Network service concentrates on support on the day a witness testifies and offers only limited support before and after the court appearance date. Court Network does not operate in all country areas.

6.34 The Commission's view is that there is a clear need to increase the level of support provided to child witnesses in sexual offences cases. This should include the provision of bicultural and/or bilingual support workers and may involve the provision of interpreters where appropriate.

474 See, for example, Submissions 11 and 51.

! RECOMMENDATIONS

- 53. Improved support should be provided to child witnesses and, where appropriate, their parents, guardians or carers in sexual offences cases, both within Melbourne and in rural and regional areas.**
- 54. The purpose of this support should be to facilitate child witnesses' more effective and credible participation in the criminal justice process, while protecting their well being.**
- 55. The support should be appropriate for children from non-English speaking backgrounds and with differing physical and intellectual requirements.**
- 56. Specialist child witness support should be provided by professional staff with accredited expertise in relation to the developmental needs and capacities of children and an understanding of the requirements of the criminal justice system in relation to the prosecution of sexual offences.**
- 57. The support should be delivered by an agency with the capacity to ensure there is appropriate continuity of care for child witnesses and their families. Where circumstances require it, there should be appropriate collaboration with other agencies providing services.**
- 58. Support for child witnesses should include:**
 - assessing the requirements of the individual child witness and coordinating the appropriate program for the child and for parents, guardians or carers;**
 - keeping the child and their parents, guardians or carers informed of the progress of the case and liaising and advocating with prosecutors, solicitors and police on behalf of the child;**
 - explaining the court process and preparing the child, parents, guardians or carers for the experience of giving evidence;**



RECOMMENDATIONS (CONTINUED)

- accompanying the child to court or arranging for a court companion of the child's choice;
- providing appropriate psychological and welfare support to children, including their parents, guardians or carers; and
- making necessary referrals for children and families, guardians or carers to therapeutic counselling, medical care and other services necessary.

59. Child-friendly facilities should be provided for children within court complexes, including in interview areas and waiting rooms.

6.35 These services could be delivered in a number of ways, including:

- expanding the existing Witness Assistance Service (WAS) to enable it to adequately carry out the functions outlined above;
- identifying organisations currently providing support to child victim/survivors, which would have the capacity to formalise and expand their role in child witness support; or
- creating a specialist child witness service.

6.36 In determining which structure is preferable, it is necessary to consider a range of issues including:

- the advantages and disadvantages of providing child witness support within an organisation which also provides therapeutic services to children and their families and, possibly, advocacy around sexual assault issues;
- the advantages or disadvantages of providing child witness support within the Office of Public Prosecutions; and
- the advantages and disadvantages of establishing an independent service based on the Western Australian model.

6.37 The first approach identified above would ensure continuity of care for children who have been sexually assaulted and would minimise the level of intrusion, trauma and potential harm to witnesses which can occur in court processes. It would allow children to receive both counselling and witness support

from the same organisation. If this were done appropriately and professionally, it could improve the quality of evidence without compromising fairness in the criminal trial process.⁴⁷⁵ However, it could expose child witnesses to cross-examination about whether they had been ‘coached’ during counselling sessions provided at the service.⁴⁷⁶

6.38 By contrast, an independent service focused on supporting children through the legal process would need to refer children elsewhere for therapeutic support, but might be less open to attack by defence counsel and could assist defence (non-accused) child witnesses as well as prosecution witnesses.⁴⁷⁷ Such a service could also give independent expert advice to the court regarding the child witness, particularly regarding issues such as the child’s competency to testify.⁴⁷⁸

6.39 In assessing any of these options it is imperative to ensure that appropriate standards, competencies and organisational capacity are developed to protect the best interests of children as well as the integrity of the criminal justice process. The Commission would welcome submissions addressing these and other issues relevant to the provision of improved support services for child witnesses.

475 These functions could be performed by different people.

476 It is the view of the Western Australian service that the independence of the service assists in establishing its credibility and provides a good defence against allegations of witness ‘coaching’. Because the service is not linked to the prosecution, the staff do not have details of individual cases and this lessens the ‘availability for contamination of the child’s evidence’. See Shannon Bellett, ‘Child Witness Service—What’s So Special About It?’, Paper presented at the Restoration for Victims of Crime Conference, Melbourne, September 1999, 8.

477 This is the case in Western Australia, see *ibid*.

478 See below para 6.116. The South Australian child protection review recommended that ‘where questions regarding children’s competency arise, the court should be encouraged by the prosecutors, or by any person acting as the legal representative of the child, to take a flexible approach to competency testing including expert opinion and reports as well as considering testing in other than a courtroom situation’: Robyn Layton, above n 467, Recommendation 93, [15.8].

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QUESTION

What is the most effective means of providing support to child witnesses? In particular:

- Should child and adult witness support services be separated, or provided by the same organisation?
- Should a child witness service independent of the Office of Public Prosecutions be established?

Alternative Arrangements for Giving Evidence**BACKGROUND**

6.40 Over the last two decades, many jurisdictions have introduced alternative ways for complainants to give evidence in sexual offences proceedings, which are intended to make testifying easier and less stressful for complainants.

6.41 In Victoria, there are two types of alternative arrangements:

- *Pre-recorded evidence-in-chief.* In certain situations, complainants' statements to the police can be video-taped or audio-taped and the recording can be played in court as the complainant's evidence-in-chief.
- *Alternative arrangements at committal proceedings and trial.* If complainants are required to give evidence at trial, they may do so from outside the courtroom by means of CCTV, or in the courtroom, with various protections such as screens, to block the view of the defendant, and/or the assistance of a support person.

6.42 The following section discusses reforms to these laws and deals with pre-recording of complainants' testimony. Closed-circuit television is dealt with in the next section.

PRE-RECORDED TESTIMONY

THE CURRENT LAW IN VICTORIA

6.43 In Victoria, section 37B of the *Evidence Act 1958* allows the admission of the evidence-in-chief of prosecution witnesses in sexual offences proceedings, in the form of an audio or video recording, if the witness is under 18 years or is a person with impaired mental functioning. The interview with the witness which is video-taped or audio-taped must be undertaken by a prescribed person. In 1996,⁴⁷⁹ Victoria Police introduced a system of video- and audio-taped evidence (VATE) for cases involving sexual offences and certain indictable offences⁴⁸⁰ where the complainant is a person under 18 years or a person with impaired mental functioning.

6.44 Members of the Victoria Police Sexual Offences and Child Abuse (SOCA) units are trained to conduct VATE interviews. When an offence against a child is reported to the police, a non-recorded interview takes place. As soon as possible after the initial interview, the VATE interview (or if necessary, more than one interview) is conducted. The police investigation then proceeds. If charges are laid, the informant is required to inform the defendant that he has the right to view the VATE. If the prosecution proposes to introduce the VATE as evidence pursuant to section 37B, a copy of the transcript must be served on the defence at least 14 days before the hearing. The VATE tape can only be used in evidence if the witness appears at the trial and attests to the truthfulness of the contents of the recording. Witnesses must be available for cross-examination or re-examination about what they said on the tapes.⁴⁸¹

Informant

The informant is the police member, usually a detective, who has primary responsibility for the conduct of the case from the time the offence is reported and throughout the prosecution.

6.45 The process of pre-recording was intended to reduce the need for complainants to give evidence in court. However, it has only done so to a limited extent. In some cases, the viewing of the VATE results in the accused pleading

479 This account of the VATE process is largely based on that of Chris Corns, 'Videotaped Evidence of Child Complainants in Criminal Proceedings: A Comparison of Alternative Models', (2001) 25 *Criminal Law Journal* 75, 80.

480 Those involving assault on, or injury or threat of injury to, a person.

481 *Evidence Act 1958* s 37B(3).

guilty. This means that the complainant does not have to give evidence at a trial or be subjected to cross-examination.

6.46 However, where there is a trial and a VATE has been made, its admission at trial is not guaranteed. The decision to seek leave to introduce the VATE remains a decision for the prosecutor. The prosecutor may decide not to tender the VATE recording at all but to call the witness to give oral evidence, or to tender the VATE recording and supplement that evidence by calling the witness to answer additional questions.⁴⁸² If the prosecutor does seek to introduce the VATE, the defence may raise objections to its admission. The judge may then decide to exclude the tape or part of it.⁴⁸³

6.47 The police do not keep statistics on the proportion of cases that go to trial in which VATE are actually used. However, we have been told that despite the routine preparation of VATE by the police in cases involving children, relatively few VATEs are in fact admitted into evidence.⁴⁸⁴

482 Corns, above n 479, 87.

483 In the case of *R v NRC* [1999] 3 VR 537, the defendant was charged with sexual offences and personal injury offences against his daughter. At the first trial, the evidence-in-chief of the complainant (who was five years old at the time of the offences) was given by means of VATE. The defendant was convicted and appealed on the basis that the judge erred in failing to warn the jury about convicting on the complainant's evidence alone and that the verdict was unsafe or unsatisfactory. The Court of Appeal allowed the appeal and a new trial was granted. The court took the view that various factors required the trial judge to give a stronger warning than was given, including the fact that the complainant had been interviewed repeatedly before making the VATE and that defence counsel was unable to cross-examine her in any significant way because she was unresponsive. President Winneke was critical of the VATE process, calling it a procedure with potential for unfairness because it permits the evidence-in-chief of young children to be presented as a 'pre-recorded package' and without the witness having been sworn or giving her evidence viva voce (at 551, 552) although he noted that it is permitted by the legislation and that there are circumstances where it will not operate unfairly. At the second trial, the judge disallowed the admission of the VATE as evidence-in-chief and the complainant gave evidence herself via CCTV. However, the VATE was admitted into evidence in re-examination 'to show the full context'. The second jury convicted the defendant who then appealed and the second Court of Appeal denied the appeal.

484 This is the impression of members of the judiciary, Office of Public Prosecutions staff and representatives of service provider organisations we have consulted. An evaluation of the use of VATE by Victoria Police is currently in progress with only very preliminary data available. This indicates that, of 126 now finalised trials for which VATE transcripts were prepared, VATE was admitted into evidence in 11. A study by the New South Wales Police, conducted between May 2000 and May 2002, found that although electronic evidence was submitted as a child's evidence-in-chief in a small number of cases, those cases constitute a reasonable proportion of cases in which children gave evidence at trial. The evaluation of the process of electronic recording generally was favourable. Youth and Child

PRE-RECORDED EVIDENCE IN OTHER JURISDICTIONS

6.48 In the Discussion Paper we raised the question as to whether all of a complainant's evidence, including cross-examination, should be able to be recorded prior to the trial.⁴⁸⁵ There was support for pre-recording all of some complainants' evidence from some submissions,⁴⁸⁶ while others were concerned that pre-recording might prejudice the defendant's opportunity for a fair trial.⁴⁸⁷

6.49 A number of jurisdictions now allow pre-recording of both evidence-in-chief and cross-examination. In the United Kingdom, the *Youth Justice and Criminal Evidence Act 1999* introduced a process⁴⁸⁸ for allowing pre-recorded children's evidence in sexual offences cases,⁴⁸⁹ including cross-examination,⁴⁹⁰ to be admitted in evidence, subject to certain safeguards.⁴⁹¹ The South African Law Commission's proposed new sexual offences legislation⁴⁹² provides that the court must declare a complainant a vulnerable witness. In the case of other child witnesses in sexual offences proceedings, the court can declare that the child is a

Protection Team, New South Wales Police, *Evaluation of the Electronic Recording of Children's Evidence*, Final Report (2002).

485 Victorian Law Reform Commission, *Sexual Offences—Law and Procedure: Discussion Paper* (2002) (hereafter Discussion Paper) 127, Question 49.

486 Submissions 7, 11, 14 and 15.

487 Submissions 23 and 28. Submissions 8 and 13 expressed the view that it is not the timing of giving evidence that causes trauma to the child witness but the nature of cross-examination and the fact that pre-recording is unlikely to alleviate this. However, the Western Australian pre-recording process, as well as allowing earlier recording of a witness' evidence, appears to allow greater judicial control of the process and can also enable evidence to be given with less interruption, as counsel can argue the admissibility issues at the editing stage. See below paras 6.53–6.58.

488 *Youth Justice and Criminal Evidence Act 1999* (UK) s 27.

489 The provisions also apply to other vulnerable witnesses. Sections 16 and 17 specify the victims to whom special measures directions may apply. Section 16 covers children under 17 and people with mental disorders, significant impairment of intelligence and social functioning or physical disability. Section 17 makes other persons eligible for assistance if the court is satisfied that the quality of the evidence given by the witness is likely to be diminished by fear or distress in testifying. Under section 21, child witnesses [under 17] must be treated as in need of special protection and a special measures direction must be made by the court when they are testifying in sexual offences cases.

490 *Youth Justice and Criminal Evidence Act 1999* (UK) ss 21(6) and 28.

491 The court can exclude the child's evidence if the court is of the opinion that in the interests of justice the recording should not be admitted: see ss 21(3)(a), 27(2).

492 According to information provided by the South African Law Commission, the draft Bill prepared by the Commission was submitted to the Minister for Justice and Constitutional Development on 23 January 2003.

vulnerable witness on its own initiative, or on application by the prosecutor, the child's guardian, or the child. The court must then make directions for the protection of the witness, which may include a direction that the witness' evidence must be pre-recorded either in part or wholly.⁴⁹³

6.50 Queensland also allows pre-recording of evidence-in-chief and cross-examination⁴⁹⁴ of children under 12 and people who, as a result of mental, intellectual or physical impairment or a relevant matter⁴⁹⁵ are likely to be disadvantaged as witnesses, although apparently this provision is rarely used.⁴⁹⁶ In 1990, the Law Reform Commissioner of Tasmania recommended that all of a child complainant's evidence, including cross-examination, should be pre-recorded at a special hearing, although this recommendation has not been implemented.⁴⁹⁷

6.51 As a matter of practice, Western Australia now relies extensively on pre-recorded evidence in child sexual abuse prosecutions. In 1991, the Law Reform Commission of Western Australia recommended that in such cases the court should have the power to direct that a child be permitted to give evidence at a special hearing (conducted according to the rules of evidence with examination, cross-examination and re-examination all conducted by counsel, subject to judicial control), which is video-taped and presented at trial in lieu of the child's testimony.⁴⁹⁸ These recommendations are now reflected in section 106I(1)(b) of

493 For discussion of the problem see South African Law Commission, above n 457, Volume 2, Chapter 20. The recommendation at page 348 does not refer to the pre-recording of evidence. The Commission suggests that it may be premature to introduce video-recorded evidence: Vol 3, 400. However, the draft Bill included in Volume 4 appears to provide for video-recording: clause 13(3)(f).

494 *Evidence Act 1977* (Qld) s 21A(2)(e).

495 '[A] "relevant matter" for a person, means the person's age, education, level of understanding, cultural background or relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or another matter the court considers relevant.' *Evidence Act 1977* (Qld) s 21A(1). A person who is likely to suffer emotional trauma or would be likely to be intimidated can also be treated as a special witness.

496 Eastwood and Patton, above n 463, 21.

497 Law Reform Commissioner of Tasmania, *Child Witnesses* Report No. 62 (1990), Recommendation 4, 5, although an electronic recording of a child complainant's evidence in a sexual offences case may be admissible at a committal hearing: *Justices Act 1959* (Tas), ss 56A, 57, 57A.

498 Law Reform Commission of Western Australia, above n 453, 59.

the *Evidence Act 1906* (WA).⁴⁹⁹ Since 1995, approximately 580 of the 1200 children who have given evidence in Schedule 7 proceedings have given pre-recorded evidence in accordance with s 106I(1)(b).⁵⁰⁰

6.52 The ALRC/HREOC joint report⁵⁰¹ on children in the criminal justice system discussed the Western Australian system for pre-recording and noted its many advantages. It recommends that 'legislation should permit the entire evidence of a child, including evidence in chief and cross-examination, to be taken prior to trial and videotaped for presentation at trial whenever the interests of justice so require'.⁵⁰²

SHOULD THE WESTERN AUSTRALIAN APPROACH BE INTRODUCED IN VICTORIA?

6.53 There are strong arguments in favour of applying the approach taken in Western Australian to children and other vulnerable witnesses in Victoria.

- The special hearings at which the child's evidence is taken can be held in advance of the trial date and often relatively close to the events giving rise to the charge. This may result in better quality evidence, both because it is captured while the witness' recollections are fresher and also because 'the child may perform better as a witness because he or she is allowed to perform in a less stressful environment'.⁵⁰³
- The process is less intimidating for children than giving evidence at committal or trial. The witness attends specifically for the scheduled special hearing, is not required to wait to give evidence and proceedings can be conducted more informally. The complainant testifies by CCTV to a court occupied by the accused, the judge and counsel for the prosecution and defence.

499 Section 106I(1)(a) provides for an alternative process whereby only the child witness' evidence-in-chief is pre-recorded and the child is called at trial for cross-examination and re-examination; however, this limited process is almost never invoked.

500 Corns, above n 479, 84.

501 Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, above n 454.

502 Ibid 316.

503 Andrew Palmer, 'Child Sexual Abuse Prosecutions and the Presentation of the Child's Story' (1997) 23 *Monash Law Review*, 171, 188.

- Unlike the current situation with VATE tapes, the prosecutor does not have discretion as to whether or not to use the tape, because the pre-recorded evidence functions as the evidence of the witness.⁵⁰⁴ The recorded testimony is played at the trial and the witness is not required to attend.
- Counsel can object to the admission of evidence. However, in Western Australia, objections are often left for the editing stage and argued before the judge after the witness has been excused. This means that witnesses are often interrupted less than in conventional testimony and permitted to tell their stories in a more direct manner.⁵⁰⁵
- Once the special hearing is completed, the child is rarely required to give evidence again. This gives the opportunity for a relatively early sense of at least partial 'closure' and the chance to move on to counselling and eventually, healing. Without early recording, 'the goal of rehabilitation of the witness through counselling can conflict with the forensic need to keep the evidence of the witness uncontaminated'.⁵⁰⁶
- The recorded evidence can be used both at committal and trial. If there is a retrial following a successful appeal, the child is not required to give evidence again as the tape can simply be replayed. On the rare occasions when issues that were not addressed at the special hearing arise later and further testimony is needed, the new issues only are put to the witness at a subsequent special hearing and the original and supplementary tapes of evidence are played in proceedings.

6.54 Three main arguments may be made against pre-recording of all of the evidence of children and young people, including cross-examination. First, some prosecutors feel that videotaped evidence is less persuasive to juries than testimony given in court.⁵⁰⁷ On the other hand some defence counsel fear that juries are more likely to believe videotaped evidence than testimony in court. There is no conclusive evidence that testimony presented on video is more or less

504 *Evidence Act 1906* (WA) s 106I(1)(b)(ii).

505 Information provided by Rachel Manley, Coordinator, Child Witness Service (WA), 7 October 2002.

506 Corns, above n 479, 77.

507 In the UK Home Office report, above n 437, court and child protection professionals were surveyed about their views of videotaped testimony. The majority of each profession agreed that 'evidence given in court had more impact [on the jury] than a videotaped account', although all of the judges took the view that testifying in court is more stressful for the child.

compelling⁵⁰⁸ than evidence given in court. Indeed, it is arguable that as more witnesses testify through CCTV, via video link from external locations and by pre-recorded testimony, jurors will become accustomed to viewing witnesses on screens and less likely to distinguish between video testimony and in-court testimony. Victorian law already provides for the evidence-in-chief of children and people with mental impairments to be pre-recorded; provision for pre-recording of cross-examination is simply an extension of existing practice.

6.55 A second argument against the Western Australian approach is that the procedure is too resource-intensive, because it requires participation of a judge and counsel in the pre-trial hearing and then again at the trial when the child's recorded evidence is played to the jury. The Commission acknowledges that this process may involve some additional costs. However, such costs may be offset by a higher proportion of guilty pleas following the special hearing.

6.56 The third and most substantial argument against permitting cross-examination to be pre-recorded is that it may be difficult for the defence counsel to cross-examine the complainant during the pre-trial hearing, because the details of the prosecution case may not yet be fully available. Pre-recording of both examination-in-chief and cross-examination would require some changes to criminal procedure to ensure that the legal representative of the accused has sufficient information about the prosecution case to cross-examine the child at the pre-trial hearing.⁵⁰⁹

6.57 On balance, the Commission believes that these objections are outweighed by the strong arguments in favour of pre-recording, which are set out above. The Western Australian approach has operated successfully for a number of years. The process alleviates the stress experienced by child witnesses⁵¹⁰ and an increased public awareness of this process arguably leads to an increase in reporting of offences.⁵¹¹ We note that the New South Wales Legislative Council Committee on Law and Justice has recently recommended law reform to provide for the pre-recording in full of a child witness' evidence and the admission at trial of this in

508 The UK Home Office evaluation found 'no significant difference between the proportion of guilty verdicts delivered for videotaped evidence as opposed to live examination-in-chief, indicating that videotapes have much the same impact on a jury as a live examination': *ibid*.

509 *Crimes (Criminal Trials) Act 1999* s 6.

510 See Eastwood and Patton, above n 463,122.

511 According to Rachel Manley, Coordinator, Child Witness Service (WA), 7 October 2002.

place of the child's evidence-in-chief, cross-examination and re-examination.⁵¹² We recommend that the pre-recording process should also be available for witnesses with impaired mental functioning.

6.58 The Commission recognises that it will be necessary to make procedural changes to ensure that the defence has enough information about the prosecution case to cross-examine the child at the special hearing. The relationship between special hearings and the committal process in sexual offences cases will be examined in more detail in the Final Report. The Commission would welcome suggestions as to any procedural changes which should be made alongside the introduction of special hearings for child witnesses and people with impaired mental functioning. In addition, pre-recording testimony may be more complex where the witness requires the assistance of an interpreter. Consideration should be given to the processes that should be implemented to ensure that witnesses whose first language is not English are able to testify effectively at a special pre-hearing. We would welcome views on this issue also.

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QUESTIONS

What procedural changes should be introduced to ensure that defence counsel has sufficient knowledge of the prosecution case to enable cross-examination of child witnesses at a special hearing?

What processes should be implemented to ensure that child witnesses whose first language is not English can testify effectively at a special hearing?

512 New South Wales Legislative Council Standing Committee on Law and Justice, above n 458,189. By contrast, the New South Wales Children's Evidence Taskforce considered the issue of pre-recording but recommended against it on the basis that the use of CCTV would afford the same protection to child witnesses. New South Wales Attorney-General's Department, *Report of the Children's Evidence Taskforce: Audio and Videotaping of Children's Out of Court Statements* (1997) 3. This comment overlooks the fact that pre-recording prevents children having to repeat their evidence if there are re-trials. See Eastwood and Patton, above n 463, 21.

SHOULD VATE RECORDINGS CONTINUE TO BE MADE UNDER THIS MODEL?

6.59 Our recommendation that the Western Australian pre-recording process be introduced in Victoria does not remove the justification for recording by the police of initial or early disclosure interviews. At present in Western Australia, police do not video- or audio-record interviews with child complainants, but take written statements only. Consideration is currently being given to introducing a process similar to VATE, although there is some concern that the need to participate in two video-recorded processes may increase the witness' trauma.⁵¹³

6.60 Although relatively few VATE tapes are admitted at trial in Victoria, the recorded interviews have advantages other than as evidence in court. Viewing the VATE tape may result in some defendants pleading guilty at an early stage. The increased accountability of recorded interviews arguably lessens the likelihood of improper questioning and lessens the likelihood of distortion that may result when an interviewer writes up interview notes after the event.⁵¹⁴ Other advantages include the recording of the child's appearance, demeanour, gestures and emotional state close in time to the initial report and the arguably increased likelihood that a defendant will confess when he knows a tape has been made of the allegations.

6.61 The New South Wales Police evaluation of the electronic recording of children's evidence⁵¹⁵ found that legal and judicial personnel with experience of the process considered that the electronic recording of a child's out-of-court statement 'improved the quality and completeness of the statement'.⁵¹⁶ 'Electronic recording was perceived to discourage leading questions and to rebut claims of contamination, as well as capturing the child's demeanour, voice tone and intonation, movements and non-verbal expressions close to the time of disclosure.'⁵¹⁷

513 Information provided by Rachel Manley, Coordinator, Child Witness Service (WA), 22 January 2003.

514 Gail Goodman and Vicki S Helgeson, 'Child Sexual Assault: Children's Memory and the Law' (1984) 40 *University of Miami Law Review* 181, 198.

515 Youth and Protection Team, New South Wales Police, *Evaluation of the Electronic Recording of Children's Evidence* (2002).

516 Ibid ii.

517 Ibid iii.



RECOMMENDATIONS

60. Section 37 of the Evidence Act 1958 should be amended to provide for the prosecution to make application for a special hearing at which all the testimony of a child witness is recorded. The special hearing should be attended by a judge, the accused and counsel for the prosecution and defence. The child should give evidence by closed-circuit television.
61. The child's recorded evidence should be admissible in the same way as evidence given orally in a hearing.
62. The special hearing process should also be available for witnesses with impaired mental functioning.
63. The Director of Public Prosecutions should develop guidelines indicating when the prosecution should make applications for a special hearing.
64. Police should continue to make video and audio-taped evidence of statements given by children and those with impaired mental functioning. A working committee should be established to develop an independent evaluation of the VATE process. This committee should include representatives from Victoria Police, Office of Public Prosecutions, Office of the Public Advocate, and other key stakeholders.

GIVING EVIDENCE AT TRIAL

CLOSED-CIRCUIT TELEVISION (CCTV)

Current Law

6.62 Under section 37C of the *Evidence Act 1958* the court can direct, or a party can apply for, a complainant in certain proceedings including a sexual offences proceeding, to be permitted to give her evidence from another room by closed circuit television (CCTV), or for a screen to be erected in the court so that the accused is not in the complainant's line of vision.

6.63 This provision was introduced in 1991 in response to increasing awareness of the fear experienced by complainants in confronting the defendant, the traumatic impact on vulnerable witnesses of a formal courtroom, and the

difficulty associated with speaking publicly about traumatic events of a highly personal nature. It has also been suggested that because testifying from outside the courtroom is usually less traumatic for the witness, the quality of the evidence is improved.

Operation

6.64 The use of CCTV by adult complainants without mental impairments is addressed in Chapter 5.⁵¹⁸ In this chapter, we deal with the use of CCTV by child complainants and adult complainants with impaired mental functioning.

6.65 In Victoria,⁵¹⁹ complainants in sexual assault cases who are children or people with impaired mental functioning have no legal entitlements to give evidence by CCTV, or to be screened from the accused. The court has the power to direct of its own motion, or on the application of a party to the proceeding, that alternative arrangements for testifying be used by witnesses under the age of 18 and witnesses with impaired mental functioning.⁵²⁰

6.66 During our consultations we have been told that in Victoria an application for the use of CCTV by a child complainant aged 12 or under is usually, but not invariably, allowed where the facilities are present and functioning properly.⁵²¹ However, it appears that children over 12 are often required to give their evidence in court rather than by using the remote facility.⁵²² Sometimes this is because prosecutors do not apply for witnesses to give evidence by CCTV, because they believe they are more likely to secure a conviction if children testify in court.⁵²³ Sometimes it is because defence counsel objects to the use of CCTV by older children and judges uphold the objection.⁵²⁴ Although section 37B allows the

518 See above paras 5.4–5.13.

519 The situation is similar in Queensland where the *Evidence Act 1977* (Qld) s 21A(2)(c) gives the court the power to grant an application or itself to order that children under 12 and other vulnerable witnesses be permitted to give evidence from a room other than the courtroom.

520 *Evidence Act 1958* s 37C(2).

521 For example Submission 18. According to representatives of Victoria Legal Aid, at one committal, where arrangement had been made for the use of CCTV, there were technical difficulties and the complainant had to testify in court: meeting held 9 August 2001 and see Submission 18.

522 According to the Witness Assistance Service, it is very rare for a witness over the age of 12 to be allowed to testify from the remote facility: Submission 67.

523 According to the Witness Assistance Service, many prosecutors are reluctant to use the CCTV facility and only infrequently make applications for its use: *ibid*.

524 Information provided by representative of Victoria Legal Aid at a consultation, 10 September 2002.

judge to direct use of CCTV without the prosecution applying, it appears that this rarely occurs.

6.67 In the course of our consultations we were told of a number of cases where the requirement to give evidence in court created significant stress for children or young people.



CASE STUDY

In a recent unreported case, the defendant was charged with multiple offences against his former step-daughter at the time she was aged between 10 and 14, including 17 counts of incest and five counts of sexual penetration of a child. An application was made by the prosecution for an order to be made by the judge to allow the then 15-year-old complainant to testify via CCTV. Defence counsel opposed the application, arguing 'there ought to be good reason why you depart from the tried and tested method—the traditional approach.' The judge questioned the girl in the courtroom about her fear of testifying in the presence of the accused and ordered that she be allowed to testify via CCTV. After two days of her testimony, defence counsel applied to the court for an order that the girl finish her testimony from the courtroom. He explained that he had seen the girl on the footpath after court the previous day and that 'she was dressed—... she had the tightest fitting, some sort of jersey material, white pants, the high heels. Not inconsistent at all, in fact, one might say, we would say even more provocative in the way she dressed, with an outline of her g-string...' 'I mean it's most important that the jury get a full appreciation of this cold girl's attitude and the way she conducts herself, and which includes her clothing.' Defence counsel also argued that as the witness hadn't 'broken down' she would be able to testify in the courtroom. The judge ruled that the complainant should continue her testimony in the courtroom and that defence counsel could ask her what she had worn the previous day. After answering several questions in the witness box the complainant became distressed and ran from the courtroom after shouting abuse at the defendant. She could not be located for some time and then did not feel able to continue with her testimony that day. The next day the prosecution renewed its request that she be allowed to testify via CCTV because of the distress she experienced from being in the presence of the defendant but this request was denied and she completed her testimony in the courtroom.

6.68 We conducted a survey of city, suburban and regional Magistrates' Courts and found that approximately one-third of them are not equipped with CCTV facilities.⁵²⁵ Where the courts are not equipped with the facility, cases perceived as requiring CCTV are usually relocated to another court. However, registrars reported that even child witnesses in sexual offences cases do not always use the facility. We asked how many child complainants testifying at committals for sexual offences do so via CCTV. Out of a total of 17 responses to this question, three registrars reported that child complainants always testify via CCTV, six that they often do so, one that they sometimes do, and three that they rarely do.⁵²⁶

6.69 We asked registrars about the attitudinal and procedural barriers to the use of CCTV by complainants in sexual offences cases and they identified various factors including: staffing constraints making it difficult to have a staff member sit in the CCTV room; general attitude to the use of alternative arrangements; reluctance by prosecutors and barristers to use the facilities; the wish of the defence counsel to cross-examine the witness in court; and the fact that the legislation creates a discretion to use CCTV, which means that the issue must be argued. On the other hand, three respondents said that when child complainants wish to use CCTV they were allowed to do so.

Should there be Routine use of CCTV for Child Witnesses?

6.70 By contrast to the situation in Victoria, where use of CCTV generally depends on an application by the prosecutor, several jurisdictions now provide for routine use of CCTV for children and young people who are witnesses in sexual offences cases.

6.71 In Western Australia, routine use of CCTV for child witnesses was recommended by the Law Reform Commission of Western Australia in 1991.⁵²⁷ Section 106N of the *Evidence Act 1906* (WA)⁵²⁸ now provides that where the necessary facilities are available, the judge must arrange for the child to testify outside the courtroom, and for the evidence to be transmitted via CCTV, or for the child to testify in the courtroom, and the defendant to be held in a room apart

525 Most of these were in regional areas. In some regional areas the County Court and the Magistrates' Court share the same building. We did not undertake a survey of the availability of CCTV in County Court trials in regional areas, although some comments on this matter were made.

526 There were four responses to this question that did not nominate a rate of use. See Appendix 3.

527 Law Reform Commission of Western Australia, above n 453, Recommendation 5.33, 74.

528 The change was made by the *Acts Amendment (Evidence of Children and Others) Act 1992* (WA).

from the courtroom to which the child's evidence is to be transmitted via CCTV. Where CCTV facilities are unavailable, a screening device is to be used.⁵²⁹ The prosecutor may apply for an order that alternative arrangements not be used. The judge may only grant the application if she or he is satisfied that the child 'is able and wishes to give evidence in the presence of the defendant'.⁵³⁰

6.72 In the Australian Capital Territory (ACT)⁵³¹ and Tasmania⁵³² the relevant legislation also provides for the routine use of CCTV for child victims in sexual offences cases.⁵³³ Similarly, Commonwealth legislation provides for mandatory use of CCTV for children giving evidence in federal sexual offences proceedings, including child sex tourism and sexual servitude offences.⁵³⁴

529 *Evidence Act 1906* (WA) s 106N(4).

530 Section 106O.

531 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 6. The provision also applies to adult complainants in sexual offences proceedings. The court can order that the person gives evidence in the courtroom if the witness prefers to do so, or the proceedings will be unreasonably delayed if this does not occur or there is a substantial risk that the court will be unable to ensure that the proceedings are conducted fairly if this does not occur.

532 *Evidence (Children and Special Witnesses) Act 1995* (Tas) s 6. Under s 7 children can only give evidence in court if the judge is satisfied that they are able and wish to do so. Under s 8 the court can make an order declaring that a person, including a person with an intellectual, physical or mental disability, should be treated as a 'special witness' in which case the judge may order that they give evidence by CCTV.

533 Under the *Evidence (Children) Act 1997* (NSW) s 18, a child under 16 giving evidence in a sexual offences case 'is entitled to give that evidence by means of closed-circuit television facilities' (s 18(1)), but may choose not to do so. The court can only order that such means are not used if it is satisfied that 'it is not in the interests of justice for the child's evidence to be given by such means or that the urgency of the matter makes the use of CCTV inappropriate' (s 18(4)). Despite this provision, the New South Wales Standing Committee on Law and Justice found that the existing provision in the Act under which children have a right to give evidence by CCTV is insufficient: New South Wales Legislative Council Standing Committee on Law and Justice, above n 458, 179. The Committee recommended that the law should be amended to provide for the use of CCTV for children unless the defence proves that exceptional circumstances exist that render the use of CCTV against the interests of justice, that the law should indicate that a general possibility of prejudice to the accused does not constitute an exceptional circumstance and the interests of the child must be paramount in determining whether to order the use of CCTV: see Recommendation 33, 180.

534 The provisions were introduced by the *Measures to Combat Serious Organised Crime Act 2001* (Cth) which amended the *Crimes Act 1914* (Cth) Part 1AD. Section 15YI provides that evidence given by a child witness must be given by means of CCTV, except in exceptional circumstances i.e. if the child is at least 16 years old and chooses not to use CCTV to give evidence, if the court orders that the child is not to give evidence by means of CCTV, or if CCTV is not available in the court. A court is not to order

6.73 A number of law reform bodies have also recommended routine use of CCTV for children.⁵³⁵ The joint ALRC/HREOC report recommended a presumption in favour of the use of CCTV in all cases involving child witnesses, with the child having the right to decide whether to use the facilities.⁵³⁶ The Queensland Law Reform Commission's report on children's evidence also recognised the merits of allowing child witnesses to testify from outside the courtroom:

There seems to be ample evidence to suggest that, provided the equipment used is of adequate quality and is sufficiently reliable, the use of closed-circuit television to assist a child witness is also to the advantage of the court, and ultimately the administration of justice, because it may enable the court to receive evidence which would otherwise be unavailable to it.⁵³⁷

6.74 It is clear that in the majority of cases the use of CCTV reduces the stress for children of giving evidence. The Australian Law Reform Commission's 1992 study of CCTV evidence given by children reported that all the children in the study who used CCTV 'said that it was easier to testify that way than to see the defendant or the other party and to be in the courtroom'. When used in line with the child's preference it gave the child a sense of control over the process and accorded with the child's sense of fairness.⁵³⁸

6.75 An evaluation of the Western Australian reforms⁵³⁹ found that most counsel and all judges who had used one of the arrangements (screens or CCTV) thought that it was fair to the defendant, none of the children who had used CCTV regretted it, and all would recommend its use to others. Most jurors understood why CCTV and/or a screen was used and did not find the equipment adversely affected their decision-making processes.⁵⁴⁰ An additional reported

that the child give evidence in court unless the court is satisfied that it is not in the interests of justice for the child's evidence to be given by CCTV.

535 See, for example, New South Wales Council Standing Committee on Law and Justice, above n 458, 179.

536 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 464, 342.

537 Queensland Law Reform Commission, above n 456, 217.

538 Australian Law Reform Commission, *Children's Evidence: Closed Circuit TV*, Report No 63 (1992) 4.

539 Western Australia Ministry of Justice, *Child Witnesses and Jury Trials: An Evaluation of the Use of Closed Circuit Television and Removable Screens in Western Australia* (1995).

540 Marion Dixon, 'Out of the Mouths of Babes...—A Review of the Operation of the *Acts Amendment (Evidence of Children) Act 1992*' (1995) 25 *Western Australian Law Review* 301, 312.

advantage of the use of CCTV was an improvement in ‘audibility of quietly-spoken witnesses’.⁵⁴¹ Overall, the evaluation concluded that the use of CCTV fulfils the goal of removing ‘some major sources of stress for children giving evidence to juries in criminal matters without compromising the rights of the accused person’.⁵⁴² However, the point was made that the experience of testifying at a trial is an extremely difficult one and ‘even CCTV and removable screens do not protect young witnesses from other distressing aspects of giving evidence’.⁵⁴³

6.76 For children for whom English is not a first language and for whom the use of an interpreter is necessary, testifying via CCTV is logistically more complex. We would welcome suggestions as to how this should best be accomplished and on any other issues specific to the use of CCTV by witnesses from non-English speaking backgrounds.

6.77 We recommend below that the *Evidence Act 1958* should be amended to require use of CCTV for all child witnesses in sexual offences cases, except where the child is able and wishes to give evidence in court. We have previously recommended that Victoria should introduce legislation to allow the evidence of child witnesses to be pre-recorded at a special hearing and the recording used at trial. In Western Australia, the provisions requiring use of CCTV apply where this procedure is used. A similar procedure should be available in Victoria.

541 Western Australia Ministry of Justice, above n 539, 35.

542 Ibid 150.

543 Most of the witnesses who participated in the study rated testifying as one of the most difficult things they had ever had to do. They felt unfairly treated, especially in cross-examination: ibid 148.



RECOMMENDATIONS

65. Section 37 of the Evidence Act 1958 should be amended to provide for the routine use of closed-circuit television by child witnesses in sexual offences trials.
66. The prosecution should be able to apply for an order that the alternative arrangement not be used. The judge should have the power to make that order only if the court is satisfied that the child is able and wishes to give evidence in court.
67. Every effort should be made to install appropriate closed-circuit television facilities in all courts in which sexual offences proceedings are held. Where facilities are unavailable, cases should be relocated where practical.



QUESTION

What arrangements should be made to facilitate the use of closed-circuit television, when the witness requires an interpreter?

Reducing Delays

6.78 One factor which contributes significantly to the stress experienced by children who report sexual assault is that they often have to wait for a lengthy period while the alleged offences are investigated and a decision is made about whether a person should be charged. Further delays may then occur before the case comes to trial.

6.79 Recognition of the stress caused by delay in pre-trial processes has led to the application of statutory time limits for pre-trial processes involving most sexual offences.⁵⁴⁴ A committal mention hearing⁵⁴⁵ must be held within three

⁵⁴⁴ Time limits were introduced in 1976 for pre-trial processes in cases of rape, attempted rape and assault with intent to rape, following a recommendation of the then Law Reform Commissioner. The former

months of the commencement of proceedings involving most child sexual assault offences.⁵⁴⁶ No time limit applies to the period between the committal mention hearing and the committal, when it will be decided by the magistrate whether the case should go to trial. However once the accused is committed for trial, the trial must commence within three months and this period can be extended for a period of up to three months.⁵⁴⁷ Despite these time limits, we were told in consultations that there were still considerable delays between the charge and conclusion of the trial process, particularly in country and regional areas. These delays occur for a number of reasons. No time limit applies to the period between committal mention and committal, and there may be numerous adjournments during this period. The directions hearing held under the *Crimes (Criminal Trials) Act 1999* is regarded as the date of commencement of trial, but the trial may not actually commence until much later. In addition, other procedural changes have resulted in time limits being imposed in relation to other offences. As a practical matter, pressure in the system has resulted in extension of the time limits being granted in many cases. The Commission would welcome advice on whether it would be desirable to impose a time limit on the period between committal mention and committal in cases involving child witnesses and on other ways of ensuring that time limits are met.

Law Reform Commission of Victoria recommended their extension to additional offences: *Rape and Allied Offences: Procedure and Evidence*, Report No 13 (1988), 25–8.

545 At the committal mention hearing it will be determined whether the accused intends to plead guilty, whether there is to be a contested committal and whether the complainant can be cross-examined: see *Magistrates Court Act 1989*, Schedule 5, 4.

546 Under the *Magistrates Court Act 1989*, Sch 5, cl 4(2), the Court can fix a different period before the three months has expired but cannot do so unless it is satisfied that, having regard to all the circumstances of the case, including the seriousness of the offence and the overall interests of justice, another period should be fixed because of the existence of exceptional circumstances or another good and sufficient reason.

547 *Crimes Act 1958* s 359A.

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QUESTION

Should a time limit be imposed for the period between committal mention and committal?

What other measures should be taken to ensure that delays in the criminal justice system are minimised for child witnesses?

6.80 In addition to concerns about lengthy pre-trial processes, concern was also expressed by several parents and carers about the long waiting periods experienced by children on the day when they give evidence and about the inadequacy of waiting areas.⁵⁴⁸

6.81 Lengthy waits in poor facilities appear to contribute significantly to a child's anxiety and discomfort about the process of testifying.⁵⁴⁹

6.82 According to the Witness Assistance Service, the waiting time for child witnesses in sexual offences cases in Victoria is on average about a day. Almost all children wait at least half a day and children will often come to court on a Monday morning and when, after half a day it becomes apparent that they will not be called that day, they are sent home and told to report again the next day when the process is repeated.⁵⁵⁰ In Western Australia when the special hearing procedure is used children do not have to wait at all. Our recommendation that a similar procedure should be introduced in Victoria will ensure that children who give pre-recorded evidence do not have to wait to do so. However, even if this recommendation is implemented some children will still have to give evidence at trial rather than at a special hearing. Changes in practice are necessary to ensure that these children are not kept waiting to give their evidence.

⁵⁴⁸ Submission 25.

⁵⁴⁹ Eastwood and Patton, above n 463, 52.

⁵⁵⁰ Information provided by Witness Assistance Service, 10 September 2002.



RECOMMENDATIONS

68. The Chief Judge of the County Court should arrange for the development of guidelines and procedures to minimise waiting times for child witnesses in sexual offences cases.
69. Child witnesses should not be required to attend court until the time they are required to testify.

CHANGES TO EVIDENCE LAW

6.83 This section deals with changes to evidence laws relating to:

- the competence of children to give evidence; and
- the admission of hearsay evidence.

Competence

CURRENT LAW

6.84 Because sexual offences against children usually occur in secret, the evidence of the child who has been assaulted will often be crucial in proving that an offence has been committed. Traditionally, the common law assumed that children were unreliable witnesses. This assumption was criticised in the ALRC/HREOC report, which summarised psychological research on children's memory, their ability to differentiate between fact and fantasy and their propensity to make false allegations, as follows:

- Children, including very young children, are able to remember and retrieve from memory large amounts of information, especially when the events are personally experienced and highly meaningful.⁵⁵¹
- The major problem with children's evidence is not the risk of children making false allegations, although this is still a possibility. Rather the problem is their significant level of false denials and retractions. If children make false allegations at others' instigation the statements are often not

551 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 454, 305.

credible and the child rarely persists with the story. On the other hand, to avoid punishment, to keep promises not to tell or to avoid revealing embarrassing information, most children will deny knowing information about an event they know occurred.⁵⁵²

- Younger children often have difficulty in telling times and dates. Although they may report events out of order or be unable to give a date or time this does not affect the accuracy of their description of an event.⁵⁵³

6.85 The process of cross-examination often involves questioning children about the sequence of events or about times and dates. A child's inability to answer such questions may be used to cast doubt on the child's credibility, even though the child is able to accurately describe the incident on which the prosecution is based.⁵⁵⁴

SWORN EVIDENCE

6.86 Children are not permitted to give evidence against alleged offenders unless they are assessed as competent to do so. A person is only competent to give evidence if they can give 'sworn' evidence—that is, if they can give evidence on oath or affirmation. A person who gives evidence on oath is required to swear by Almighty God that they will tell the truth, the whole truth and nothing but the truth.

6.87 The common law test of competence to give sworn evidence was that the witness understood the nature and significance of the oath.⁵⁵⁵ In many common law jurisdictions and until recently, in most Australian states, children below a certain age were presumed not to be competent to give sworn evidence. In the case of young children, the judge or magistrate questioned the children in the absence of the jury to decide whether they were competent to take the oath. Often this involved asking children whether they believed in God and whether they believed that they would suffer divine punishment if they did not tell the truth.⁵⁵⁶ Defence

552 Ibid.

553 Ibid.

554 For an excellent discussion of this defence counsel tactic see Shannon Caroline Taylor, *The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court Australia in 1995* (PhD Thesis, University of Ballarat, 2001), Chapter 9.

555 *R v Brazier* (1799) 1 Leach 199, 168 ER 202.

556 John R Spencer and Rhona H Flin, *The Evidence of Children—The Law and the Psychology*, (1990) 49.

counsel also cross-examined children about these matters. In modern times, the secularisation of society has resulted in some judges placing less emphasis on a belief in God, although some judges and magistrates still ask children questions about their religious beliefs when they inquire into their competence.

6.88 The movement away from emphasis on religious belief has resulted in some states making legislative changes to the test which must be satisfied before a person can give sworn evidence.⁵⁵⁷ In New South Wales, Tasmania, South Australia and the Australian Capital Territory, all witnesses are now presumed to be competent to give sworn evidence, subject to understanding the need to tell the truth (or a similar requirement).⁵⁵⁸

6.89 In Victoria, adult witnesses and children over 14 are assumed to be capable of giving sworn evidence, while people with impaired mental functioning and children below the age of 14 are able to give sworn evidence only if they understand the nature of an oath.⁵⁵⁹ To determine whether a child under 14 is competent, the judge or magistrate will question the child to assess the child's understanding of the obligation and significance of giving sworn evidence.

6.90 There is significant variation in the way the requirement that children's understanding of the nature of the oath is interpreted and applied by judges and magistrates. It is not clear whether the law in Victoria still requires children swearing an oath to believe in God and to expect that God will punish them for swearing a false oath. In *R v Hayes*⁵⁶⁰ the English Court of Appeal indicated that it was no longer necessary to show that a child giving sworn evidence believed that there was a divine sanction for failing to tell the truth. The important question was whether the child 'had a sufficient appreciation of the solemnity of the

557 For example, *Evidence Act 1902* (WA) s 106B; *Evidence Act 2001* (Tas) s 13.

558 *Evidence Act 2001* (Tas) ss 12, 13; *Evidence Act 1929* (SA) s 9; *Evidence Act 1995* (NSW) ss 12, 13; *Evidence Act 1995* (Cth) ss 12, 13.

559 *Evidence Act 1958* s 23. Section 23A outlines a procedure to be followed in the case of complainants in sexual offences cases who have impaired mental functioning and who have been assessed as not competent to give evidence. In such a case, the court may give directions for the complainant to be seen by it and the jury and questioned about matters other than the facts in issue if the capacity of the complainant to consent to the sexual activity, or the state of mind of the accused in relation to the complainant's capacity to so consent, is relevant.

560 *R v Hayes* (1977) 64 Cr App R 194, 198. The Court of Appeal upheld the trial judge's decision to allow two young boys who had never heard of God, Jesus or the Bible to give evidence on oath, saying '...in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised'.

occasion and the added responsibility to tell the truth over and above the duty to tell the truth which is an ordinary duty of normal social conduct'. The Victorian Court of Appeal has left open the question whether this principle applies in Victoria.⁵⁶¹

UNSWORN EVIDENCE

6.91 In Australia, each jurisdiction also allows some witnesses to give unsworn evidence if they reach a specified standard of accountability.⁵⁶² The test for capacity to give unsworn evidence differs between jurisdictions. In Victoria, section 23(1) of the *Evidence Act 1958* provides that children under 14 or people with impaired mental functioning, if judged not to understand the oath,⁵⁶³ may give unsworn testimony if they understand the duty of telling the truth and are capable of responding rationally to questions about the facts in issue. The requirement that children understand the duty of telling the truth before they can give unsworn evidence does not differ significantly from the test which some states specify as the test for determining whether children are competent to give sworn evidence.

PROBLEMS WITH THE CURRENT LAW

6.92 Prosecutions of people accused of sexual assault of children are subject to many difficulties. It is therefore particularly important that child complainants and other child witnesses be given every opportunity to present their evidence. In

561 *R v Fotios Fotou* (Unreported, Victorian Court of Appeal, 26 June 1996, BC 9602773, Charles JA) 7. See also *R v Simmons* (1997) 68 SASR 81, 83 where Perry J expressed doubt whether it was still necessary for a person to have a religious belief before he or she could take the oath. Compare *R v Dmonic* (1984) 14 A Crim Rep 418 where the child's lack of religious belief was held to prevent him from taking an oath, even though the child understood what it meant to tell the truth and *R v Schlaefer* (1992) 57 SASR 423 where the South Australian Supreme Court took a similar view.

562 *Evidence Act 2001* (Tas), ss 12, 13; *Evidence Act 1929* (SA) s 9; *Evidence Act 1995* (NSW) ss 12, 13; *Evidence Act 1977* (Qld) s 9; *Evidence Act 1906* (WA) ss 97, 100A, 106B, 106C; the position in the ACT is governed by s 13 of the *Evidence Act 1995* (Cth); *Oaths Act 1939* (NT) s 25A.

563 In Victoria, witnesses must take the oath unless they object to doing so or it is not practical to administer the oath in accordance with their religious beliefs: *Evidence Act 1958* s 102. The position in most other Australian jurisdictions is different, allowing a witness to elect to take the oath or to affirm. The Victorian Parliament Law Reform Committee recently reviewed the law regarding oaths and affirmations and recommended that the Victorian legislation be amended to enable witnesses to choose to take the oath or to affirm in line with the Commonwealth position: *Inquiry into Oaths and Affirmations with Reference to the Multicultural Community* (2002) Recommendation 19, 230.

its current state, the law regarding the capacity of child witnesses to testify is complex and may create obstacles to the child testifying. In particular:

- The test of competency for giving sworn evidence may involve an inquiry into the child's religious beliefs. The practice of swearing on a Bible (or other religious text) to invoke an obligation of truthfulness is a Christian one. For children from secular backgrounds this concept may be unfamiliar and of little or no relevance. For children from religious or cultural backgrounds other than Christian ones it may be an inappropriate practice.⁵⁶⁴ No inquiry as to their religious beliefs is usually made of adults without mental impairments.
- Children in Victoria may be unable to give sworn evidence, even though they are capable of understanding that they should tell the truth, because the present competency test probably requires them to understand the religious significance of taking an oath. If juries give greater weight to sworn evidence than unsworn evidence, the inability of children to take an oath may result in some perpetrators of sexual assault being acquitted.
- Children may be incompetent to give unsworn evidence because they do not 'understand the duty of telling the truth'⁵⁶⁵ even though they are able to accurately communicate information which is relevant to the charge. The competency requirement may result in a failure to charge an alleged offender or may deprive the prosecution of the main evidence relevant to the charge.⁵⁶⁶
- There is little guidance on the questions that should be asked to ascertain competency to give sworn or unsworn evidence. An inquiry by the judge into a child's understanding of the oath is usually that child's 'first introduction to the courtroom drama'.⁵⁶⁷ Although some judges or magistrates ask developmentally sensitive questions, others ask questions that are far too difficult and abstract.⁵⁶⁸ At one recent Victorian trial, a 10-

564 The Victorian Parliament Law Reform Committee heard evidence that it is not customary for Sikhs, Buddhists, Muslims or Quakers to swear an oath on a religious text in the way that Christians swear on the Bible: *ibid* 79–96.

565 Spencer and Flin, above n 556, 54.

566 *Ibid*.

567 Louise Sas, *I'm doing my job in court, are you? Questions for the Criminal Justice System*, (1999) Child Witness Project, London Family Court Clinic and The Child Witness Network, 50.

568 *Ibid*.

year-old witness was asked by the judge ‘what is the truth?’—an open-ended and conceptual question that reduced her to confused silence immediately.⁵⁶⁹ There is evidence that the process of assessing competency is problematic for the judge as well.⁵⁷⁰

- Lack of guidance on the questions to be asked to determine competency may result in inconsistent judicial decision-making.
- The current competency requirements are sometimes seen as necessary to protect an innocent defendant from wrongful conviction. However, excluding the evidence of a child because the child is not competent to give sworn or unsworn evidence may also result in the conviction of an innocent person.⁵⁷¹

569 Trial observed by researcher, Victorian Law Reform Commission, County Court, 16 May 2002.

570 As part of a New South Wales research project conducted in 1995, 50 judicial officers were questioned about the way they determine a child’s competence. Their responses indicated considerable dissatisfaction with the oath and with competence testing. Several (n=13) said they preferred the affirmation because they doubted the value of the oath in a predominantly secular society: J Cashmore, *The Evidence of Children* (1995) Judicial Commission of New South Wales, Monograph Series No. 11, 8.

571 See *Sparks v R* [1964] AC 964 discussed in Spencer and Flin, above n 556, 55.



CASE STUDY

In an unreported 1995 case,⁵⁷² the defendant was charged with multiple offences including four counts of sexual penetration of a child under 10. At the time of the trial the complainant was 11 years old. The judge questioned her about her understanding of telling the truth and lying. He then asked, 'Do you know what the Bible is?' and later, 'What do you think might happen if you tell a lie once you've taken an oath on the Bible?' She was allowed to take the oath and testify. During cross-examination, the defence barrister asked her a question about the defendant and then asked her if she was telling the truth. He then reminded her that she had been asked questions about truthfulness, lies and the oath and she answered that an oath is 'when you swear to God that you won't lie'. He repeated 'swear to God that you won't lie. Why would you do that do you think?' She then broke down and required a break. She was upset and couldn't continue until someone was brought in to support her. The court reconvened and the defence barrister resumed his questioning about truth telling. She explained that it is important not to tell a lie because if you tell a lie you're lying to God. He asked 'who is God?' She answered 'The man who made everyone.' And he asked whether it is important not to tell lies to him and then suggested that she had told a lie that morning. She became upset again.

OPTIONS FOR REFORM

6.93 In this section we consider the following possibilities for reform, namely:

- abolishing the requirement that evidence be given on oath;
- specifying an age below which all children give unsworn evidence only;
- reducing the age at which children are assumed competent to give sworn evidence;
- adopting a presumption that all witnesses, including children, are competent to give sworn evidence; the presumption would be rebutted if a child whose competence was challenged did not meet the relevant competence test; and

572 Transcript, County Court (1995), provided to the Commission as part of Submission 65.

- altering the tests which determine competence to give sworn and/or unsworn evidence.

ABOLISHING THE REQUIREMENT THAT EVIDENCE BE SWORN

6.94 The purpose of requiring a witness to swear an oath is to impress on the witness the importance of telling the truth. The oath is intended to provide some guarantee of the veracity of the witness's evidence. It is strongly arguable that the diminishing role of religion in the public sphere has removed the significance of swearing an oath, and that this process is unlikely to affect the truthfulness with which witnesses give their evidence.

6.95 The removal of the religious oath would prevent inquiries into the state of the child's religious belief, making it easier for children to give sworn evidence and removing some of the stress which children may experience as the result of questioning about their religious beliefs which they do not understand. Law reform bodies have been divided on whether this approach should be followed. In its comprehensive 1985 report on evidence, the Australian Law Reform Commission recommended the retention of the religious oath, although Justice Kirby (as he then was) expressed the dissenting view that the requirement that evidence be given on oath or affirmation should be abolished and that instead there should be a simple requirement that witnesses promise to tell the truth and receive a warning against giving false evidence.⁵⁷³ Similarly, the recent Victorian Parliament Law Reform Committee inquiry said that many Victorians value the opportunity to give sworn evidence and accordingly recommended the retention of the practice.⁵⁷⁴ By contrast, some other law reform bodies have recommended 'complete removal of the oath and its replacement with a secular affirmation or solemn promise to tell the truth'.⁵⁷⁵ The Commission agrees with the view expressed by Justice Kirby, but does not consider it appropriate to recommend abolition of the religious oath solely in sexual offences cases. It would be beyond

573 Australian Law Reform Commission, *Evidence*, Report No 26, Interim (1985) Vol 1, 313–15.

574 The Law Reform Commission of Western Australia considered abolishing the distinction between sworn and unsworn evidence in relation to child witnesses but concluded that the seriousness with which sworn evidence is regarded by both witnesses and juries merits its retention, even 'in the absence of an acknowledged belief in God': Law Reform Commission of Western Australia, above n 463, 14.

575 Victorian Parliament Law Reform Committee, above n 564, 234. The bodies cited by that Committee include the Irish Law Reform Commission, Auld's Review of the Criminal Courts of England and Wales, the Ontario Law Reform Commission, the English Criminal Law Revision Committee, the Law Reform Commission of Canada and the majority of the Northern Territory Law Reform Committee.

the terms of reference of this project to recommend changes to oaths in all criminal proceedings. However, even if provision for sworn evidence is retained, the Commission's view is that the test for competence to give sworn evidence should be changed. This is discussed in more detail below.

SPECIFYING AN AGE BELOW WHICH ALL CHILDREN GIVE UNSWORN EVIDENCE ONLY

6.96 In the United Kingdom, under the *Youth Justice and Criminal Evidence Act 1999*, an age is specified under which all children give unsworn evidence. Under section 53, all children under 14 years give unsworn evidence.⁵⁷⁶ Like the first option, allowing children below a certain age to give unsworn evidence only, would remove the need to question children below that age about their religious belief or understanding of truth telling (depending on the test which applies). However, it is arguable that the children's unsworn evidence may be regarded by juries as less significant than sworn evidence and that this may therefore have an adverse impact on the prosecution's ability to prove its case. In addition, the establishment of a mandatory cut-off age means that some children would be prevented from giving sworn evidence when an assessment of their individual capacity may have allowed them to do so.

REDUCING THE AGE AT WHICH IT IS ASSUMED THAT CHILDREN ARE COMPETENT TO GIVE SWORN EVIDENCE TO 12

6.97 In Victoria, adults and children over 14 are presumed competent to give sworn evidence, and no inquiry is made into their understanding of the nature of an oath. No similar presumption applies to children under 14. The age at which children are presumed competent to give sworn evidence could be reduced to 12, as is the case in Western Australia.⁵⁷⁷ By around 10 or 11 years of age, most

576 According to section 53 of the *Youth Justice and Criminal Evidence Act 1999* (UK), in the United Kingdom all people, whatever their age, are considered competent to act as witnesses unless they cannot understand questions asked of them in court, or cannot answer them in a way that can be understood with if necessary, the use of 'special measures'. Witnesses under 14 years give unsworn evidence while witnesses over 14 take the oath or affirm if they understand the solemnity of a criminal trial and that taking an oath places a particular responsibility on them to tell the truth.

577 Section 106B of the *Evidence Act 1905* (WA) provides:

(1) A child who is under the age of 12 years may in any proceeding, if the child is competent under subsection (2), give evidence on oath under section 97(3) or after making a solemn affirmation under section 97(4).

children can grasp the abstract meaning of dishonesty.⁵⁷⁸ Reducing the age to 12 would allow more children to give sworn evidence, which might result in a higher conviction rate for those who commit sexual offences against children.

APPLYING A STATUTORY PRESUMPTION THAT ALL WITNESSES ARE COMPETENT TO GIVE SWORN EVIDENCE

6.98 Even if the age at which children are assumed competent to give sworn evidence were reduced to 12, the law may continue to operate arbitrarily. Adults who do not understand the nature of the oath will not be subjected to a competency assessment, while all children under 12 will be subjected to questioning. In 1985, the ALRC argued that this approach took no account of differences in patterns of child development. The Commission pointed out that it was not possible to pick an age above which all children are to be regarded as psychologically competent or below which all children should be regarded as incompetent.⁵⁷⁹

6.99 The ALRC recommended that all witnesses should be regarded as competent to give sworn evidence unless the contrary is shown. The court should have the ability to rule at any time during the trial that the witness cannot meet these requirements.⁵⁸⁰ This approach has been adopted in section 12 of the *Evidence Act 1995* (Cth and NSW) and of the *Evidence Act 2001* (Tas), which provides that there is a general presumption of competency that applies to all witnesses regardless of age.⁵⁸¹ In 1997 the joint ALRC/HREOC inquiry into

(2) A child who is under 12 years is competent to take an oath or make a solemn affirmation if, in the opinion of the Court or person acting judicially, the child understands that

(a) the giving of evidence is a serious matter; and

(b) he or she in giving evidence has an obligation to tell the truth that is over and above the ordinary duty to tell the truth.

Section 106C provides that a child under the age of 12 years, who is not competent to give evidence under section 106B, may give evidence without taking any oath or making a solemn affirmation, if the Court or a person acting judicially forms the opinion, before the evidence is given, that the child is able to give an intelligible account of events which he or she has observed or experienced.

578 Australian Law Reform Commission, above n 573, 129.

579 Ibid 127.

580 Australian Law Reform Commission, *Evidence*, Report No 38 (1987) Summary of Recommendations, Recommendation 2 (see also draft Bill, clause 18, 19(4)).

581 Similar provisions also apply in South Australia under the *Evidence Act 1929* (SA) s 9(1).

children in the legal system⁵⁸² recommended that other Australian jurisdictions should enact similar provisions. As we discuss below, in 1985, the ALRC also recommended revision of the test to determine competence to give sworn evidence.⁵⁸³

6.100 Under the Uniform Evidence Act⁵⁸⁴ a person who is incapable of understanding that he or she is obliged to give truthful evidence is not competent to give evidence on oath.⁵⁸⁵ A person not capable of giving a rational reply to a question about a fact is not competent to give evidence about that fact, but may be competent to testify about other facts. This distinction is ‘particularly important for children who may have differing language skills, abilities to make inferences, conclusions or estimates or capacities to understand concepts such as time and special perspective. This approach to competency allows a young child to respond under oath to simple questions but not to questions beyond the child’s capacity that cannot be reframed in simpler terms’.⁵⁸⁶

6.101 Adopting a similar provision in Victoria would make this state’s evidence legislation consistent with federal evidence law and the law of evidence applicable in NSW, Tasmania, SA and the ACT. This approach could also allow larger numbers of children to give sworn evidence, though defence counsel are still likely to raise questions about a child complainant’s competence. If juries place more weight on sworn than on unsworn evidence (a matter on which we can only speculate) this approach could result in conviction of a higher proportion of perpetrators of child sexual assault. Giving children who have the capacity to do so the opportunity to give sworn evidence upholds their dignity and integrity. The Commission supports the adoption of a presumption that all witnesses are competent to give sworn evidence.

582 Australia Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 454, Recommendation 98, 324.

583 Australian Law Reform Commission, above n 573, Summary of Recommendations, and see para 522, draft Bill clause 13.

584 The Commonwealth, NSW and Tasmania have enacted legislation based on the ALRC’s 1987 report on evidence, which provided a blueprint for uniform evidence legislation in all Australian jurisdictions: see above n 580. The Uniform Evidence Act provisions also apply in the ACT.

585 See, for example, *Evidence Act 1995* (NSW) s 13.

586 Australia Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 454, 323.

ALTERING THE TEST WHICH DETERMINES COMPETENCY TO GIVE SWORN EVIDENCE

6.102 If the distinction between sworn evidence and unsworn evidence is retained, and sworn evidence is to retain its status as solemn and trustworthy, it is necessary to formulate a basic standard of competency to give sworn evidence. A standard of competency is required even if all witnesses are assumed to be competent, as there will be some cases, including those involving children, where there is a doubt about competency. As we have seen, the current test requires the witness to understand the nature of the oath. As the ALRC has commented, this test ‘is essentially one of moral and religious understanding’.⁵⁸⁷ In some cases judges are still questioning children about the state of their religious beliefs in order to determine their competency.⁵⁸⁸ Changing the test would prevent this occurring. Instead of requiring that the witness ‘understand the nature of the oath’ the test should be reformulated to prevent children being asked inappropriate questions about the state of their religious beliefs.

6.103 A number of different tests could be applied for competence to give sworn evidence. Some jurisdictions require only that the witness understands the obligation to give truthful evidence.⁵⁸⁹ In Queensland and the Northern Territory,⁵⁹⁰ as in Victoria, the test is whether the witness understands the nature of an oath. In Western Australia the test for competence to give sworn evidence⁵⁹¹ requires the child to understand that

- (a) the giving of evidence is a serious matter; and (b) he or she, in giving evidence, has an obligation to tell the truth that is over and above the ordinary duty to tell the truth.

The later part of the test seems unnecessarily complex and appears to require questions to be directed at the child which differentiate between the duty to tell the truth and a more onerous duty to tell the truth in court.

587 Australian Law Reform Commission, above n 573, Volume 1, 129.

588 See, for example, *R v Fotios Fotou* (Unreported, Victorian Court of Appeal, 11 June 1996, BC 9602773, Winneke P, Charles JA and Southwell AJA, where the trial judge had asked the child about the Bible.

589 *Evidence Act 1929* (SA) s 9(1), *Evidence Act 2001* (Tas) ss 12, 13, *Evidence Act 1995* (NSW) ss 12, 13; *Evidence Act 1995* (Cth) ss 12, 13.

590 This is implicit from the *Evidence Act 1977* (Qld) s 9(1) and from the *Oaths Act 1939* (NT) s 25A(1).

591 *Evidence Act 1906* (WA) s 106B(2).

6.104 The ALRC considered that the question ‘who can be a witness and give evidence’ should be based on a concept of psychological competence, rather than on the ability to understand the nature of the oath. Psychological competence includes the ability to understand questions and give rational answers to them, as well as the ability to understand the obligation to give truthful answers.⁵⁹²

6.105 The Victorian Law Reform Commission’s view is that to be competent to give sworn evidence the child must:

- be able to understand the questions and give answers to them that can be understood; and
- understand the obligation to give truthful evidence.

CHANGING THE TEST OF COMPETENCY TO GIVE UNSWORN EVIDENCE

6.106 All Australian jurisdictions allow children who are not competent to take the oath to give unsworn evidence, provided they fulfil a basic test of accountability.⁵⁹³ Allowing certain witnesses to give unsworn evidence allows the court to hear a broader range of evidence which is potentially relevant to the case. The fact that the evidence is not given on oath or affirmation may affect how the jury assesses the evidence and the weight which is attached to it, but does not prevent the evidence being given.

6.107 In Victoria, section 23 of the *Evidence Act 1958* provides that children can give unsworn evidence if they understand the duty of telling the truth and are capable of responding rationally to questions about the facts in issue. Section 13(2) of the NSW *Evidence Act 1995* allows children to give unsworn evidence if they understand the difference between truth and a lie, are told by the court that it is important to tell the truth, and indicate that they will not tell lies. The requirement that the child understands the difference between the truth and a lie is similar to the test which we have proposed should apply to competence to give sworn evidence.

6.108 There is little point in the legislation making provision for children to give unsworn evidence if the test of competence for unsworn evidence is substantially

592 Australian Law Reform Commission, above n 573, Vol 1, 127–30.

593 *Evidence Act 1958* (Vic) s 23; *Evidence Act 2001* (Tas) s 13(2); *Evidence Act 1929* (SA) s 9(2); *Evidence Act 1995* (NSW) s 13(2); *Evidence Act 1977* (Qld) s 9; *Evidence Act 1906* (WA) s 106C; *Oaths Act 1939* (NT) s 25A; *Evidence Act 1995* (Cth) s 13(2).

the same test as that which applies to sworn evidence. A test which requires children to show they understand the difference between truth and lies will often prevent children under about 10 or 11 years giving unsworn evidence, since it is not until that time that most children will fully understand the abstract notion of dishonesty.⁵⁹⁴ The solemnity of participation in legal proceedings is arguably sufficient to convey to the child witness the importance of telling the truth. Recent Canadian research suggests that the way a child answers questions about truth-telling or lying has no bearing on whether a child will actually tell the truth,⁵⁹⁵ although the researchers suggested some possible benefit (and at least no harm) from the child being asked to tell the truth.⁵⁹⁶

6.109 In Western Australia, the test for capacity to give unsworn evidence is that the child is able 'to give an intelligible account of events which he or she has observed or experienced'.⁵⁹⁷ In the United Kingdom, a witness under 14 or an adult witness who is ineligible to give sworn evidence⁵⁹⁸ may give unsworn testimony unless it appears to the court that the witness 'is not a person who is able to (a) understand questions put to him as a witness, and (b) give answers to them which can be understood'.⁵⁹⁹ The Commission prefers the United Kingdom formulation to the West Australian test.

6.110 Adoption of a test of this sort, requiring children only to be able to understand and answer questions, would facilitate prosecution of alleged offenders of crimes against young children, as child witnesses may be able to convey information but not have reached the stage of development where they can demonstrate an understanding of the difference between truth and a lie. The jury will have to decide whether the child's evidence is credible. The fact that the

594 ALRC, above n 573, Vol 1, 129.

595 Bala, Lee et al, above n 438, 411.

596 Ibid 446.

597 *Evidence Act 1906* (WA) s 106C; the Northern Territory legislation allows the evidence of a child under 14 years who is not competent to take the oath to be received without being sworn 'with the same consequences as if an oath had been administered in the ordinary manner' provided the witness 'is capable of giving an intelligible account of his experience': *Oaths Act 1939* (NT) s 25A.

598 According to section 55(1) of the *Youth Justice and Criminal Evidence Act 1999* (UK), a person over the age of 14 years may not give sworn evidence unless 'he has a sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking the oath'. Section 55(3) states that 'the witness shall be presumed to have a sufficient appreciation of those matters if no evidence tending to show the contrary is adduced (by any party)'.

599 *Youth Justice and Criminal Evidence Act 1999* (UK) s 53(3).

evidence is unsworn will affect the weight which is given to the evidence, rather than its admissibility.

6.111 This is consistent with the approach in some civil law jurisdictions⁶⁰⁰ where children below a certain age usually give unsworn evidence without any determination as to their capacity. The weight to be accorded the evidence is a matter to be assessed in the normal way.

6.112 In the Commission's view, children who can answer questions about events they have experienced should be able to give evidence about those events, even if they are not capable of understanding that they are under a duty to tell the truth. Like any other evidence offered to a court, it should be subject to appropriate scrutiny and directions by the judge and be available to the jury to assess.

APPLYING THE TEST OF COMPETENCY TO GIVE SWORN OR UNSWORN EVIDENCE

6.113 Magistrates and judges are likely to experience difficulty in determining the appropriate questions to ask the child and in assessing the capacity of the child to meet the relevant test.⁶⁰¹ In *R v Joseph George Stephenson*,⁶⁰² the trial judge commented on the problems which judges may have in questioning young children. Inappropriate questioning may cause children significant stress, may mean that they 'dry up' when they are questioned to determine their competence and could result in the exclusion of evidence which should have been admitted.

6.114 There has been no systematic education for judges and magistrates about child development or the problems which child witnesses are likely to experience in giving evidence. Judges may not have adequate knowledge of child development to assess competence and are forced to draw on their personal experience in communicating with children. This may or may not equip them to deal with the particular child witness whose competence is being questioned. They may be unaware of the cultural and linguistic complexities of dealing with children who come from non-English speaking backgrounds or other minority communities.

600 For example France, Germany and Sweden: Spencer and Flin, above n 556, 401.

601 Cashmore, above n 570, 8.

602 Referred to in *R v Joseph George Stephenson* (Unreported, Court of Criminal Appeal, Western Australia, 18 October 2000, BC 200006320, Pidgeon, Wallwork and Parker JJ) [24].

6.115 In South Australia, section 9(3) of the *Evidence Act 1929* allows the court to ‘inform itself as it sees fit’ in assessing a child’s competence. The joint ALRC/HREOC Report commented that this allowed a child’s competency to be tested with the assistance of a professionally qualified person or a person with whom the child had rapport, and permitted testing of the child’s competence outside the court room.⁶⁰³

6.116 The Victorian Law Reform Commission believes that it should be possible for the court to seek a report from an appropriate independent expert on the child’s ability to understand their obligation to tell the truth (in the case of sworn evidence) or to give rational answers to questions (in the case of unsworn evidence).⁶⁰⁴

603 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 454, 324; see also Layton, above n 467, [15.7–15.8].

604 Section 9A(2) of the *Evidence Act 1977* (Qld) allows a court to hear expert evidence about the witnesses’ level of intelligence, including the witness’s powers of perception, memory and expression, or another matter relevant to the witness’ ability to give reliable evidence in order to decide whether a person who does not understand the nature of the oath has sufficient intelligence to give reliable evidence pursuant to section 9A(1)(a) or, in the case of a child less than 12 years, pursuant to s 9A(1)(b).



RECOMMENDATIONS

70. Section 23 of the Evidence Act 1958 should be amended to provide that all witnesses, regardless of age, should be presumed competent to give sworn evidence.
71. The test for competence to give evidence on oath should be that witnesses :
 - be able to understand questions put to them as witnesses and give answers to them which can be understood; and
 - understand that they are obliged to give truthful evidence.
72. People who are not competent to give sworn evidence should be able to give unsworn evidence if they can understand questions put to them as witnesses and give answers to them which can be understood.
73. People who are not capable of giving comprehensible answers to a question about a fact should not be competent to give evidence about that fact, but may be competent to testify about other facts.
74. In cases involving allegations of child sexual assault, the court should be able to seek a report from an independent and appropriately qualified expert about the child's competence to give sworn or unsworn evidence.

Admission of Hearsay Evidence

THE CURRENT RULE AGAINST HEARSAY

6.117 In Victoria, the rule against hearsay evidence prevents a fact from being established⁶⁰⁵ by calling a witness to give evidence about a statement made out of

⁶⁰⁵ The rule does not prevent the use of hearsay evidence for other purposes, for example to establish a person's state of mind which is at issue at trial: see *Walton v R* (1989) 166 CLR 283; *Pollitt v R* (1992) 174 CLR 558, or to support their credibility in a case where it is alleged that their account was a recent invention or to show that a person complained of a sexual assault at the first available opportunity (the recent complaint principle). See *R v Geoffrey Arthur Hall* (Unreported, Supreme Court of NSW, Court of Appeal, BC 9700339, 1997, Hunt CJ, Studdert and Simpson JJ) 1–2.

court.⁶⁰⁶ For example, in a case where a teacher is prosecuted for sexual assault of a child, the child may disclose the abuse to her mother. The hearsay rule prevents the mother giving evidence of the disclosure to prove that the abuse occurred. It also prevents the child giving evidence of what she told her mother to support the evidence that the child gives to the court.⁶⁰⁷ The rule covers both oral and written statements and arguably, also words and gestures which imply a fact.⁶⁰⁸

6.118 The main reason that hearsay evidence is excluded is that it will often be less reliable than direct evidence. Where the person who has made the statement is not in court, he or she has not sworn an oath or made an affirmation and cannot be subjected to cross-examination. This objection does not apply where the maker of the statement gives evidence in court of a statement made outside court. Here the exclusion of evidence of what the person who made the statement said to another person seems to be based on the principle that a person should not be able to support their evidence by giving evidence of a prior consistent statement.⁶⁰⁹

6.119 There are a number of common law exceptions to the hearsay rule, and it has been modified by legislation in most Australian jurisdictions. For example, in Victoria it has been modified by legislation allowing use of videotaped evidence of children and people with impaired mental functioning in sexual offences cases.⁶¹⁰

PROBLEMS WITH THE CURRENT LAW

6.120 There are a number of reasons why it may be in the interests of justice to allow hearsay evidence to be given of sexual assault complaints made by children.

606 Spencer and Flin, above n 556, 126 and J D Heydon, *Cross on Evidence* (6th Aust Ed, 2000) 45.

607 Evidence law usually prevents admission of evidence of prior consistent statements to prove what is alleged in court. This is sometimes seen as an aspect of the hearsay rule (see, for example, Spencer and Flin, above n 556, 129, and sometimes as a separate rule. Prior consistent statements can sometimes be admitted to bolster the credibility of the witness, but not to prove the truth of what is asserted. One situation where they can be admitted is where they are 'recent complaints' where they are admitted as evidence of consistency: *Kunnatil John Suresh v R* ([1998] HCA 23, Gaudron and Gummow JJ) and *Papakosmas v R* (1999) 196 CLR 297, 303.

608 Heydon, above n 606, 856–7.

609 For other justifications for the rule, see Australian Law Reform Commission, above n 580, 72.

610 See for example *Evidence Act 1958* s 37B. The person must identify himself or herself at the hearing and attest to the truthfulness of the statement and must be available for cross-examination.

- The rule prevents a jury hearing evidence about the initial complaint of sexual abuse by a child⁶¹¹ although this may be crucial in assessing the veracity of the allegation. For example, it will usually prevent evidence of a complaint of abuse by a child to a parent, teacher, doctor or parent, or of what the child said in response to an investigation of alleged abuse, being used as evidence of the truth of the statement.
- The rule is based on the principle that the 'best evidence' is evidence given orally in open court. This may not be the case in relation to children. Andrew Palmer argues that 'what the child said when the abuse was first disclosed is actually more persuasive evidence of abuse than anything the child may say at the time of the trial'.⁶¹² The evidence of the disclosure may be 'better' than the evidence at trial because the child's memory of events may have faded by the time of the trial. In addition, 'by the time the child comes to testify at trial...age appropriate descriptions of the alleged acts may have been replaced with [other language]...[T]he story through repeated telling may have become stale and a flat and emotionless recitation of events is unlikely to persuade a jury that the child is telling the truth'.⁶¹³
- Many allegations of child abuse are not prosecuted, either because the child is incompetent to testify or is too traumatised to testify.⁶¹⁴ If evidence of the child's various statements to family, police, counsellors etc could be used as evidence of the truth of the statement, a higher proportion of offenders could be charged and convicted.

CHANGES TO THE LAW IN OTHER JURISDICTIONS

6.121 Criticisms of the hearsay rule have led to legislative modifications in some Australian jurisdictions. Some of these are discussed below. Reforms fall into two main categories.

611 Andrew Palmer, 'Child Sexual Abuse Prosecutions and the Presentation of The Child's Story' (1997) 23 *Monash University Law Review* 171, 177.

612 Ibid 180. Note that the admission of a VATE tape may give the jury access to the initial interview. However VATE tapes are not used in all cases and apply only to a complaint in the context of a police interview.

613 Ibid.

614 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 464, 330.

- General reforms to hearsay laws, such as those contained in the Uniform Evidence Acts which apply in the Commonwealth, NSW, Tasmania and the ACT.
- Specific reforms which may allow children's out of court statements to be used as evidence of the truth of the child's statement in sexual offences cases.

6.122 Victoria has not enacted general reforms to hearsay laws; nor has it enacted specific provisions modifying the hearsay rule in cases involving sexual offences against children.⁶¹⁵ In its 1988 *Report on Sexual Offences Against Children*, the former Law Reform Commission of Victoria acknowledged the need for change, but recommended that any revision take place 'in the context of a general reform of the hearsay rules following the review by the Standing Committee of Attorneys General of the Australian Law Reform Commission and New South Wales Law Reform Commission report on Evidence'. The Commission also said that if the review did not lead to general reform, a special exception for hearsay in cases involving children should be established.⁶¹⁶ Given the lack of any general reform of the laws of evidence in Victoria, the Commission now considers that it is appropriate to consider reform of the hearsay rule in cases involving alleged sexual offences against children.

6.123 In this section we consider the following options for reform of Victorian hearsay law:

- adopting the Uniform Evidence Act provisions on hearsay;
- applying the Uniform Evidence Act provisions to sexual offence cases only; and
- creating a hearsay exception for cases involving sexual offences against children.

615 Victoria has, however, enacted *Evidence Act 1958* s 37B, which allows admission of videotaped evidence of children.

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

ADOPTING THE UNIFORM EVIDENCE ACT HEARSAY PROVISIONS

6.124 A number of Australian jurisdictions have enacted legislation based on the ALRC's 1987 report on evidence,⁶¹⁷ which provided a blueprint for uniform evidence legislation in all Australian jurisdictions.⁶¹⁸ The Uniform Evidence Act hearsay provisions are found in the Commonwealth, NSW and Tasmanian Evidence Acts and also apply in the ACT.⁶¹⁹ Although these hearsay exceptions are general and apply to all proceedings, the provisions could, in some circumstances, allow evidence of a child's previous complaint of sexual abuse. The legislation retains the hearsay rule⁶²⁰ but creates exceptions allowing admission of first-hand hearsay evidence in certain situations. First-hand hearsay is defined in section 62 as 'a previous representation that was made by a person who had personal knowledge of an asserted fact'. The first-hand hearsay provision could allow evidence of statements made by children to, for example, a mother, a doctor, or the police, to be given by one of these people, if the situation came within one of the exceptions discussed below. These provisions do not allow admission of second-hand hearsay. For example, if the child made a statement to her doctor, who in turn told the child's mother about it, the mother's account of the statement would be second-hand hearsay, which could not be admitted to show that the assault occurred.

6.125 The scope of the exceptions which allow admission of hearsay evidence depend on whether the maker of the statement is available or not to give evidence. They are explained in more detail below. The Uniform Evidence Act also imposes other restrictions on use of hearsay evidence.⁶²¹ Not only must the statement come within the statutory exception, but the court can exclude or limit the use of the evidence if it may be unfairly prejudicial to a party, or be misleading or

617 The rule against hearsay was previously the subject of the New South Wales Law Reform Commission *Report on the Rule Against Hearsay*, Report No 29 (1978).

618 Andrew Palmer, 'The Reliability-Based Approach to Hearsay', 17 (1995) *Sydney Law Review* 522.

619 *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas). For the position in the ACT, see *Evidence Act 1995* (Cth) ss 4(1) and 8(4)(a). Under the latter provision, the Commonwealth Evidence Act does not affect provisions of the *Evidence Act 1971* (ACT) specified in regulations.

620 *Evidence Act 1995* (Cth) s 59(1). Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.

621 Section 67 requires reasonable notice in writing to each other party of a party's intention to introduce evidence pursuant to section 65.

confusing.⁶²² Only relevant evidence can be admitted under one of the legislative exceptions.⁶²³

6.126 The Commission believes there are strong arguments in favour of Victoria amending the *Evidence Act 1995*, to bring Victorian law on hearsay evidence into line with NSW and Commonwealth law. Such a change would not be confined to sexual offence cases but would allow hearsay evidence to be admitted in trials relating to sexual offences against adults, as well as against children. However it is beyond the scope of this reference for us to recommend a general reform of the law of hearsay.⁶²⁴

APPLYING THE UNIFORM EVIDENCE ACT PROVISIONS TO CHILD SEXUAL OFFENCES CASES

6.127 Another approach would be for the Commission to recommend the specific application in child sexual offences cases of provisions similar to the general hearsay exceptions in the Uniform Evidence Act.

6.128 As mentioned above, the circumstances in which hearsay evidence is admitted depend upon whether the maker of the statement is unavailable or available to give evidence.

Where the Maker of the Statement is Unavailable to Give Evidence

6.129 Section 65 contains an exception to the hearsay rule for criminal proceedings where the maker of a previous statement is not available to be called as a witness.⁶²⁵ This provision would allow a witness who saw, heard or otherwise

622 *Evidence Act 1995* (Cth) ss 136, 137.

623 See, for example, *Evidence Act 1995* (NSW) s 55.

624 Compare the Uniform Evidence Act hearsay provisions with the United States Rule 803(24), which provides a general residual exception to the hearsay rule under which a statement is admissible if it has circumstantial guarantees of trustworthiness and is offered as evidence of a material fact or is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and if the interests of justice and purposes of the rules are served and notice is given of the intention to introduce the statement. In the case of child sexual assault, some indications of the circumstantial trustworthiness of a child's previous complaint include the spontaneity of the statement, the degree of certainty expressed by the child, and the child's use of age-appropriate terminology.

625 A person is unavailable to give evidence about a fact for the purposes of the Act if he or she is dead; not competent to give evidence about the fact; if it would be unlawful for him or her to give evidence about the fact; if a provision of the Act prohibits the evidence being given; if 'all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or to secure his or her

perceived a child making a representation, to give evidence about the content of what was said or done by the child, in circumstances where the child was not available to give evidence.

6.130 However for the evidence to be admissible, the representation must come within one of the situations specified in the legislation. These situations are intended to provide some guarantee of the reliability of the evidence. The situations which are most likely to apply to a person who is sexually assaulted cover representations:

- made at or shortly after the time when the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication;⁶²⁶
- made in circumstances that make it highly probable that the representation is reliable; or
- against the interests of the person who made it at the time when it was made.

6.131 This provision creates two main bases for admission of evidence relevant to child sexual assault where the child is unavailable to give evidence.

Statement Made at or Shortly After the Time when the Asserted Fact Occurred

6.132 This is an extension of the common law principle which recognises an exception to the hearsay rule allowing admission of a statement which was made spontaneously and as part of an event which it describes.⁶²⁷ For example, if a child who is held prisoner and raped and immediately afterwards told her parents, this statement could be admitted as evidence of the rape.

attendance, but without success; or all reasonable steps have been taken, by the person seeking to prove the person is not available, to compel the person to give the evidence, but without success'. *Evidence Act 1995* (Cth), Dictionary s 5. It is not clear whether a child who cannot give evidence because to do so would cause her or him serious trauma is unavailable for the purposes of the Act.

626 This provision extends the common law exception which allows admission of hearsay statements which are made contemporaneously with the relevant event. This exception was interpreted restrictively in *Vocisano v Vocisano* (1974) 130 CLR 267. The provision allows admission of representations made shortly after the event occurred, see for example *R v Polkinghorne* [1999] NSWSC 704; BC 9904049, where a statement by a murdered woman to her mother, prior to her death, that 'Vin stabbed me' was admissible.

627 *Ratten v R* [1972] AC 378. For more detailed discussion see Andrew Ligertwood, *Australian Evidence* (3rd ed, 1998) 564.

Statement Made in Circumstances that Make it Highly Probable that the Representation is Reliable

6.133 The second basis is that the representation is made in circumstances making it highly probable that it is reliable.⁶²⁸ To date, this ground has been interpreted cautiously by the courts.⁶²⁹

6.134 Although section 65 allows admission of hearsay evidence where the maker of a previous statement is not available to be called as a witness, this is qualified by section 61. A previous representation cannot be used to prove a fact if, at the time that the person made the representation they were not competent to give evidence about the fact, because they were incapable of giving a rational reply to a question about the fact. This would prevent evidence being admitted about what a child said to her or his mother about a particular fact in a sexual assault case if the child was incapable of rationally replying to a question about that fact, but would not prevent evidence being given about other relevant facts about which the child could answer questions. This provision does not exclude representations which a person makes about their health, sensations, feelings, intention, knowledge or state of mind. For example evidence of a young girl's statement to her mother that she was sore in the vaginal area could be admitted under this provision.⁶³⁰

6.135 Section 67 ensures that allowing admission of hearsay evidence where the maker of the statement is not available to give evidence in court does not unfairly surprise the other side in the case.⁶³¹ If a party proposes to introduce hearsay evidence under section 65 they must give reasonable notice to the other party of the intention to adduce that evidence. The notice must state the provision on which the party intends to rely in arguing that the hearsay rule does not apply.

Queensland Application of this Provision to Sexual Offences

6.136 Queensland has applied similar principles to sexual offences cases in which the maker of the statement is unavailable to give evidence. Under the

628 *Walton v The Queen* (1989) 166 CLR 283; *R v Benz* (1989) 168 CLR 110.

629 *Pollitt v The Queen* (1992) 174 CLR 558.

630 In addition to the situations covered by s 65, if evidence was admissible at common law to bolster the credibility of the witness (for example under the recent complaint rule) the Uniform Evidence Act allows its use to establish the truth of the statement: see *Evidence Act 1995* (Cth) s 60. The Hon Justice Beazley, 'Hearsay and Related Evidence—A New Era' (1995) 18 *University of New South Wales Law Journal* 39, 42.

631 For discussion of this problem see Australian Law Reform Commission, above n 573, 370.

Uniform Evidence Act, it is not clear whether a person who would be traumatised by giving evidence is to be regarded as unavailable.⁶³² By contrast, section 93B of the Queensland *Evidence Act* allows first-hand hearsay to be admitted in sexual assault cases⁶³³ where the maker of the representation about an asserted fact is mentally or physically incapable of giving evidence, and where the representation was:

- made at or shortly after the time when the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or
- made in circumstances making it highly probable that the representation is reliable; or
- at the time it was made, against the interests of the person who made it.

6.137 The Queensland provisions go further than the Uniform Evidence Act in another respect. Under the Uniform Evidence Act hearsay evidence cannot be admitted to prove a fact if, when the representation was made the person making it was incapable of giving a rational reply to a question about the fact [contained in the representation].⁶³⁴ This restriction does not apply in Queensland. Thus, in Queensland a mother could give evidence of what she was told by a young child, even though the child could not give a rational reply to a question about the matters. However, where hearsay evidence is admitted under section 93B the court must, unless there are good reasons to the contrary, warn the jury about the possibility that hearsay evidence may be unreliable, of the reasons for its unreliability and of the need for caution in accepting it and determining the weight it should be given.⁶³⁵

Admission of Hearsay Evidence Where the Maker of the Statement is Available to give Evidence

6.138 Section 66 of the *Evidence Act 1958* allows the admission of evidence about previous representations in criminal proceedings, where the maker of the statement is available to give evidence. Evidence may be introduced about a

632 See above n 625. Queensland Law Reform Commission, above n 456, 88.

633 The provision applies to a 'prescribed criminal proceeding'. This includes rape and sexual assault cases and is not confined to cases involving children. See *Evidence Act 1977* (Qld) s 93B.

634 See for example *Evidence Act 1995* (NSW) s 61.

635 *Evidence Act 1977* (Qld) s 93C.

previous representation by the maker of the statement or someone who saw, heard or otherwise perceived the representation being made, if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.⁶³⁶

6.139 If the Uniform Evidence Act provisions were applied to child complainants in sexual offences cases in Victoria, hearsay evidence would be admissible if the occurrence of the asserted fact was fresh in the memory of the child who made the representation.⁶³⁷ This would allow a person who had heard the child make a statement about sexual assault to give evidence of that statement, as long as the child was available to give evidence. The High Court⁶³⁸ has “interpreted the word ‘fresh’ in section 66(2) to mean ‘recent’ or ‘immediate’” and has emphasised the importance of a close temporal link between the event and the representation.⁶³⁹

Problems in Applying the Uniform Evidence Act Approach to Child Sexual Offences Cases

6.140 The Uniform Evidence Act provisions create general exceptions to the hearsay rule, which are not tailored to deal with sexual offences against children. The exceptions to the hearsay rule which apply where the person is unavailable to give evidence can apply where the child is incompetent but may not operate if the child is too distressed to give evidence. The exclusion of such evidence may make it impossible to prosecute an alleged offender. Even if the requirement of unavailability to give evidence applies where the child was too distressed to give

636 Note that there are a number of other exceptions. The most important of these in the context of child sexual abuse cases is contained in the *Evidence Act 1995* (NSW) s 60. Under this section, evidence of a representation may be admitted for a reason other than to prove the fact intended to be asserted by the representation. This means that if evidence of a prior consistent statement by a child was admitted in response to a claim that the child had made up the story of sexual assault, in order to show that the child was a credible witness, it could also be used as evidence that the assault had occurred.

637 For a discussion of the meaning of this expression see *R v Geoffrey Arthur Hall* (Unreported, Supreme Court of New South Wales, Court of Appeal, BC 9700339, Hunt CJ, Studdert and Simpson JJ). Chief Justice Hunt quoted Odgers, *Uniform Evidence Law* (1995) to the effect that an event cannot be ‘fresh in the memory’ more than 24 hours after it occurred, though he indicated that the test was more flexible than this.

638 *Graham v R* [1998] 195 CLR 606.

639 *Graham v R* [1998] 195 CLR 606, 608, Gaudron, Gummow and Hayne JJ. Justice Callinan was also prepared to consider the quality and vividness of the recollection, but thought that its contemporaneity was almost always likely to be the most important consideration: 614. The case involved a complaint made about six years after it was alleged that the last of the offences occurred.

evidence, the exception which allows admission of hearsay statements made shortly after the asserted fact occurred will rarely apply in practice. Children who are sexually abused typically wait for months or even years before disclosing the abuse. As the South African Law Commission has acknowledged,⁶⁴⁰ a child's disclosure of sexual abuse is a process rather than an event and some children disclose sexual abuse gradually over several sessions.

6.141 The reasons why children may not report sexual abuse were also discussed in the report of the Cleveland Inquiry.⁶⁴¹

Many children who have been subject to sexual abuse are put under pressure from the perpetrator not to tell; there may be threats of violence to the child or that the perpetrator will commit suicide, of being taken away from home and put into care, threats that someone they love will be angry with them, or that no one would believe them. Children may elect not to talk because of a genuine affection for the perpetrator and an awareness of the consequences to the perpetrator, to the partner, to the family unit, or for an older child an understanding of the economic considerations in the break-up of the family and the loss of the wage-earner. The secretive element persists. Professor Sir Martin Roth in evidence said 'there is a powerful disincentive to disclosing the fact that one has fears that he may be regarded as having permitted himself, as having collaborated in it, as having been lastingly damaged in a sexual way. He is likely to fear ridicule, humiliation, obloquy and so on.'

6.142 Where the child is available to give evidence, hearsay evidence can only be admitted if the fact was 'fresh in the memory' of the child when she or he made the statement. Again this would preclude admission of hearsay evidence of statements made some time after the abuse occurred. The New South Wales Standing Committee on Law and Justice has recently reported⁶⁴² on child sexual assault prosecutions. The Committee was critical of the 'fresh in the memory requirement', as interpreted by the High Court. The Committee's view is that the High Court approach 'would lead to the exclusion of evidence of complaint of

640 South African Law Commission, above n 457, 39.

641 Cleveland Report (1988) para 17, cited in Spencer and Flin, above n 556, 143.

642 NSW Legislative Council Standing Committee on Law and Justice, above n 458.

most victims of child sexual assault’⁶⁴³ because ‘delayed disclosure of sexual assault is a *typical feature* of the way that victims respond to child sexual abuse’.⁶⁴⁴

6.143 The ‘reliability’ ground could provide a broader basis for admission of children’s hearsay statements, but under the Uniform Evidence Act it applies only where the child is unavailable to give evidence.

6.144 While applying the Uniform Evidence Act provisions to child sexual offences would be some improvement on the present law, the Commission’s view is that such a change would not go far enough. The Commission believes there is need for legislative reform of the hearsay rule which takes account of the way in which child sexual abuse disclosures are typically made. The creation of a specific exception for hearsay evidence relating to child sexual assault is consistent with the view taken by other bodies, including the ALRC/HREOC review and the Victorian Crime Prevention Committee⁶⁴⁵ and with the reforms adopted in Queensland, WA, SA and Tasmania.⁶⁴⁶

Creating a Specific Hearsay Exception

6.145 A number of Australian States have adopted specific hearsay exceptions for cases involving allegations of sexual or physical abuse of children.⁶⁴⁷ Similarly, more than half the states in the United States have specific child sexual abuse hearsay exceptions.⁶⁴⁸

6.146 The advantage of specific exceptions is that they can be tailored to deal with the reality of the circumstances in which children typically disclose that they have been assaulted. They can also acknowledge the ‘unique need in a child abuse

643 Ibid 110.

644 Ibid.

645 Parliament of Victoria, Crime Prevention Committee, *Combating Child Sexual Assault: An Integrated Model, First Report* (1995) 185. The Victorian Committee recommended that ‘an inquiry into the rules of evidence relating to child sexual assault cases be conducted as a matter of urgency’. The Committee advocated some relaxation of the hearsay rules to allow the admission of evidence of a child’s disclosures of the abuse: 186.

646 *Evidence Act 1977* (Qld) s 93A; *Evidence Act 1929* (SA) s 34ca; *Evidence Act 1910* (Tas) s 122F; and *Evidence Act 1906* (WA) s 106H.

647 *Evidence Act 1977* (Qld) s 93A; *Evidence Act 1929* (SA) s 34ca; *Evidence Act 1910* (Tas) s 122F; and *Evidence Act 1906* (WA) s 106H.

648 For an assessment of the effect of these exceptions see Dorothy F Marsil, Jean Montoya, David Ross and Louise Graham, ‘Children as Victims and Witnesses in the Criminal Trial Process: Child Witness Policy: Law Interfacing with Social Science’ (2002) 65 *Law and Contemporary Problems* 209.

case for allowing the victim's statements to be used, since in most of these cases, there are no eyewitnesses to the abuse, nor are there usually observable physical injuries to the child'.⁶⁴⁹

6.147 The reforms which have been adopted generally combine provisions which widen the circumstances in which evidence is admissible with the imposition of controls intended to guarantee that the evidence is reliable and to ensure that the accused has an appropriate opportunity to challenge the evidence. Some examples are as follows.

Where the Child is Available to Give Evidence

6.148 New South Wales, Queensland, Western Australia and South Australia have provisions permitting admission of hearsay where the child is available to give evidence.

New South Wales

6.149 In New South Wales the *Evidence (Children) Act 1997* has modified the hearsay rule to allow the court to hear evidence of a previous representation made by a child to an official investigating the offence.⁶⁵⁰ The evidence can be given either by the court viewing or hearing the recording (a similar process applies in relation to VATE tapes in Victoria) or by the child giving evidence of what they previously told the investigating official.

Queensland

6.150 Queensland allows admission of evidence of a statement made in a document where the maker of the statement is available to testify if:

- (a) the maker of the statement was a child under the age of 12 years or an intellectually impaired person...and had personal knowledge of the matters dealt with by the statement
- (b) the statement was made soon after the occurrence of the fact or was made to a person investigating the matter to which the proceeding relates.⁶⁵¹

This provision is not confined to sexual offences proceedings.

649 National Clearinghouse on Child Abuse and Neglect Information, *User Manual Series, Working with the Courts— Proving Child Maltreatment In Court*, available from <www.calib.com/nccanch/pubs/usermanuals/courts/prove.cfm> at 6 February 2003.

650 *Evidence (Children) Act 1997* (NSW), ss 8, 12.

651 *Evidence Act 1977* (Qld) s 93A.

Western Australia

6.151 In Western Australia, section 106H of the *Evidence Act 1906* allows the admission into evidence of any relevant statement made by a child (whether recorded, either in writing or electronically, or not recorded) at the judge's discretion, provided that the defence had notice of the statement and the child was available for cross-examination about the statement. A relevant statement is 'a statement that (a) relates to any matter in a [sexual offence] proceeding and (b) was made by the affected child to another person before the proceeding was commenced.'⁶⁵² A child is a person under the age of 18.⁶⁵³ So far it seems that this provision has rarely been relied upon.⁶⁵⁴

South Australia

6.152 In South Australia, where the alleged victim of a sexual offence is a child under 12, the court may use its discretion to admit evidence from a witness of the nature and contents of a complaint made to the witness by the child. The evidence may be admitted if the court, after considering the nature and contents of the statement, is of the opinion that the evidence is of sufficient probative value to justify its admission. The victim must be called or must be available to be called as a witness.⁶⁵⁵

6.153 The South Australian and Western Australian provisions allow admission of evidence in a broader range of circumstances than the Uniform Evidence Act. They do not require that the occurrence of the asserted fact was fresh in the memory of the person who made the representation. We have argued above that this requirement is ill-suited to the circumstances in which children report sexual assault.

Where the Child is not Available to Give Evidence

6.154 The provisions discussed above require children to be available to give evidence.⁶⁵⁶ There is a strong argument that hearsay evidence of a statement made by a child should be admissible even if the child is not available to give evidence. Palmer argues that hearsay evidence should be admissible 'where giving evidence

⁶⁵² *Evidence Act 1906* (WA) s 106H(3).

⁶⁵³ *Evidence Act 1906* (WA) s 106A.

⁶⁵⁴ Dixon, above n 540, 315.

⁶⁵⁵ *Evidence Act 1929* (SA) s 34C.

⁶⁵⁶ Under *Evidence (Children) Act 1997* (NSW) s 11(2), the child must be available for cross-examination and re-examination.

might cause undue trauma to the declarant, for example in a child abuse case; where the declarant is incompetent to testify, including cases where the incompetence is due to his or her age; where the witness can no longer remember the events to which their earlier statement related; and where a witness gives testimony inconsistent with their prior statements'.⁶⁵⁷

6.155 In Canada, it has been held that hearsay evidence of child sexual assault can be admitted where the child is not available if acceptance of the hearsay is necessary and the evidence is reliable. In the case of *Kahn*⁶⁵⁸ evidence of a four-year-old girl's complaint to her mother about sexual assault by the defendant doctor immediately after her consultation with the doctor was held to be admissible by the Supreme Court of Canada. The fact that the child was incompetent to testify meant that the first limb of the test was satisfied and the spontaneous nature of her allegation together with other factors satisfied the second requirement. Other factors which may make it necessary to admit the child's evidence include the evidence that testifying will be traumatic to the child, the youth of the child or the inability of a young child to appear in court to give a comprehensive account of events.⁶⁵⁹

6.156 A similar approach applies in a number of United States jurisdictions.⁶⁶⁰ For example, under Pennsylvania legislation,⁶⁶¹ the court can admit the evidence of a child who is unavailable to give evidence because the court determines that testimony by the child will result in the child suffering serious emotional distress, such that the child cannot reasonably communicate. In determining whether this is the case, the court can observe or question the child or a material witness, or hear the testimony of a parent, custodian or any other person, such as a person who has dealt with the child in a medical or therapeutic setting. The evidence is

657 Palmer, above n 618, 544.

658 *R v Kahn* [1990] 2 SCR 531.

659 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 454, Recommendation 102, 332.

660 For a list of various states' statutory provisions containing hearsay exceptions for evidence of a child's complaint of abuse see United States Department of Health and Human Services, National Clearinghouse on Child Abuse and Neglect Information and National Center for Prosecution of Child Abuse and Neglect State Statutes Elements, *Child Witnesses*, Number 23 Child Hearsay Exceptions.

661 42 Pennsylvania Consolidated Statutes § 5985.1A. For a similar example see Child Physical and Sexual Abuse Victim Protection Act Alabama Code s 15-25-32(2) (a)(2)-(4), Mass Ann Laws Ch 233 § 81.

admissible if the court finds that the time, content and circumstances of the statement provide sufficient indicia of reliability.⁶⁶²

6.157 The joint ALRC/HREOC report on children in the criminal justice system recommended that hearsay evidence should be admissible whether or not the child was available to give evidence. The report recommended that the exception to the hearsay rule should be expressed in the following terms:⁶⁶³

Evidence of a child's hearsay statements regarding the facts in issue should be admissible to prove the facts in issue in any civil or criminal case involving child abuse allegations, where admission of the hearsay statement is necessary and the out-of-court statement is reasonably reliable. A person may not be convicted solely on the evidence of one hearsay statement admitted under this exception to the rule against hearsay.

6.158 The Commission's view is that the Victorian *Evidence Act 1958* should be amended to allow admission of hearsay evidence in child sexual offences cases both where the child is available to give evidence and where the child is mentally or physically incapable of giving evidence. Provision for the latter case is similar to the situation in the Queensland legislation.⁶⁶⁴ In such circumstances we propose a similar safeguard to that proposed in the joint ALRC/HREOC report, which prevents a person from being convicted solely on the basis of hearsay evidence.

6.159 Our recommendations are largely based on the recommendation made by the ALRC/HREOC. However, instead of specifying that the evidence must be 'reasonably reliable', the recommendation incorporates the South Australian requirement that the evidence must be of sufficient probative value to justify its admission. This will mean that the issue of reliability will be left to the jury. In order to prevent the accused from being surprised by the admission of hearsay we recommend that reasonable notice be given of the intention to admit the evidence.

662 In *Idaho v Wright* 497 US 805, 110 S Ct 3139 (1990), the United States Supreme Court upheld the constitutionality of the Idaho legislation, which allowed admission of a hearsay statement where the statement had circumstantial guarantees of trustworthiness, was more probative than any other evidence which could be procured through reasonable efforts and the interests of justice would be best served by admission of the evidence. On the facts of the case the majority held that the child's out of court statements had not met the requirement of 'particularised guarantees of trustworthiness'.

663 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 454 Recommendation 102, 332.

664 *Evidence Act 1977* (Qld) s 93B.

6.160 The recommendation provides that a person cannot be convicted solely on the basis of hearsay evidence, thus incorporating safeguards for people accused of sexual assault.



RECOMMENDATIONS

75. Evidence of a child's hearsay statements regarding the facts in issue should be admissible to prove the facts in issue in any criminal case involving child sexual assault allegations, where:

- the child is under 16; and
- the court, after considering the nature and contents of the statement, is of the opinion that the evidence is of sufficient probative value to justify its admission.

76. A person may not be convicted solely on the basis of hearsay evidence admitted under this exception to the rule against hearsay.

6.161 Although we have recommended introduction of a hearsay exception for cases involving child sexual assault we note that in jurisdictions where such exceptions have been introduced they may be infrequently used. There appears to be a reluctance among many practitioners to introduce this type of evidence, even where the exceptions exist.⁶⁶⁵ Dezwirek Sas et al⁶⁶⁶ note that the acceptance of hearsay evidence is 'slow and erratic' and 'the courts are in the early stages of accepting the evidence of out of court statements of children'. Accordingly, any legislative broadening of the court's ability to accept hearsay evidence should be accompanied by appropriate education for practitioners and judiciary to increase awareness of the availability, purpose and utility of the amendments.

665 Scottish Executive Central Research Unit, *Vulnerable and Intimidated Witnesses: Review of Provisions in other Jurisdictions* (2002) 34.

666 Louise Dezwirek Sas, David A Wolfe and Kevin Gowdey, 'Children and the Courts in Canada' in Bette L Bottoms, Gail S Goodman (eds) *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law* (1996) 84.

Chapter 7

The Offence of Rape and the Meaning of Consent

INTRODUCTION

7.1 Most of the discussion contained in this Interim Report concerns procedural and administrative reforms and changes to the laws of evidence which are intended to make the criminal justice system more responsive to the needs of complainants in sexual offences cases. The Commission's view is that relatively few changes are required to the substantive law of sexual offences. In this chapter and Chapter 8 we discuss the changes to the substantive law which we do believe are necessary. This chapter focuses on consent in relation to the offence of rape. The definition of consent and the jury directions on consent which we recommend are also relevant to other sexual offences.

CONSENT

7.2 In a rape trial, a jury is asked to look at a range of evidence about the behaviour of the parties concerned and the circumstances surrounding the sexual acts. In most cases of rape, there is little or no physical evidence of the assault, such as injuries.⁶⁶⁷ The most significant evidence usually comes from the testimony of the complainant, and the central issue is most often whether or not she consented to sexual penetration. Commonly, the complainant and the accused are known to each other, and sometimes they are involved in an ongoing sexual relationship. In such cases, members of the jury must draw on their own 'common sense' and make complex assessments and evaluations about the motivations and expectations of the parties involved. This is by no means an easy task. Consent is

667 Melanie Heenan and Helen McKelvie, *The Crimes Rape Act 1991: An Evaluation Report*, Report No 2, Rape Law Reform Evaluation Project, Department of Justice (1997) (hereafter RLREP), 44.

‘an attitude of mind and a phenomenon of the will’.⁶⁶⁸ It is difficult to reconstruct the emotions and power dynamics that operate within a sexual encounter between two individuals in the ‘detached, forensic atmosphere of a courtroom, sometimes many months or even years after the event’.⁶⁶⁹

7.3 In rape trials, some jurors and judges continue to bring to bear stereotypical views of sexual roles in their assessment of consent. Factors such as alcohol consumption by the victim, the absence of signs of force and resistance, and value judgments about forms of acceptable social behaviour for women feature powerfully within legal constructions of consent. Justice L’Heureux-Dubé of the Supreme Court of Canada in the case of *Ewanchuk* wrote, ‘This case is not about consent, since none was given. It is about myths and stereotypes, which have been identified by many authors’.⁶⁷⁰ Justice L’Heureux-Dubé went on to quote the work of a scholar on sexual consent:

...Myths of rape include the view that women fantasise about being rape victims; the women mean ‘yes’ even when they say ‘no’; that any woman could successfully resist a rapist if she really wished to; that the sexually experienced do not suffer harms when raped (or at least suffer lesser harms than the sexually ‘innocent’); that women often deserve to be raped on account of their conduct, dress, and demeanour; that rape by a stranger is worse than one by an acquaintance. Stereotypes of sexuality include the view of women as passive, disposed submissively to surrender to the sexual advances of active men, the view that sexual love consists in the ‘possession’ by a man of a woman, and that heterosexual sexual activity is paradigmatically penetrative coitus.⁶⁷¹

As long as such myths circulate in courtrooms the notion of ‘consent’ cannot be determined fairly, and female victims of sexual assault will be unable to achieve true equality in the eyes of the law.

7.4 One of the aims of sexual assault law reform over the last decade has been to displace these powerful myths and to provide a legislative statement of appropriate standards of sexual interaction. The most significant changes to the law have been the introduction of a statutory definition of consent⁶⁷² and the

668 Law Reform Commission of Victoria, *Rape and Allied Offences: Substantive Aspects*, Discussion Paper No 2 (1986) 10.

669 Ibid.

670 *R v Ewanchuk* [1999] 1 SCR 330, 370, L’Heureux-Dubé J.

671 David Archard, *Sexual Consent* (1998) 131 as cited in *R v Ewanchuk* [1999] 1 SCR 330, 337.

672 *Crimes Act* 1958 s 36, inserted by *Crimes (Rape) Act* 1991 s 3.

mandatory jury directions on consent.⁶⁷³ Consent now means 'free agreement' and includes a non-exhaustive list of circumstances in which a person cannot freely agree to an act. This includes circumstances where a person is asleep, unconscious, or so affected by alcohol or other drugs as to be incapable of freely agreeing; is unlawfully detained; or is incapable of understanding the sexual nature of the act. These provisions are said by some to promote a communicative model of sexual relations.

7.5 A judge must direct the jury about two things. First, 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.⁶⁷⁴ The judge must also give a direction that a person is not to be regarded as having freely agreed to a sexual act just because she or he did not protest or physically resist or sustain physical injury, or because she or he freely agreed to engage with anyone in a sexual act either earlier or on the same occasion.⁶⁷⁵ The judge must relate the direction to the facts in issue in the proceeding in order to help the jury understand it.

7.6 Despite reforms to the law, rape trials still involve intense scrutiny of the complainant's behaviour, rather than of the actions of the accused. In 1997, the Rape Law Reform Evaluation Project Report found that complainants were frequently subjected to 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 were the kind of person who was likely to agree to sexual penetration.⁶⁷⁶ Dr Melanie Heenan, in her study of 34 rape trials that proceeded through the County Court in Victoria in 1996–98, found that consent remained a dominant focus.⁶⁷⁷ Stereotypical images of 'real-rape' victims were still widely-circulated in the courtroom and used to assess the behaviour of female complainants before, during and after the assault.

673 *Crimes Act 1958* s 37, inserted by *Crimes (Rape) Act 1991* s 3. Section 37 was further amended by the *Crimes (Amendment) Act 1997* s 4.

674 See discussion of jury directions below paras 7.54–7.57.

675 This provision supplements the sexual history provisions in the *Evidence Act 1958* s 37A. Provisions relating to sexual history are discussed in Chapter 5.

676 RLREP, above n 667, Chapter 7.

677 Melanie Heenan, *Trial and Error: Rape, Law Reform and Feminism* (PhD Thesis, Monash University, 2001), 242–3.

7.7 Given the on-going problems with the operation of consent in rape trials, the Commission has examined a variety of evidentiary, procedural and substantive reforms to the law. In this section we focus on changes to the definition of consent and directions on consent. Firstly, we examine a proposal for a change to the substantive offence of rape made by Professor Alison Young and Dr Peter Rush of the University of Melbourne.⁶⁷⁸ Amongst other things, the proposed offence provides a re-definition of the substantive offence of rape which, the authors argue, makes the presence or absence of consent on the part of the victim to sexual penetration irrelevant. The proposed offence is reinforced by limiting the type of evidence that can be admitted in sexual offences committals and trials.

7.8 The Commission has made a decision that the Rush and Young proposal should not be endorsed. After setting out the reasons for this decision, this chapter analyses alternative approaches to reforming the existing provisions on consent. These include:

- strengthening the directions for juries in relation to the meaning of consent;
- the test in relation to the accused's belief in consent; and
- the accused's failure to turn his mind to the complainant's consent.

The Commission also considers the role that a preamble to the sexual offences legislation could play in clearly establishing the social context of sexual offences, and endorsing the right of every person to sexual autonomy.

Rush and Young Proposal

7.9 Rape law reform has involved a number of significant challenges to the traditional construction of the offence of rape (or sexual assault). In the 1970s in certain jurisdictions in the United States, an alternative approach to rape was adopted, which required the prosecution to prove that sexual penetration occurred in 'coercive circumstances'. The word 'consent' was removed from the definition

⁶⁷⁸ The Rush and Young proposal was first submitted in response to the Model Criminal Code Officers Committee (MCCOC) Discussion Paper on Sexual Offences Against the Person. The Submission was considered very briefly in the Final Report by MCCOC: Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5: Sexual Offences Against the Person: Report* (1999) 27–31. Rush and Young reformulated their proposal for the Commission's reference and submitted it in response to the Discussion Paper, above n 485: Submission 5.

of the offence. A single offence of 'criminal sexual conduct' was established. This single offence was graded into four separate degrees of conduct.⁶⁷⁹

7.10 One of the aims of the so-called 'Michigan model' was to reduce the focus on the circumstances in which sexual penetration took place and to minimise the significance of the role of consent in rape trials.⁶⁸⁰ It was argued that rape should be treated primarily as a crime of violence as opposed to a crime founded upon a lack of consent. The reforms attracted attention and evaluative research from policy makers, scholars and lawyers. The major criticisms of the reforms were that consent continued to play a significant role in the prosecution and there was only a limited effect on reporting rates, prosecution practices and trial outcomes.⁶⁸¹

7.11 The submission that the Commission received from Professor Young and Dr Rush is another important attempt to re-conceptualise the offence of rape. The following discussion of the proposal is drawn from the submission to the Commission and a roundtable held on 24 June 2002 to discuss the proposal.⁶⁸²

7.12 Rush and Young propose that the offence of 'Rape: Causing Injury with Sexual Penetration' should be defined as follows:

679 The *Michigan Criminal Sexual Conduct Act* 1974 introduced categories of offences each carrying different maximum penalties. First degree criminal sexual conduct applied to acts where: (i) the accused was armed; (ii) the offence occurred under circumstances involving the commission of any felony; (iii) the penetration was accomplished by force or coercion or as a result of the victim being mentally or physically incapacitated, and resulted in personal injury (defined to include mental anguish); or (iv) the accused was aided and abetted in the commission of the offence.

Second degree criminal sexual conduct had a similar definition to first degree conduct, but covered non-penetrative sexual assaults. Third degree sexual conduct covered circumstances where the sexual penetration was achieved by means of coercion but did not result in personal injury. Finally, fourth degree conduct was similar to third degree conduct, but applied to non-penetrative sexual assaults. Consent was allowed to feature as a defence to the prosecution case.

680 In addition to the substantive reforms, the legislation also abolished the requirement of evidence of corroboration and resistance, and evidence of the complainant's prior sexual history with people other than the accused was barred, except in limited circumstances. The exceptions included where the evidence could provide an alternative source for pregnancy, sperm or sexually transmitted disease, or where there had been prior sexual contact with the accused.

681 J C Marsh, A Geist, and N Caplan, *Rape and the Limits of Law Reform* (1982) 50–2; Susan Caringella-MacDonald, 'The Comparability in Sexual and Nonsexual Assault Case Treatment: Did Statute Change Meet the Objective?' (1985) 2 *Crime and Delinquency* 206–22.

682 The roundtable was held on 24 June 2002 and attended by Professor Alison Young, Dr Peter Rush, Professor Marcia Neave, Dr David Neal, Professor Ian Leader-Elliott, Therese McCarthy, Justice David Harper, Professor Sam Ricketson and staff from the Commission.

A person who:

- (a) sexually penetrates another person, and
- (b) causes injury to that other person

with the intention of causing injury or with recklessness as to causing injury is guilty of the offence of rape.

7.13 Rush and Young argue that their proposal differs from the Michigan model and the existing Victorian rape provision because their model redefines rape as a crime that focuses on the harm *caused* by the accused, rather than a crime that focuses on the *circumstances* of the complainant's consent (current model) or the coercive and violent *circumstances* of the act (Michigan model). In other words, the Rush and Young model differs from previous law reform proposals because it reconfigures rape as a crime that causes unlawful consequences rather than a crime which occurs in unlawful circumstances. In doing this, it is entirely consistent with other serious offences such as assault and homicide which are classified as 'consequence' or 'result' crimes.

7.14 The Rush and Young proposal aims to shift the emphasis away from the complainant's behaviour towards the behaviour and mental state of the accused.⁶⁸³ They suggest that evidence about the complainant's behaviour, which is currently admitted because it is seen as relevant to whether or not the complainant consented (or whether the crime occurred in circumstances of non-consent), could be excluded as a result of this changed definition.

7.15 Rush and Young argue that their proposed change to the definition of rape would make it possible within a legal context for victim/survivors of rape to represent their experiences of the harm suffered and that this would be less traumatic for victims than the current offence.

7.16 As the law currently stands, in order to successfully prove rape, the prosecution must show that:

- the physical act of sexual penetration occurred and was intentional;
- the complainant did not consent to the sexual act; and
- the accused was aware that the complainant was not consenting or might not have been consenting.

683 Submission 5, 2.

7.17 That is, the offence of rape is concerned with the circumstances in which the sexual act occurred. Usually, the most contentious circumstance in a rape trial is whether or not the complainant consented to the sexual act. In these cases, the focus is on the complainant's state of mind.

7.18 Rush and Young point out that most serious offences against the person are concerned firstly, with the harm suffered by the victim and secondly, with the intention of the accused to cause that harm. For example, in order to prove murder, the prosecution must show that the accused intended to kill or cause grievous bodily harm (really serious injury), or to have been aware that death or grievous bodily harm was a probable consequence of his conduct.

INJURY

7.19 The Rush and Young definition of injury in the crime of rape is as follows:

1. For the purposes of the definition of rape, 'injury' occurs where the victim experiences bodily injury, injury to mental well-being or adverse economic consequences, whether permanent or temporary.
 - (a) A person's experience of bodily injury may include becoming unconscious, suffering pain, being disfigured, infection with a recognised disease, involuntary consumption of drugs or alcohol, or any significant impairment of bodily functioning.
 - (b) A person's experience of injury to mental well-being may include significant emotional harm, persistent impairment of ordinary mental functioning, recognisable clinical conditions, but does not include distress, grief or anger except as indicators of significant injury to mental well-being.
 - (c) A person's experience of adverse economic consequences may include significant detriment to the person's financial position, or potential loss of employment or promotion.
 - (d) A person's experience of injury is caused by the acts of the accused when the acts of the accused substantially, albeit not solely, contribute to the experience of injury.

7.20 The proposal defines injury broadly including physical, psychological and economic harm. The definition does not specify when the injury might occur— injury does not have to become apparent immediately, it could emerge months or even years after the sexual penetration.

7.21 The current definition of ‘injury’ in section 15 of the *Crimes Act 1958* covers unconsciousness, hysteria, pain and substantial impairment of bodily function. Rush and Young’s proposal covers, amongst other things, injury to well-being which includes trauma, depression and other clinical conditions recognised in modern psychology and psychiatry.

7.22 Proof of injury could be based on medical or psychological evidence, or on testimony from the complainant or family, friends and associates of the complainant.

CAUSATION

7.23 In order to show that the sexual penetration caused injury to the complainant Rush and Young propose that the prosecution would have to prove either that:

- the *act(s) of sexual penetration* caused the injury; or
- sexual penetration took place and that *other acts* of the accused caused the injury.

Either scenario, or a combination of the two scenarios, would be sufficient to establish the causal element in their definition.⁶⁸⁴

7.24 In the first case, it would be sufficient to show that the accused’s actions were a substantial cause of the injury. In the second case, other acts by the accused were the substantial cause of the injury, but these acts occurred in the context of sexual penetration. For example, sexual penetration occurs between an accused and a complainant. Prior to the act of penetration, the accused hits the complainant. The complainant suffers physical injuries attributable to the blow, not to the sexual penetration. In this case, the complainant could still establish a link between the acts causing injury and the sexual penetration, and this would satisfy causation.

7.25 The test of causation to be applied is included in the definition of injury. Injury is caused by the acts of the accused when the acts of the accused substantially, albeit not solely, contribute to the experience of injury. Rush and

684 Submission 5, 10.

Young argue that only in exceptional circumstances will the inquiry into causation focus upon the actions of people other than the accused.⁶⁸⁵

INTENTION OR RECKLESSNESS

7.26 As well as removing the requirement that the prosecution prove that the complainant did not consent, the proposal would involve a significant change to the mental element of the offence with regard to the accused person. Under the present definition of rape, the relevant mental element is awareness by the accused person that the complainant is not, or might not be, consenting. Under the Rush and Young proposal, the relevant mental element would be an intention to cause injury or recklessness about causing it.

7.27 The proposal does not envisage that it should be sufficient to show that the accused negligently caused harm to the complainant as a result of the sexual act. However, the re-definition would circumvent the problems currently associated with the subjective test of honest belief as to consent. At present, an accused person cannot be guilty of rape if he honestly believed that the complainant was consenting, even if his belief was objectively unreasonable.⁶⁸⁶ Because the circumstance (absence of the complainant's consent) would no longer be an element of the offence, the accused person's state of mind regarding that circumstance would no longer be directly relevant.

7.28 For example, in a case such as *DPP v Morgan*⁶⁸⁷ (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) if the accused person claimed that he honestly believed that the complainant was consenting to sexual penetration (i.e. that she only struggled because 'she liked it kinky'), this belief would be irrelevant because consent to sexual penetration is legally irrelevant. The question for the jury would be whether the accused

685 Rush and Young state that, '...as emphasised in the High Court (see especially *Royal*) and the Victorian Supreme Court (see *Evan & Gardiner (No 2)* amongst others), the inquiry into causal liability in criminal trials must be firmly focussed on whether or not *the accused* caused the prohibited harm': Submission 5, 12.

686 Although the trial judge is required to instruct members of the jury that, in deciding whether the accused did honestly believe that the complainant was consenting, they should consider whether such a belief was reasonable. This will be discussed in further details below: paras 7.82–7.85.

687 [1976] AC 182.

intended to injure the complainant, or was aware that his actions were likely to injure the complainant.

EVIDENCE AND PROCEDURE

7.29 Rush and Young argue that their model shifts the focus away from the complainant's behaviour towards the mental state of the accused. Because consent would no longer be an element of the offence, the type of evidence which is now admitted to suggest that the complainant consented to the sexual act, for example evidence of what she was wearing or how much alcohol she had consumed prior to the sexual act, would be less likely to be relevant. To make this even clearer, Rush and Young propose that the following provisions be included within the *Crimes Act 1958*:⁶⁸⁸

1. Evidence admissible at committal or trial must be evidence directly relevant to proving the elements of the sexual offence charged. Evidence will only be relevant if it directly relates to the acts and circumstances *immediately prior to or during* the event which is the subject of the charge.
2. Evidence will not be directly relevant to proof of the crime charged and hence not admissible in a court of law if it relates to the following matters:
 - (a) The kind of clothing worn and manner of dress by the complainant;
 - (b) The voluntary consumption of alcohol or drugs by the complainant;
 - (c) The place of residence of the complainant;
 - (d) The kind of employment engaged in by the complainant;
 - (e) The marital status of the complainant;
 - (f) The use of prescription medicine by the complainant which has been prescribed by a doctor for the complainant;
 - (g) The ethnicity, sexual orientation and gender of the complainant;
 - (h) The sexual experience of the complainant before or after the event the subject of the charge.
3. (a) If counsel wish to introduce evidence relating to any of the matters listed in section 2, they must make a written application to the judge or magistrate for permission to do so.

688 Submission 5, 17–18.

- (b) Permission can only be given if, in the opinion of the judge or magistrate, the evidence is directly relevant to proof of the elements of the crime charged.
- (c) The permission must state in writing and in detail the reasons for regarding the evidence as directly relevant.

EVALUATION

7.30 Rush and Young argue that the requirement to prove lack of consent beyond reasonable doubt often makes it difficult, if not impossible, to protect the sexual autonomy and personal integrity of all members of the community. The proposal attempts to reduce the importance of consent by removing it as an element of the offence. The proposal is also intended to address the excessive focus in rape trials on the conduct of the complainant, rather than the conduct of the accused.⁶⁸⁹

7.31 In evaluating this model, the Commission considered whether the re-definition of the offence of rape would make a significant difference in the way that rape trials are conducted. In particular, would the proposal make the trial process less traumatic for complainants, while at the same upholding the accused's right to a fair trial?

ADVANTAGES AND DISADVANTAGES OF PROPOSAL

INJURY

7.32 The Rush and Young model suggests an important philosophical shift in the understanding of rape. Under the existing crime of rape, the accused commits a 'wrong' by breaching the sexual autonomy of the victim. The accused is culpable because he has intentionally or recklessly infringed the complainant's right to bodily integrity by sexually penetrating her against her will. 'Lack of consent' is the fundamental element that turns an acceptable act of sexual penetration into rape. Similarly, under the Michigan model the 'wrong' committed is that the

689 Submission 5, 16. Professor Young has undertaken an analysis of a small sample of rape trial transcripts in which she strongly condemns the evidentiary techniques used in trials to cast doubt on the credibility of the complainant. She illustrates how the requirement of non-consensual sex in the basic definition of rape enables the complainant to be interrogated on a range of issues relating to appearance, alcohol consumption and prior sexual history: Alison Young, 'The Wasteland of the Law, The Wordless Song of the Rape Victim' (1998) 22 *Melbourne University Law Review* 442.

sexual penetration is violent or coercive. Once again, the complainant's right to freely engage in sexual acts has been contravened.

7.33 In 1997, in an early exposition of their model, Rush and Young identified the fundamental issue of sexual offences to be whether the complainant has been harmed by the conduct of the accused. The harm or the trauma of the rape is an element that must be proven and in this way the seriousness of the harm experienced by the complainant is recognised.

We do this in order to legally take account of the fact that the primary problem of sexual offences is the trauma suffered by the victim of the offence...A definition which identifies the primary problem of sexual offences in the *circumstance* of consent does not establish the injury *to the victim* as relevant to the determination of criminal liability.⁶⁹⁰

7.34 The Rush and Young model emphasises the victim's experience of rape. The model does not focus on what the complainant said or did at the time that the sexual act occurred. The proposed model allows a complainant to tell the judge and jury what she has suffered. This contrasts with the current trial process, where the victim's experience of trauma is marginal to the proceedings and is only officially considered when a victim impact statement is issued at the sentencing stage. In this way, one positive effect of the Rush and Young model is that it may lead to the criminal justice system directing attention to the experience of a rape victim, rather than that experience being peripheral to the successful prosecution of the case.

7.35 A possible unintended effect of the proposal is that complainants may have to emphasise their harm and suffering in order to establish the physical element of the crime. In those cases where victims feel that their sexual autonomy has been invaded, but do not see themselves as 'injured' in any significant way, (for example, they do not consider themselves to have suffered significant emotional harm, persistent impairment of ordinary mental functioning, or recognisable clinical conditions) or are not seen by others as 'injured', there may be less likelihood of a conviction.

7.36 Admittedly, this is also a feature of the current system. The Rape Law Reform Evaluation Project found that of the 105 accused in their sample who

690 Peter Rush and Alison Young, 'A Crime of Consequence and a Failure of Legal Imagination: The Sexual Offences of the Model Criminal Code', (1997) 9 *Australian Feminist Law Journal* 100–133, 108.

stood trial in the County Court for rape, only eight were convicted of a rape offence where the complainant showed no evidence of injuries. Over 50% of the accused were convicted where the complainant had received some medical treatment.⁶⁹¹ Under the Rush and Young model, due to the focus on injury, there may be an even greater privileging of physical injuries over other harms which are perceived to be less serious.

7.37 Rush and Young argue that trials focused upon injury will be less traumatic for complainants than trials focused on consent. There can be no doubt that it is extremely damaging for a rape victim to be told by the defence that she was a willing participant in what was a harmful and traumatic act. Nevertheless, the Commission is concerned that the proposal could result in complainants having to endure gruelling cross-examination about their experience of pain and suffering. The Commission is not convinced that this kind of cross-examination will be any less difficult for complainants than cross-examination on consent.

7.38 The proposed change contemplates a more expansive definition of injury than is contained in section 15 of the *Crimes Act 1958*. This would require education of judges, lawyers and juries. It raises problems of proof of injury. Rush and Young acknowledge that proof of injury would involve a focus on the complainant, and may require the testimony of psychiatrists and psychologists where no bodily injury is evident. There is also a danger that the defence will seek access to prior counselling or psychiatric records to see whether there was an earlier injury that breaks the causal link between the accused and the complainant. The result could be 'the expert psychologisation of the fact of rape' and a focus upon past medical and/or psychiatric history.⁶⁹²

7.39 By removing consent from the definition of rape, Rush and Young argue that their model is likely to reduce the focus upon the prior sexual history. Prior sexual history either with the accused or with others will not be directly relevant to the injuries sustained by the complainant. Nevertheless, the Commission believes that the evidence that a prosecution would need to produce in order to prove injury and the causal connection between the injury and the sexual penetration could be just as, if not more, traumatic for a complainant in a rape trial.

691 RLREP, above n 667, 234.

692 Submission 5, 10.

THE ROLE OF CONSENT

7.40 In 1997 Rush and Young argued that because consent to sexual penetration would no longer be an element of their proposed offence, the issue of the complainant's consent is less likely to be raised and the complainant is less likely to be cross-examined about whether or not she was a willing participant in the sexual penetration.

When read in conjunction with the doctrine of causation, the scope for using the standard of consent as *evidence* disproving the actual existence of the prohibited consequence...would be reduced considerably. As the doctrine of criminal causation has increasingly emphasised, the beliefs of victims (or third parties such as police and medics) are irrelevant to the causal inquiry in criminal trials because that inquiry is centred on the accused.⁶⁹³

7.41 Rush and Young argued that under the proposed model, the defendant could argue that the complainant was not injured because she consented to penetration, but this would only be an evidentiary matter relevant to the proof of harm.

7.42 The Commission is not convinced that consent to sexual penetration will cease to be a key issue in trials. Evidence of consent will be relevant to the issue of injury and will be relevant in establishing a causal link between the defendant's acts and the complainant's injury. If the complainant's injury is psychological, rather than physical, it is likely to be argued that she cannot have been injured because she consented to the sexual penetration. Even if the injury is physical, it may be argued that it was not caused by the defendant's acts, but by her willing participation in those acts.⁶⁹⁴

7.43 Cross-examination of the complainant about her consent is unlikely to be any less vigorous than under the current law. Indeed, defence counsel may respond to the change by routinely arguing that the complainant consented and therefore suffered no injury or consented to the actual injury.

693 Rush and Young, above n 690, 111.

694 For example, defence counsel may argue that the complainant willingly engaged in 'rough' sexual activity.

CAUSATION

7.44 Questions of causation are likely to be problematic especially where there is no physical injury directly attributable to the sexual penetration. There may be increased emphasis by defence counsel on a complainant's prior sexual activities. Evidence that a complainant incurred some form of 'injury' through a prior sexual encounter may be used by the defence to break the causal link between the alleged sexual act and the complainant's injury. This could lead to more successful applications being made to allow cross-examination of complainants about their prior sexual activities. This will be particularly traumatic for women who have suffered past sexual assault. It is likely that the defence will try to show that psychological injury was incurred by sexual assaults that took place long before the accused and the complainant became sexually involved.⁶⁹⁵ The Commission believes that it will be difficult to restrict the admission of evidence about a prior or subsequent event that may have caused the alleged injury. Unlike in physical assault or murder trials, the nexus between the act causing injury and the actual injury are more difficult to establish in rape trials where there is no physical evidence of injury. This will lead to a proliferation of alternative theories by the defence as to what actually caused the complainant's harm. While in non-rape trials these arguments may rarely be accepted by the jury (as Rush and Young argue), in rape trials the position is much less clear because injury is likely to be less apparent.

7.45 Another problem with the Rush and Young model is that it may be difficult for the prosecution to establish, beyond reasonable doubt, an intention to cause injury. In other offences such as murder or physical assault, the evidence of death or injury is normally enough to infer that a wrongful act has been committed, either intentionally or recklessly. However, given the dominant view of sexual acts in society it is unlikely that juries will be quick to infer that the sexual penetration caused harm *unless* there is either evidence of injuries or strong evidence of non-consensual circumstances. Clearly, Rush and Young want to avoid this 'presumption of consent' by taking consent out of the definition. Nevertheless, the Commission believes that the defence will still be able to successfully argue that the accused was not aware that the complainant would or might suffer injury from the sexual penetration *because* the complainant

695 The Commission agrees with Rush and Young when they write, 'No doubt defence lawyers may want to suggest that the injury suffered was not caused by the acts of the accused but by previous events which had a traumatic impact on the complainant': Submission 5, 12.

consented. As a result, consent may be reintroduced to determine the mental element.

Conclusion

7.46 The most promising aspect of the proposed offence is that it places the victim's experience of harm and trauma within the very definition of the offence of rape. However, the Commission is concerned that a trial focusing on the victim's injury will be no less stressful for a complainant than a trial that focuses on consent. The proposed offence is unlikely to reduce victimisation of complainants through the trial process. Moreover, it will remain extremely difficult under the proposed offence to marginalise consent as a determinative factor in rape trials. If consent remains a central determinant in trials, it is unlikely that the proposed change to the offence would affect reporting rates for complainants or conviction rates.

7.47 The Commission has considered the merits of the Rush and Young model and is of the preliminary view that the proposed definition of rape should not be adopted.

7.48 The Commission's rejection of the Rush and Young proposal means that it is necessary to consider other changes to the *Crimes Act 1958* provisions relating to consent. In the next section we consider changes to the directions which the trial judge must give the jury on the issue of consent.

CHANGES TO PROVISIONS ON CONSENT

7.49 The issue of consent in rape is also contentious in debates on law reform in other Commonwealth countries. The United Kingdom Parliament has introduced a Sexual Offences Bill in the House of Lords.⁶⁹⁶ The Bill follows on from the recommendations of the United Kingdom Home Office in its review of sex offences law.⁶⁹⁷ The Bill is designed to reform and modernise the law on sexual offences, and contains proposals for significant amendments to the definition of

696 This was the case as at 17 April 2003. The Sexual Offences Bill was introduced in the House of Lords on 13 February 2003. The Bill had its Second Reading on 13 February 2003 and went into committee on 31 March 2003.

697 See United Kingdom Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences*, Volume 1, Summary, Report and Recommendations (2000) and Volume 2: *Supporting Evidence* (2000).

consent. For example, under the proposed amendments, lack of belief in consent for rape is established if a reasonable person would, in all the circumstances, doubt whether the complainant consented *and* the accused does not act in a way that a reasonable person would consider sufficient in all the circumstances to resolve such doubt.⁶⁹⁸ Another proposed amendment is to presume the absence of consent and the absence of a belief in consent by the accused where certain *prima facie* circumstances exist.⁶⁹⁹ These circumstances include where the complainant was asleep or otherwise unconscious or unlawfully detained at the time of the act.

7.50 The South African Law Commission has proposed a statutory definition of rape where lack of consent is not an element of the offence.⁷⁰⁰ An act which causes penetration is *prima facie* unlawful if it is committed in any coercive circumstances.⁷⁰¹ Coercive circumstances include any use of force, any threat of harm or an abuse of power or authority.⁷⁰² The accused can raise a defence of consent or belief in consent.

7.51 In light of developments both overseas and within Australia, the Victorian Law Reform Commission has revisited many of the debates on the law of consent that have flourished during the last decade, and has also consulted widely on the current application of the legal framework on consent. The Commission believes that there is still scope to reform the law of consent so as to redress the inequities suffered by complainants, whilst maintaining the rights of the accused to a fair trial.

7.52 The following case study is used to illustrate some of the issues surrounding the operation of the provisions on consent.⁷⁰³

698 See clause 1 Sexual Offences Bill [HL] 2003. See also Second Reading Speech, House of Lords, Lord Falconer of Thoroton, 13 February 2003.

699 Clause 78 Sexual Offences Bill [HL] 2003.

700 South African Law Commission, *Sexual Offences: The Substantive Law*, Discussion Paper 85 (1999), 111–23; South African Law Commission, *Sexual Offences Report (Final)*, Annexure A: Draft Sexual Offences Bill (2002).

701 South African Law Commission, *Sexual Offences Report (Final)*, Annexure A: Draft Sexual Offences Bill (2002), cl 3(2)(a).

702 Ibid cl 3(3).

703 This case study is based upon the facts of the case *The Queen v Paul Ev Costa* (1996) (Unreported, BC 9601208, Victoria, Court of Criminal Appeal, Phillips CJ, Callaway JA, and Southwell AJA, 2 April 1996). Elements of the facts, including the names of individuals, of that case have been changed for the purpose of the case study.



CASE STUDY

Frank is a 41-year-old small business owner. Genevieve is his 21-year-old receptionist. After work one day, a group of staff, including Frank and Genevieve, went out for dinner. After dinner Frank asked Genevieve if she would like to come to the office for some more drinks. Genevieve refused. She said she had to work the next day. Frank was persistent, and Genevieve later said that she felt 'submissive' because Frank was her employer. They returned to the office.

By this stage Frank was quite drunk. He sat next to Genevieve and tried to put his arm around her and kiss her. Genevieve ducked and Frank fell on the floor where he fell asleep. In recounting the events, Frank later denied ever making sexual advances prior to falling asleep.

At this point Genevieve started to walk home. However, she did not feel safe walking alone on the street. She returned to the office and lay down on a couch upstairs where she fell asleep. Somewhat later, Genevieve was awakened and observed that Frank had his hand on her crotch and was saying to her, 'You sleep like a baby'. Genevieve was scared. She replied, 'You shouldn't be doing that'. Genevieve said she was half asleep, half awake at the time. She nodded back off to sleep for a couple of seconds and then awoke again. She noticed that Frank was kneeling alongside the couch. Genevieve later described her experience:

I was noticing that he was making advances on me and I couldn't do anything. I wasn't awake, I was thinking 'What's going on?'. He was trying to undo my pants, pull down my top and kiss me. He tried to put his tongue in my ears. I wasn't awake. I was thinking to myself, 'This can't be happening to me'. He then got one of my pants down, touched me inside with his fingers, then his tongue, then he pinned my arms down and penetrated me. I kind of froze. I couldn't say or do anything. I tried to avoid his kisses by moving my head from side-to-side.

**CASE STUDY**

Frank, for his part, tells a different story of what happened. He says that he found Genevieve asleep. He knelt beside her and said, 'Gee you sleep like a baby. You've got beautiful eyes.' He said that Genevieve had her eyes open at the time. Frank said that he then kissed her lips. She did not push him away. Frank then started to caress Genevieve. He removed her pants and kissed her body. Frank said that he believed that Genevieve was responding. He said, 'She didn't discourage me in any way, so it was the natural thing to do, and we had intercourse.' Frank claims that Genevieve touched him on the shoulder, and that's when he proceeded to have sexual intercourse with her. He said that when Genevieve said, 'You shouldn't be doing this' he took it to mean that she was enjoying the forbidden nature of the relationship (employer/employee).

7.53 The case study involving Frank and Genevieve raises the following questions around the operation of consent in the offence of rape.

- Would Genevieve's failure to say or do anything at the time of penetration amount to a lack of consent?
- Would Genevieve's failure to say or do anything at the time of penetration be enough to show Frank that she was not consenting or might not be consenting?
- Was it reasonable for Frank to have believed that Genevieve was consenting to the sexual penetration? If Frank's belief that she was consenting was honest, but unreasonable, should he be culpable for rape?
- Would it be useful for the directions to the jury to state more clearly what standards of behaviour are expected of someone like Frank in such a situation?

Effect of Failure to Do or Say Anything

7.54 As was pointed out in the introduction to this chapter, the 1991 amendments to the *Crimes Act 1958* introduced mandatory jury directions on consent. Section 37(1)(a) of the Crimes Act requires the judge, in a relevant case, to 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. The judge must also 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).⁷⁰⁴ The judge must relate the direction to the facts of the case to help the jury understand it.

7.55 In the Discussion Paper, the Commission asked whether the mandatory jury direction on consent should 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. This question was prompted by the Court of Appeal decision in the case of *R v Laz*.⁷⁰⁵ In this case the trial judge gave the following 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.

7.56 The accused was convicted. He appealed to the Court of Appeal, arguing that this direction was legally incorrect. 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.⁷⁰⁶

7.57 In the Court of Appeal's view, 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'.⁷⁰⁷ 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.⁷⁰⁸

7.58 Three submissions to the Commission's Discussion Paper thought that the mandatory direction should be changed to make it clear that the failure of a

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

705 [1998] 1 VR 453.

706 [1998] 1 VR 453, 460.

707 *R v Laz* [1998] 1 VR 453, 460.

708 *R v Laz* [1998] 1 VR 453, 460.

complainant to say or do anything indicating free agreement is sufficient, of itself, to amount to evidence of lack of consent.⁷⁰⁹ None of the submissions provided arguments in favour of that position. Six submissions opposed changing the mandatory direction.

7.59 The main arguments which were put against changing the existing direction (or against retaining the direction even in its current form) were that:

- it is factually inaccurate to say that if a person does not say or do anything to indicate consent, he or she is not consenting;⁷¹⁰
- the proposed direction improperly intrudes on the function of the jury by imposing upon them a particular interpretation of the facts;⁷¹¹ and
- the direction has the potential to reverse the onus of proof.⁷¹²

THE EDUCATIVE FUNCTION OF THE JURY DIRECTION

7.60 Ever since the former Law Reform Commission of Victoria proposed the mandatory jury direction there have been claims that the direction does not accurately reflect the norms and patterns of everyday sexual relations. In the 1996 Rape Law Reform Evaluation Project, legal personnel gave detailed comments on section 37(1)(a). Approximately half of the barristers and judges interviewed, and most of the solicitors, felt that the directions caused either no problems, or were quite warranted and appropriate to give to juries.⁷¹³ However, the wording of the direction provoked strong responses from some barristers (mainly from the defence bar) who felt that it did not reflect the way in which sexual relations normally occur. One barrister interpreted the direction as requiring men to get

709 Submissions 11, 27 and 7.

710 Submissions 13 and 17.

711 Submission 17.

712 Submissions 17 and 23.

713 RLREP, above n 667, 316. Of the 47 barristers interviewed, just under half objected to, did not support or questioned the usefulness of the direction. Many of these barristers challenged the factual proposition that failure to say or do anything is indicative of lack of consent: 317. Two of the 18 County Court judges interviewed also said that they did not think that the direction 'accords with human experience': 319. Only one of the six solicitors working in the Office of Public Prosecution shared concerns about the accuracy of the direction: 318–19.

written consent before they engaged in sex with women.⁷¹⁴ Other barristers were critical of the direction on the grounds that it was not applicable in practice.⁷¹⁵

7.61 The variety of views on the meaning of consent makes it particularly important to clarify the meaning of consent for the jury. A standard direction enables this to be done. The Commission acknowledges that not everyone in the community agrees that a positive indication of consent is necessary. However, legislative endorsement of a ‘communicative model’ of sexual relations was intended to deal with problematic social attitudes towards sexual practices that unfortunately persist. The jury direction performs an educative function by clarifying the law and establishing standards of behaviour for sexual relations which are based on principles of communication and respect. Communication does not have to be verbal, it can be displayed through gestures or facial expressions. The aim of the jury direction is to:

- dispel the enduring myth that a woman must show evidence of physical resistance to sexual advances in order to provide evidence of a lack of consent. The previous Law Reform Commission of Victoria recommended a strong legislative statement on the meaning of consent, and lack of consent, to make it clear that this is not what is required by the law.⁷¹⁶
- reduce the emphasis upon the victim’s mind when determining consent. It creates greater scope for the accused to be cross-examined as to what he considers constituted ‘free agreement’.

7.62 The Commission supports this aim. The direction under section 37(1)(a) signals an enlightened approach towards sexual relations, and clarifies one aspect of the legal position on consent. Far from being ‘out of touch’ with social mores, it upholds contemporary values about sexual relationships, such as mutual respect and communication.

7.63 Section 37(1)(a) is particularly salient when dealing with a situation such as the case study above. In this case, Genevieve’s evidence indicates that she became immobilised out of fear. Sub-sections 36(a) and (b) of the *Crimes Act 1958* already provide vitiating circumstances where the complainant submits

714 Ibid 317.

715 Ibid 317.

716 Law Reform Commission of Victoria, *Rape: Reform of the Law and Procedure*, Interim Report No 42 (1991) 9.

because of the fear of force, or because of the fear of harm. Sub-section 36(d) also states that where a person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing, that person cannot freely agree to sexual penetration. Sub-section 37(1)(a) amplifies the effect of these vitiating circumstances. In the case of Genevieve, her inability to respond was the product of both fear and a state of sleepiness. It is in precisely these situations that a sub-section 37(1)(a) direction challenges Frank's claim that '[s]he didn't discourage me in any way, so it was the natural thing to do, and we had intercourse'. The direction also serves to refute the outmoded assumption that because Genevieve did not resist she was therefore consenting to the penetration.

7.64 The Commission does not believe that sub-section 37(1)(a) is redundant due to changed social values or because section 36 lists situations in which a person will not be treated as having consented. On the contrary, the Commission has been made aware of occasions in which both the spirit and intent of the sub-section 37(1)(a) direction is being undermined or deliberately contradicted in comments by defence counsel to the jury. For example, in a five-hour address in a trial studied by Dr Melanie Heenan, the defence barrister made the following statement in closing:

You are not being pushed away or told to stop—surely you're entitled to make some assumptions about her state of mind...she's lying there saying nothing and doing nothing while he's putting his finger in her vagina...she's lying there saying and doing nothing while he...Are you not entitled to conclude that they're prepared to go along with it?⁷¹⁷

7.65 The defence counsel in this trial suggests that it can be assumed that the complainant consents if she does not physically resist or verbally refuse the advances. Whilst it is for the jury to determine consent on the whole of the evidence presented, it is necessary to maintain this direction in order to displace the authority of a perceived 'entitlement' to sexual relations where a person does not say or do anything to resist.

7.66 Some judges have also appeared to undermine the spirit and intent of the sub-section 37(1)(a) direction. For example, the following case went to trial in the County Court in 2001 in a regional location.⁷¹⁸ The complainant and the accused

717 Heenan, above n 677, 266.

718 Regional Trial Number 1, County Court, August 2002.

were estranged partners at the time of the alleged offences. Their relationship had ended some months earlier. The accused allegedly indecently assaulted the complainant when she was so intoxicated that she was unaware of the sexual penetration at the time it occurred. The accused claimed that some time prior to the alleged offences (when he and the complainant were in a sexual relationship together) the complainant had 'dared' him to do things to her when she was unconscious or asleep as a result of the excessive consumption of alcohol.⁷¹⁹ According to the accused, the 'dare' was made to test the complainant's claim that she would surely wake up or be aware that these acts were being done to her. The complainant vigorously denied ever having had such a conversation with him while she was in a de facto relationship with the accused. The assaults were only discovered because the accused video-taped the sexual acts.

7.67 At the trial, the prosecution argued that as a matter of law the complainant could not be regarded as consenting, because section 36 of the Crimes Act says that a person who is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing, cannot consent to a sexual act. Under sub-section 37(1)(a), failure to say or do anything, coupled with the complainant's unconscious state, should be enough to show lack of consent.

7.68 The excerpt from the transcript below shows that the judge's view was that a person can give 'blanket consent' to sexual acts, in advance of those acts occurring.

Prosecutor: My authority is the case, the section or portion I just read to Your Honour and also, when one looks at the Crimes Act, which presupposes, in my submission, that each act of sexual contact between the parties requires consent.

His Honour: Yes, but why can't—every act requires consent. But why can't there be blanket consent?...

719 According to His Honour, the 'dare' described by the accused was 'something to the effect that...you get so drunk you don't know what's happening, anything could happen while you're drunk, people could take advantage of you—and they could say that was said in a sexual context—and she says, no, no, you needn't worry about me, I'm all right, I'm a very light sleeper, it couldn't happen to me; and he said, yes, it could, you don't know how deeply out you are et cetera. And he says, well, look, if necessary I'll take a video of something to prove it. And she says, I dare you to'. Regional Trial Number 1, County Court, August 2002. Transcript of proceedings Thursday 1 August 2002, 3.

Prosecutor: Your Honour, could I use this expression: how can there be a situation where there is blanket consent, in my submission, when each act requires some consent, when under the legislation a person can withdraw their consent, for instance? In my submission, a person doesn't need to say, well—for instance a wife said to her husband, well, if you can do what you want to do with me and I love what you're doing—this in the first six months of marriage...

His Honour: Yes—and then withdraws consent...

Prosecutor: What if she doesn't say anything—15 years later is it still applicable? In my submission...

His Honour: Well, why not? Why not—if nothing else has changed then it hasn't been withdrawn. Why, as a matter of common sense wouldn't it still be applicable?

Prosecutor: What I would say, as a matter of common sense, it's the other way, Your Honour, with respect.

7.69 Later in the discussion, the judge persisted with the question as to why the conversations recounted by the accused 'couldn't be a continuing authority unless it's withdrawn or revoked'.

7.70 The judge ruled that it was for the jury to decide, as a matter of fact, whether or not consent had been given.⁷²⁰ The jury could reach this view if it believed the accused's story that the woman had agreed previously to be penetrated when she was drunk or asleep. The accused was acquitted. This approach to consent appears to make section 36 ineffective. It also removes the requirement for consent to any act at the time that it is occurring. It means that in many cases where the complainant is asleep, unconscious or drunk at the time of penetration, the accused will be able to rely on the concept of 'blanket consent' to escape conviction for rape.

7.71 The discussion between the prosecutor and the judge indicates that there are still significant differences in interpretation about the standards of appropriate communication surrounding consent to a sexual act. Upon first reading of the

720 In the trial transcript, the debate between the judge and the prosecutor is about whether an inference about the victim's consent can be drawn from the facts about her prior statements. The prosecution argued that the issue of consent should be withdrawn from the jury because, as a matter of law, subsection 36(d) establishes that where a person is unconscious, they cannot freely agree to sexual acts. The judge ruled that if the complainant's prior statements authorising the accused's actions were to be believed by the jury, then it was for the jury to decide, as a matter of fact, whether or not consent was given.

facts of this case, it is difficult to accept an explanation that an unconscious woman consented to sexual acts. Such a conclusion appears to run counter to the principles and policies that have guided reform of the legislation on consent through the last decade.

7.72 The communicative model of consent reflected in section 37(1)(a) is inconsistent with a notion of 'blanket consent' to sexual acts. At page 11 of the transcript the judge says:

I could see someone on Monday and say, I've got to go away for a fortnight I'll be back on Saturday week, and she can say, right, I'll look forward to your return and this is what we'll do when you return—of a sexual nature—and if I come back on Saturday week and nothing's changed and that hasn't been withdrawn, surely there is consent to what happens on Saturday week.

7.73 The Commission is of the opinion that in such a scenario, if the woman did not say or do anything to indicate willingness to participate in the sexual act upon the man's return, then this would normally be enough to show lack of consent. Simply because a promise was given verbally, does not mean that the consent indicated is operative two weeks later. If there are no words, gestures, expressions or acts to indicate consensual participation then the jury must 'have regard to the common human experience that, in general, people do not engage voluntarily in sexual activities without indicating by word or action in some way their preparedness to do so'.⁷²¹

7.74 The spirit of section 37(1)(a) indicates that consent is to be given to sexual relations each and every time such acts are proposed. This does not require a written agreement, as some might argue, merely a physical or verbal response from the complainant indicating that she is a willing participant in the acts. This can take the form of a smile or a responsive gesture. Where consent that is contemporaneous with the commission of the sexual act in question cannot be implied from the words or behaviour of the complainant, the jury is entitled to infer from the facts that there is a lack of free agreement. The current wording of section 37(1)(a) creates some scope for misunderstanding over the contemporaneity of consent. The Commission therefore proposes a change to the jury direction to make it clear that section 37(1)(a) pertains to a situation where

721 *R v Laz* [1998] 1 VR 453, 460.

there is a failure to say or do anything to indicate free agreement to the particular sexual act *at the time that the act occurred*.

7.75 In the next section we discuss the effect of sub-section 37(1)(a) upon the role of the judge and jury.

The Function of the Jury and the Reversal of the Onus of Proof

7.76 In the Discussion Paper the Commission asked whether the mandatory jury direction should be changed to make it clear that the failure of the complainant to say or do anything indicating free agreement can be sufficient, of itself, to amount to evidence of free agreement. The effect of this change would be to overcome the decision in *R v Laz*. The Commission's view is that such a change should be made.

7.77 It is important to clarify what is intended by such a provision. Evidence may be of varying degrees of cogency.⁷²² In some situations evidence of particular facts 'is sufficiently weighty to entitle a reasonable person to decide the issue in that party's favour, although it is not obligatory to do so'.⁷²³ This is known as *prima facie* evidence. In other situations evidence is presumptive. This covers the situation 'where a party's evidence in support of an issue is so weighty that no reasonable person could help deciding the issue in that party's favour in the absence of further evidence'.⁷²⁴ For the purposes of section 37(1)(a), the Commission believes that failure to do or say anything indicating consent should be *prima facie*, not presumptive evidence of the absence of free agreement. In other words, if the jury believes evidence that the complainant did or said nothing, this is sufficient to support a finding that the person did not freely agree to penetration. However, the jury could still find that there was consent in these circumstances. A legislative statement to this effect makes the purpose of section 37(1)(a) clear and promotes a communicative model of sexual relations.

722 J D Heydon, *Cross on Evidence* (6th ed, 2000) [1590].

723 *Ibid* [1600].

724 *Ibid* [1605].

7.78 Such a change does not relieve the prosecutor of the responsibility of proving the case against the accused. Both the legal burden and the evidential burden in a rape trial lie with the prosecution.⁷²⁵ Firstly, the prosecution must show that there is sufficient evidence for an issue of fact (here, the issue of lack of consent) to go to the jury for consideration.⁷²⁶ If this burden is not satisfied, the judge will withdraw the issue from the jury. Under our proposal, evidence to show that the complainant said or did nothing to indicate free agreement to the sexual act would be sufficient

Evidential burden

The evidential burden is the duty that lies on a party to introduce evidence so that the party's case may be left to the jury.

Legal burden

The legal burden is the duty that lies on the prosecution to persuade the jury that they have established all the elements of an offence, or rebutted all the elements of a particular defence according to the required standard of proof.

to allow the issue of lack of consent to go to the jury for consideration. The defendant may or may not choose to give an explanation to the jury. If the defendant does choose to give evidence, or put other evidence before the jury to support his case, the judge does not scrutinise the evidence to ensure that it is of a quality and quantity worthy of consideration by the jury, but must let the jury decide the matter.

7.79 The operation of sub-section 37(1)(a) does not jeopardise a defendant's right to silence. A defendant does not need to give evidence in the witness box in order to respond to the evidence presented by the prosecution. The defendant may adduce evidence to the contrary through cross-examination of the complainant. Defence counsel may also draw attention to evidence already led by the prosecution, and use this evidence to challenge the complainant's claim that she said or did nothing, and/or the complainant's claim that she was not consenting. The failure to say or do nothing is merely evidence supportive of an inference by the jury of a lack of free agreement.

7.80 If there is sufficient evidence for the matter to go to the jury, the prosecution must persuade the jury that the three elements of the rape offence are established *beyond reasonable doubt*. If the defendant chooses to respond to the evidence that the complainant failed to say or do anything indicating consent, it

725 See majority decision in *Director of Public Prosecutions v Morgan* [1976] AC 182, per Lord Cross of Chelsea, 2000. Note dissent of Lord Simon of Glaisdale about the shifting of the burden 'backwards and forwards in the course of a trial': 317.

726 Glanville Williams, 'The Evidential Burden: Some Common Misapprehensions' *The New Law Journal* (Feb 17, 1977) 156.

would be for the jury and not the judge to decide whether the complainant consented and the jury would be required to give the defendant the benefit of any doubt.

7.81 In respect of the evidentiary burden, the offence of rape is not dissimilar to the offence of theft. Evidence that a defendant who is caught with a stolen wallet just an hour after the theft is sufficient to satisfy the prosecution's evidential burden and to send the matter to jury for consideration. However, the defence can adduce evidence via cross-examination from the owner of the wallet or from witnesses at the scene to show that in fact the wallet passed through another person's hand before he discovered it lying on the street. It is up to the jury to determine whether the evidence establishes the guilt of the accused beyond a reasonable doubt. In the same way, where the prosecution leads evidence that a complainant, such as Genevieve in the case study, said or did nothing to respond to Frank's sexual advances, the matter can go to the jury. The defence can cross-examine Genevieve, in order to adduce evidence that she touched Frank on the shoulder, and that she encouraged Frank by referring to the risqué and hence tantalising nature of their relationship ('You shouldn't be doing this.'). The defence could also draw on a variety of other evidence regarding Genevieve's behaviour after and before the sexual act which would cast doubt upon the evidence of a lack of free agreement. If the defence chooses not to provide any explanation about Genevieve's claim to have 'frozen' in fear, then the jury can still doubt the veracity of Genevieve's evidence and draw an inference about the meaning of her actions that is unfavourable to the prosecution.



RECOMMENDATION

77. The mandatory jury direction on consent should be changed as follows:

'The fact that a person did not say or do anything to indicate free agreement to the particular sexual act at the time that the act occurred is evidence that the act took place without that person's free agreement.'

SHOULD THE MENTAL ELEMENT FOR RAPE BE CHANGED?

7.82 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.⁷²⁷ In Victoria, a person cannot be convicted of rape if he or she acted in the belief that the complainant had consented to penetration, even if that belief is objectively unreasonable.⁷²⁸ This 'subjective approach' to the mental element is based on the House of Lords decision in *DPP v Morgan*.⁷²⁹ Section 37(1)(c) of the *Crimes Act 1958* 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'.

7.83 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*,⁷³⁰ 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.⁷³¹ However, it still remains possible that the mental element will not be established where an accused has an honest but unreasonable belief in consent.

7.84 In Victoria, where the accused does not give any thought as to whether the victim is consenting, this may not be sufficient to establish an awareness by the accused of a possible lack of consent.⁷³² In other words, if the accused does not turn his mind to the question of consent, he cannot form a sufficient belief as to consent. The Court of Appeal in *Ev Costa* said that there must be a conscious advertence to the question of the complainant's consent in order to satisfy the mental element.⁷³³ The accused must *foresee* the harm as at least a *possible* event. He must have been 'aware that the woman was not consenting, or else realised that she might not be and determined to have intercourse with her whether she was consenting or not'.⁷³⁴

727 *Crimes Act 1958* s 38.

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

729 [1976] AC 182.

730 [1976] AC 182.

731 The accused were convicted of rape in *Director of Public Prosecutions v Morgan* [1976] AC 182.

732 In NSW, inadvertence does amount to recklessness. See below para 7.93.

733 *The Queen v Paul Ev Costa* (1996) (Unreported, BC 9601208, Victoria, Court of Criminal Appeal, Phillips CJ, Callaway JA, and Southwell AJA, 2 April 1996) 22.

734 *R v Flannery and Prendergast* [1969] VR 31, 33.

7.85 The impact of the construction of the mental element can be seen in the case study involving Frank and Genevieve. In the case against Frank, the defence would argue that Genevieve was consenting. The defence would also argue that even if the jury does not accept that Genevieve was consenting, they can still find that Frank had an honest belief in her consent. Frank could use a number of supporting arguments. Firstly, he could argue that in his view of sexual relations, a woman failing to say or do anything does not indicate to him a lack of free agreement. On the contrary, he could argue that he interpreted it as a sign of willing submission to his advances. Secondly, Frank could argue that he was so drunk that his judgment was affected, and he honestly believed that Genevieve was consenting.

Submissions

7.86 The submissions to the Discussion Paper were divided on the test for the mental element. Those in favour of maintaining the current subjective test argued that the mental element of rape is consistent with the fundamental principles of criminal responsibility, and with other serious offences against the person.⁷³⁵ Those who supported an objective test argued that the law should reflect society's views about the appropriate standards of behaviour for sexual relations. For example, the Gatehouse Centre submission argued that a subjective test endorses 'malformed beliefs' and anti-social cognitive processes and should not be validated.⁷³⁶

7.87 The submissions to the Discussion Paper reflect the broad arguments for and against a subjective fault test for rape which have been well-rehearsed in law reform documents written throughout the past decade.⁷³⁷

ARGUMENTS FOR RETAINING A SUBJECTIVE MENTAL ELEMENT

7.88 There are two main arguments in favour of retaining a full subjective mental element. First, the subjective mental element is consistent with the principles of criminal responsibility; secondly, changes to the mental element may have no real effect in rape trial outcomes.

⁷³⁵ Submissions 23 and 28.

⁷³⁶ Submission 8.

⁷³⁷ See Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure*, Report No 43 (1991), 8–17; Model Criminal Code Officers Committee, *Sexual Offences Against the Person* (1999) 69–85.

7.89 In common law jurisdictions, for most serious offences against the person, it is not sufficient for an accused to have merely committed the forbidden act.⁷³⁸ He or she must also be subjectively blameworthy. This means that a person can only be found guilty of rape when it is proven beyond reasonable doubt that he intended to sexually penetrate the complainant without her consent, or was reckless as to whether or not the complainant was consenting. It is often said that rape, like other serious offences against the person, is designed to punish the wicked, not the stupid or the naive.⁷³⁹ Thus, murder, theft, robbery and assault are all crimes that require the accused to have an actual intention to do the prohibited act (or at least be reckless). Rape, it is argued, should be treated in the same way.

7.90 Supporters of a subjective mental element also argue that a person who is unreasonable and negligent about the complainant's consent should not be treated with the same severity as a person who intentionally or recklessly sexually penetrates a complainant with full awareness that she is not consenting. Existing offences which have an objective fault element, such as negligently causing serious injury,⁷⁴⁰ have maximum penalties that are far lower than for the equivalent offences which require intention.⁷⁴¹

7.91 A second pragmatic argument against a change to the existing subjective mental element is that only a small number of trials focus on the accused's mistaken belief. A change to the test, it is argued, would jeopardise the principles of criminal responsibility without ensuring that a higher proportion of people who are actually guilty of rape are convicted. Such a position was taken by the former

738 *Director of Public Prosecutions v Morgan* [1976] A.C. 182; *He Kaw Teh v The Queen* (1985) 157 CLR 523; ; *R v Saragaozza* [1984] VR 187. There are a few serious offences where there is no mention of a fault element, for example section 45 *Crimes Act 1958* (sexual penetration of a child under the age of 10) and section 32 'Offence to Perform Female Genital Mutilation'.

739 Per Bray CJ in *R v Brown* [1975] 10 SASR 139, 148.

740 *Crimes Act 1958* s 24.

741 The Commission believes that the creation of a separate offence of negligent sexual penetration carrying a lower maximum sentence will create more problems than it will solve. The offence could become a 'compromise solution' for juries, resulting in fewer rather than more convictions for rape. This is because, according to the previous Law Reform Commission of Victoria, there is anecdotal evidence that juries are sometimes reluctant to convict of serious offences when a less harsh alternative is available: see Law Reform Commission of Victoria, above n 737, 18–19. This could downgrade the perceived seriousness of rape. See also Simon Bronitt, 'The Direction of Rape Law in Australia: Toward a Positive Consent Standard' (1994) 18 *Criminal Law Journal* 249. See also Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5: Sexual Offences Against the Person: Report* (1999) 91–97.

Law Reform Commission of Victoria in support of retaining the subjective test of intent.⁷⁴²

7.92 The former Law Reform Commission of Victoria's research showed that the state of mind of the accused was rarely the main focus of rape trials. In 23% (12 out of 51) of the trials in the study, a mistaken belief in consent was the main line of defence used by the accused. 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. The Report stated 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.⁷⁴³

7.93 A problem often identified with the subjective test as it operates in Victoria is that an accused who does not turn his mind to the question of whether the complainant is consenting but goes ahead and sexually penetrates her, may not have the requisite mental element to commit rape.⁷⁴⁴ Some critics have argued that an objective mental element would redress this problem by making such an accused culpable because the so-called 'reasonable person' would have been aware of a lack of consent. The difficulty with this critique of the subjective test is that in other common law jurisdictions such as New South Wales, 'recklessness' has been

742 Law Reform Commission of Victoria, above n 716, 12–15.

743 Ibid 13.

744 In most cases where the accused argues that he did not advert to the possibility that the complainant might not be consenting, the jury is unlikely to accept this. This point was made in the following submissions to the Discussion Paper by Victoria Police, Corporate Policy and Executive Support (Submission 9), Criminal Bar Association of Victoria (Submission 28), Criminal Law Section of the Law Institute of Victoria (Submission 23). See also the comments of Professor Glanville Williams, who argues, 'No man engaged on sexual congress (unless perhaps he is intoxicated) has a blank mind on the subject of the woman's consent. Either he believes that she is consenting, or believes that she is not, or is aware of his ignorance on the subject...' Glanville Williams, 'Unresolved Problem of Recklessness', (1988) 8 *Legal Studies* 74, 84. Nevertheless, culpable inadvertence has not been developed as an aspect of recklessness in Victoria. *The Queen v Paul Ev Costa* (Unreported, Victoria, Court of Criminal Appeal, Phillips CJ, Callaway JA, and Southwell AJA, 2 April 1996) 16. In dicta in *Ev Costa*, the Court of Appeal referred to conscious advertence of a possibility rather than a probability of consent. See also *R v Flannery and Prendergast* [1969] VR 31, 33.

defined to include ‘a culpable state of inadvertence’.⁷⁴⁵ Rather than creating an objective mental element, it may be more straightforward to adopt the New South Wales approach to recklessness, and include culpable inadvertence within the existing subjective test.⁷⁴⁶

ARGUMENTS FOR CHANGING THE SUBJECTIVE MENTAL ELEMENT

7.94 Under the current law, the subjective mental element can be used to reverse the communicative model of consent which was established by earlier reforms. Section 36 of the *Crimes Act 1958* sets out situations in which a person cannot freely agree to sex, for example, when asleep or unconscious. Even if one of these situations applies, an accused is not guilty of the offence if he did not intend to penetrate the complainant without her consent. In other words the accused can *apparently still disregard these circumstances and seek shelter behind his own, often wishful, interpretation of the circumstances.*

7.95 This was clearly not the intention of the earlier reforms to the definition of consent. The former Law Reform Commission of Victoria rejected the proposal of an objective test for the mental element of rape, arguing that the law could have an educative function without ‘abandoning the ‘mens rea requirement’.⁷⁴⁷ The previous Commission recognised the important role that the law had to play in educating the public about appropriate standards of conduct and inappropriate

745 *R v Kitchener* (1993) 29 NSWLR 696, Kirby J wrote, ‘It would be unacceptable to construe a provision such as 61D(2) so as to put outside the ambit of what is ‘reckless’ a complete failure to advert to whether or not the subject of the proposed sexual intercourse consented to it or declined consent’: 697. This position was reaffirmed a few years later by the Court of Appeal in the case of *R v Tolmie* (1995) 37 NSWLR 660, where Kirby J concluded that the dicta in *Morgan* supported an objective *aspect* to recklessness based on inadvertence. Justice Kirby noted that this concept of recklessness did not prevent an accused relying on a positive mistaken (albeit unreasonable) belief as to consent. ‘In this sense if mounting to an inadvertent test, recklessness is limited to cases in which the accused did not consider the question of consent at all’: 668. In other words, the objective aspect of recklessness is not a standard of negligence based on the reasonable person standard, but rather a *negative* state of mind based on a complete failure to consider the autonomy interests of the other person.

746 This is the approach recommended by the Model Criminal Code. See Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5: Sexual Offences Against the Person: Report* (1999) 88, [5.2.6]. The model offence of unlawful sexual penetration contains sub-section 3 which states, ‘For the purposes of this section, being reckless as to a lack of consent to sexual penetration includes not giving any thought to whether or not the other person is consenting to sexual penetration.’

747 Law Reform Commission of Victoria, above n 716, 16.

myths about 'seduction, sexual conquest and female sexuality'.⁷⁴⁸ However, the former Commission argued that the creation of a set of circumstances negating free agreement (sub-sections 36(a)–(g)) and jury directions on consent (section 37) would be sufficient to 'get the message across to most people about what the law regards as unacceptable behaviour'.⁷⁴⁹

7.96 In Heenan's study, honest belief in consent was run in the very trials where the complainant was incapable of freely agreeing. In the four trials where belief in consent was run as a principal line of defence, the complainants were either asleep at the time of the sexual activity or unconscious during the incident, with little or no recollection of the events that were alleged to have occurred.⁷⁵⁰ Only one of these trials resulted in an acquittal. However, the juries were instructed by the judges that, despite the fact that the complainants were unable to freely agree, the accused may still be acquitted, based on an honest belief in consent.⁷⁵¹ When the principle of a communicative model of sexual relations is juxtaposed next to the common law principle allowing an honest but unreasonable belief in consent the effect can be both confusing and contradictory. This can undermine the symbolic value and educative function of the reforms to rape law that have occurred over the last decade.

7.97 Whilst honest belief in consent may not predominate as a 'main line of defence' in trials studied in previous research, the guilty mind of the accused is still a factor that members of the jury are obliged to consider as part of their deliberations. When considering the second element alone (did she consent?) the jury may draw on the accused's interpretation of the events to answer this question. This is because there is very little evidence besides the behaviour of both

748 Ibid 16.

749 Ibid 16.

750 Heenan, above n 677, 259–60.

751 Some have argued that in circumstances where the accused is asleep or unconscious, for example, it is a mistake of law to have an honest belief in consent: Lucinda Vandervort, 'Mistake of Law and Sexual Assault: Consent and Mens Rea', (1987/88) 2 *Canadian Journal of Women and the Law* 233–30. Section 36 explicitly articulates circumstances where a person cannot freely agree to sexual penetration. Therefore, where one of these circumstances is present and lack of consent established, any accused who claims an honest belief in consent is ignorant of the law in section 36, and cannot rely on this lack of knowledge to escape conviction. If this argument is correct then it may be that trial judges are failing to articulate properly the relationship between the mens rea and the actus reus of rape. It may be that it is not just the social context of sexual assault that is neglected by focusing upon a subjective test, but that the full potential of the legal changes introduced in the 1990s has not been fully realised.

parties that will shed light on the question of the complainant's consent. If the accused believed the complainant was consenting, then it is more likely that the jury will accept that the complainant was in fact consenting. This means that the test applied to the mental element will influence how the overall facts in issue are interpreted by a jury.⁷⁵²

7.98 A second argument for departing from the subjective mental element is that the law ought to impose a higher standard of care in sexual circumstances. This is because the cost of taking reasonable care in ascertaining the consent of another party in a sexual encounter is minimal in comparison to the harm inflicted upon the other party through non-consensual sexual penetration. The ability to raise an honest but unreasonable belief in consent may well countenance the commission of a serious harm even though it could have been avoided by taking small steps such as asking a question or verifying a gesture or remark.⁷⁵³ As Jennifer Temkin says:⁷⁵⁴

The ultimate question which arises in this area of law is whether a commitment to subjectivism should override all other considerations regardless of circumstances or social cost. It is suggested that where a woman demonstrates her lack of consent, it is no hardship for a man to enquire whether her consent is present and that as a matter of policy the law should demand that he do so.

Temkin argues that the requirement that a man take reasonable steps to ascertain consent is a small price to pay to prevent the suffering that results from sexual assault. The failure to take these steps constitutes a lack of regard for the sexual autonomy of another individual and produces serious consequences for the victim.

7.99 A final argument for change is that the current subjective fault element is difficult to conceptualise. This test is complicated because it contains a 'double

752 Dr Jeremy Gans has argued that the previous Law Reform Commission of Victoria's conclusion about the limited effect of the subjective test is based purely on the Director of Public Prosecutions' study conducted by the previous Commission, not on juror research. Gans criticises the delineation between straight consent trials and 'honest belief' trials. He argues that the so-called 'straight consent trials' also logically raise the defence of honest belief. Whilst honest belief in consent may not feature often as a 'main line of defence' in trials studied, the guilty mind of the accused may still be an important factor taken into account in jury deliberations. See Jeremy Gans, 'When Should the Jury be Directed on the Mental Element of Rape?' (1996) 20 *Criminal Law Journal* 247–66.

753 Toni Pickard, 'Culpable Mistakes and Rape: Relating Mens Rea to the Crime' (1980) 20 *University of Toronto Law Journal* 75–98, 77.

754 Jennifer Temkin, *Rape and the Legal Process* (1987), 84.

subjective element'.⁷⁵⁵ The jury must consider both the complainant's and the accused's state of mind. Was she freely agreeing? If not, did he know that she was not consenting? In most cases, apart from the victim's own word, there are few physical signs that can indicate whether or not an offence took place.⁷⁵⁶ Only a minority of reported sexual assaults ever involve physical injuries or result in other material evidence being available to support the complainant's testimony that the sexual act was not consensual.⁷⁵⁷ Mostly, cases rest on the complainant's word versus the accused's word. The onus is then on the prosecution to show beyond reasonable doubt that the accused was aware (or might have been aware) that the complainant was not consenting (freely agreeing). This is complicated by the fact that rape is a crime where the members of the jury are being asked to infer the intentions of the accused from his surrounding conduct and actions.⁷⁵⁸

7.100 Having weighed up the arguments for and against changes to the mental element, the Commission believes that the case for change is stronger than the case for maintaining the status quo. In the next section we consider the advantages and disadvantages of three possible models for change. The first model involves creating an objective fault element. The other two models remove the mental element from the offence of rape and provide the accused with a defence of mistaken belief. All three models depart from the common law principles of criminal responsibility to varying degrees.



RECOMMENDATION

78. The Commission recommends that the law of rape should be changed to ensure that an accused cannot escape culpability because he held an honest but unreasonable belief in the complainant's consent.

755 Ngiare Naffine, *An Inquiry into the Substantive Law of Rape* (1984), 36.

756 With other serious offences, such as murder or assault, there is likely to be other physical or medical evidence which supports the allegations.

757 In RLREP, above n 667, 44. In 41.3% of incidents, no physical injuries were identified; in 38.4% of accidents minor injuries, such as scratches and bruising, were recorded. Only in 44 incidents (16.2%) was medical treatment required for the complainant.

758 Naffine, above n 755, 36.

PROPOSED MODELS

7.101 The Commission supports moving towards a more objective approach to the mental element. An objective approach would focus less on the honesty of an accused's belief and more on the reasonableness of the belief. There are a variety of ways in which this can be applied. This could be achieved by adopting one of the following three approaches:

1. Change the subjective mental element to create an objective mental element by applying a 'reasonable person' test.
2. Remove awareness of non-consent as an element of rape and introduce a defence of mistaken belief in consent. Where the accused successfully raises mistaken belief in consent as a defence, the prosecution must then prove, beyond reasonable doubt, that the belief was neither honest nor reasonable. This is similar to the approach taken in Western Australia, Tasmania and Queensland, where a Criminal Code operates.⁷⁵⁹
3. Remove awareness of non-consent as an element of rape and introduce a defence where the accused honestly believed that the complainant was consenting. Where an accused alleges honest belief in consent a judge must be satisfied that there is sufficient evidence of the existence of such a belief before the defence of honest belief can be considered by the jury. The accused cannot rely on the defence where the accused failed to take reasonable steps to ascertain consent *or* the accused did not turn his or her mind to the possibility that the person was not consenting.

⁷⁵⁹ Australian criminal law derives from legislation, decisions of courts (common law) or a combination of both of these. The Code jurisdictions of Queensland, Western Australia, Tasmania and the Northern Territory have codified the criminal law and in so doing have departed significantly from the common law principles. In Victoria, South Australia, the Australian Capital Territory and New South Wales some offences have been codified in legislation, but criminal law remains, for the most part, a product of the common law.

Option 1: An Objective Fault Element for Rape



OPTION 1

A person commits rape if:

- (a) he or she intentionally sexually penetrates another person without that person's consent; and
- (b) (i) is aware that the person is not consenting or might not be consenting;
or
(ii) a reasonable person would, in all the circumstances, have been aware that the person was not consenting or might not be consenting.

7.102 Under this approach, the prosecution would not have to prove that the accused was aware that the complainant was not consenting. It would be sufficient for the prosecution to show that a reasonable person would, in all the circumstances, have been aware that the complainant was not consenting or might not be consenting.

7.103 This model applies a strict standard when judging sexual behaviour, thus sending out a strong symbolic message to the community. An accused could not be exculpated because he or she failed to turn his or her mind to the issue of consent where a reasonable person would have been aware of a lack of consent.

7.104 One disadvantage of this approach is that the 'reasonable person' standard would create difficulties both in interpretation and application. The characteristics of a 'reasonable person' are extremely difficult to define especially in the context of sexual assault. Some scholars have argued that sexual assault is a wide-spread social problem, and the perception of an individual perpetrator may not deviate significantly from the perceptions of society more generally.⁷⁶⁰ In other words, the stereotypes around appropriate sexual roles and behaviour for women may be sanctioned and reproduced within a 'reasonable person' test.

7.105 Despite the fact that social standards of sexual behaviour have changed greatly over the last few decades, the expectations and roles of men and women in

⁷⁶⁰ Vandervort, above n 751, 282.

a sexual encounter are still markedly different. The stereotype of women as often coy or passive participants in sexual acts is an enduring one. It is possible that a jury may find that it is reasonable for a man to ignore the protests of a woman because this is considered a natural part of the ritual of sexual engagement in our society. The prejudices and anomalies of the accused's perceptions may be authorised through such an approach, thus undermining the communicative model of sexual relations promoted in the current legislation.

Option 2: Following the Code States' Approach

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OPTION 2

A person commits rape if he or she intentionally sexually penetrates another person without that person's consent.

It is a defence to a charge of rape if the accused held an honest and reasonable belief that the complainant was consenting to the sexual penetration.

7.106 Under this model, the prosecution would only be required to prove that the accused had an intention to sexually penetrate the complainant and that the penetration occurred without her consent. The accused could raise mistaken belief in consent as a defence. In order to raise the defence, the accused must produce some evidence about his state of mind. The evidential standard would seem to be less stringent than that applied in Canada (see Option 3), however there is limited case law on this matter.⁷⁶¹ Once the defence is raised, prosecution would have to prove, beyond reasonable doubt, that the belief was neither honest nor reasonable.

7.107 The defence combines a subjective and an objective element. In *BRK v R* the Western Australian Court of Criminal Appeal held that 'reasonableness' was to

⁷⁶¹ In *Sutherland v The Queen* (Unreported, Western Australia Criminal Court of Appeal, No 23 of 1991, 2 Aug 1991, Malcolm CJ, Franklyn and Owen JJ) 14, the Court held that even where the defence counsel did not rely upon the defence of honest and reasonable mistake, the judge must still direct the jury on this where there is 'some evidence' fit for consideration.

be determined 'by the standards of a reasonable person of the same 'age, background, and level of intellectual functioning as the accused'.⁷⁶²

7.108 The assessment of the reasonableness of the belief may be slightly less problematic than constructing the 'reasonable person'. This is because the emphasis is upon the reasonableness of the actual mistaken belief, rather than on the behaviour of an ideal person.

Option 3: Adapting the Canadian Approach

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OPTION 3

A person commits rape if he intentionally sexually penetrates another person without that person's consent.

It is a defence to a charge of rape that the accused held an honest belief that the complainant was consenting to the sexual penetration. However where an accused alleges that he believed that the complainant consented to the sexual penetration, a judge must be satisfied that there is sufficient evidence of the existence of such a belief before the defence of honest belief can be considered by the jury.

The defence is not available where:

- (i) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or
- (ii) the accused did not turn his or her mind to the possibility that the person was not consenting.

7.109 This third option is similar to the Canadian approach towards the mistaken belief defence.⁷⁶³ In Canada, a defence of honest but mistaken belief in

762 *'BRK' v R*, *'CKH' v R*, *'MJM' v R*, *'WRH' v R*, *'SEM' v R* (Unreported, BC 200102696, Western Australia Criminal Court of Appeal, Murray, Parker and Owen JJ, 25 May 2001) 36.

consent is available to the accused. However, the defence must raise some plausible evidence in support so as to give an 'air of reality' to the defence of mistaken belief.

7.110 The judge must decide, based on all the evidence, whether or not there is sufficient evidence to put the defence to the jury. The so-called 'air of reality' test requires that the judge should only leave the defence to the jury if he or she is satisfied that the totality of the evidence is sufficient to support the claim of honest but mistaken belief in consent. '[T]he mere assertion by the accused that "I believed she was consenting" will not be sufficient. What is required is that the defence of mistaken belief be supported by evidence beyond the mere assertion of a mistaken belief.'⁷⁶⁴ The Supreme Court of Canada appears to say that the evidentiary threshold (the 'air of reality' test) is evaluated on the basis of the evidence, but without regard to whether or not reasonable steps were taken by the accused.⁷⁶⁵ The presence or absence of reasonable steps taken to ascertain consent are considered only once the defence has been successfully raised.

7.111 If the evidentiary threshold is satisfied, the defence goes to the jury to determine whether reasonable doubt is raised. In Canada, an accused is barred from relying on a defence of mistaken belief where the accused failed to take reasonable steps, in all the circumstances known to him, to ascertain that the complainant was consenting.⁷⁶⁶

7.112 The advantage of this proposed model is that it avoids the pitfalls associated with constructing a 'reasonable person' and focuses attention upon the actions of the accused. The requirement that 'reasonable steps' be taken to ascertain consent is consistent with a communicative model of sexual relations. In

763 In 1992, a statutory definition of consent was enacted (Bill C 49). Criminal Code RSC 1985 C-46, s 273.1 lists circumstances where a person is taken not to be consenting. Section 273.2 lists circumstances in which a defence of belief in consent is not available to the accused. In *R v Ewanchuk* the Supreme Court of Canada does not appear to draw a clear distinction between lack of belief in consent as part of the requisite mental element of the offence, and the defence of honest belief in consent. See *R v Ewanchuk* [1999] 1 SCR 330, 353-4 Lamer CJ, and Cory, Iacobucci, Mayor, Bastarache and Binnie JJ.

764 *R v Park* [1995] 2 SCR 836, 853-4, L'Heureux-Dubé J, Lamer CJC, La Forest, Gonthier, Cory and McLachlin JJ concurring.

765 In *R v Ewanchuk* [1999] 1 SCR 330 L'Heureux-Dubé J dissented on this point arguing that 'unless and until an accused first takes reasonable steps to assure that there is consent, the defence of honest but mistaken belief does not arise': 378.

766 Under sub-section 273.2(a), the accused is also barred from relying on the defence where the accused's belief arose from the accused's self-induced intoxication, or from recklessness or wilful blindness.

cases where the jury accepts that the complainant did not consent to sexual penetration, and there is insufficient evidence to support a mistaken belief defence, there will be no risk of the jury being confused by judges' directions about the required mental element.⁷⁶⁷

7.113 At this stage, commentary on the interpretation of the 'reasonable steps' requirement in Canada is limited. In an article written in 2000, Professor Elizabeth Sheehy cites a number of lower court decisions in which judges have found a failure to take 'reasonable steps' where an accused relied on the complainant's silence or ambiguous conduct as an indication of consent.⁷⁶⁸ In some of these cases judges have argued that it is the duty of the accused to 'abstain or obtain clarification on the issue of consent'.⁷⁶⁹ However, Professor Sheehy is critical that in cases where the complainant is asleep, unconscious or extremely intoxicated judges have not 'raised the bar for what steps are said to be reasonable'.⁷⁷⁰ This shortcoming cannot be taken as an inherent flaw in the construction of the defence, rather, as Sheehy herself argues, it is testament to the 'powerful belief system' that 'remains deeply embedded beneath the rape law reforms'.⁷⁷¹

? QUESTION

The Commission seeks views on the most appropriate model for reform of the existing mental element for rape.

INTOXICATION

7.114 It is important to recognise the impact that the three options discussed above could potentially have in cases where there is evidence of self-induced intoxication by the accused. Currently, under the common law, evidence of intoxication is admissible when determining whether the accused was aware that

767 See Gans, above n 752, 259–61.

768 Elizabeth Sheehy, 'From Women's Duty to Resist to Men's Duty to Ask: How Far Have We Come?' (2000) 20 *Canadian Womens Studies* 98–104.

769 See the dissenting judgment of McLachlin J in *R v Esau* [1997] 2 SCR 777.

770 Sheehy, above n 768, 102.

771 Ibid 98.

the complainant was not consenting or might not have been consenting.⁷⁷² Intoxication can be relied on by the defence to show that the accused was so intoxicated that he was incapable of being aware that he was sexually penetrating the complainant without her consent. The defence could also argue that the defendant was intoxicated and this affected his awareness that the victim might not be consenting. Intoxication can also be used to support an honest, albeit unreasonable, belief in the complainant's consent.⁷⁷³

7.115 Consumption of drugs or alcohol can affect an accused's ability to reason, and may have a dis-inhibiting effect in a sexual encounter. An accused may act on an inclination when intoxicated which he would ignore when sober. The policy dilemma is whether an accused should be held accountable for irrational and wishful beliefs about another party's consent that are formed while in an inebriated state. In other words, should the jury assess the standards of reasonableness based on the standards of behaviour of a sober person, or should the inebriated state of the accused be relevant when looking at the circumstances surrounding the incident?⁷⁷⁴

7.116 The models proposed above will impact upon the treatment of intoxication in the mental element. The Commission notes that at common law, for serious offences involving death or serious injury, where the fault element is negligence, the standards of the reasonable person are those of an un-intoxicated person.⁷⁷⁵ In the Code jurisdictions self-induced intoxication is relevant to the actual belief held by the accused. However it is not relevant to the reasonableness of that belief. 'The reasonable man is a sober man' wrote Kennedy J in *Daniels v*

772 *R v O'Connor* (1980) 146 CLR 64.

773 On the other hand, the Crown can also rely on evidence of intoxication to support the prosecution case. The Crown may ask the jury to draw an inference of intention based on the fact that the accused was drunk and alcohol acted as a dis-inhibiting agent. Intoxication may be important evidence where the prosecution is arguing that the defendant was reckless as to consent. The Crown can also lead evidence of intoxication to show that the defendant got drunk in order to give himself the 'Dutch courage' necessary to perform the act of sexual intercourse against the victim's will.

774 The issue of consent has been well-debated and the relevance of self-induced intoxication to a standard of 'reasonableness' or a 'reasonable person' remains a complicated question (see, for example, Law Reform Committee of Victoria, *Criminal Liability for Self-Induced Intoxication*, Report (1999). This must be considered in light of the divergent approach towards self-induced intoxication by the Code jurisdictions and New South Wales, as compared with common law jurisdictions such as Victoria.

775 See *Nydam v The Queen* [1977] VR 430.

*R.*⁷⁷⁶ Unintentional intoxication is a defence to the extent that it deprives an accused of his or her capacity to understand what they are doing, to control their actions, or to know that they should not do an act or omission.⁷⁷⁷ In Canada a defence of belief in consent is not available to an accused where the belief in consent arose from self-induced intoxication.⁷⁷⁸

7.117 The Commission seeks responses on the best way to address the issue of self-induced intoxication in light of the three proposed models.

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QUESTION

What is the best way to address the issue of self-induced intoxication in the context of sexual offences? For example, should the reasonable person be a sober person? Or, should an accused be unable to rely on the defence of belief in consent where this belief arose from self-induced intoxication?

776 *Daniels v The Queen* (1990) 1 WAR 435, 445.

777 Criminal Code (Qld) s 28 and Criminal Code (WA) s 28. Intoxication is only relevant as a defence to intoxication where the offence has as an element an intent to cause a specific result, e.g. assault causing serious injury. Rape is not such an offence, and hence intoxication is not a defence. Where the accused's mind is impaired due to 'unintended' intoxication e.g. drink spiking, and the intoxication deprives the accused of the capacity to understand and control his or her actions, a defence is available. See Karen L Whitney, Martin M Flynn and Paul D Moyle, *The Criminal Codes: Commentary and Materials on the Criminal Law in Western Australia and Queensland* (5th ed, 2000) 499–500.

778 Criminal Code RSC 1985 C-46, s 273.2.

Chapter 8

Changes to Other Sexual Offences

INTRODUCTION

8.1 The Discussion Paper explained the elements of the main sexual offences in the *Crimes Act 1958* and asked questions about possible reforms. In this chapter we propose changes dealing with:

- the offence of incest;
- circumstances where a person is compelled to sexually penetrate the accused or another person;
- offences covering sexual offences with people with mental impairments;
- offences covering sexual acts by people in a position of care, supervision and authority; and
- the offence of procuring sexual penetration of a child under the age of 16 years.

The chapter also proposes that an interpretation provision, setting out the objects of sexual offences laws, should be included in both the *Crimes Act* and the *Evidence Act 1958*. Other changes to the substantive law may be recommended in the Final Report.

INCEST

8.2 The offence of incest is problematic for two main reasons. Firstly, the offence was originally based on religious and cultural prohibitions on sexual intercourse between family members and concerns about the genetic effects of relatives having children together.⁷⁷⁹ As a result, its primary focus is on prohibiting sexual penetration in particular relationships. The goal of protecting children and young people from abuse by family members is of secondary importance.

779 Victorian Law Reform Commission, *Sexual Offences—Law and Procedure: Discussion Paper* (2001) (hereafter Discussion Paper), 86.

Secondly, the crime of ‘incest’ was historically seen as ‘a consensual but prohibited act’.⁷⁸⁰ Parts of the incest offence are drafted in such a way that the offence can apply to both parties involved in the act of penetration, making both victim and offender culpable of incest. This reinforces the suggestion that victims of intra-familial sexual penetration are willing participants in the sexual activity.

Arguments for Reforming Incest Provisions

8.3 The offence of incest does not require the prosecution to establish lack of consent to sexual penetration. The prosecution must only show that sexual penetration took place between people within particular intra-familial relationships. Nevertheless, the term ‘incest’ is surrounded by powerful social myths about the sexual deviancy of young children (particularly girls) within the family. These myths are used to suggest that a victim of incest is, in fact, a willing participant in the sexual act.⁷⁸¹

8.4 The term ‘incest’ is embedded with a range of pejorative and biased preconceptions, and as a result, the wrong done to the victim/survivor, and the violation, abuse of trust and sense of powerlessness that she or he experiences, is often obscured. In *R v J*, Toohey J referred to the connotation of reciprocity and consent that underlies the offence of incest. ‘Although in one sense the term “incest” produces an immediate reaction of disapproval, it sometimes serves to conceal the implications for the girl concerned.’⁷⁸² Justice Toohey cites the work of feminist author Elizabeth Ward who renames ‘father-daughter’ incest as ‘girl-

780 Shannon Caroline Taylor, ‘A Name By Any Other Word Does Not Necessarily Make It Merely Another Rose’ in A Mills and J Smith (eds) *Utter Silence: Voicing the Unspeakable* (2001) 212.

781 Elizabeth Ward, ‘Rape of Girl-Children by Male Family Members’, (1982) 15 ANZL Crim 90–9; Leslie Feiner, ‘The Whole Truth: Restoring Reality to Children’s Narrative in Long-Term Incest Cases’, (1997) 87 *The Journal of Criminal Law & Criminology* 1385–429; Shannon Caroline Taylor, *The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court of Australia in 1995* (PhD Thesis, University of Ballarat, 2001). ‘Incest’ is also associated with a variety of other preconceptions such as class-bound assumptions about the incidence of incest in working class families: see Ward 93–4), and psychoanalytic theories about children’s propensity to fantasise about sexual acts and make false accusations: see Jean Goodwin et al., ‘False Accusation and False Denials of Incest: Clinical Myths and Clinical Realities’, *Sexual Abuse: Incest Victims and their Families* (1989) 17.

782 (1982–83) 45 ALR 331, 335–6.

child rape'.⁷⁸³ Ward argues that the term incest 'serves to deny in linguistic and affective terms the fact that a form of abuse has taken place'.⁷⁸⁴

8.5 The argument that 'incest can occur with consent' creates difficulties for complainants when giving evidence about experiences of sexual violation and abuse of trust, especially where the abuse has occurred over many years. Any consideration of consent on the victim's behalf can lead to a diminished perception of harm suffered by the complainant.

8.6 Sub-sections 44(3) and 44(4) of the *Crimes Act 1958* cover sexual penetration of a person over the age of 18 years by particular family members. Both of these offences are drafted in such a way that technically the offence can apply to both parties involved in the act of penetration.⁷⁸⁵ This is despite the fact that one party may be the initiator and the other party the victim. Where a person is over 18 years and is penetrated by a 'father or mother or other lineal ancestor or his or her step-father or step-mother', he or she can be co-charged with incest and face a five year maximum penalty of imprisonment.⁷⁸⁶ The same applies where a person is penetrated by a 'sister, half-sister, brother or half-brother'. Coercion is a defence under these sub-sections,⁷⁸⁷ however this will only be useful to a victim once charges have been laid against him or her, and the trial has begun.

8.7 It is not common for those who report sexual abuse to be charged as co-offenders, but the possibility that this could occur is a disincentive for adult victims of intra-familial sexual penetration to report offences committed by family members. It can also be very traumatic for a victim of intra-familial sexual abuse to discover that she can be charged with an offence. For example, the Commission heard in consultation about an adult woman with an intellectual disability who

783 Ward, above n 781, 90.

784 Ibid 90.

785 Currently, section 35(2) states that for the purposes of the incest offence (and other specified sexual offences) 'both the person who sexually penetrates another person and the other person are taking part in an act of sexual penetration'. The advantage of section 35(2) is that it could conceivably operate in a situation where sibling A compels sibling B to penetrate sibling A. Section 35(2) would make sibling A guilty of an offence because he 'took part in an act of sexual penetration'. The disadvantage is that where sibling A sexually penetrates sibling B, both sibling A and B are taking part in act of sexual penetration. Both victim and offender can be charged with incest under sub-section 44(4).

786 *Crimes Act 1958* s 44(3).

787 See s 44(6).

had been sexually assaulted by her father since she was a teenager.⁷⁸⁸ When the police were notified of this by a concerned party they said that both the adult woman and the father were guilty of incest. No formal report was subsequently made to the police for fear of the consequences for the adult victim.

8.8 Recent research on incest trials in Victoria shows that assertions are sometimes made that the complainant was willing and complicit in the performance of the sexual act. Dr Caroline Taylor's doctoral thesis identified three trials where there was discussion of co-charging of complainants or applying an accomplice warning for the complainant's evidence.⁷⁸⁹ In these trials, judges and lawyers discussed the issue of the victim's so-called 'consent'. In one such case in the County Court the judge made the following comments about the complainant's use of the word 'rape' to describe her experience:

The charge is not rape; the charge is incest. Incest can occur with consent...it is regrettable that this witness does not seem to be able to restrain herself. No doubt in her mind she believes she suffered a grave injustice or it is a great act she is putting on.⁷⁹⁰

8.9 Similarly, in *R v Grech*, during the course of the trial the complainant was asked whether she consented to the acts of incest. She vehemently denied the suggestion of consent. Nevertheless, in sentencing, the judge said that the father had used his 'authority' to 'obtain [his] daughter's reluctant consent'.⁷⁹¹

Submissions

8.10 In the Discussion Paper, the Commission asked whether people who sexually abuse children or young people who are members of their families should be prosecuted for the crime of incest, or whether it would be preferable for them to be prosecuted for another offence such as rape or unlawful sexual penetration of a child.⁷⁹²

⁷⁸⁸ Submission 27.

⁷⁸⁹ Taylor, above n 781, 168. Trials L, M and J. Fourteen Victorian County Court trials that occurred in 1995 were analysed, using the trial transcripts. Note, in *R v Ware* (1994) the Court of Appeal decided that a mandatory accomplice warning was not necessary for complainants of incest: (1994) 73 A Crim R 17, BC9400987.

⁷⁹⁰ Taylor, above n 781, 167. The case is referred to as case J (31/8/95).

⁷⁹¹ Ibid 221.

⁷⁹² Discussion Paper, above n 779, 87, Questions 18–20.

8.11 Seven of the nine submissions which commented on the offence of incest were in favour of abolishing it and prosecuting the perpetrator for a penetrative offence other than incest, for example, rape or sexual penetration of a child. Four of these respondents thought that the familial relationship should be given special emphasis by the judge when sentencing.⁷⁹³ There was only one submission that supported maintaining the existing provision for incest. The Law Institute of Victoria stated that the crime of incest should be retained because it makes it unnecessary to prove lack of consent to penetration between specified family members in cases where the sexual act involves a complainant over the age of 18 years.⁷⁹⁴

Reform Proposals

8.12 The Commission does not support abolishing the offence of incest, which would result in alleged offenders being prosecuted under an existing penetrative offence, such as rape or sexual penetration of a child or young person. There is a danger that this could be perceived as decriminalising or diminishing the significance of sexual assault within the family. Such a change would also make it more difficult to obtain a conviction of a parent who sexually assaulted his or her child who was over the age of 18 years.⁷⁹⁵ In such cases, the parent would have to be prosecuted for rape, making it necessary to prove that the complainant did not consent to penetration.

8.13 The Commission agrees that significant changes are required to the current offence of incest to ensure that the offence more effectively responds to the reality of sexual assault within the family. The Commission has canvassed alternative names for the offence that reflect the abusive context in which ‘incest’ typically occurs, such as ‘intra-familial sexual assault’, ‘intra-familial sexual abuse’ and ‘intra-familial rape’. The Commission’s preliminary view is that the offence should be renamed ‘intra-familial sexual penetration’, however we seek further views on the most appropriate name for the offence.

793 Submissions 9, 10, 12 and 13.

794 Submission 23.

795 If the child was under 16 years, the parent could be charged under s 45 of the *Crimes Act 1958* (Sexual penetration of a child under 16 years) which does not require consent to be proven. If the child was aged 16 or 17 years and the parent was in a position of care supervision or authority of the child, he or she could be prosecuted under s 48 of the *Crimes Act 1958*.

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QUESTION

What name should be given to offences involving intra-familial sexual penetration?

8.14 The Commission also proposes additional changes to section 44 of the *Crimes Act 1958* to remove the suggestion of reciprocity which is a consequence of the current structure, wording and operation of the section. The proposed changes are intended to:

- reduce the stigma for victims associated with the term ‘incest’;
- challenge the perception that children can consent to intra-familial sexual penetration;
- recognise intra-familial sexual abuse of children as a serious form of sexual violation, and a violation of trust and respect; and
- prevent victims of intra-familial sexual abuse from being co-charged, or seen as accomplices to the act of sexual penetration.

Proposed Offence of Intra-familial Sexual Penetration

8.15 The Commission proposes the creation of three offences of intra-familial sexual penetration.

1. An offence which covers a person who takes part in an act of penetration with his or her child, step-child or lineal descendant. This offence applies regardless of the age of the child.
2. An offence which covers a person who takes part in an act of penetration with the child or step-child or lineal descendant of his or her de facto spouse, where the person penetrated is under 18.
3. An offence which covers an act of sexual penetration by a person of a child under 18 whom he or she knows to be his sister, half-sister, brother or half-brother.

These offences are currently treated as incest under section 44(1), (2) and (4).

8.16 Unlike the current offence of incest, our recommendations do not make it an offence for a person over 18 to take part in an act of penetration with his or her

parent, lineal ancestor, or step-parent. Under our recommendations, the parent could be charged with the offence, but the child could not.⁷⁹⁶ This is consistent with our goal of ensuring that victims of the offence are not seen as complicit in the act of penetration.

796 In a Victorian case-file study of 100 incest cases which resulted in convictions between April 1976–April 1984, there was not one case that concerned sexual penetration of a parent or grandparent by a child or step-child. See Ian W Heath, *Incest: A Crime Against Children* (1985), 14. In the rare case where an adult child does sexually penetrate a parent (without being compelled to do so) the Commission believes that it would be preferable to charge the child or step-child with rape, rather than intra-familial sexual penetration.



RECOMMENDATIONS

79. An offence of intra-familial sexual penetration should be created, in place of the existing offence of incest:

- A person must not take part in an act of sexual penetration with a person whom he or she knows to be his or her child or other lineal descendant or his or her step-child.
- A person must not take part in an act of sexual penetration with a person under the age of 18 whom he or she knows to be the child or other lineal descendant or the step-child of his or her de facto spouse.
- A person must not sexually penetrate a person under the age of 18 whom he or she knows to be his or her sibling.

80. Consent should not be a defence to the above intra-familial sexual penetration offences.

81. A person who takes part in a prohibited act of intra-familial sexual penetration under the coercion of the other person who took part in that act is not guilty of an offence.

82. In all proceedings for offences of intra-familial sexual penetration it shall be presumed in the absence of evidence to the contrary:

- that the accused knew that he or she was related to the other person in the way alleged; and
- that people who are reputed to be related to each other in a particular way are in fact related in that way.

Definition: Sibling means a sister, half-sister, brother or half-brother.

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QUESTION

What is the most appropriate title for the offence proposed above? The Commission has given the offence a preliminary title of 'Intra-familial sexual penetration'. Other possible titles include, 'Intra-familial sexual assault', 'Intra-familial sexual abuse' or 'Intra-familial rape'.

Proposed Offence of Persistent Sexual Abuse of a Sibling

8.17 The proposed offence of intra-familial sexual penetration does not cover the case where adult siblings consensually engage in sexual penetration. However we propose a further offence to cover acts of sexual penetration between adult siblings, where the penetration is a continuation of sexual assault which occurred when the complainant was a child. This proposed offence focuses primarily on the abusive context within which the sexual penetration occurs, rather than on the blood relationship between the two siblings.

8.18 The aim of this provision is to apply the criminal sanctions which now cover acts of sexual penetration between adult siblings to situations where the accused has sexually abused his or her sibling before the victim was 18 years of age, through to adulthood. In such cases, consent has effectively been vitiated through long-standing sexual abuse. Such abuse should be subject to criminal penalties.⁷⁹⁷

8.19 A provision of this kind could overcome difficulties which currently exist for adult victims of sibling sexual abuse, where the accused is prosecuted for rape. Sections 36(a) and (b) state that a victim does not freely agree where he or she submits 'because of force or the fear of force' or 'because of the fear of harm of any type to that person or someone else'. In the circumstances of persistent sexual

⁷⁹⁷ The reason for a specific provision on persistent sexual penetration by siblings is to deal with the problem of co-charging of the victim/survivor. There is a difficulty drafting a provision which guarantees that an adult victim of sexual penetration by a sibling is not co-charged. This is because the term 'sibling' applies to both parties. For this reason, the Commission is proposing to abolish the offence of sexual penetration between adult siblings except in circumstances where the sexual penetration has been ongoing from the time the victim was under 18 years. Where sexual penetration occurs once both siblings are over 18 years the alleged offender could be charged with rape but difficulties may arise in obtaining a conviction in some circumstances.

abuse of a sibling, the fear of force or harm gains strength through a complicated and insidious process of emotional exploitation. The exploitative power dynamics that can exist between siblings within a family do not neatly fit within the dominant interpretations of 'fear of harm'. Exploitation and coercion can take place with very little verbal communication, but it may be difficult to establish lack of consent so that the alleged perpetrator can be successfully prosecuted for rape.

8.20 This provision will cover circumstances where sexual intercourse between siblings commences when the victim turns 18, but where prior to that, the accused has engaged in sexual contact with the victim. In such cases, the victim has suffered an abuse of trust and physical violation, and as a result may be submitting to the sexual penetration. Such a scenario is not uncommon, and it is appropriate and necessary for legislation to take account of this reality. The proposed provision would mean that the prosecution does not have to prove with such a high degree of particularity the date or exact circumstances of the acts that occurred when the victim was under the age of 18 years.



RECOMMENDATIONS

83. A new offence should be created to make it an offence where:

(1) the accused took part in act of sexual penetration of his or her sibling when the sibling was 18 years or older; and

(2) the accused took part in one or more acts which would constitute an offence under Crimes Act 1958 section 38 (rape), section 44 (sexual penetration of a person under the age of 18 years by a sibling); section 45 (sexual penetration of a child under 16); section 47 (indecent act with a child under 16); section 48 (sexual penetration of a 16- or 17-year-old under the care, supervision and authority of the accused); section 49 (indecent act with a 16- or 17-year-old⁷⁹⁸ under the care, supervision and authority of the accused); or the 'compelling sexual penetration offence' (see below).

84. It is not necessary to prove an act referred to in sub-section (2) 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).

85. A prosecution for this offence must not be commenced without the consent of the Director of Public Prosecutions.

Definition: Sibling means a sister, half-sister, brother or half-brother.

COMPELLING OFFENCES

8.21 Under section 38 of the *Crimes Act 1958*, a person commits the crime of rape if that person compels a male person to sexually penetrate the offender or another person with his penis, or compels a person not to withdraw his penis from the offender or the other person. Forcing a man or boy to penetrate another person with his penis is treated as rape of the person who has been forced to

⁷⁹⁸ Section 49 currently covers only the case where the child is 16 years old. In para 8.65 below, we propose that section 49 should also include the case where the child is 17, to make the care supervision and authority offences consistent.

penetrate, irrespective of whether the person who has been sexually penetrated consents to the act. The section does not cover the situation where a male victim is compelled to penetrate the offender or a third person other than with his penis or where a female victim is forced to sexually penetrate the offender or a third person.

8.22 The invasion of the victim's autonomy is the same whether a person is compelled to penetrate another person with a penis or in some other way. In the Commission's view, section 38 should be amended to extend the crime of rape to cover situations where the victim is forced to sexually penetrate another person, regardless of the gender of the victim or whether the penetration is penile, digital, oral or by an object. The approach proposed is consistent with that recommended by the Model Criminal Code Officers Committee.⁷⁹⁹



RECOMMENDATIONS

86. Section 38(3) of the Crimes Act 1958 should be amended to include, within the crime of rape, the situation where:

- a person (the offender) compels another person (the victim) to sexually penetrate the offender or a third person, irrespective of whether the person who is penetrated consents to the act; or
- a person (the offender) prevents a person who has sexually penetrated the offender or a third person from ceasing to sexually penetrate the other person, irrespective of whether the person who is penetrated consents to the act.

87. Section 38(4) should be amended by removing the word 'male'.

8.23 The Model Criminal Code Officers Committee (MCCOC) also recommended the creation of a new offence carrying the same penalty as rape to cover the case where a person is compelled to self-penetrate or to penetrate or be

⁷⁹⁹ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5: Sexual Offences Against the Person—Report* (1999), 67 and Appendix 2, [5.2.7], 314.

penetrated by an animal.⁸⁰⁰ We agree with this view and recommend the creation of this new offence.



RECOMMENDATION

88. The Crimes Act 1958 should be amended to create a new offence of compelling sexual penetration, with the same penalty that applies to rape. The offence would apply where a person (the offender) compels another person (the victim) to sexually penetrate the victim or to sexually penetrate or be penetrated by an animal.

SEXUAL OFFENCES AGAINST PEOPLE WITH IMPAIRED MENTAL FUNCTIONING

Existing Law

8.24 The law assumes that people over the age of consent have the capacity to consent to sexual penetration, unless they lack the capacity to understand or do not understand that sex involves physical penetration or that penetration is an act of a sexual nature.⁸⁰¹ Most people with intellectual disabilities or mental illnesses or other mental impairments are capable of understanding the nature of sexual acts, so that they are capable of consenting to sexual activity.

8.25 If a person sexually penetrates or engages in other sexual acts with a person with a mental impairment, they can be prosecuted for rape or indecent assault. However these offences do not adequately protect people with intellectual disabilities, mental illnesses or other mental impairments, from sexual abuse. In Chapter 3 we discussed some of the barriers which may prevent people with impaired mental functioning from reporting sexual assault to the police. Even if they overcome these barriers, as a practical matter it is often difficult to successfully prosecute an alleged offender for rape or indecent assault. Juries may be reluctant to convict accused people because they do not regard people with

800 Ibid 314–15. Note that A could be charged with bestiality (s 59) for compelling B to penetrate or be penetrated by an animal. However the penalty for bestiality under s 59 is less than that for rape.

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

impaired mental functioning as credible witnesses, and may treat with scepticism the claim that they did not consent to having sex with the accused.

8.26 In addition, it will be difficult to successfully prosecute for rape or indecent assault in circumstances where the person with impaired mental functioning has consented to penetration or other sexual acts, and where the alleged offender is in a position of power over the complainant and has taken advantage of the power relationship to sexually exploit him or her.

8.27 Under section 51 of the *Crimes Act 1958* it is an offence for a person who provides medical or therapeutic services to a person with impaired mental functioning to take part in a sexual act with that person. Under s 51(4), the offence applies only where the services relate to the mental impairment. Section 52 makes it an offence for a worker (including a voluntary worker) at a residential facility to take part in a sexual act with a resident of the facility.

8.28 In the Discussion Paper, the Commission identified the following issues relating to sections 50, 51 and 52:

- whether the definition of impaired mental functioning should be changed, for example to explicitly cover people with ‘severe personality disorders’;
- whether sections 51 and 52 adequately balance protection of people with impaired mental functioning against their right to sexual autonomy;
- whether it should be necessary to prove knowledge of impairment as an element of the section 51 offence, which applies to people who provide medical or therapeutic services to people with impaired mental functioning;
- whether the consent of the person with impaired mental functioning should be a defence to a charge under sections 51 or 52.

These issues are discussed below.

Should the Definition of ‘Impaired Mental Functioning’ be Changed?

8.29 Under section 50, the expression ‘impaired’ includes a person whose mental functioning is impaired because of mental illness, intellectual disability,⁸⁰² dementia or brain injury. This list is not exhaustive, so that the offences in sections 51 and 52 can cover sexual activities with people who have mental impairments other than those listed in the section. In the Discussion Paper, the Commission asked whether the definition of people with impaired mental functioning should be expanded to include people with severe personality disorders. The Model Criminal Code (MCC) explicitly covers a person whose mental functioning is impaired because of a ‘severe personality disorder’ but does not define this expression.⁸⁰³ Submissions from Victoria Police and the Mental Health Legal Service both supported the extension of the definition on the grounds that people with severe personality disorders were at the same level of risk of sexual exploitation as those that already come under the current definition.⁸⁰⁴

8.30 Other respondents were concerned about the lack of clarity around the definition of ‘severe personality disorder’.⁸⁰⁵ The Office of the Public Advocate noted that the *Diagnostic and Statistical Manual of Mental Disorders* does not define ‘severe personality disorder’, rather it identifies specific types of disorder such as histrionic personality disorder and borderline personality disorder.⁸⁰⁶

8.31 There have been intense and long-standing debates about whether personality disorders are mental illnesses.⁸⁰⁷ The *Mental Health Act 1986* defines a

802 Under section 50, intellectual disability has the same meaning as intellectual disability for the purposes of the *Intellectually Disabled Persons’ Services Act 1986*.

803 Model Criminal Code Officers Committee, above n 799, [5.2.28], 174.

804 Submission 12, 2; Submission 9, 8; Submissions 4 and 17.

805 Submissions 8, 13 and 20.

806 Submission 20. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed, 2000).

807 In 1989, the former Law Reform Commission of Victoria, in its Report on *The Concept of Mental Illness in the Mental Health Act 1986* found that the definition of ‘mental illness’ in the *Mental Health Act 1986* did not prevent a person who is suffering only from anti-social personality disorder from being considered to be mentally ill. See Law Reform Commission of Victoria, *The Concept of Mental Illness*, Report 31 (1990). The Commission was influenced by the decision in *The Appeal of KMC* where the Mental Health Review Board held that a borderline personality disorder was a recognised mental illness. Hearing No: 130989:Z26:588371, reported in Helen Kiel, (ed) *Decisions of the Mental Health Review Board In Victoria 1987–1991*, 353. For further discussion on the issue, see David McCallum, ‘Law,

person as mentally ill if 'he or she has a mental illness, being a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory'.⁸⁰⁸ Section 8(2) lists a number of factors which are not sufficient to warrant a finding that a person is mentally ill. One of these factors is that 'the person has an antisocial personality'.⁸⁰⁹ Psychiatric assessment would be necessary to determine whether an individual patient with a personality disorder also falls within the broad definition of mental illness provided in the Act. If this was the case, the current provisions would apply to them.

8.32 The question whether severe personality disorder should be explicitly included in the list of 'impairments' raises a broader policy question as to whom these sexual offences should protect. On the one hand, the definition should be sufficiently broad to protect people who are vulnerable to sexual exploitation. On the other hand, the expansion of the definition limits the autonomy of those who come within it to engage in sexual activities. Historically, the provisions focused on the protection of people with intellectual disabilities. Perhaps for this reason, the current definition emphasises diagnostic criteria, that is it focuses on particular intellectual disorders or illnesses.

8.33 Some submissions suggested that the definition should not refer to diagnostic categories, but should instead focus on the ability of the alleged victims of abuse to resist sexual exploitation and make decisions about sexual activities with people who are in a position to exercise power over them. For example, submissions from the Office of the Public Advocate and the Gatehouse Centre/South East Centre Against Sexual Assault (SECASA) supported a shift towards a focus upon capacity, as opposed to clinical diagnosis.

Psychiatry and Antisocial Personality Disorder: A Problem of Government' 15(1) *Law in Context* (1997) 29; and the United Kingdom Home Office and Department of Health, White Paper, *Reforming the Mental Health Act*, Part 2: High Risk Patients (2000). For a discussion of the impact of diagnostic and treatment decisions upon victims of sexual assault with mental health problems see South East Centre Against Sexual Assault, Monash Medical Centre, *Certified Truths: Women Who Have Been Sexually Assaulted—Their Experience of Psychiatric Services* (1994).

808 Section 8(1A). The definition is used to determine whether a person should be admitted and detained as an involuntary patient.

809 *Mental Health Act 1986* s 8(2)(l).

The specific illness or problem that leads to the impaired mental functioning is not so important. It is the effect of this illness upon the individual and the person's ability to make informed judgements about their sexuality and sexual relations with other people which is the principal issue.⁸¹⁰

8.34 The Commission has considered whether the definition of 'impaired mental functioning' in section 50 should be changed to focus on the person's capacity to make informed judgments about sexual activities.⁸¹¹ Arguably, this would extend protection to a wider range of people with mental impairments. However, in our view any theoretical advantage of this approach would be outweighed by some significant practical disadvantages. There is no evidence that the current definition has given rise to difficulties. If there is a doubt about whether the provisions cover the complainant, a psychologist or psychiatrist could testify as to whether the person has an intellectual disability as defined by the *Intellectually Disabled Persons' Services Act 1986*, or a mental illness. A less precise definition of impairment could result in a wider range of experts being called to testify whether the complainant fell within the category of people protected by the legislation. If experts present conflicting opinions on whether or not the complainant has an impairment, then the jury is unlikely to convict an accused who claims that he was unaware of the complainant's impairment. In such cases, the additional protection provided by the section could be more theoretical than real.

8.35 The Commission also believes that it is unnecessary to change the definition to make specific reference to 'severe personality disorder'. As we have indicated above, this is not a recognised clinical diagnosis. Because the current definition is not exhaustive, people with personality disorders amounting to a mental illnesses already fall within the definition.



RECOMMENDATION

89. The definition of 'impaired' in section 50 of the Crimes Act 1958, which includes, but is not limited to, an impairment because of mental illness, intellectual disability, dementia or brain injury, should not be changed.

810 Submission 7.

811 An example of a broader definition that was canvassed is 'cognitive impairment' defined as 'a significant disability that affects a person's comprehension, reasoning or judgement'.

Should the Categories in Sections 51 and 52 be Changed?

8.36 As has been discussed above, section 51 covers people providing ‘medical and therapeutic services’ to a person with impaired mental functioning. Section 52 covers sexual activities between people with impaired mental functioning and workers in residential facilities. At present people are rarely prosecuted for these offences and only a very small number of prosecutions progress to the trial stage. Changes to the substantive law could make it easier to prosecute offenders who exploit people with mental impairments. Even if prosecution rates for these offences remain relatively low, it is important that the law should specify an appropriate standard of behaviour for those providing services to people with impaired mental functioning. In this context, the law has the important symbolic function of establishing an appropriate balance between state protection of vulnerable people and their right to sexual autonomy. The section below considers whether the current law has struck the appropriate balance between these competing principles.

8.37 The Model Criminal Code (MCC) deals with service providers differently from the current Victorian legislation. The proposed MCC offence includes anyone ‘who is responsible for the care of a person with a mental impairment’. This covers anyone who provides medical, nursing, therapeutic or educative services to a person in connection with a mental impairment.⁸¹² The MCC offence does not include workers in a facility providing services to people with impaired mental functioning who do not provide medical, nursing, therapeutic or educative services, for example a gardener or a cleaner. As we have seen, these workers currently fall within the offence created by section 52. Under the MCC provision, consent is a defence where the complainant was not unduly influenced by the fact that the person was responsible for caring for her or him.⁸¹³

8.38 In its submission the Office of the Public Advocate (OPA) said that a broader range of service providers should be covered by the legislation. This approach recognises that government policy seeks to ensure people with disabilities, as far as possible, ‘lead their lives as full citizens, intersecting, for example, with employment and training/education domains’.⁸¹⁴ The submission also acknowledges that despite the policies of ‘normalisation’, mentally-impaired

812 Model Criminal Code Officers Committee, above n 799, Appendix 2, [5.2.28(2)], 174.

813 Ibid [5.2.32], 180.

814 Submission 20, 3.

people remain particularly vulnerable to sexual assault in a range of activities and relationships. Similarly, participants in a Commission roundtable on impaired mental functioning and sexual assault favoured a legislative provision that reflected the diversity of living conditions and arrangements experienced by people with mental impairments.

8.39 The Commission agrees that de-institutionalisation requires a change to the legislation to protect people with impaired mental functioning against exploitation by people who provide services outside residential facilities. Like the Model Criminal Code Officers Committee (MCCOC) recommendations, our recommendations are intended to cover service providers whose relationship with the complainant creates the potential for sexual exploitation. Changes to sections 51 and 52 are discussed below.

CHANGES TO SECTION 51

8.40 Section 51 makes it an offence for a person providing medical or therapeutic services related to the complainant's impairment to sexually penetrate or commit an indecent act with the person to whom the services are being provided. In a case involving a prosecution under section 51, Judge Mullaly ruled that in order to obtain a conviction for this offence, the prosecution must prove the following:⁸¹⁵

- 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;

815 *R v Patterson* Victoria, County Court, Mullaly J, 29 March 1999.

- 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.

8.41 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 principles of criminal responsibility. However, in the Discussion Paper, the Commission raised the question whether section 51 should be a strict liability offence.⁸¹⁶ If this were the case it would be unnecessary for the prosecution to establish knowledge of the impairment as an element of the offence. The accused could rely on the defence that he had an honest and reasonable belief that the patient did not have any mental impairment. There were few direct responses to this idea in submissions.

8.42 The Commission is of the view that proof that the person providing medical or therapeutic services knew of the impairment should not be required where the services related to the impairment. As currently drafted, section 51 applies only to those providing medical or therapeutic services *relating to the impaired mental functioning*. Because the services must relate to the impairment, those who are providing such services will almost invariably be aware that the patient is impaired. In the Commission's view, the vulnerability of people with mental impairments to sexual abuse by service providers makes it appropriate for this to be a strict liability offence. The defence of honest and reasonable belief that the person did not have a mental impairment could be raised by the accused in the rare case where they were providing services relating to the impairment, but were unaware of the complainant's cognitive problem.

8.43 This recommendation would make section 51 more consistent with offences involving another group of people vulnerable to sexual exploitation—that is, young people. Under sections 48 and 49 of the *Crimes Act 1958*, it is an offence for a person to engage in sexual acts with a young person under their care, supervision and authority. This is a strict liability offence, so that knowledge of the young person's age is not an element of the offence, but it is a defence to the charge that the person in the supervisory relationship believed on reasonable

816 Discussion Paper, above n 779, 115–16.

grounds that the young person was above the age at which sexual activity is lawful.⁸¹⁷

8.44 We also propose the creation of a new offence to cover the situation where the services provided do not relate to the mental impairment.⁸¹⁸ At present, for example, a doctor who sexually penetrates an intellectually disabled woman whom he is treating for an illness, or a dentist who sexually penetrates a mentally ill woman, would not be guilty of an offence under section 51, because the services would not relate to the impairment.⁸¹⁹ In the view of the Commission, such relationships will often involve the same imbalance of power which exists where the services are related to the impairment. It is the service relationship which creates the potential for sexual exploitation, rather than the type of services which are provided.

8.45 However, we propose that where the services do not relate to the mental impairment, for example, where they are provided by a dentist or podiatrist, the service provider must be aware of the victim's mental impairment. Not all therapeutic service-providers will be in a position to be aware of the cognitive impairment. For example, a person providing podiatry services to a woman with a mental illness would not necessarily be aware of her mental impairment. In this situation, the podiatrist would only be guilty of the offence if he or she were aware of the impairment. Hence it should be an offence for a person providing medical or therapeutic services to a person with impaired mental functioning, who is aware that their patient is mentally impaired, to engage in sexual acts with them, even if the services do not relate to the impairment.

817 Eighteen in the case of sexual penetration and 17 in the case of other indecent acts.

818 *Crimes Act 1958* s 51(4).

819 See ruling in *R v Patterson*, Victoria, County Court, Mullaly J, 29 March 1999, 248; Section 51(4) *Crimes Act 1958* provides that the offence in s 51 only applies 'if the services are related to the impaired mental functioning'.



RECOMMENDATION

90. Section 51 of the Crimes Act 1958 should be amended so that:

- it is an offence for a person who provides medical or therapeutic services to a person with impaired mental functioning to engage in a sexual act with that person;
- where the medical or therapeutic services are related to the impaired mental functioning, it is unnecessary for the prosecution to prove that the accused was aware of the person's impaired mental functioning. However, the accused can raise the defence that they had an honest and reasonable belief that a person did not have a mental impairment;
- where the medical or therapeutic services are not related to the impaired mental functioning, the service provider is not guilty of the offence unless he or she was aware that the person's mental functioning was impaired.

These offences should not apply where the person with the impaired mental functioning is the spouse or de facto spouse of the person providing the services.

CHANGES TO SECTION 52

8.46 Section 52 prohibits sexual acts between people with impaired mental functioning and workers in residential facilities. 'Residential facilities' are defined as approved mental health service under section 3 of the *Mental Health Act 1986* or premises operated by any person or body for the purposes of providing residential services to intellectually disabled people. In its submission, the Office of the Public Advocate suggested that in the context of de-institutionalisation people such as providers of professional education and recreation services, attendant care support, outreach and employment services and adult training support services should also be covered by the legislation.

8.47 Some may argue that legislation which extends beyond workers in residential facilities is too paternalistic. Many people with impaired mental functioning have more limited mobility and smaller social networks than those

without impairments. Extension of the current provision could prevent such people from having sexual relationships with people such as gardeners, drivers and tutors who are working at a facility or in a program which provides them with services.

8.48 On the other hand, there is a clear need to protect people with mental impairments from sexual assault. During our consultations, we were told that sexual assault of people with impaired mental functioning by carers or others associated with program provision is relatively common. National and international research indicates that:

- incidents of sexual assault are rarely reported;
- abuse mainly occurs in the victim's place of residence;⁸²⁰
- offenders are usually known to the victim;⁸²¹ and
- women who live in institutions or group homes are up to three times more vulnerable to assault, and ten times more likely to be sexually assaulted, than women without disabilities.⁸²²

8.49 Women with impaired mental functioning are especially vulnerable to sexual assault due to a variety of social, political, economic and environmental factors. Many are heavily dependent on the state, family or caregivers for everyday needs. Dependency, coupled with the difficulties of detecting abuse and the reluctance of service providers to recognise the problem, may lead to a denial of the existence of sexual exploitation.⁸²³ Many of those with impaired mental functioning have restricted social lives and experience. This impacts upon

820 Moira Carmody, 'Invisible Victims: Sexual Assault of people with an Intellectual Disability' (1991) 17 *Australian and NZ Journal of Developmental Disabilities* 2, 229–36.

821 Sobsey and Doe, in research conducted in Canada with 162 victims with intellectual disabilities who reported sexual abuse found that 96.6% of offenders were known to the victims: Dick Sobsey and Tanis Doe, 'Patterns of Sexual Abuse and Assault' *Sexuality and Disability* (1991); Vicky Turk and Hilary Brown, 'The Sexual Abuse of Adults with Learning Disabilities: Results of a Two Year Incidence Survey' (1993) 6 *Mental Handicap Research* 3, 212.

822 Lesley Chenoweth, 'Invisible Acts: Violence Against Women with Intellectual Disabilities', (1993) 2 *Australian Disability Review* 22–8; Robert Conway, Louise Bergin and Kathryn Thornton, *Abuse and Adults with an Intellectual Disability Living in Residential Services. A Report to Office of Disability* (1996).

823 Moira Carmody and Joan Bratel, 'Vulnerability and Denial: Sexual Assault of People with Disabilities', Jan Breckenridge and Moira Carmody (eds) *Crimes of Violence: Australian Responses to Rape and Child Sexual Abuse* (1992).

knowledge of acceptable boundaries of social relations and legal rights.⁸²⁴ Victims may not disclose or report such exploitation because they do not recognise this as a crime.

8.50 The Commission's proposal is intended to make it clear that such abuse by those involved in the provision of services to people with mental impairments is unacceptable. In our view, the high incidence of sexual assault of people with mental impairments, and the low levels of reporting, suggest that the law must continue to set high standards of conduct for those working in programs or facilities which provide services to people with mental impairments.

8.51 It would be necessary for the prosecution to prove that the service provider was aware of the person's mental impairment before he or she could be convicted of this offence. Where the accused is working in a program providing specialist services to people with mental impairments, for example people with intellectual disabilities, there will normally be little difficulty for the prosecution to prove this element of the offence. However, where the program provides services to a range of people, including but not limited to those with impaired mental functioning (for example, a gym which encourages people with disabilities to attend its program), a service provider who was unaware of the impairment should not be guilty of the offence.



RECOMMENDATION

91. A person working at a facility or in a program which provides services to people with impaired mental functioning, who takes part in a sexual act with a person whom he or she knows has impaired mental functioning, should be guilty of an indictable offence.

RELEVANCE OF CONSENT

8.52 The MCC allows for a limited defence of consent where a person who is responsible for the care of a person with a mental impairment sexually penetrates the impaired person. The model provision is worded in the following way:⁸²⁵

824 Ibid.

825 Model Criminal Code Officers Committee, above n 799, 180.

A person who is responsible for the care of a person with a mental impairment is not criminally responsible for an offence against this Division in respect of an act if, at the time of the act:

- (a) the person with the mental impairment consented to the act; and
- (b) the giving of that consent was not unduly influenced by the fact that the person was responsible for the care of the person with the mental impairment.

8.53 The MCC provisions relating to consent are intended to recognise the autonomy of mentally impaired person to freely engage in sexual relations. The provision is intended to recognise that a carer may have a non-coercive and non-exploitative sexual relationship with a mentally impaired person.

8.54 Two submissions (Law Institute of Victoria and the Criminal Bar Association) supported a limited defence of consent to the offences in sections 51 and 52. The OPA advocated a more protective approach, arguing that due to the vulnerability of people with impaired mental functioning, consent should not be a defence. The Mental Health Legal Service also supported a limited consent defence, but suggested that the onus of proof be shifted onto the accused to show that consent was not obtained 'by abuse of professional or other trusted position, responsibility or authority or exploitation of vulnerability arising from a person's disability'.⁸²⁶

8.55 In the view of the Commission, a limited defence of consent should not apply. Such a provision is inconsistent with the policy goal of protecting people with mental impairment from engaging in sexual activity with people in positions where they are able to exploit them. Such a provision would undermine the protective effect of sections 51 and 52 and could result in detailed cross-examination of complainants about the circumstances in which the sexual acts occurred.

826 Submission 15.

**RECOMMENDATION**

92. Sections 51 and 52 should not include a limited defence of consent, along the lines recommended by the Model Criminal Code Officers Committee.

SEXUAL OFFENCES AGAINST CHILDREN AND YOUNG PEOPLE**Care, Supervision and Authority Offences****EXISTING OFFENCES**

8.56 Under section 48 of the *Crimes Act 1958*, it is an offence for a person to take part in an act of sexual penetration with a 16- or 17-year-old to whom he or she is not married and who is under his or her care, supervision or authority.

8.57 Under section 49, it is an offence for a person to commit, or be in any way party to, the commission of an indecent act with, or in the presence of, a 16-year-old, to whom he or she is not married and who is under his or her care, supervision or authority. The consent of the child is not a defence to a charge under these sections, unless the person in the position of care believed, on reasonable grounds, that the child was above the relevant age or that he or she was married to the child.

SHOULD THE LEGISLATION SPECIFY THE RELATIONSHIPS WHICH ARE COVERED?

8.58 In the Discussion Paper, the Commission asked whether these sections should specify the relationships of care, supervision and authority to which they applied. This approach was recommended in the report of the MCCOC.⁸²⁷ The MCC provision covers sexual relationships between young people and:

- school teachers;
- parents, including step-parents, adoptive parents, legal custodians, legal guardians;
- religious instructors;

827 Model Criminal Code Officers Committee, above n 799, 164.

- counsellors;
- health professionals (where the young person is a patient); and
- police and prison officers.

8.59 The submissions to the Discussion Paper indicate some support for a non-exhaustive list within the section 48 provision. There were seven responses in favour of specifying the relationships covered. The submissions from Gatehouse Centre/SECASA and Victoria Police favoured a non-exhaustive list. The Criminal Bar supported an exhaustive list, and found the MCC list to be acceptable. The Law Institute of Victoria did not support any changes to the section, arguing that ‘the expression “care, supervision or authority” is readily capable of being understood, and should not be subject to the prescriptive approach adopted by the MCC’.⁸²⁸

8.60 One argument in favour of an exhaustive list of the relationships covered by sections 48 and 49 is that such a list would provide certainty about the limits of permissible sexual behaviour and would provide the basis for education of people in care, supervision and authority relationships about their legal responsibilities to the young people for whom they are responsible.

8.61 In the Commission’s view however, these advantages of the MCCOC approach are outweighed by some significant problems. The history of these offences in Victoria shows a shift away from the delineation of specific categories of relationships, towards a general definition. The Commission does not think there is a strong case for returning to an exhaustive list. Such an approach would not accommodate the variety of potential relationships of supervision and care in which young people are involved. The cost of increased clarity would be a lack of flexibility and reduced emphasis upon the power dynamic within the relationship.

8.62 At the same time, the inclusion of a non-exhaustive list in the legislation could serve a valuable educative function. No such list exists in the other jurisdictions within Australia for sexual offences against young people. However, models do exist in overseas jurisdictions. For example, the state of Mississippi in the United States adopts a two-pronged approach towards the offence of sexual penetration with a child under the age of 18 years. Section 97-3-95(2) of the Mississippi Code Ann. (2001) states:

828 Submission 23, 12.

A person is guilty of sexual battery if he or she engages in sexual penetration with a child under the age of eighteen years if the person is in a position of trust or authority over the child including without limitation the child's teacher, counsellor, physician, psychiatrist, psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach.

8.63 The benefit of the Mississippi approach is that it offers the decision-maker an indication of the types of relationships that the offence is designed to prohibit. Arguably, the non-exhaustive list further clarifies the scope of the offence, without returning to an overly-prescriptive list of categories covered by the offence.

8.64 We propose that the section should refer to the relationships set out in the recommendation below. It is unnecessary to include reference to the relationship between parents, adoptive parents and step-parents in section 48, because penetrative acts between parents and children are currently within the offence of incest and will be covered by the proposed offence of intra-familial sexual penetration. However section 49 (which covers non-penetrative acts involving a person in a position of care, supervision and authority over a child) should specify relationships between parents, adoptive parents and step-parents. Indecent acts within these relationships are currently covered only by indecent assault. It is preferable that consent should not be a defence within these relationships where the complainant is 16 or 17 years old.

8.65 The Commission does not believe that there is any justification for having different ages of consent for sexual activities with a person in a position of care. Sexual abuse and exploitation of a young person may occur within a supervisory relationship, whether or not penetration occurs. For this reason we have recommended that both sections 48 and 49 should cover sexual acts with young people aged 16 or 17 years.

8.66 Any discussion of the merits of an exhaustive or non-exhaustive list must take into account the operation of a defence of reasonable belief that the child was over the relevant age. The MCC has proposed an exhaustive list of relationships covered by the offence, but does not make available a defence of reasonable belief that the child was aged 18 years or older. This approach reflects the policy view that if the relevant relationship is clearly specified, the person in that relationship must ensure that the young person is over the relevant age before engaging in sexual activity with her or him. Even if young people mislead people in authority about their age, the latter will be guilty of the offence.

8.67 By contrast, the current Victorian provision allows a defendant to argue consent as a defence where the accused believed on reasonable grounds that the child was 18 years or older or that he was married to the child. The less clear the limits of the offence, the greater the need for a defence of reasonable belief. Because we do not propose that the section should include an exhaustive list of the relationships covered, the defence of reasonable belief as to age should continue to apply.



RECOMMENDATIONS

93. Sections 48 and 49 should include a non-exhaustive list of the relationships covered by the section including the relationships of:
- teacher and student;
 - foster parent, legal guardian, and the child for whom they are caring;
 - in the case of section 49 (which penalises non-penetrative sexual acts), parents, including step-parents and adoptive parents and their children;
 - religious instructors;
 - employers;
 - youth workers;
 - sports coaches;
 - counsellors;
 - health professionals and young people who are patients; and
 - police and prison officers and young people in custody.
94. The age of consent for sexual activity with a person over whom someone is in a position of care, supervision and authority should be 18 years, regardless of whether the sexual acts involve sexual penetration.
95. The defence of reasonable belief that the young person was aged 18 years or more should continue to apply.

Procuring and Soliciting Offences

EXISTING LAW

8.68 Section 58 of the *Crimes Act 1958* makes it an offence for a person to ‘procure’ a child under 16 years to take part in an act of penetration outside marriage with another person or to procure a person to take part in an act of penetration outside marriage with a child under 16 years. In order for the offence to apply:

- sexual penetration must occur;
- the act of penetration must involve a person other than the accused;
- the accused must influence the mind of the child, causing him or her to take part in the act of sexual penetration;
- the child must be under the age of 16 years; and
- the procuring must occur in Victoria (the sexual penetration need not).

The section 58 offence is rarely used in prosecutions.⁸²⁹

8.69 Section 60(1) creates a summary offence of soliciting. The offence applies where an accused person solicits or actively encourages a child under 18 years to take part in an act of sexual penetration or an indecent act with the accused or another person, and the child is under the care, supervision or authority of the accused.

8.70 The main difference between ‘procuring’ in section 58 and ‘soliciting or actively encouraging’ in section 60 appears to be that section 58 requires the sexual act to have taken place,⁸³⁰ whereas ‘soliciting’ is committed irrespective of whether or not the sexual penetration or indecent act actually occurred.⁸³¹ Unlike section 58, section 60 covers the situation where the child is solicited to take part in an act of penetration either with the accused or with another person. However, section 60 only applies where the child is under the care, supervision and

829 Discussion with Gary Ching, Manager, Sexual Offences Unit, Office of Public Prosecutions, 17 March 2003.

830 See *R v Pikos* [1967] VR 89, 90.

831 Butterworths, *Criminal Law Victoria* (online edition) (at 16 April 2003), *Crimes Act 1958*, s 57, [Commentary]; Butterworths, *Criminal Law Victoria* (online edition) (at 16 April 2003), *Crimes Act 1958*, s 58, [Commentary].

authority of the accused. Section 60 is primarily used to deal with prostitution-related acts, namely, where a child's sexual services are exchanged for payment.

PROBLEMS WITH THE EXISTING LAW

8.71 Submissions from Victoria Police and the Office of Public Prosecutions argue that these provisions may be inadequate to deal with certain circumstances where a child is approached for sexual purposes, but sexual contact does not occur. The police, in particular, are concerned about the problem of children being approached and groomed for sexual purposes over the Internet.

8.72 Historically, the procuring and soliciting offences have emerged out of policies to deal with prostitution. Whilst recruitment of children for prostitution is still a serious concern, there already exist a variety of laws designed to combat this issue.⁸³² In contemporary times, there are a range of other contexts, previously unforeseen, in which children may require legal protection from procuring or soliciting. Sexual exploitation of children through the Internet is now said to have become a 'serious problem'.⁸³³ The development and the widespread use of the Internet has created new opportunities for child sexual abuse facilitated through the medium of the Internet. Facilitation can occur through the Internet in a manner that is difficult to detect, and offenders can hide or misrepresent their identities with ease.⁸³⁴ The Internet remains largely unregulated, and education on safe Internet use is still developing.

8.73 Where a child is propositioned or recruited over the Internet the offence of soliciting does not apply, because the child will not be under the care,

832 See in particular *Prostitution Control Act 1994* s 5 (causing or inducing a child to take part in prostitution), s 6 (obtaining payment for sexual services provided by a child), s 7 (agreement for provision of sexual services by a child), s 11 (allowing a child to take part in prostitution) and s 11A (child over 18 months not to be in brothel).

833 See End Child Prostitution and Trafficking, <www.focalpointngo.org/ngonews.htm>, accessed May 2001, as quoted in Janet Stanely, 'Child Abuse and the Internet' (2001) *National Child Protection Clearinghouse Issues*. In a limited survey done in Australia of adolescent Internet users, 27% of the children said that they had been contacted by what they believed to be a sexual predator. Only one quarter of children who had been sexually solicited told a parent, and no reports were made to the police. One-third of children did not disclose the solicitation at all. See *ONLINE Newsletter* No 2, November, 'News from NAPCAN ACT', 11, <www.napcan.org.au/Documents/NAPCANNewsletterNovember2001.PDF, accessed> 16 April 2003.

834 Marni Feather, 'Internet and child victimisation', Paper presented at the Children and Crime: Victims and Offenders Conference, convened by the Australian Institute of Criminology, Brisbane, 17–18 June 1999, as cited in Stanley, *ibid*, 3.

supervision and authority of the accused. The offence of procuring will not apply if the act of sexual penetration has not occurred, or if the accused has procured the person to take part in an act of penetration with the accused, rather than with a third person.

8.74 Where the actual sexual penetration does not occur, but steps have been taken towards this end, the accused may sometimes be charged with inchoate offences such as attempting to procure or conspiracy or incitement to procure. These crimes are designed to intervene to prevent the commission of a future offence. An attempt offence covers conduct that is more than merely preparatory to the commission of the offence, and immediately and not remotely connected with the commission of the offence.⁸³⁵ This means that the accused's conduct must be sufficiently close to the commission of an offence in order to qualify as an attempt.

8.75 There are a few cases from other jurisdictions in which there have been successful convictions for attempts to procure. The cases indicate that the sexual nature of the course of conduct needs to be clear, and the conduct needs to be leading inexorably towards the commission of an act of sexual penetration or indecency.⁸³⁶ The intent can be inferred from the accounts of conversations

835 See *Crimes Act 1958* s 321N.

836 In *R v Miskell* (1953) 37 Cr App R 214 the appellant, a British corporal, met a German boy of 14 on a street, took him to a cafe and bought him refreshments, and then into a park, where he sat alone with the boy and made indecent gestures and indulged in indecent conversation, though he did not specifically invite the boy to participate in an act of indecency with him. He suggested to the boy that they should sleep out together in a park or in the woods, and asked the boy to meet him the next night, saying they could go to the cinema or for a walk. The next night he met the boy at the agreed place, went for a walk and was then arrested.

On appeal the court held that the acts of the accused could amount to an attempt to procure the commission of an act of gross indecency. 'It is not a question of whether the acts are an attempt to commit the gross indecency acts, but whether they are an attempt to procure acts of gross indecency.'

In *R v Cope* (1921) 16 Cr App R 77, a man, Riley, committed an act of gross indecency with a boy called Price. Riley told the appellant of his meeting with Price and gave him his name and address. The appellant wrote a letter to the victim. The appellant wrote the letter to the youth knowing of Riley's conviction for the offence and stating that he was a friend of Riley's and sending Riley's good wishes, and saying that he was going to the town and would like to meet the youth at a particular time. The letter was intercepted and the jury were asked to draw the inference of intention to procure the youth for purposes of committing an act of gross indecency with him.

On appeal the court held that there was enough evidence to entitle the jury to find that Price would have read into the letter an invitation to repeat with the appellant the offence which he had committed with Riley. Therefore the sending of the letter was an attempt to procure. The letters contain terms

between the child and the accused, communications exchanged, and/or statements made by the accused to a third party.

8.76 For example, in *Ayles v R*⁸³⁷ the appellant was convicted of attempting to procure a child to commit an act of gross indecency.⁸³⁸ The appellant engaged the two boys in a conversation with a view to encouraging them to engage in sexual behaviour in his presence. He talked to two boys at a camp about sexual matters, for example, homosexuality, sex with animals etc. This happened again on the next night. He told the boys that he and his friends watched and masturbated in front of videos. He told the boys that they could do the same in front of him, and he would only join in if they really wanted him to.

8.77 The appellant argued that there was insufficient evidence to amount to an attempt to procure. The Court held that the purpose of the procurement may be inferred from the conduct of the accused person and it need not be an express invitation to perform acts of gross indecency.⁸³⁹ On the boys' evidence, the statements allegedly made by the appellant to them led right up to the point where the only remaining act which would constitute a commission of the principal offence would be if one or other of the two boys had actually masturbated that night.⁸⁴⁰

8.78 Although a conviction was obtained in *Ayles v R* the 'attempt to procure' may not adequately cover some cases involving sexual grooming. A person who 'grooms' a child for sexual offences may not be able to be convicted of attempting to procure, unless a clear intention to procure the child for a sexual act can be established. For example, it may not cover the case where an adult establishes regular contact with a child, through the Internet, and engages in sexually explicit conversations designed to gain the child's trust and confidence with a view to setting up a meeting with the child for the purpose of taking part in a sexual act

which would have conveyed the incitation to the mind of their intended recipient as unmistakably as if it had been set out in express terms: see 82–3.

837 *Ayles v R* (1993) 66 A Crim R 302, Court of Criminal Appeal South Australia.

838 The principal offence was *Criminal Law Consolidation Act* 1935, s 58, which states that:

Any person who in public or in private (a) commits any act of gross indecency with, or in the presence of any person under the age of 16 years; (b) incites or procures the commission by any such person of an act of gross indecency with the accused, or in the presence of the accused, or with any other person in the presence of the accused; shall be guilty of a misdemeanour.

839 *Ayles v R* (1993) 66 A Crim R 302, 307.

840 *Ayles v R* (1993) 66 A Crim R 302, 308.

with the child. The case law is limited and the scope of the offence of ‘attempting to procure’ is not always clear. Where an accused has sexual conversations with a child over the Internet, a court will have to decide whether the accused was far enough along the course of conduct to be culpable. The requirement that an attempt be more than merely preparatory to the commission of the offence, and immediately and not remotely connected with the commission of the offence, may be narrowly interpreted to include only those situations where the chain of events is already well in train and the commission of the offence is interrupted by an intervening act, such as a tip-off to the police or the child failing to turn up to a meeting.

SHOULD THERE BE AN INTERNET-SPECIFIC PROCURING OFFENCE?

8.79 Some overseas jurisdictions have created a separate offence to cover Internet-specific circumstances. England has proposed an offence of meeting a child following sexual grooming;⁸⁴¹ Canada has created an offence of ‘luring a child’ where the communication occurs via ‘a computer system’;⁸⁴² and some United States states such as Maine have offences to cover soliciting a child by a computer.⁸⁴³

8.80 The Commission has rejected the approach of creating an Internet-specific offence. In our view, the criminality of the conduct should not be based on the medium used by the alleged offender to prepare the child to participate in sexual activity. The changes to section 58 which we propose below will cover a range of telecommunications media including telephones and the Internet.

PROPOSAL

8.81 The Commission proposes that section 58 should be expanded to include ‘soliciting’ as well as procuring and that the current offence of soliciting contained in section 60 should be repealed. The new offence in section 58 should not be confined to procuring or soliciting to take part in an act of penetration, but should cover indecent acts as well. It would be artificial to draw a distinction

841 Sexual Offences Bill (HL) 2003 cl 17.

842 The offence makes it illegal to communicate with a child for the purpose of committing a sexual offence against that child: Criminal Code RSC 1985 C-46, s 172.1.

843 Title 17-A, Maine Criminal Code, Chapter 11, §259 ‘Solicitation of child by computer to commit a prohibited act’.

between sexual penetration and indecent acts because these acts exist on a continuum. Urging a child to take part in any of these acts can produce a sense of violation and threat for the child. The Commission also recommends that the offence should apply whether the sexual act is with the accused or a third person.

8.82 The addition of the word ‘soliciting’ will broaden the application of the section 58 provision. The emphasis in the word ‘soliciting’ is upon the making of an offer or the request for a particular action.⁸⁴⁴ Whereas, ‘procuring’ connotes a more careful process of contrivance in order to bring about a particular result.

8.83 The wrong that the proposed offence seeks to prohibit is the conduct of recruiting or propositioning children to participate in a sexual act. Whether or not the sexual act actually takes place should not affect the criminal nature of the act. An adult who invites a child to take part in an act of sexual penetration but does not actually follow through with the act should be regarded as culpable in the same way as a person whose ‘grooming’ behaviour succeeds in inducing the child to take part in an act of sexual penetration. Both of these adults intend to influence the mind of the child to cause him or her to take part in a sexual act. The fact that the sexual act does not take place does not change the fact that the accused had a guilty intent to engage in sexual acts and acted upon the intention to engage in sexual acts.

8.84 Where an offer is made to a child to participate in some form of sexual activity, or the child is urged or persuaded by an adult to take part in sexual acts, this will be sufficient to constitute an offence. In circumstances where the adult makes a proposition to a person whom he knows is a child over the Internet, but is not aware of the child’s location, and there is no likelihood that the adult could actually engage in the act of sexual penetration that he has proposed, the adult could be convicted of soliciting sexual acts from the child.

8.85 However the new offence will require that the accused does more than engage in sexually explicit conversation with the child. Whilst not condoning such behaviour, the Commission does not consider that the soliciting or procuring

844 For case law on the interpretation of soliciting in a context of prostitution, see *Coleman v Director of Public Prosecutions* (2000) 49 NSWLR 371; 114 A Crim R 298. Justice O’Keefe held that the term ‘solicit’ did require proof of persistence, harassment or pressure to the person approached. See also *Newman v Paties; Ex parte Newman* [1979] Qd R 402; *Fingleton v Bryson* (1980) 26 SASR 208; *Jitjarden v Thompson* (1995) 38 NSWLR 611; (1995) 85 A Crim R 24; *Weisz v Monahan* [1962] WLR 262; [1962] 1 All ER 664; *Behrendt v Burridge* [1976] 1 WLR 29; [1976] 3 All ER 285.

offences should extend to cover indecent conversations between adults and children. A person should only be culpable once he or she has formed the intent to commit a specific wrongful act or series of acts. Soliciting requires that the accused invites or encourages the child to participate in a specific sexual act or acts. Where no particular act or acts are contemplated no offence will be committed.

8.86 The new offence is primarily intended to protect children under 16 years. Consistent with the offences in sections 48 and 49, the Commission recommends that children aged 16 or 17 years under the care, supervision and authority of the accused should also be covered by the section 58 offence.



RECOMMENDATIONS

96. Section 60 of the Crimes Act 1958 'Soliciting Acts of Sexual Penetration or Indecent Acts' should be repealed.
97. Section 58 of the Crimes Act 1958 should be amended to make it an offence for:
- a person aged 18 years or over to solicit or procure a child under the age of 16 to take part in an act of sexual penetration or an indecent act outside marriage with him or her or another person;
 - a person over 18 years to solicit or procure another person to take part in an act of sexual penetration or an indecent act outside marriage with a child under the age of 16;
 - a person over 18 years to solicit or procure a 16- or 17-year-old child to whom he or she is not married and who is under his or her care, supervision or authority to take part in an act of sexual penetration or an indecent act with him or her or another person.
98. The section should also provide that:
- a person in Victoria who solicits or procures a child outside Victoria to take part in sexual penetration or an indecent act, which if committed in Victoria would be an offence, is guilty of this offence;
 - a person outside Victoria who solicits or procures a child outside Victoria to take part in an act of sexual penetration or indecent act in Victoria is guilty of this offence.

INCLUSION OF OBJECTS AND INTERPRETATION CLAUSES

8.87 The consultations and research undertaken by the Commission indicate that despite significant reforms to the substantive law of rape and other sexual offences, there is still a need for education of participants in the criminal justice system about the social context and serious nature of sexual assault. Chapter 4 addresses a variety of strategies to promote cultural change within the criminal justice system. The Commission believes that the inclusion of objects and interpretation clauses at the beginning of the provisions on sexual offences in the *Crimes Act 1958* will also assist in clearly stating the social problem that the legislation seeks to address, and the principles that the legislation endeavours to uphold. Similar principles should be included in the Evidence Act, to guide the interpretation of evidentiary provisions relevant to sexual offences.

8.88 The arguments for including objects and principles of interpretation in relation to sexual offences are as follows:

- The criminal law has both a regulatory and an educative function. It should emphasise that people have a right to make decisions about their sexual activity and to choose not to engage in sexual activity. The interpretation clause will ensure that the provisions of sexual offences laws are interpreted consistently with the goals of the legislation.
- A statement of principles of interpretation will give added weight to any directions or instructions that a judge gives to the jury. The judge and jury can refer to the principles to shed light on where any ambiguity may exist in the interpretation of particular sections.
- Sexual assault continues to be under-reported, and the serious social harm of sexual assault has only recently begun to be given the recognition that it deserves. The unique nature and context of sexual assault should be clearly stated by the legislature, so that this underwrites the interpretation of the particular provisions in the legislation.

8.89 It is intended that the proposed clauses should assist, and not complicate, the interpretation of specific legislative provisions.



RECOMMENDATIONS

99. The Crimes Act 1958 should include a statement of the objectives of Part 1 subdivisions 8A to 8G in the following terms:

The aims of subdivisions 8A to 8G are:

(i) to uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity; and

(ii) to protect children and people with impaired mental functioning from sexual exploitation.

100. The Act should also contain an interpretative clause in the following terms:

In interpreting subdivision 8A to 8G the court is required to consider the unique character of sexual assault and the unique way in which sexual assault affects the lives of victims. In particular, the court must have regard to the high incidence of sexual violence within society and the fact that:

- sexual offences are significantly under-reported;
- women and children are overwhelmingly the victims of sexual assault;
- offenders are commonly known to victims; and
- sexual offences occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.

101. A similar interpretative clause should be included in the Evidence Act 1958 to apply to provisions relevant to sexual offences trials, including Part 2 Division IIA, sections 37A to 37C and sections 39 to 41.

Appendix 1

Submissions Received

1. Confidential
2. Confidential
3. Ms Judy Flanagan, Manager, CASA Loddon Campaspe Region
4. N Rogerson
5. Associate Professor Alison Young and Dr Peter Rush
6. Dr M L Murnane, Coordinator of the Child Protection Unit, Monash Medical Centre
7. Mr John Hinchcliffe
8. Joint submission: Gatehouse Centre for the Assessment and Treatment of Child Abuse and South East Centre Against Sexual Assault
9. Victoria Police
10. Domestic Violence and Incest Resource Centre (DVIRC)
11. Victorian CASA Forum
12. Ms Brenda Lee
13. Dr John Harry, Medical Officer, Gatehouse Centre
14. Senior Constable Fiona Stevens, Seymour Sexual Offences and Child Abuse Unit
15. Mental Health Legal Centre Inc
16. Voices
17. Associate Professor John Willis, School of Law and Legal Studies, La Trobe University
18. Kelly
19. Darebin Community Legal Centre
20. Office of the Public Advocate
21. Women's Legal Service Victoria
22. Confidential
23. Criminal Law Section, Law Institute of Victoria

24. Confidential
25. Confidential
26. Confidential
27. Federation of Community Legal Centres (Vic.)
28. Criminal Bar Association
29. Confidential
30. South West Advocacy
31. Confidential
32. Confidential
33. Ms E Sitarenos
34. Confidential
35. Confidential
36. Confidential
37. Warrnambool SOCA
38. Warrnambool CASA
39. Brauer College and Warrnambool College
40. Confidential
41. Confidential
42. Warrnambool City Council
43. Duplicate
44. Ms Pat O'Brien, Emma House, Warrnambool
45. Department of Human Resources, Warrnambool
46. Confidential
47. South West Health/CASA, Warrnambool
48. South West Institute of TAFE, Warrnambool
49. Gunditjmara Aboriginal Co-Op, Warrnambool
50. Joint submission: Brophy Family Services, Crimes Victims Services, The Legal Centre
51. Violence Against Women Sub-Committee, Federation of Community Legal Centres
52. Murray Mallee Legal Service
53. Mildura SOCA Unit
54. Sunraysia Ethnic Communities Council, Mildura
55. Mildura Secondary College and St Joseph's College, Mildura

56. Mildura Base Hospital
57. Mallee Sexual Assault Unit and Domestic Violence Services, Mildura
58. Victims Assistance Program, Mildura
59. Sunraysia Community Health Centre, Mildura
60. Mildura Magistrates' Court
61. North West Law Association, Mildura
62. Mildura Youth Centre
63. Mildura West Primary School
64. Isik College, Mildura
65. Confidential
66. Victoria Legal Aid
67. Witness Assistance Service
68. Various service providers
69. CASA Forum, 9 April 2002
70. Duplicate
71. Court Network, June 2001
72. Court Network, March 2002
73. WLRG Solicitors (now called Women's Legal Service)
74. Confidential
75. Confidential

Appendix 2

List of Offences

Below is the list of penetrative offences included in the research on reported sexual offences and on prosecution outcomes. They have been selected from a list of offence categories and descriptions provided by the Office of Public Prosecutions.

Legislation Code ⁸⁴⁵	BOC ⁸⁴⁶	Legislation Title	Description
3664.48.2		Crimes Act 1928	Sexual penetration of female under 10 years
3664.48.2	A1	Crimes Act 1928	Sexual penetration of female under 10 years
6231.44.2		Crimes (Sexual Offences) Act 1991	Sexual penetration of child under 18 years of de facto
6231.44.2	A1	Crimes Act 1958	Sexual penetration of child under 18 years of de facto
6231.44.2	A3	Crimes Act 1958	Sexual penetration of child under 18 years—step-child of de facto
6231.45.1		Crimes (Sexual Offences) Act 1991	Sexual penetration of child under 10 years
6231.45.1	A1	Crimes Act 1958	Sexual penetration of child under 10 years
6231.45.1	A3	Crimes Act 1958	Sexual penetration of child under 16 years
6231.46.1		Crimes Act 1958	Sexual penetration of child 10–16 years
6231.46.1	A1	Crimes Act 1958	Sexual penetration of child 10–16 years
6231.47.1		Crimes Act 1958	Sexual penetration of child under 10 years
6231.47.1	A5	Crimes Act 1958	Sexual penetration of child under 10 years

⁸⁴⁵ Act number, section number and sub-section number.

⁸⁴⁶ Basic Offence Category.

6231.47A.1		Crimes Act 1958	Sexual relationship with child under 16 years
6231.47A.1	A1	Crimes Act 1958	Maintain sexual relationship with child under 16 years
6231.48		Crimes Act 1958	Sexual penetration of 16 year old
6231.48.1		Crimes Act 1958	Sexual penetration of person aged 10–16
6231.48.1	A1	Crimes Act 1958	Sexual penetration of 16–17 year old under care
6231.48.1	A3	Crimes Act 1958	Sexual penetration of person 10–16 years
6231.49.1		Crimes Act 1958	Sexual penetration of person aged 16–18 years
6231.49.1	A2	Crimes Act 1958	Sexual penetration of person aged 16–17 years
6231.49.3	A1	Crimes Act 1958	Sexual penetration of 16–17 year old under care, supervision or authority
3664.48.1		Crimes Act 1928	Incest
3664.48.1	A1	Crimes Act 1928	Incest—by lineal ancestor
3664.48.1	A2	Crimes Act 1928	Incest—by step-parent
3664.48.1	A3	Crimes Act 1928	Incest—by parent
6103.52.1	A1	Crimes Act 1957	Incest—by lineal ancestor
6103.52.1	A2	Crimes Act 1957	Incest —by step-parent
6103.52.1	A3	Crimes Act 1957	Incest—by parent
6103.52.3	A1	Crimes Act 1957	Incest—of mother or sister
6231.44.1	A3	Crimes Act 1958	Incest—by step-parent
6231.44.1	A4	Crimes Act 1958	Incest—by parent
6231.44.1	A5	Crimes Act 1958	Incest—by lineal descendant
6231.44.1	C4	Crimes Act 1958	Incest—child/step-child/lineal descendant
6231.44.4	A1	Crimes Act 1958	Incest—sibling
6231.44.4	A2	Crimes Act 1958	Incest—half-brother/sister
6231.52.1		Crimes Act 1958	Incest—by parent
6231.52.1	A2	Crimes Act 1958	Incest—by lineal ancestor
6231.52.1	A3	Crimes Act 1958	Incest—by step-parent
6231.52.1	A4	Crimes Act 1958	Incest—by parent
6231.52.1	A5	Crimes Act 1958	Incest (prior 28/2/81)
6231.52.1	A6	Crimes Act 1958	Incest (1/3/81 – 4/8/91)
6231.52.4	A1	Crimes Act 1958	Incest—sibling
6231.52.4	A6	Crimes Act 1958	Incest—half brother/sister

3663.44.1		Crimes Act 1928	Carnally knowing girl aged 10–16 years
3664		Crimes Act 1928	Carnally knowing girl aged 10–16 years
3664.42		Crimes Act 1928	Carnally knowing and abusing a girl under 10 years
3664.42	A1	Crimes Act 1928	Carnal knowledge of a girl under 10 years
3664.44.1	A1	Crimes Act 1928	Carnal knowledge of girl between 10–16 years
6103.46	A1	Crimes Act 1957	Carnal knowledge girl under 10 years
6103.48.1	A1	Crimes Act 1957	Carnal knowledge of girl 10–16 years
6231.46		Crimes Act 1958	Carnally knowing and abusing a girl under 10 years
6231.46	A1	Crimes Act 1958	Carnal knowledge of girl under 10 years
6231.48.1	A4	Crimes Act 1958	Carnal knowledge of girl 10–16 years
LAW.23		Common Law	Carnal knowledge
LAW.23	A1	Common Law	Carnal knowledge
3664.65.1		Crimes Act 1928	Buggery with person under 14 years or with violence
3664.65.1	A1	Crimes Act 1928	Buggery with person under 14 years
3664.65.1	A2	Crimes Act 1928	Buggery with violence
3664.65.2	A1	Crimes Act 1928	Buggery
6103.68.1		Crimes Act 1957	Buggery
6103.68.1	A1	Crimes Act 1957	Buggery with person under 14 years
6103.68.1	A2	Crimes Act 1957	Buggery with violence
6103.68.2	A1	Crimes Act 1957	Buggery
6231.68.1		Crimes Act 1958	Buggery with a person under 14 years with violence
6231.68.1	A1	Crimes Act 1958	Buggery with person under 14 years
6231.68.1	A2	Crimes Act 1958	Buggery with violence
6231.68.2		Crimes Act 1958	Buggery
6231.68.2	A1	Crimes Act 1958	Buggery
6231.68.3		Crimes Act 1958	Buggery

Appendix 3

Alternative Arrangements Survey

The Commission surveyed registrars at Victorian Magistrates' Courts about the facilities which provide alternative arrangements for giving evidence. Registrars were asked about how frequently the courts made use of closed-circuit television (CCTV) for giving evidence and screens in assisting complainants in sexual offences proceedings to give their evidence. Questionnaires were sent to 50 Magistrates' Courts. Forty-three surveys (86%) were completed and returned to the Commission.

Closed-circuit television facilities have been installed in the Melbourne Magistrates' Court, in six⁸⁴⁷ of the seven participating Magistrates' Courts in the wider metropolitan area (suburban courts) and in 14⁸⁴⁸ of the 23 participating regional Magistrates' Courts. Where the facilities were not available, registrars suggested that the types of matters requiring alternative arrangements are either not listed in their courts (often because the court only sits for administrative processes such as directions hearings), or, where matters of this type are listed, the proceeding is relocated and heard in a court equipped with CCTV facilities.

847 Broadmeadows, Dandenong, Frankston, Heidelberg, Ringwood and Sunshine.

848 Bairnsdale, Ballarat, Bendigo, Geelong, Hamilton, Horsham, Mildura, Moe, Morwell, Sale, Shepparton, Wangaratta, Warrnambool and Wodonga.

MAGISTRATES' COURTS WITH CCTV FACILITIES

CCTV facility			Court Location			Total
			Melbourne	Metropolitan	Regional	
	Yes	Count	1	6	14	21
		% within court location	100.0%	85.7%	60.9%	67.7%
	No	Count	0	1	9	10
		% within court location	0%	14.3%	39.1%	32.3%
Total		Count	1	7	23	31
		% within court location	100.0%	100.0%	100.0%	100.0%

Legislation also allows for the use of screens to block the line of vision from the witness box to where the accused sits in the dock. According to the responses to the survey, screens are available in the Melbourne Magistrates' Court, in three⁸⁴⁹ of the seven participating suburban courts and in five⁸⁵⁰ of the 24 participating regional courts. Many of the courts that indicated they were not equipped with screens were courts which did not generally hear sexual offence cases.

849 Dandenong, Frankston and Sunshine.

850 Bairnsdale, Colac, Geelong, Morwell and Sale.

MAGISTRATES' COURTS WITH SCREENS

Screens available			Court Location			Total
			Melbourne	Metropolitan	Regional	
Yes	Count		1	3	5	9
	% within court location		100.0%	42.9%	20.8%	28.1%
No	Count		0	3	19	22
	% within court location		0%	42.9%	79.2%	68.8%
Other	Count		0	1	0	1
	% within court location		0%	14.3%	0%	3.1%
Total	Count		1	7	24	32
	% within court location		100.0%	100.0%	100.0%	100.0%

Proceedings held at the Magistrates' Court

According to registrars surveyed, few adult complainants use CCTV at the committal stage, although the rate of use appears to vary considerably from court to court. The Commission was told that the facility is 'rarely' used by adult complainants in the Melbourne Magistrates' Court, 'often' used in one suburban court,⁸⁵¹ and with respect to 13 regional courts,⁸⁵² the spectrum of possible use ranged from 'rarely' to 'always'.

851 Geelong.

852 One respondent did not nominate a rate of use.

USE OF CCTV BY ADULTS AT COMMITTAL

Frequency of use of CCTV facility			Court Location			Total
			Melbourne	Metropolitan	Regional	
Always	Count		0	0	2	2
	% within court location		0%	0%	15.4%	12.5%
Often	Count		0	1	2	3
	% within court location		0%	50.0%	15.4%	18.8%
Sometimes	Count		0	0	2	2
	% within court location		0%	0%	15.4%	12.5%
Rarely	Count		1	0	5	6
	% within court location		100.0%	0%	38.5%	37.5%
Never	Count		0	0	1	1
	% within court location		0%	0%	7.7%	6.3%
Other	Count		0	1	1	2
	% within court location		0%	50.0%	7.7%	12.5%
Total	Count		1	2	13	16
	% within court location		100.0%	100.0%	100.0%	100.0%

Closed-circuit television facilities are used more frequently for children testifying at committal proceedings in sexual offences cases, although the use of the facilities was still limited overall. In the Melbourne Magistrates' Court, child complainants apparently often testify via CCTV, but do not in the metropolitan courts. In the 13 responses from regional courts, three registrars reported that the facility is 'always' used by child complainants, five indicated that it is 'often' used, and three indicated that it is 'rarely' used.

USE OF CCTV BY CHILDREN AT COMMITTAL

Frequency of use of CCTV facility			Court Location			Total
			Melbourne	Metropolitan	Regional	
	Always	Count	0	0	3	3
		% within court location	0%	0%	23.1%	17.6%
	Often	Count	1	0	5	6
		% within court location	100.0%	0%	38.5%	35.3%
	Sometimes	Count	0	1	0	1
		% within court location	0%	33.3%	0%	5.9%
	Rarely	Count	0	0	3	3
		% within court location	0%	0%	23.1%	17.6%
	Other	Count	0	2	2	4
		% within court location	0%	66.7%	15.4%	23.5%
Total		Count	1	3	13	17
		% within court location	100.0%	100.0%	100.0%	100.0%

Trials Involving Sexual Offences

Registrars were asked about their knowledge of the use of CCTV by adult complainants in sexual offences trials. Few registrars felt able to respond to this question, given that many of them would be administratively responsible for the Magistrates' Court only. However, of the five suburban registrars who responded, two said that CCTV would 'rarely' be used for adult complainants while the remaining three did not specify the rate of use. Of the 12 responses in relation to regional courts, use varied across the spectrum from 'always' to 'never' used.

USE OF CCTV BY ADULTS AT TRIAL

Frequency of use of CCTV facility			Court Location		Total
			Metropolitan	Regional	
	Always	Count	0	2	2
		% within court location	0%	16.7%	11.8%
	Often	Count	0	3	3
		% within court location	0%	25.0%	17.6%
	Sometimes	Count	0	1	1
		% within court location	0%	8.3%	5.9%
	Rarely	Count	2	3	5
		% within court location	40.0%	25.0%	29.4%
	Never	Count	0	2	2
		% within court location	0%	16.7%	11.8%
	Other	Count	3	1	4
		% within court location	60.0%	8.3%	23.5%
Total		Count	5	12	17
		% within court location	100.0%	100.0%	100.0%

Two of the five suburban courts reported that CCTV is 'rarely' used for sexual offences trials involving child complainants. Of the 12 regional courts that responded, three reported that it is 'always' used, three said that it is 'often' used, while two suggested the facilities were 'rarely' used.

USE OF CCTV BY CHILDREN AT TRIAL

Frequency of use of CCTV facility			Court Location		Total
			Metropolitan	Regional	
Always	Count		0	3	3
	% within court location		0%	25.0%	17.6%
Often	Count		0	3	3
	% within court location		0%	25.0%	17.6%
Rarely	Count		2	2	4
	% within court location		40.0%	16.7%	23.5%
Other	Count		3	4	7
	% within court location		60.0%	33.3%	41.2%
Total		Count	5	12	17
		% within court location	100.0%	100.0%	100.0%

Attitudes to using CCTV

Registrars were asked about whether they could identify any procedural or attitudinal barriers to the use of CCTV from solicitors, barristers, judges or other court participants. There were not many responses to this question but some respondents did identify barriers:

- Lack of consultation or prior notice of an intention to apply for use of the facility. Registrars commented on the time taken for equipment to be checked before the facility can be used. There also must be an 'independent person' available to act as a court officer to the CCTV room, which requires extra staffing.
- Barristers and judges/magistrates more often than not prefer adult complainants to be in court in order to see their reactions and body language.
- 'There is a reluctance by prosecutors and barristers to use the facilities.'
- Defence counsel at times argue that the facility should not be used; that it is more difficult to use—'they like to intimidate witnesses'.
- 'Nothing specific, but the general attitude that I have found is that it is seen as important that the victim face the accused and give evidence in court. It is felt that the CCTV...is too impersonal, and doesn't allow body language to be seen by jury'.

There were other comments made by registrars that indicated a more positive attitude by legal personnel towards the use of CCTV, particularly in relation to the use of the facilities by children.

- 'CCTV is a widely accepted practice and very rarely is its use objected to';
- 'Magistrate[s] would be inclined to enable witness use of CCTV.'
- 'In my experience, any young person who desires to give evidence via CCTV is accommodated without question.'
- '[The] facility is more likely to be used in the case of child complainants'.

Appendix 3

Police Training

The following training is currently being provided by Victoria Police and includes material relevant to sexual offences.⁸⁵³ Training is provided for:

- constables;
- Sexual Offence and Child Abuse (SOCA) Unit members;
- Field Investigators; and
- members of Criminal Investigation Units and other detectives.

Probationary Constables' Course

Police Academy instructors conduct some training on sexual assault. Two periods of training are allocated covering the Code of Practice for the Investigation of Sexual Assault and other general considerations relevant to how police respond to reports of sexual assault.

Constables' Course

Sexual assault training is provided by the staff from the SOCA Co-ordination Unit and is combined with the Family Violence training. One day in total is dedicated to both topics. Sexual assault training covers basic considerations when responding to victims of sexual assault, as well as outlining the content of the Code of Practice for the Investigation of Sexual Assault. Family violence training comprises theory and a 55-minute presentation by representatives from the group No to Violence regarding police action at a family violence incident and the impact that this action, or inaction, has on the alleged offender. Theory is followed by group work discussing police action in the context of particular scenarios.

⁸⁵³ Commission researchers observed some of the training provided to both SOCA Unit and CIU members. The information presented in this appendix was provided by the Sexual Offence and Child Abuse Unit Co-ordination Office.

Sexual Offences and Child Abuse Unit Course

This course is conducted by the SOCA Unit Co-ordination Office and is generally available to SOCA unit members and some Criminal Investigation Unit members and general duty members, with priority given to SOCA unit members. The course covers all aspects of dealing with victims of sexual and physical assault, the Code of Practice, relevant legislation, protocols, interview techniques and some limited investigative techniques. Representatives from Centres Against Sexual Assault and the Department of Human Services are also involved in presenting relevant sessions.

The SOCA Unit course also incorporates the video and taping of evidence (VATE) course, which is a mandatory requirement for operational SOCA unit members to attend.

Field Investigators' Course

No training is provided in this course on sexual assault legislation or investigations.

Detective Training School

Staff at the Crime Courses Unit provide all training in relation to sexual assault investigations. Staff are given a time allocation of five and a half days. Areas covered are relevant legislation, abduction legislation, forensic procedures legislation, Sexual Crime Squad case scenario and criteria, case management of sexual assault investigations, as well as a session from a criminal psychologist. A victim/survivor also speaks to the detectives about her experience of the assault and of the police response. A separate full day is set aside for a practical scenario which covers the investigation process and the roles of different police members in this process. There is currently no session dedicated to the Code of Practice.

Sexual Assault Seminar

The Sexual Crime Squad conducts a sexual assault seminar which is available to CIU and SOCAU members who have been working in the field for approximately three to five years. This course takes five days and covers all aspects of sexual assault investigation. It is conducted once every two years. Some consideration is currently being given to increasing the course due to the high demand.

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