



Victorian Law Reform Commission

Sexual Offences Final Report

Victorian Law Reform Commission

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Preface

This Final Report is the culmination of the Victorian Law Reform Commission's reference on sexual offences.

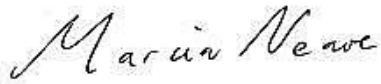
The Report contains 202 recommendations on all aspects of the criminal justice process. The recommendations in the Report are based on research on how current laws and procedures are working and on extensive consultation with complainants, organisations which provide counselling and support to victims of sexual offences, police, prosecution and defence lawyers, judges, magistrates and many others. Our recommendations are intended to make the criminal justice system more responsive to complainants in sexual offences cases, whilst at the same time ensuring a fair trial for those accused of these offences.

The Report is the product of the work of many people. In the Discussion Paper and Interim Report published previously I recognised the significant contributions of Research and Policy Officers. Dr Sara Charlesworth, Stephen Farrow, Ailsa Goodwin and Trish Luker contributed to the Discussion Paper and Sangeetha Chandrashekar, Nicky Friedman and Dr Melanie Heenan worked on the Interim Report. Nicky Friedman, Angela Langan, Hilary Little and I had responsibility for researching and writing this Final Report. Nicky Friedman contributed significantly to research and writing of Chapters 3, 5 and 10, Angela Langan to Chapters 3, 4, 6 and 9 and Hilary Little was responsible for empirical research and drafted Chapters 2, 7 and 8. I am grateful for the hard work and commitment of the whole research team. Members of the Sexual Offences Division, Justice David Harper and Judge Jennifer Coate and Professor Felicity Hampel SC worked tirelessly on the reference.

The Chief Executive Officer, Padma Raman, oversaw reference planning and co-ordinated many of the consultations. Simone Marrocco assisted with the organisation of the consultations. Several people made very significant contributions to formatting and production, including Kathy Karlevski, the Operations Manager, Lorraine Pitman, my Personal Assistant and Julie Bransden, the Commission's Librarian. The Report was edited by Valina and Tony Rainer.

Many other people provided information and contributed to the Commission's policy work, including the members of the Advisory Committee for the reference (named below), and the lawyers, judges and other experts who participated in consultations on particular legal issues.

I am grateful to the Executive Committee of the County Court and the County Court judges who agreed to have their jury directions analysed and to magistrates and judges who commented on proposed procedural changes. The Commission could not function effectively without the voluntary contributions of those who serve on our Advisory Committees and provide expert advice, who are listed in our Acknowledgements below. I am deeply grateful for their advice and assistance. The recommendations in this Report are of course the responsibility of the whole Commission.

A handwritten signature in cursive script that reads "Marcia Neave". The ink is dark and the signature is fluid, with a large initial 'M' and a long, sweeping 'e' at the end.

Professor Marcia Neave

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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
ABCA	Alberta Court of Appeal (Canada)
ABS	Australian Bureau of Statistics
AC	Appeal Cases (United Kingdom)
ACT	Australian Capital Territory
AJ	Alberta Judgments (Canada)
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
BCCA	British Columbia Court of Appeal (Canada)
CASA	Centre Against Sexual Assault
CCTV	closed circuit television
CCU	Crisis Care Unit
CIU	Criminal Investigations Unit
CJ	Chief Justice
CJ at CL	Chief Justice at Common Law
cl	clause
CLR	Commonwealth Law Reports
CR	Criminal Reports (Canada)

Cr App R	Criminal Appeal Reports
Cth	Commonwealth
CWP	Child Witness Project
CWS	Child Witness Service
DDLS	Disability Discrimination Legal Service
DHS	Department of Human Services
DNA	Deoxyribonucleic acid
DPP	Director of Public Prosecutions
ER	English Reports
et al	and others
EuroWRC	The White Ribbon Campaign in Europe
FMO	Forensic Medical Officer
e.g.	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
MAPPS	Male Adolescent Program for Positive Sexuality
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
OJ	Ontario Judgments (Canada)
OPA	Office of the Public Advocate
OPP	Office of Public Prosecutions
para	paragraph
PEIJ	Prince Edward Island Judgments (Canada)
PRISM	Prosecution Recording and Information Systems Management
Qd R	Queensland Reports
Qld	Queensland
R	The Queen (as in <i>R v Case Name</i>) or The Reports (UK) 1893–1895
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

SAIS	Sexual Assault Investigation Section
SASR	South Australian State Reports
sch	schedule
SCR	Supreme Court Reports (Canada)
SECASA	South East Centre Against Sexual Assault
SIU	Sexual Investigation Unit
SOCA(U)	Sex Offences and Child Abuse (Unit)
SPSS	Statistical Package for Social Sciences
Tas	Tasmania
UBC L Rev	University of British Columbia Law Review
UK	United Kingdom
v	versus (said as ‘and’)
VATE	video and audio taped evidence
VCCAV	Victorian Community Council Against Violence
VIFM	Victorian Institute of Forensic Medicine
VMC	Victorian Multicultural Commission
vol	volume
VR	Victorian Reports
VSC	Supreme Court of Victoria
WA	Western Australia
WAS	Witness Assistance Service
WLR	Weekly Law
WLR	Weekly Law Reports
YJ	Yukon Judgments (Canada)



TERMINOLOGY

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

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

Accused/defendant: We use the term 'defendant' when describing the position of a person charged with criminal offences up to and including committal proceedings and 'accused' following committal and during trial until conviction.

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

Cognitive impairment/impaired mental functioning: We use the term 'impaired mental functioning' when referring to the current legislation, as that is the terminology contained in the legislation. We recommend a change to the legislation so that the term 'cognitive impairment' is used instead, as this is regarded as a more accurate description by disability groups and is widely used and accepted. We use the term 'cognitive impairment' throughout the Report whenever we are not referring to the current legislation.

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 increasingly using 'culturally and linguistically diverse (CALD)' to refer to immigrant and refugee communities. However, we have chosen to use NESB to maintain consistency with the previous Sexual Offences reports and because participants in some consultations expressed a preference for this term.

Executive Summary

THE BACKGROUND TO THIS INQUIRY

In 2001 the Attorney-General, the Honourable Rob Hulls, asked the Victorian Law Reform Commission to consider whether the criminal justice system is sufficiently responsive to the needs of complainants in sexual offence cases and to make recommendations for any necessary changes. This Final Report is the culmination of three years work, which has included both research on the way current laws and procedures work in practice and extensive consultations.

Throughout the course of our inquiry we have spoken with victims of sexual assault who have decided not to report offences to the police and with complainants who have participated in the legal process. We have also consulted non-government organisations which support sexual assault victims, members of Victoria Police, defence and prosecution lawyers, magistrates and judges and many other experts. We have made particular efforts to understand the difficulties experienced by people who face significant barriers in participating in the criminal justice process, including children, Indigenous people, people with cognitive impairments and people from non-English speaking backgrounds.

The Commission published an Interim Report in 2003 which made 107 preliminary recommendations covering the entire criminal justice process, from disclosure and reporting, through to prosecution, committal and trial. Fifty-five submissions were received in response to these preliminary recommendations. The Final Report takes account of 55 submissions made in response to the Interim Report as well as further consultations conducted by the Commission to test the workability of our preliminary recommendations.

The 202 recommendations in this Report respond to the widely held perception that the criminal justice system does not always deal fairly with complainants in sexual offence cases. People who allege that they have been sexually assaulted are the least likely of all crime victims to report the offence to the police. Only about one in six reports to police of rape and less than one in seven reports of incest or sexual penetration of a child result in prosecution. Conviction rates for rape are substantially lower than for other offences and have fallen since the late 1980s.

Concerns about the fairness of the criminal justice process contribute to substantial under-reporting of sexual offences and may discourage people from giving evidence against alleged offenders at committal and trial.

Prosecution for a sexual offence has very serious consequences for the accused, including life-long stigma and the possibility of a lengthy prison sentence if convicted. It is vital to safeguard the presumption of innocence and ensure that the criminal justice system treats people accused of offences fairly. However the Commission does not accept the argument that this is the sole purpose of the criminal justice system. The community has an interest in encouraging people to report sexual crimes and in apprehending and dealing with those who commit them.

The recommendations in this Report are intended to achieve the twin goals of providing decent treatment for complainants, who perform a public service when they report offences and give evidence in court, and ensuring a fair trial for people accused of sexual offences. During our consultations some lawyers expressed concerns that our recommendations would increase the chance that people would be wrongly convicted of offences. We disagree with this view. Most of the changes proposed are already in place in other parts of Australia and there is no evidence that they have caused injustice to those charged with offences.

CHAPTER 2—IMPROVING POLICE RESPONSES

Because police are the ‘gate-keepers’ to the criminal justice system, the way they respond to people who report sexual assault is vitally important. Throughout this inquiry the Victorian Law Reform Commission has worked closely with senior members of Victoria Police, who have shown a strong commitment to improving police responses. Police processes are governed by the Victoria Police Code of Practice for the Investigation of Sexual Assault Cases, which is currently being reviewed. Victoria Police is a joint convenor, with the Office of Women’s Policy, of the Statewide Steering Committee to Reduce Sexual Assault.

As part of its work, the Commission convened focus groups with several Centres Against Sexual Assault (CASAs) and with Victoria Police members to discuss attitudes to complainants and identify problems in current policing processes which create a need for reform.

Our focus group research showed that there was still room to improve police attitudes and understanding about sexual assault. In focus groups we were told that some police are influenced by common myths surrounding sexual assault and the behaviour of victims, although other police participants showed an awareness

of the difficulties faced by complainants and the particular barriers to reporting sexual assault that exist for people with a cognitive impairment and people from NESB and Indigenous communities. Both CASA focus groups and police members of Sexual Offence and Child Abuse Units (SOCAUs) were critical of the attitudes and approach of some Criminal Investigation Unit (CIU) detectives in communicating with complainants.

CASA focus groups reported a lack of consistency in police decisions about whether or not to authorise prosecutions of sexual offences. Similar issues were also identified in police focus groups.

Major recommendations for the Victoria Police cover:

- enhancing training for general duties police, members of Sexual Offences and Child Abuse Units and Criminal Investigation Units to ensure a more sensitive and supportive response to people who report they have been sexually assaulted;
- working with NESB and Indigenous communities to develop training packages that are responsive to the needs of complainants from these communities;
- ensuring that police comply with Code of Practice requirements which seek to provide continuity of care to people who report sexual assault and make sure they have access to counselling services;
- providing information about police processes to complainants in a range of languages;
- undertaking research to gain a better understanding of the reasons why there has been an apparent increase in the numbers of people who make complaints and then withdraw them;
- giving written reasons to complainants when a decision is made not to continue with an investigation or not to lay charges;
- reviewing the process of authorising cases for prosecution to ensure decisions are consistent and transparent;
- regularly evaluating decision-making about prosecutions;
- attaching one or more detectives to existing SOCA Units to work exclusively on investigating sexual offences reported to SOCA and preparing briefs of evidence. These Units (known as Sexual Assault Investigation Sections) will shortly be piloted by Victoria Police; and
- improving police data collection on sexual assault.

The Commission was told that in country areas it was often impossible to satisfy the Code of Practice requirement that people reporting a sexual assault are medically examined within two hours. Delay in medical examination can be distressing for victims and also hinder police investigations. We recommend that the government should consider allocating additional funding to the Victorian Institute of Forensic Medicine to ensure that appropriate numbers of forensic medical officers can be recruited and trained, particularly in regional areas reporting chronic shortages.

CHAPTER 3—INCREASING THE RESPONSIVENESS OF THE CRIMINAL JUSTICE SYSTEM

The changes to procedure and evidence laws which are recommended in this Report are unlikely to be effective unless they are also accompanied by changes to the culture of the criminal justice system. This Chapter makes recommendations to support systemic changes to the prosecution, committal and trial processes, including:

- building on existing programs for prosecutor training and judicial education to enhance prosecutors' and judges' expertise in dealing with sexual offence cases;
- changing the committal process to reduce delays and to ensure that children and people with a cognitive impairment do not have to face cross-examination at both committal and trial; and
- moving towards a more specialised approach for managing sexual offence cases involving children or people with a cognitive impairment, to facilitate a faster and more sensitive response to the needs of these complainants.

We explain these recommendations below.

TRAINING FOR JUDGES AND LAWYERS

The Interim Report's preliminary recommendations on prosecutor training and judicial education received significant support in submissions. Following publication of the Interim Report the Judicial College of Victoria held seminars for judges on issues arising in child sexual assault cases and jury warnings in sexual offence cases. The Office of Public Prosecutions (OPP) provides training for prosecutors handling sexual offence cases. The Commission recommends ongoing training on sexual assault for judges, defence lawyers and prosecutors. We also

recommend that barristers from the private profession should only be briefed by the OPP to prosecute sexual offence cases if they have participated in training.

CHANGES TO THE COMMITTAL PROCESS

A committal hearing is a preliminary examination of the evidence by a magistrate to determine whether the evidence is of sufficient weight to support a conviction. If the magistrate finds this is the case, the defendant is committed to trial in the County Court.

During our consultations many concerns were expressed about the effect of committals on complainants in sexual offence cases. Complainants are often cross-examined at both committal and trial. Children and people with a cognitive impairment found this particularly difficult. We were also told that defence counsel often question complainants more rigorously at committal where no jury is present, than at the trial. At trial the complainant may be cross-examined more sensitively by the defence, so that the accused does not lose the jury's sympathy. The committal process also lengthens the period during which complainants must be involved in the criminal justice process, which creates particular difficulties for children, who cannot put events behind them until the criminal justice process is completed.

The Commission believes that changes to the committal process are necessary to reduce delays and protect children and people with a cognitive impairment from being cross-examined twice. The Report examines a number of ways of dealing with this issue and recommends prohibiting cross-examination of children and people with cognitive impairment at committal hearings for sexual offences. These changes are combined with provision for pre-recording of the evidence of children and people with a cognitive impairment, which is discussed below.

SPECIALISED HANDLING OF SEXUAL OFFENCE CASES

In the Interim Report we asked whether a specialised approach could improve how the criminal justice system deals with sexual offence cases. We suggested that specialisation would acknowledge the complexities of sexual offence cases. It could create an environment in which lawyers, judges and court staff could gain a better understanding of and be more responsive to complainants' needs, including the need for case management processes which would deal with these offences quickly. Overseas experience has shown that specialisation may bring about cultural changes in the way the criminal justice system responds to complainants.

Two main forms of specialisation were discussed: a new stand-alone court with jurisdiction to hear both summary and indictable offences, and the establishment of specialist lists in both the Magistrates' Court and the County Court. The first model is currently being piloted in New South Wales, where initial evaluations are favourable. Under the latter model, judicial officers within the Magistrates' Court and the County Court who expressed an interest would be assigned to a specialist sexual offences list for a defined period.

The majority of submissions supported specialisation, but did not express a clear view about the type of specialist approach which would be most appropriate. The Magistrates' Court favours the creation of a specialist sexual offences list and piloted a specialist list for committals in child sexual offence cases in January 2004. In the County Court at present there seems to be little support for a model of specialisation under which judges who express an interest are assigned to a specialist sexual offences list for a period (say three months). The Court's view is that all County Court judges have the expertise to deal with these cases and that most judges would be reluctant to hear one type of matter exclusively for a defined time.

Based on our consultations with the courts, we recommend the establishment of a specialist list in the Magistrates' Court for summary offences and committals in sexual offence matters involving child complainants and complainants with a cognitive impairment. For the County Court, we recommend the assignment of a designated judge to list and manage all sexual assault cases involving child complainants and complainants with a cognitive impairment. Given concerns about specialisation expressed by the County Court we do not recommend that only designated judges should hear sexual offence cases.

CHAPTER 4—MAKING IT EASIER FOR COMPLAINANTS TO GIVE EVIDENCE

The Commission has identified a number of features of sexual offence cases which make committals and trials particularly distressing for many complainants, including:

- the sense of marginalisation and powerlessness experienced by many complainants, because their status in the criminal proceeding is only that of witnesses, and because they have little control over the process;
- the long and frustrating delays that frequently occur; and

- the traumatic effect of unnecessarily intimidating or confusing cross-examination.

Cross-examination of witnesses is an essential feature of an adversarial criminal justice system. However complainants often find it very confronting to see their alleged attacker and the resulting trauma may muddle or distort their testimony. The focus on the complainant's behaviour and credibility during cross-examination can also cause significant distress.

Although legislation requires the permission of the judge before a complainant can be cross-examined about their prior sexual activities, we found that such cross-examination often occurs. Sometimes this is done without any application for permission to cross-examine the complainant on this issue, despite the current legislative requirement that such permission is obtained.

Legislation also places restrictions on admission of evidence about what a complainant told a counsellor. However these restrictions do not prevent a defence lawyer from subpoenaing a person to produce counselling notes, so that the defence knows what is in them, even if they are not used as evidence in the case. Complainants may be reluctant to seek counselling after they have been sexually assaulted because they fear that the counsellor will be required to give evidence or produce notes of what the complainant said in counselling sessions.

RECOMMENDATIONS TO PROTECT COMPLAINANTS DURING CROSS-EXAMINATION

The Report makes a number of recommendations for changes to law and procedure to make it easier for complainants to give evidence and to prevent inappropriate admission of evidence of prior sexual activity, or confidential counselling material. These include:

- providing for mandatory use of closed circuit television, so that complainants in sexual offence cases do not have to give evidence in the presence of the jury and the accused in the court room, except where the trial judge is satisfied they want to give evidence in this way;
- strengthening existing provisions which require a judge to give permission before evidence can be admitted of a complainant's prior sexual activities. We recommend that the legislation should be amended to make it clear that these restrictions apply to both consensual and non-consensual activity (for example sexual abuse of the complainant when she was a child). Evidence of other sexual activities should only be admitted if it is relevant to a fact in issue in the committal or trial and if it is in the interests of

justice. In deciding whether this is the case the court must consider a number of matters, including the distress, humiliation and embarrassment that the complainant may suffer as the result of the admission of the evidence and the accused's right to defend himself against the charge;

- placing restrictions on subpoenaing counsellors to produce counselling notes and imposing more stringent conditions on the admission in evidence of confidential counselling information;
- ensuring that adequate support is provided for adult complainants in sexual offence cases.

We also recommend that the accused should be prohibited from personally cross-examining complainants and other vulnerable witnesses. This recommendation is discussed in more detail below. Many of the recommendations listed above are already in force or have been proposed in other States.

PROHIBITING CROSS-EXAMINATION BY UNREPRESENTED ACCUSED

Under the current law, people may represent themselves at trial and may therefore cross-examine the complainant personally. Although this does not happen often, it has the potential to cause complainants great distress. Restrictions against this happening already exist in most Australian jurisdictions, as well as in England, Scotland and New Zealand. In the Interim Report we recommended the accused be prohibited from personally cross-examining the complainant and other 'protected witnesses', including children and people with cognitive impairment. Instead, the accused would be invited to obtain legal representation. We proposed that if they refused, the court should direct Victoria Legal Aid to appoint a lawyer for the cross-examination. We suggested the lawyer should act as a friend of the court, rather than the accused's representative.

Lawyers' groups and some judges were strongly opposed to the recommendation, arguing that the accused has a fundamental right to conduct his own defence. Questions were also raised about practical problems that may arise if the lawyer was acting as a friend of the court. However, the majority of submissions supported our recommendations. The Commission believes the accused's right to a fair trial can be protected without allowing him to personally cross-examine the complainant.

The Commission recommends the court-appointed lawyer should act as the legal representative of the accused when they cross-examine the complainant. Lawyers will act on the instructions of the accused and owe the same duties as if the accused had engaged them. If the accused declines to instruct the court-appointed

lawyer, the lawyer will have an obligation to act in the best interests of the client in cross-examining the complainant. In this situation, any inadequacy in the cross-examination will not be unfair to the accused, as it will be caused by the accused's failure to give instructions.

MODIFICATIONS TO THE HEARSAY RULE

Chapter 4 also recommends changes to the hearsay rule. This rule generally prevents a jury from hearing evidence from the complainant about what he or she said out of court about an offence. It also prevents other people giving evidence about what the complainant told them. An exception to the hearsay rule allows the jury to hear evidence that the complainant told someone about a sexual assault if this occurred immediately after the assault occurred (the recent complaint principle). However the jury can only treat this evidence as supporting the complainant's credibility, and not as evidence of the truth of what the complainant said.

The hearsay rule sometimes excludes evidence likely to be reliable and helpful to the jury. The recent complaint exception which allows hearsay evidence to be admitted for limited purposes is based on the incorrect assumption that people who have been sexually assaulted typically report this immediately. If a person tells someone about a sexual offence some time after it allegedly occurred this evidence will not usually be admissible.

The Australian Law Reform Commission published a report on evidence in 1987 that recommended retaining the hearsay rule but legislating to permit the admission of some first-hand hearsay in criminal proceedings. The Commonwealth, NSW, Tasmania and the ACT have enacted the Uniform Evidence Act based on those recommendations. Other States have enacted child-specific hearsay exceptions. Victoria is the only State that has neither. We considered a range of ways in which the hearsay rule could be modified in sexual offence cases, and have proposed reforms based on the Uniform Evidence Act.

The major recommendations are:

- hearsay evidence that can be admitted under the current rules will be able to be used as evidence of the truth of the statement made;
- where the person who made the statement is available to give evidence, hearsay evidence of the statement will be able to be given by the person who made it, or by someone who heard them making the statement. For this to apply the facts must have been fresh in the memory of the person when they made the statement;

- where the person making the statement is not available to give evidence, the evidence will be admissible if the statement was made at or shortly after the alleged facts occurred or made in circumstances which make it highly probable it is reliable.

Safeguards for the accused have been included in our recommendations:

- The court can exclude hearsay evidence if it would be unfair to the accused to admit it.
- The jury must be told that hearsay evidence may not be as reliable as direct evidence.

CHAPTER 5—IMPROVING THE SYSTEM FOR CHILD COMPLAINANTS

Child complainants in sexual offence cases face significant difficulties in reporting offences and giving evidence.

- At the time the acts occurred they may not have understood that the behaviour was an offence and may have been pressured by the accused to keep it secret.
- Because abuse of children may have occurred over a long period, complainants may find it difficult to recall details of particular incidents of abuse; this problem is exacerbated if the complainant has to give evidence about events which occurred some time ago.
- They will often have been assaulted by family members and may be reluctant to take action that will result in the break up of their family or prosecution of the alleged offender.
- They may not understand why they have to tell their story many different times to different people and are likely to find the language used in court confusing.
- They may find cross-examination particularly stressful.
- Delays in court processes may make it difficult for them to recall details of events.
- Lengthy court processes may inhibit recovery from traumatic events by preventing the child from putting the experience behind them.

These problems are compounded for children with cognitive impairment and NESB and Indigenous children. They contribute to low reporting rates for child sexual abuse and few prosecutions for such offences. People accused of sexual offences against children are entitled to the presumption of innocence, and must

receive a fair trial. However, it is also important to ensure child complainants are treated fairly and are able to give their evidence without feeling they are being victimised. It is also in the public interest that people guilty of offences are convicted and prevented from assaulting other children.

The recommendations made by the Commission to improve the situation for child complainants include:

- establishing an independent specialist child witness support service along the lines of the service which operates successfully in Western Australia. If this is not possible, we recommend that the Office of Public Prosecutions receives dedicated funding for the existing Witness Assistance Service to enable it to service the particular needs of child witnesses;
- changing the rules determining competence to give evidence, to make it easier for children to give sworn and unsworn evidence;
- allowing evidence-in-chief and cross-examination of child witnesses and witnesses with a cognitive impairment to be pre-recorded in the presence of the trial judge, the accused and prosecution and defence counsel;
- allowing admission of the hearsay evidence of a child if the child is under 16, the child is available to give evidence and the court is of the view that the evidence has sufficient probative value to justify it being admitted; and
- imposing a duty on the trial judge to prevent children being subjected to misleading, confusing intimidating or harassing cross-examination.

The details of these recommendations are set out below.

CHANGES TO COMPETENCE REQUIREMENTS

Sexual offences against children usually occur in secret, making the child's evidence crucial in proving that an offence has been committed. Under Victorian law children aged 14 or over are assumed to be competent to give sworn evidence. Children aged under 14 are questioned and assessed by the judge or magistrate as to their understanding of the oath. If they are assessed as incompetent, they may give unsworn evidence but this is regarded by the law as having less weight. The Commission believes current tests for admission of children's evidence may prevent some people accused of sexual offences from being prosecuted.

We recommend legislative changes to:

- create a presumption that all witnesses, regardless of age, are competent to give sworn evidence (a similar provision is contained in the Uniform Evidence Act);

- change the competency test to allow child witnesses who can understand questions and answer them, and who understand the obligation to tell the truth, to give evidence on oath;
- change the competency test to allow a child to give unsworn evidence if they can understand questions put to them and give comprehensible answers to those questions; and
- allow the court to seek expert evidence as to the child's competence to give evidence.

PRE-RECORDING OF CHILDREN'S EVIDENCE

Current Victorian legislation allows police to video-record or audio-record interviews with children and for the tape of the evidence (VATE) to be admitted as the child's evidence-in-chief at trial. Despite these provisions VATEs are seldom used in evidence. We make recommendations to improve the VATE process.

The prosecutor can apply to the court for the child to give their evidence by CCTV. Applications for use of CCTV are usually granted by the court. However prosecutors sometimes do not apply for the child to testify via CCTV because they believe the child is capable of giving evidence in court and that the jury may be more likely to convict if this occurs. Under our earlier recommendation (see Chapter 4) all complainants in sexual offence cases will have the right to give evidence using CCTV.

Although the above changes will help child complainants, the Commission believes more needs to be done. Under the current system there may be a considerable delay between the time the child reports the offence and when he or she gives evidence. This delay could be reduced by pre-recording both the child's evidence-in-chief and their cross-examination. This process has been operating successfully in Western Australia for almost a decade and has recently been introduced in Queensland.

We recommend pre-recording the child's evidence-in-chief and cross-examination at a preliminary hearing in the presence of the prosecution, defence counsel and the judge as soon as possible after committal. The child would give their evidence by CCTV. The recording would then be played at the trial. If there was a successful appeal and a re-trial, the tape could be played again, rather than the child having to be recalled to give evidence. We also recommend a similar process be available for witnesses with cognitive impairment.

This process will reduce delays for children in giving evidence, and allow them to give evidence at a time when they are more likely to recall the events on which the charge is based. It will help children to recover from traumatic events more quickly and allow them to move on with their lives.

ALLOWING ADMISSION OF CHILDREN'S HEARSAY EVIDENCE

Children who have been abused rarely report it immediately. The hearsay rule prevents the prosecution from calling evidence from someone other than the child, such as their mother or teacher, to give evidence that the child reported abuse to them, even though this will often be the best evidence of an alleged assault. The rule against hearsay also prevents the child from giving evidence of what they told someone else about the assault.

There are currently two situations in which the court will allow evidence to be given about the child's prior consistent statements: to rebut allegations the child is dishonest or mistaken, and as evidence of 'recent complaint'. The Commission believes further amendment to the hearsay rule is required. A delay before trial is particularly disadvantageous for children, as their memory of the event will fade. Children also find it difficult to continually repeat their story. As a result their evidence may not seem believable by the time they give it at trial. We recommend that hearsay statements of children under 16 should be admissible to prove the facts in issue if the child is available to give evidence and if the court believes the evidence is of sufficient probative value to justify its admission. This recommendation applies in addition to recommendations about hearsay in Chapter 4.

PROTECTING CHILDREN FROM INAPPROPRIATE CROSS-EXAMINATION

Cross-examination involving the use of complex language, and leading and repetitive questioning, is particularly difficult for children. Complex concepts, questions using double negatives, or a confusing sequence of questions are inappropriate for children. Judicial officers have the power to control the trial process to ensure questions asked of witnesses are fair, comprehensible and appropriate. Victorian legislation also requires the court to disallow indecent or scandalous questions and those intended to insult or annoy. These powers seem to be used sparingly by judges.

The Commission believes the current law is not adequate to protect children. Our recommendation is similar to the approach recommended by the Queensland Law

Reform Commission. Our recommendations seek to improve children's cross-examination by:

- imposing a duty on the court to ensure questions asked of children aged under 18 are not misleading, confusing or phrased inappropriately;
- requiring the court to take the witnesses' age, education and any disabilities into account when deciding whether to disallow a question;
- supporting the preparation of a guide to assist judges in dealing with child witnesses (the Australian Institute of Judicial Administration (AIJA) is currently considering this project);
- educating defence lawyers, prosecutors and the judiciary about effective and fair ways of questioning child witnesses.

CHAPTER 6—IMPROVING THE SYSTEM FOR COMPLAINANTS WHO HAVE A COGNITIVE IMPAIRMENT

People who have a cognitive impairment have an increased vulnerability to sexual assault and abuse because of their daily dependence on others for assistance. They also face additional barriers when accessing the criminal justice system. They may not understand that what has happened to them is a crime, may face misconceptions about their credibility and memory when reporting an offence, and may find the process of questioning difficult, both at the reporting stage and in court.

Chapter 2 of this Report makes recommendations for improving police responses. These recommendations will assist complainants with a cognitive impairment. Further recommendations in this Chapter directed at improving police responses include:

- developing guidelines for the identification of cognitive impairment in consultation with key agencies, and ensuring all officers are familiar with the guidelines;
- requiring investigating officers to use the VATE process to take a complainant's statement if they are unsure whether a person has a cognitive impairment; and
- providing training to police on appropriate techniques for communicating with people with a cognitive impairment.

It is also recommended that the Office of the Public Advocate (OPA) should liaise with CASA to develop training for Independent Third Persons (ITPs) who support people with a cognitive impairment during police interviews.

Chapters 3 and 5 contain recommendations to improve the court process for complainants with a cognitive impairment in relation to committals, pre-recording, use of VATE and CCTV, and specialist lists in the Magistrates' and County Courts. We also believe it is necessary to impose a duty on the court to ensure appropriate questioning of people with cognitive impairment, and recommend the *Evidence Act 1958* be amended to impose such a duty. We recommend training for defence lawyers, prosecutors and judicial officers about the disadvantages experienced by people with cognitive impairment and effective communication techniques.

It is clear that people with a cognitive impairment face significant difficulties in the criminal justice process, whether they are complainants, witnesses or accused. Some of the issues raised in consultations were beyond the scope of this inquiry. The Commission suggests that the Attorney-General consider asking the Commission to review how people with cognitive impairment are treated in the criminal justice system as complainants, accused and witnesses. In the meantime, we also recommend training for CASA in identifying disability and working with people with cognitive impairment.

CHANGING SEXUAL OFFENCES WHICH PROTECT PEOPLE WITH A COGNITIVE IMPAIRMENT FROM SEXUAL EXPLOITATION

Section 50 of the *Crimes Act 1958* defines the term 'impaired mental functioning' for the purposes of sections 51 and 52, which prohibit certain people from being involved in sexual activities with people with a cognitive impairment. Some submissions raised concerns about this term, suggesting use of the word 'mental' stigmatises people with disabilities. We recommend this term be changed to 'cognitive impairment'.

A number of submissions also wanted the definition to be changed to refer to a person's capacity to make informed judgments about sexual activities. At present the definition refers to particular mental conditions as examples of 'impaired mental functioning', though the definition is not restricted to these conditions. The Commission has decided against recommending a definition based on capacity. As sections 51 and 52 create serious offences, it is important their application is clear. A redefinition could make these offences more difficult to prosecute as it would require a range of experts to be called to testify about

whether the complainant had the capacity to choose to engage in sexual activity with people in positions of power over him or her. The number of prosecutions under these sections of the Act is very small compared to the estimated rates of sexual abuse. We therefore do not support adopting a definition that would make it harder to prosecute those who sexually exploit people with a cognitive impairment.

We recommend section 51 be amended to make it an offence, for a person who provides medical or therapeutic services *relating to the cognitive impairment* to participate in sexual activity with the complainant. The intention is to make it unnecessary for the prosecution to prove the accused had knowledge of the impairment, where the services relate to that impairment. The defence of honest and reasonable belief the person did not have a cognitive impairment will apply to cover the rare situation where a provider of services was unaware of the impairment. We also propose a new offence to cover the situation where the services do not relate to the cognitive impairment. In that case, the service provider would only be guilty of the offence if they were aware of the impairment.

Section 52 currently prohibits sexual acts between people with cognitive impairment and workers in residential facilities. We recommend section 52 be extended to cover any person working at a facility or in a program which provides services to people with cognitive impairment. As is the case under the current law, it is not proposed that the defence of consent should apply to these offences, since they are designed to protect people with impaired mental functioning against exploitation. We also recommend that section 35 of the *Crimes Act 1958* should be amended to ensure that same-sex partners of people with cognitive impairment cannot be prosecuted for these offences.

CHAPTER 7—JUDGES' DIRECTIONS TO JURIES

This Chapter evaluates and recommends changes to the laws that determine how judges direct juries in sexual offence cases.

In a sexual offence trial, the judge is responsible for summarising the evidence and directing the jury about the law, and the jury is responsible for deciding the guilt or innocence of the accused. Historically, jury warnings in sexual offence cases existed solely to protect accused persons against unfair convictions. In more recent times however, legislation has been enacted to counter myths about sexual assault and to ensure that complainants, as well as accused, are treated fairly. This chapter evaluates the effectiveness of the legislative changes intended to produce this 'balance of fairness'.

The Commission undertook a qualitative empirical study in which it examined 24 judges' charges in sexual offence trials that took place between 2000 and 2002 in the County Court of Victoria. The aims of the study were to determine:

- how trial judges are applying the legislative provisions of the *Crimes Act 1958* which govern jury directions about consent, belief in consent and delay in reporting;
- how judges approach the common law rules relating to delay in the reporting of sexual offences (*Longman* and *Crofts* warnings); and
- the clarity and length of judges' charges.

As a result of our findings, further research and consultations, the Commission makes a number of recommendations about jury directions in sexual offence trials, including:

- amending the mandatory consent direction contained in section 37 of the *Crimes Act 1958* to say that the fact that a person did not say or do anything to indicate free agreement to a sexual act is evidence that the act took place without that person's free agreement;
- amending section 61 of the *Crimes Act 1958* to prevent a judge from warning the jury that it is dangerous or unsafe to convict an accused unless the judge is satisfied that the accused has in fact suffered some specific forensic disadvantage as a result of the complainant's delay in reporting, or that the accused has in fact been prejudiced as a result of other circumstances in the case. Section 61 should be further amended to include a provision preventing a judge from stating or suggesting in any way to the jury that the credibility of a complainant is affected by a delay in reporting, unless the judge is satisfied that there is sufficient evidence to justify such a warning; and
- amending the *Evidence Act 1958* to clarify that in sexual offence cases, expert evidence about sexual assault is admissible.

CONSENT DIRECTIONS

Section 36 of the *Crimes Act 1958* defines consent as 'free agreement'. If consent is in issue in a sexual offence trial, section 37 requires a judge 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 the person did not freely agree. The Commission recommends that the word 'normally' be removed from section 37 to make it clear that the failure of the complainant to say or do anything is

sufficient of itself to show lack of consent. This will reinforce the communicative model of consent.

DELAY DIRECTIONS (SECTION 61, LONGMAN AND CROFTS WARNINGS)

Section 61(1)(a) of the *Crimes Act 1958* provides that the judge must not warn or suggest to the jury that the law regard complainants in sexual offence cases as an unreliable class of witness. If delay in reporting the offence is raised as an issue in the trial, the judge must tell the jury that there may be good reasons for such delay. These amendments were designed to reflect the reality that many sexual offence victims delay reporting the offence. However, the High Court has said that the existence of such provisions does not prevent trial judge from commenting that a delay in reporting a sexual assault could affect the credibility of the complainant (a *Crofts* warning) and does not remove the need to warn juries in certain circumstances about the dangers of convicting of accused persons on the uncorroborated testimony of the complainant (a *Longman* warning).

The Commission is concerned that the effectiveness of section 61 is being undermined by these common law warnings, which often appear alongside them. This is likely to confuse juries, as the two sets of directions appear to contradict each other. Further, we remain of the view that phrase ‘dangerous or unsafe to convict’ may be interpreted by juries as an invitation to acquit. We recommend that the *Longman* and *Crofts*-style warnings be restricted to situations where the judge is satisfied that there is sufficient evidence that the accused has in fact suffered some specific disadvantage as a result of a delay in reporting or for other reasons.

JURY ATTITUDES

Juries can be influenced by their own experience and attitudes, and may rely on common myths about sexual assault during their decision-making. One way to ensure that jury decision-making is based on accurate information would be to allow experts to give general evidence about sexual assault, for example, on the reasons for delay in reporting an assault. We recommend an amendment to the *Evidence Act 1958* to clarify that expert evidence about sexual assault is admissible in sexual offence cases.

CHAPTER 8—THE MENTAL ELEMENT OF RAPE

In Victoria, the prosecution must prove the accused intentionally sexually penetrated the complainant without her consent, while aware that she was not or

might not have been consenting. All elements of the offence of rape, including the state of mind of the accused (or the ‘mental element’ of the offence), must be established by the prosecution beyond reasonable doubt. Current Victorian law provides for a subjective approach to the mental element. The prosecution must prove that the accused did not honestly believe that the complainant consented. In deciding whether this is the case the jury can, however, take into account whether the accused’s belief in consent was reasonable in the circumstances.

The Commission believes that the subjective approach to the mental element of rape should be modified for several reasons including the following:

- it does not adequately protect the autonomy of people to refuse to participate in sexual activity. Instead of requiring the initiator of sex to find out if the other person consents, it places the onus on the person approached to resist; and
- the current law may allow an accused person to avoid culpability if he has not turned his mind to the issue of consent.

The current law undermines the ‘communicative model’ of consent and does nothing to discourage the assumption of consent in ambiguous situations. A person who honestly believes that another person’s silence or acquiescence means consent may be acquitted of rape;

Several other jurisdictions have recognised the disadvantages of a subjective mental element and introduced objective or partially objective tests. For example, Western Australia, Queensland and Tasmania apply an objective test, as do New Zealand and England. Canada has a partially objective test.

OUR RECOMMENDED MODEL

The majority of submissions were in favour of an objective or partially objective test for the mental element of rape, although some lawyers’ groups opposed any change to the current law.

The Commission recommends a variation on the current Canadian model, which has both objective and subjective elements. Under this model:

- The accused can raise a defence of honest belief in consent.
- Before the defence can be put to the jury, the trial judge must be satisfied that there is sufficient evidence of an honest belief in consent, which goes beyond the accused’s mere assertion (the ‘air of reality’ test).

- Once the trial judge is satisfied that this test is satisfied, the defence of honest belief in consent can be put to the jury. The judge will direct the jury that the defence must fail if they determine that:
 - the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting (any evidence of self-induced intoxication is not to be taken into account in determining this); or
 - the accused did not turn his mind to the issue of whether the complainant was consenting; or
 - any one of the fact situations set out in section 36 of the *Crimes Act 1958* were present at the time and the accused knew of these facts (section 36 provides a non-exhaustive list of factors in which a complainant is not to be regarded as consenting, for example where the complainant is asleep or unconscious, or under the apprehension of force or harm).

The Commission believes that this model has several advantages, including:

- the model avoids the ‘reasonable or ordinary person’ test, which has caused problems in other areas of the criminal law, for example provocation;
- it is a partially subjective, partially objective model;
- it simplifies the jury’s decision-making process by ensuring that the jury need only consider the accused’s honest belief in consent when there is evidence that this is in issue in the case;
- it prevents an accused who has not even considered whether the other person is consenting, or who has failed to take reasonable steps to ascertain whether that person is consenting, from benefiting from such inaction. The onus is shifted to the initiator to determine that there is consent; and
- it supports the communicative model of consent.

CHAPTER 9—OTHER LEGISLATIVE CHANGES

Chapter 6 makes recommendations for changes to offences against people with cognitive impairment. Chapter 8 proposes changes to the offence of rape. This Chapter recommends changes to offences covering:

- incest;
- compelling people to participate in sexual activities; and

- some sexual offences against children and young people.

INCEST

The Commission believes the offence of incest needs to be changed to emphasise that the primary purpose of the offence is to protect people against sexual exploitation by family members who have power over them. We recommend that the offence be re-named ‘intra-familial sexual penetration’. The term incest stigmatises both parties to the transaction and may suggest a victim is a willing participant in the activity. Apart from the name change, we recommend creating three separate offences of intra-familial penetration, and an offence of persistent abuse of a sibling.

COMPELLING PEOPLE TO PARTICIPATE IN SEXUAL ACTIVITIES

We recommend changes to offences which punish people who compel others to participate in sexual activities. The recommendations will make these offence apply regardless of the gender of the victim, and of whether the penetration is penile, digital, oral or by an object. We also recommend it be an offence to compel someone to self-penetrate, or penetrate or be penetrated by an animal. Our recommendations were supported in submissions.

RECOMMENDATIONS RELATING TO OFFENCES AGAINST CHILDREN AND YOUNG PEOPLE

Our recommendations for changes to sexual offences against young people include:

- in the offence which prohibits people in a relationship of care supervision and authority over young people, from participating in sexual activities with them, providing examples of the types of relationships which are covered;
- prohibiting non-penetrative sexual activity between young people aged 16 and 17 and people who have a relationship of care, supervision and authority over them;
- repealing section 60 of the *Crimes Act 1958*, which covers soliciting acts of sexual penetration, and replacing it with a new section which covers soliciting and procuring of young people to take part in sexual penetration and indecent acts. This will cover people who use the Internet, for

example, to establish contact with and ‘groom’ young people for sexual acts;

- amending the offence of unlawful sexual penetration of a child to make it clear the onus is on the accused to establish the defence of reasonable belief as to age or marriage on the balance of probabilities
- re-naming the offence of maintaining a sexual relationship with a child as an offence of ‘persistent sexual abuse of a child’.

CHAPTER 10—DEALING WITH JUVENILE SEXUAL OFFENDERS

Although the main focus of this inquiry is on improving the system for complainants, we also decided to examine the issue of juvenile sexual offenders. Research suggests many sexual offenders begin offending when they are young. Some abuse younger children, including siblings. Only a very small number of these offences are currently dealt with by the criminal justice system. Among chronic adult sexual offenders it is estimated that between 50% and 80% committed their first offences as adolescents.

Although the Child Protection division of the Department of Human Services may become involved when a young person has committed a sexual assault, their primary responsibility is to protect the victim. The abuser may not come within the provisions of the *Children and Young Persons’ Act 1989* which allows care applications to be made for children ‘at risk of harm’.

The Commission believes neither Child Protection nor the criminal justice system currently responds adequately to young people who sexually assault others. Many young people are not charged because they are too young to be held criminally responsible, or because the victim is too young to give credible evidence. In addition, where the victim and offender are siblings, the family and the victim may be reluctant for the victim to testify against his or her sibling.

We recommend the *Children and Young Persons’ Act 1989* be amended so the court can make an order to protect a child who is a sexual offender. The requirement to participate in a treatment program will often be the most effective way to deal with the young offender’s behaviour.

We also briefly examine other responses to the needs of young sexual offenders, including various forms of diversion and family conferencing. In Victoria, Children’s Court conferencing can only occur as part of the sentencing process, after the young person has been convicted. It is not currently used for sexual offences.

The Commission tentatively proposes a system under which the child could obtain treatment in a variety of ways, including under orders made in the criminal and protective divisions of the Children's Court and referral by a range of agencies. Such treatment might be combined with processes such as family conferencing, which could be a means of making young people who would otherwise never have been prosecuted or convicted more accountable to those they have assaulted. We recommend the establishment of a joint working party, including representatives from DHS and the Children's Court, to consider a broader range of responses to the problem of juvenile sexual offending.

Recommendations

Chapter 1

Introduction

1. The Department of Justice Diversity Unit should convene a steering committee with representation from criminal justice stakeholders, government agencies and Aboriginal services and community groups to oversee the development and implementation of the following:
 - ‘Responding to Sexual Assault’ training for Aboriginal community members and workers;
 - a Community Family Violence/Sexual Assault Resource Guide; and
 - a Statewide sexual assault awareness and safety campaign for Indigenous people.
2. The Department of Justice and the Victorian Multicultural Commission should convene a steering committee including representatives from the Department of Human Services, Victoria Police, the Centre Against Sexual Assault (CASA) and relevant NESB community organisations to plan and implement a series of community education campaigns focusing on strategies to reduce sexual assault in NESB communities.
3. These campaigns should be developed in consultation with appropriate women’s organisations from the various communities targeted and should be consistent with the principles for NESB community education developed at the Victorian Law Reform Commission’s forum.
4. The Department of Justice should convene a working party comprising representatives of Victoria Police, the Office of Public Prosecutions, the courts and other relevant stakeholders, to establish an integrated process for the collection of reliable statistics relating to sexual offences.
5. If possible the database should permit tracking of offences from the time of report until the matter is concluded.

6. The data base should also include information on:
 - incidence of offences in Victoria;
 - the characteristics of victims and offenders, including racial and ethnic background, any disability and age;
 - police reports and prosecution rates for such offences; and
 - prosecution outcomes and the factors which may affect them.
7. The Department of Justice Diversity Unit and the Victorian Multicultural Commission should continue to collaborate to develop a program for uniform data collection by the various government and non-government agencies and services that work with victim/survivors and perpetrators of sexual assault. The program should include the development of appropriate standards, systems and the provision of training to personnel to ensure that accurate data regarding the Indigenousness and Aboriginality, ethnicity and other relevant characteristics of service users is recorded and forwarded to a centralised agency for collation

Chapter 2

Improving Police Responses

8. Victoria Police should consider funding a research project to obtain further information about why complaints are withdrawn and the factors that influence police decisions to take no further action on a complaint. Information derived from this research should be taken into account in police training, and considered in the review of the Code of Practice for the Investigation of Sexual Assault (Code of Practice) and the review of the brief authorisation process proposed in Recommendation 19 below. See also Recommendation 32 below.
9. Victoria Police and CASAs should ensure that NESB complainants receive written information in relevant community languages as soon as practicable after a report of sexual assault has been made, about culturally specific support services available to them.
10. Victoria Police should ensure that Indigenous complainants receive written information about Indigenous support services available to them as soon as practicable after a report of sexual assault has been made.

11. Victoria Police should enhance training and develop refresher courses for all general duties police on how to respond appropriately to victims of sexual offences.
12. Training on sexual assault for members of Sexual Offences and Child Abuse (SOCA) Units and Criminal Investigation Units (CIU) 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; and
 - the barriers that victims often face in reporting offences.
13. Training for CIU 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 material could usefully be included in a training session developed by CASAs in collaboration with the SOCAU Coordination Office.
14. 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;
 - people with cognitive impairments; and
 - children.
15. In developing sexual assault training packages for police, Victoria Police should:
 - work collaboratively with CASAs to develop training packages that ensure police members understand the role of CASAs and can benefit from their experience of working directly with complainants;
 - engage consultants or representatives from non-English speaking background community organisations who are recognised by communities as having expertise or training experience in culturally appropriate sexual assault service responses; and

- engage consultants 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.
16. 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 CASA and SOCA Units, the principles of the Code of Practice, and the options victims have in making a statement. These materials should be provided in a range of languages.
 17. Liaison Committees (see Recommendations 27, 28, 29 below) should assist in the development of these materials and ensure the materials are kept updated and readily available at police stations at all times.
 18. The Code of Practice 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.
 19. Victoria Police should review their brief authorisation process with the aim of developing a model that is consistent, transparent and accountable. In particular, the impact of court costs on the decision-making process should be examined and appropriate strategies devised to resolve any issues which are identified.
 20. Victoria Police should consider delegating power to the Officers-in-Charge of SOCA Units to authorise sexual assault briefs.
 21. A monitoring process should be established to allow evaluation of the authorisation process on a regular basis, so that necessary amendments can be made.
 22. All officers who are able to authorise briefs in sexual assault matters should be required to attend a sexual assault brief manager's course.
 23. Where the Criminal Investigation Unit has principal carriage of the investigation the officer-in-charge of the relevant SOCA Unit, or the individual SOCA Unit members, should be consulted prior to any decision being made against authorising the brief for prosecution.
 24. Police should be made aware that the *Code of Practice* applies regardless of whether medical attention or a forensic medical examination is required.
 25. The meaning of the requirement that people reporting a recent sexual assault should be taken to the nearest CASA or hospital Crisis Care Unit should

reflect the principles upon which the Police *Code of Practice* was first based. The Code should be interpreted to ensure that victims receive continuity of care and to optimise their future access to counselling services.

26. The government should consider allocating additional funding to the Victorian Institute of Forensic Medicine (VIFM) to ensure that appropriate numbers of Forensic Medical Officers (FMOs) and sexual assault doctors can be recruited and trained, particularly in regional areas reporting chronic shortages.
27. The Sexual Assault Liaison Committee should consider the most appropriate means of ensuring that forensic medical officers are familiar with accurate interpretation of the Code of Practice guidelines. This could be achieved through the inclusion of material in training manuals and sessions, redistributing copies of the Code, and issuing 'refresher' documents that clearly state the position on relevant issues.
28. Where Regional Liaison Committees have been established, a CIU member from the appropriate division should be nominated to regularly attend the meetings. FMOs should be invited to attend the meeting when needed.
29. Where no Regional Liaison Committee currently exists, a CIU member should be nominated to contact the local CASA and FMOs 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 report back to the CASA, VIFM and Victoria Police on what action was taken.
30. The Commission recommends that Victoria Police establish Sexual Assault Investigation Sections in all metropolitan divisions where the caseload reaches a pre-determined threshold. The processes of selection for CIU members, tenure, and lines of accountability should be clearly established by Police Command.
31. Victoria Police should review the current Operating Procedures relating to sexual assault with a view to:
 - determining appropriate time frames for the investigation of sexual offences;
 - ensuring increased supervision regarding investigation time frames and appropriate victim contact/follow-up.

32. Victoria Police should consider devising a comprehensive performance standards process (perhaps to be included in the Operating Procedures) whereby there is ongoing monitoring of the police response to sexual assault, including the monitoring of:
 - the delays between initial report and initiation of the prosecution process;
 - the number and type of cases authorised and why;
 - the number and type of cases not authorised and why; and
 - the number and type of cases that do not reach the brief authorisation stage.
33. Victoria Police should establish appropriate IT systems to enable the effective monitoring and evaluation of sexual assault reporting patterns and of police procedures relating to authorisation of briefs for prosecution of sexual assault matters. Such systems should be compatible with broader Department of Justice systems.
34. Any new IT system should be evaluated for efficacy approximately two years after implementation.

Chapter 3

Increasing the Responsiveness of the Criminal Justice System

35. Bodies which offer seminars and lectures for continuing professional development purposes should include material on sexual offence laws and practice which will assist lawyers practising in criminal law or in areas such as family law and child protection where allegations of sexual assault may be relevant.
36. As well as promoting understanding of the laws and procedures relevant to sexual assault, such programs should include information about the social context in which sexual offences typically occur, and the emotional, psychological, and social impact of sexual assault.
37. The Office of Public Prosecutions (OPP) should continue to offer a regular training program for solicitors and prosecutors involved in committals and trials in sexual offence cases. As well as dealing with legal issues the objectives of the program should include:

- increasing prosecutors' understanding of the emotional, psychological and social impact of sexual assault on complainants in sexual offence cases, and how this may affect complainants in giving their evidence;
 - providing information on the social context in which sexual offences typically occur;
 - ensuring that prosecutors are aware of the advantages of meeting with complainants before the hearing and advising them about what will happen when they give their evidence;
 - familiarising prosecutors with the use of all alternative arrangements available to assist witnesses in giving evidence, and of the advantages to complainants in giving their evidence in this way;
 - liaising with witness support services to ensure that complainants receive support and information which prepares them for what will happen in court; and
 - encouraging prosecutors to take appropriate steps to protect complainants from offensive, unfair or irrelevant cross-examination.
38. Prosecutors from the private Bar should only be briefed to appear in sexual offence cases if they have participated in the OPP training program on sexual assault or in an equivalent continuing professional development program.
39. The OPP should ensure that prosecutors receive training on how to deal with the problems experienced by people who are likely to have experienced discrimination because of their disability, Indigenous status or language or ethnicity. This could be done by engaging consultants with relevant expertise or by building links with relevant organisations who could participate in designing and providing components in the training program. Such organisations might include:
- CASAs;
 - non-English speaking background community organisations which have expertise in providing culturally appropriate sexual assault service responses;
 - Indigenous community organisations which are recognised by Indigenous communities as having expertise or training in culturally appropriate sexual assault service responses; and

- disability organisations with expertise or training in providing appropriate sexual assault service responses for people with a disability.
40. The Judicial College of Victoria should continue to offer regular programs for judges and magistrates which facilitate discussion of issues which commonly arise in sexual offences committals and trials, particularly issues relating to the exercise of judicial discretions dealing with child witnesses and witnesses with a cognitive impairment, intervention during cross-examination and directions or warnings to juries.
 41. The program should include presentations by recognised experts 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 and:
 - 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 Indigenous status, language and ethnicity or disability, and how this may affect complainants in giving their evidence;
 - the effect of these offences on victims and the particular problems that complainants may experience in giving evidence; and
 - the background to, and application of, any recent legislative changes, and legislative changes arising from the report on this reference.
 42. Schedule 5 of the *Magistrates Court Act 1989* should be amended to prohibit cross-examination of children or people with cognitive impairment at committal hearing.
 43. The *Evidence Act 1958* should be amended to create a presumption in favour of the pre-recording of the evidence-in-chief and cross-examination of child complainants and complainants with cognitive impairment in sexual offence cases.
 44. The recorded evidence should be admissible as if the evidence were given orally in accordance with the usual rules of evidence, in the same way as evidence is given orally in a hearing. *Note that further recommendations relating to pre-recording are contained in Chapter 5.*
 45. Where the complainant in a sexual offence matter is a child or a person with a cognitive impairment, a case conference should be conducted in the County Court within 21 days after the accused has been committed for trial.

46. At the conclusion of the case conference, if the matter is to continue to trial, dates should be set for pre-recording the complainant's evidence, for a directions hearing and for trial. Pre-recording should occur within 21 days of the case conference, and the trial within three months of the date of committal. A directions hearing should be held shortly before trial.
47. Where a person is committed for trial for a sexual offence against a child or a person with a cognitive impairment, the OPP should file and serve depositions and the presentment at least seven days prior to pre-recording.
48. A Working Party comprising representatives from the Magistrates' Court, the County Court, the OPP, Victoria Legal Aid, the Law Institute, Victoria Police and the Victorian Government Reporting Service should be established to identify the reasons for delays in processing sexual offence cases (including delays between committal mention and committal hearing) and to make recommendations for reducing such delays as far as possible. Some of the issues which should be considered are: continuity of solicitor and counsel within the OPP, continuity of defence counsel, streamlining of grants of Legal Aid, and the resources required to reduce delays in the provision of transcripts.
49. Priority should be given to the introduction of processes to reduce delays in cases involving child complainants and people with a cognitive impairment
50. In the County Court a designated judge should be assigned to list and manage all sexual assault cases involving child complainants and complainants with a cognitive impairment.
51. Delays and different treatment occurs because such matters as section 37A applications are not always handled at the same stage of the process. The court should identify all matters that are to be considered at directions hearings in all sexual offences cases.
52. The County Court should be resourced to evaluate the effect of this process on delays and plea rates.
53. The Magistrates' Court should establish a separate list (or lists) for summary offences and committals in sexual offence cases involving child complainants and complainants with a cognitive impairment in the Melbourne metropolitan area and major regional centres.

54. Initially, such cases should be allocated to magistrates who have expressed an interest in dealing with sexual offence cases. They should be assigned to this list for a defined period.
55. All magistrates hearing cases in the sexual offences list should participate in a judicial education program on issues that arise in hearing child sexual offence cases and cases involving a complainant with a cognitive impairment. Such education should be conducted on an ongoing basis.
56. The Magistrates' Court should evaluate the effect of these processes on timelines and plea rates.
57. Subject to the availability of resources and the outcome of the above evaluation, the Magistrates' Court should consider establishing a list to deal with all sexual offences cases.
58. The Department of Justice should consider the need for additional resources in the Magistrates' Court in order to implement the above recommendations.

Chapter 4

Making it Easier for Complainants to Give Evidence

59. Section 37C of the *Evidence Act 1958* should be amended to give all adult complainants in sexual offence trials the right to give evidence by closed-circuit television (CCTV).
60. The prosecution should be able to apply for an order that the complainant give evidence in the court room. Before the court makes such an order the presiding judge or magistrate must satisfy him or herself that the complainant is aware of his or her right to give evidence by CCTV and that the complainant is able and wishes to give evidence in the court room.
61. Every effort should be made to install appropriate CCTV facilities in all courts in which sexual offence proceedings are held. Where facilities are unavailable, cases should be relocated where practical.
62. Where the complainant gives evidence by CCTV the court may make any order it considers appropriate to allow the complainant to take part in a view or identify a person or thing.
63. The Magistrates' Court and the County Court should develop a protocol dealing with matters relating to the operation of the CCTV link, including

who in the courtroom is to be able to, or not to be able to, be heard or seen by the complainant.

64. Where CCTV cannot be used, or an order is made that the complainant should give evidence in court, a screen is to be used to remove the defendant from the complainant's direct line of vision, except where the magistrate or judge has satisfied him/herself that the complainant does not wish a screen to be used for this purpose.
65. If it is not practically possible to implement Recommendations 59–63 for all complainants in sexual offence cases immediately, priority should be given to ensuring that CCTV is available for use by all child witnesses in sexual offence cases and for witnesses with a cognitive impairment.
66. Complainants in sexual offence cases should be entitled to have a person of their choice beside them for the purpose of providing emotional support while they are giving evidence, (whether or not they give evidence by CCTV) except where the presiding judge or magistrate is satisfied that the complainant does not wish to have a support person present.
67. Where the presiding judge or magistrate is of the opinion that it is not in the interests of justice for a particular person to provide support to the complainant, that person shall not be entitled to act as a support person, but this does not prejudice the right of the complainant to have another person beside them for the purpose of providing emotional support while they are giving evidence.
68. Section 37A of the *Evidence Act 1958* should be amended to make it clear that it applies to both consensual and non-consensual sexual activities.
69. Section 37A of the *Evidence Act 1958* should be amended to provide that the court shall not grant leave for the complainant to be cross-examined about sexual experience or activity (whether consensual or non-consensual) or lack of sexual experience or activity unless it is satisfied that:
 - the evidence is of substantial relevance to a fact in issue; and
 - admission of the evidence is in the interests of justice having regard to the matters in Recommendations 70 and 71 below.
70. In deciding whether the admission of the evidence is in the interests of justice the judge must consider:

- whether the probative value of the evidence outweighs the distress, humiliation and embarrassment that the complainant may suffer as the result of the admission of the evidence;
 - the risk that the evidence may arouse discriminatory belief or bias, prejudice, sympathy or hostility in the jury;
 - the need to respect the complainant's personal dignity and privacy; and
 - the right of the accused to make a full answer and defence to the charge.
71. In assessing the distress, humiliation, or embarrassment that the complainant may suffer as a result of leave being granted the court must consider the age of that person and the number and nature of questions that will be put to that person.
 72. Evidence of prior sexual experience or activity should not be regarded as having substantial relevance to a fact in issue merely because of the fact that the complainant freely agreed to participate in another sexual act with the accused or with another person.
 73. Evidence of the complainant's sexual activity or experience is not admissible to support an inference that the complainant is the type of person who is more likely to have consented to the sexual activity or experience that is the subject matter of the charge.
 74. The OPP should continue to notify defence counsel of the need to make a written application for leave to cross-examine the complainant at least 14 days before the date listed for committal or trial, unless exceptional circumstances justify admission of the evidence without prior written application.
 75. The OPP should establish a system for monitoring the operation of section 37A of the *Evidence Act 1958* which enables an assessment of the percentage of sexual offence cases in which applications are made for the admission of prior sexual history evidence, the grounds on which such applications are based and the success rate of applications.
 76. A counselling communication must not be disclosed in committal proceedings. Accordingly, at committal
 - a person cannot be required (whether by subpoena or otherwise) to produce a document that records a counselling communication; and
 - evidence of a counselling communication cannot be admitted or adduced.

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77. 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.
78. A person who objects to production of a document which records a counselling communication in relation to a trial or plea proceedings cannot be required to produce the document unless
- the document is first produced for preliminary examination by the court for the purposes of ruling on the objection;
 - and the court is satisfied that:
 - the contents of the document have substantial probative value;
 - other evidence of the contents of the document or the confidence is not available; and
 - the public interest in preserving the confidentiality of the communication and protecting the confider from harm is substantially outweighed by the public interest in allowing disclosure of the communication (the public interest test).
79. The preliminary examination is to be conducted in the absence of the parties and their legal representatives, except to the extent that the court determines otherwise.
80. Evidence taken at a preliminary examination is not to be disclosed to the parties or their legal representatives, except to the extent that the court determines otherwise.
81. After undertaking the preliminary examination the court is to determine whether the confidential counselling communication should be disclosed.

82. A counselling communication cannot be adduced in evidence at a trial or in plea proceedings unless the court, after inspecting the document, is satisfied that
- the contents of the document have substantial probative value;
 - other evidence of the contents of the document or the confidence is not available; and
 - the public interest in preserving the confidentiality of the communication and protecting the confider from harm, is substantially outweighed by the public interest in allowing disclosure of the communication (the public interest test).
83. In deciding whether the public interest test is satisfied, the court must consider
- the extent to which disclosure of the information is necessary to allow the accused to make a full defence;
 - the need to encourage victims of sexual offences to seek therapy and the extent to which such disclosure discourages victims from seeking counselling or diminishes its effectiveness;
 - whether admission of the evidence is being sought on the basis of a discriminatory belief or bias;
 - whether the victim or alleged victim objects to disclosure of the communication;
 - the attitude of the person to whom the communication relates; and
 - the nature and extent of the reasonable expectation of confidentiality and the potential prejudice to the privacy of any person.
84. The legislation should continue to apply to counselling communications whenever they are made.
85. Existing requirements which govern applications for leave and notification of the informant and the counsellor should continue to apply.
86. If there is a general review of the law of evidence in Victoria, the review should consider whether restrictions should be placed on the admission of confidential communications made in the context of professional relationships, similar to the restrictions in ss 126A–126F of the *Evidence Act 1995* (NSW).

87. The *Evidence Act 1958* should be amended to allow the admission of first-hand hearsay evidence in sexual offences cases in circumstances where this evidence is admissible under sections 65 and 66 of the Uniform Evidence Act.
88. A person should be regarded as unavailable to give evidence for the purposes of the provision allowing admission of hearsay evidence if they are dead or mentally or physically incapable of giving evidence.
89. The court should not be able to admit hearsay evidence to prove an asserted fact if, when the representation was made, the person was not competent to give evidence about an asserted fact because he or she was incapable of giving a rational reply to a question about a fact. This should not apply to a statement made by a person about his or her health, sensations, intention, knowledge or state of mind.
90. Where evidence is sought to be adduced of a hearsay statement made by a person who is unavailable to give evidence, the person who seeks to adduce the evidence must give reasonable notice in writing to the other party of the intention to adduce that evidence. The notice must state the provision on which the party seeks to rely in arguing that the hearsay rule does not apply.
91. Where evidence of a previous representation is admitted for a purpose other than to prove the fact asserted, it should also be admissible as evidence of the truth of that fact. (This provision is based on section 60 of the Uniform Evidence Act).
92. The court may refuse to admit hearsay evidence if the court is satisfied that it would be unfair to the defendant to admit the evidence.
93. In a jury trial the judge must warn the jury that hearsay evidence may not be as reliable as direct evidence.
94. In any criminal proceeding for a sexual offence, the accused may not cross-examine the complainant or a protected witness personally. (Note: Protected Witness is defined in Recommendation 101.)
95. The court must advise the accused that legal representation is required in sexual offence cases if the complainant or a protected witness is to be cross-examined and that he or she may not cross-examine the complainant or protected witness personally. The accused must be invited to arrange legal representation and given an opportunity to do so.

96. If the accused refuses legal representation, the court must direct Victoria Legal Aid to provide legal assistance for the purpose of cross-examination of the complainant or protected witness.
97. A court-appointed lawyer has the same obligations as a lawyer engaged by the accused when he or she cross-examines on behalf of the accused. If the accused refuses to instruct the court appointed lawyer the lawyer is obliged to act in the best interests of the accused when cross-examining on behalf of the accused, subject to the obligations that lawyers normally owe as officers of the court.
98. When the court advises the accused that legal representation is required in sexual offence cases and that he or she cannot cross-examine the complainant or a protected witness personally, the court must warn the accused about the implications of the rule in *Browne v Dunn*.
99. If the accused declines to accept the legal assistance provided for this purpose, or to provide such instructions as are necessary to enable the person appointed to question the complainant or protected witness adequately or at all, he is to be taken as having foregone his right to cross-examine the complainant or protected witness.
100. The court must inform the jury that the accused is not permitted to cross-examine the complainant or a protected witness personally. If a complainant or protected witness is cross-examined by a person appointed for that purpose, the court must warn the jury that:
 - the procedure is a routine practice of the court;
 - no adverse inference is to be drawn against the accused as a result of the use of the arrangement; and
 - the evidence of the witness is not to be given any greater or lesser weight because of the use of the arrangement.
101. A ‘protected witness’ means any child under 18, a person who is a complainant in respect of other sexual offence charges brought against the accused, and a person with impaired mental functioning, or a person who is declared by the court to be a protected witness under Recommendation 102.
102. An application may be made to the court for a parent or sibling of the accused or complainant, or any family member of the accused or complainant, to be declared a protected witness if the court considers that

the person would suffer unnecessary distress, humiliation, or intimidation if cross-examined by the accused personally.

103. The current section 372 and section 398A of the *Crimes Act 1958* should not be amended.
104. A dedicated funding stream should be committed to the OPP based Witness Assistance Service to enable it to provide adequate support to all adult prosecution witnesses in sexual offences cases, both in Melbourne and in rural and regional areas.

The funding should be sufficient to enable the service to:

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

Chapter 5

Improving the System for Child Complainants

105. The Department of Justice should establish an independent specialist witness support service for child witnesses.
106. The service should provide support to child witnesses, their parents, guardians or carers in sexual offences cases, both within Melbourne and in rural and regional areas.

107. The purpose of this support should be to facilitate child witnesses' more effective and credible participation in the criminal justice process, while protecting their wellbeing.
108. The support should be appropriate for Indigenous children, children from non-English speaking backgrounds and children with differing physical and intellectual requirements.
109. Specialist child witness support should be provided by professional staff with 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.
110. Where circumstances require it, there should be appropriate collaboration between the service and other agencies providing services to the child witness.
111. 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, guardian or carer 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.
112. Child friendly facilities should be provided for children within court complexes, including in interview areas and waiting rooms.
113. Police should continue to make video and audiotaped evidence (VATE) of statements given by children and people with a cognitive impairment.

114. Victoria Police should establish an independent evaluation of VATE statements in sexual offence cases and of the use of VATE statements in evidence.
115. The evaluation should include
 - arranging for a review panel, including a magistrate, a member of Victoria Police, a judge, an experienced defence barrister, an experienced prosecutor and a child psychologist with expertise in methods for questioning children, to view a sample of VATEs (including tapes played at trials and tapes not played) to assess their admissibility, forensic quality and the appropriateness of the interview techniques used;
 - researching Australian and international best practice with respect to the preparation of video recordings of evidence and making recommendations about changes to police training which may be necessary to improve the quality and admissibility of VATE interviews; and
 - making recommendations for prosecutor training which might encourage greater reliance on VATE tapes.
116. A joint Working Party of Victoria Police and the OPP should be established to oversee implementation of any recommendations made as a result of the evaluation.
117. The Working Party should include a person with expertise in dealing with child victims of sexual assault, and a representative of the Department of Human Services (DHS).
118. Section 37 of the *Evidence Act 1958* should be amended to give child complainants in sexual offences cases the right to give evidence by CCTV.
119. The prosecution should be able to apply for an order that the alternative arrangement not be used. Before the court makes such an order the presiding judge or magistrate must satisfy him or herself that the complainant is aware of his or her right to give evidence by CCTV and that the complainant is able and wishes to give evidence in the court room.
120. Recommendations 62–67 should also apply in relation to child complainants.
121. Child complainants in sexual offence cases should be entitled to have a person beside them for the purpose of providing emotional support while they are giving evidence (whether or not they give evidence by CCTV)

except where the presiding judge or magistrate has satisfied him/herself that the complainant does not wish to have a support person present.

122. All child complainants' evidence given by CCTV should be simultaneously audio and video recorded so that in the event of a retrial or other situation arising that requires the court to rehear all or part of the child complainant's evidence, the tape can be played instead of the child being called to testify again.
123. The *Evidence Act 1958* should be amended to create a presumption in favour of videorecording of children's evidence-in-chief and cross-examination. Pre-recording should occur at a hearing presided over by a judge at which the accused and counsel for the prosecution and defence are present.
124. The prosecution should be able to apply for an order that a child complainant should give evidence at the trial rather than pre-record his or her evidence. Before the court makes such an order, the presiding judge or magistrate must satisfy him or herself that the complainant is aware of his or her right to have evidence pre-recorded at a separate hearing and that the complainant is able and wishes to give evidence at the time of the trial by CCTV or in the court room.
125. The child's recorded evidence should be admissible as if the evidence were given orally in accordance with the usual rules of evidence in the same way as evidence given orally in a hearing.
126. Unless the court orders otherwise, the child's recorded evidence should be admissible in a retrial of the same offence, or for a trial of an offence arising out of the same circumstances.
127. At the hearing the defendant must not be in the same room as the child, but must be capable of seeing and hearing the child when the child gives evidence.
128. The child must give their evidence by closed circuit television from a place outside the courtroom.
129. If the child's evidence has been pre-recorded the child may not be subsequently cross-examined or re-examined on any matter unless either:
 - a party seeks to recall the child as a result of that party having become aware of a matter of which that party could not have been aware with reasonable diligence at the time of the pre-recording, or

- it is in the interests of justice for the court to permit the child to be re-examined or cross-examined; or
 - if the child were giving evidence in court in the normal way the child could be recalled to give further evidence and it would be in the interest of justice to make the order.
130. If the child's evidence is insufficient to support all of the counts on the presentment the accused should be presented on the original counts, the entire pre-recording played to the jury, and the prosecution should then formally withdraw the counts that were not supported by the child's evidence.
131. A similar pre-recording process should also be available for witnesses with cognitive impairment.
132. 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.
133. The test for competence to give evidence on oath should be that witnesses understand that they are obliged to give truthful evidence.
134. 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 intelligible answers to them.
135. 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.
136. Before children give unsworn evidence the judge should tell them that it is important to tell the truth and not to tell lies.
137. At the same time that the judge instructs a child that the child must tell the truth, the judge should also tell the child:
- that the child may not know or not be able to remember some things that the child is questioned about, and that the child should tell the court if this is the case;
 - that the child will be asked questions that may make suggestions that are true or untrue;

- that the child should agree with true statements, but should not feel under pressure to agree if the statement is incorrect, according to the child's understanding of what happened.
138. In cases involving allegations of child sexual assault, the court should be able to seek a report from an independent and appropriately qualified expert on the child's competence to give sworn or unsworn evidence.
139. Evidence of a hearsay statement made by a child which is relevant to the facts in issue shall be admissible to prove the facts in issue in any criminal case involving child sexual assault allegations where:
- the child is under the age of 16 and
 - the child is available to give evidence and
 - the court, after considering the nature and contents of the statement and the circumstances in which it was made, is of the view that the evidence is of sufficient probative value to justify its admission.
140. The court must warn the jury that the hearsay nature of the evidence may make it unreliable.
141. Provisions allowing admission of the hearsay evidence of children to prove facts in issue should not detract from or modify common law rules allowing admission of evidence of statements made to third persons for a purpose other than as proof of the facts in issue.
142. The provisions that allow admission of hearsay evidence of children are not intended to derogate from the broader provisions relating to the admission of hearsay evidence specified in Recommendations 87–93.
143. That the *Evidence Act 1958* be amended to impose a duty on the court to ensure, as far as possible, that in the case of questions asked of children under 18 years of age:
- neither the content of a question nor the manner in which a question is asked is misleading or confusing, phrased in inappropriate language or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive; and
 - the questions are not structured or sequenced in a way that is intimidating, harassing, confusing, annoying or misleading.
144. In deciding whether to disallow a question, the court is to take into account any relevant condition or characteristic of the witness, including age, culture,

personality, education and level of understanding and any mental, intellectual or physical disability of the witness.

145. The County Court should participate in the Australian Institute of Judicial Administration (AIJA) project for the preparation of a judicial bench book to assist judges in dealing with child witnesses. The Bench book should include material about children's development and guidelines for effective communication with children of different ages and backgrounds.
146. Programs for continuing professional development of lawyers and prosecutor training [See Recommendations 35–38] should draw lawyers' attention to the legislative changes recommended above and include material that addresses the developmental patterns of children and the appropriate ways to question child witnesses.
147. Prosecutor training should draw prosecutors' attention to the legislative changes recommended above and to the desirability of objecting to questioning that contravenes these legislative restrictions.
148. The program of judicial education referred to in Recommendations 40–41 should deal with the issues that arise during trials involving child witnesses and include information from specialists in child development about best practice questioning of child witnesses.
149. The Department of Justice should fund an independent evaluation of the effect of this package of reforms on child complainants.

Chapter 6

Improving the System for Complainants Who Have a Cognitive Impairment

150. Victoria Police should develop guidelines for the identification of cognitive impairment in consultation with the Office of Public Advocate and the Equal Opportunity Commission. Guidelines prepared by Corrections Victoria might provide a useful model for this process.
151. Training for general duties police, SOCA members and CIU members should ensure that police are familiar with and can apply the guidelines for the identification of cognitive impairment.
152. If investigating officers are unsure as to whether a person has cognitive impairment, they should use the VATE process to take that person's statement.

153. Training of general duties police and SOCA Unit and CIU members should include appropriate communication techniques with people with a cognitive impairment.
154. OPA should liaise with CASA House to develop training for Independent Third Persons (ITPs) in supporting people with a cognitive impairment who report sexual assault.
155. OPA should consider seeking resources to enable it to establish a central roster system for allocating Independent Third Persons.
156. CASA training should include a component on identifying disability and working with people with cognitive impairment.
157. The Attorney-General should consider establishing a review which identifies the issues confronted by people with cognitive impairment in the criminal justice system as complainants, accused and witnesses and makes recommendations for legal and procedural changes.
158. That the *Evidence Act 1958* be amended to impose a duty on the court to ensure, as far as possible in the case of questions asked of people with a cognitive impairment that:
 - neither the content of a question nor the manner in which a question is asked is misleading or confusing, phrased in inappropriate language or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive; and
 - the questions are not structured or sequenced in a way that is intimidating, harassing, confusing, annoying or misleading.
159. Training programs for prosecutors and defence lawyers should include a component on the disadvantages experienced by people with cognitive impairment, and effective communication with people with a cognitive impairment.
160. Judicial education programs on sexual offences should include material that familiarises judges with communication and other difficulties people with a cognitive impairment may face.
161. Sections 50, 51 and 52 of the *Crimes Act 1958* should be amended to use the term ‘cognitive impairment’ rather than ‘mental impairment’.
162. Section 23 of the *Evidence Act 1958* should be amended to use the term ‘cognitive impairment’ rather than ‘impaired mental functioning’.

163. The definition of ‘impaired’ in section 50 of the *Crimes Act 1958* should not be changed.
164. 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 cognitive impairment to engage in a sexual act with that person;
 - where the medical or therapeutic services are related to the cognitive impairment, it is unnecessary for the prosecution to prove that the accused was aware of the person’s cognitive impairment. However, the accused can raise the defence that they had an honest and reasonable belief that a person did not have a cognitive impairment; and
 - where the medical or therapeutic services are not related to the cognitive impairment, the service provider is not guilty of the offence unless he or she was aware that the person had a cognitive impairment.
165. Section 52 of the *Crimes Act 1958* should be amended as follows: A person working or volunteering at a facility or in a program which provides services to people with cognitive impairment, who takes part in a sexual act with a person whom he or she knows has cognitive impairment, should be guilty of an indictable offence.
166. Sections 51 and 52 of the *Crimes Act 1958* should not include a defence of consent.
167. Section 35 of the *Crimes Act 1958* should be amended to include ‘spouse or domestic partner’ and should be broadly defined to include same sex couples and couples in a genuine relationship who are not cohabiting.
168. The Working Party that is convened by the Department of Justice to establish an integrated process for the collection of reliable statistics on sexual offences [see Recommendation 4] should consider how to ensure that information is collected relating to complainants and offenders with cognitive impairment.

Chapter 7

Judges’ Directions To Juries

169. The mandatory jury direction on consent contained in section 37 of the *Crimes Act 1958* 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.'

170. Section 61 of the Crimes Act 1958 should be amended as follows (**proposed amendments in bold text**, existing provisions in normal text):

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

(a) The judge must not warn, or suggest in any way to, the jury that the law regards complainants in sexual offence cases as an unreliable class of witness; and

(b) (i) if evidence is given or 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 making a complaint about the alleged offence by the person against whom the offence is alleged to have been committed, the judge must inform the jury that there may be good reasons why a victim of a sexual assault may delay or hesitate in complaining about it.

(ii) **The judge must not state, or suggest in any way to the jury that the credibility of a complainant is affected by a delay in reporting a sexual assault unless satisfied that there exists sufficient evidence in the particular case to justify such a warning.**

(c) The judge must not warn, or suggest in any way to the jury that it is dangerous or unsafe to convict the accused, unless satisfied that:

(i) there is evidence that the accused has in fact suffered some specific forensic disadvantage due to a substantial delay in reporting; or

(ii) there is evidence that the accused has in fact been prejudiced as a result of other circumstances in the particular case.

(d) If the judge is satisfied in accordance with sub-section (c) that a jury warning is required, the judge may warn the jury in terms she or he thinks appropriate having regard to the circumstances of the particular case.

(e) In giving a jury warning pursuant to sub-section (d), it is not necessary for the judge to use the words 'dangerous or unsafe to convict'.

(2) **Subject to s 61(1)(b)(ii), (c), (d) and (e)**, nothing in sub-section (1) prevents a judge from making any comment on evidence given in the proceeding that it is appropriate to make in the interests of justice.

(3) Despite sub-section (2), a judge must not make any comment on the reliability of evidence given by the complainant in a proceeding to which sub-section (1) applies if there is no reason to do so in the particular proceeding in order to ensure a fair trial.

171. Judicial education on sexual assault should include:

- information about the social and cultural context of sexual assault (see Recommendation 7) and the factors that result in delays in reporting assault;
- training on the content and comprehensibility of jury directions and the appropriate balance between comments on the facts and discussion of the law; and
- information about the usefulness of providing written and visual aids to assist jury decision-making.

172. Judges should consider providing juries with written and visual aids to assist their deliberation.

173. The *Evidence Act 1958* should be amended to clarify that in sexual offence cases expert evidence about sexual assault is admissible. This evidence may include evidence on:

- the nature and dynamics of sexual assault;
- social, psychological and cultural factors that may affect the behaviour of people who have been sexually assaulted and may result in them delaying in reporting an assault.

Chapter 8

The Mental Element of Rape

174. The *Crimes Act 1958* should be amended to include the following formulation of the mental element of rape:

- 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.
- The accused must produce some evidence that he had an honest belief that the complainant consented before this matter can be left to the jury. The mere assertion by an accused that he believed the complainant was consenting shall not constitute sufficient evidence of an honest belief as to consent.
- 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 but mistaken belief in consent can be considered by the jury.
- The defence of honest belief in consent is not available where:
 - the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting;
 - the accused did not turn his or her mind to the possibility that the complainant was not consenting; or
 - one or more of the circumstances listed in section 36(a)–(g) existed and the accused was aware of the existence of such circumstances.
- In considering the question of whether the accused took reasonable steps in the circumstances known to the accused at the time to ascertain that the complainant was consenting, the jury shall not have regard to any evidence of the accused's self-induced intoxication.
- If relevant to the facts in issue in a proceeding, the judge must direct the jury that—in considering the accused's alleged belief that the complainant was consenting to the sexual act it must take into account whether that belief was reasonable in all the relevant circumstances. [current section 37(1)(c) *Crimes Act 1958*].

Chapter 9

Other Legislative Changes

175. 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.
176. Consent should not be a defence to the above intra-familial sexual penetration offences.
177. 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.
178. 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.
179. A new offence should be created to make it an offence where:
- (1) the accused took part in an act of sexual penetration of his or her sibling when the sibling was 18 years or older; and
 - (2) prior to the sibling attaining the age of 18 years, the accused took part in one or more acts that 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 person aged 16 or 17 under the care, supervision and authority of the accused); section 49 (indecent act with a person aged 16 or 17 under the care, supervision and authority of the accused); or the ‘compelling sexual penetration offence (see para 9.13 below).
180. 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).

181. A prosecution for this offence must not be commenced without the consent of the Director of Public Prosecutions.
182. 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.
183. Section 38(4) of the *Crimes Act 1958* should be amended by removing the word 'male'.
184. 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.
185. Sections 48 and 49 of the *Crimes Act 1958* 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.
186. 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.
187. The defence of reasonable belief that the young person was aged 18 years or more should continue to apply.
188. Section 60 of the *Crimes Act 1958* Soliciting Acts of Sexual Penetration or Indecent Acts' should be repealed.
189. 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.
190. 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.
191. Section 45 of the *Crimes Act 1958* should be amended to make it clear that where the accused is charged with unlawful sexual penetration of a person aged between 10 and 16, and the complainant consented, the onus is on the accused to establish the defence of reasonable belief as to age or marriage on the balance of probabilities.

192. Section 47A of the *Crimes Act 1958* should be amended to replace the words ‘maintain a sexual relationship with a child’, wherever they appear, with the words ‘persistent sexual abuse of a child’.

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

The aim of subdivisions 8A to 8G are to:

- (i) 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;
- (ii) protect children, young people and people with cognitive impairment from sexual exploitation;

194. 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 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, children and young people, and people with disabilities are overwhelmingly the victims of sexual assault;
- offenders are commonly known to victims; and
- sexual offences occur in circumstances where there are unlikely to be any physical signs of an offence having occurred.

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

Chapter 10

Dealing With Juvenile Sexual Offenders

196. Section 63 of the *Children and Young Persons Act 1989* should be amended as follows:

- Insert subparagraph (g) after (f) ‘the child is displaying sexually abusive behaviour and an order of the Children’s Court is necessary to ensure his or her access to, or attendance at, an appropriate therapeutic service’.

197. The Department of Human Services should commission appropriate research to enable it to develop guidelines for the identification of problematic sexual behaviours in children and young people.
198. The Department of Human Services and the Children's Court should establish a working group, including representation from Victoria Police, to develop a wider range of options for responding to children and young people who have been involved in sexually abusive behaviour and to increase the numbers of young people held to account for this conduct.
199. Options to consider include:
 - expansion of existing treatment programs; and
 - introduction of a conferencing process, along the lines of the model which applies in South Australia.
200. In developing a wider range of responses to young people who have committed sexually abusive acts, the Working Group should consider:
 - the respective roles which the Children's Court and Department of Human Services should play in overseeing the process;
 - the criteria which should determine eligibility to participate in the program and the body which should be responsible for applying those criteria;
 - the body which should be responsible for overseeing compliance with the program;
 - mechanisms to ensure the appropriate representation of victims' interests within the program; and
 - mechanisms for independent evaluation of the program.
201. Options for dealing with sexually abusive young people should provide for referral from a variety of sources including Victoria Police, the Child Protection Service and other agencies.

Chapter 1

Introduction

SCOPE OF THIS REPORT

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

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

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

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

THE CRIMINAL JUSTICE SYSTEM RESPONSE TO SEXUAL OFFENCES

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

1998–9.¹ As many studies have shown,² the majority of alleged sexual offences go unreported. Victorian data shows that people who allege that they have been sexually assaulted are the least likely of all crime victims to report to the police.³

1.6 A relatively low proportion of reports of sexual offences result in prosecution. In our study, less than one in six reports to police of rape and less than one in seven reports of incest or sexual penetration of a child proceeded to prosecution.⁴ Even if an offence is reported and the defendant is prosecuted, guilty pleas⁵ and conviction rates are lower than for other criminal offences. In the years 1997–8 to 1998–9, of the 357 defendants who were initially referred to prosecution for one or more rape charges 76% were not convicted of rape.⁶ Of the 282 accused who were committed for trial on at least one rape charge only 84 (30%) pleaded guilty or were convicted of rape at trial. A further 98 (35%) pleaded guilty to, or were convicted of, a non-rape offence.⁷ Conviction rates for rape have fallen significantly since 1988–9, when approximately 46% of accused were convicted of at least one rape charge.⁸

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

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

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

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

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

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

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

9 Interim Report para 2.81.

10 See, for example, Interim Report Chapters 3 and 4–6.

traumatic nature of the experience. Research suggests that Aboriginal women and children experience a high rate of sexual assault¹¹ but offences against them are rarely reported. The criminal justice process also deals poorly with the needs of people from non-English speaking backgrounds (NESB).¹²

THE UNIQUE CHARACTERISTICS OF SEXUAL OFFENCES

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

- Sexual offences usually involve the exercise of power by one person over another.¹³ They are most frequently committed by family members, friends or other people known to the victim.¹⁴ Such breaches of trust make sexual offences particularly traumatic for those who experience them. These factors contribute to the very low reporting rate for such offences, which means that some serious offenders are not prosecuted. People who are sexually assaulted by someone they know are less likely to report the offence than those who are assaulted by strangers.¹⁵
- Although sexual assault is frequently depicted as a criminal offence that is typically committed by a stranger, most sexual offences reported to the police involve persons known to complainant.¹⁶ It has been suggested¹⁷

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

12 Interim Report paras 3.12–23.

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

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

15 ABS, above n 2, 29.

16 Interim Report paras 2.25–31.

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

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

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

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

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

- Until recently sexual offences law reflected the assumption that people who were sexually assaulted normally complained of the offence immediately.²⁰ Research shows that this is not the case.²¹ Many people do not tell anyone about the offence for some time and considerable time often elapses before the alleged offence is reported to the police. Such delays may make it difficult to prosecute offences successfully. They may also make it difficult for a person accused of an offence to run his or her defence.
- Historically, sexual offence laws were based on the myth that women as a class of witness are untrustworthy, that women frequently make false allegations of rape²² and that the evidence of children who report sexual offences is inherently unreliable. Such misconceptions have been disproved by empirical research.²³ Although the law has been changed to remove many of these discriminatory assumptions²⁴ there still appear to be misconceptions about the way that perpetrators and victims of sexual assault typically behave. These assumptions may influence police decisions about whether a person should be charged, and prosecution decisions about whether to drop more serious charges if the accused agrees to plead guilty to less serious offences. At trial, defence counsel may use these misconceptions strategically to play on prejudices held by juries. Judges are still required to give some jury directions that do not accurately reflect research on the behaviour of complainants.²⁵ For example, the law may require the judge to tell the jury to take account of the fact that the

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

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

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

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

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

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

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

- Research shows that many complainants in sexual offence cases find their experience of the criminal justice system acutely distressing. Despite reforms over the past decade, the Commission's research and consultations show that many complainants are still very dissatisfied with the criminal justice process. While witnesses in other types of criminal prosecutions often find cross-examination stressful, in sexual offence cases this difficulty is compounded by the fact that the complainant must often answer questions about anatomical details and intimate sexual matters and be cross-examined at length on their behaviour prior to, and during, events that may have been very traumatic. Cross-examination may be particularly stressful for people from Indigenous backgrounds²⁸ and people from cultures where sexual matters are not usually discussed.²⁹
- The adversarial nature of the criminal justice system requires prosecutors to prosecute the case vigorously while at the same time showing fairness to the accused. This may make it difficult for prosecutors to take sufficient account of the needs of complainants.³⁰ Similarly, defence counsel often argue that their responsibility to vigorously test the prosecution case, if the accused denies the allegations, makes it difficult for them to treat complainants sensitively. The trial judge's responsibility to ensure fairness to the accused means that some judges are reluctant to intervene to protect

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

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

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

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

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

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

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

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

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

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

33 Ibid paras 1.27–8.

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

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

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

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

OUR APPROACH—FAIRNESS TO BOTH COMPLAINANTS AND ACCUSED

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

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

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

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

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

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

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

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

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

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

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

41 Interim Report para 6.62.

42 Submission 42.

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

1.22 The Commission is committed to retaining a fair trial process for people accused of sexual offences. It is important that the reforms we recommend do not increase the chance of wrongful convictions. However as the data discussed above⁴⁴ shows, the proposition that sexual offence allegations are easy to make and difficult to disprove does not accord with the empirical evidence. As we have seen, people who allege they have been sexually assaulted are the least likely of all crime victims to report to the police.⁴⁵ When an alleged assault is reported and a person is charged, the presumption of innocence provides considerable protection to people accused of sexual assault.

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

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

43 Ibid 3.

44 See paras 1.6–7.

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

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

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

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

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

EVIDENCE SUPPORTING OUR RECOMMENDATIONS

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

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

CONSULTATIONS AND SUBMISSIONS

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

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

48 Interim Report paras 1.12–25.

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

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

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

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

RESEARCH

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

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

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

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

OTHER COMMISSION ACTIVITIES RELEVANT TO THE REFERENCE

SUPPORT FOR INDIGENOUS ROUNDTABLE ON SEXUAL ASSAULT

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

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

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

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



RECOMMENDATION(S)

1. The Department of Justice Diversity Unit should convene a steering committee with representation from criminal justice stakeholders, government agencies and Aboriginal services and community groups to oversee the development and implementation of the following:
 - 'Responding to Sexual Assault' training for Aboriginal community members and workers;
 - a Community Family Violence/Sexual Assault Resource Guide; and
 - a Statewide sexual assault awareness and safety campaign for Indigenous people.

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

STATEWIDE STEERING COMMITTEE TO REDUCE SEXUAL ASSAULT

1.35 The Statewide Steering Committee to Reduce Sexual Assault is a joint initiative by Victoria Police and the Office of Women's Policy. It met for the first time in June 2003⁵¹ and its members include various government and community organisations. The terms of reference of the Committee state that sexual assault 'must be addressed through a whole-of-community whole-of-government approach...'⁵² The committee is currently considering how the criminal justice system can better support the needs of sexual assault victims.

COMMUNITY EDUCATION INITIATIVES

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

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

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

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

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

1.37 In March 2004, the Commission and the Victorian Multicultural Commission co-hosted a forum which focused on best practice models for education in NESB communities around sexual assault. The forum made a series of detailed recommendations⁵³ about the appropriate content for any proposed program of community education to increase awareness and understanding of issues involving sexual offences. In particular, the forum participants emphasised that any education strategy involving a particular community must take place in the context of a long term commitment to addressing the issue of sexual violence within that community and must be appropriate⁵⁴ to its needs.

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

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

53 These recommendations are set out in Appendix 2.

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

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

PROFESSIONAL EDUCATION AND PARTICIPATION IN OTHER RESEARCH

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

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

DATA COLLECTION

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

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

55 Interim Report paras 3.19–23.

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

THE STRUCTURE OF THIS REPORT

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

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

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

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

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

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

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

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

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

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

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

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

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

Chapter 10 makes proposals for dealing with juvenile sexual offenders.

OTHER ISSUES

SENTENCING

1.49 In October 2000, the Victorian Government established a review of sentencing laws, and commissioned Professor Arie Freiberg to carry it out. The Report of that Review was delivered to the Government in 2002.⁵⁶ Because the period of the review overlapped with the VLRC project, we decided not to make recommendations about sentencing issues. The Sentencing Review recognised that ‘Victoria’s criminal justice statistical information base is amongst the least developed of any in Australia’.⁵⁷ The Sentencing Review was ‘hindered by not having comprehensive, up-to-date and accurate sentencing data readily available’. Similarly, detailed sentencing statistics were not available to the Commission when we began this project. The compilation of reliable sentencing information would have diverted resources away from tasks which we considered more important. In our view it would also have been inappropriate to consider sentencing for sexual offences separately from sentencing for other serious offences against the person.

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

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

57 Ibid 194.

58 Ibid 185.

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

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

1.51 *Pathways to Justice* recommended the creation of a Sentencing Advisory Council⁶¹ which was established by Part 3 of the *Sentencing (Amendment) Act 2003*.⁶² The functions of the Council include undertaking research on sentencing, analysing sentencing statistics and disseminating information on sentencing. The work of the Council will provide a basis for well informed community discussion on sentencing. When the Sentencing Advisory Council is established later this year we believe it would be appropriate for it to consider sentencing in sexual offence cases.

THE LIMITATIONS OF THE CRIMINAL JUSTICE SYSTEM

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

59 Ibid 189.

60 Julie Stubbs, above n 2, 22.

61 Arie Freiberg, above n 56, 185–98.

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

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

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

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

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

1.56 People who have experienced sexual assault may also be entitled to counselling and financial assistance under the Victims of Crime Assistance Scheme.⁶⁴ The legislation providing for victim's assistance was substantially amended in 2000.⁶⁵ The Commission's terms of reference did not allow us to investigate the adequacy of the current scheme.

63 Julie Stubbs, above n 2, 23.

64 *Victims of Crime Assistance Act 1996*.

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

Chapter 2

Improving Police Responses

INTRODUCTION

2.1 In Chapter 1 we referred to the substantial underreporting of sexual offences in Victoria and elsewhere in Australia.⁶⁶ It is possible that the reporting rate, rather than increasing—which is what might be expected after the major reforms to the law of sexual assault in Victoria in the last 13 years—is actually diminishing.⁶⁷ It is also disturbing that over the eight-year period from 1994–5 to 2001–2, there has been a significant increase in the number of complainants withdrawing their complaints of sexual assault.⁶⁸ Withdrawn complaints of rape increased from 14% of reported cases in 1994–5 to 24.8% in 2001–2. In the case of other penetrative offences, the increase in withdrawals was threefold: from 3.2% of reported offences in 1994–5 to 9.9% in 2001–2. The reasons for this increase in withdrawn reports are unknown.

2.2 This Chapter focuses on the vital role which police play in responding to sexual assault. Because police are, in effect, the ‘gatekeepers’ to the criminal justice system, Victoria Police is in an ideal position to take a leadership role in increasing the reporting of sexual assault. While there are a range of reasons why people may not report sexual assault, the police are often the first port of call for those victims of sexual assault who choose to ‘speak the unspeakable’⁶⁹ and it is the police who investigate alleged offences. How the police are perceived by people who report an assault and the quality and consistency of their investigative and decision-making

66 See para 1.5. See also Victorian Law Reform Commission, *Sexual Offences*, Interim Report (2003) (hereafter Interim Report), Chapters 2 and 3. See also para 2.1 below.

67 Australian Bureau of Statistics, *Recorded Crime: Australia 2001* Catalogue 4510.0 (2002) 19. Victoria has the third lowest per capita rate of reported sexual assault in Australia, see p 8.

68 See Interim Report above n 66, para 2.43 and Graph 5.

69 Marg D'Arcy, *Speaking the Unspeakable: Nature, Incidence & Prevalence of Sexual Assault in Victoria* (1999).

practices will have a major impact on reporting and prosecution patterns. Police are also in a position to establish relationships with other agencies which provide services to people who report they have been sexually assaulted.

POLICE PROCESSES IN HANDLING SEXUAL ASSAULT

SOCAU UNITS, CIUS AND THE SEXUAL CRIMES SQUAD

2.3 Sexual assaults are generally dealt with by specialist Sexual Offence and Child Abuse Units (SOCAUs) and Criminal Investigation Units (CIUs). Some are dealt with by the Sexual Crimes Squad. Members of SOCAUs have received training about sexual assault and in metropolitan areas deal almost exclusively with this issue. Members of CIUs are detectives who investigate many different types of crime and do not generally have any special training in the area of sexual assault (although some material on sexual assault is included in detective training courses).⁷⁰ In regional areas, due to lower staffing levels, SOCAUs may not always be available at the time of a reported sexual offence.

2.4 The Sexual Crimes Squad is a specialist squad within Victoria Police which provides assistance and advice to the SOCAUs and CIUs on a daily basis, as well as conducting proactive investigations into recidivist paedophiles and sex offenders. Members wishing to join the Sexual Crimes Squad must be at the level of Detective Senior Constable (or Senior Constables eligible to so qualify). The Squad has approximately 45–50 members attached to it at any time—an Inspector, two Senior Sergeants and six crews managed by one Sergeant and four to six Detective Senior Constables. The Squad runs a Sexual Assault Seminar once every two years which is available to members and non-members.⁷¹

THE CODE OF PRACTICE FOR THE INVESTIGATION OF SEXUAL ASSAULT

2.5 Procedures for handling sexual assaults are governed by the *Victoria Police Code of Practice for the Investigation of Sexual Assault Cases (Code of Practice)*⁷²

70 CIU members only receive ‘refresher’ training in sexual assault if they choose to complete an additional qualification, for example a VATE course, or if they are transferring to the Sexual Crimes Squad.

71 Some Sexual Assault Squad members complete the VATE and SOCA courses but this is not compulsory.

72 Victoria Police, *Code of Practice for the Investigation of Sexual Assault* (1999) (hereafter *Code of Practice*) is discussed in detail in the Interim Report above n 66, at paras 3.48–57.

which was introduced in 1992 and the Victoria Police Operating Procedures.⁷³ A working party was convened in June 1992 to review the operation of the *Code of Practice* and a revised version was completed in 1994. The Code was independently reviewed in 1993.⁷⁴ Since that time, there has been no independent review of its operation. Victoria Police is currently conducting a major review of the *Code of Practice*.⁷⁵

2.6 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, Centres Against Sexual Assault (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.

2.7 The Code states that ‘the first priority in sexual assault cases is to care for the victim’.⁷⁶ The central mechanism that drives the police response is a requirement that complainants receive immediate crisis care⁷⁷ after reporting sexual assault to the police, or at the very least within two hours after the arrival of the first police member.⁷⁸ The significance of crisis care in the context of recent

73 The Operating Procedures state that where they relate to sexual assault cases, they are to be read in conjunction with the *Code of Practice*, 5.2

74 See Melanie Heenan and Stuart Ross, *Police Code of Practice For Sexual Assault Cases: An Evaluation Report* (c1995).

75 See discussion below para 2.12.

76 *Code of Practice*, above n 72, 3. See also above n 66.

77 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 complainants 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, Lise Pittman, June Baker et al, *Breaking the Silence—To Report or Not to Report a Study of Victims/Survivors of Sexual Assault & Their Experiences of Making an Initial Report to the Police* (1993) 16.

78 See *Code of Practice*, above n 72, Guidelines 5, 43, 65.

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’.⁷⁹ It almost certainly will also affect the person’s willingness to proceed with making a police report.⁸⁰

KEY FEATURES

2.8 In an operational sense, the Code distinguishes the steps that ought to be taken by police members when responding to reports of sexual assault, that 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 SOCAUs);
- members who are interviewing sexual assault victims; and
- investigators.

2.9 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 situation⁸¹ [the expression ‘victim’ is used throughout this Chapter and is in the Police Code];
- ‘never presume an allegation of rape is false until it is thoroughly investigated’;⁸²
- consider the range of emotional responses that victims may have following an experience of sexual assault;⁸³

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

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

81 See for example *Code of Practice*, above n 72, 12.

82 Ibid 33.

83 Ibid 66.

- provide victims with copies of their statements as soon as possible; and
- keep victims informed about the progress of the investigation and any decisions made.⁸⁴

2.10 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’.

2.11 The Code also requires the establishment of Victoria Police and CASA liaison committees to ‘monitor, document and report adherence to the *Code of Practice*’. Such committees are intended to encourage cooperation between police and CASAs, identify and resolve problems at local level and provide a framework for managing breaches of its guidelines.⁸⁵ In the Interim Report we indicated that nine of fourteen CASAs who participated in the Commission’s focus groups with CASAs had established regional liaison committees. There were no committees in four large regional areas, where CASA representatives and police would have had to travel considerable distances to attend meetings. One metropolitan service which did not have a liaison committee felt that less formal methods for handling concerns with the police had been effective.⁸⁶

CURRENT PROJECTS—VICTORIA POLICE INVOLVEMENT

2.12 Throughout this inquiry the Victorian Law Reform Commission has worked closely with senior members of Victoria Police, who have shown a strong commitment to improving police responses to sexual assault. Under the auspices of the Statewide Steering Committee to Reduce Sexual Assault, Victoria Police in December 2003 began a formal wide-ranging evaluation of the *Code of Practice for the Investigation of Sexual Assault*.⁸⁷ A two month consultation period with major

84 Ibid 68–73.

85 Ibid 7 and 8.

86 Interim Report paras 3.60–64.

87 The review is being undertaken by the Sexual Offences and Child Abuse Co-ordination Unit within Victoria Police.

external stakeholders is now nearing completion.⁸⁸ It is intended that the review will result in an improved *Code of Practice*, the design and development of training packages on sexual assault to Victoria Police members and the development of a *Code of Conduct* relating to sexual assault.

2.13 Some of the areas the review is looking at include:

- adding a Victims' Charter of Rights to the *Code of Practice*;
- issues surrounding crisis counselling, for example, the criteria for the decision whether or not to convey a victim to a CASA and the necessary emphasis on the victim's best interests;
- issues relating to Indigenous complainants, complainants from of non-English speaking backgrounds (NESB), intellectual disability/impairment and mental illness, and in particular the need to improve services for these victims via appropriate and timely referrals to specialist agencies and through training packages for police.
- communication with victims, in particular the need to provide written reasons to victims where no charges are to be laid or no further investigation is to proceed;
- issues surrounding drug or alcohol facilitated sexual assault;
- the special needs of child victims of sexual assault;
- issues surrounding forensic medical officer (FMO) examinations and victim medical needs generally; and
- dispute resolution procedures.

2.14 Victoria Police is also currently preparing a pilot evaluation project for the establishment of Sexual Assault Investigation Sections⁸⁹ (SAISs) in three metropolitan areas.⁹⁰ It is envisaged that each SAIS will comprise at least two detectives and two SOCAU members. These units will work exclusively on investigating both historical and recent sexual offences. The Commission has been

88 The organisations that have been or will be consulted include: various CASAs, the Gatehouse Centre, Office of Women's Policy, Victorian Institute of Forensic Medicine, Aboriginal Family Violence & Legal Service, Victim Referral and Assistance Service, Department of Human Services, Advocacy and Guardianship Board, Elizabeth Hoffman House, Islamic Women's Welfare Council and the Horn of Africa Community.

89 See discussion below paras 2.95–97.

90 Dandenong, Sunshine and Broadmeadows have been identified as appropriate pilot sites, due to the high incidence of sexual assault.

informed that the evaluation framework and Standard Operating Procedures for the pilot units are in the design stage (but shortly to be finalised) and that the pilot units should be up and running by the end of 2004. The Commission strongly supports this project and makes recommendations about the establishment of SAISs below.

2.15 The Commission has also been advised by Victoria Police that a new 'ready reckoner'⁹¹ for sexual assault cases is shortly to be finalised and distributed to all police. This is a pocket-sized 'flip chart' for dealing with reports of sexual assault and will contain a brief summary of the Code of Practice: what to do, when to do it and how. This is another commendable initiative by Victoria Police.

ISSUES IDENTIFIED IN INTERIM REPORT

2.16 Chapter 3 of the Interim Report reported on issues about the police response to sexual assault that were identified in focus groups,⁹² which the Commission held with CASAs. Some of the main views expressed in focus groups were as follows.

- Complainants withdraw complaints for a range of reasons, including their treatment by police, their fears about the implications of pursuing a criminal justice response or the lengthy delays which are experienced in bringing matters to court.
- The *Code of Practice* continues to provide the basis for an efficient, professional and appropriate response to the majority of complainants, but there are some problems about its interpretation and application that need to be addressed.
- The complainant's initial contact with police has an important effect on whether the person will decide to proceed. Concerns were expressed about police attitudes to complainants. It was suggested that police would benefit from additional training on sexual assault. CASAs generally expressed positive views about SOCAUs, but said that some general duties police and members of CIUs did not respond sensitively to complainants.

91 'Ready reckoners' are already used by Victoria Police for several different types of offence.

92 For the Interim Report several focus groups were run with Centres Against Sexual Assault (CASAs). See discussion in Interim Report above n 66, Chapter 3.

- Complainants often felt they were not informed about the progress of investigations, or about a decision that there was insufficient evidence to prosecute.
- There was some inconsistency in the police response to reports of sexual assault, including inconsistency about when matters will be referred to the Director of Public Prosecutions (DPP) for prosecution.
- Concern was expressed about lengthy delays in investigating complaints.

2.17 In late 2003 the Commission ran a series of six focus groups with members of Victoria Police to obtain information about police procedures and to obtain their views on a range of matters, including issues raised by CASAs. Focus groups discussion topics included:

- police beliefs about the level of false reporting and their attitudes and views on the factors that influence victims' decisions about reporting and withdrawal; and
- police attitudes to the *Police Code of Practice on Sexual Assault* and procedures and attitudes that influence decisions to charge offenders and authorise or not authorise a particular matter for prosecution.

2.18 In the remainder of this Chapter we discuss the findings from police focus groups and make recommendations on police processes which take account of the views expressed by both police and CASAs.

FINDINGS ARISING FROM POLICE FOCUS GROUPS

2.19 Participation in the police focus groups was voluntary. Participants were informed that no-one would be identified in the write-up of the focus groups. The six groups were comprised as follows:

- 7 SOCAU members from Melbourne metropolitan stations
- 12 CIU members from metropolitan stations
- 10 SOCAU members from regional stations
- 11 CIU members from regional stations
- 17 Officers in Charge (OICs) o SOCAUs (metropolitan)
- 6 Officers in Charge of CIUs (metropolitan)⁹³

93 The gender mix varied from group to group, with the CIU groups containing the largest ratio of men. All but one session was taped.

POLICE ATTITUDES AND TRAINING NEEDS

ATTITUDES ABOUT THE TRUTH AND FALSITY OF COMPLAINTS

2.20 In 2.1 we referred to the increase in withdrawal of sexual assault reports that has occurred over the past eight years. There was a prevalent belief in all groups that false reports of sexual assault were likely to be withdrawn. Views differed as to the likely proportion of withdrawn reports that were false, but the figures proffered were high. The metropolitan CIU members thought that it was *at least* half and several of the regional CIU members thought that it was ‘about 50%’. One person in the latter group also commented that a very high percentage of recently reported rapes are false or have an element of falsehood, especially alleged husband/wife rapes. The OICs of CIUs thought that the figure was 40%–50% generally, but over 50% in the CBD. There was general agreement that it was a “very high percentage”.

2.21 Interestingly, most SOCAU members had a different view and did not seem to think that many withdrawn reports were actually false reports. Although views varied on the issue, the reports most often cited by SOCAU members as being false were those from teenage girls ‘caught out’ by their parents having sex, or people with a cognitive impairment.

2.22 There appeared to be a worrying assumption on the part of many in the groups, especially the CIUs and OICs, that it is possible to ‘just tell’ when a report is false. Some of the CIU OICs stated that they can tell a complaint is false where there is, for example, no corroboration or the stories don’t ‘gel’ in some way. One metropolitan CIU member commented that ‘the false reports are quite easy to determine early on’. Another added that the detectives make it ‘easy’ for people to withdraw false reports without them having to admit to their falsity.

2.23 The apparent belief of detectives and OICs that there is a high rate of false complaints is likely to affect the way in which reports are investigated. An attitude of scepticism may also result in complainants withdrawing allegations, even though investigation might have substantiated them. Clearly this attitude is inconsistent with the Code of Practice principle that allegations of rape should never be presumed to be false until they are thoroughly investigated.⁹⁴ In consultations with CASAs for the Interim Report, counsellor/advocates described

94 *Code of Practice*, above n 72, Guideline 33 and see also Guideline 66.

how devastating it was for a person to be confronted by a detective accusing them of lying—‘Clients are just blown away by that...’⁹⁵

2.24 It would appear that either false reporting has increased dramatically in Victoria in the last 20 years, or police are today more willing to judge reports false. According to police statistics from 1986–7,⁹⁶ only 7% of reported sexual assaults were judged to be false. A study released in 1991 by the Community Council Against Violence⁹⁷ reported that 71 allegations of rape made to Victoria Police between 1987 and 1990 were categorised as ‘false’. Those cases represented only 4.8% of reported rapes during this period. South Australia reported an even lower figure of 1.4% for false reports.⁹⁸

REASONS FOR WITHDRAWAL OF COMPLAINTS

2.25 A number of other reasons were advanced by SOCAU and CIU members and OICs for complainants withdrawing their complaints, including:

- fear of the lengthy criminal justice process, especially of cross examination;
- lack of confidence in the criminal justice system—judges’ comments, for example ‘no doesn’t mean no’ do not help;⁹⁹
- feelings of guilt, especially where alcohol or drugs were involved, that they were somehow responsible;
- some just want the offence recorded but have no intention of taking it further;
- some make the report only for the purposes of applying for crimes compensation;
- pressure from boyfriends or family to report, when they didn’t really want to;

95 See Interim Report above n 66, para 3.106.

96 Police Complaints Authority of Victoria (April 1988). *Sexual Assault Victims and the Police*, cited in Ngaire Naffine, ‘Windows on the Legal Mind: The Evocation of Rape in Legal Writings’ (1992) 18 (4) *Melbourne University Law Review* 741, 753.

97 *A Profile of Rapes Reported to the Police in Victoria 1987–1990*, Melbourne, 1991, 65–9, cited in Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure* Report No 43 (1991) 25.

98 Naffine, above n 96. Naffine comments that based on these stats, the ‘vast majority’ of rape complaints are genuine, and that women alleging rape are ‘mainly believed’ [by police]. She expressed the opinion that the statistics are probably conservative.

99 This was a comment by a CIU regional member.

- sometimes people report rape where ‘they’ve had sex and not really wanted to but it’s not been a rape’;¹⁰⁰
- pressure from family to withdraw reports, when the report is of intra-familial abuse; and
- where there has been a delay in reporting and it is one person’s word against the other.

2.26 It is difficult to assess the accuracy of police perceptions in this area without reliable information about the reasons why complaints are withdrawn or police decide to take no further action. The Commission believes that additional research on the reasons why complaints are withdrawn could result in improvements to police procedure and reduce the number of withdrawn complaints.



RECOMMENDATION(S)

8. Victoria Police should consider funding a research project to obtain further information about why complaints are withdrawn and the factors that influence police decisions to take no further action on a complaint. Information derived from this research should be taken into account in police training, and considered in the review of the Code of Practice for the Investigation of Sexual Assault (Code of Practice) and the review of the brief authorisation process proposed in Recommendation 19 below. See also Recommendation 32 below.

ATTITUDES TOWARDS VULNERABLE GROUPS

2.27 In Chapter 3 of the Interim Report we referred to factors which may discourage vulnerable complainants such as children, people from a non-English speaking background, Indigenous people and people with disabilities or impairments from reporting sexual assault.¹⁰¹ Focus groups explored the extent of these barriers and the extent to which police were aware of, and sympathetic to, the problems faced by vulnerable people.

¹⁰⁰ SOCAU rural member.

¹⁰¹ Interim Report above n 66, paras 3.6–55.

People from a Non-English Speaking Background

2.28 In the focus groups few participants had personally dealt with many (or indeed any) reports of sexual assault by NESB people. Most recognised that these people face additional barriers when reporting. One regional SOCAU member said:

They don't come forward. A lot of them are from countries where the police are the bad guys. You go to the police station and never come out again.

A metropolitan SOCAU member made the following comment:

There are no supports for them, being non-English speaking.

2.29 Some police expressed the belief that young women from particular cultural backgrounds were likely to make false reports.

With a number of people from Turkish and Muslim backgrounds, where virginity before marriage is a big issue, they've probably had consensual sex and come to us and report it as a rape to justify the circumstances they find themselves in, and then withdraw it... Although we don't charge them with false reporting, it's fairly obvious that the reason it's been reported to us is to get them past this cultural disgrace.

2.30 The Commission is concerned that cultural stereotyping of this kind may result in failure to investigate reports from some NESB women who may have already had to overcome considerable obstacles before deciding to make a report.

2.31 During our NESB consultations, it became clear that women from non-English speaking backgrounds often feel that their particular needs are misunderstood, not only by police¹⁰² but by CASA workers. One woman of non-English speaking background said:

CASAs can understand the impact of rape, but not how it impacts on us.

And another commented:

I went a few times [to CASA] but then I realised the way I felt was not understood.

2.32 The Commission suggests that both police and CASAs attempt to establish better links with organisations which provide assistance to people from NESBs, with a view to providing a more culturally sensitive response to women and children from these communities who report sexual assault. The review of the

102 For a discussion of this, see Interim Report above n 66, paras 3.14–23.

Code of Practice is likely to recommend changes along these lines.¹⁰³ The Commission suggests that both the police and the CASAs make information available to NESB complainants, as soon as practicable, about the culturally specific support services available to them.

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RECOMMENDATION(S)

9. Victoria Police and CASAs should ensure that NESB complainants receive written information in relevant community languages as soon as practicable after a report of sexual assault has been made, about culturally specific support services available to them.

Indigenous People

2.33 The barriers encountered by Indigenous people were canvassed in the Interim Report.¹⁰⁴ There was general agreement amongst the focus group participants that Indigenous people very rarely report sexual assaults, despite the fact that such crimes occur frequently within Indigenous communities.¹⁰⁵ Many thought this was because the communities are close knit and the accused is mostly well-known to the victim, and that the communities prefer to deal with such things themselves. Others posited lack of confidence that the criminal justice system would actually deliver justice as an important reason for low reporting:

[Indigenous women] see a lack of successful prosecution, see that complainants get ostracised [in the communities].¹⁰⁶

2.34 The findings in a recent report by Elizabeth Hoffman House and CASA House¹⁰⁷ support police perceptions of sexual assault within Indigenous communities.¹⁰⁸ The authors ran a series of focus groups with Indigenous and

103 See above paras 2.12–13.

104 See paras 3.24–28.

105 One SOCAU member commented: 'Sexual assault amongst aboriginal communities is an epidemic. What aboriginal adolescent girl hasn't been sexually assaulted?'

106 Metropolitan SOCAU member.

107 See Elizabeth Hoffman House and CASA House, *From Shame to Pride: Access to Sexual Assault Services for Indigenous People* Consultation Outcomes, Reports and Recommendations (2004). The recommendations from this report are reproduced in Appendix 2.

108 For a summary of recent reports relating to sexual violence in Indigenous communities, see *ibid* 16–19. For example, a recent study by the NSW Aboriginal Justice Advisory Council, *Speak Out Speak*

non-Indigenous participants¹⁰⁹ in three metropolitan and regional areas in Victoria. Indigenous workers spoke repeatedly about the ‘epidemic’ of sexual abuse:

Its [sic] just like this disease that just keeps getting stronger and stronger. Whole generations of our young people are growing up thinking that this stuff is normal behaviour.¹¹⁰

2.35 Participants also said that very few victims report sexual offences to police or seek any other assistance:

There is a perception that if you are a victim and you speak out, then you risk getting victimised all over again. There are also the repercussions from family members and the community. It can be anything from being isolated out or intimidated into silence.¹¹¹

2.36 Many participants complained of the lack of Indigenous-specific services for sexual assault victims and identified this as a ‘key barrier’ to victims seeking assistance.¹¹² Indigenous workers also reported a lack of understanding within communities of the role of CASAs. Some of the other problems identified were: institutionalised racism within the service systems and legal system, fear of reprisals from the perpetrator or family/community, victims not labelling the incident as a sexual assault and fear of police and the legal system generally. One Indigenous worker commented:

Strong: Aboriginal Women in Custody found that 69% of the Aboriginal women surveyed reported being abused as a child and 75% of those women said they were sexually assaulted as children. Over 82% did not report the abuse. Over 73% reported being abused as adults and 42% of these were sexually assaulted. A report by the Queensland Aboriginal and Torres Strait Islander Women’s Task Force on Violence in 1999/2000 estimated that about 88% of rape cases within Indigenous communities goes unreported. The report also highlighted that many sexual offences occur within families, but are not often identified by Indigenous women as such. Even if they are, the women ‘are reluctant to seek help from the legal system because they fear they will be abused further by male police and male lawyers who were considered to place them on trial, rather than the perpetrator’. (at p 18).

109 A total of 54 people participated in the focus groups and included Indigenous workers/community members, mainstream providers of services to people who have experienced sexual assault, particularly the CASAs and both Indigenous and non-Indigenous mainstream participants.

110 Elizabeth Hoffman House and CASA House, above n 107, 23.

111 Ibid 24.

112 Ibid 27.

One of our women was encouraged by the CASA to go to police, and she did. But once she got there, when she presented her story, she was faced with a lot of disbelief. She didn't go back.¹¹³

2.37 It is clear that sexual abuse within Indigenous communities is not a problem that can be dealt with in isolation. In a roundtable discussion held before publication of the Commission's Interim Report, the following priority areas were identified:

- 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.¹¹⁴

2.38 In terms of a specific police response, Victoria Police has made a start with its review of the Code of Practice which, amongst other things, will look at ways to improve police and CASA responses to the needs of Indigenous women who report sexual assault.¹¹⁵

2.39 The Commission considers it important for CASAs and police to ensure that information is provided to Indigenous complainants about the availability of support and counselling services from culturally specific service providers.

113 Ibid 33.

114 See Interim Report above n 66, Chapter 3.

115 See above paras 2.12–13.

! RECOMMENDATION(S)

10. Victoria Police should ensure that Indigenous complainants receive written information about Indigenous support services available to them as soon as practicable after a report of sexual assault has been made.

People with a Cognitive Impairment

2.40 The barriers which people with a cognitive impairment face in reporting sexual assault are discussed in the Interim Report.¹¹⁶ Since then the Disability Discrimination Legal Service (DDLS) has undertaken a project on the problems experienced by people with cognitive impairment in accessing the criminal justice system after sexual assault.¹¹⁷

2.41 Despite the over-representation of people with a cognitive impairment as victims of sexual assault, there are very few prosecutions under the Victorian offences designed to protect people with cognitive impairment from sexual exploitation by people with power over them.¹¹⁸ Chapter 3 of this Report makes proposals to overcome the difficulties experienced by these people in reporting offences and giving evidence.

2.42 Most participants in the focus groups had had some personal experience dealing with reports of sexual assault by people with cognitive impairments. They were generally in agreement that these matters rarely reach prosecution stage. One SOCAU metropolitan member said

They [people with cognitive impairments] are not believed... It is difficult for them to give a good account of what happened.

2.43 Another person commented that people with an intellectual disability 'don't withdraw but the briefs don't get authorised'. A CIU metropolitan member commented that people with intellectual disabilities 'can't verbalise things properly, they can't talk about things to the level we need to prosecute' and another said that unless there is physical or forensic evidence to corroborate the

116 See paras 3.29–43.

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

118 *Crimes Act 1958* ss 51 and 52. Confirmed by Gary Ching, Manager Sexual Offences unit in OPP in email of 23 September 2002.

complaint, then you 'don't have a complaint'. Clearly there is a need for more police training and other support to assist police in dealing with reports of sexual assault from people who have a cognitive impairment. We discuss this issue in Chapter 6.

Children

2.44 There was general agreement within several of the groups that the pressures on children reporting sex offences are often greater than those on adults.¹¹⁹ Some thought that children are often pushed into reporting and do not want to go ahead as they know the offender and are afraid of the consequences; others felt that it was the parents who often instigated withdrawals when they realise the traumatic, drawn-out process ahead of the child. One SOCAU metropolitan member commented that unless the child has good support within the family for the report, the pressures on the child were enormous and a withdrawal was likely. An Officer in Charge of a CIU thought that 'parents are unwilling for a child to go through the system... It's just too hard for them to cope'. Another said that that parents will sometimes report something a child has told them but 'parents don't want kids involved with the judicial system in any way'.

Rural Victims

2.45 Another disadvantaged group of victims are those living in rural areas. According to focus group participants, services are difficult to access, the police are often inadequately resourced¹²⁰ and the court delays can be inordinate. Some areas do not have SOCAUs and in others SOCAU members are difficult to contact after hours when sexual assaults often occur.¹²¹ CASA services are also limited in the country, so that a victim may have to wait weeks or even months to receive counselling. Several participants complained that CASAs were often difficult to contact.

119 For a discussion about the particular pressures on child victims of sexual assault see generally David Jefferies, 'Gathering Evidence from Child Witnesses: A Police Perspective' (Paper presented at the Children as Witnesses Conference, Australian Institute of Criminology, 3-5 May 2002).

120 One CIU regional member commented: 'we [Victoria Police] are now looked at as a business and we don't fund some parts of it as well as others'.

121 For sexual assault victims needing immediate assistance after hours, there is the Sexual Assault Crisis Line which is staffed by CASA workers. The number is listed in the phone book or can be obtained direct from Telstra.

2.46 Community attitudes were also identified as a problem. A SOCAU member said:

certainly with our strike rate in Ballarat with convictions in the County Court, you really have to prepare them [complainants] for the fact that if this...gets to court, it doesn't matter how much evidence you've got...I say to them it's unlikely we'll get a conviction in court [in Ballarat].

The reason suggested for this problem was that people in the area still don't think that sexual assault happens.

2.47 A CIU member commented:

Ballarat has a really bad reputation for juries... You can have a watertight case and then the jury goes 'no not guilty'.

Victims of sexual assault are no doubt well aware of this situation and may decide not to bother reporting, because of the uncertainty of outcome.

COMMUNICATION WITH COMPLAINANTS

2.48 In the Interim Report we referred to the concerns which the CASA groups had expressed about some CIU members. Counsellor advocates who had worked in the field for some years had noted positive changes in the approach of CIU detectives. However it was said that some CIU members still took an adversarial approach in dealing with complainants. It was also said that investigative processes still took precedence over the complainant's welfare.

2.49 Along similar lines, SOCAU members were frequently critical of the detectives' communication styles and attitudes. Many felt that detectives went into investigations with preconceptions, for example, that if the victim knew the offender it wasn't likely to be a rape.¹²² Others ask as their first question to the SOCAU member who has dealt with the initial report: 'is it [the claim] legitimate?' or 'is she attractive?', 'what was she wearing?'¹²³ Some SOCAU members thought that sexual offence files are a low priority for the CIUs. A metropolitan SOCAU member suggested that one reason why these cases are not a priority for CIUs is that they involve hard work and it takes a long time to lay the foundations for a solid case:

122 In this regard, a SOCAU OIC thought that the detective training was at fault in that the cases discussed are always stranger rapes, despite the reality that most victims know the offenders.

123 Comment from a SOCAU OIC.

They deal with the human element—emotions—and volatile and sensitive issues. It takes a long time to work with people and it's not a matter of ...just getting the facts... They're [CIU detectives] under the pump – 15, 20 open cases at a time, and these things [sexual assault investigations] go on for months and months.

2.50 Some SOCAU members thought that CIU members' communication techniques with complainants left much to be desired, that they were often harsh or blunt,¹²⁴ used inappropriate language¹²⁵ or were generally insensitive. One suggested frustration with the process as a reason:

Once you get your fingers bitten a few times with a huge sex brief that's gone nowhere I guess you are wanting to know whether this person is in for the long haul right from the word go and they expect the victim to say 'yes I'm in for the long haul'. And if they get the wishy washy ones...it must be very frustrating.¹²⁶

Another thought that preconceptions about 'real' rape victims play a role:

If the victim can articulate herself about the offence, then she's not acting like she's been raped. There's still a bit of a preconception of how you should behave if you've been raped...if the victim is inarticulate then they wonder what sort of witness she will make...¹²⁷

The Police Code of Practice emphasises that:

people react differently to traumatic events. A victim may appear very composed and be able to calmly discuss the incident. You should not infer from this that the victim is unaffected by the assault or is lying... Alternatively a victim may be in a very distressed state.

Training for police should ensure that these varying reactions are understood by police.

2.51 It was also suggested that police may be influenced by judgments about the behaviour of the woman reporting the offence.

124 As one metropolitan SOCAU member said: 'It's a time management issue for them, and if they can cut to the chase and get a definite answer by being a bit blunt and in your face, they'll do it'.

125 One SOCAU member had overheard a CIU member say to another officer in front of a complainant: 'apparently she's a victim of a gang bang.' (SOCAU metropolitan member).

126 SOCAU metropolitan member.

127 SOCAU metropolitan member.

Was she contributing to the offence...this old belief that she must have done something or been wearing something or said something for her to have been raped...¹²⁸

2.52 Such comments suggest that CIU members need additional training to assist them to deal with complainants. Recommendation 30, proposes the establishment of specialised Sexual Assault Investigation Sections. In these sections, a detective or CIU member would be attached to a SOCAU. This will help build up a core of detectives with expertise in investigating sexual assault.

GENERAL DUTIES POLICE

2.53 In the CASA focus groups concerns were also expressed about the response of some general duties police. Similarly, participants in the police focus groups commented that although the response of general duties police to those who report sexual offences is often good, some either do not know about the Code of Practice or are not sensitive in dealing with complainants. One OIC participant commented that the first contact is very important. The person the victim encounters at the front desk in the police station will affect her impression of the whole process. One rural SOCAU member thought that 'a minority [of general duties police] don't give good service' and that if front desk members don't have the appropriate skills and training they won't make a good first impression.

2.54 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. The view expressed was that providing one module on sexual assault amongst the huge amount of information new recruits have to absorb was clearly inadequate.

2.55 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 decide 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 SOCAUs could be involved in providing training to general duties members.

128 Regional SOCAU member.

RECOMMENDATIONS

TRAINING NEEDS

2.56 In the Interim Report we said that there was a need to enhance sexual assault training, particularly training for members of CIUs and general duties police. Police focus groups expressed similar concerns. The Commission recommends that Victoria Police review and overhaul the sexual assault training programs for general duties police, and for police in SOCAUs and CIUs.

!	RECOMMENDATION(S)
11.	Victoria Police should enhance training and develop refresher courses for all general duties police on how to respond appropriately to victims of sexual offences.
12.	Training on sexual assault for members of Sexual Offences and Child Abuse (SOCA) Units and Criminal Investigation Units (CIU) should address the social context of sexual offences, including: <ul style="list-style-type: none"> • the characteristics of most offences, offenders and victims; • the short-term and long-term impact of sexual assault on victim/survivors; and • the barriers that victims often face in reporting offences.
13.	Training for CIU 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 material could usefully be included in a training session developed by CASAs in collaboration with the SOCAU Coordination Office.
14.	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: <ul style="list-style-type: none"> • Indigenous people; • people from non-English speaking backgrounds;

! RECOMMENDATION(S)

- people with cognitive impairments; and
 - children.
15. In developing sexual assault training packages for police, Victoria Police should:
- work collaboratively with CASAs to develop training packages that ensure police members understand the role of CASAs and can benefit from their experience of working directly with complainants;
 - engage consultants or representatives from non-English speaking background community organisations who are recognised by communities as having expertise or training experience in culturally appropriate sexual assault service responses; and
 - engage consultants 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.¹²⁹

PROVIDING INFORMATION TO THOSE REPORTING SEXUAL ASSAULT

2.57 Based on the results of consultations and CASA focus groups conducted for the Interim Report, the Commission believes that improvements could be made to police communication processes with people who have reported sexual assault. Written materials in a range of languages covering police processes in sexual assault cases should be made available at police stations across Victoria. This may help to demystify the process for some victims and encourage reporting.

2.58 The Commission also recommends that police provide written reasons to complainants when it has been decided that no charges will be laid or no further action will be taken. In police focus groups participants reported that written reasons for a decision not to authorise a matter for prosecution were rarely given to complainants¹³⁰ and that the normal way to inform a person about a decision

129 The SOCA Coordination 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 SOCAU training course.

130 Only the metropolitan CIU OICs thought that written reasons were often provided.

not to proceed was by a phone call. A few focus group participants said that they had on occasion provided written reasons, but only where the person had requested it after being informed verbally of the decision not to proceed.

2.59 Some CIU members were of the opinion that if police were honest with the complainant from the start about their chances of a successful prosecution, then non-authorisation¹³¹ should come as no surprise. Interestingly, many participants reported that complainants were often relieved to hear that their cases had not been approved for prosecution.

2.60 The Commission's recommendation that written reasons be provided is aimed at improving communication between complainants and police and at increasing the accountability and transparency of police decision-making. Such changes could make people more confident about reporting sexual assaults to the police.



RECOMMENDATION(S)

16. 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 CASA and SOCA Units, the principles of the Code of Practice, and the options victims have in making a statement. These materials should be provided in a range of languages.
17. Liaison Committees (see Recommendations 27, 28, 29 below) should assist in the development of these materials and ensure the materials are kept updated and a ready supply available at police stations at all times.
18. The Code of Practice 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.

131 See discussion below para 2.61.

AUTHORISATION OF BRIEFS

2.61 The ‘authorisation’ process refers to the decision-making process where a file is examined to decide whether or not it should be referred to the Office of Public Prosecutions (OPP) for prosecution. Generally it is the senior sergeant attached to the relevant CIU who is in charge of the authorisation process for sexual offence briefs, although in country areas it is sometimes the station senior sergeant (who may or may not have specific knowledge about the law relating to sexual offences). Generally, the Officers in Charge of SOCAUs are not delegated power to authorise or not authorise briefs of evidence relating to sexual assault, even though many are CIU qualified. The Commission sees this as somewhat anomalous, given that these officers have both specialised training in sexual offences and also detective qualifications. For this reason they may be better qualified to review these briefs than those with no specific training in the area of sexual offences.

2.62 CASA focus groups reported an apparent lack of consistency in police responses to reports of sexual assault.¹³² In the police focus groups, the Commission was told that there are no formal criteria against which cases are assessed for authorisation. Some participants felt that the authorisation process was somewhat haphazard and unpredictable. A common comment was that costs are almost always a consideration in the decision—if there is any chance of losing the case and having legal costs awarded against the department, then a brief will usually not be authorised.

Particularly [in cases] where there is not a great deal of corroboration, it can come down to costs. If we lose, we get costs awarded against us, that comes out of our budget; the bosses won’t authorise it if it’s a line ball.¹³³

2.63 According to a SOCAU OIC, costs are awarded against the police in most unsuccessful prosecutions, and sometimes when only some of the charges have failed. Certainly since the High Court decision of *Latoudis v Casey*,¹³⁴ it is now easier for successful defendants to claim costs from police. In that case the High

132 Interim Report para 3.105.

133 Metropolitan CIU OIC. For the financial year 2002/3, costs were awarded against police in 0.3% of cases (the previous financial year was 0.4%), well within the police target for the year of <1% of cases: Victoria Police *Annual Report* 2002–3. The Annual Report does not give breakdowns as to the types of cases in which costs were awarded against police. Given the low conviction rate for sexual offences, it could be that they make up a higher proportion of these cases than other types of matters.

134 (1990) 170 CLR 534.

Court decided that in ordinary circumstances an order for costs should be made in favour of the person against whom a criminal prosecution has failed. Mason CJ said in relation to police:

The argument that police and other public officers charged with the enforcement of the criminal laws will be discouraged by the apprehension of adverse orders for costs from prosecuting cases which should be brought is without substance and is no longer accepted by the courts...¹³⁵

2.64 The Commission believes that the review of the brief authorisation process (see Recommendation 19 below) should examine the effect of court costs on authorisation, particularly in cases in which there is no physical or other evidence to support the complainant's allegations.

2.65 The existence of corroborating evidence such as signs of physical injury, forensic evidence or supportive witnesses was identified as an important factor in the authorisation decision. One CIU OIC commented:

If an injury is consistent with the attack then you're more likely to authorise that brief than one in which the victim has no injuries at all.

One regional SOCAU member said that if there is no supporting evidence she will tell complainants that they have little chance of success:

If it's one on one...you tell the victim almost straight away if there's no witness evidence, no medical evidence...they have 'Buckley's or none'... The percentage of authorised briefs is tiny compared to the complaints you get.

2.66 The majority of women who are sexually assaulted are not physically injured.¹³⁶ Police reluctance to authorise a brief in such cases may mean that many of those actually guilty of sexual assault are not prosecuted because there is little or no physical evidence to implicate them.

2.67 In country areas senior sergeants may also consider community attitudes when deciding whether or not to authorise a case for prosecution:

135 Ibid 543. For a brief discussion of the case see Fitzroy Legal Service, *The Law Handbook* (2004) 80.

136 Discussion Paper para 3.15.

In Ballarat the general community still don't think it [sexual assault] happens, they would still be blaming the victim and they're your jury... Your boss has to consider community perceptions as to the outcome... If more went to court, the public awareness would change.¹³⁷

2.68 Another factor which influenced brief authorisation was police perceptions about whether the complainant would be a convincing witness. If the complainant was intoxicated at the time of the offence, briefs were less likely to be authorised because it was thought that she might be perceived as having faulty recall or even as being dishonest. One regional CIU member said that if the victim was drunk and is 'sketchy' about what happened, you have to let her know that 'it [her story] will be picked apart by the defence'. If the complainant is inarticulate or lacking confidence when relating the facts to police that may count against her in authorisation. One SOCAU member expressed frustration with this situation:

There seems to be lots of pre-empting about how things will pan out in court and not giving the victim the opportunity to stand there and say what's gone on... I don't know many 'ideal' victims that you have... The reality is that there are not many 'ideal' victims of sexual offences... They make those decisions [authorisation decisions] based on the fact that people might be a little bit slow or because they didn't act a certain way.¹³⁸

2.69 Other factors put forward as influencing the authorisation decision were:

- existence of a mental impairment for either party;
- extreme youth of the complainant (under 10 years);
- if the only corroborating evidence was witness statements and those witnesses have had criminal convictions;
- the age of the allegations and whether there was any supportive evidence;
- whether or not the complainant could recall specific details; and
- the existence or otherwise of similar fact evidence or whether the accused has many prior convictions.

All of these factors except the last one apparently make it less likely that a file will be authorised.

137 Regional SOCAU member. A SOCAU OIC commented that some areas such as Bendigo are notorious for acquitting those accused of sex crimes.

138 Metropolitan SOCAU member.

2.70 There appears to be a lack of consistent and transparent process in relation to the authorisation of briefs. From the Commission's own research, and also the ABS *Women's Safety Survey*, it is clear that a large proportion of sexual assault reports never reach prosecution. In part this is due to complainants withdrawing their reports themselves, but many others are rejected as viable cases for prosecution by police. The Commission recommends that Victoria Police review the brief authorisation process to make it more consistent, accountable and transparent than appears to be the case at present. The review should consider the extent to which concern about costs affects authorisation of certain types of sexual offence briefs, for example those in which there is no physical or witness evidence to support the complainant's allegations. Guidelines should clearly specify the factors which should be considered in the authorisation process relating to sexual offences, including factors relating to costs.

2.71 As noted in the Interim Report,¹³⁹ in 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.¹⁴⁰



RECOMMENDATION(S)

19. Victoria Police should review their brief authorisation process with the aim of developing a model that is consistent, transparent and accountable. In particular, the impact of court costs on the decision-making process should be examined and appropriate strategies devised to resolve any issues which are identified.
20. Victoria Police should consider delegating power to the Officers-in-Charge of SOCA Units to authorise sexual assault briefs.
21. A monitoring process should be established to allow evaluation of the authorisation process on a regular basis, so that necessary amendments can be made.

139 See n 1, para 3.117.

140 See Victoria Police, *Violence Against Women Strategy: A Way Forward* (2002) 7.

! RECOMMENDATION(S)

22. All officers who are able to authorise briefs in sexual assault matters should be required to attend a sexual assault brief manager's course.
23. Where the Criminal Investigation Unit has principal carriage of the investigation, the Officer-in-Charge of the relevant SOCA Unit, or the individual SOCA Unit members, should be consulted prior to any decision being made against authorising the brief for prosecution.

POLICE CONCERNS ABOUT THE CODE OF PRACTICE

2.72 As would be expected, all police focus group participants were aware of the existence of the *Code of Practice*. The majority thought that the Code generally worked well but several said that most uniformed members were not aware of their obligations under the Code and some were not even aware of its existence.¹⁴¹ Recommendations 11–15, which proposed changes to police training, are intended to ensure that all police, including general duties police, are aware of the requirements of the Code.

2.73 In support of the Code some participants in police focus groups said that it simply codified what police were doing anyway.¹⁴² One SOCAU OIC commented that the Code 'works inasmuch as you have a set format which is a lot clearer than it was'.

2.74 There was also criticism of some aspects of the Code in the focus groups. The Code of Practice requires that:

members must consider the victims' immediate medical needs and take them to the nearest CASA or Hospital Crisis Care Unit (HCCU) as soon as possible. This is an absolute priority in cases of recent sexual assault and should occur within two hours of the arrival of the first police member.¹⁴³

A counsellor or advocate should be at the crisis care unit to provide emotional support for the victim and to explain medical and legal options available.

141 Comments were made to this effect by several participants, including a CIU metropolitan member, a SOCAU regional member, a SOCAU OIC and a CIU OIC.

142 CIU regional members were of this view.

143 *Code of Practice*, 4.

2.75 These provisions are intended to ensure that a person who reports sexual assault receives appropriate support as soon as possible. The availability of this support will affect the complainant's recovery from the event and may also affect their decision about whether to continue with the complaint.

2.76 There was much opposition among police to the requirement that the person should be conveyed to the nearest CASA or Hospital Crisis Care Unit (HCCU) within two hours before any investigations begin. Opposition was greater amongst the CIU members and OICs, many of whom thought that the rule was not only impractical but interfered with investigational requirements.

2.77 The metropolitan CIU members were particularly scathing about CASAs and the two hour rule:

It's a load of rubbish. Sometimes the CIU needs to speak to the victim straight away. Others thought that victims should be given a say, particularly as some were willing to assist with investigative requirements such as visiting the crime scene prior to going to CASA.¹⁴⁴ Some thought it should not be mandatory to convey the victim to a CASA as the first port of call. SOCAUs and CIUs working in regional areas pointed out that it is often impossible to comply with the two hour rule, as it sometimes takes longer than that to drive to the nearest CASA, assuming the CASA is open. In some rural areas, police advised it could take up to a month before a CASA could see a victim.

2.78 The Code provides that unless the victim otherwise requests, a SOCAU member of the same sex should conduct the interview and take a full statement. It seems that this provision is not applied on a regular basis. Police said that unless the victim specifically requested a same sex officer to take the statement whoever was available attended to it. Most participants said that victims rarely requested a person of the same sex to take their statement. If they did, they would attempt to accommodate the request, although in country areas this would not always be possible due to low staffing levels. One regional CIU member commented: 'This "equal opp." stuff has gone a bit too far'.

2.79 In the CASA focus groups and in a report published by CASA House there were four main areas of the Code where problems with compliance were identified. These were summarised as follows: police placing investigatory needs

144 Here it should be noted that the Code in fact states that where the victim's wishes are contrary to the guideline (the 'two hour rule') or, in the case of children, the wishes of the parent/guardian are contrary to it, an exception can be made.

above the care of the complainant, failure to provide a police member of the same sex to take the complainant's statement, failure to maintain regular conduct with the complainant about the process of the investigation, and not always referring complainants to a CASA.

2.80 Participants in the CASA focus groups said that police often interpreted the provision requiring the complainant to be taken to the nearest CASA or hospital care unit as requiring the victim to be taken to the CASA nearest the place where the report was made. The Code was intended to require the victim to be taken to the CASA nearest to where she was living, unless the victim wishes otherwise, so that she is able to receive ongoing counselling and emotional support. The Code of Practice should be interpreted in the way originally intended, and police training should emphasise the importance of this requirement.

2.81 The Commission regards the Code as a very important means of ensuring a coordinated and supportive response to women who report sexual offences. There is clearly some lack of awareness of the Code among general duties officers. Resistance to the Code among SOCAU or CIU members may stem from lack of resources to implement the Code, from lack of understanding about the purpose of the relevant provisions or from reluctance to collaborate with CASAs.¹⁴⁵ The Commission believes that areas of difficulty should be discussed by police and CASAs and resolved during the review of Code of Practice which is currently being undertaken by Victoria Police.



RECOMMENDATION(S)

24. Police should be made aware that the *Code of Practice* applies regardless of whether medical attention or a forensic medical examination is required.
25. The meaning of the requirement that people reporting a recent sexual assault should be taken to the nearest CASA or hospital Crisis Care Unit should reflect the principles upon which the Police *Code of Practice* was first based. The Code should be interpreted to ensure that victims receive continuity of care and to optimise their future access to counselling services.

¹⁴⁵ See paras 2.91–94.

FORENSIC ISSUES

2.82 As the Code of Practice recognises, the Forensic Medical Officer (FMO) is the only person who can decide whether a medical examination should be conducted or not. Having a victim medically examined within two hours was reported to be nearly impossible in country areas. Several focus group participants from these areas complained that there were not enough FMOs or local doctors available to conduct the examinations. One CIU regional member stated that the whole of Latrobe Valley does not have a police surgeon as there is no doctor who wants to take on the task. As a result, victims must be conveyed to one of the Melbourne crisis centres. Another participant commented that there is no FMO callout procedure in East Gippsland and victims end up sitting for hours in police stations or cars. Sometimes victims have to wait until 5 pm to be examined by an FMO as the doctor insists on finishing with her private patients first. Child victims in regional areas often had to be driven to the Gatehouse Centre in Melbourne for medical examinations due to a lack of available local doctors to conduct paediatric sexual assault examinations.

2.83 Overall, the participants appeared to be saying that lack of sufficient FMOs in country areas disadvantages not only victims, but also police investigative requirements.

2.84 In metropolitan areas, some SOCAU participants reported often having to wait several hours for an FMO to attend, even where a victim had physical injuries.¹⁴⁶ The metropolitan CIU members were generally very positive about the FMOs they had contact with, saying they were helpful and usually very prompt. Some CIU OICs were of the opinion that there should be no time limits specified for the medical examination. One said that it's 'constraining' and that it could be the end of the victim's report if she was not up to an immediate medical examination.¹⁴⁷ Another made the suggestion that if there is no FMO available or if the victim feels more comfortable being examined by her own GP, then that should be allowed. Someone else made the comment that the GP would need to have some kind of sexual assault kit available, otherwise any evidence collected

146 Comment from a SOCAU metropolitan member.

147 In this regard it should be noted that the *Code of Practice* specifically allows an exception to the guideline that a victim should be transferred to the nearest CASA or HCCU within two hours: where the victim's wishes are contrary to the guideline, or in the case of children, the wishes of the parent or guardian are contrary to the guideline.

could be challenged later in court as unreliable. These issues should be considered in the review of the Code of Practice.

2.85 The Commission spoke with representatives from the Victorian Institute of Forensic Medicine (VIFM), which is responsible for recruiting, training and supervising¹⁴⁸ FMOs and sexual assault doctors throughout Victoria. Doctors in rural areas wishing to be registered as FMOs (to perform all kinds of forensic duties, including examination of sexual assault victims) or sexual assault doctors (to perform only sexual assault examinations) must, amongst other requirements, complete a police background check. They are visited by a representative from VIFM and provided with a comprehensive Sexual Assault Manual¹⁴⁹ which sets out background material and administrative and forensic requirements for sexual assault forensic examinations.

2.86 According to VIFM, recruiting FMOs and sexual assault doctors in rural areas is proving difficult, partly due to the fact that rural doctors receive only a per case payment and no on call fee.¹⁵⁰ In many areas it has not been possible for VIFM to recruit sufficient female FMOs and sexual assault doctors, which is problematic as many sexual assault victims request medical examination by a female doctor. Due also to funding issues, it is difficult for VIFM to conduct frequent enough visits to regional areas to support the existing FMOs.

2.87 The Commission suggests that the government consider allocating increased funding to VIFM to ensure that appropriate numbers of FMOs are recruited and trained in areas reporting chronic shortage.

2.88 Further, the Commission believes that all FMOs should be well versed in the guidelines of the Code of Practice on Sexual Assault. Appropriate strategies for ensuring this occurs could be considered by the recently established Sexual Assault Liaison Committee. The Sexual Assault Liaison Committee includes representatives from CASAs, VIFM, the Victorian Forensic Science Centre, the

148 VIFM conducts meetings every two months at its offices in Melbourne with doctors who conduct sexual offence forensic examinations. This is an opportunity for the exchange of information (guest speakers are often invited) and the discussion of problems. VIFM also publishes a quarterly newsletter with updates and educational material and conducts regular conferences for members, as well as training sessions. There is no formal performance monitoring procedure as such, however the majority of FMOs send their reports into VIFM prior to them going to the police.

149 Victorian Institute of Forensic Medicine, *Sexual Assault Examiners Manual* (2003).

150 Their city counterparts receive both a per case payment and on call fee, due to the much higher number of reported sexual assaults in metropolitan areas.

Sexual Crimes Squad, the Office of Public Prosecutions, the SOCA Unit Coordination Office, and other key stakeholders.

!

RECOMMENDATION(S)

26. The government should consider allocating additional funding to the Victorian Institute of Forensic Medicine (VIFM) to ensure that appropriate numbers of Forensic Medical Officers (FMOs) and sexual assault doctors can be recruited and trained, particularly in regional areas reporting chronic shortages.
27. The Sexual Assault Liaison Committee should consider the most appropriate means of ensuring that forensic medical officers are familiar with accurate interpretation of the Code of Practice guidelines. This could be achieved through the inclusion of material in training manuals and sessions, redistributing copies of the Code, and issuing 'refresher' documents that clearly state the position on relevant issues.

INVESTIGATIVE DELAYS

2.89 In CASA focus groups concerns were expressed about the long delays which often occurred between the report of a rape and the charging of an offender. Where an alleged offender cannot be found delay is unavoidable. However, police expressed concerns about the extraordinarily long delay in obtaining the results of DNA testing. One CIU member complained that the wait was sometimes longer than a year.¹⁵¹ Obviously such a situation is highly unsatisfactory from the point of view of both complainants and investigating detectives.

2.90 Victoria currently has a large backlog of cases awaiting analysis, which the Victorian Forensic Science Centre (VFSC) estimates would take about four years to eliminate with a lead time of 12 months from the appointment of extra staff.¹⁵²

151 CIU regional member.

152 See Law Reform Committee, Victorian Parliament, *Forensic Sampling and DNA Databases in Criminal Investigations* (2004) VFSC Submission 23 S4, at p 469. Some legal organisations which participated in this review perceived the VFSC to be aligned with the interests of Victoria Police and the prosecution. For example, the Law Institute of Victoria commented that the VFSC was perceived

The Victorian government allocated additional funding for 2003/2004 for the purchase of necessary equipment and it has recently announced a four-year package commencing 1 July 2004 for the appointment of an additional 23 staff to work on the DNA backlog. The Commission commends this move, which should improve the current difficult situation regarding DNA testing.

IMPROVING WORKING RELATIONSHIPS BETWEEN KEY PLAYERS

2.91 Under the Victoria Police Strategic Plan 2003–2008,¹⁵³ one of the listed aims is ‘Partnership Policing’. The plan states that under ‘partnership policing’, the effectiveness of the police approach will be reflected in ‘a greater number and diversity of partnerships with government departments, research institutions, industry groups, other social agencies, community groups and experts’.¹⁵⁴

2.92 The Code of Practice can only achieve its purpose if there is co-operation between CASA, the local Crisis Care Unit, SOCAU members, detectives and any Forensic Medical Officer working in the particular area. It was evident from the focus groups that there is room for improvement in the relationships between police and various key stakeholders and in particular between CIUs and CASAs. In the police focus groups, resentment towards CASAs came mostly from the CIU members, who felt that CASA counsellors sometimes talked victims out of proceeding with their complaints by giving them advice they are not qualified to give about police and criminal justice processes. One person said: ‘It’s us and them. They treat the victim as their own property’. The attitudes of the SOCAU members towards cooperating with CASAs varied widely and tended to depend on their own particular experience in their regions.

2.93 Training of police and more constructive dialogue between CASAs and police could ensure that police understand the reasons for these provisions and could contribute to police and CASAs working together effectively in supporting people who report sexual assault.

2.94 Greater use of police/CASA liaison committees could contribute to an improvement in relationships. CIU representatives should regularly attend and contribute to such committee meetings. Sexual assault liaison committees do not exist in all areas. Consideration should be given to establishing liaison committees

to be ‘an organ or a command of the police’: D. Laschko, Minutes of Evidence, 22 July 2002, 91, cited in the Committee Report, 362.

153 Victoria Police, Strategic Plan 2003–2008 <<http://www.police.vic.gov.au>>.

154 Ibid 17.

in all metropolitan areas. In country areas where it would be impractical to establish a Committee, a Criminal Investigation Unit member should be nominated to contact the local CASA and FMOs on a quarterly basis to discuss any problems or issues that have emerged. Formalised methods for resolution of issues and reporting back should be put in place.

! RECOMMENDATION(S)

28. Where Regional Liaison Committees have been established, a CIU member from the appropriate division should be nominated to regularly attend the meetings. FMOs should be invited to attend the meeting when needed.
29. Where no Regional Liaison Committee currently exists, a CIU member should be nominated to contact the local CASA and FMOs 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 report back to the CASA, VIFM and Victoria Police on what action was taken.

ADDITIONAL STRUCTURAL ISSUES

2.95 The option of establishing specialised Sexual Assault Investigation Sections (SAISs) was discussed in detail in the Interim Report.¹⁵⁵ The model involves attaching one or more detectives to the existing SOCA Unit to work exclusively on investigating sexual offences reported to SOCA and preparing briefs of evidence.¹⁵⁶ As noted above, Victoria Police are currently preparing a SAIS pilot evaluation program, and three pilot SAISs should be in operation in Dandenong, Sunshine and Broadmeadows by the end of the year. The Commission is of the opinion that the detectives recruited for SAISs should complete the SOCAU and VATE training courses as soon as possible after commencing with the SAIS.

2.96 The Commission remains of the view that the SAIS model would improve police response to sexual offences by ensuring that:

155 Interim Report paras 3.118–25.

156 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.

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

2.97 The Commission also recommends that Victoria Police review the current Operating Procedures with a view to improving police response to sexual assault. The police should also consider developing a comprehensive performance monitoring procedure in the area of sexual assault response.



RECOMMENDATION(S)

30. The Commission recommends that Victoria Police establish Sexual Assault Investigation Sections in all metropolitan divisions where the caseload reaches a pre-determined threshold. The processes of selection for CIU members, tenure, and lines of accountability should be clearly established by Police Command.
31. Victoria Police should review the current Operating Procedures relating to sexual assault with a view to:
 - determining appropriate time frames for the investigation of sexual offences;
 - ensuring increased supervision regarding investigation time frames and appropriate victim contact/follow-up.

**RECOMMENDATION(S)**

32. Victoria Police should consider devising a comprehensive performance standards process (perhaps to be included in the Operating Procedures) whereby there is ongoing monitoring of the police response to sexual assault, including the monitoring of:
- the delays between initial report and initiation of the prosecution process;
 - the number and type of cases authorised and why;
 - the number and type of cases not authorised and why; and
 - the number and type of cases that do not reach the brief authorisation stage.

IT AND DATA COLLECTION

2.98 In the Victoria Police Strategic Plan 2003–2008, one of the priorities is ‘Intelligent Policing’. This is defined as a ‘proactive, problem-orientated response to crime and community safety...driven by data and other information that demonstrates needs and priorities for policing services’.¹⁵⁷ To achieve this goal it is planned to introduce integrated information systems and to expand the capacity of the police IT and communications network and ‘introduce processes so that information, ideas and experience are easily accessible throughout the organisation’.¹⁵⁸

2.99 The Commission supports this plan to expand the IT and communications network. It is clear that the current data collection capacity is insufficient to enable proper evaluation and monitoring of police processes in relation to sexual assault. The Commission had originally intended to undertake empirical research on the reasons that complainants withdraw complaints and the factors which affect police decisions to take no further action. Our initial project assessment revealed that existing and readily accessible police data does not allow reliable conclusions to be drawn about why particular cases do not reach prosecution stage, nor is it possible—without an extensive undertaking—to evaluate the consistency or otherwise of the process under which police authorise a

157 Ibid 10.

158 Ibid 11.

summary prosecution, or to decide to refer an indictable offence to the Office of Public Prosecutions for prosecution.¹⁵⁹ Due to time and cost constraints, we have not undertaken this research.¹⁶⁰ However in the view of the Commission there is a clear need for better information technology systems and data collection/evaluation within Victoria Police.

2.100 If police response to sexual assault is to be appropriately evaluated on an ongoing basis, IT systems which enable differences in policing patterns to be identified will be essential. The police should be in a position to easily and effectively monitor delays between crime and prosecution, to compare the ‘performance’ of various units responding to sexual assault—both metropolitan and regional—and to monitor the consistency or otherwise of the decisions to authorise a prosecution or refer the matter to the OPP. Any new police data collection and evaluation systems should be designed so as to be compatible with the broader Department of Justice systems.

! RECOMMENDATION(S)

33. Victoria Police should establish appropriate IT systems to enable the effective monitoring and evaluation of sexual assault reporting patterns and of police procedures relating to authorisation of briefs for prosecution of sexual assault matters. Such systems should be compatible with broader Department of Justice systems.
34. Any new IT system should be evaluated for efficacy approximately two years after implementation.

159 See also paras 2.61–71.

160 The Commission had planned to analyse these cases closely by examining the casebook narratives completed by individual SOCAU and CIU members following a report of sexual assault.

Chapter 3

Increasing the Responsiveness of the Criminal Justice System

INTRODUCTION

3.1 Chapter 1 of this Report describes the unique characteristics of sexual offences, which create particular challenges for the criminal justice system. It suggests that changes which maintain fairness to the accused, but make the system more responsive to the needs of complainants, could encourage more people to report sexual assault and to give evidence at committal and trial.

3.2 Chapter 4 of our Interim Report described complainants' perceptions of the criminal justice process.¹⁶¹ The qualitative data which the Commission obtained from submissions and consultations was supplemented by other research on the experiences of complainants in sexual offence cases which has been conducted in many jurisdictions.¹⁶² Issues identified by complainants and the organisations which assist them include:

- perceptions that the criminal justice system does not treat complainants fairly and sensitively;
- the sense of marginalisation and powerlessness experienced by many complainants because their status in the criminal proceeding is only that of witnesses and because they have little control over the process;

161 Interim Report 147–59.

162 See for example: Department for Women, New South Wales, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996); Melanie Heenan and Helen McKelvie, *Crimes (Rape) Act 1991, An Evaluation Report* (1997); Pia van de Zandt, 'Heroines of Fortitude' in Patricia Easteal (ed) *Balancing the Scales: Rape, Reform and Australian Culture* (1998); Standing Committee on Law and Justice, Legislative Council, New South Wales Parliament, *Report on Child Sexual Assault Prosecutions* Report No 22 (2002).

- the lack of appropriate, accessible information about what is happening at the various stages of the criminal justice process;
- the long and frustrating delays that occur throughout the process;
- difficulty caused by not understanding the complex language used throughout the criminal justice process, particularly in court; and
- the traumatic effect of intimidating or confusing cross-examination.

3.3 Our consultations also produced many reports of perceived barriers to participation in the criminal justice process which confront complainants who have a cognitive impairment, complainants from Indigenous communities and NESB and refugee communities and children, including children from these groups.

3.4 The Interim Report¹⁶³ said that changes to substantive offences and to the law of evidence needed to be accompanied by cultural changes within the criminal justice system to improve the system's response to complainants in sexual offence cases.

3.5 Chapter 2 of this Report makes recommendations for improving police responses to reports of sexual assault. In this Chapter we make recommendations which are intended to improve other aspects of the criminal justice process. Recommendations include:

- building on existing programs for prosecutor training and judicial education to enhance prosecutors' and judges' expertise in dealing with sexual offence cases;
- changing the committal process to reduce delays and to ensure that children and other particularly vulnerable witnesses do not have to face cross-examination at both committal and trial; and
- moving towards a more specialised approach for managing sexual offence cases involving children or people with a cognitive impairment, to facilitate a faster and more sensitive response to the needs of these complainants.

3.6 In Chapter 5 of this Report¹⁶⁴ we recommend there should be a presumption in favour of recording all evidence of children and people with cognitive impairment prior to trial. In this Chapter we discuss when pre-recording

163 Interim Report paras 4.32–45.

164 See Recommendations 123–131.

should occur and how committal and trial procedures could be modified to provide for this process of pre-recording.

PROFESSIONAL DEVELOPMENT FOR LAWYERS AND JUDICIAL OFFICERS

3.7 Recommendations which are designed to make the criminal justice process more responsive to the needs of complainants will only be effective if their purpose is understood and accepted by prosecutors, defence lawyers and judges and if those involved in the administration of criminal justice support them. Prosecutors and judges should receive information about the research findings which underpin the proposed reforms, have the opportunity to discuss and enhance existing processes, and identify issues which may arise in applying new provisions.

TRAINING FOR LAWYERS

3.8 In the Interim Report¹⁶⁵ we recommended a program of specialist education for prosecutors who appear in sexual offences cases. Training of this type acknowledges the key role which prosecutors play in liaising with complainants during the criminal justice process and in pursuing laws and procedures intended to ensure fair treatment of complainants.

3.9 The recommendation for prosecutor education received significant support in submissions. Many of those who responded said that appropriate education for key participants was essential to developing the criminal justice system to make it more responsive to the needs of complainants. Loddon Campaspe CASA, for example, said in its submission: 'Regular and continuing education of prosecutors, defence counsel and judicial education are crucial to changing the culture of the courts'.¹⁶⁶ The Equal Opportunity Commission of Victoria strongly supported the recommendation and suggested that the training 'should ideally cover some of the specific issues, myths and stereotypes that affect particular groups of complainants during the legal process, such as Indigenous complainants and complainants with a cognitive impairment'.¹⁶⁷ The Criminal Bar Association agreed with the recommendation and noted that the OPP already

165 Interim Report paras 4.36–40 and Recommendation 20.

166 Submission 19.

167 Submission 38.

has ‘a proactive approach to educating prosecutors’.¹⁶⁸ The Department of Human Services strongly supported the recommendation and suggested that the program ‘should...demonstrate how support of the complainant may lead to provision of better quality evidence’.¹⁶⁹ The Federation of Community Legal Centres suggested that the training should be a compulsory and ongoing part of professional development.¹⁷⁰

3.10 Since the Interim Report was published a continuing professional development scheme (CPD) has been introduced for solicitors in Victoria, and a continuing legal education (CLE) scheme for barristers.¹⁷¹ Practitioners are required to accumulate units, which can be earned by participating in approved seminars, workshops and conferences.¹⁷²

3.11 As seminars and workshops may be offered by a range of approved bodies, it is not possible for the Commission to recommend the particular body which would be responsible for offering seminars on the legal issues relating to sexual offences. However, we recommend that bodies which offer seminars and lectures for continuing professional development purposes should include material on sexual offence laws and practice which would assist lawyers practising in criminal law or in areas such as family law and child protection, where allegations of sexual assault may be relevant. The participation of defence lawyers in such seminars could improve the quality of representation for accused people, and improve the quality of cross-examination of complainants in sexual offence cases.

3.12 As we described in the Interim Report, a specialist training program on sexual offences has been implemented by the Office of Public Prosecutions (OPP). The program is attended by solicitors from the OPP who deal with sexual offence cases, and Crown prosecutors. Barristers in the private profession who are regularly briefed in sexual offence cases may also attend.

168 Submission 42.

169 Submission 44.

170 Submission 47.

171 For solicitors, Continuing Professional Development Rules 2004 were made by the Victorian Lawyers RPA Ltd (now Law Institute of Victoria Limited) under Legal Practice Act 1996, s 72. For barristers, the Victorian Bar Council introduced Compulsory Continuing Legal Education Rules 2004, also pursuant to s 72.

172 A number of other activities also qualify for the award of CPD and CLE points; see Rule 1.1–11 in the Continuing Professional Development Rules and Rules 3–9 in the Compulsory Continuing Legal Education Rules 2004.

3.13 The initial program appears to have been successful. We support the further development and continuation of this program and recommend that when briefing members of the private profession the OPP should only brief barristers who have participated in the program. We recommend that the OPP collaborate with appropriate agencies such as the Equal Opportunity Commission and CASAs to prepare and present courses which will enable barristers to understand the special difficulties and barriers faced by some complainants.



RECOMMENDATION(S)

35. Bodies which offer seminars and lectures for continuing professional development purposes should include material on sexual offence laws and practice which will assist lawyers practising in criminal law or in areas such as family law and child protection where allegations of sexual assault may be relevant.
36. As well as promoting understanding of the laws and procedures relevant to sexual assault, such programs should include information about the social context in which sexual offences typically occur and the emotional, psychological, and social impact of sexual assault.
37. The Office of Public Prosecutions (OPP) should continue to offer a regular training program for solicitors and prosecutors involved in committals and trials in sexual offence cases. As well as dealing with legal issues the objectives of the program should include:
 - increasing prosecutors' understanding of the emotional, psychological and social impact of sexual assault on complainants in sexual offence cases, and how this may affect complainants in giving their evidence;
 - providing information on the social context in which sexual offences typically occur;
 - ensuring that prosecutors are aware of the advantages of meeting with complainants before the hearing and advising them about what will happen when they give their evidence;
 - familiarising prosecutors with the use of all alternative arrangements available to assist witnesses in giving evidence, and of the advantages to complainants in giving their evidence in this way;

! RECOMMENDATION(S)

- liaising with witness support services to ensure that complainants receive support and information which prepares them for what will happen in court; and
 - encouraging prosecutors to take appropriate steps to protect complainants from offensive, unfair or irrelevant cross-examination.
38. Prosecutors from the private Bar should only be briefed to appear in sexual offence cases if they have participated in the OPP training program on sexual assault or in an equivalent continuing professional development program.
39. The OPP should ensure that prosecutors receive training on how to deal with the problems experienced by people who are likely to have experienced discrimination because of their disability, Indigenous status or language or ethnicity. This could be done by engaging consultants with relevant expertise or by building links with relevant organisations who could participate in designing and providing components in the training program. Such organisations might include:
- CASAs;
 - non-English speaking background community organisations which have expertise in providing culturally appropriate sexual assault service responses;
 - Indigenous community organisations which are recognised by Indigenous communities as having expertise or training in culturally appropriate sexual assault service responses; and
 - disability organisations with expertise or training in providing appropriate sexual assault service responses for people with a disability.

JUDICIAL EDUCATION

3.14 In the Interim Report we described the program then being considered by the Judicial College of Victoria to facilitate discussion among members of the judiciary about substantive legal issues and process issues which commonly arise in sexual offences cases. Recommendation 21 proposed that the Judicial College implement a program for judicial officers

to facilitate discussion of issues which commonly arise in sexual offences committals and trials, particularly issues relating to the exercise of judicial discretions, interventions during cross-examination and directions or warnings to juries.¹⁷³

Recommendation 22 described the information we considered should be included in the program, including information about the effect of sexual offences, the problems that complainants experience in giving evidence and the social context in which offences occur.¹⁷⁴

3.15 These recommendations received strong support in submissions, including those from certain CASAs, Violence Against Women Integrated Services, Victorian Community Council Against Violence, Youth Affairs Council of Victoria, the Salvation Army, the VOICES group of victim/survivors and the Department of Human Services.¹⁷⁵ In discussions with the Commission, Chief Judge Rozenes also expressed strong support for judicial education.¹⁷⁶

3.16 The Disability Discrimination Legal Service supported the recommendations and made an additional recommendation that the College offer a compulsory program for judges and magistrates ‘to promote understanding of the needs and specific issues impacting on victim/survivors of sexual assault with a cognitive impairment who appear before the court and the means available to them to facilitate meaningful participation of victim/survivors in the court process’.¹⁷⁷

3.17 The Federation of Community Legal Centres supported the recommendation but considered that ‘it does not go anywhere near far enough’.¹⁷⁸ Their view was that judicial training should be compulsory and should ‘include the socio-cultural context of sexual assault and the impact on the victim/survivor’.

3.18 The Criminal Bar Association supported Recommendation 21 and suggested that it ‘is also worthwhile balancing [the content proposed for the

173 Interim Report, Recommendation 21, 165.

174 Ibid, Recommendation 22.

175 Submissions 19, 24, 22, 12, 33, 30 and 44.

176 However, in Submission 39 Judge Neesham, with the support of Judges Nixon, Kelly and Hart suggested that judicial education on the matters referred to in recommendation 22 was unnecessary and that the recommendation gives insufficient weight to the fact that trials are by jury not judge alone.

177 Submission 40.

178 Submission 47.

sessions in Recommendation 22] with like training from the perspective of an accused...[including] the factors that have contributed to wrongful convictions in sexual cases'.¹⁷⁹

3.19 The Judicial College has now begun its education program. It conducted a seminar for County Court judges in November 2003 to discuss the issues that arise in child sexual assault cases and a seminar in April 2004 to discuss jury warnings in sexual offence cases.

3.20 We recommend that the College continue to offer regular seminars addressing issues relevant to sexual offences cases. Such seminars should not be confined to legal issues. The College should arrange programs which include presenters with expertise on the social context and the impact of sexual assault and how this may affect the complainants in giving their evidence.

3.21 The Australian Institute of Judicial Administration is undertaking some preliminary work for research on jury directions in sexual offences and homicide cases. When this research is completed findings on the effectiveness of jury directions could usefully be included in the information provided to judges in the Judicial College program.

3.22 Despite State differences in the substantive law of sexual offences, judges in all Australian jurisdictions face similar issues when they preside over sexual offence trials. We consider it would be helpful for the National Judicial College, as part of its provision of ongoing professional development for members of the judiciary, to offer seminars on issues relevant to sexual offences cases.

!**RECOMMENDATION(S)**

40. The Judicial College of Victoria should continue to offer regular programs for judges and magistrates which facilitate discussion of issues which commonly arise in sexual offences committals and trials, particularly issues relating to the exercise of judicial discretions dealing with child witnesses and witnesses with a cognitive impairment, intervention during cross-examination and directions or warnings to juries.

179 Submission 42.



RECOMMENDATION(S)

41. The program should include presentations by recognised experts 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 and:
- 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 Indigenous status, language and ethnicity or disability, and how this may affect complainants in giving their evidence;
 - the effect of these offences on victims and the particular problems that complainants may experience in giving evidence; and
 - the background to, and application of, any recent legislative changes, and legislative changes arising from the report on this reference.

CHANGING THE COMMITTAL PROCESS

3.23 When an adult is charged with an indictable sexual offence which cannot be heard summarily, a committal will be held in the Magistrates' Court.¹⁸⁰ Committal hearings¹⁸¹ are a preliminary examination of the evidence by a magistrate to determine whether or not there is evidence of sufficient weight to support a conviction.¹⁸² If the magistrate finds that this is the case, the defendant is committed to trial in the County Court. At committal stage, the defendant may apply to have witnesses produced for cross-examination.

DISCLOSURE

3.24 One of the purposes of the committal process is to ensure adequate and timely disclosure of the prosecution case against the accused. In Western Australia

180 *Magistrates' Court Act 1989* s 56. Section 56(2) provides that a committal proceeding must be conducted in accordance with Schedule 5 of the Act.

181 The committal hearing will be preceded by a committal mention. If the accused pleads guilty during the committal process or nominates to go directly to the County Court, no committal hearing will be held.

182 *Magistrates' Court Act 1989* Schedule 5 Cl 23(2).

where committals have been abolished alternative processes have been put in place to ensure disclosure is carried out.¹⁸³

3.25 Under the current process in Victoria the prosecution usually prepares a brief of evidence¹⁸⁴ which is served on the defendant.¹⁸⁵ The brief of evidence must include a list of witnesses who have made statements, copies of witness statements, a copy of every statement made by the complainant to any member of the police force, a transcript of any audio or video recording that the informant intends to rely upon, and a description of tests and forensic procedures that have not yet been completed but which the informant intends to rely upon.¹⁸⁶

3.26 The hand-up brief process is intended to ensure that an accused receives details of the case against him at an early stage of proceedings.¹⁸⁷ It is also intended to reduce costs by ‘preventing blanket requests for the attendance of witnesses with no proper thought being given to which witnesses are really required until the day of the court hearing’.¹⁸⁸

3.27 A witness whose statement is included in the hand-up brief does not have to attend the committal to give oral evidence-in-chief.¹⁸⁹ However the court can give leave for the witness to give oral evidence-in-chief to supplement their written statement where this is ‘in the interests of justice’.¹⁹⁰ A witness who has not made

183 In Western Australia the *Justices Act 1902* provides a regime for disclosure supervised by the Magistrates court in much the same way as the Victorian provisions—see *Justices Act 1902* (WA) Part V Division 2.

184 The prosecution prepare a brief of evidence to be served on the defendant. The defendant can elect to go directly to trial by way of relying on the ‘hand-up brief’ procedure. The magistrate must still be satisfied that the material contained in the brief of evidence which has been ‘handed up’ by the prosecution contains evidence of sufficient weight such that a jury properly instructed could convict the defendant of the offences with which he has been charged. The defendant, after being served with the brief of evidence prepared by the prosecution may request certain or all witnesses to attend for cross-examination at a committal hearing.

185 *Magistrates’ Court Act 1989* s 56(2) and Schedule 5 cl 6. Where the accused is pleading guilty a plea brief can be served on the accused.

186 *Magistrates’ Court Act 1989* Schedule 5 cl 6 see esp 6 (h) and (i) relating to sexual offence committals. Provision is made for a description only of the forensic evidence due to the time limits imposed for committal mentions. The forensic analysis would usually not be complete when the brief is prepared.

187 This is discussed in: Second Reading Speech Victoria, *Parliamentary Debates*, Legislative Assembly, 29 October 1998, 887 (Phil Gude, Minister for Education on behalf of the Attorney-General Jan Wade).

188 Ibid 886.

189 *Magistrates’ Court Act 1989* Schedule 5 cl 13(6).

190 Schedule 5 cl 15(2) and (3).

a written statement may give oral evidence-in-chief with the leave of the court if it is in the interests of justice.¹⁹¹

CROSS-EXAMINATION AT COMMITTAL

3.28 Historically there were virtually no restrictions on cross-examination of witnesses at committal in Victoria. The defence were required to notify the prosecution and the court as to which witnesses they wished to cross-examine, and those witnesses were then required to attend for cross-examination. The only restriction was that the court had a general power to set aside the application if it was frivolous, vexatious or would be oppressive in all the circumstances to require a witness to attend at the committal proceeding.¹⁹²

CHANGES TO CROSS-EXAMINATION RULES IN 1999

3.29 Substantial changes were made to the committals process on 1 July 1999.¹⁹³ Restrictions were imposed to limit the availability of witnesses for cross-examination at committal. The defence is required to give notice of an intention to seek leave to cross-examine a witness no later than 14 days before the committal mention date.¹⁹⁴

3.30 Requiring leave to cross-examine means that the defence have to think in advance about which witnesses are required at committal and why. The application for leave is heard at the committal mention, and the magistrate makes a ruling as to which witnesses the defence will be allowed to cross-examine at the committal hearing.

3.31 The new process was intended to place increased pressure on the parties to come together and commence negotiations at an earlier stage than had been occurring.¹⁹⁵ It also made the process less onerous for witnesses. Between 1 July 1999 and 30 June 2001 the court could only give leave for a witness to be cross-examined at committal if the court was satisfied that the scope and purpose of the questioning had substantial relevance to the facts in issue, and if the witness was

191 Schedule 5 cl 15(2)(b) and (3).

192 *Magistrates' Court Act 1989* Schedule 5 cl 3(7) prior to amendment in 1999.

193 *Magistrates' Court (Amendment) Act 1999*.

194 Schedule 5 clause 12(1). At the committal mention the accused will indicate whether they intend to proceed to a contested committal hearing, plead guilty or reserve their plea.

195 Above n 187, 888.

under 18, that the interests of justice could not be adequately served except by granting leave.¹⁹⁶ The court was also required to take account of a number of factors in deciding whether to permit cross-examination, including the age of the witness and whether the defendant had made admissions.¹⁹⁷

3.32 These provisions gave child witnesses in sexual offences some protection against being cross-examined twice, first at committal and then at trial. They 'frequently led to outright refusals by magistrates to grant leave to cross-examine witnesses under 18'.¹⁹⁸

LIBERALISATION OF CROSS-EXAMINATION RULES IN 2001

3.33 The rules controlling cross-examination of witnesses at committal were liberalised in June 2001. As a result of these changes, the defence application for leave to cross-examine no longer has to indicate the scope and purpose of the proposed questioning and how it has substantial relevance to the facts in issue. Under the new rules, it is now only necessary to indicate 'an issue to which the questioning relates, a reason as to why the evidence of the witness is relevant to that issue and why cross-examination on that issue is justified'.¹⁹⁹ Strict time limits still apply for each stage of the committal process,²⁰⁰ but there is no time limit between committal mention and committal hearing.

3.34 The provisions protecting children were also changed. In the case of a child under 18 it is no longer necessary to pass a threshold test in order to cross-examine at committal. Previously the defence had to establish that the interests of

196 *Magistrates' Court Act 1989* Schedule 5 Clause 13 (as at 1 July 1999).

197 *Magistrates' Court (Committal) Rules 1999* Order 9.02.

198 Mark Regan, 'Committal Proceedings: Further Changes July 2001' (Paper presented at the Leo Cussen Institute Seminar: Criminal Law 2001: Committal Proceedings 30 July 2001, Melbourne), 56.

199 Schedule 5 cl 13(5).

200 Filing Hearings are to be held within 7 days of arrest, or within 4 weeks after issue of a summons. At Filing Hearing, a Committal Mention date is to be fixed at 12 weeks later. This time limit cannot be extended for sexual offence cases: Schedule 5 cl 4(2). The prosecution brief must be served on defence 6 weeks prior to the Committal Mention date. A Form 8A Application to cross-examine witnesses must be filed by the defence no later than 14 days prior to committal mention: Schedule 5 cl 12(1). In 2001 the provision allowing the court to allow a late application for leave to cross-examine was expanded to allow a late application to cross-examination if it is in the interests of justice: Schedule 5 Clause 12(5). The previous provision required the applicant to show 'exceptional circumstances'. The Prosecution must file a Form 9A Notice within 7 days of Committal Mention, indicating consent or opposition to the Form 8A Application.

justice could not be adequately served unless cross-examination of the child was allowed.

3.35 Although there is no longer a threshold test, the new provisions set out a range of factors which must be taken into account in determining whether the questioning of a witness under 18 is justified. The court must take account of the need to minimise the trauma that might be suffered by the witness, any characteristics of the witness including any mental, physical or intellectual disability, and a range of other factors including the importance of the witness to the prosecution case and the existence or lack of corroborating evidence.²⁰¹ During cross-examination the court can disallow questions if the defendant has not identified an issue to which the question relates and has not provided a reason why the evidence is relevant, if the question is not justified or if it is unduly repetitive.²⁰²

3.36 The new test for leave to cross-examine makes it more likely that complainants will be cross-examined at committal and then again at trial. In addition, if leave is granted, cross-examination is not confined to the issues nominated in the application.²⁰³ It is therefore likely that witnesses will be cross-examined about a broader range of issues and more extensively at committal than was previously the case. This cross-examination is then likely to be repeated at trial.

ARGUMENTS FOR RETENTION OF COMMITTALS IN SEXUAL OFFENCE CASES

3.37 A major purpose of committals is to ensure that the community is not put to the expense of setting up a judge and jury trial where the prosecution evidence does not warrant it. If it becomes clear at the committal that the evidence is not of sufficient weight to support a conviction, the magistrate will not commit the defendant for trial.

3.38 Those who support retention of committals argue that they 'filter' out cases in which the evidence is not strong, so that the accused is unlikely to be convicted. As well as saving public money, this means that complainants do not

201 *Magistrates' Court Act 1989* Schedule 5 cl 13 (5B). See also cl 17 which contains special rules for sexual offences. In particular the informant must be represented by a legal practitioner and a limit is placed on the people who can be present while the witness is giving their evidence.

202 Schedule 5 cl 16.

203 Schedule 5 cl 13(5C). Previously it was: Schedule 5 cl 16 as at 1 July 1999.

have to endure both the committal and trial process when there is no prospect of conviction of the defendant. Committals also give the prosecution the opportunity to assess the strength of the case against the defendant. Even if the defendant is committed for trial, the DPP may decide not to proceed with the prosecution if it is apparent it will not be successful. These measures may help to prevent unnecessary cross-examination of complainants.²⁰⁴

3.39 The committal process may also encourage some offenders to plead guilty to all or some of the offences with which they have been charged. A defendant may decide to plead guilty if some charges are dropped or may plead guilty in the hope that this will result in them receiving a ‘discount’ on their sentence.²⁰⁵ The discount is designed to encourage a guilty plea at an early stage to minimise distress to the victim and save the community the cost of the trial.

3.40 Those who support committals also suggest that giving evidence at committal may assist complainants to prepare for trial. Very few complainants will have previously given evidence in court. Giving evidence at committal could assist them to obtain an understanding of what trial may be like, and to feel more prepared for it. In effect, the committal could act as a ‘practice run’ for trial.

ARGUMENTS AGAINST COMMITTALS IN SEXUAL OFFENCE CASES

3.41 During our consultations the following concerns were expressed about the effect of committals in sexual offence cases.

- Complainants found it very difficult to be cross-examined at both committal and trial. This was particularly traumatic for children.
- Some parents were unwilling to allow children to give evidence at trial because they had found cross-examination at committal so daunting. Some adults also said that after committal they were no longer prepared to give evidence at trial.

204 Second Reading Speech Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2000, 1210 (Rob Hulls, Attorney-General).

205 *Sentencing Act 1991* s 5(2)(e) requires the court to consider the fact that the accused pleaded guilty to the offence and the stage in proceedings that the plea, or an indication of the intention to plead, was entered when deciding on an appropriate sentence. Section 5(2C) requires the court to have regard to the defendants conduct in relation to the trial as an indication of remorse. An early plea of guilty can indicate remorse where the circumstances support it.

- The evidentiary principles which apply to sexual offence cases (for example restrictions on admission of prior sexual history evidence) may not always be enforced stringently at the committal stage.
- Defence counsel may question the witness more rigorously at committal where no jury is present, than at the trial. At trial the complainant may be cross-examined more sensitively by the defence, so that the accused does not lose the jury's sympathy.
- The committal process lengthens the criminal justice process because of the delays involved, including delays between charge and completion of the committal process and between committal and trial.

HOW COMMITTALS WORK IN PRACTICE

FILTERING WEAK CASES

3.42 Although committals are said to filter out weak cases, the Commission's research shows that around 87% of sexual offence cases are committed for trial.²⁰⁶ Some defendants decide to plead guilty after committal hearings, when they have been able to assess the strength of the evidence against them.²⁰⁷

ARE COMPLAINANTS CROSS-EXAMINED TWICE?

3.43 The Commission undertook an empirical project to determine whether complainants are routinely cross-examined at committal. The project looked at all sexual offence matters which had a committal hearing at Melbourne Magistrates' Court over a four month period from September 2003 to December 2003. Forty matters were examined.²⁰⁸ In 39 of the 40 cases a request was made by the defence to cross-examine the complainant. All but one of those requests was granted.

206 In the Commission's rape tracking study, 87% of those originally charged with rape were committed for trial on at least one rape or non-rape offence: see Discussion Paper para 4.59. In the study of penetrative offences, 86.4% of those charged with penetrative offences other than rape were committed for trial: see Interim Report para 2.81.

207 However, there may be other ways to encourage early guilty pleas. The Victorian Government is currently considering the introduction of a 'sentence indication procedure' whereby the court will provide the accused with an indication of the sentence he would receive if he pleaded guilty: Attorney-Generals Justice Statement: New Directions for the Victorian Justice System 2004–2014, Department of Justice, Victoria, para 3.2.4.

208 There were originally 43, however three matters were eventually excluded. In one matter the prosecution withdrew the charges before the committal hearing. The other two had committal

3.44 In 14 of the 40 cases the complainants were under 18 years of age at the time of the committal hearing. As noted above, in those cases the magistrate is required to consider additional factors when determining whether to grant the application. Despite those additional considerations, applications to cross-examine were successful in 100% of the matters involving child complainants. An order was made for the complainant to give evidence remotely via CCTV in only five of the 40 matters.²⁰⁹ Four of those five matters involved child complainants.

3.45 The only case where the court refused to allow cross-examination involved an adult complainant, use of a weapon, documented physical injury and full admissions by the defendant. However, those factors were not unique: other cases in the data set involved documented injury and admissions. It is therefore difficult to determine why that matter was refused when all others were granted. Even in cases where the complainant was a child and the defendant had made full or partial admissions, both of which are matters the court is required to consider in deciding whether to allow cross-examination, the applications were still successful and no order was made for the complainant to give evidence via CCTV.²¹⁰

3.46 The current legislation has made it easier to cross-examine complainants, particularly children. It would appear that even where issues are fairly well defined—where there is supportive evidence and the defendant has made admissions—in the overwhelming majority of cases, cross-examination will still be permitted at committal. This means that most complainants are cross-examined twice.

DELAYS

3.47 Throughout our consultations we were told that many sexual offence cases are subject to significant delays and that complex cases involving child complainants are frequently adjourned repeatedly. Long delays before trial can cause extreme stress for complainants and their families who anticipate the process with anxiety and are unable to move forward in their lives until the proceedings

hearings outside the data collection period—one was adjourned, and the other one had already had committal hearing and the hearing within our collection period was a further hearing to add a witness.

209 In the other 35 cases, it is not known whether the prosecution made applications for the use of alternative arrangements which were refused or whether no applications were made.

210 There were 3 such cases in the study. We do not know whether applications were made for the use of CCTV in any of these cases.

are complete. For children, the lapse of time often makes a great difference to their ability to recall events and significantly detracts from the quality of their evidence.

3.48 Currently the legislation requires that in some sexual offence cases (for example cases involving sexual offences against children)²¹¹ a committal mention must be held within three months of the commencement of proceedings.²¹² A trial must occur within three months of the committal.²¹³ No time applies to the period between committal mention and committal hearing.

3.49 In order to understand the effect of committals on delays and also to gauge the effectiveness of the legislative time limits, the Commission tracked 27 cases²¹⁴ involving sexual penetration charges of children under 18 years. The Commission examined the elapsed times between charge date and committal hearing, committal hearing and trial, and the total time elapsed between charge date and trial.

3.50 Although each case in the data set went to trial, not all had a full committal hearing. Seven matters were committed to trial from a committal mention, that is, the defendant was committed based on the 'hand-up brief' procedure rather than after a hearing where the witnesses were cross-examined.²¹⁵ For these cases the shortest time lapse between charge date and committal was 22 days and the longest was 100 days, with an average lapse of 59 days or just under three months. These matters took longer to get from the committal stage to trial than those that had a full committal hearing. The time from charge date to trial was, however, somewhat shorter for these matters (due to a much shorter time lapse between charge and committal).

211 Some offences against adults are also included, for example incest and sexual offences against people with cognitive impairment by persons who provide medical or therapeutic services to them.

212 Above n 200.

213 *Crimes Act 1958* s 359A(1).

214 See Table 1 below. Originally, a data set of 33 cases involving penetrative offences against children was identified from an existing data set compiled by the VLRC from the Office of Public Prosecutions PRISM database for analysis during the second phase of the reference. These cases represented all penetrative offences against children under 18 years which went to trial between July 1997 and June 1999. Due to unavailability of data, only 27 of the 33 cases were eventually included in the final data set.

215 The reasons for this are unknown. The cases examined went to trial between July 1997 and June 1999 when there were few restrictions on cross-examination at committal. It is therefore unlikely that the defence were denied the opportunity to cross-examine witnesses at committal hearing by the court. It is possible that legal aid funding was denied for committal hearing in those cases, or that a strategic decision was taken by the defence to proceed directly to trial.

3.51 In the 20 cases where a committal hearing was conducted, the delays between charge date and committal were longer than for the 'on the papers' matters. The time lapse between charge date and committal ranged from 31 days to 333 days, with an average time lapse of 136 days or 4.5 months. However, these matters had a shorter delay between committal and trial, with an average time lapse of 186 days (just over six months) for the 'hand-up brief' matters compared with an average lapse of 244 days (eight months) for matters where a full committal hearing was held.

3.52 For all 27 matters, the delay between committal and trial was far greater than between charge and committal, averaging 200 days (about 6.5 months) as compared with 116 days (almost four months).

3.53 Overall, the matters which proceeded most quickly from charge date to trial were those where committals were held 'on the papers': an average of 304 days (10 months) compared with an average of 322 days (about 10½ months) for matters where committal hearings were held.

Table 1. Delays: Initiation²¹⁶ to committal to trial for offences involving sexual penetration of a child under 18

Phase	Types of time lapses (in days)	Whole sample (number of cases=27)	Matters where committal hearing held (number of cases=20)	Matters where committal 'on the papers' (number of cases=7)
Initiation to committal	Range ²¹⁷	22 to 333	31 to 333	22 to 100
	Average ²¹⁸	116	136	59
	Median ²¹⁹	112	126	59
Committal to trial	Range	52 to 488	84 to 482	52 to 488
	Average	200	186	244
	Median	142	124	214
Initiation to trial	Range	140 to 641	140 to 641	152 to 517
	Average	317	322	304
	Median	286	286	279

3.54 Despite the long delays between committal and trial, the legislatively prescribed periods were not necessarily breached because the legislative prescription for the commencement of the trial is satisfied by the conduct of a directions hearing, whether or not the actual trial commences or is adjourned. In this way there is technical compliance with the legislation, although repeated adjournments are often granted. It has been suggested that delays are often considerable in regional areas. In the Commission's police focus groups one SOCAU member raised the issue of delays on circuit, stating:

216 Initiation here means the date of charge.

217 Smallest time lapse in days to longest time lapse in days.

218 The average is calculated by adding all values in the sample then dividing by the number in the sample.

219 The median is the midpoint of the sample, or the 'middle value'.

We explain this to people at the start: ‘It’s going to be a long process, it’s not like Law and Order.’ Some just don’t want to wait.

3.55 There seem to be several reasons for the delays.

- No time limit applies to the period between committal mention and committal hearing. In addition, more than one committal mention may be held before a committal hearing.²²⁰
- The time limit applicable to the commencement of the trial is satisfied by the conduct of a directions hearing. At the directions hearing a date for trial may be set, or the matter may be adjourned to a further directions hearing. The directions hearing allows for technical compliance with the legislation but repeated adjournments are often granted.
- Most time limits can be extended as the court can grant adjournments.²²¹ These adjournments can lead to lengthy delay in proceedings, as noted above, between charge and committal. The Commission did not undertake research to ascertain why adjournments are requested and granted and whether the prosecution are either agreeing to or not opposing adjournments.

3.56 These delays create significant problems, particularly where child complainants are involved. Modification of the committal process, as recommended below, could contribute to the reduction of delays in sexual offence cases.

OPTIONS FOR REFORM OF COMMITTALS

3.57 The Commission believes that changes to the committal process are necessary to reduce delays and protect children and other vulnerable witnesses, for example people with a cognitive impairment²²² from being cross-examined twice.

220 For example, an adjournment to further committal mention may occur if the prosecution brief is not yet complete, or the accused has not yet been able to organise legal representation.

221 For example under *Magistrates’ Court Act 1989* Schedule 5 clause 4(4)(c) the defendant can request that the committal mention hearing be held after the relevant period.

222 It is not suggested that people with an intellectual disability are child-like, but that individuals within the two groups may have similar needs and experiences when in contact with the justice system: NSW Attorney-General’s Department Criminal Law Review Division, *People with an Intellectual Disability—Giving Evidence in Court*, June 2000. See www.lawlink.nsw.gov.au/clrd1.nsf/pages/dis_report_3.

We considered three main ways in which the committal process could be made more responsive to the needs of complainants:

- abolishing committal hearings in all sexual offence cases;
- restricting the right to cross-examine children and witnesses with cognitive impairments at committal; and
- abolishing the right to cross-examine children and witnesses with cognitive impairments at committal.

OPTION 1: ABOLISHING COMMITTAL HEARINGS IN SEXUAL OFFENCE CASES

3.58 Western Australia has abolished committal hearings for all offences.²²³ This approach could be applied to sexual offence cases in Victoria.

3.59 Under this option there would be no provision for examination of witnesses prior to the trial. The defendant would not be able to give or tender any evidence before trial, or able to formally submit that there was insufficient evidence for the matter to go to trial. It would therefore be necessary for the prosecution to carefully examine matters at that stage in order to decide whether the evidence is sufficient for the matter to go to trial.²²⁴

3.60 It would be necessary to retain a pre-trial disclosure process which could occur either in the Magistrates' Court or in the County Court. If the trial disclosure process occurred in the Magistrates' Court, the current 'hand-up' procedure could be used to transmit the matter from the Magistrates' Court to the County Court.

3.61 Clearly the WA legislature has decided that the interests of justice can be adequately served by not having committals at all. This option would reduce system costs associated with committal and could lessen delays in sexual offence matters..

3.62 In light of our research and empirical studies relating to committal, the Commission supports a wider review of committals to examine whether they should be retained. However, broad recommendations about committals are beyond the scope of this reference. The Commission notes that the Attorney-

223 *Justices Act 1902* (WA) s 2.

224 In Western Australia this function is fulfilled by the Petty Sessions unit in the Office of Public Prosecutions.

General has highlighted committals as one area that will be looked at as part of the recently released Justice Statement.²²⁵

3.63 The Commission has decided against recommending abolition of committals in sexual offence cases for several reasons. First, although there may be advantages in abolishing committal hearings generally, there would be difficulties in abolishing them for sexual offences alone. Such an approach would create anomalies in cases where a person was charged with both sexual and other criminal offences. It would also put the accused in sexual offences cases at a special disadvantage as compared with accused charged with other offences.

3.64 Secondly, if committals were abolished it would be desirable to have some other mechanism for filtering out unsustainable cases before they go to trial. This issue should be considered in the context of a broader review of committals. It is arguable that abolition of committals might also reduce the number of early guilty pleas. Further empirical work would be necessary to determine whether this is the case.

3.65 Thirdly, we believe that the concerns of complainants about delays and cross-examination at committal can be met in less radical ways than by abolishing committals in all sexual offence cases.

OPTION 2: RESTRICTING THE RIGHT TO CROSS-EXAMINE CHILDREN AND WITNESSES WITH A COGNITIVE IMPAIRMENT

3.66 The second option is to retain the current committal process but legislate to restrict cross-examination at committal of certain witnesses in sexual offence cases. Under this option a new legislative threshold test could be imposed, requiring application for leave to cross-examine children or witnesses with a cognitive impairment. This approach has been adopted in South Australia, Tasmania, Queensland and New South Wales.²²⁶ This is a less radical step than abolishing committals altogether for sexual offence cases.

3.67 However, in Victoria the threshold test has been changed several times in recent years in order to overcome perceived problems with its operation. Between 1 July 1999 and 30 June 2001 the test for allowing cross-examination of witnesses was:

225 See above n 207.

226 *Summary Procedure Act 1921* (SA) s 106; *Justices Act 1959* (Tas) s 3 and s 57A; *Evidence Act 1977* (Qld) s 21AG; *Criminal Procedure Act 1986* (NSW) ss 93–4.

- cross-examination should have substantial relevance to the facts in issue; and
- if the witness was under the age of 18 years, cross-examination would not be permitted unless the interests of justice could not be adequately served except by granting leave.²²⁷

3.68 On its face this test provided broad protection for child witnesses, applying to child witnesses generally rather than only complainants in sexual offence cases. In practice, however, the test may not have been applied consistently.²²⁸

3.69 It is difficult to formulate a test that gives the court sufficient guidance as to when cross-examination should be allowed. At a roundtable held by the Commission to discuss this issue²²⁹ it was suggested that rules to limit cross-examination require considerable resources to be expended by the court and the defence without producing much difference in outcome. It was also noted that in sexual offence cases the complainant is often the only witness against the accused, so that leave to cross-examine will invariably be given no matter what test is applicable.

3.70 After careful consideration of this option, including a detailed examination of new Queensland provisions which attempt to limit the circumstances in which cross-examination may occur,²³⁰ the Commission has decided against this approach. The Commission does not believe that children and people with cognitive impairment should be cross-examined twice. Because rules limiting but

227 *Magistrates' Court Act 1989* Schedule 5 Cl 13 (4)(b) as at 1 July 1999.

228 In the Second Reading Speech of the *Magistrates' Court (Committal Proceedings) Bill*, however, the Attorney-General stated that the test resulted in applications to cross-examine young witnesses being refused, and lead to more young witnesses being cross-examined at trial. The basis for this view is not known: Second Reading Speech Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2000, 1210 (Rob Hulls, Attorney-General).

229 Roundtable 4 March 2004.

230 *Evidence (Protection of Children) Amendment Act 2003* (Qld) introduced new provisions restricting the right to cross-examine children. For example, s 21AG (3) provides that a child should not give evidence at committal unless certain criteria met and the interests of justice can't be adequately satisfied by leaving cross-examination of the child until trial. There are also provisions relating to how the evidence will be taken if permission is given to cross-examine the child. In that case there is a presumption in favour of a special hearing to pre-record the entirety of the child's evidence: s 21AG(7) and Subdivision 3. The special hearing provisions are applicable to both committal and trial, and summary hearings: s 21AI.

not preventing cross-examination at committal provide only limited protection to vulnerable witnesses, the Commission supports the third option discussed below.

OPTION 3: ABOLISHING THE RIGHT TO CROSS-EXAMINE CHILDREN AND WITNESSES WITH A COGNITIVE IMPAIRMENT AT COMMITTAL

3.71 The third option considered is to retain the current committal process, but legislate to prohibit cross-examination at committal of certain witnesses in sexual offence cases. We considered whether this should apply to child victims only, child witnesses generally, all victims of sexual offences, witnesses with particular vulnerability, or a combination of these. We have decided to recommend this option for children and witnesses with cognitive impairment only.²³¹

3.72 In coming to this recommendation the Commission has considered all the matters discussed above, particularly the need to ensure that resources are best utilised and that accused charged with sexual offences against children are not disadvantaged. We have also considered research which shows that cross-examination is particularly traumatic for children and that children and people with cognitive impairment are at a special disadvantage as witnesses.²³² Cross-examination of these witnesses at committal also invariably contributes to delays by the addition of another step in the process to trial. For children, the lapse of time often makes a great difference to their ability to recall events and significantly detracts from the quality of their evidence. People with cognitive impairment, particularly impairments that affect memory, are also disadvantaged by delay.

3.73 Our research of cross-examination of complainants at committal found that the current system is not effective in protecting children. Although the court must take into account certain considerations before allowing the cross-examination, these appear to be easily overcome when the child is a complainant in a sexual offence case. In the period of our study of committals, every child complainant was cross-examined.²³³

3.74 In some cases, cross-examination at committal will lead to the accused deciding to plead guilty before trial. However, in many cases the complainant will

231 When combined with recommendations below, relating to pre-recording of testimony and a specialist handling of these matters in the Magistrates' and County Courts, we believe the court experience will be significantly improved for these vulnerable witnesses without compromising the rights of the accused.

232 See paras 5.131–44, 6.37.

233 See para 3.44.

be cross-examined again at trial. In addition, it was noted at the Roundtable²³⁴ that cross-examination at trial generally repeats what occurred at committal. That is, there is a laborious process of re-examining on all the issues, rather than the committal being used to cut down the issues that go to trial. We believe this repeated cross-examination is likely to perpetuate the trauma and frustration of these child witnesses and disadvantage them in the presentation of their evidence.

3.75 The recommendation below is intended to provide protection to child witnesses and witnesses with a cognitive impairment and, when combined with pre-recording of testimony of these witnesses, will ensure fairness to the accused while enhancing their capacity to give their evidence to the court.

!

RECOMMENDATION(S)

42. Schedule 5 of the *Magistrates Court Act 1989* should be amended to prohibit cross-examination of children or people with cognitive impairment at committal hearing.

COMBINING COMMITTAL CHANGES WITH PROVISION FOR PRE-RECORDING

3.76 In the Interim Report we recommended the introduction of a provision allowing the prosecution to apply for a child's evidence-in-chief and cross-examination to be video recorded in the presence of a judge and shown at trial. This procedure has been used in Western Australia for 12 years²³⁵ and has recently been introduced in Queensland.²³⁶

3.77 After further research we have decided to recommend that where a person is charged with an indictable sexual offence against a child or someone who has a cognitive impairment, there should be a presumption in favour of the complainant's evidence-in-chief and cross-examination being pre-recorded prior to trial in the presence of a judge. This should occur except where the court is satisfied that the complainant wishes to give evidence at the trial, or where the interests of justice can only be served by the complainant giving evidence at

234 See above n 229.

235 *Evidence Act 1906* (WA) s 106I(1)(b), inserted by *Acts Amendment (Evidence of Children and Others) Act 1992* (WA).

236 *Evidence Act 1977* (Qld) Part2, Division 4A, Subdivision 3.

trial.²³⁷ Pre-recorded evidence would be played to the jury at trial. If there was a retrial following a successful appeal, the tape could be re-played so that the complainant did not have to give evidence again.

3.78 Our reasons for making this recommendation, and the details of the recommendation, are discussed in Chapter 5. In this section we consider how existing processes should be modified to provide for pre-recording.

3.79 The new process must enable pre-recording of the complainant's evidence as soon as possible after the service of the brief of evidence upon the defendant. This will ensure that evidence is captured while the complainant's recollections are fresh and enable the complainant to put the events behind them as soon as possible. However, in order to ensure fairness to the accused, it is also necessary for defence counsel to have sufficient knowledge of the case against the accused to enable them to cross-examine the complainant at the time when pre-recording occurs. The accused must have information about the allegations to be able to make a decision as to whether to plead guilty prior to the trial.

SAFEGUARDING THE ACCUSED'S RIGHT TO TEST THE EVIDENCE

3.80 The Commission has considered how to reconcile the aim of ensuring that the complainant can give evidence and be cross-examined as quickly as possible, with the need to ensure that cross-examination does not occur until defence is fully aware of the details of the prosecution case.

3.81 Conducting the pre-recording at the same time as the committal would enable complainants to give evidence at an earlier stage than if pre-recording were postponed until after committal. However we are concerned that under this approach the accused would not have heard evidence at committal which might provide a basis for cross-examination of the complainant. This issue was discussed at the Roundtable which the Commission held to consider changes to the committal process and the introduction of specialist lists.²³⁸ We propose that pre-recording should occur after the accused has been committed for trial and a presentment has been filed in the County Court. Provision of the presentment and depositions to the accused before pre-recording occurs will ensure that the

237 In this case the complainants evidence would normally be given via CCTV. In Chapter 4, we recommend that all complainants in sexual offence cases should normally give evidence by CCTV; see Recommendations 59–61.

238 Above n 229.

accused person is fully informed of the case against him and defence counsel can properly prepare for, and conduct, the examination of the witness.

3.82 If evidence is given at trial which could not have been anticipated by the defence at the time of the pre-recording, so that the child could not have been cross-examined on it, we recommend in Chapter 5 that legislative provision should be made for the child to be recalled so that they can be cross-examined on this new evidence.²³⁹ Provision of this kind is already made in Western Australia and Queensland,²⁴⁰ although the Commission has been told that it has rarely been necessary to recall a child in Western Australia.

CASE CONFERENCES

3.83 It is proposed that the preliminary hearing in which pre-recording occurs should take place as soon as possible after a case conference occurs in the County Court. A case conference is an informal procedure held in the County Court after the matter has been committed for trial. The parties appear before a judge to discuss the issues involved in the trial on a 'without prejudice' basis. To ensure fairness to the accused, the judge who presides over the case conference is not to hear any subsequent plea or preside over the trial.²⁴¹ The purpose of the case conference is to create an opportunity for negotiation on plea and, if that is not successful, to identify the issues that will be contested at trial. The judge has an active role in adjudicating and assisting the prosecution and defence to try to resolve issues. Case conferences are held in the County Court in most criminal cases but are not presently used in sexual offence cases.

3.84 The Commission recommends that the County Court introduce case conferences for sexual offence cases. This process should initially be piloted in cases where the complainant is a child or a person with a cognitive impairment. In such cases, the matter should be listed for a case conference in the County Court 21 days after committal.²⁴² Negotiations at the case conference may result in some accused deciding to plead guilty. However, if that does not occur, we recommend

239 Recommendation 129.

240 *Evidence Act 1977* (Qld) s 21AN; *Evidence Act 1906* (WA) s 106T.

241 County Court Criminal Jurisdiction, Case List Management System, *Crimes (Criminal Trials) Act 1999*, Practice Note No. 1 of 1999, para 6.6.8.

242 We discuss new procedures in the Office of Public Prosecutions and Victoria Legal Aid below which will support this process.

that the judge presiding over the conference set dates for pre-recording, directions hearing and trial.

3.85 The trial date should be set within three months of the date of committal and this deadline should be applied strictly. Dates for pre-recording and directions hearing should be set within the three month period. We recommend that the date for pre-recording be set 21 days after the case conference. The depositions and presentment should be filed and served at least seven working days prior to the pre-recording. The time limits are short, though manageable, if the same solicitor and counsel remain involved on both the defence and prosecution sides. The short time frames may also make it easier for the same counsel to remain with the matter.

3.86 The directions hearing should be conducted shortly after the pre-recording, so that if the accused person has decided to plead guilty after the complainant has provided their evidence, the trial date can be vacated and a date set for plea. We also recommend that there be provision for counsel for the defence and prosecution to seek a further case conference after the pre-recording, if they believe the matter could be successfully resolved to plea through a further case conference.

3.87 We have referred above to the requirements that in cases involving sexual offences against children²⁴³ a committal mention must be held within three months of the commencement of proceedings²⁴⁴ and a trial must occur within three months of the committal of the matter to the County Court.²⁴⁵ No time limit applies to the period between committal mention and committal hearing.

3.88 Significant delays often occur between committal mention and committal. If this period is too long it will undermine one of the purposes of pre-recording, which is to ensure that children and people with a cognitive impairment can give their evidence as soon as possible after an alleged offender is charged. In the course of our consultations we heard a number of suggestions about how delays in the processing of sexual offence cases (and particularly those involving children) could be reduced.

3.89 It has been suggested that processing times in the OPP could be reduced in child sexual offence cases if the same solicitor and counsel had the carriage of

243 Some offences against adults are also included, for example incest.

244 See above n 200.

245 *Crimes Act 1958* s 359A(1).

the matter throughout. If the recommended 21-day time limit is introduced for the period between committal and case conference this will become even more important. If counsel has been briefed for committal, it is desirable that the same counsel should handle the case conference, pre-recording and trial. Changes to the way in which the OPP handles sexual offence cases may require additional resources.²⁴⁶

3.90 It is equally desirable that the same defence counsel remain briefed throughout a matter. Continuity of counsel for the defence could also assist in reducing delays and ensure that time limits can be met. The current system of funding through Victoria Legal Aid requires applications to be made separately for each stage of a matter as it progresses. This may cause delay after committal while a further grant of legal aid is requested. It has been suggested that changes to Legal Aid guidelines, to allow a legal aid grant for committal to include a grant for the case conference, would make it more likely that the same counsel would continue to act for the accused. The Commission understands that VLA is currently considering a simplified grants process for criminal trials which may help to address these issues.²⁴⁷

3.91 In order to reduce delay to trial, we suggest that if a matter does not resolve at case conference and proceeds to pre-recording, it may be desirable for Legal Aid guidelines to provide for a grant of Aid that covers both pre-recording and trial, with the proviso that a 'plea fee' (rather than a 'trial fee') would be paid if the accused pleaded guilty after the special hearing. The Commission has not assessed the practicability of these proposals but believes they should be seriously considered.

3.92 Further work, outside the scope of this reference, is required to identify the sources and reasons for delays. The Commission suggests that a working party be established to find the best way to address delays in processing sexual offence cases, particularly delays in cases involving children. The working party should include representatives from all the key stakeholders including the Courts, the Bar,

246 Currently the OPP try to ensure that the same solicitor handles a matter from committal mention until completion. However, with current staffing levels in the sexual offences unit it is not always possible for that to occur. This may be improved by our recommendations about new time limits.

247 Personal communication by e-mail from Tony Parsons, Managing Director, Victoria Legal Aid, 11 May 2004.

the Office of Public Prosecutions, Victoria Legal Aid, the Law Institute, Victoria Police and the Victorian Government Reporting Service.²⁴⁸

3.93 The recommendations made in the next section of this Chapter for the introduction of specialised sexual offences lists in the Magistrates' Court, and for assignment of a judicial officer to list and actively manage all cases involving allegations of child sexual assault or sexual offences against people with a cognitive impairment in the County Court, should also contribute to the reduction of delay in such cases.

! RECOMMENDATION(S)

43. The *Evidence Act 1958* should be amended to create a presumption in favour of the pre-recording of the evidence-in-chief and cross-examination of child complainants and complainants with cognitive impairment in sexual offence cases.
44. The recorded evidence should be admissible as if the evidence were given orally in accordance with the usual rules of evidence, in the same way as evidence is given orally in a hearing.
Note that further recommendations relating to pre-recording are contained in Chapter 5.
45. Where the complainant in a sexual offence matter is a child or a person with a cognitive impairment, a case conference should be conducted in the County Court within 21 days after the accused has been committed for trial.
46. At the conclusion of the case conference, if the matter is to continue to trial, dates should be set for pre-recording the complainant's evidence, for a directions hearing and for trial. Pre-recording should occur within 21 days of the case conference and the trial within three months of the date of committal. A directions hearing should be held shortly before trial.

248 The Victorian Government Reporting Service produces transcripts of court proceedings, which the OPP require for depositions.

!	RECOMMENDATION(S)
47.	Where a person is committed for trial for a sexual offence against a child or a person with a cognitive impairment, the OPP should file and serve depositions and the presentment at least seven days prior to pre-recording.
48.	A Working Party comprising representatives from the Magistrates' Court, the County Court, the OPP, Victoria Legal Aid, the Law Institute, Victoria Police and the Victorian Government Reporting Service should be established to identify the reasons for delays in processing sexual offence cases (including delays between committal mention and committal hearing) and to make recommendations for reducing such delays as far as possible. Some of the issues which should be considered are: continuity of solicitor and counsel within the OPP, continuity of defence counsel, streamlining of grants of Legal Aid and the resources required to reduce delays in the provision of transcripts.
49.	Priority should be given to the introduction of processes to reduce delays in cases involving child complainants and people with a cognitive impairment.

SPECIALISED HANDLING OF SEXUAL OFFENCES CASES

ISSUES RAISED IN THE INTERIM REPORT

3.94 In the Interim Report²⁴⁹ we mentioned that some jurisdictions were moving towards a more specialised approach in handling sexual offences cases which include features such as specialised prosecution teams, judicially managed lists, special Legal Aid grants, witness support staff and specialised court staff. We asked whether a specialised approach could assist in overcoming the difficulties that the criminal justice system has in dealing with sexual offence cases. We also discussed a number of possible advantages of some form of specialisation, including:

- enabling recognition of the unique features of sexual offences cases and the difficulties faced by complainants in such cases;

249 Interim Report paras 4.46–60.

- providing an opportunity to develop case management procedures that are more sensitive to the needs of complainants;
- making it easier to provide physical facilities (for example separate waiting rooms) and technology (for example closed circuit television) to ensure that complainants feel safe;
- making it easier to identify barriers to participation in the criminal justice system by children, people with a cognitive impairment and people from Indigenous and non-English-speaking backgrounds, and to develop systems for meeting their needs;
- reducing delays;
- providing an opportunity to develop support services for complainants alongside the criminal justice process;
- facilitating exchange of information and resources between agencies that support court users;²⁵⁰ and
- symbolising the fact that sexual offences are taken seriously by the criminal law.

3.95 We also suggested that specialisation could contribute to the development of expertise in the substantive law and procedures relevant to sexual offences cases which require detailed knowledge about:

- the rules of evidence which apply in sexual offence cases, 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;
- dealing with child witnesses, for example determining whether the child is competent to give evidence and ensuring the children are not subjected to inappropriate or confusing cross-examination; and
- the distinctive jury directions that must be given in sexual offence trials.²⁵¹

250 A key attribute of each of the projects discussed above is good communication and cooperation between agencies, whether as a distinct feature of the project or where it is an incidental consequence of the project as in New South Wales.

A review of good-practice models to facilitate access to justice by those experiencing family violence found that a coordinated community response to family violence is a key aspect of a number of successful projects. Office of the Status of Women, *Research into Good-Practice Models to Facilitate Access to the Civil and Criminal Justice System by People Experiencing Domestic and Family Violence* Final Report (2002).

SUBMISSIONS

3.96 The Interim Report referred to two main forms of specialisation. One model would involve establishing a new stand-alone court with jurisdiction to hear summary sexual offence cases, indictable offences triable summarily which are currently often heard in the Magistrates Court, and indictable offences. A more modest reform would involve the establishment of a specialist sexual offences list in both the Magistrates' Court and the County Court. It was contemplated that judicial officers, who had expressed an interest in this area of law and had received some training on the issues which arise in trying sexual offence cases, might be assigned to these lists for a defined period.²⁵² Most submissions that expressed a view on this matter did not express a preference between these two approaches.

3.97 Twenty-four of the 55 submissions received responded to the question regarding specialisation. The majority of the responses were positive about the prospect of some form of specialisation.²⁵³ The major benefits referred to in the submissions were the opportunity for legal personnel involved to become more aware of, and responsive to, complainants' needs and the likelihood of more efficient case management enabling cases to be processed more quickly.

3.98 Support for the specialisation proposal came from several CASAs.²⁵⁴ Loddon Campaspe CASA took the view that 'a "specialist approach" where well trained and experienced legal personnel deal with sexual assault matters in court may ensure greater consistency of response'.²⁵⁵ SECASA favoured the establishment of a specialist jurisdiction and considered that it 'may be easier for a specialist court to bring about the changes needed to make the court system more accessible for victims'.²⁵⁶ The Gatehouse Centre at the Royal Children's Hospital commented that they 'strongly believe that specialisation within the Criminal Justice system would enhance all areas including awareness, procedures, support and case management'.²⁵⁷

251 See discussion in Chapter 7.

252 Interim Report para 4.53.

253 Seventeen submissions made positive comments.

254 Submissions 19, 21, 26, 28 and 29.

255 Submission 19.

256 Submission 26.

257 Submission 28.

3.99 Support for the proposal also came from the Violence Against Women Integrated Services,²⁵⁸ Uniting Care Victoria and Tasmania, a member of the public and the Youth Affairs Council of Victoria: 'We see that such a jurisdiction would mean that those who work within it could develop an in-depth understanding of the complexities and sensitive nature of sexual assault cases...[and]...would also streamline the process and in this way improve the experience of complainants'.²⁵⁹ The Salvation Army²⁶⁰ and the Australian Childhood Foundation²⁶¹ both favoured the proposal and considered that specialisation would afford significant benefits to child complainants.

3.100 Qualified support came from the VOICES victims/survivors' support group which emphasised that the specialist jurisdiction must 'be charged with the authority to hear any case involving a number of offences where one or more of those offences is a sexual offence'.²⁶² South Western CASA supported the concept but 'has reservations about how it would operate in regional areas'.²⁶³ The Domestic Violence and Incest Resource Centre supported the proposal but cautioned that [specialisation] 'should not occur without comprehensive integration with specialisation approaches being developed in the area of family violence'.²⁶⁴

3.101 The supervising magistrate of the criminal division of the Magistrates' Court also favours some form of specialisation. As well as delivering benefits including efficiency and cultural change, she takes the view that 'acknowledgement of the need for specialisation would itself be of assistance in changing community (importantly potential complainants) perceptions of the justice system'.²⁶⁵

3.102 Opposition to specialisation (or at least specialisation involving assignment of cases to self-selected judges) was expressed in a submission from Judge Neesham of the County Court, with which Judges Nixon, Kelly, and Hart

258 Submission 24.

259 Submission 12.

260 Submission 33.

261 Submission 41.

262 Submission 30.

263 Submission 29.

264 Submission 20.

265 Submission 8.

concurrent.²⁶⁶ The submission said that the ‘principles of trial applicable in ...a rape trial are no different from the principles applicable upon the trial of any other indictable offence’ and that any County Court judge ‘should be perfectly competent to conduct such a trial’. The submission queried the willingness of judges to sit full time on ‘emotionally draining’ sexual offence trials and also ‘the utility of a specialist court that seeks a verdict from a non-specialist jury’. The Law Reform Committee of the County Court also opposed specialisation in its submission and observed that ‘specialization invariably leads to excessive familiarity and development of intractability and inflexibility of approach’.²⁶⁷

3.103 The Criminal Bar Association submission also considered that specialisation was not justified and said that ‘the current rotational system [for assigning judges to cases] works effectively’.²⁶⁸ The Victorian Bar did not support the establishment of a specialist sexual offences jurisdiction on the grounds that it would ‘unnecessarily segregate and stigmatise’ these cases and also that the emotionally draining nature of sexual assault cases would make them unsuitable for Judges to hear for lengthy periods.²⁶⁹

EXAMPLES OF A SPECIALIST APPROACH

3.104 During the last year, the Commission has obtained information about various forms of specialisation within a number of jurisdictions inside and outside Australia. We discuss some examples of specialisation below.

VICTORIA

3.105 Within the Victorian court system there are already a number of different types of specialisation. In the Supreme Court, apart from the Court of Appeal, judges are assigned to one or other of the three divisions of the Court: the Commercial & Equity Division, the Common Law Division and the Criminal Division. This arrangement is designed to promote specialisation, although any judge can hear any case in any Division. The fact nevertheless remains that (for example) homicide trials are assigned wherever possible to judges with an interest and expertise in this area.

266 Submission 39.

267 Submission 52.

268 Submission 42.

269 Submission 48.

3.106 Historically, there was some specialisation in case management processes in the County Court. The Court had a number of judge-managed lists which grouped together particular types of cases with the aim of ensuring more efficient case management. Specialist divisions exist for Workcover, building cases, defamation cases and damages (medical).²⁷⁰ Although the County Court appears to be moving away from this approach,²⁷¹ a number of these judge-managed lists remain.²⁷² The judge who manages the particular list assigns the cases to other judges, although these judges are not necessarily selected because they have specialist expertise in the particular legal area.

3.107 The Magistrates' Court currently operates a number of specialist jurisdictions, including a Drug Court based on a therapeutic approach²⁷³ in the Melbourne suburb of Dandenong and Koori divisions of the Court²⁷⁴ in Shepparton, Broadmeadows and Warrnambool.

3.108 In order to reduce delays in committals in child sexual offence cases, the Magistrates' Court piloted a specialist committal list for such matters in January 2004. Magistrate Lisa Hannan ran the list and she and another magistrate presided over committals in the Melbourne Magistrates' Court. Magistrate Hannan reports that this approach increased the number of cases settling by way of a guilty plea after committal and reduced delays in matters where the accused

270 The 2002 Annual Report of the County Court notes, at page 19, that 'Building disputes are notoriously difficult to resolve. Contributing factors may include a multiplicity of parties and issues and the technical nature of the matters in dispute. To overcome these problems a Building cases list was established in this court in 1983.'

271 A third of cases are now assigned to 'cylinders' which are headed by a judge who takes responsibility for overseeing case management and who assigns the cases. The approach is intended to produce more active judicial management of cases. The assignment does not reflect the subject matter of the case.

272 See County Court *Annual Report* 2002.

273 Various jurisdictions within Australia and internationally have established drug courts to sentence and supervise the treatment of offenders with drug problems who have committed offences while under the influence of drugs or to support a drug habit. The Victorian Court focuses on attempting to rehabilitate and reintegrate drug offenders. <<http://www.magistratescourt.vic.gov.au>>.

274 The Koori Court was established by the *Magistrates' Court (Koori Court) Act 2002*. It is a division of the Magistrates' Court that sentences offenders who have pleaded guilty. It provides a relatively informal atmosphere and enables greater participation of members of the Koori community in court processes. The court aims to tailor sentencing orders to the cultural needs of Koori offenders. <<http://www.magistratescourt.vic.gov.au>>.

pleaded not guilty. She noted that this approach had a positive effect on the conduct of matters in terms of disclosure and the conduct of cross-examination.²⁷⁵

3.109 Specialisation may also take the form of establishing a stand-alone court to deal with particular categories of cases. For example the Children's Court, which has both a Family (Child Protection) and a Criminal Division, occupies a separate purpose-built building, in which specialist magistrates and a judge sit for an assigned period, experienced lawyers practise and an infrastructure of appropriate support services is made available.

Proposal for a Specialised Family Violence Division in the Magistrates' Court

3.110 The Magistrates' Court of Victoria has already adopted protocols and other measures to regulate the handling of family violence matters. These processes attempt to systematise the handling of family violence and stalking matters so that consistency between courts is improved and matters are processed in a way that best accommodates the needs of aggrieved family members, including their need for expeditious resolution of the matter, privacy and security and access to support services.²⁷⁶

3.111 The Court is now moving towards a greater degree of specialisation in the area of family violence. A Family Violence Court Reference Group was established in June 2002 to develop a more comprehensive framework for a specialist approach to family violence.

3.112 Possible features of the proposed Family Violence Division of the Magistrates' Court include the power to exercise a number of relevant jurisdictions concurrently, more effective listing practices, improved safety and security measures, and special measures to be responsive to diversity. The recommendations we make below for a specialist sexual offences jurisdiction are consistent with those contemplated for the Family Violence jurisdiction.

NEW SOUTH WALES

3.113 New South Wales is currently about half way through a 28 month trial of specialist approach to handling child sexual assault cases in four courts. Three

275 Personal communication with Magistrate Lisa Hannan 3 May 2004.

276 Interim Report para 4.57 and see updated Magistrate's Court of Victoria, *Family Violence and Stalking Protocols* (Revised November 2003).

courts in Sydney's west: Parramatta, Campbelltown and Penrith, as well as the court in the regional town of Dubbo, have been equipped to participate in the trial. Each of these courts houses both a Local Court (the equivalent of Victoria's Magistrates' Court jurisdiction) and a District Court (the equivalent of Victoria's County Court jurisdiction). This enables all child sexual offences cases, whether summary or indictable, to be heard in the pilot specialist court.

3.114 The recommendation for a pilot was made in the NSW Legislative Council Standing Committee on Law and Justice Report on Child Sexual Assault Prosecutions.²⁷⁷ The Report recommended a pilot specialist court featuring courts equipped with high standard electronic facilities for the use of special measures such as CCTV and staff trained to use the facilities, pre-trial hearings to determine a child's readiness to proceed, and appropriate child friendly facilities and judicial officers, prosecutors and court staff selected on the basis of interest and specialised training in child development.

3.115 The pilot project incorporates most of these features. A suite of rooms in an office building five minutes walk away from the Parramatta Court has been equipped with two CCTV rooms in which children's evidence is given and projected into the courtrooms in either Parramatta, Penrith or Campbelltown. This facility has a large sitting area, a private interview room and a room with children's videos which is furnished in a child-friendly way with bright colours, toys and so on. The facility is secure and unmarked. Children required to give evidence are able to do so without entering the court building at all. The Witness Assistance Service workers, prosecutors and anyone else who needs to be in contact with the child will attend the remote facility or contact the child by telephone. If exhibits are required, documents can be faxed to the facility.

3.116 The technology is of a very high standard and enables even a very quietly spoken child to be heard easily in court. There are two screens in each CCTV room and one of these has a split screen feature enabling the child to see both the judge and the defence or prosecution barrister at the same time. Excellent technical support is on hand and local court staff have also received equipment training.²⁷⁸

3.117 Although there is no formal process of pre-trial hearings to determine the child's ability to testify, it is the practice of the chief listing judge to enquire about

277 Standing Committee on Law and Justice, *Inquiry Into Child Sexual Assault Matters* (2002).

278 According to our researcher's observations during a visit to the facility on 24 November 2003.

these issues at an early stage of pre-trial processes. The project team from the NSW Attorney-General's department has prepared a draft Practice Note²⁷⁹ to formalise the pre-trial hearing process.²⁸⁰

3.118 Prosecutors and judges are not specially selected to participate in this jurisdiction but are randomly assigned to these cases. However, a significant effort has been made by the project team, working with other agencies including the Judicial College, to put together information packages for all magistrates and judges outlining the special needs of child witnesses in sexual assault cases and explaining the purposes of the pilot.²⁸¹

3.119 While the proposed evaluation of the court is not available, early feedback from personnel involved in the project, as well as those working at agencies in close contact with complainants in these cases, indicates that the specialist approach improves child witnesses' experiences in two main ways. First, it is far easier for children to testify from the remote facility and secondly, the more 'hands on' case management approach taken by the judiciary, together with the greater focus on the needs of the child witnesses, means that cases are being heard more quickly and scheduling is more effective. Changes to scheduling have meant that children are now asked to come in when they are actually to testify, rather than routinely asked to come into court on the Monday of the week the case is listed 'just in case' they are required.

3.120 An additional benefit noted by a member of the project team was the increased opportunity for greater inter-agency collaboration, although increased communication and cooperation may stem more from the pilot nature of the project and the consequent need for ongoing assessment and monitoring, than from the specialist nature of the court.

3.121 Various people who commented on the pilot project noted that specialisation of judicial members and prosecutors would be highly desirable and that the decision not to implement this aspect of the Standing Committee's recommendation is regrettable. Although numerous training and education opportunities have been made available to all judicial members, whether to take

279 At the time of writing, the Note was being considered by the jurisdictional heads.

280 According to information provided by the NSW Attorney-General's department in November/December 2003.

281 Ibid.

up these opportunities is entirely the decision of individual members and there is no ongoing evaluation process to monitor the utility of the training provided.

SPECIALISATION OVERSEAS

South Africa

3.122 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 about the need for improving the treatment of rape victims within the criminal justice system.²⁸² The Wynberg 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 sex crimes by providing a specialised service to victims of sex crimes, and to increase the conviction rate and sentencing of perpetrators.²⁸³ The Court is adversarial in nature, is staffed with specialist prosecutors, has facilities for witness preparation, works closely with other agencies to provide integrated service delivery, is equipped with a CCTV room and employs a social worker who provides support services to children. Since the establishment of the specialist court in Wynberg, a number of additional specialist courts have been opened in the Western Cape. Conviction rates in the specialist courts are higher than in ordinary regional courts in the Western Cape²⁸⁴ and, on the whole, the evaluations of the court have found the specialist approach assists in the reduction of secondary trauma for witnesses testifying at the sexual offences courts.²⁸⁵

Manitoba

3.123 In the Canadian province of Manitoba, a specialist family violence court was established in 1990. This court deals with all child abuse, wife abuse and elder

282 Lulama Dikweni Mastoera Sadan, Shaamela Cassiem, *Pilot Assessment: The Sexual Offences Court in Wynberg & Cape Town and Related Services* (2001) 5.

283 Ibid.

284 Ibid 36.

285 Ibid 43.

Because the courts are not sufficiently resourced, training for specialist staff is often inadequate and staff turnover is high. An evaluation of the courts found that these factors reduce the courts' capacity to achieve the aim of reducing secondary trauma. Ibid 53–6.

See also National Child Sexual Assault Reform Committee, *Discussion Paper: Alternative Models for Prosecuting Child Sex Offences in Australia (Draft)* (2003).

abuse cases where there has been an ongoing intimate relationship involving elements of trust, dependency or kinship between the parties. All cases involving child victims of physical and sexual abuse are handled by the court, as are cases involving adult survivors of child sexual assault, on the basis that all assaults against children involve breaches of trust.²⁸⁶

3.124 The goals of the court when established were expeditious court processing, rigorous prosecution and more appropriate sentencing. The court has been successful in achieving a three month average processing time and in imposing more appropriate sentences for family violence cases.²⁸⁷ However, case attrition rates prior to sentencing are still high.²⁸⁸ The establishment of the specialised jurisdiction involved the development of particular goals, protocols and procedures and the recruitment of specially trained prosecutors²⁸⁹ and judges. According to an evaluation of the court's operations,²⁹⁰ these specialist practitioners significantly reduced 'problems of biased attitudes or lack of awareness'²⁹¹ and improved consistency in decision-making.²⁹² The court has two victim support programs—the Women's Advocacy Program and the Child Abuse Victim Witness Program—which provide support and advocacy for women and children who have been victims of violence by their partners, parents or caregivers. An important aspect of the Services' advocacy role is to address women's

286 E. Jam [sic] Ursel, 'The Winnipeg Family Violence Court' 14 (12) *EuroWRC* 3 <www.eurowrc.org>.

287 Prior to specialisation, the most frequent sentences for family violence offences were conditional discharge, suspended sentence and probation. In the first two years of the Family Violence Court's function, the most frequent disposition was probation followed by suspended sentence and incarceration. Ibid 6.

288 Ibid 1.

289 The court is currently staffed by 13 specialist prosecutors. In the opinion of Dr Jane Ursel, who has compiled data and evaluated the court's performance since its inception, the involvement of specialist prosecutors is the single greatest factor responsible for the court's success. (communicated by Dr Ursel to VLRC researcher on 26 November 2003).

290 These observations are based on Dr Jane Ursel's evaluation of the 4080 cases processed by the court during its first two years of operation. E. Jam [sic] Ursel, 'The Winnipeg Family Violence Court' 14 (12) *EuroWRC* 3.

291 Ibid.

292 Ibid 2.

reluctance to continue through the criminal justice system²⁹³ and to advocate for the complainants with the prosecutors.²⁹⁴

OUR RECOMMENDATIONS

3.125 The Commission believes that there are strong arguments in favour of adopting a more specialised approach to sexual offence cases. Experience in Manitoba shows that assigning judicial officers with an interest in family violence to a specialist list within the court, together with the establishment of a specialist prosecutors unit, has helped to change the criminal justice culture in a way which makes court staff, judges and lawyers more aware of the needs of complainants.²⁹⁵

3.126 We believe that the assignment of self-selected judges and magistrates to specialist sexual offences lists for a period would have a similar effect, particularly if steps were made to build up the existing sexual offences unit in the Office of Public Prosecutions. Once judicial members, prosecutors, defence counsel, court staff Practice Committee, Ministry of Justice) and other agencies have the opportunity to devote appropriate time and attention to the complex issues involved in prosecutions of sexual offences, their sensitivities to the needs of both the accused and complainants is likely to be heightened.

3.127 Specialisation would contribute to the establishment of judicial expertise in dealing with the issues which commonly arise in sexual offence cases. While concerns are sometimes expressed²⁹⁶ that treating sexual offences cases differently from other criminal cases could result in these cases being regarded as less important than other offences, this does not appear to have occurred in jurisdictions that have established specialist courts. We believe it is possible to combine a specialist approach to sexual offences that is sensitive to the needs of complainants, while at the same time ensuring that accused persons are treated fairly and that allegations against them are tested within a rigorous adversarial process.

293 The Services' counsellors meet with women after the police have charged the alleged offender but before the case is passed on to the Prosecution.

294 According to information given to VLRC researcher by Dr Jane Ursel, on 26 November 2003.

295 Ibid.

296 Submission 48. Although Submission 8 makes the point that specialisation would signal that these cases are taken seriously.

3.128 Establishment of sexual offence lists in the Magistrates' Court and County Court would encourage the adoption of case management processes that minimise delays and produce greater confidence in the legal system amongst the agencies which support complainants.²⁹⁷ The purpose of these changes would be to encourage more people to report offences and to give evidence at committal and trial. These changes would also contribute to complainants feeling that the criminal justice process operates fairly, even if it does not always produce the outcome they might have wanted.²⁹⁸

WHAT FORM OF SPECIALISATION?

3.129 The Commission has considered the form of specialisation that it might be practical to introduce at this stage. As discussed above, the Magistrates' Court has already successfully piloted a specialist child sexual offences list at the Melbourne Magistrates' Court. We recommend that the Court establish a specialist list for sexual offences against children and people with a cognitive impairment in Melbourne and major regional cities. Magistrates should be allocated to the list for a defined period and members of the Court should be rotated through the list. All magistrates hearing cases in this list would be expected to participate in relevant judicial education programs on hearing child sexual offence cases.

3.130 For resource reasons our recommendation is limited to cases involving children and complainants with a cognitive impairment.²⁹⁹ However, if this approach proves successful we would expect the Magistrates' Court to consider whether it could be extended to all sexual offence cases.

3.131 There have been a number of discussions with the Chief Judge of the County Court and other County Court judges about the introduction of a model

297 Office of the Status of Women, *Research into Good-Practice Models to Facilitate Access to the Civil and Criminal Justice System by People Experiencing Domestic and Family Violence* Final Report (2002).

298 Tyler discusses the importance of participants' perceptions of fairness in their contact with legal processes. He submits that legal outcomes such as conviction and sentence have less influence on people's reactions to their contact with the system than the behaviour of legal authorities during personal encounters. Tom Tyler, *Trust and Law-Abidingness: A Proactive Model of Social Regulation* (2001).

299 Although child complainants and complainants with a cognitive impairment will no longer be cross-examined at committal under our recommendations, other witnesses may still be called. The specialist list may assist in reducing any delay in committal hearings in those matters so that the case can proceed to pre-recording in the County Court as quickly as possible.

under which judges who express an interest might be assigned to a specialist sexual offences list within the Court for a period of, for example, three months.

3.132 At present there appears to be little support for this model within the Court. The major concerns expressed by those who oppose specialisation focus on the reluctance of judges to hear one type of matter exclusively over long periods. It has been argued that all County Court judges should be regarded as having sufficient expertise to hear the full range of cases that form the Court's business. The Chief Judge encourages all members of the court to participate in judicial education. It is argued that the provision of appropriate specialist information for all judges will ensure that each judge of the Court is well placed to hear sexual offence cases.

3.133 In light of the concerns expressed by the County Court it would be premature for the Commission to recommend the assignment of sexual offence cases to designated judges. Instead, we recommend that the Court establishes a pilot scheme under which a designated judge is appointed to manage a list of cases involving allegations of child sexual assault.

3.134 The appointment of a designated judge would assist the County Court to recognise and manage the range of issues that arise in child sexual offence cases and allow the new processes recommended in this Report to be overseen and refined if necessary.

3.135 A designated judge would be able to liaise with other relevant institutions, including the Magistrate's Court, and develop a clear understanding of where the problems are so that they could be dealt with effectively. He or she could contribute to the design of ongoing judicial education covering identified problems, and oversee the collection and maintenance of data to assess the effectiveness of this approach. The designated judge might also take responsibility for preparing a comprehensive and up-to-date set of materials on the issues likely to be encountered in such cases, and to assist judges who feel less experienced or confident about these issues. The designated judge could assign cases to judges for cases conferences, directions hearings and trials.

3.136 The appointment of a designated judge with these responsibilities would signal the County Court's willingness to address the concerns of complainants and increase community confidence in the way the criminal justice system deals with alleged offences against children and people with a cognitive impairment.

3.137 We propose that the Court should arrange for evaluation of the pilot scheme by an independent researcher at the end of the 12 month period.

!

RECOMMENDATION(S)

50. In the County Court a designated judge should be assigned to list and manage all sexual assault cases involving child complainants and complainants with a cognitive impairment.
51. Delays and different treatment occurs because such matters as section 37A applications are not always handled at the same stage of the process. The court should identify all matters that are to be considered at directions hearings in all sexual offences cases.
52. The County Court should be resourced to evaluate the effect of this process on delays and plea rates.
53. The Magistrates' Court should establish a separate list (or lists) for summary offences and committals in sexual offence cases involving child complainants and complainants with a cognitive impairment in the Melbourne metropolitan area and major regional centres.
54. Initially, such cases should be allocated to magistrates who have expressed an interest in dealing with sexual offence cases. They should be assigned to this list for a defined period.
55. All magistrates hearing cases in the sexual offences list should participate in a judicial education program on issues that arise in hearing child sexual offence cases and cases involving a complainant with a cognitive impairment. Such education should be conducted on an ongoing basis.
56. The Magistrates' Court should evaluate the effect of these processes on timelines and plea rates.
57. Subject to the availability of resources and the outcome of the above evaluation, the Magistrates' Court should consider establishing a list to deal with all sexual offences cases.
58. The Department of Justice should consider the need for additional resources in the Magistrates' Court in order to implement the above recommendations.

Chapter 4

Making it Easier for Complainants to Give Evidence

INTRODUCTION

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

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

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

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

4.3 The Chapter deals with:

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

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

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

ALTERNATIVE ARRANGEMENTS FOR GIVING EVIDENCE

CURRENT LAW AND PRACTICE

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

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

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

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

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

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

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

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

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

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

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

308 Interim Report paras 5.5–7.

309 Submission 8.

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

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

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

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

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

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

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

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

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

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

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

RECOMMENDATIONS IN THE INTERIM REPORT ON CCTV

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

SUBMISSIONS

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

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

315 Spencer and Flin, above n 313.

316 Davies and Noon, above n 314.

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

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

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

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

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

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

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

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

318 Submission 6.

319 Submission 47.

320 Submission 8.

321 Submission 39.

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

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

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

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

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

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

322 Submission 49.

323 Submission 48.

324 Submission 52.

325 Submission 42.

326 Submission 8.

RECOMMENDATIONS

ROUTINE USE OF CCTV

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

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

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

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

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

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

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

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

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

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

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

331 Submission 30.

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

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

! RECOMMENDATION(S)

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

SUPPORT PEOPLE

Current Law

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

Recommendation

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

!

RECOMMENDATION(S)

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

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

! RECOMMENDATION(S)

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

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

THE ADMISSIBILITY OF CERTAIN TYPES OF EVIDENCE

PRIOR SEXUAL ACTIVITY

The Current Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Does the Restriction on Cross-Examination Work in Practice?

Prior Non-Consensual Sexual Activity

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

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

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

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

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

343 Submission 44.

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

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

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

Prior Consensual Sexual Activity

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

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

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

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

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

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

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

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

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

347 Interim Report paras 5.23–29.

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

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

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

Recommendations in the Interim Report

Prior Non-Consensual Sexual Activity

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

! RECOMMENDATION(S)

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

Prior Consensual Sexual Activity (or Lack of It)

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

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

350 Submission 48.

351 Submission 42.

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

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

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

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

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

354 Ibid.

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

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

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

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

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

Response to Interim Report Recommendations

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

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

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

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

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

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

361 Submission 49.

362 Submission 47.

363 Submission 49.

364 Submission 44.

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

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

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

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

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

Recommendations

A New Test for Admission of Prior Sexual History Evidence

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

365 Submission 42.

366 Submission 48.

367 Submission 52.

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

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

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

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

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

368 Submission 52.

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

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

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

Procedural Issues

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

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

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

370 Submission 2.

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

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

! RECOMMENDATION(S)

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

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

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

CONFIDENTIAL COMMUNICATIONS

CURRENT RESTRICTIONS ON ADMISSION OF EVIDENCE OF CONFIDENTIAL COMMUNICATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

PROBLEMS WITH THE CURRENT LAW

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

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

RECOMMENDATIONS IN THE INTERIM REPORT

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

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

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

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

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

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

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

4.77 The second option had three elements:

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

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

SUBMISSIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

390 Submission 10.

391 Submission 47.

392 Submission 19.

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

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

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

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

393 Submission 33.

394 Submissions 4, 42, and 48.

395 Submission 4.

396 Submission 42.

397 Ibid.

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

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

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

RECOMMENDATIONS ON USE OF COUNSELLING COMMUNICATIONS

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

398 Submission 48.

399 Ibid.

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

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

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

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

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

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

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

403 *Evidence Act 1958* s 32C.

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

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

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



RECOMMENDATION(S)

76. A counselling communication must not be disclosed in committal proceedings. Accordingly, at committal
 - a person cannot be required (whether by subpoena or otherwise) to produce a document that records a counselling communication; and
 - evidence of a counselling communication cannot be admitted or adduced.
77. 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.

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

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

**RECOMMENDATION(S)**

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

!

RECOMMENDATION(S)

- the public interest in preserving the confidentiality of the communication and protecting the confider from harm, is substantially outweighed by the public interest in allowing disclosure of the communication (the public interest test).

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

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

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

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

DEFINITION OF 'COUNSELLING'

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

408 *Evidence Act 1958* s 32B.

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

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

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

(b) the person

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

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

whether or not for fee or reward.⁴⁰⁹

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

SUBMISSIONS

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

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

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

410 Submission 6.

411 Submission 7.

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

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



RECOMMENDATION(S)

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

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

THE CURRENT LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MODIFICATION OF THE HEARSAY RULE IN OTHER JURISDICTIONS

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

422 Ibid 441–51.

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

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

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

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

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

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

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

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

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

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

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

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

PROBLEMS WITH THE CURRENT LAW

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

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

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

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

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

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

434 See Interim Report 73, Graph 3.

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

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

SUBMISSIONS

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

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

RECOMMENDATIONS IN THIS REPORT

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

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

437 See below paras 5.127–8 and Recommendation 139.

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

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

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

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

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

440 See Para 4.109–11.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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RECOMMENDATION(S)

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

CROSS-EXAMINATION BY UNREPRESENTED ACCUSED

THE CURRENT LAW

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

PROBLEMS WITH THE CURRENT LAW

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

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

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

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

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

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

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

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

RECOMMENDATIONS IN THE INTERIM REPORT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SUBMISSIONS

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

463 Ibid.

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

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

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

4.132 Judges Neesham, Kelly and Hart commented that:

464 Submission 52.

465 Submission 42.

466 Submission 48.

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

468 *Evidence Act 1958* ss 39–40.

469 Submission 28 (submission to the Discussion Paper).

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

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

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

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

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

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

470 Submission 39.

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

472 Judge Nixon, qualification for support to Submission 39.

473 Submission 49.

474 Submission 20.

475 Submission 19.

476 Submission 28.

RECOMMENDATIONS

PROHIBITING CROSS-EXAMINATION BY THE ACCUSED

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

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

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

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

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

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

479 Ibid para 3.67.

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

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

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

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

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

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

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

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

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

480 Ibid para 3.70.

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

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

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

Questions are Put by a Court-Appointed Lawyer

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

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

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

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

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

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

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

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

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

A Friend of the Court?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Our Approach

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

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

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

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

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

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

496 Submission 39.

497 Submission 42.

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

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RECOMMENDATION(S)

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

IMPLICATIONS OF THE RULE IN *BROWNE V DUNN* FOR UNREPRESENTED ACCUSED**The Rule in *Browne v Dunn***

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

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

499 [1894] 6 R 67.

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

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

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

PROBLEMS FOR UNREPRESENTED ACCUSED

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

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

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

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

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

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

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

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

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

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

We make a similar recommendation below.

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



RECOMMENDATION(S)

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

506 (1990) 19 NSWLR 677, 688.

**RECOMMENDATION(S)**

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

ALLEGATIONS BY MULTIPLE COMPLAINANTS

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

507 Discussion Paper paras 8.44–63.

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

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

CURRENT LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS OF COURT OF APPEAL DECISIONS

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

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

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

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

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

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

513 Discussion Paper paras 8.54–60 and Appendix 5.

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

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

CONSULTATION AND SUBMISSIONS

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

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

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

SUCCESS OF AMENDMENTS

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

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

517 Submissions 7, 8, 11, 28.

518 Submission 11.

519 Submission 28.

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

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

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

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

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

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

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

522 See Appendix 3.

523 [2000] VSCA 157.

524 [2003] VSCA 38.

525 [2004] VSCA 12.

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

4.181 In its judgment, the Court of Appeal noted:

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

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

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

!

RECOMMENDATION(S)

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

WITNESS SUPPORT SERVICES

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

⁵²⁶ Winneke P, 18.

⁵²⁷ Winneke P, 19.

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

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

⁵³⁰ Ibid 238.

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

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

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

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

532 Submission 42.

533 Submissions 28, 40 and 47.

534 Submission 47.

535 See para 5.11.

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

537 Ibid 5.152 and 6.30.

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

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

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

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

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

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

**RECOMMENDATION(S)**

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

The funding should be sufficient to enable the service to:

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

Chapter 5

Improving the System for Child Complainants

INTRODUCTION

5.1 Chapters 3 and 6 of the Interim Report discussed problems in the way that the criminal justice system deals with child complainants in sexual offence cases. Over the past two decades many other law reform reports have made similar findings.⁵⁴¹

5.2 Historically the legal system regarded children as unreliable witnesses. ‘This view was reflected in rules of evidence that limited children’s competence to give evidence and required corroboration and judicial warning in relation to children’s evidence.’⁵⁴² Although these rules have now been modified, the criminal justice process still fails to respond adequately to the needs of children.

5.3 In their joint report on children in the legal process the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission commented that:

541 See for example Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* Project 87 (1991); Crime Prevention Committee, Parliament of Victoria, *Combating Child Sexual Assault: An Integrated Model: First Report Upon the Inquiry into Sexual Offences Against Children and Adults* (1995); 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); New South Wales, Royal Commission into the New South Wales Police Service, *Final Report—Volume VI: The Paedophile Inquiry: Appendices* (1997); Standing Committee on Law and Justice, Legislative Council, New South Wales Parliament, *Report on Child Sexual Assault Prosecutions* Report No 22 (2002); Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* Report No 55 (2000).

542 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 541, 304.

[t]he legal system has traditionally given little support and preparation to child witnesses. Within the courtroom children are often subject to harassing, intimidating, confusing and misleading questioning...A significant amount of evidence was presented to the Inquiry that children are frequently traumatised by their court appearance... The abuse many children suffer is compounded by the abuse perpetrated by the legal system itself.⁵⁴³

[W]hatever the jurisdiction, the structures, procedures and attitudes to child witnesses within...legal processes frequently discount, inhibit and silence children as witnesses. In cases where the child is very young or has or had a close relationship with one of the parties or where the subject of the evidence is particularly sensitive, children often become so intimidated or distressed by the process that they are unable to give evidence at all.⁵⁴⁴

5.4 The difficulties which child complainants in sexual offence cases face in giving evidence at committal and trial are now widely recognised. Judge Mary Ann Yeats of the Western Australian District Court recently commented that the increased number of trials of sexual offences against children had resulted in :

an increased general awareness of the special problems children face in giving evidence before a judge and jury. In that sort of formal setting in the face of 12 strangers making up the jury and a number of strangely costumed barristers, court staff and judge—not to mention the presence of the accused person—children's evidence has, on occasion, not been heard. Children have been overwhelmed by the strangeness and strangers of the courtroom such that, on occasion, they have simply been unable to answer questions reliably or at all. We learned that children were being further damaged by the court process. Reliable research has shown that the traditional courtroom setting and procedures placed children under such stress in giving their evidence that they suffered further injury as a result of the court process.⁵⁴⁵

5.5 The difficulties faced by all children in the criminal justice system are compounded for Indigenous children, children from non-English speaking backgrounds (NESB) and children with disabilities. Indigenous children have historically had significant reasons to fear police and may have cultural difficulties

543 Ibid 335.

544 Ibid 297.

545 (Her Honour Judge) Mary Ann Yeats, 'Alternative Arrangements for Giving Evidence: A Judicial Perspective' (Paper presented at the Children as Witnesses Workshop, 14 November 2003, Melbourne).

in communicating with authority figures and participating in the legal process. Similarly, children from some NESB backgrounds may fear the police. Children with cognitive impairments and other disabilities may be unable to give oral evidence and may face problems with perceptions about the reliability of their evidence.⁵⁴⁶ All these factors contribute to the low reporting rate of offences against children and the even lower rate of alleged offences that result in prosecution.⁵⁴⁷

5.6 There is some evidence that conviction rates in cases involving offences against children are actually dropping.⁵⁴⁸ Low conviction rates may be partly attributable to rules of evidence which do not permit adequate assessment of children's competency to give evidence, are based on misapprehensions about the ways in which children who are sexually assaulted typically behave and which take insufficient account of empirical information about the behaviour patterns of those who sexually assault children.⁵⁴⁹

5.7 People accused of offences against children are entitled to the presumption of innocence and must receive a fair trial in which they are not convicted unless their guilt is established beyond reasonable doubt. However there is also a public interest in ensuring that child complainants are treated fairly and that they have an opportunity to tell their story without being victimised or traumatised. As well as preventing false convictions, the law must give due weight to the public interest in encouraging people to report child sexual assault to the police and in securing

546 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); Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, '18. Children's Involvement in Criminal Justice Processes' in *Seen and Heard: Priority for Children in the Legal Process* (1997) 351.

547 Only around 14.5% of penetrative offences other than rape (for example incest and penetration of children) that are reported to Victoria Police result in a prosecution: Interim Report para 2.81. No data is available on the prosecution rate for offences that do not involve penetration.

548 In Victoria, of the 258 penetrative offence matters prosecuted from 1997–8 to 1998–9, there were 116 convictions at trial or as the result of a guilty plea (44.9%) for at least one penetrative offence; Interim Report para 2.74 Table 3 and para 2.81. There are no Victorian figures enabling these figures to be compared with earlier years. The conviction rates in Victoria seem to be lower than those in NSW. See National Child Sexual Assault Reform Committee, *Discussion Paper: Alternative Models for Prosecuting Child Sex Offences in Australia (Draft)* (2003), Table 1, 7; Table 2, 8. These tables show conviction rates for child sex offences and other offences in higher courts in NSW from April 1991–April 1992, January 1992–December 1996 and January 1998–September 2001. The draft paper says that similarly low conviction rates apply in other jurisdictions in Australia.

549 For a discussion of factors which may affect conviction rates: see Ibid10–13.

convictions of those who have committed offences and who are likely to continue to assault children if they are not apprehended and convicted.

5.8 This Chapter proposes reforms designed to make the criminal justice system more responsive to the needs of child complainants and witnesses in sexual offence cases and to increase the likelihood that those who abuse children are convicted. It makes recommendations on:

- improving support for child complainants and other child witnesses;
- use of alternative arrangements for children to give evidence;
- changes to the rules of evidence to make it easier for children to give evidence and to allow admission of children's hearsay evidence;
- better judicial control of cross-examination; and
- imposition of a duty on lawyers in relation to the questioning of children.

Many of the reforms proposed are already in force or have been recommended in other Australian jurisdictions or in New Zealand or Canada.

5.9 In Chapter 9 we make recommendations for changes to some of the substantive sexual offences that are relevant to children.

SUPPORT FOR CHILD WITNESSES

THE NEED FOR SPECIALISED SUPPORT

5.10 In the Interim Report,⁵⁵⁰ we argue that witnesses in sexual offences cases need appropriate support throughout their involvement in the criminal justice process. Research shows⁵⁵¹ that the provision of support can be effective in minimising the trauma of giving evidence, improving the standard of evidence and increasing confidence in the criminal justice system. It may also assist in increasing reporting and conviction rates.

5.11 As we describe in the Interim Report, a number of Victorian agencies currently provide witness support to both adult and child witnesses in sexual offences cases. The State's network of Centres Against Sexual Assault (CASAs) provide both crisis and ongoing counselling, support and advocacy to

550 Interim Report paras 5.151–5.

551 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) above n 541, 335–9.

victim/survivors of sexual assault.⁵⁵² Court Network provides court support to witnesses⁵⁵³ and the Witness Assistance Service (WAS), based at the Office of Public Prosecutions (OPP), provides information and support to prosecution witnesses in homicide, culpable driving and sexual offences cases.⁵⁵⁴ The Children's Protection Society operates a sexual abuse counselling and prevention program that provides support to child witnesses.

5.12 In the Interim Report we recommended that support be made available to assist adult⁵⁵⁵ and child⁵⁵⁶ complainants in sexual offences cases and we listed the various features appropriate for support services. Submissions⁵⁵⁷ made in response to the Interim Report were generally supportive of the need for a witness support service with the various features recommended. Several of the CASAs and the Federation of Community Legal Centres⁵⁵⁸ favoured the increase of support services and took the view that an increase in resources to CASAs would be the most effective way to deliver general witness support.⁵⁵⁹ The Gatehouse Centre and the Disability Discrimination Legal Service emphasised the importance of statewide support⁵⁶⁰ and adequate resources for services. The Criminal Bar Association⁵⁶¹ supported the recommendation but insisted that 'clear guidelines be established to ensure that this support does not taint the process or compromise the integrity of the trial'.

HOW SHOULD CHILD WITNESS SUPPORT BE DELIVERED?

5.13 In Chapter 6 of the Interim Report we focused particularly on the crucial role of specialised witness support for children in increasing children's ability to participate in criminal justice processes. We described the type of support we considered appropriate and then discussed the three possible modes of service

552 See discussion of CASAs in Interim Report. See also Chapter 3.

553 Interim Report paras 5.152–3.

554 Ibid.

555 Interim Report Recommendations 51 and 52.

556 Ibid Recommendations 53–9.

557 Including submissions from the Department of Human Services, the Youth Affairs Council of Victoria and Judge Anderson of the County Court.

558 Submission 47.

559 Submission 19, 26 and 28.

560 Submissions 28 and 40.

561 Submission 42.

delivery: the service could be an extension of the current Office of Public Prosecutions based WAS; it could be an independent, Department of Justice funded service or it could be an expansion of the services provided by agencies that currently provide support to child witnesses such as the Children's Protection Society and various CASAs. In the Interim Report, we asked which of these models was preferable. Several submissions address this question.

5.14 Various submissions took the view that adult and child support should be separated, including Barwon CASA,⁵⁶² the Gatehouse Centre⁵⁶³ and the VOICES group.⁵⁶⁴ On the other hand, the Department of Human Services (DHS) considered that adult and children's services could be provided by the same service provided that children's particular needs are recognised,⁵⁶⁵ and the Violence Against Women Integrated Services⁵⁶⁶ took the view that although a suitable idea in theory, in regional areas 'it would be difficult to justify that separation due to separate services being potentially financially unviable'.

5.15 Several submissions⁵⁶⁷ expressed the view that specialist services for children would be most appropriately delivered by an independent service, rather than an OPP-based service as is currently the case. The DHS and the Australian Childhood Foundation both commented that a service independent of the OPP, based on the Western Australian model, would be the preferred model. On the other hand, the WAS considers that:

It is important that the OPP is the agency that continues to deliver support and information to child witnesses and their families through its WAS service, as it is provided in a timely manner, and provides continuity of care and is in the best position to provide updates and information in relation to the progress of a matter. WAS has gained the confidence of the legal staff within the OPP...and the Police informants...and this ensures that information and support are delivered in a timely manner.⁵⁶⁸

562 Submission 16.

563 Submission 28.

564 Submission 30.

565 Submission 44.

566 Submission 24.

567 Submissions 29, 41 and 44.

568 Submission 55.

5.16 Only one submission commented on the suitability of linking witness support to counselling services. Loddon Campaspe CASA took the view that child witness support should be provided by 'professionals who are trained for this work, separate from, but with links to counselling services'.

OTHER MODELS

5.17 In the Interim Report, we described the Western Australian specialist witness support service for children and people with cognitive impairment in detail.⁵⁶⁹ Western Australian child witnesses questioned about the work of the service acknowledged its effectiveness as a support mechanism.⁵⁷⁰

5.18 In New South Wales there is a Witness Assistance Service based at the Office of the Director of Public Prosecutions (DPP) which is similar to the Victorian model. However, the service is significantly more substantial and is able to give a more comprehensive level of support to victims of personal violence. The service currently employs a manager, an administrative officer, a senior lawyer in the role of sexual assault liaison officer, four senior Witness Assistance Officers who perform a joint clinical and supervisory role, three Aboriginal Witness Assistance Officers and 24 Witness Assistance Officers. The service provides statewide support, with officers based at the 11 DPP Offices throughout the State. The Witness Assistance Officers are trained in child sexual assault support and in dealing with child witnesses. The service prioritises child sexual assault cases when determining the allocation of resources and support. A key aim of the service is to ensure that child sexual assault victim/survivors are linked to appropriate counselling services and to liaise with the counselling service in the provision of support to the child.

5.19 Despite the capacity of the service, it is still not able to deliver a comprehensive service to all victims of personal violence and must rely on the prosecuting solicitors to provide support to victims of more minor offences.⁵⁷¹

569 Interim Report paras 6.22-5.

570 Christine Eastwood and Wendy Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* (2002) Criminology Research Council 81.

571 Information provided by the Witness Assistance Service Manager during discussions on 23 November 2003 and 19 May 2004.

THE COMMISSION'S VIEW

5.20 Although there are advantages and disadvantages to each method of service delivery, on balance, the Commission considers that specialised child witness support would most appropriately be delivered by an independent Department of Justice-based service. The new Victim Support Agency could play a role in developing a framework for such a service. Given their budgetary and geographic constraints, the current Witness Assistance Service and various other agencies provide excellent service to many complainant witnesses but there are significant advantages in an independent and specialist service for child witnesses.

5.21 A specialist service for child witnesses acknowledges the particular needs of this especially vulnerable group and allows expert staff to develop best practice responses to their needs. The specialist service could implement programs to ensure that it can provide assistance to children from diverse backgrounds (including Indigenous children and NESB children) and children with special needs (including children with cognitive impairments and other disabilities). The service could also serve an educational role within the broader criminal justice sector and assist in increasing the understanding of the needs of child witnesses and maximising their effective participation in the system. An independent service would also allow defence witnesses to receive assistance also and would alleviate concern that witnesses may be 'coached' inappropriately by counsellors.

5.22 If it is not possible for the Department of Justice to establish an independent specialist child witness service, we recommend that the Office of Public Prosecutions receive dedicated funding for the Witness Assistance Service to enable it to more appropriately service the particular needs of child witnesses. This funding should be sufficient for services to be provided promptly and appropriately to all children throughout Victoria including Indigenous children, NESB children and children with disabilities.



RECOMMENDATION(S)

105. The Department of Justice should establish an independent specialist witness support service for child witnesses.
106. The service should provide support to child witnesses, their parents, guardians or carers in sexual offences cases, both within Melbourne and in rural and regional areas.

**RECOMMENDATION(S)**

107. The purpose of this support should be to facilitate child witnesses' more effective and credible participation in the criminal justice process, while protecting their wellbeing.
108. The support should be appropriate for Indigenous children, children from non-English speaking backgrounds and children with differing physical and intellectual requirements.
109. Specialist child witness support should be provided by professional staff with 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.
110. Where circumstances require it, there should be appropriate collaboration between the service and other agencies providing services to the child witness.
111. 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, guardian or carer 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.



RECOMMENDATION(S)

112. Child friendly facilities should be provided for children within court complexes, including in interview areas and waiting rooms.

ALTERNATIVE ARRANGEMENTS FOR CHILDREN TO GIVE EVIDENCE

THE CURRENT LAW IN VICTORIA

5.23 Victorian law provides two main alternatives to a child giving the whole of their evidence in the court room.

- Interviews with the police may be video or audio-taped, and the tape may be used as the child's evidence-in-chief at trial.
- At committal or trial, the court may order that the child gives evidence from another room by closed circuit television (CCTV) or that a screen be erected to block the complainant's view of the accused.

VIDEO OR AUDIO RECORDING (VATE) OF A CHILD'S EVIDENCE-IN-CHIEF

5.24 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 recording or videorecording, if the witness is under 18 years or is a person with 'impaired mental functioning'. The interview with the witness which is videotaped or audiotaped must be undertaken by a prescribed person. Most members of the Victoria Police Sexual Offences and Child Abuse (SOCA) units are trained to conduct VATE interviews and most interviews with children are taped. 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 tape.⁵⁷²

5.25 Introduction of the VATE tape was intended to:

- be less traumatic for children, because it would reduce the number of times the child would have to tell their story;

572 *Evidence Act 1958* s 37B(3).

- ensure that the court had access to statements made by the child shortly after the alleged offence was reported to the police;
- ensure that the interview process was appropriate and that the child was not influenced by the questioning process; and
- encourage offenders to plead guilty.⁵⁷³

5.26 The viewing of the VATE tape, by the accused and defence counsel before trial, may result in the accused pleading guilty. This means that the child complainant does not have to give evidence at a trial or be subjected to cross-examination. However in cases where the accused does not plead guilty and there is a trial, the prosecutor may decide not to tender the VATE recording at all but to call the witness, or to tender the VATE recording and supplement that evidence by calling the witness to answer additional questions.⁵⁷⁴

5.27 The prosecutor may choose not to tender the VATE tape because he or she believes that the tape contains inadmissible evidence that the defence will challenge, or because he or she thinks that a conviction is more likely to be obtained if the child gives evidence orally. If the prosecutor does seek to introduce the VATE tape, the defence may raise objections to its admission. The judge may then decide to exclude the tape or part of it.

5.28 Although Victoria Police do not keep statistics on use of VATE tapes, our consultations suggest that relatively few VATE tapes are admitted in evidence at trial.⁵⁷⁵ Prosecutors told us that there are sometimes difficulties with the quality of interviews recorded on VATE tapes. If the tape contains inadmissible material, or the police interviewer appears to be leading the child, the prosecutor may not seek to use the VATE tape in evidence because the defence is likely to challenge its admission.

5.29 Victoria Police told us that they were often not informed of the prosecutor's decision that the VATE tape should not be used or of the reasons for

573 Law Reform Commission of Victoria, *Sexual Offences Against Children*, Report No 18 (1988) 108.

574 Chris Corns, 'Videotaped Evidence of Child Complainants in Criminal Proceedings: A Comparison of Alternative Models' (2001) 25 *Criminal Law Journal* 75.

575 This is the impression of members of the judiciary, OPP staff and representatives of service provider organisations we have consulted. A study by the NSW Police, conducted between May 2000–May 2002, found that although electronic evidence was submitted as a child's evidence-in-chief in a small numbers 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. NSW Police, 'Evaluation of the Electronic Recording of Children's Evidence'.

that decision. This lack of feedback means that police are not necessarily aware of the need to change interviewing procedures to ensure that the evidence is usable. Comments in some cases suggest there may also be some judicial resistance to the use of VATE tapes.⁵⁷⁶

5.30 The Commission arranged a meeting between Victoria Police and the DPP, Paul Coghlan QC, to establish a process for systematic feedback about the quality of VATE tapes, which could result in improvements in interviewing techniques and increase the use of VATEs. The Commission has worked with the SOCA Coordination Unit to design a form for use by prosecutors, to record whether a VATE is used or not and if not, why not. This form is to be completed by the individual Police Prosecutor or OPP solicitor responsible for the prosecution of a case for which VATE was made and returned to the SOCA Coordination Unit for processing. It is anticipated that the systematic completion of these forms will provide Victoria Police with useful guidance regarding the preparation of VATEs. This will need to be combined with commitment by the Victoria Police and the OPP to improve the process so as to increase the use of VATE tapes.

CCTV

5.31 In Victoria, section 37C of the *Evidence Act 1958* allows the court, on its own initiative or on application of the prosecution or defence, to direct that alternative arrangements be made for a child witness in sexual offence proceedings

576 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 upheld the first ground but not the second 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 'inherent potential for unfairness', 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.

to give evidence.⁵⁷⁷ Alternative measures include provision for the child to give evidence by CCTV or for a screen to be used to remove the defendant from the witness' direct line of vision.⁵⁷⁸

5.32 During our consultations we were told that 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.⁵⁷⁹ However, it appears that children are often required to give their evidence in court rather than by using the remote facility.⁵⁸⁰ The Commission undertook a review of committal hearings in sexual offences cases over a four-month period between September 2003 and December 2003. Fourteen of the 40 cases examined involved complainants under 18. Successful applications to cross-examine the child were made in all of these 14 cases and the child gave evidence by CCTV in only four of them.⁵⁸¹

5.33 Prosecutors may not apply for child complainants to give evidence by CCTV because they believe they are more likely to secure a conviction if the child testifies in court.⁵⁸² Sometimes defence counsel objects to the use of CCTV by older children and judges uphold the objection.⁵⁸³ Although section 37B of the *Evidence Act 1958* allows the magistrate or judge to direct use of CCTV without the prosecution applying, it appears that this rarely occurs. 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.

577 The provision is not limited to children. See above para 4.6.

578 *Evidence Act 1958* s 37C(3) (a) and (b). The court can also direct that a person be allowed to be beside the witness for the purpose of providing emotional support, that legal practitioners do not robe and/or remain seated while examining or cross-examining a witness and that only specified persons be present in court while the witness is giving evidence. See para 4.7.

579 For example Submission 18 to the Discussion Paper. 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, consultation 9 August 2001.

580 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 to the Discussion Paper.

581 For a more detailed account of the research see paras 3.43–6.

582 According to the Witness Assistance Service, many prosecutors are reluctant to use the CCTV facility and only infrequently make applications for its use: submission 67, above n 38.

583 According to confidential submission, Submission 18.

INTERIM REPORT PROPOSALS

5.34 The Interim Report recommended that:

- Police should continue to video or audio-tape children's evidence. A working party should be established to independently review the VATE process.
- Child witnesses should have the right to give their evidence by CCTV. The judge should have the power to order that CCTV not be used, on application of the prosecutor. The judge should only order that CCTV not be used if they are satisfied that the child is able to and wishes to give evidence in court.
- Victoria should enact legislation similar to Section 106I(1)(b) of the *Evidence Act 1906* (WA), which allows children in a sexual offences case to give the whole of their evidence at a hearing held before the trial. The hearing would be conducted according to the rules of evidence with examination, cross-examination and re-examination all conducted by counsel, subject to judicial control. The videorecording of the hearing would be played at the trial instead of the child giving evidence orally.⁵⁸⁴

5.35 Most submissions supported this 'package' of alternative measures as a means of reducing the stress which children experience in giving evidence and increasing the accuracy of their evidence.

RECOMMENDATIONS

5.36 Our final recommendations are discussed below and deal with:

- VATE;
- CCTV; and
- pre-recording of children's evidence.

⁵⁸⁴ See Recommendations 60–4, Interim Report para 264.

RETENTION OF VATE TAPING PROCESS

5.37 Relatively few submissions made comments on the recommendation that the VATE process should be retained.⁵⁸⁵ The submission from the Australian Childhood Foundation commented that the VATE system itself created hurdles for children and was not sensitive to the ways in which children need to be supported in order to communicate their experiences of sexual assault. The Foundation was critical of the interaction between the police and DHS in handling allegations of sexual assault and explicitly supported a formal evaluation of the VATE system, as was recommended by the Commission.⁵⁸⁶

5.38 The Commission believes that police interviews with child witnesses should continue to be recorded. We also recommend the pre-recording of children's evidence-in-chief and cross-examination.⁵⁸⁷ However this will not make VATE tapes redundant. If the child's evidence is pre-recorded, the VATE tape could be admitted as the child's evidence-in-chief.

5.39 Viewing the VATE tape is likely to result in some defendants pleading guilty at an early stage. Taping the interview reduces the possibility of improper questioning and lessens the likelihood of distortion that may result when an interviewer writes up interview notes after the event.⁵⁸⁸ Evaluation of the electronic recording of children's evidence⁵⁸⁹ has found that it 'improved the quality and completeness of the statement'.⁵⁹⁰ Other advantages include the recording of the child's appearance, demeanour, gestures and emotional state close in time to the initial report.

5.40 Further work needs to be done to ascertain why relatively few VATE tapes are admitted in evidence. We recommend that Victoria Police establish an

585 See however Submission 16, which spoke of the distress of a child who had to give their evidence-in-chief in court, because a VATE tape had not been made and Recommendation 40, which raised issues about the use of VATE tapes for people with a cognitive impairment.

586 Submission 41. See also comments about the use of VATE for people with a cognitive impairment in Submission 40 and Submission 44, which supported evaluation of the VATE system by an independent academic.

587 See para 5.58.

588 Gail Goodman and Vicki Helgeson, 'Child Sexual Assault: Children's Memory and the Law' (1985) 40 *University of Miami Law Review* 181 198.

589 Youth and Child Protection Team, NSW, *Evaluation of the Electronic Recording of Children's Evidence* (2002).

590 Ibid ii.

independent evaluation of the VATE taping process, as has already occurred in New South Wales. The evaluation should include:

- assessment of a sample of VATE tapes, to determine whether prosecutors' concerns about the admissibility of VATE tapes are well founded;
- recommendations about changes to police training which may be necessary to improve the quality and admissibility of interviews recorded on VATE tapes; and
- recommendations about training of lawyers involved in the prosecution of child sexual offences to encourage them to rely on VATE tapes wherever possible.

5.41 A Joint Police/OPP working party should be established to oversee implementation of any recommendations made as a result of the evaluation. The Working Party should include a person with expertise in dealing with child victims of sexual assault and a representative of DHS.



RECOMMENDATION(S)

113. Police should continue to make video and audiotaped evidence (VATE) of statements given by children and people with a cognitive impairment.
114. Victoria Police should establish an independent evaluation of VATE statements in sexual offence cases and of the use of VATE statements in evidence.
115. The evaluation should include
 - arranging for a review panel, including a magistrate, a member of Victoria Police, a judge, an experienced defence barrister, an experienced prosecutor and a child psychologist with expertise in methods for questioning children, to view a sample of VATEs (including tapes played at trials and tapes not played) to assess their admissibility, forensic quality and the appropriateness of the interview techniques used;
 - researching Australian and international best practice with respect to the preparation of video recordings of evidence and making recommendations about changes to police training which may be necessary to improve the quality and admissibility of VATE interviews; and



RECOMMENDATION(S)

- making recommendations for prosecutor training which might encourage greater reliance on VATE tapes.
116. A joint Working Party of Victoria Police and the OPP should be established to oversee implementation of any recommendations made as a result of the evaluation.
117. The Working Party should include a person with expertise in dealing with child victims of sexual assault and a representative of the Department of Human Services (DHS).

ROUTINE USE OF CCTV

5.42 Only the Criminal Bar Association and Victorian Bar submissions opposed routine use of CCTV for child witnesses.⁵⁹¹ The Criminal Bar Association thought that the same procedures should apply to adults and children.

5.43 A number of submissions explicitly supported the child's right to use CCTV,⁵⁹² though many of the positive comments took the use of CCTV for granted and focused on the proposal that all the child's evidence be pre-recorded and played at trial. The Department of Human Services submission said that the child should have the right to decide whether to use the facilities:

It is important that the child be given a sense of control over the process and that the process accord with the child's sense of fairness, with the likelihood that the quality of the child's evidence be improved.⁵⁹³

Judge Anderson also supported routine use of CCTV by child witnesses.⁵⁹⁴

5.44 In Chapter 4 we recommended that all complainants in sexual offence trials should have the right to give evidence by CCTV.⁵⁹⁵ We make a separate recommendation that children's evidence should routinely be taken in this way,

591 Submissions 42, 48.

592 See Submissions 5, 10, 12, 19, 20, 25, 28, 29, 30, 38, 47, 44 and 49.

593 Submission 44.

594 Submission 49.

595 See paras 4.26–32 and Recommendations 59–65.

because of the importance of ensuring that children do not have to give evidence in open court.

5.45 New South Wales, Queensland, Western Australia, Tasmania, the ACT and the Northern Territory provide for routine use of CCTV by child complainants in sexual offence cases⁵⁹⁶ and similar provisions apply in England. Our recommendation will ensure that child witnesses in Victoria are treated in the same way as in most other States and Territories.

5.46 In Western Australia, provision for use of CCTV was part of a package of reforms designed to meet the needs of child complainants, which according to Judge Yeats 'have been grasped with enthusiasm and have become part of [the] legal culture'.⁵⁹⁷ The Commission's enquiries show that despite initial concerns, Western Australian judges, prosecutors and defence counsel now support children giving their evidence in this way,⁵⁹⁸ though some judges⁵⁹⁹ emphasised the need for good quality technical and trained operators to manage it. An formal evaluation of the system, which included an exit survey of jurors in 13 trials, was very positive.⁶⁰⁰ The only reservation was that almost half of the jurors found it difficult to judge the size of the child witness and more than a quarter found it difficult to judge the child's age. As a result, the transmission procedure was changed to give the jury a view of the child coming into the remote room with a court officer so that the whole of the child can be seen and the jury can judge the child's size.

596 *Evidence (Miscellaneous Provisions) Act 1991*, Republication No 10 (ACT) s 8(1)(b); *Evidence Act* (NT) as in force 1 January 2004 ss.21A(2)(a); *Evidence (Children) Act 1997* (NSW) s 18; *Evidence Act 1977* (Qld) s 21AB, s 21AP (normally the child's evidence is to be pre-recorded at a special hearing; if this does not occur the child must normally give evidence by CCTV); *Evidence (Children and Special Witnesses) Act (2001)* (Tas) provision s 6(1).

597 (Her Honour Judge) Mary Ann Yeats, 'Alternative Arrangements for Giving Evidence: A Judicial Perspective' (Paper presented at the Children as Witnesses Workshop, 14 November 2003, Melbourne) 2.

598 Notes of meeting with members of the Criminal Bar on 9 May 2003; meeting with His Honour Chief Judge Hammond on 8 May 2003; meeting with His Honour Judge Jackson on 8 May 2003; meeting with Legal Aid on 9 May 2003; meeting with Prosecutors on 8 May 2003.

599 Meeting with His Honour Chief Judge Hammond on 8 May 2003; meeting with His Honour Judge Jackson on 8 May 2003.

600 Ministry of Justice, *Child Witnesses and Jury Trials: An Evaluation of the Use of Closed Circuit Television and Removable Screens in Western Australia* (1996). Only 16 of the 109 jurors thought it would have been easier to reach a verdict if they had seen the child in the courtroom.

5.47 Judge Mary Ann Yeats says that:

the use of CCTV is now the norm and prosecution and defence lawyers use it without difficulty. Some defence counsel welcome the remoteness of the child and see some benefit to the accused in keeping the child out of the courtroom. But the statistics on conviction rates do not support any bias in favour of the defence... When the changes are analysed from a judicial perspective there seems to be no diminishment of an accused's right to a fair trial according to law.⁶⁰¹

5.48 According to Judge Yeats, the use of screens is less satisfactory because of difficulties in ensuring the child does not see the accused when the child enters the courtroom or enters the witness box. Further, the use of a screen does 'nothing to prevent the child being overwhelmed by the courtroom setting in the presence of strangers...(and) did nothing to ensure that the child's evidence could be properly heard'.⁶⁰²

5.49 Where the child gives evidence by CCTV they should be entitled to have a support person present. A support person and a court officer are generally present in Western Australia.⁶⁰³ Recommendations 2-7 (in Chapter 4) which apply to adult complainants who give evidence by closed circuit television are also intended to apply to children.

5.50 In Western Australia, it is the practice to simultaneously video and audio record the evidence of child witnesses who testify via CCTV. This means that, in the case of a retrial or another situation requiring the court to hear the child's testimony again, the child is not recalled. Instead, the child's evidence, exactly as given the first time, is played to the court as evidence in the subsequent trial. We recommend that this process is introduced in Victoria as a way of avoiding the problem of requiring a child complainant to testify at more than one trial about the same material.



RECOMMENDATION(S)

118. Section 37 of the *Evidence Act 1958* should be amended to give child complainants in sexual offences cases the right to give evidence by CCTV.

601 Mary Ann Yeats, above n 597, 12.

602 Ibid 9-10.

603 Ibid 14.



RECOMMENDATION(S)

119. The prosecution should be able to apply for an order that the alternative arrangement not be used. Before the court makes such an order the presiding judge or magistrate must satisfy him or herself that the complainant is aware of his or her right to give evidence by CCTV and that the complainant is able and wishes to give evidence in the court room.
120. Recommendations 62–67 should also apply in relation to child complainants.
121. Child complainants in sexual offence cases should be entitled to have a person beside them for the purpose of providing emotional support while they are giving evidence (whether or not they give evidence by CCTV) except where the presiding judge or magistrate has satisfied him/herself that the complainant does not wish to have a support person present.
122. All child complainants' evidence given by CCTV should be simultaneously audio and video recorded so that in the event of a retrial or other situation arising that requires the court to rehear all or part of the child complainant's evidence, the tape can be played instead of the child being called to testify again.

PRE-RECORDING OF EVIDENCE-IN-CHIEF AND CROSS-EXAMINATION AND RE-EXAMINATION OF CHILD COMPLAINANTS

Submissions on Pre-Recording

5.51 The majority of submissions supported the recommendations for the introduction of a process of pre-recording the child's evidence-in-chief and cross-examination.⁶⁰⁴ The Youth Affairs Council of Victoria commented that:

these recommendations possibly stand to make the most positive impact on the lives of children and young people involved in the court process...minimising the contact the complainant has with the court system will considerably enhance their ability to recover from the traumatic events that they have experienced and allow them to move on with their lives[.]

⁶⁰⁴ See Submissions 5, 7 (which commented that the accused should be supported as well)8, 9, 10, 16, 19, 20, 21, 25, 26, 29, 30, 38, 41, 40, 44, 47 and 49.

5.52 Magistrate Lisa Hannan said that:

This recommendation would represent a significant step forward in terms of process for the reasons identified in the report and I strongly support it. Issues relevant to appropriate defence disclosure would need to be carefully considered as would process in terms of how and at what stage of proceedings recording is to occur.

5.53 Judge Anderson's submission and the submission from the Federation of Community Legal Centres 'strongly supported' the recommendations.

5.54 The recommendations were opposed by the Victorian Bar and the Criminal Bar Association. The Victorian Bar thought that although some children were traumatised by giving evidence in court many children were not.

For those who are distressed in giving evidence, we question whether that trauma would be significantly diminished by the special hearing process. We also submit that taped evidence is not as illuminating for a jury as evidence given 'live'. The demeanour and body language of a witness are significant, and the jury is likely to perform less well in its function of assessing the witness.

5.55 Similarly, the Criminal Bar Association disagreed with the proposal, suggesting that if a judge was available it would be better to have an early trial, rather than pre-recording the child's evidence. The Criminal Bar was concerned that pre-recording of cross-examination might occur at a time when the defence was not adequately prepared.

5.56 The Criminal Bar was also concerned that the absence of the child in court would prevent the jury asking the child questions and that the process would cause problems with the rule in *Browne v Dunn*,⁶⁰⁵ which is a rule designed to ensure fairness in an adversary trial process. The *Browne v Dunn* rule requires a person who wishes to introduce evidence inconsistent with the evidence given by a witness for the other side, to give the witness an opportunity to comment during cross-examination on the evidence that has been led. The Criminal Bar raised the problem that at the trial evidence may be given that is inconsistent with evidence given previously by a child complainant and the child may not have been cross-examined by the defence on this issue. We address this problem below.

605 (1894) 6 R 67.

The Commission's View

5.57 Our recommendation that children should have the right to give evidence by CCTV will reduce the stress experienced by child complainants to some extent, but in the Commission's view it does not respond adequately to the needs of child complainants.⁶⁰⁶

Advantages of Pre-Recording

5.58 The Commission believes that there would be significant advantages in allowing a child complainant's evidence-in-chief and cross-examination to be pre-recorded at a hearing held before the trial.

- Despite the statutory time limits which apply in Victoria⁶⁰⁷ there are still long delays between the commencement of prosecution and children giving their evidence at trial. Until cross-examination of the child has been completed it will be very difficult for them to begin the process of recovery from the events on which the charge was based. The procedure has the potential to reduce delays to some extent and consequently reduce the stress which children suffer while waiting for a court appearance.
- The procedure may result in better quality evidence, both because evidence may be 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'.⁶⁰⁸
- The pre-recording process is less intimidating for a child complainant than giving evidence at committal or trial. The witness can attend specifically for the scheduled hearing, without being required to wait to give evidence. Proceedings can be conducted more informally. The complainant can testify by CCTV to a court occupied by the accused, the judge and counsel for the prosecution and defence.
- Unlike the current situation with VATE tapes, the prosecutor would not have a discretion as to whether or not to use the tape, because the pre-recorded evidence would function as the evidence of the witness.⁶⁰⁹ The

606 See discussion of the difficulties child complainants experience: Interim Report paras 6.8–18 and 6.53–8.

607 See above para 3.48.

608 Andrew Palmer, 'Child Sexual Abuse Prosecutions and the Presentation of the Child's Story' (1997) 23 (1) *Monash University Law Review* 171–88.

609 *Evidence Act 1906 (WA)* s 106T.

recorded testimony would be played at the trial and the witness would not normally be required to attend.

- Counsel can object to the admission of evidence. In Western Australia, objections are often left for the editing stage and argued before the judge after the witness has been excused. The adoption of a similar process in Victoria would mean that child complainants would be interrupted less than in conventional testimony and permitted to tell their stories in a more direct manner.⁶¹⁰
- Once the pre-recording is completed, the child will rarely be 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'.⁶¹¹
- If there is a retrial following a successful appeal, the tape can be replayed so that the child would not be required to give evidence again.⁶¹²

5.59 Child complainant's evidence-in-chief and cross-examination have been able to be pre-recorded in Western Australia for many years.⁶¹³ Under the present legislation the prosecution can apply for an order directing that the child's evidence be pre-recorded.⁶¹⁴ Since 1995, approximately 580 of the 1200 children who have given evidence in specified sexual offence cases have given pre-recorded evidence in accordance with section 106I(b) of the *Evidence Act 1906* (WA).⁶¹⁵ The ALRC/HREOC joint report⁶¹⁶ on children in the criminal justice system

610 Information provided by the Child Witness Service, 7 October 2002.

611 Chris Corns, 'Videotaped Evidence of Child Complainants in Criminal Proceedings: A Comparison of Alternative Models' (2001) 25 *Criminal Law Journal* 75 77.

612 In *H v The Queen* [1977] Supreme Court of Western Australia, Court of Criminal Appeal Library No 97037 (Unreported, 6 February 1997), Wallwork J at 11 it was held that the video-tape from the first trial could be played at the second trial. This was confirmed by the *Evidence Act 1906* (WA) s 106T(5)(b). The child's evidence must be video recorded see s106N.

613 Section 106T 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 seldom used.

614 *Evidence Act 1906* (WA) s 106I.

615 Chris Corns, 'Videotaped Evidence of Child Complainants in Criminal Proceedings: A Comparison of Alternative Models' (2001) 25 *Criminal Law Journal* 75 84.

616 Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, above n 541.

examined the Western Australian system for prerecording, noted its many advantages and recommended its adoption.⁶¹⁷

5.60 Initially lawyers were concerned that the process would be unfair to the accused, but the Commission's meetings with lawyers in Western Australia confirmed that the process was now well accepted, though some concerns were still expressed about delays occurring before the pre-recording was conducted. Judge Jackson who has written extensively about the experiences of child witnesses has commented that:

There is no basis for the suggestion that the legislative, administrative and judicial steps taken in Western Australia have impacted adversely on the rights of the accused to a fair trial. They have, however, reduced the unfairness to children and other vulnerable witnesses. The two are not in competition.⁶¹⁸

5.61 Eastwood and Patton's study of the experiences of child complainants⁶¹⁹ in Western Australia, New South Wales and Queensland also provide evidence that child complainants in Western Australia find the criminal justice process less stressful than complainants in New South Wales and Queensland where pre-recording was not used.⁶²⁰ Nearly two-thirds of child complainants in Western Australia said that if they were sexually abused again they would report sexual abuse again. By contrast, only 44% of Queensland children and 33% of New South Wales children said they would report again.

5.62 These differences were also evident in the responses of lawyers and judges. Forty-six percent of Western Australian lawyers and judges surveyed said they would want their child in the justice system if the child was a victim of serious sexual assault, compared with 18% in Queensland and 33% in New South Wales.⁶²¹

617 Ibid 316.

618 His Honour Judge Hal Jackson, 'Child Witnesses in the Western Australian Criminal Courts' (2003) 27 (4) *Criminal Law Journal* 199 210.

619 Eastwood and Patton interviewed 63 child complainants aged between 8 and 17 years, 39 parents/guardians and 28 lawyers from the three States.

620 The numbers of children from NSW and Qld who participated in the study were relatively small—9 and 18 respectively.

621 Christine Eastwood and Wendy Patton, *The Experience of Child Complainants of Sexual Abuse in the Criminal Justice System* 2. WA children found the process less stressful than children in the other two States for a number of reasons. These were not confined to the pre-recording process. No WA child was physically present in the court room. Thirty per cent pre-recorded evidence-in-chief and cross-

5.63 In Queensland, pre-recording of children's evidence has now become the standard practice for child complainants giving evidence in sexual assault trials as a result of recent amendments to the *Evidence Act 1977*.⁶²² Once a committal has occurred⁶²³ the evidence-in-chief of a child under 16 and the child's cross-examination must normally be pre-recorded at a preliminary hearing, presided over by a judicial officer.⁶²⁴ The evidence must be videotaped and shown at trial, unless the court orders otherwise. If this measure cannot be given effect (for example because no court room with appropriate facilities is available and the procedure would delay a trial) the court may make an order that this procedure is not to apply, for good reason, having regard to the child's wishes and the purposes of the provisions.⁶²⁵ In exercising this discretion the court must take account of the need to preserve the integrity of the child's evidence and the principle that the child's evidence should be taken in an environment that limits, to the greatest extent practicable, the distress or trauma that might otherwise be experienced by the child in giving their evidence.⁶²⁶

5.64 In England⁶²⁷ the *Youth Justice and Criminal Evidence Act 1999*⁶²⁸ allows the court to give a special measures direction providing for cross-examination, as

examination and all the others gave evidence by CCTV. The WA children had the benefits of the specialised child witness service for court preparation and also while waiting to give evidence on the day of the trial.

- 622 *Evidence Act 1977* (Qld) s 21AK–21AM. Queensland previously had provisions allowing pre-recording of the evidence of children under 12 and people who, as the result of a mental, intellectual or physical impairment or other relevant matter, were likely to be disadvantaged as witnesses. However this procedure was rarely used; Queensland Law Reform Commission, above n 541, 159.
- 623 The Queensland legislation also provides that at the committal 'the child's evidence in chief is to be given only as a statement and, ordinarily, the child is not to be called as a witness for cross-examination; *Evidence Act 1977*, s 21AB(iii), 21AF, 21AG.
- 624 *Evidence Act 1977* (Qld) s 21AB, 21AK. The child may be required to give evidence in the court room, rather than by audio-visual link, but the accused must not be in the same room. In this situation the accused must be capable of seeing and hearing the child when they give their evidence, 21AL.
- 625 *Evidence Act 1977* (Qld) s 21AO.
- 626 *Evidence Act 1977* (Qld) s 21AA, see also s 9E. Under *Evidence Act 1977* (Qld) ss 21AP–AR; if the child does not give evidence at a preliminary hearing the child must usually give evidence by CCTV, or the accused must be held in a room apart from the court room and the child's evidence transmitted to that room by audio-visual link. If audio-visual facilities are not available a screen or other device must be used so the child cannot see the accused.
- 627 The English provisions were based on recommendations in three previous enquiries see Home Office, *Report of the Advisory Group on Video Evidence* (1989) 21–6 and Recommendations 1-4; Department of Health, 'People like Us' *The Report of the Review of the Safeguards For Children Living Away From Home* (1997) Chapter 20; Home Office, *Speaking Up for Justice*, Report of the Interdepartmental

well as examination-in-chief, of child witnesses giving evidence in sexual offences cases to be videorecorded.⁶²⁹ If this occurs the witness cannot be cross-examined or re-examined on any evidence given by the witness unless the court gives a further direction for cross-examination and re-examination.

Possible Problems With the Introduction of the Procedure

Resource Implications

5.65 The Commission acknowledges that the introduction of pre-recording will add to judicial workload as it will be necessary to assign a judge to preside over the separate hearing. Defence counsel will be required to prepare and appear at this hearing and then the trial, which may increase legal aid costs. We believe that this cost is justified by the benefits of the procedure for child complainants and the likelihood that such changes will contribute to an increase in the number of people who are willing to report child sexual assault to the police because they have more confidence that the child will be treated appropriately. There would also be some cost savings where successful appeals result in retrials because the child would not have to give evidence again.

Safeguarding the Accused's Right to Test the Evidence

5.66 Pre-recording will have to occur at a time when defence counsel has sufficient notice of the prosecution case to cross-examine the child at the special hearing. In Chapter 3 we recommend that in the case of an indictable offence the special hearing should occur soon after case conference in the County Court. (We also recommend some changes to committals in child sexual assault cases.)⁶³⁰ Provision for the child's evidence to be pre-recorded after committal and after the presentment has been filed will ensure that accused persons have sufficient notice of the case against them.

5.67 If at trial evidence is given that the accused could not have anticipated when the pre-recording was conducted, so that the child could not have been cross-examined on it, provision should be made for the child to be recalled for cross-examination on this new evidence. The Western Australian and Queensland legislation allows the judge to order the child to give further evidence at another

Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System (1998) 56–8, Recommendations 41, 45, 46.

628 Section 28.

629 *Youth Justice and Criminal Evidence Act 1999* (Eng) s 21.

630 Recommendations 43–9.

special hearing or to attend the court to give further evidence,⁶³¹ although the Commission was told that this had rarely been necessary in Western Australia. The adoption of a similar provision in Victoria would meet concerns about the rule in *Browne v Dunn* that were expressed by the Criminal Bar.

5.68 In England the court can only order that the child attend court if a party seeks to cross-examine the child because the party has become aware of a matter that could not have been ascertained with reasonable diligence at the time the pre-recording was conducted, or if it is in the interests of justice to permit further cross-examination for any other reason.⁶³² Similar limits should be placed on the recall of the child in Victoria.

5.69 An issue has arisen as to what approach should be taken when the child does not come up to proof on all the counts in the presentment when they give their pre-recorded evidence.⁶³³ To ensure fairness to the accused we recommend that the presentment be filed before pre-recording occurs.⁶³⁴ If the child's evidence is insufficient to support all of the counts on the presentment the prosecution will not be able to proceed with all the counts at the trial. In that case we recommend that the accused be presented on the original counts, the entire pre-recording be played to the jury, and the prosecution should then formally withdraw the counts which were not supported by sufficient evidence. This ensures fairness to the accused, as it is closest to what would occur if the child gave evidence at the trial in the usual way.

631 *Evidence Act 1977* (Qld) s 21AN; *Evidence Act 1906* (WA) s 106K(5), 106T.

632 *Youth Justice and Criminal Evidence Act 1999* (Eng) s 28(5) and (6). See also the limit on recall of witnesses in *Evidence Act 1977* (Qld) s 21AN.

633 See *Grinrod v The Queen* [1999] WASCA 44 at para 14 (Ipp J, Kennedy and Owen JJ concurring) and discussion in (Her Honour Judge) Mary Ann Yeats, 'Alternative Arrangements for Giving Evidence: A Judicial Perspective' (Paper presented at the Children as Witnesses Workshop, 14 November 2003, Melbourne), 20–2.

634 Recommendation 47.

**RECOMMENDATION(S)**

123. The *Evidence Act 1958* should be amended to create a presumption in favour of videorecording of children's evidence-in-chief and cross-examination. Pre-recording should occur at a hearing presided over by a judge at which the accused and counsel for the prosecution and defence are present.
124. The prosecution should be able to apply for an order that a child complainant should give evidence at the trial rather than pre-record his or her evidence. Before the court makes such an order, the presiding judge or magistrate must satisfy him or herself that the complainant is aware of his or her right to have evidence pre-recorded at a separate hearing and that the complainant is able and wishes to give evidence at the time of the trial by CCTV or in the court room.
125. The child's recorded evidence should be admissible as if the evidence were given orally in accordance with the usual rules of evidence in the same way as evidence given orally in a hearing.
126. Unless the court orders otherwise, the child's recorded evidence should be admissible in a retrial of the same offence, or for a trial of an offence arising out of the same circumstances.
127. At the hearing the defendant must not be in the same room as the child, but must be capable of seeing and hearing the child when the child gives evidence.
128. The child must give their evidence by closed circuit television from a place outside the courtroom.
129. If the child's evidence has been pre-recorded the child may not be subsequently cross-examined or re-examined on any matter unless either:
 - a party seeks to recall the child as a result of that party having become aware of a matter of which that party could not have been aware with reasonable diligence at the time of the pre-recording, or
 - it is in the interests of justice for the court to permit the child to be re-examined or cross-examined; or



RECOMMENDATION(S)

- if the child were giving evidence in court in the normal way the child could be recalled to give further evidence and it would be in the interest of justice to make the order.
130. If the child's evidence is insufficient to support all of the counts on the presentment the accused should be presented on the original counts, the entire pre-recording played to the jury, and the prosecution should then formally withdraw the counts that were not supported by the child's evidence.
131. A similar pre-recording process should also be available for witnesses with cognitive impairment.⁶³⁵

SUMMARY

5.70 To summarise, the recommendations on use of alternative measures:

- provide for continued use of video and audio recording of police interviews for child witnesses and the use of recordings as evidence-in-chief. We make proposals for the evaluation and improvement of the existing process;
- ensure that children have a right to give their evidence by CCTV; and
- introduce pre-recording of children's evidence-in-chief and cross-examination, similar to the system which works successfully in Western Australia.

CHANGES TO EVIDENCE LAW

5.71 This section deals with changes to evidence laws including:

- laws which determine the competence of children to give evidence; and
- laws relating to the admission of out-of-court statements made by children.

⁶³⁵ More detailed recommendations dealing with people with a cognitive impairment are set out in Chapter 6.

COMPETENCE

CURRENT LAW

5.72 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. However children cannot give evidence unless they are ‘competent’ witnesses. The legal tests which determine competency to be a witness are not consistent across Australia.⁶³⁶

5.73 Under Victorian law children aged 14 or over are assumed to be capable of giving sworn evidence.⁶³⁷ Children under 14 are only able to give evidence on oath (sworn evidence) if they ‘understand the nature and significance of an oath’.⁶³⁸ To determine whether a child under 14 is competent, the judge or magistrate questions the child in the absence of the jury⁶³⁹ to assess the child’s understanding of the obligation and significance of giving sworn evidence.

5.74 Where a child is assessed as incompetent to give sworn evidence they may give unsworn evidence. Section 23(1) of the *Evidence Act 1958* allows a child to give unsworn evidence if, in the opinion of the court, the child understands the duty of speaking the truth and is capable of responding rationally to questions about the facts in issue. The law regards evidence given on oath as carrying greater weight than unsworn evidence, but in practice it is not known whether juries are actually influenced by the fact that evidence is sworn or unsworn.

PROBLEMS WITH THE CURRENT LAW

5.75 The Interim Report argued that the tests which determine competence to give sworn and unsworn evidence disadvantage children who report sexual abuse.

- Children may be unable to give sworn evidence, even though they are capable of understanding that they should tell the truth, because the competency test which applies in Victoria probably requires them to understand the religious significance of taking an oath.⁶⁴⁰ Children from

636 For discussion of the approach in other jurisdictions see Interim Report paras 6.84–91.

637 *Evidence Act 1958* s 23(1).

638 *R v Brasier* (1799) 1 Leach 199; 168 ER 202.

639 *Evidence Act 1958* s 23(2).

640 *R v Brasier* (1799) 1 Leach 199; 168 ER 202 laid down the common law test, which has not been modified by legislation in Victoria.

secular backgrounds are unlikely to satisfy this test. For children from religious or cultural backgrounds other than Christian ones, swearing an oath may be quite inappropriate and may add to the stress which they experience in giving evidence.⁶⁴¹

- Children may be incompetent to give unsworn evidence because they cannot undertake to tell the truth⁶⁴² even though they are able to accurately communicate information which is relevant to the charge. The competency requirement for unsworn evidence could result in a failure to charge an alleged offender or could deprive the prosecution of the main evidence relevant to the charge.⁶⁴³ 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.⁶⁴⁴

5.76 The Interim Report also argued that the current processes for determining competency do not work well:

- Competency is tested by the judge or magistrate asking the child a series of questions, but there is no evidence that the questions that are commonly asked adequately test the child's understanding.⁶⁴⁵ Courts do not hear expert evidence on the capacity of a particular child to give evidence, even though a person with expertise in the development patterns of children may be able to provide important information about the child's capacity to give evidence.

641 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: Law Reform Committee, Victorian Parliament, *Inquiry into Oaths and Affirmations with Reference to the Multicultural Community* (2002) 79–96.

642 J. R. Spencer and Rhona H. Flin, *The Evidence of Children, The Law and the Psychology* (2nd ed) (1993) 54.

643 Ibid 54.

644 See *Sparks v The Queen* [1964] AC 964, discussed in Ibid 55.

645 At a Victorian trial observed by a researcher at the VLRC on 16 May 2002, a 10-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. Judge Yeats has described a situation in which she asked an 8 year old child about her birthday and whether she had a cake and presents. She replied no to both these questions. The child came from a cultural background in which birthdays were not celebrated, so these questions were not helpful in determining competence (Her Honour Judge) Mary Ann Yeats, 'To Swear or Not to Swear' (Paper presented at the Children as Witnesses Workshop, 14 November 2003, Melbourne).

- Judges and magistrates find it difficult to know what questions they should ask a child to determine the child's competence.⁶⁴⁶ Judges are not trained in child development and may not know how to ask the child appropriately worded questions.⁶⁴⁷ They may be unaware of the complexities that arise in questioning children from NESB or Indigenous backgrounds. Sometimes the questions asked are far too difficult and abstract.⁶⁴⁸
- Inappropriate questioning may cause children significant stress, may mean that they 'dry up' when they are questioned to determine their competence. This could result in the exclusion of evidence that should have been admitted.
- Lack of guidance on how to test the competency of a child to give evidence may result in inconsistent decision-making on this issue.

RECOMMENDATIONS IN THE INTERIM REPORT

5.77 The Interim Report recommended that the *Evidence Act 1958* be amended to:

- include a presumption that all witnesses, regardless of age, are competent to give evidence;
- change the test for competence to give evidence on oath to allow children who can understand questions put to them as witnesses and answer them and who understand the obligation to tell the truth, to give evidence on oath;
- change the test for competence to give unsworn evidence so that children can give unsworn evidence if they can understand questions put to them and give comprehensible answers to those questions; and
- allow the court to seek an expert report on the child's competence to give evidence.

646 See comments on these difficulties in *R v Stevenson* [2000] WASCA 301, Pidgeon, Wallwork and Parker JJ, (18 October 2000).

647 Louise Sas, *I'm Trying to Do My Job in Court. Are You? Questions for the Criminal Justice System* (1999) 50.

648 See above n 645.

SUBMISSIONS

5.78 Most submissions which commented on the issue supported changes to the test for competency to give sworn evidence.⁶⁴⁹ Magistrate Lisa Hannan said that:

The current requirements are archaic and do not reflect any reality for children. In my experience this is an area for ongoing concern for judicial officers.⁶⁵⁰

5.79 The Department of Human Services submission said that it is desirable that a larger number of children be allowed to give sworn evidence as this will uphold children's dignity and integrity. The submission criticised the fact that the current law specifies a particular age to determine competency to give sworn evidence, when adults who may not understand the nature of the oath are not questioned in the same way.

An arbitrary age does not take into consideration wide differences in patterns of child development.⁶⁵¹

5.80 Relatively few submissions commented on changes to the test of competency to give unsworn evidence.⁶⁵² The recommendation that the court should be able to order an expert report to assess a child's competence was strongly supported by the Salvation Army, the Disability Discrimination Legal Service, the Australian Childhood Foundation, DHS⁶⁵³ and Dr Michelle Earle of the Eastern Victims Assistance Program⁶⁵⁴ who commented that:

Assessment of competence requires knowledge and skills in such fields as child development, child psychology and cognitive development and cannot be undertaken by laypersons... [I]t seems absolutely crucial to base the decision on current expert evidence.

5.81 Submissions which commented on use of expert evidence thought this should occur as a matter of course. The County Court submission did not oppose the provision allowing for an expert report on the child's competence, but 'upon

649 Submissions 8, 19, 21, 71 (which supported abolition of the requirement for an oath for both children and adults).

650 Submission 8.

651 Submission 44.

652 Supported in Submissions 34, 40, 41, 44; opposed in Submissions 42 and 48.

653 Submission 33, 40, 41, 44.

654 Submission 14.

the basis that the trial judge has the final say'.⁶⁵⁵ The Victorian Bar took a similar view.⁶⁵⁶

5.82 The Criminal Bar Association opposed any change to current law and practice in relation to competence, although it commented that:

Victoria is currently considering whether or not to adopt the provisions of the Uniform Evidence Act. If the Uniform Evidence Act is adopted by Victoria, then competence will be determined in accordance with that Act. In the meantime the current provisions should continue.⁶⁵⁷

5.83 In the Criminal Bar's view the current tests for competence to give sworn and unsworn evidence were appropriate and there was no evidence to suggest that judges required assistance from experts in assessing competence.⁶⁵⁸

5.84 The Victorian Bar also opposed changes to the test for competency to give sworn and unsworn evidence. In the case of sworn evidence:

There does seem to be a certain incongruity in regarding evidence as being on oath when there is no reference to the religious significance of the oath. If the law is to be changed in this area then it should be changed for all witnesses and the nature of the oath should also be changed.⁶⁵⁹

5.85 In the case of unsworn evidence the Bar thought the test should be whether the child understands that they must tell the truth.

RECOMMENDATIONS

SWORN EVIDENCE

5.86 The Commission reiterates the recommendations on competence that were made in the Interim Report. Recommendation 132 on the presumption of competence and Recommendation 133 on the test for competence to give sworn evidence are based on the Uniform Evidence Act provisions which apply in New South Wales, South Australia, Tasmania and the ACT, as well as at

655 Submission 52.

656 Submission 48.

657 Submissions 42, 46.

658 Submissions 42, 46, 47.

659 Submission 48.

Commonwealth level.⁶⁶⁰ The Commission sees no reason to delay the introduction of these provisions until the Uniform Evidence Act provisions are applied in Victoria, as proposed in the Criminal Bar Association submission.⁶⁶¹

UNSWORN EVIDENCE

5.87 The test for competence to give unsworn evidence which applies under the Uniform Evidence Act is that:

- the court is satisfied that the person understands the difference between a truth and a lie;
- the court tells the person that it is important to tell the truth; and
- the person indicates, by responding appropriately when asked, that he or she will not tell lies in proceedings.⁶⁶²

5.88 In the Interim Report we argued that a more liberal test for competence to give unsworn evidence should apply in Victoria. The proposed test is that a person 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.

5.89 The test does not require the court to be satisfied that ‘the person understands the difference between a truth and a lie’. In our view there is no point in having a test for admission of unsworn evidence which is substantially similar to the test of competence to give sworn evidence. The Uniform Evidence Act test 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.⁶⁶³ In our view the solemnity of participation in legal proceedings is sufficient to convey to the child witness the importance of telling the truth. Recent Canadian research suggests that the way a child answers

660 *Evidence Act 1995* (NSW) ss 12, 13; *Evidence Act 1929* (SA) s 9(1); *Evidence Act 2001* (Tas) ss 12, 13(1); *Evidence Act 1995* (Cth) ss 12, 13; For the position in the ACT, see *Evidence Act 1995* (Cth) s 4(1) and 8(4)(a), which provides that the Commonwealth Act applies to proceedings in ACT courts. Under the latter provision, the *Evidence Act 1995* (Cth) does not affect provisions of the *Evidence Act 1971* (ACT) specified in regulations until the day fixed by proclamation.

661 Submission 42.

662 *Evidence Act 1995* (Cth) s 13.

663 Australian Law Reform Commission, *Evidence*, Report No 26, Vol 1 (1985) 129.

questions about truth-telling or lying has no bearing on whether a child will actually tell the truth.⁶⁶⁴

5.90 The test we recommend is based on the test of competence to give unsworn evidence that applies in England under the *Youth Justice and Criminal Evidence Act 1999* (Eng).⁶⁶⁵ A similar test for competence to give unsworn evidence applies in Queensland,⁶⁶⁶ the Northern Territory⁶⁶⁷ and Western Australia⁶⁶⁸ and has been recommended in New Zealand.⁶⁶⁹ The Commission's inquiries in Western Australia suggest that this approach has not created difficulties.

5.91 A provision allowing a child, who can understand and answer questions, to give unsworn evidence will facilitate the prosecution of alleged offenders of crimes against young children, as child witnesses may be able to convey information before they have reached the stage of development where they can demonstrate that they understand the difference between truth and a lie. The jury will have to decide whether the child's evidence is credible. The fact that the evidence is unsworn may affect the weight which is given to the evidence, rather than its admissibility.

5.92 Researchers on children's competence have suggested there may be some benefit (and at least no harm) from a child being asked to tell the truth.⁶⁷⁰ For this reason we have added a recommendation that the court should be required to tell the child that it is important to tell the truth. Jurisdictions that have implemented the Uniform Evidence Act have such a provision, as has Queensland.⁶⁷¹ The Evidence Code, proposed by the New Zealand Law Commission, will also require

664 Nicholas Bala, Kang Lee, Rod Lindsay et al, 'A Legal & Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses' (2000) 38 *Osgoode Hall Law Journal* 409 411.

665 Section 55(3), (8).

666 *Evidence Act 1977* (Qld) s 9A(2), (3).

667 *Oaths Act* (NT) as in force 1 December 2000, s 25A.

668 *Evidence Act 1906* (WA) s 106C allows children to give unsworn evidence if they can give an intelligible account of events they have observed or experienced.

669 New Zealand Law Commission, *Evidence*, Report 55, Vol 1, 96 and Vol 2, s 78.

670 New Zealand Law Commission (1996) *The Evidence of Children and Other Vulnerable Witnesses*, Preliminary Paper 26, 6–9.

671 See for example *Evidence Act 1995* (Cth) s 13(2)(b). Queensland has enacted similar legislation see *Evidence Act 1977* (Qld) s 9B(3).

the judge to tell a child witness of the importance of telling the truth and not telling lies.⁶⁷²

PROCESS FOR ASSESSING COMPETENCE

5.93 At present the judge questions the child to assess the child's competence. In the Interim Report, the Commission recommended that the court should be able to seek an expert report on the child's competence to give sworn or unsworn evidence, though the judge should make the ultimate decision on competence. We affirm that recommendation. A similar provision already exists in Queensland⁶⁷³ and was recommended in the ALRC/HREOC Report on children in the legal process.⁶⁷⁴ Judicial education programs on child sexual abuse should provide judges with information about how such experts might be used.

5.94 Later in this Chapter we discuss proposals to ensure that children are not subjected to harassing or oppressive cross-examination. However these recommendations do not meet the concerns expressed during our consultations and at our roundtable on evidentiary issues, about the pressure and confusion children face when responding to forceful cross-examination that puts particular facts to them (leading questions).

5.95 An assumption underpinning the adversarial process is that persistent questioning, which occurs during cross-examination, will expose the fact that a witness is lying or does not remember events accurately. However, children who are constantly questioned on a matter may change their answers in order to please the questioner. Children often have difficulty understanding why defence counsel should suggest that they are not telling the truth, are mistaken or have been prompted to make an accusation by another person. When subjected to forceful cross-examination along these lines they may withdraw true statements because they think they are giving the 'wrong answer'.⁶⁷⁵

5.96 In the Commission's view, children would be assisted in understanding the role of defence counsel if the judge were to explain the purpose of cross-

672 New Zealand Law Commission, n 669, Vol 2, s 78.

673 *Evidence Act 1977* (Qld) s 9C; see also *Evidence Act 1929* (SA) s 9(3) which allows a judge to inform him/herself as he thinks fit about the witness' capacity.

674 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) 324.

675 Mark Brennan and R Brennan, *Strange Language: Child Victims under Cross-Examination* (1988), 91–3.

examination to them. This should occur at the same time that children are instructed that they must tell the court the truth. Some judicial officers in the Children's Court already make similar comments to children.



RECOMMENDATION(S)

132. 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.
133. The test for competence to give evidence on oath should be that witnesses understand that they are obliged to give truthful evidence.
134. 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 intelligible answers to them.
135. 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.
136. Before children give unsworn evidence the judge should tell them that it is important to tell the truth and not to tell lies.
137. At the same time that the judge instructs a child that the child must tell the truth, the judge should also tell the child:
 - that the child may not know or not be able to remember some things that the child is questioned about, and that the child should tell the court if this is the case;
 - that the child will be asked questions that may make suggestions that are true or untrue;
 - that the child should agree with true statements, but should not feel under pressure to agree if the statement is incorrect, according to the child's understanding of what happened.

**RECOMMENDATION(S)**

138. In cases involving allegations of child sexual assault, the court should be able to seek a report from an independent and appropriately qualified expert on the child's competence to give sworn or unsworn evidence.

ADMISSION OF EVIDENCE OF OUT OF COURT STATEMENTS MADE BY CHILDREN

CURRENT LAW

5.97 A child who has been sexually abused may eventually tell a trusted person about the abuse. Children who have been abused rarely report the abuse immediately and many do not tell anyone about it for a considerable period.⁶⁷⁶ Out of court statements, which children make to others about the abuse, cannot usually be admitted as evidence that the abuse has occurred.

Hearsay Rule

5.98 The hearsay rule prevents admission of evidence of out of court statements (whether made orally or in writing) to prove the facts made in those statements.⁶⁷⁷ Most States, including Victoria, have modified the rule to allow admission of the videotaped evidence of children and people with impaired mental functioning in sexual offences cases.⁶⁷⁸ However the hearsay rule prevents the prosecution from calling someone other than the child (for example the child's mother or teacher) to give evidence that the child told them about the abuse, in order to substantiate the allegations against the accused.

⁶⁷⁶ For a good overview of the literature on this see National Child Sexual Assault Reform Committee, *Discussion Paper: Alternative Models for Prosecuting Child Sex Offences in Australia (Draft)* (2003) 4.2.1.

⁶⁷⁷ 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 The Queen* (1989) 166 CLR 283; *Pollitt v The Queen* (1992) 174 CLR 558 BC 9202688, 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). These qualifications are discussed below and see *R v Geoffrey Arthur Hall* (Unreported, Supreme Court of NSW, Court of Appeal, BC 9700339, Hunt CJ, Studdert and Simpson JJ, 28 February 1997, 1–2.

⁶⁷⁸ 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.

5.99 The basis for the hearsay rule is that evidence given by a third person about what someone else said to them is likely to be less reliable than direct evidence that the affected person gives in court,⁶⁷⁹ which can be tested by cross-examination. The jury can assess the demeanour of the person giving evidence and observe the person's response to questions. If third parties testify about what the alleged victim told them these safeguards do not apply.

5.100 The rule against hearsay⁶⁸⁰ also prevents the alleged victim of a sexual assault from giving evidence that they told someone else about the assault.⁶⁸¹ For example, a child cannot usually give evidence that she told her mother of the abuse to support the evidence that she gives in court. Here the child's prior consistent statement is excluded because it is regarded as 'self-serving'. 'Self-serving' statements⁶⁸² are not admissible as proof that the alleged facts occurred, because of the suspicion that a person might fabricate them to support their case. This rule applies to children's prior consistent statements, even though the child is not a party to the proceedings and it is unlikely that a child would have sufficient understanding of criminal proceedings to seek to bolster the prosecution case in advance.

5.101 The rule which prevents the jury hearing evidence of prior consistent statements does not prevent a person from being cross-examined about prior inconsistent statements in order to discredit them.⁶⁸³ Complainants in sexual assault cases are commonly cross-examined about inconsistencies between what they said to police, what they said at committal and what they said at trial. One of the main purposes of cross-examination is to cast doubt on the credibility of the witness by highlighting such inconsistencies.⁶⁸⁴

679 A. Ligertwood, *Australian Evidence Law* (3rd ed, 1998) 526.

680 The rule against admission of evidence of prior consistent statements to prove what is alleged in court is sometimes seen as an aspect of the hearsay rule (see, for example, J. R. Spencer and Rhona H. Flin, *The Evidence of Children, The Law and the Psychology* (2nd ed) (1993) 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' and are admitted as evidence of consistency.

681 A. Ligertwood, above n 679, 480

682 For other justifications for the rule, see Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 541, 172.

683 See also *Evidence Act 1958* s 35.

684 A. Ligertwood, above n 677, 480, 517–9.

Qualifications on the Hearsay Rule

5.102 There are two situations in which the court will allow evidence to be given that the child made prior statements about sexual abuse.

Admission of Prior Consistent Statements to Rebut Allegations that the Child is Dishonest or Mistaken

5.103 If the defence suggests that the child has lied or been mistaken in making the allegation of abuse, evidence can sometimes be given of a prior consistent statement to refute this suggestion. For example, the defence case may be that the child made a false allegation of abuse after her parents separated because she was coached by a parent to do so. Hearsay evidence that the child told her teacher that she had been sexually assaulted by her father long before her parents separated could be admitted to rebut the defence claim, but not to prove the truth of the statement that she was abused.⁶⁸⁵ This exception is limited to the situation where the defence suggests a reason why the witness invented or was mistaken about the alleged fact and where the prior consistent statement rebuts that suggestion, as in the example given above.⁶⁸⁶ It does not allow evidence of a prior consistent statement to be given in every situation when it is suggested that the child's evidence is inaccurate.

Recent Complaint

5.104 Evidence that the child told someone about the sexual assault very shortly after the assault occurred is also admissible for limited purposes.⁶⁸⁷ The principle allowing admission of evidence of a 'recent complaint' is based on the assumption that people who are sexually assaulted will usually complain at the first available opportunity and that failure to complain quickly suggests that the complaint is false.⁶⁸⁸ Evidence of 'recent complaint' is only admissible to support the complainant's credibility and not to prove the truth of the allegation of sexual assault.

685 See para 4.103.

686 Ligertwood, above n 679, 482.

687 *Kunnatil John Suresh v The Queen* (BC 9800989 [1998] HCA 23) Gaudron and Gummow JJ and *Papakosmas v The Queen* (1999) 196 CLR 297, 303.

688 See *R v Knigge* [2003] USCA 94.

PROBLEMS WITH THE HEARSAY RULE

Rule May Prevent Admission of Best Evidence

5.105 The hearsay rule reflects the view that direct evidence given in court is preferable because it is usually the ‘best’ evidence. There are several reasons why direct evidence given by a child in court may not be ‘better’ than hearsay evidence of a child’s earlier statements about sexual abuse.

- There is often a considerable delay between the sexual assault and the time when the child gives evidence in court. By the time the evidence is given in court the child’s memory of the event will often have faded.⁶⁸⁹ A statement the child made to someone out of court closer to the time of the alleged assault will often be more comprehensive and reliable than a later account. A contemporaneous account can provide support for a memory that has become less clear because of the passage of time. While admission of hearsay evidence will often support the prosecution case it could also assist the accused by showing that the child’s current memory of events is mistaken.
- Children typically have to tell their story several times before the trial. Often they do not understand why they have to repeat their story. As a result their testimony in court may not sound as credible as their initial disclosure of abuse.

[T]he story through repeated telling may have become stale and a flat and emotionless recitation of events [which] is unlikely to persuade a jury that the child is telling the truth.⁶⁹⁰

- The stress of giving evidence may affect children when they give their evidence in court, so that they appear unreliable even though they are telling the truth.
- Children are frequently abused by family members or other people whom they know. Children who disclose familial abuse may be pressured by the alleged perpetrator or other family members to withdraw a true allegation.

689 Andrew Palmer, ‘Child Sexual Abuse Prosecutions and the Presentation of the Child’s Story’ (1997) 23 *Monash University Law Review* 171, 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.

690 Ibid.

When combined with other supportive evidence admission of the child's statement could provide the basis for prosecution.

5.106 In addition to the fact that children's out-of-court statements will often be the 'best evidence' of an alleged assault, there are other reasons for admitting such hearsay evidence. Evidence about the circumstances in which the allegation was made and what the child said when disclosing abuse may be crucial in assessing the reliability of the child's evidence.⁶⁹¹ The hearsay rule will often prevent the jury hearing this evidence. Although the child may be cross-examined about a delay in reporting the offence to the police, evidence that the child made an earlier disclosure of abuse will not always be admissible. This may result in the jury drawing inaccurate conclusions about the child's credibility and about the accuracy or inaccuracy of the child's complaint.

Limitations of Recent Complaint Principle

5.107 As we explained above, the recent complaint principle allows evidence to be given of a prompt report of sexual assault by the complainant, in order to support the complainant's credibility. The recent complaint principle has been interpreted restrictively in Victoria.

When is a Complaint 'Recent'?

5.108 In *R v Knigge*⁶⁹² the Court of Appeal held that this principle did not justify extending the concept of a 'recent complaint' to cover a statement made by a child to her teacher about five months after the last incident of alleged abuse. Because the statement had not been made 'at the first reasonable opportunity' it was not admissible to support the complainant's credibility.⁶⁹³

5.109 Although some Australian Courts have interpreted the recent complaint principle a little more liberally than the Victorian Court of Appeal in *R v Knigge*,⁶⁹⁴ even this more liberal application is likely to exclude evidence of most out-of-court statements about sexual assault made by children.

691 Palmer, above n 689, 177.

692 *R v Knigge* [2003] VSCA 94.

693 The second ground for its inadmissibility was that it did not amount to a complaint. See also *Suresh v The Queen* (1998) 72 ALJR 769, 772 per McHugh J, 778 per Kirby J. In that case the High Court suggested that a six month delay was too long, but dismissed the appeal on the ground that evidence of the complaint had been admitted without any objection by the accused.

694 *R v Knigge* [2003] VSCA 94. In *R v W* [1996] 1 Qd R 573 at 575, the Qld Court of Appeal said that instead of requiring the complaint to be made at the earliest available opportunity before it could be

Restrictions on the Meaning of a 'Complaint'

5.110 In *Knigge*⁶⁹⁵ the Court of Appeal also held that evidence of statements which the child made to her teacher about behaviour of the child's stepfather, which the prosecution argued was aimed at preparing the child to participate in sexual acts, was also inadmissible to support the child's credibility. The Court of Appeal suggested that the recent complaint principle only referred to explicit statements about sexual abuse.

5.111 The difficulty with this restriction is that it prevents the jury hearing hearsay evidence about behaviour that typically precedes sexual abuse of children, even for the purposes of supporting the child's credibility. Third parties cannot give evidence that the child has complained to them of such behaviour, even if the statement was made shortly after the behaviour occurred. Children cannot give evidence that they have complained of such behaviour to someone, even if their complaint is made immediately after the behaviour occurred.

5.112 Interviews with offenders convicted of offences against children show that they often test children's responses before they engage in explicitly sexual behaviour. For example they may participate in sexual 'games' or conversations with the child or touch the child's genitals as if by accident. Evidence of a course of conduct of this kind may be relevant to the credibility of the child, but juries are unlikely to hear evidence that the child has previously complained of this type of behaviour. As a result, an alleged sexual assault may be presented as an isolated incident rather than as the culmination of a pattern of behaviour. In these circumstances the child's evidence may not seem credible, even when they are telling the truth.⁶⁹⁶

Patterns of Disclosure of Child Sexual Assault

5.113 Because children rarely report an assault immediately,⁶⁹⁷ the recent complaint principle will rarely allow evidence to be given of a prior consistent statement made by a child, to support the child's credibility.

admitted in evidence, the court should consider whether 'having regard to the circumstances surrounding the complaint, including the time which has elapsed since the alleged commission of the offence, the complaint is capable of supporting the credibility of the witness.' In that case evidence of a statement made by a young girl one week after the alleged events occurred was admitted to support her credibility. See also *R v M* (2000) 109 A Crim R 530

695 *The Queen v Jack Ronald Knigge* (2003) .

696 National Child Sexual Assault Reform Committee, above n 676, 4.2.2.

697 See para 5.97.

A detailed review of the psychological literature shows that the typical pattern of disclosure for sexually abused children is in the order of months or years after the abuse, and that this response is not, as assumed by judges for hundreds of years, evidence of fabrication, but rather, evidence of the trauma experienced by the sexually abused child.⁶⁹⁸

5.114 Delay in reporting is particularly likely to occur where the child is sexually assaulted by a person who has the child's trust and confidence. As Justice Mary Gaudron pointed out in *M v The Queen*:

[t]he victim may be reluctant to resist the offender or to protest, and on that account, reluctant also to complain. As well, a child in that situation may be reluctant to complain from fear that he or she will not be believed, from fear of punishment, or, even, fear of rejection by the offender.⁶⁹⁹

5.115 Courts sometimes suggest that restrictions on recent complaint evidence are necessary to protect the accused against unfair conviction. This argument is based on the demonstrably false assumption that those who are sexually assaulted typically complain at the first available opportunity. It is inconsistent with the philosophy which underpins section 61(1)(b) of the *Crimes Act 1958*, which requires the court to tell the jury that there may be good reasons why a person who has been sexually assaulted may delay in reporting the assault.

RECOMMENDATIONS IN THE INTERIM REPORT

5.116 The Interim Report recommended that the hearsay rule should be amended to give the court a discretion to admit the hearsay evidence of a child complainant if it was of the opinion that the evidence was of sufficient probative value to justify admission, whether or not the child was available to give evidence. For example, where a child told her teacher that she had been sexually assaulted by her father but later refused to give evidence against her father, the court would have a discretion to allow the teacher to give evidence about what he was told by the child.

5.117 To safeguard accused people against unfair conviction the Interim Report recommended that a person should not be able to be convicted solely on the basis of such hearsay evidence.

698 National Child Sexual Assault Committee, above n 676, 4.2.3.

699 (1994) 181 CLR 487, 514–5 per Gaudron J.

5.118 The recommendations in the Interim Report took account of ALRC/HREOC Report on children in the legal system, which recommended that the hearsay evidence of children should be admissible.⁷⁰⁰ Western Australian⁷⁰¹ and South Australian⁷⁰² legislation already give the court a discretion to admit such evidence where the child is available to give evidence. More recently Queensland has enacted legislation to make admissible evidence of ‘how and when any preliminary complaint was made by the complainant about the alleged commission of the offence’.⁷⁰³ This provision does not explicitly require the complainant to be available to give evidence, though this may be implicit. The court has a discretion to exclude the evidence if it is unfair to the accused to admit the evidence.⁷⁰⁴ A number of overseas jurisdictions, including Canada and many States in the United States,⁷⁰⁵ also allow admission of the hearsay evidence of children in sexual assault cases.

SUBMISSIONS

5.119 Submissions which commented on the issue generally supported the recommendation that children’s hearsay evidence should be admissible provided the court is of the view that it is of sufficient probative value. The Australian Childhood Foundation commented that the current rules were a significant barrier to effective prosecution of cases of child sexual assault:

700 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) 330–2.

701 *Evidence Act 1906* (WA) s 106H. The defendant must be given a copy of the statement or details of the statement and must be given the opportunity to cross-examine the child.

702 *Evidence Act 1929* (SA) s34CA. The victim must be called or available to be called as a witness. See also *Evidence Act 1977* (Qld) s93B. This provision applies to sexual offences and is not confined to the evidence of children. It allows admission of evidence of a representation about an asserted fact if the representation was made shortly after the asserted fact happened and in circumstances making it highly likely that the evidence was reliable, where the person making the representation is mentally or physically incapable of giving evidence.

703 *Evidence (Protection of Children) Amendment Act 2003* (Qld) s 40, inserting new s 4A in the *Criminal Law (Sexual Offences) Act 1978*.

704 *Evidence (Protection of Children) Amendment Act 2003* (Qld) s 40, inserting new s 4A in the *Criminal Law (Sexual Offences) Act 1978*.

705 See Interim Report paras 6.155–56.

It is clear that children disclose to people they know and trust. Such trust is built on children's day to day experiences of relationships. In this context, adults who have regular contact with a child are well positioned to understand the child's language, their ability to be accurate about the information they provide and support the child to communicate to others. Once a child has made a disclosure to a trusted adult, it may be unlikely that the child will want to tell another adult, especially someone they have met only for the first time. It is our experience that children feel they have 'told' someone they believe can help them. Young people in particular, do not understand the need to repeat their disclosure to others.

It is crucial that the original disclosure is made available to the criminal justice system.⁷⁰⁶

5.120 Similarly, Judge Anderson said that:

as a matter of principle there seems no reason why these changes should not be made as otherwise relevant evidence would not be admitted. There appear to be adequate safeguards in the processes recommended.⁷⁰⁷

5.121 By contrast, submissions from the Criminal Bar Association, the Victorian Bar, the County Court and the County Court judges who made a separate submission expressed reservations or were strongly opposed to the proposal. Judges Neesham, Nixon, Kelly and Hart were concerned about the reliability of hearsay statements. They argued that children (particularly young children) were susceptible to suggestions made by others. In addition:

Children can, and some do, lie in court. A child may become upset at the prospect of going to court for fear of being unmasked as a liar. That is no basis for the admission of the lie by way of hearsay.

There is no reliable way of eliciting the circumstances in which the hearsay accusation was made. What was its context? What questions were asked beforehand? What was the demeanour of the questioner? What was the relationship between the questioner and the complainant?⁷⁰⁸

5.122 The Victorian Bar referred to the fact that evidence of a 'spontaneous and timely complaint could already be admitted' under the recent complaint principle and said that such evidence was frequently admitted in sexual offence trials. Their

706 Submission 41.

707 Submission 49.

708 Submission 39.

submission also expressed concerns about the reliability of hearsay evidence and the thought that ‘great caution should be exercised before measures are introduced which would assist those children who fabricate evidence and make it almost impossible for such fabrication to be revealed’.⁷⁰⁹ Concern was expressed that the admission of such evidence could lead to unjust convictions.

5.123 The County Court also referred to the possibility that children may fabricate accusations or be manipulated by others. The Court’s submission suggested that if the hearsay rule was modified the judge should have the discretion to exclude the evidence if its admission was unfair in all the circumstances. The Court did not believe that the proposed recommendation requiring the evidence to have significant probative value was sufficient. Magistrate Lisa Hannan also indicated the need for further safeguards before such evidence could be admitted.

OUR RECOMMENDATIONS

5.124 The Commission believes that there are compelling reasons to allow the court to admit children’s hearsay evidence in sexual assault cases, provided the jury is made aware of the factors that may affect the reliability of this evidence. For the reasons set out above⁷¹⁰ the child’s initial statement about the abuse will often be the ‘best evidence’ of contested facts. The hearsay rule may also prevent the jury having access to information that is crucial in assessing the reliability of the child’s evidence.⁷¹¹

5.125 Our initial preference was to follow the approach in the Interim Report, which recommended that the court should have a discretion to admit children’s hearsay evidence, regardless of whether or not the child is available to give evidence. This would ensure that evidence of statements made by young children to a third party would be admissible, even if the child’s memory of the event had faded or if the child refused to give evidence, for example because of pressure from family members. Admission of such evidence, combined with direct evidence by other witnesses, could contribute to successful prosecutions of some offenders who currently escape conviction and punishment. An example is provided by the

709 Submission 48.

710 See paras 5.105–7.

711 Evidence of statements is only admissible in support of credibility under the recent complaint principle or to rebut a suggestion of recent invention.

Canadian case of *Kahn*,⁷¹² in which evidence of a four-year-old girl's complaint to her mother that she had been assaulted by her paediatrician was held admissible by the Canadian Supreme Court. The child was incompetent to testify herself. If the child's hearsay evidence had been held inadmissible it is unlikely that the doctor would have been convicted, though the child's story was supported by the presence of semen on her clothing.

5.126 Some lawyers and judges have argued that it may be unfair to people accused of sexual offences to admit such evidence, where the child's evidence cannot be tested in cross-examination because the child is not available to give evidence. It is arguable also that provisions allowing the court to admit hearsay evidence if the evidence is of sufficient probative value, in a situation where the child is unavailable, may have limited effect. Courts may routinely exercise their discretion to exclude hearsay evidence in this situation.

5.127 For this reason we now propose a specific child hearsay exception, limited to the situation where the child is available to give evidence. Child-specific hearsay exceptions for sexual assault cases already exist in most parts of Australia. The recommendation will allow the admission of relevant hearsay statements of a child under the age of 16 in a sexual assault case as evidence of an asserted fact, where the court is of the opinion that the evidence is of sufficient probative value to justify its admission and the child is available to give evidence. The court will be able to exclude the evidence where its probative value is outweighed by the danger of unfair prejudice to the defendant.

5.128 The recommendation for a child-specific hearsay exception is intended to operate in conjunction with the recommendation in Chapter 4 that Victoria should adopt the Uniform Evidence Act exceptions making the hearsay evidence of both adults and children admissible in specified circumstances. The recommendation is intended to extend the admissibility of children's hearsay evidence beyond the circumstances set out in the Uniform Evidence Act, in cases where the child is available for cross-examination. The Commission believes that it is necessary to introduce a child specific hearsay exception, in addition to the exceptions in the Uniform Evidence Act, because the latter provisions will often only allow the admission of hearsay evidence where the statement is made shortly after the assault is alleged to have occurred. As we have discussed above, children typically delay telling others that they have been sexually assaulted.

712 [1990] 2 SCR 531.

5.129 The recommendation is not intended to detract from current common law principles that allow admission of previous statements made by a child, in order to support the child's credibility. In the unusual situation where the child complains shortly after the assault, the recent complaint principle will continue to apply. However the principle will usually be redundant, because in these circumstances, the proposed Uniform Evidence Act provisions will allow this evidence to be admitted in support of the truth of the allegation. If the defence claims that the child's allegations are a 'recent invention', relevant evidence of a child's prior consistent statement will be able to be admitted to support the child's credibility, even if the court does not permit the statement to be used as evidence of the truth of the statement under the child hearsay exception proposed above.

5.130 To summarise, our recommendations envisage that statements made by children to third parties about sexual assault will be admissible in the same circumstances as statements made by adults under the Uniform Evidence Act provisions. In addition, disclosures of sexual assault made by children under 16 may be admissible under the child specific exception. In both situations the court will have a discretion to exclude evidence which is unfairly prejudicial to the accused. We also recommend that the court should be required to warn the jury that hearsay evidence may not be as reliable as direct evidence.



RECOMMENDATION(S)

139. Evidence of a hearsay statement made by a child which is relevant to the facts in issue shall be admissible to prove the facts in issue in any criminal case involving child sexual assault allegations where:

- the child is under the age of 16 and
- the child is available to give evidence and
- the court, after considering the nature and contents of the statement and the circumstances in which it was made, is of the view that the evidence is of sufficient probative value to justify its admission.

140. The court must warn the jury that the hearsay nature of the evidence may make it unreliable.

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RECOMMENDATION(S)

141. Provisions allowing admission of the hearsay evidence of children to prove facts in issue should not detract from or modify common law rules allowing admission of evidence of statements made to third persons for a purpose other than as proof of the facts in issue.
142. The provisions that allow admission of hearsay evidence of children are not intended to derogate from the broader provisions relating to the admission of hearsay evidence specified in Recommendations 87–93.

PROTECTING CHILDREN FROM INAPPROPRIATE CROSS EXAMINATION

5.131 In the Interim Report we discussed the difficulties which many child witnesses experience in responding to cross-examination.⁷¹³ The language used in questioning children in court is likely to add to the stress they experience in answering questions in a formal and unfamiliar environment. The ALRC/HREOC report on children's experience of the legal process said that children find cross examination particularly difficult.⁷¹⁴ Factors contributing to this difficulty include aggressive and harassing cross-examination and cross-examination which involves use of complex language, or constant leading or repetitive questioning.

AGGRESSIVE TREATMENT OF WITNESSES

5.132 A number of barristers told the Commission that child witnesses in sexual offence cases are rarely cross-examined aggressively because such cross-examination by the defence is likely to have a negative effect on the jury.⁷¹⁵ Although defence lawyers thought that harassing cross-examination rarely occurred, the Commission received a number of submissions describing the harsh impact of cross-examination on child witnesses, which made the experience of giving evidence intimidating and confusing and impaired children's ability to testify: one young complainant told us 'it was the worst six hours of my life'. She said the process

713 Interim Report paras 4.18–24, 6.9–14.

714 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) 343–7.

715 Evidentiary Roundtable, 11 February 2004.

made her feel not that she was the victim, but that she was in the wrong.⁷¹⁶ In its 1995 Report, the Victorian Parliament Crime Prevention Committee referred to ‘aggressive defence counsel who badger, berate and intimidate witnesses’ and a defence counsel screaming at a child that they were lying.⁷¹⁷

5.133 Similarly, the ALRC /HREOC Inquiry

heard significant and distressing evidence that child witnesses are often berated and harassed during cross-examination to the point of breakdown.⁷¹⁸

COMPLEX LANGUAGE AND CONFUSING AND INAPPROPRIATE QUESTIONS

5.134 The ALRC/HREOC review of children’s role in the criminal justice system cited research showing that barristers regularly use language that is beyond the everyday experiences of children.⁷¹⁹ Questions asked of a child witness may be inappropriate in a number of ways.

- The question may draw upon cognitive concepts the child is unable to comprehend.
- The question may be inappropriately structured by, for example, using a double negative or suggesting a particular answer.
- The order of the questions may be confusing, for example not chronological or repetitive.

5.135 The adversarial system requires rigorous testing of the evidence. The purpose of cross examination in a criminal trial is to create a reasonable doubt in the mind of the jury about the prosecution case against the accused.⁷²⁰ Barristers are not trained to question children and may unintentionally confuse a child by using complex or inappropriate language.

716 Submission 74 to Discussion Paper.

717 Crime Prevention Committee, Parliament of Victoria, *Combating Child Sexual Assault: An Integrated Model: First Report Upon the Inquiry into Sexual Offences Against Children and Adults* (1995) 191. The Crime Prevention Committee suggested that this was particularly likely to occur in committal hearings when a jury was not present and where magistrates may have less experience controlling aggressive counsel and prosecutors may be less experienced at intervening.

718 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 541, 344.

719 Ibid 343.

720 Of course the onus is on the prosecution to persuade the jury that the accused is guilty beyond reasonable doubt.

5.136 It has also been argued that ‘the techniques of cross-examination within a child sexual assault trial are arguably, an important defence method for constructing the child complainants as unreliable and untrustworthy and, thus, influencing a jury’s decision as to the guilt or innocence of the accused’.⁷²¹ The Victorian Parliament’s Crime Prevention Committee reported that:

Examples of defence counsel asking multiple questions designed to confuse witnesses or lead them into a statement which suits the needs of the defence are commonplace. It is a technique which accomplished legal counsel perfect... Confusing a child into making statements which are not accurate is contrary to the needs of the justice system.⁷²²

5.137 Researcher Dr Mark Brennan has analysed a number of transcripts which provide examples of the kind of language often used in cross-examining children. Brennan’s research shows that ‘Children six to fifteen years of age fail to hear as sensible language about half of what is addressed to them during cross-examination’.⁷²³ The child’s ability to give evidence may be impaired by cross-examination that relies on unclear connections and strange expressions. The child’s confusion may be accentuated by the use of linguistic constructions that ‘are put together in such an obtuse and confusing way that they cannot even be heard as language, let alone responded to coherently’.⁷²⁴ Complex and confusing language is often combined with questions that characterise the child as a witness who should not be believed.⁷²⁵

COGNITIVE APPROPRIATENESS

5.138 In order to obtain accurate testimony⁷²⁶ from a child witness it is important to use words and phrasing that are appropriate for the individual child’s age, cultural background and maturity. However, it seems that questioners of

721 National Child Sexual Assault Reform Committee, 6.

722 Crime Prevention Committee, Parliament of Victoria, above n 717, 207.

723 Mark Brennan, ‘The Discourse of Denial: Cross-Examining Child Victim Witnesses’ (1995) 23 *Journal of Pragmatics* 71.

724 Ibid 74. Mark Brennan calls this ‘the discourse of denial’

725 Mark Brennan, ‘The Battle for Credibility—Themes in the Cross Examination of Child Victims Witnesses’ (1994) VII (19) *International Journal for the Semiotics of Law* 51.

726 Karen Saywitz, ‘Improving Children’s Testimony: The Question, the Answer, and the Environment’ in Maria Zaragoza, John Graham, Gordon Hall, Richard Hirschman and Yossef Ben-Porath (eds) *Memory and Testimony in the Child Witness* (1995) 116.

child witnesses are often unaware, or do not take account of the way in which children's vocabulary develops over time. Saywitz et al refer⁷²⁷ to a child witness who was asked 'to point' to the person who hurt her and did so readily. However, later she was asked 'to identify' the assailant and she failed to do so. According to Saywitz, this failure damaged her credibility.

5.139 Research has established that children understand concepts such as height, weight, size and time gradually, as they age. When a child is asked about cognitive concepts such as time, space and distance before she has reached that stage of understanding, the child is unable to respond accurately, regardless of how simply the question is phrased. A recent study of transcripts in 58 Canadian child sexual abuse cases found that children were often asked developmentally inappropriate questions. For example a ten-year-old was asked 'How wide are the windows at Pizza Dan's?' and 'How far is the lake from your home?' The children often responded 'I don't know' or, when pressured by counsel to answer, gave inaccurate answers.⁷²⁸ These answers detract from the persuasiveness and credibility of the child's testimony.

5.140 In order to maximise the ability of children to give accurate evidence, it is essential that they are asked questions appropriate to their cognitive level. This is not fundamentally different from ensuring that witnesses who cannot communicate in English are questioned via an interpreter, in a language they can understand. The South Australian 2003 Child Protection Review⁷²⁹ pointed out that a child's lack of familiarity with concepts such as space and time does not prevent the child being able to recount an incident accurately.

Structure of Questioning

5.141 Conventional cross-examination often involves questions with suggested answers attached, for example 'I put it to you that you were never in his house' or 'You were never there, were you?' This technique is known as putting leading questions to a witness and is allowed in cross-examination. On the surface, there is

727 Karen Saywitz, Carol Jaenicke and Lorinda Camparo, 'Children's Knowledge of Legal Terminology' (1990) 14 (6) *Law and Human Behaviour* 523.

728 Laura Park, 'Legal Disparities and the Child Witness' (Paper presented at the "Redefining the Legal Issues of Sexual Assault and Abuse" sponsored by the Society for the Psychological Study of Social Issues, June 28–30, 2002, Toronto).

729 Robyn Layton, *Our Best Investment: A State Plan to Protect and Advance the Interests of Children* (2003) 15.14.

nothing particularly insulting or inappropriate sounding about a question of this type. However, the significant power imbalance between a child complainant and a defence barrister may mean that a question that sounds as if it requires a certain answer is likely to elicit that answer, not because it is necessarily the correct answer but because that is what the child feels compelled to say.⁷³⁰

5.142 Research by Brennan also suggests that ‘atypical use of the negative’ is particularly problematic for child witnesses: ‘That happened on Thursday, did it not?’⁷³¹ Compound sentences incorporating more than one question are also confusing and sometimes impossible for children to respond to accurately: ‘When you were on vacation during the summer of third grade and you visited your maternal grandmother’s house, did your uncle take you to his apartment, and what happened there?’ Despite the inappropriateness of this kind of question, phrasing like this is ‘endemic to the investigative and judicial process’.⁷³²

Order of Questioning

5.143 Studies have found that repetitive questions can be very confusing for children and may induce inconsistent answers as children try to understand what is required. Children may change their answer when the question is repeated because they believe that the first answer was wrong or somehow unsatisfactory.⁷³³

5.144 According to the ALRC/HREOC report, lawyers often interrupt witnesses. The effect of this confusion prevents children from remembering events in order and also makes it more likely that children’s evidence will be contaminated.⁷³⁴

730 Observation made by judicial officers during consultations.

731 Mark Brennan and Roslin Brennan, *Strange Language, Child Victims Under Cross Examination* (3rd ed) (c1988) 62–4.

732 Karen Saywitz, ‘Improving Children’s Testimony: The Question, the Answer, and the Environment’ in Maria Zaragoza, John Graham, Gordon Hall, Richard Hirschman and Yossef Ben-Porath (eds) *Memory and Testimony in the Child Witness* (1995) 117.

733 Judy Cashmore and Kay Bussey, *The Evidence of Children* (1995); Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* Report 55, Part 2 (2000) 41.

734 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) 343.

CURRENT LAW

5.145 The criminal justice process features a number of checks and balances to control the way witnesses from the opposing side are treated in cross-examination. Judicial officers have a general power to control courtroom processes and to ensure that questions asked of witnesses are fair, comprehensible and appropriate.⁷³⁵ They may intervene to clarify a question or to enquire whether the witness is able to answer, particularly when the witness is in some way vulnerable. In addition, Victoria legislation requires the court to disallow indecent or scandalous questions⁷³⁶ and questions intended to insult or annoy.⁷³⁷

5.146 The Commission believes that these powers tend to be exercised sparingly by judicial officers. Magistrates' and judges' approaches to intervention in cross-examination are individual and primarily a matter of personal style.⁷³⁸ A judicial officer with a less interventionist style will allow questioners greater freedom to pose whatever questions they choose. The current legislation is limited to indecent, scandalous, insulting and annoying questions and does not explicitly deal with questions that are age-inappropriate or misleading and repetitive. The Commission takes the view that these controls are insufficient to ensure that child witnesses are protected against inappropriate questions.

OTHER APPROACHES

5.147 The legislative provisions in most other Australian States which allow questions to be disallowed are broader than those which apply in Victoria. Unlike the Victorian legislation, the Uniform Evidence Act, which applies in the Commonwealth,⁷³⁹ NSW,⁷⁴⁰ Tasmania⁷⁴¹ and the ACT,⁷⁴² allows the court to

735 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* Report 55, Part 2 (2000) 267.

736 *Evidence Act 1958* s.39 The court shall forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the court, unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed.

737 *Evidence Act 1958* s. 40 The court shall 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.

738 Robyn Layton, *Our Best Investment: A State Plan to Protect and Advance the Interests of Children* (2003) 15.14.

739 *Evidence Act 1995* (Cth).

740 *Evidence Act 1995* (NSW).

disallow ‘a question put to a witness in cross-examination, or inform a witness that it need not be answered, if the question is – (a) misleading; or (b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive’.⁷⁴³ Section 41(2) provides:

Without limiting the matters that the court may take into account for the purposes of subsection (1), it must consider:

- (a) any relevant condition or characteristic of the witness, including age, personality and education, and
- (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.⁷⁴⁴

5.148 The Queensland Law Reform Commission recommended a slightly broader version of the power to disallow inappropriate questions as follows:⁷⁴⁵

The court may disallow a question put in cross-examination to a witness under the age of 18 years, or inform the witness that it need not be answered, if the question is:

- (a) misleading or confusing;
- (b) phrased in inappropriate language; or
- (c) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.

Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account:

- (a) any relevant condition or characteristics of the witness, including age, culture, personality, education and level of understanding; and
- (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

741 *Evidence Act 2001* (Tas).

742 *Evidence Act 1971* (ACT).

743 Section 41(1).

744 *The Evidence Act* (NT) as in force at 1 January 2004 s21B enables the court to disallow a question to a witness under 16 years of age that is ‘confusing, misleading or phrased in inappropriate language’. In deciding whether to disallow a question the court must have regard to the age, culture and level of understanding of the child.

745 Queensland Law Reform Commission, *The Receipt of Evidence By Queensland Courts: The Evidence Of Children* Report 55, Part 2A (2000) Recommendation 13.1, 270.

OUR RECOMMENDATION

5.149 It is vital to ensure that children who must testify in child sexual assault prosecutions are questioned fairly and appropriately. Child witnesses confront difficulties that are not experienced by adults. This should be recognised in the criminal justice system. Protecting children from unfair questioning will minimise the trauma experienced by those who have already been subjected to abuse and may blame themselves for the repercussions that follow when they disclose it.⁷⁴⁶ Ensuring fair questioning will improve the quality of children's evidence because the children will understand and be able to respond effectively to the questions they are asked. There is a public interest in supporting children to give evidence in sexual offence cases. In some cases their evidence will lead to the conviction of offenders who, if they were not apprehended, would go on to abuse other children.

5.150 The Commission considers that existing Victorian legislation which gives the Court a discretion to forbid indecent, scandalous, insulting or annoying questions is not adequate to protect children. Questions that cause difficulty for children, particularly in cross-examination, may not fall into these categories but may nevertheless be unfair, inappropriate or impossible for the child to answer coherently.

5.151 The Commission's view is that the Uniform Evidence approach is too limited. Our recommendation draws on the Queensland Law Reform Commission proposal, but imposes a duty on judicial officers, as far as practicable, to disallow questions that are inappropriate in the ways listed. When combined with Recommendation 137, which requires judges to give the child some guidance about the cross-examination process, this will ensure child witnesses are treated fairly. The recommendation does not fetter the judicial officer's discretion to decide when intervention is necessary. We recommend that the types of questioning to be disallowed include repetitive questions and questions which are ordered in a confusing way that may cause problems for child witnesses.

5.152 In order to maximise the effectiveness of tighter legislative controls on the types of questions asked of child witnesses, prosecutors, defence counsel and judicial officers need to be aware of the rationale for those changes. Previous experience has indicated that legislative change in isolation from attitudinal

746 Mark Brennan, 'The Discourse of Denial: Cross-Examining Child Victim Witnesses' (1995) 23 *Journal of Pragmatics* 71-72.

change is not effective.⁷⁴⁷ Information about children's cognitive development is specialised psychological information and is not necessarily available to police, lawyers and judges whose task it is to question children in the course of a criminal justice prosecution.

5.153 In Chapter 3 we recommend an education program be provided for prosecutors. This program should include material that addresses the developmental patterns of children and examines appropriate ways to question child witnesses. The training program for prosecutors should emphasise their important role in objecting to questioning that contravenes the restrictions.

5.154 Judicial officers play a key role in controlling the courtroom process, the types of questions that are put to witnesses by counsel and the manner in which those questions are put. To assist them to ensure that child witnesses are questioned appropriately, they require access to information about children's development and research findings about best practice methods for questioning children. We recommend that the Judicial College of Victoria program on sexual offences recommended in Chapter 3 should contain material on the issues that arise during trials involving child witnesses and include information from specialists in child development about best practices in questioning child witnesses.

5.155 Many judges would also find it useful to have regular access to resources on child witnesses. Such information could be usefully provided in a resource guide along the lines of an expanded version of a judicial bench book.⁷⁴⁸ An Aboriginal Benchbook for Western Australian courts has been prepared under the auspices of the Australian Institute of Judicial Administration. Information about cross-cultural issues that may arise in the course of the conduct of trials involving Aboriginal people has been brought together in a resource guide for the judiciary. It is intended that this should provide a model for bench books on Indigenous issues to be prepared by courts elsewhere in Australia.

5.156 It would be helpful for Magistrates and County Court judges to have access to a collection of materials on issues confronted by judicial officers in cases involving children. The AIJA is considering how to facilitate the production of a

747 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?* (2002).

748 A benchbook is usually an internal document incorporating standard jury directions and background case law used as a guide by judges.

bench book on child witnesses. We urge the County Court to consider participating in this AIJA project.

!**RECOMMENDATION(S)**

143. That the *Evidence Act 1958* be amended to impose a duty on the court to ensure, as far as possible, that in the case of questions asked of children under 18 years of age:
 - neither the content of a question nor the manner in which a question is asked is misleading or confusing, phrased in inappropriate language or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive; and
 - the questions are not structured or sequenced in a way that is intimidating, harassing, confusing, annoying or misleading.
144. In deciding whether to disallow a question, the court is to take into account any relevant condition or characteristic of the witness, including age, culture, personality, education and level of understanding and any mental, intellectual or physical disability of the witness.
145. The County Court should participate in the Australian Institute of Judicial Administration (AIJA) project for the preparation of a judicial bench book to assist judges in dealing with child witnesses. The Bench book should include material about children's development and guidelines for effective communication with children of different ages and backgrounds.
146. Programs for continuing professional development of lawyers and prosecutor training [See Recommendations 35–38] should draw lawyers' attention to the legislative changes recommended above and include material that addresses the developmental patterns of children and the appropriate ways to question child witnesses.
147. Prosecutor training should draw prosecutors' attention to the legislative changes recommended above and to the desirability of objecting to questioning that contravenes these legislative restrictions.

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RECOMMENDATION(S)

148. The program of judicial education referred to in Recommendations 40–41 should deal with the issues that arise during trials involving child witnesses and include information from specialists in child development about best practice questioning of child witnesses.
149. The Department of Justice should fund an independent evaluation of the effect of this package of reforms on child complainants.

Chapter 6

Improving the System for Complainants Who Have a Cognitive Impairment

INTRODUCTION

6.1 This Chapter makes recommendations to improve the criminal justice response for people with a cognitive impairment who are sexually assaulted, including people who have an intellectual disability, a mental illness, dementia or an acquired brain injury. Currently the offences dealing with sexual exploitation of people with a cognitive impairment refer to people with ‘impaired mental functioning’.⁷⁴⁹

6.2 Some submissions raised concerns about the use of the term ‘impaired mental functioning’. It has been suggested that the use of the term ‘mental’ stigmatises people with disabilities.⁷⁵⁰ In this Chapter we use the expression ‘cognitive impairment’ instead, since this expression is regarded as a more accurate description by disability groups and is widely used and accepted. We have used that term throughout this Chapter, except where we refer to the existing legislation.

6.3 People who have a cognitive impairment are more vulnerable to sexual assault and abuse because they depend on others for assistance with daily life. Most sexual assault occurs in the victim’s place of residence.⁷⁵¹ Often the abuser is someone known to the victim, for example a staff member or other resident. Women are more at risk than men.⁷⁵² Women who live in institutions or group

749 *Crimes Act 1958* ss 50, 51, 52.

750 Disability Discrimination Legal Service (DDLS) Submission 40.

751 Moira Carmody, ‘Invisible Victims: Sexual Assault of People with an Intellectual Disability’ (1991) 17 (2) *Australia and New Zealand Journal of Developmental Disabilities* 229–236.

752 Vicky Turk and Hilary Brown, ‘The Sexual Abuse of Adults with Learning Disabilities: Results of a Two Year Incidence Survey’ (1993) 6 (3) *Mental handicap Research* 212.

homes are up to three times more vulnerable to assault, and ten times more likely to be sexually assaulted than women without disabilities.⁷⁵³

6.4 In earlier Chapters⁷⁵⁴ we referred to the barriers that people with a cognitive impairment experience in reporting sexual assault to the police and in participating in the criminal justice process. These barriers were identified in a report by Disability Discrimination Legal Service (DDLS)⁷⁵⁵ and at a Commission roundtable which focused on issues relevant to people with cognitive impairment.⁷⁵⁶

6.5 Problems faced by people with a cognitive impairment include the following:

- they may not tell anyone about sexual abuse because they may not understand that what has happened to them is a crime;⁷⁵⁷
- they may face misconceptions about their credibility and their memory, as a result of which their complaints about sexual assault may not be taken seriously by the police;⁷⁵⁸
- they may have difficulty in explaining what happened to them when they are interviewed by the police;⁷⁵⁹

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

754 Chapters 2 and 3. See also Interim Report paras 3.29–43.

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

756 Roundtable 19 September 2002.

757 Moria Carmody and Joan Bratel, 'Vulnerability and Denial: Sexual Assault of People with Disabilities' in Jan Breckenridge and Moria Carmody (ed) *Crimes of Violence: Australian Responses to Rape and Child Sexual Abuse* (1992); Disability Discrimination Legal Service, *Beyond Belief, Beyond Justice: The Difficulties for Victim/Survivors with Disabilities when Reporting Sexual Assault and Seeking Justice* Final Report of Stage One of the Sexual Offences Project (2003). In addition, it might be difficult for family or support people to know when intervene or to offer help. A 1996 study conducted by the National Council of Intellectual Disability found that family members and staff working with intellectually disabled people in residential services felt that they lacked the skills and training required to recognise and report abuse: Robert Conway, Louise Bergin and Kathryn Thornton, *Abuse and Adults with Intellectual Disability Living in Residential Services: A Report to the Office of Disability* (1996). This is an important issue which we believe should be included in a wider review of cognitive impairment and the criminal justice system.

758 Interim Report paras 3.29–43.

- complex courtroom language makes it difficult for them to respond to questioning or to understand legal processes; and
- they are likely to find cross-examination particularly daunting and difficult.⁷⁶⁰

6.6 The effect of these barriers is that the criminal justice system does not adequately protect people with a cognitive impairment against sexual abuse. Despite their over-representation as victims of sexual assault, there are very few prosecutions under the Victorian offences designed to protect people with cognitive impairment from sexual exploitation by people with power over them.⁷⁶¹

6.7 In this Chapter we refer to recommendations made earlier in this Report, which are intended to assist people with a cognitive impairment to participate in the criminal justice process, and deal with some additional matters. We also propose some further changes. Recommendations in this Chapter cover:

- refining the Independent Third Person (ITP) Program;
- including information on cognitive impairment in police training and judicial education programs about sexual assault;
- amending sections 50–2 of the *Crimes Act 1958* to improve the current offences designed to protect people with cognitive impairment; and
- setting up a system for collecting statistics on sexual offences and cognitive impairment, in order to increase understanding of the extent of this problem.

6.8 We also recommend that the Attorney-General should consider giving the Commission a reference to consider a broader review of the treatment of people with cognitive impairment in the criminal justice system as complainants, accused and witnesses. There are many issues which we have not covered in this Report, as it would not be appropriate to make recommendations which relate solely to victims of sexual assault with a cognitive impairment without considering the position of victims of other offences and also accused with cognitive impairments.

759 Kelly Johnson, Ruth Andrew and Vivienne Topp, *Silent Victims, A Study of People with Intellectual Disabilities as Victims of Crime* (1988) 48.

760 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System* Report No 80 (1996) 261.

761 The provisions are found in *Crimes Act 1958* ss 51, 52. It was confirmed by Gary Ching, Manager of the Sexual Offences unit at OPP that prosecutions for these offences occur infrequently (email of 27 January 2004).

POLICE RESPONSE

6.9 In Chapter 3 we made recommendations for improving police responses to people who report sexual assault. These recommendations will go some way towards assisting people with a cognitive impairment.

6.10 The Police Code of Practice for the Investigation of Sexual Assault Cases requires interviews with people who are intellectually disabled or mentally impaired to be conducted with the assistance of an Independent Third Person.⁷⁶² The role of the Independent Third Person is discussed in more detail below. The Review of the Code is examining the changes needed to improve police response to people with a cognitive impairment.⁷⁶³ The Commission supports this review.

ASSISTING POLICE TO IDENTIFY THAT A PERSON HAS A COGNITIVE IMPAIRMENT

6.11 Like many other service providers in the community, police may have difficulties in identifying that a person has a cognitive impairment and in determining the nature of the person's impairment. We recommend that guidelines to assist police to identify cognitive impairment be developed by Victoria Police. The Office of the Public Advocate and the Equal Opportunity Commission should be consulted on these guidelines. Corrections Victoria is currently developing screening tools for prison officers to identify people who have acquired brain injury, and already have screening for mental illness.⁷⁶⁴ Their knowledge and expertise in this area may be of assistance to Victoria Police.

6.12 Police guidelines could include a statement of the main types of cognitive impairment, possible indicators of each type of impairment, and key features of a person's social information that may be suggestive, for example their social security entitlement and whether the person has a caseworker. Police should have training on those guidelines to ensure that they are well accepted and understood.

6.13 In Chapter 5 we discuss the current procedure of video recording and audio recording of statements of people with cognitive impairment (VATE statements) who report sexual assault. We recommend that police continue to use VATEs, but also recommend that the VATE process needs to be evaluated. Given

762 Victoria Police, *Code of Practice for the Investigation of Sexual Assault* (1999), guideline 57.

763 See para 2.13.

764 Information supplied by Peter Person, Policy Officer Corrections Victoria in conversation on 5 April 2004. Inquiries are also made by Corrections as to whether the person is registered with DHS as having an intellectual disability.

the difficulties that police may have in identifying cognitive impairment, we recommend below that if the police are unsure as to whether a person has a cognitive impairment, the person's statement should be taken using VATE.

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RECOMMENDATION(S)

150. Victoria Police should develop guidelines for the identification of cognitive impairment in consultation with the Office of Public Advocate and the Equal Opportunity Commission. Guidelines prepared by Corrections Victoria might provide a useful model for this process.
151. Training for general duties police, SOCA members and CIU members should ensure that police are familiar with and can apply the guidelines for the identification of cognitive impairment.
152. If investigating officers are unsure as to whether a person has cognitive impairment, they should use the VATE process to take that person's statement.

*INTERVIEWING COMPLAINANTS WITH A COGNITIVE IMPAIRMENT***Interviewing Techniques**

6.14 Complainants with a cognitive impairment may face significant difficulties in making their statements. Police need to allow sufficient time when taking statements from people with a cognitive impairment and give them time to have a break when necessary. Police also need to develop interviewing and communication skills which meet the needs of people with a cognitive impairment.

6.15 The DDLS Project found that there is an assumption amongst police that victims with a cognitive impairment will not present as credible witnesses. These perceptions can lead to reluctance to take a complaint of sexual assault from a person with a cognitive impairment seriously or to take a statement or investigate the matter.⁷⁶⁵

765 Above n 755, 54–6.

6.16 The Commission's focus groups with the police also indicated that victims with a cognitive impairment, particularly mental disorders, are not considered to be credible witnesses and that briefs for prosecution of those accused of sexually assaulting a person with an intellectual disability were rarely authorised.⁷⁶⁶ Earlier research in NSW also found that police lacked knowledge about cognitive impairment, used inappropriate communication techniques and required training to improve their responses.⁷⁶⁷

6.17 These issues cause attrition of cases and only a small number of victims with cognitive impairment who report sexual assault progress to the trial stage.⁷⁶⁸ The Commission believes that training is needed to improve police knowledge of cognitive impairment and to improve police techniques in communicating with people who have such an impairment. Victoria Police is currently considering changes to police training along these lines. Recommendation 14 in Chapter 2 of this Report⁷⁶⁹ says that police training should include best practice models for responding to people with a cognitive impairment who report that they have been sexually assaulted.



RECOMMENDATION(S)

153. Training of general duties police and SOCA Unit and CIU members should include appropriate communication techniques with people with a cognitive impairment.

SUPPORT DURING THE POLICE INTERVIEW PROCESS

6.18 People who have a cognitive impairment require support when they are being interviewed by the police. Independent Third Persons (ITPs) are volunteers who provide support for people with cognitive impairment during police

766 Above paras 2.42–3. See also Roundtable with disability service providers 19 September 2002 and Meeting with DDLS 18 December 2003.

767 New South Wales Law Reform Commission, *'Research Report 3 (1993) —People with an Intellectual Disability and the Criminal Justice System: Consultations'* <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/RR3CHP2>> ; Mark Brennan and Roslin Brennan, *Cleartalk: Police Responding to Intellectual Disability* (1994).

768 The offences are under *Crimes Act 1958* s 51 and 52. See discussion at 6.40–55.

769 See above para 2.56.

interviews.⁷⁷⁰ The person who requires support may be a person who reports an offence or a person who is suspected of committing it.

6.19 The selection criteria for ITPs requires that they have a practical understanding of people who have a disability and their communication issues.⁷⁷¹ The role of the ITP is to facilitate communication with the person being interviewed and to prevent them being questioned inappropriately. Inappropriate questions are questions that cannot be clearly understood by the interviewee—the ITP has no power to object to questioning on any other basis.

6.20 The ITP program is run by the Office of the Public Advocate (OPA). In the Interim Report we recommended that the OPA develop an accredited training program for ITPs to ensure consistent standards of practice when working with victims of sexual assault.⁷⁷²

6.21 The Commission received 11 submissions on that recommendation.⁷⁷³ Seven submissions supported this recommendation:⁷⁷⁴ one was concerned that an accused person with cognitive impairment should also be given support by OPA⁷⁷⁵ and two thought the recommendation did not adequately address the issues around ITPs.⁷⁷⁶

6.22 OPA advised that it has developed training for ITPs in supporting victims/survivors of crimes generally. About 15% of interviews attended by ITPs are for people who report a crime. Almost 75% of these are for alleged victims of sexual assault.⁷⁷⁷ Clearly it is therefore important for ITPs to receive specific information about supporting people who report sexual assault. OPA has agreed

770 Victoria Police Operating Procedures, para 4.6.3.2 requires an ITP or family member to be present when an offender is interviewed, and Victoria Police, *Code of Practice for the Investigation of Sexual Assault* (1999), Above n 762, guideline 57 requires an ITP to be present when taking statements from the victim.

771 See <<http://www.publicadvocate.vic.gov.au>> and follow links to Programs and Independent Third Persons Program.

772 Interim Report Recommendation 2.

773 Submissions 7, 19, 26, 30, 31, 38, 40, 42, 44, 47, 48.

774 Submissions 19, 26, 30, 42, 44, 47, 48.

775 Submission 7.

776 Submissions 38 and 40.

777 Information provided by Lisa Morrison, Coordinator ITP program in conversation of 9 January 2004. In the 2001–2 year there were 930 attendances by ITPs. 749 were for alleged offenders, and 151 for victims. Of the 151 victims, 112 were victims of sexual assault. Figures relate to attendances at interview, not clients. There may be more than one attendance at interview per person assisted.

that within the current training it would be sensible to include training on sexual assault.⁷⁷⁸

6.23 The Equal Opportunity Commission Victoria (EOCV) submission on this issue⁷⁷⁹ agreed that it is important for ITPs to be trained in sexual assault issues. It also suggested that a person be available to support the victim from the first interview with police to at least the stage at which a decision is made about prosecution. That person should have a high level of expertise in working with victims of sexual assault as well as expertise in working with people with cognitive impairment. The theme of consistent support and advocacy is taken up in the DDLS submission, discussed below.

6.24 In the Interim Report⁷⁸⁰ we discussed the improvements made to the ITP program following a review in 1995⁷⁸¹ including: a funded coordinator's position, a review of recruitment and selection criteria and a review of training. As a result of the training review, for the past two years ITPs have been required to undertake a compulsory two-day induction training course and to complete a one day update session at least once every two years. OPA continues to work on its training program to ensure that it is more focused on skills development.⁷⁸² In light of OPA's comments, we no longer recommend accredited training, but support the current compulsory training program.

6.25 The Commission notes that it may be helpful for OPA to liaise with Centre Against Sexual Assault (CASA) House in developing a training component on supporting people with a cognitive impairment who report sexual assault. CASA workers might also benefit from training which assists them in communicating with people with cognitive impairments.

6.26 Both the roundtable which the Commission held to discuss problems experienced by people with a cognitive impairment and the DDLS submission raised concerns about the availability and role of ITPs and the adequacy of the

778 Submission 31.

779 Submission 38.

780 Interim Report para 3.35.

781 Department of Health and Community Services, *The Independent Third Person Program: Evaluation* (1995).

782 Conversation with Lisa Morrison, Coordinator of Independent Third Person Program on 9 January 2004.

ITP in providing support for people with a cognitive impairment who report a sexual assault to the police.

6.27 The DDLS submission argued that police were sometimes selective in choosing an ITP to attend interviews. Concerns were expressed about impartiality and effectiveness of ITPs. It is particularly important for people with a cognitive impairment who are accused of sexual offences to have an effective ITP present at the interview.

6.28 The DDLS suggested that the decision as to which ITP is used should be independent from police and controlled by the ITP program centrally via a roster system. This could be done by way of a central phone number that diverts to whoever is rostered on at that time. OPA report that they have used a roster system in the past and this did not work as they do not have the resources to operate a centrally controlled system that would operate 24 hours a day. Such a system would therefore require an additional allocation of resources to the program.



RECOMMENDATION(S)

154. OPA should liaise with CASA House to develop training for Independent Third Persons (ITPs) in supporting people with a cognitive impairment who report sexual assault.
155. OPA should consider seeking resources to enable it to establish a central roster system for allocating Independent Third Persons.

ADVOCACY FOR PEOPLE WITH A COGNITIVE IMPAIRMENT

6.29 The DDLS submission pointed out that the role of ITPs is to provide support rather than advocacy for the interviewee. People with cognitive impairment, who report they have been sexually assaulted, will not necessarily have access to someone who can act as their intermediary and advocate in dealing with the police, in explaining the legal process to them and in assisting them to make decisions about whether to continue with a complaint.

6.30 DDLS believes that there is a need for someone to provide advocacy for people with cognitive impairment to ensure they understand the language being used, and that they are fully informed about their options and role in the legal process. In order to properly fulfil an advocacy role, the same person would have

to be available to the person with cognitive impairment throughout the whole criminal justice process, from reporting until any court hearing is complete. DDLS do not suggest ITPs should take on an advocacy role given their voluntary nature, but believe that it is necessary for advocacy to be provided by a funded body.⁷⁸³

6.31 In the absence of an advocacy service for people with cognitive impairment, DDLS suggested that in addition to an ITP, complainants should have access to a support person during their dealings with police.⁷⁸⁴ This could be their Disability Support Worker or a CASA worker. This should be taken into account in the current review of the police Code of Practice. In consultations for their project, DDLS found that CASAs identified a need for further training to assist them to work with people with disabilities. Such training should provide an understanding of disability and how it may affect a person's capacity to identify and disclose sexual assault.⁷⁸⁵ We recommend that a component on identifying disability and working with people with cognitive impairment become a core element of CASA training.

6.32 It is clear that the criminal justice system offers people with a cognitive impairment very limited protection against sexual assault. Realistically the criminal law may never be able to deal adequately with sexual assaults committed in secret on people with limited or non-existent communications skills.

6.33 However, with adequate assistance many people with a cognitive impairment can tell the police what has happened to them and can give evidence in court. The Commission believes there is a need to consider better ways of supporting people with a cognitive impairment who are victims of crime to participate in police interviews and in the whole criminal justice process. There is also a need to assist people with a cognitive impairment who are charged with sexual offences, who may face significant disadvantages in instructing their lawyer or in participating in the court process. Such problems arise in all areas of the criminal law and are not limited to sexual offences.

783 Meeting with Jonathon Goodfellow and Margaret Camilleri 18 November 2003. There was discussion about this role being fulfilled by either Disability Support workers or CASA workers, however DDLS believed the former would require further training about legal rights and the legal process, and the latter would require further training to assist in working with people with disabilities. Specific funding for such a role would also be required.

784 Above n 755, 48.

785 Ibid 51–2. It is noted in the report at p 34 that since 1997 CASAs have developed a kit and some practice guidelines for supporting victims with an intellectual disability.

6.34 The Commission believes provision of support for people who have a cognitive impairment who are involved in the criminal justice system requires broader and more systematic analysis than the scope of this reference allows. We recommend that the Attorney-General consider a review of the treatment of people with cognitive impairment in the criminal justice system as complainants, accused, and witnesses. The review should undertake research to identify the needs of people with cognitive impairment when reporting sexual assault and the most effective way of supporting them to do so.⁷⁸⁶ It should consider ways of reducing the risk of assault by people with cognitive impairment who are in care or attending programs. It should also look at education for people with cognitive impairment about human relations, sexual safety and protective behaviours and about the law and their legal rights. The VLRC would be a suitable body to undertake this project.



RECOMMENDATION(S)

156. CASA training should include a component on identifying disability and working with people with cognitive impairment.
157. The Attorney-General should consider establishing a review which identifies the issues confronted by people with cognitive impairment in the criminal justice system as complainants, accused and witnesses and makes recommendations for legal and procedural changes.

COURT PROCESSES

6.35 In previous Chapters we have made a number of recommendations which will assist people with a cognitive impairment in giving evidence. These include:

- abolishing the right to cross-examine complainants with a cognitive impairment at committal;⁷⁸⁷
- establishing a specialist list in the Magistrates' Court to handle summary offences against people who have a cognitive impairment and committals in cases involving indictable sexual offences against these people;⁷⁸⁸

786 Above n 755, Recommendation 8.

787 See Recommendation 42.

- assigning a designated judge in the County Court to list and manage all sexual offence cases involving offences against complainants with a cognitive impairment;⁷⁸⁹
- increasing the use of VATE tapes so that fewer complainants with a cognitive impairment have to give oral evidence-in-chief;⁷⁹⁰
- allowing all complainants (including complainants with a cognitive impairment) to give evidence by closed circuit television;⁷⁹¹
- introducing a process for pre-recording evidence-in-chief and cross-examination of people who have a cognitive impairment;⁷⁹² and
- preventing the accused in a sexual offence case from cross-examining the complainant.

6.36 As noted in the Interim Report⁷⁹³ the language of the courtroom poses particular obstacles for complainants with some types of cognitive impairment. For example, people with intellectual disabilities may have particular difficulty with leading or lengthy questions, questions spoken rapidly or containing many concepts or double negatives.⁷⁹⁴ They may also find it more difficult to follow events such as processes that occur before and during trial.

6.37 Complainants with an intellectual disability or a mental illness may find cross-examination daunting and very difficult. In DDLS consultations it was noted that a person with an intellectual disability will often give the answer that they think will please the questioner or cause the questions to stop. In many cases this will be a 'yes' or 'no' answer.⁷⁹⁵ In Chapter 5 we recommended that the *Evidence Act 1958* should be amended to impose a duty on the court to ensure appropriate questioning of children and young people. The Commission considers that a similar duty should apply in the case of people with a cognitive impairment.

788 See Recommendation 53.

789 See Recommendation 50.

790 See Recommendation 113.

791 See Recommendation 59.

792 See Recommendation 43.

793 Interim Report para 4.26.

794 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System* Report No 80 (1996) 258.

795 Above n 755, 58 and Submission 44.

**RECOMMENDATION(S)**

158. That the *Evidence Act 1958* be amended to impose a duty on the court to ensure, as far as possible in the case of questions asked of people with a cognitive impairment that:

- neither the content of a question nor the manner in which a question is asked is misleading or confusing, phrased in inappropriate language or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive; and
- the questions are not structured or sequenced in a way that is intimidating, harassing, confusing, annoying or misleading.

6.38 The DDLS submission noted that the criminal justice system can only operate fairly if judges and magistrates have an understanding of and sensitivity to the needs of people with a cognitive impairment.⁷⁹⁶ This will assist them to assess whether the person with the disability fully comprehends the questions being put to him or her and whether they should intervene. It will also assist them to identify when the person may need a break from questioning.

6.39 In Chapter 3 we made recommendations for prosecutor training, training of defence lawyers and judicial education programs on issues that commonly arise in sexual offence cases. Such education should include information on the problems that complainants with a cognitive impairment face in participating in the criminal justice process and on how those problems might be overcome. Training materials should be prepared with input from the Office of the Public Advocate.

**RECOMMENDATION(S)**

159. Training programs for prosecutors and defence lawyers should include a component on the disadvantages experienced by people with cognitive impairment, and effective communication with people with a cognitive impairment.

796 Above n 755, 54.

**RECOMMENDATION(S)**

160. Judicial education programs on sexual offences should include material that familiarises judges with communication and other difficulties people with a cognitive impairment may face.

SEXUAL OFFENCES AGAINST PEOPLE WITH COGNITIVE IMPAIRMENT

6.40 Chapter 7 of the Discussion Paper identified some deficiencies in sections 50, 51 and 52 of the *Crimes Act 1958*, which create a number of sexual offences against people with ‘impaired mental functioning’. In Chapter 8 of the Interim Report we proposed some changes to these provisions.

6.41 In the section below we describe responses to our proposals and make final recommendations for changes to these sections.

SECTION 50

6.42 Section 50 currently defines the concept of ‘impaired mental functioning’. For the reasons discussed in 6.2 we recommend that this expression should be changed to ‘cognitive impairment’. Section 50 says that ‘impaired’ includes a person whose mental functioning is impaired because of mental illness, intellectual disability, dementia or brain injury. This is a non-exhaustive list, so that mental impairment due to other factors could also be included. In the Interim Report we discussed whether the definition of ‘impaired mental functioning’ in section 50 should be expanded to explicitly include people with severe personality disorders. The Interim Report suggested that this was unnecessary. The majority of submissions agreed that the current definition was sufficient to cover people with severe personality disorders. We do not recommend this change to the definition.

6.43 A number of submissions⁷⁹⁷ argued that instead of referring to particular disorders the definition should simply refer to the person’s capacity to make informed judgments about sexual activities. We do not recommend adopting a ‘capacity’ definition for these sections.

6.44 These sections specify an appropriate standard of behaviour for those providing services to people with a cognitive impairment. Section 51 covers

797 Submissions 31, 38, 40 and 44. Also at meeting with Jonathon Goodfellow and Margaret Camilleri from Disability Discrimination Legal Service on 18 November 2003.

people providing ‘medical and therapeutic services’ to the person and section 52 covers sexual activities between people with a cognitive impairment and workers in residential facilities. Because the sections create serious offences that carry long terms of imprisonment it is important that their application is clear.

6.45 Although research suggests that much sexual abuse occurs in these settings, there are very few prosecutions under these sections. The Office of Public Prosecution’s records show only 17 prosecutions under section 51 or section 52 since 1996.⁷⁹⁸

6.46 A definition which was solely based on capacity would make these matters more difficult and lengthy to prosecute. Under the current definition a psychologist or psychiatrist may be required to testify as to whether the person has, for example, a mental illness. A capacity-based definition could result in a wide range of experts being called to testify whether the complainant has the capacity to make a choice as to whether to participate in sexual acts with people in positions of power over her. If experts presented conflicting opinions on whether or not the person had capacity to make an informed choice to participate in sexual acts, it is unlikely that the jury would convict an accused who claims that he believed the complainant had made such a choice. We do not support adopting a definition that would make it harder to prosecute those who sexually exploit people with a cognitive impairment.

SECTION 51

6.47 Section 51 makes it an offence for a provider of medical or therapeutic services related to a person’s impairment to sexually penetrate or commit an indecent act with the person to whom the services are being provided. We discussed changes to section 51 in the Interim Report.⁷⁹⁹ We recommended that section 51 be amended to allow the prosecution of a person who provides medical or therapeutic services *relating to the cognitive impairment* without requiring the prosecution to prove that the accused had knowledge of the impairment. The defence of honest and reasonable belief that the person did not have a cognitive impairment could be raised by an accused providing services related to the impairment who was unaware of the cognitive impairment. This is more likely to arise in the context of therapeutic than medical services.

798 Information provided by Jari Jancar, IT Manager, Office of Public Prosecutions, from search of their PRISM database on 13 February 2004.

799 Interim Report paras 8.36–45.

6.48 Our proposal was generally supported by submissions,⁸⁰⁰ though some submissions were concerned about the availability of the defence of honest and reasonable belief.⁸⁰¹ The Commission thinks it is important to make provision for this defence to cover the rare situation where a person providing services relating to the impairment does not know of it. For example, a physical therapist may conduct an exercise class with a group of people with various disabilities, but may be unaware of the nature of their various disabilities. In this situation the therapist might engage in a sexual act with a person with a cognitive impairment without being aware that the person had a cognitive impairment.

6.49 In these circumstances we think it is appropriate for the accused to be able to raise the defence of honest and reasonable belief. We confirm the recommendation in the Interim Report.

6.50 We also proposed a new offence to cover the situation where the services do not relate to the cognitive impairment. This would cover, for example, the situation where a dentist who is treating a woman who has an intellectual disability engages in a sexual act with her, or a chiropractor sexually penetrates a woman who has a mental illness whom he is treating for a back problem. Because not all therapeutic service providers will be in a position to be aware of the cognitive impairment we proposed that these service providers should only be guilty of the offence if they were aware of the impairment.

6.51 Submissions received to the Interim Report were supportive of the new offence, and we confirm our interim recommendations.

SECTION 52

6.52 Section 52 currently prohibits sexual acts between people with cognitive impairment and workers in residential facilities. A ‘residential facility’ is defined as an 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. Changes to section 52 were also discussed in the Interim Report.⁸⁰² Government policies of de-institutionalisation mean that a higher proportion of people with a cognitive

800 Submissions 19, 26, 38, 44, 48 and 49 were supportive, apart from wanting the capacity definition to be included.

801 Submissions 31 and 40.

802 Interim Report paras 8.46–55.

impairment now live with family or relatives and attend day care or other programs.⁸⁰³

6.53 Our interim recommendation was to extend section 52 to cover any person working at a facility or in a program that provides services to people with cognitive impairment, rather than just workers in residential facilities. The offence would only apply if the worker knows the person has a cognitive impairment. In our view the high incidence of sexual assault of people with cognitive impairments, and the low levels of reporting, suggest that the law must do more to protect them.

6.54 Submissions to the Interim Report were overwhelmingly in support of this extension of section 52. One submission⁸⁰⁴ said that the section should cover volunteers as well as workers. We agree with that submission, as volunteers are in the same position as paid workers in relation to the person to whom services are provided and should have the same responsibility to them. Another submission suggested extending the section to cover employers of people with cognitive impairment.⁸⁰⁵ The Commission has decided against that extension.

6.55 The legislation must balance two competing goals. On the one hand it should not prevent people with a cognitive impairment from having non-exploitative sexual relationships. On the other hand sexual abuse of people with a cognitive impairment by carers or people involved in program provision is unfortunately relatively common. Confining the operation of section 52 to carers and service providers achieves an appropriate balance between these goals and sets out clear standards of behaviour for those who work in programs for people with a cognitive impairment.

CONSENT

6.56 The issue of consent in relation to these offences was discussed in the Interim Report. Most submissions were supportive of our recommendation that consent not apply to these offences.⁸⁰⁶

6.57 The Equal Opportunity Commission Victoria⁸⁰⁷ submitted that if section 50 was not changed to include a capacity definition then a limited defence of

803 Submissions 38 and 44.

804 Submission 26.

805 Submission 38.

806 Submissions 19, 26, 31, 40, 44, 49.

807 <http://www.eoc.vic.gov.au>

consent should apply, with the onus being placed on the accused to demonstrate that consent was not obtained through the abuse of trust or professional authority. The Criminal Bar and Victorian Bar⁸⁰⁸ thought that the defence of consent should apply to these offences.

6.58 The historical reason for introducing these offences was that the law of rape did not adequately protect people with a cognitive impairment from sexual abuse. We consider that the defence of consent would be inconsistent with the policy goal of protecting people with cognitive impairment from exploitation through these offences. Allowing a defence of consent in these circumstances would invariably raise the issue of capacity, which would lead to the difficulties in prosecution discussed above. We confirm our recommendation that the defence of consent should not apply to these offences.

PARTNERS OF PEOPLE WITH A COGNITIVE IMPAIRMENT

6.59 The Equal Opportunity Commission Victoria (EOCV) also raised the issue of sexual discrimination in this part of the *Crimes Act 1958*. Sections 51 and 52 do not apply in the situation where the person is the spouse or de facto spouse of the person with cognitive impairment.

6.60 Section 35 contains definitions relating to subdivisions 8A to 8G which contain sections 50 to 52. ‘De facto spouse’ is defined as ‘a person who is living with a person of the opposite sex as if they were married although they are not’. This could leave same sex couples open to prosecution. We agree with the EOCV’s suggestion that section 35 be amended to include ‘spouse or domestic partner’ and that this be broadly defined to include same sex couples and couples who are not cohabiting (for example because one of the people is living in a nursing home). Those in genuine relationships should not be placed at risk of prosecution.

EDUCATION OF PEOPLE WITH COGNITIVE IMPAIRMENT

6.61 We have earlier discussed the need for education of those involved in the criminal justice system about issues relating to cognitive impairment.⁸⁰⁹ It is also very important that people with cognitive impairment and their carers are educated about their rights and obligations in the criminal justice system, and

807 Submission 38.

808 Submissions 42 and 48.

809 Recommendation 14 relates to police and Recommendations 40 and 41 relate to judicial education.

have access to information in a suitable format. Knowledge about sexuality, relationships and sexual rights and safety is also important, and may assist people with cognitive impairment to develop appropriate sexual and self-protective behaviours.⁸¹⁰ This may reduce their risk of assault by people known to them. It is unlikely that legislative change alone will improve the rate of prosecutions under sections 51 and 52. It is necessary for victims to first have a greater understanding of their rights and of what constitutes a criminal offence in order for reporting of these offences to increase.



RECOMMENDATION(S)

161. Sections 50, 51 and 52 of the *Crimes Act 1958* should be amended to use the term 'cognitive impairment' rather than 'mental impairment'.
162. Section 23 of the *Evidence Act 1958* should be amended to use the term 'cognitive impairment' rather than 'impaired mental functioning'.
163. The definition of 'impaired' in section 50 of the *Crimes Act 1958* should not be changed.
164. 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 cognitive impairment to engage in a sexual act with that person;
 - where the medical or therapeutic services are related to the cognitive impairment, it is unnecessary for the prosecution to prove that the accused was aware of the person's cognitive impairment. However, the accused can raise the defence that they had an honest and reasonable belief that a person did not have a cognitive impairment; and
 - where the medical or therapeutic services are not related to the cognitive impairment, the service provider is not guilty of the offence unless he or she was aware that the person had a cognitive impairment.

810 Above n 755, 45–8.

**RECOMMENDATION(S)**

165. Section 52 of the *Crimes Act 1958* should be amended as follows: A person working or volunteering at a facility or in a program which provides services to people with cognitive impairment, who takes part in a sexual act with a person whom he or she knows has cognitive impairment, should be guilty of an indictable offence.
166. Sections 51 and 52 of the *Crimes Act 1958* should not include a defence of consent.
167. Section 35 of the *Crimes Act 1958* should be amended to include 'spouse or domestic partner' and should be broadly defined to include same sex couples and couples in a genuine relationship who are not cohabiting.

INFORMATION ON REPORTING PATTERNS

6.62 In Victoria there is very little data collected on victims with a cognitive impairment who report sexual assault. Victoria Police do not systematically record the existence of intellectual disability or mental illness for their annual statistics on reported crimes, nor do the courts. The lack of data and the failure to accurately record information both on the incidence and characteristics of sexual assault of people with cognitive impairment impedes legal and policy development in this area.

6.63 In Chapter 1 we recommended that an integrated process be established for the collection of reliable statistics relating to sexual offences. To improve policy development in this area we believe that cognitive impairment needs a particular focus.

**RECOMMENDATION(S)**

168. The Working Party that is convened by the Department of Justice to establish an integrated process for the collection of reliable statistics on sexual offences [see Recommendation 4] should consider how to ensure that information is collected relating to complainants and offenders with cognitive impairment.

Chapter 7

Judges' Directions To Juries

INTRODUCTION

7.1 Previous chapters in this Report have recommended procedural and evidentiary reforms which are intended to make it easier for complainants to report sexual offences to the police and to give evidence in court. This Chapter recommends changes to the laws which determine what the judge must tell the jury in a sexual offence case. It also proposes the inclusion of material relevant to these changes in judicial education and prosecutor training.

7.2 The changes are in part recommended because the Commission is satisfied that jury directions too often reflect outdated perceptions. The Commission recognises that those perceptions are often allied to an entirely appropriate concern that no injustice be done to those who are accused of sexual offences. If the recommendations set out in this Report are adopted, the Commission nevertheless believes that accused persons will be appropriately protected while complainants will be treated with that fairness which, in the past, they may have been denied.

7.3 In a criminal trial the judge is responsible for directing the jury about the law and the jury is responsible for deciding whether the accused is guilty of the offence with which he has been charged. For example, in a rape trial the judge will tell the jury that the prosecution must prove beyond reasonable doubt that the accused intentionally sexually penetrated the complainant without her consent and that the accused was aware that the complainant was not consenting, or might not be consenting. The jury will have to decide whether these facts have been established.

7.4 As well as explaining the law to the jury, Victorian judges summarise the evidence and may make comments on it. The jury will be told that they must comply with the judge's directions about the law, but that since it is their role to decide the facts they may accept or reject any comment that the judge makes about the facts.

7.5 A judge who is directing a jury in a sexual offence trial faces significant challenges. In giving jury directions the judge must instruct the jury on the issues about which they must be satisfied before the accused can be convicted. The law also requires the judge to warn the jury about matters which could affect the reliability of evidence given by some witnesses, which the jury may be unaware of and which fall within the special knowledge of the judge.⁸¹¹ In *R v BWT*⁸¹² Wood CJ at CL referred to at least eight different matters on which it may be necessary to instruct the jury in a sexual offence case.

7.6 The judge will need to charge the jury in clear and comprehensible language that the average juror will understand. In directing juries in sexual offence cases the judge will be particularly concerned to ensure that there is no basis for an appeal, the result of which might require the complainant to go through the ordeal of giving evidence again. This entirely commendable approach nevertheless carries the danger that the jury will be given warnings, of the kind discussed below, when on the facts of the particular case those warnings are inappropriate.

7.7 Historically the sole purpose of jury warnings was to protect the accused against an unfair conviction. In more recent times legislation has been enacted to counter myths about sexual assault⁸¹³ and to ensure that complainants, as well as people charged with sexual offences, are treated fairly.

7.8 Courts have also emphasised the importance of recognising the interests of witnesses. Deane J in the High Court decision of *Dietrich v R*⁸¹⁴ noted that a fair trial 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 an English sexual assault appeal case, the Lord Chief Justice (Lord Lane) speaking for the Court said that:

811 For example where a person who gives evidence was an accomplice of the accused, the judge is required to warn the jury against acting on possibly unreliable testimony alone. See generally Andrew Ligertwood, *Australian Evidence* (3rd ed) (1998) 178–183.

812 (2002) 54 NSWLR 241.

813 For a discussion of the popular myths surrounding sexual assault, see Denise Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (2003). See also the judgment of L'Heureux-Dube J in *R v Ewanchuk* [1999] 1 S.C.R. 330, 369–70 and the references she cites on that page, for example; Ngaire Naffine, 'Possession: Erotic Love in the Law of Rape' (1994) 57 *Modern Law Review* 10; Richard Andrias, 'Rape Myths: A Persistent Problem in Defining and Prosecuting Rape' (1992) 7:2 *Criminal Justice* 2.

814 (1992) 177 CLR 292.

The learned judge has the duty on this and on all other occasions of endeavouring to see that justice is done. Those are high sounding words. What it really means is, he [sic] has got to see that the system operates fairly: fairly not only to the defendants but also to the prosecution and also to the witnesses. Sometimes he has to make decisions as to where the balance of fairness lies.⁸¹⁵

7.9 This Chapter evaluates the effects of recent legislative changes which were intended to produce this 'balance of fairness'. Because the Commission believes that judges are likely to find it helpful to receive information about the outcomes of our research, these outcomes are discussed in some detail. The Chapter goes on to recommend some changes to the laws which determine the circumstances in which jury directions must be given and the content of those directions.

METHODOLOGY

7.10 The main purpose of the Commission's study of jury charges was to evaluate how legislation relevant to sexual offences is reflected in judge's comments and jury directions. In 1991 the *Crimes Act 1958* was amended to introduce a statutory definition of consent⁸¹⁶ and to set out a non-exhaustive list of circumstances in which a person does not freely agree to a sexual act.⁸¹⁷ The new legislation also required judges to give jury directions about consent⁸¹⁸ and delay in reporting.⁸¹⁹ Section 61, which deals with the jury directions which must be given in cases involving a delay in reporting, was further amended in 1997.⁸²⁰ These provisions operate in conjunction with common law requirements as to jury warnings in cases where there has been a delay in complaint.

7.11 To assess the effect of changes in the law on jury directions the Commission examined 24 charges in sexual offence trials occurring in the three year period between 2000 and 2002 in the County Court of Victoria. This exercise could not have been undertaken without the assistance of the Office of

815 *R v DJX* (1990) 91 Cr App R 36, 40.

816 *Crimes Act 1958* s 36 inserted by *Crimes (Rape) Act 1991* s 3.

817 This list (s 36(a)–(g)) includes submission due to force, harm or fear of force or harm, and situations where the complainant is asleep, unconscious or so intoxicated by alcohol or other drugs as to be incapable of freely agreeing.

818 *Crimes Act 1958* s 37(1) inserted by *Crimes (Rape) Act 1991*.

819 *Crimes Act 1958* s 61 inserted by *Crimes (Rape) Act 1991*.

820 *Crimes (Amendment) Act 1997*.

Public Prosecutions (OPP) and the Judges of the County Court. The Commission gratefully acknowledges that assistance.

7.12 The study was a qualitative one which did not aim to produce statistically significant results but to provide information on how juries are being directed in a number of cases.

7.13 Potentially relevant cases occurring in this period were identified initially using a database maintained by the OPP known as PRISM. The Commission then asked solicitors from the Sexual Offences Section of the OPP to identify from that list the five most recent rape or serious sexual assault trials where the principal issue in dispute was consent or belief in consent and/or there was a significant delay in complaint.⁸²¹

7.14 Approval was obtained from the Executive Committee of the County Court Judges of Victoria for the Commission to obtain access to the judges' charges in these matters. Judges' directions are audio-recorded but not routinely transcribed unless there is an appeal against conviction. The Victorian Government Recording Service (VGRS) agreed to transcribe the 24 directions. Once transcribed, the charges were sent to individual judges for revision.⁸²² The transcripts were examined by a research and policy officer from the Commission with social science expertise. The information was recorded in a specially designed Access coding schedule.⁸²³ All transcripts were then independently re-examined and where necessary re-coded by a second research and policy officer, with both legal and social science expertise.

7.15 The jury directions (charges) were examined to ascertain how judges direct juries about the definition of consent, the necessary state of mind of the accused and any delay in complaint. Views about sexual assault which judges expressed in directing the jury on consent and other matters were noted by the researcher.

821 All but two of the identified cases were rape matters. The non-rape matters were: one case involving three alleged indecent assaults, where both consent and belief in consent were in issue, and one case involving charges of sexual penetration and indecent assault which fell within our criteria as there was an eight year delay in the reporting of the alleged offences. One identified matter was eventually excluded from the study sample on the basis that neither consent, belief nor delay were in issue in the proceedings.

822 It is standard practice in Victoria for judges to revise their directions where a copy of the charge has been requested. Generally, such revisions are only grammatical or semantic and the content of the charge is not altered.

823 A copy of the coding schedule may be viewed at the Commission.

Great care was taken by the researchers to ensure that any quotes taken from the charges were accurate and not used out of context.

7.16 The research examined how amendments to section 61 were reflected in jury warnings in cases in which there was a delay in reporting the alleged offence. We identified the situations in which such warnings were being given and the nature of these warnings and also considered how judges direct juries when complaints are made promptly (the 'recent complaint' principle). The research also examined the clarity of jury directions and the time which was taken in delivering them.⁸²⁴

LIMITATIONS

7.17 Selection of the cases was dependent on OPP solicitors being able to identify their five most recent cases within the period 2000–02. It could be that the cases identified by the solicitors were not the most recent within that period, although for the purposes of our study this was not essential. A random sample of all charges fitting the criteria for examination would have been preferable but the time and cost of such an approach prohibited this method.

7.18 The Commission did not have access to the whole transcript for each matter due to the prohibitive cost of having each case transcribed. We did not, therefore, examine the prosecution or defence opening and closing remarks. However, the current judicial practice in Victoria is that judges summarise the evidence and almost always refer to the way in which the defence and prosecution cases have been argued.

7.19 The charges generally reveal whether the prosecution or defence have taken exception to an aspect of a judge's charge and the judges usually prefaces any re-directions with a comment to that effect. However, the contents of discussions between the judge and counsel were not always recorded by the transcriber, which meant that the Commission did not have access to such information.

824 We understand that our study is likely to complement national research currently being considered by the Australian Institute of Judicial Administration (AIJA) Jury Charge Committee into the length and comprehensibility of jury charges and methods to aid juries in their deliberations.

JURY DIRECTIONS ON THE ELEMENTS OF SEXUAL OFFENCES

7.20 In this section we consider jury directions on consent and on the state of mind of the accused.

CONSENT—*CRIMES ACT 1958* SECTIONS 36 AND 37

THE 1991 CHANGES

7.21 The 1991 amendments to section 36⁸²⁵ of the *Crimes Act 1958* defined consent as ‘free agreement’ and provided a non-exhaustive list of circumstances in which a person does not freely agree to a sexual act.⁸²⁶

7.22 Section 37⁸²⁷ requires the judge 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.⁸²⁸ Under section 37(1)(b) the judge is required—if relevant to the facts in issue—to direct the jury that a person is not to be regarded as having freely agreed to a sexual act just because she did not protest or physically resist⁸²⁹ or sustain physical injury⁸³⁰ or that she agreed on a previous occasion to a sexual act with the accused or another person.⁸³¹

7.23 These reforms made significant changes to the concept of consent. Section 37(1)(a) introduced the concept that inactivity or silence now indicates lack of consent rather than the opposite. Bernadette McSherry has suggested that the new definition reinforces a ‘communicative model of sexuality’.⁸³² The former Law

825 *Crimes Act 1958* s 36 inserted by *Crimes (Rape) Act 1991* s 3.

826 See n 817 for what is included in this list.

827 Inserted by *Crimes (Rape) Act 1991* s 3.

828 *Crimes Act 1958* s 37(1)(a).

829 *Crimes Act 1958* s 37(1)(b)(i).

830 *Crimes Act 1958* s 37(1)(b)(ii).

831 *Crimes Act 1958* s 37(1)(b)(iii). The *Crimes Act 1958* s 37 was later amended further by *Crimes (Amendment) Act 1997* s 4 to add at the end of s 37(1) that the judge is must ‘relate any direction given to the facts in issue in the proceeding so as to aid the jury’s comprehension of the direction.’ Section 37(2) was also inserted: ‘A judge must not give to a jury a direction of a kind referred to in sub-section (1) if the direction is not relevant to the facts in issue in the proceeding.’

832 See Bernadette McSherry, ‘Legislating to Change Social Attitudes: The Significance of Section 37 (A) of the Victorian Crimes Act 1958’ (Paper presented at the Conference: Without Consent: Confronting Adult Sexual Violence, held 27-29 October 1992, Melbourne, 1993); and Simon Bronitt, ‘The Direction of Rape Law in Australia’ (1996) 18 *Criminal Law Journal* 249.

Reform Commission of Victoria stated: 'Another benefit of expressing these directions in legislative form is that the community in general will be made aware of what type of evidence is, or is not, sufficient to prove lack of consent'.⁸³³

JURY DIRECTIONS ON THE MEANING OF CONSENT

7.24 Our research showed that judges gave the mandatory directions on consent required by section 37 in all but one of the directions considered.⁸³⁴ An example of a standard direction under section 37(1)(a) is:

Consent obviously is a state of mind. It means free agreement. It may be evidenced by what the woman says or does or what she does not say or do. But evidence that a woman does not say or do anything to indicate consent is normally enough to show the act takes place without that person's free agreement...⁸³⁵

7.25 Most judges then referred to the relevant parts of section 37(1)(b)⁸³⁶ which sets out the situations in which a person is 'not to be regarded' as having freely agreed to a sexual act.

7.26 A person is not to be regarded as having freely agreed to a sexual act because he or she freely agreed to engage in a sexual act with the accused or another person on another occasion.⁸³⁷ In one case in which the complainant and accused had in the past engaged in consensual intercourse, the judge said that:

833 Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure* Appendixes to Interim Report No 42 (1991) 8.

834 In this matter (Trial 23) the judge omitted the direction pursuant to s37(1)(a), that the fact that a person did not say or do anything to indicate free agreement is normally enough to show that the act took place without the person's free agreement, when consent was in issue. It does not appear from the transcript that the Prosecutor took exception to this oversight. The judge was clearly asked to re-direct on a number of issues but there was no re-direction on consent.

835 Trial 5.

836 For example, in all nine matters in which the accused and complainant were former/current partners, the judges gave the mandatory direction under s 37(1)(b)(iii), that 'a person is not to be regarded as having freely agreed to a sexual act just because on that or an earlier occasion, she or he freely agreed to engage in another sexual act ...with that person...'.⁸³⁷

837 Section 37(1)(b)(iii).

...Nor, because on another earlier occasion that she did consent to a sexual act with the accused, does that necessarily mean that she was consenting on the occasion in question.⁸³⁸

7.27 While this direction is close to the spirit of the legislation on consent it might be argued that the inclusion of the word ‘necessarily’ implies the *possibility* of prior consent. The inclusion of the word ‘necessarily’ is also inconsistent with the wording of the legislation.

7.28 Trial 20 provides a useful example of a direction on the communicative model of consent:

...you have heard in this case...of previous consensual intercourse with the accused, and there has [sic] been questions about whether or not she had consensual intercourse with another or others, but whatever the answer on that, well, the fact that she may have is not to be regarded as resulting in free agreement on this occasion.

7.29 However in several other instances judicial elaborations on the meaning of consent appeared to undermine the effect of the standard statutory direction that consent means ‘free agreement’.⁸³⁹ Trial 1 involved the alleged gang rape of a young woman who worked at a fast food outlet by five men who frequented the outlet on a regular basis. The judge gave the standard directions on consent as required by section 37(1)(a) omitting, however, the directions under 37(1)(b)⁸⁴⁰ and added:

Victims of rape are not confined to the ranks of the virtuous. A prostitute may be raped as may a lady of loose morals and/or voracious sexual appetite.

7.30 Given the context of the direction—for example the judge’s reference to the complainant as having ‘eccentric sexual habits’⁸⁴¹—it seems clear that the judge was not implying that the complainant belonged in the ‘ranks of the

838 Trial 18. In this case, the complainant alleged that her estranged partner arrived at her house demanding to know about her movements and whether she had been sleeping with someone. He then allegedly raped her.

839 Trials 1, 8, 14 and 15 are examples which will be discussed in this section. A discussion of the directions on reasonable belief can be found at paras 7.51–64 below.

840 See above para 7.10.

841 See para 7.145 below. That paragraph contains a quote in which the judge uses the words ‘eccentric sexual habits’. The Prosecutor objected to the use of these words.

virtuous'. The judge made additional comments which seem inconsistent with the purpose of section 37(1)(b)(iii).⁸⁴² For example:

The relevance of the gang-bang is two-fold. Firstly it goes to the issue of consent. You are entitled, if you see fit, to infer that a woman who has previously agreed to multiple sexual partners, is more likely to consent to further such activity than a woman who has not.⁸⁴³

7.31 Trial 14 was a case which involved three alleged indecent assaults by an accused against his former partner. The accused gave evidence that the complainant had said to him on an earlier occasion that she agreed to him performing sexual acts on her when she was in a state of oblivion from alcohol, in order to test the accused's assertion that when she was in such a condition anyone could do anything to her and she would not know it was happening.⁸⁴⁴ The judge again gave all the mandatory consent directions but went on to elaborate about the issue of consent.

What is different about this case is that it is contended that there was consent by [the complainant]. In what I will call the normal case the question of consent centres around the time of the performing of the act. This case is different because the consent that is alleged here is not a consent given at the time of the performing of the act, but a consent said to have been given previously and to be still operative at that time of the commission of the act.

7.32 The defence submitted that consent to a sexual act can legitimately be given at a time prior to the act in question. This was accepted by the judge, who directed the jury accordingly.⁸⁴⁵

842 *Crimes Act 1958* s 37(1)(b)(iii) reads: 'a person is not to be regarded as having freely agreed to a sexual act just because—(iii) on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person'. This direction *must* be given by the judge where relevant to the facts of the case.

843 The judge went on: 'You are also entitled to more readily accept, if you see fit, an accused statement that he believed a woman was consenting to multiple sexual partners, when she says to him that she had previously enjoyed such activity, or he is aware that she previously so enjoyed such activity.'

844 Trial 14 is also discussed in the Interim Report paras 7.66–70.

845 As the judge directed: 'Remember that [defence counsel] does not have to prove that these things were said [the alleged conversation in which the complainant stated that she could drink herself into such a condition that anyone could do anything to her and she would not know] and that they amount to consent, it is for the Crown to prove beyond reasonable doubt that these things were not said or if they were that they do not amount to consent to the performance of the acts which occurred in the circumstances in which they occurred.'

7.33 The charges in Trials 1 and 14 reveal a notion of ‘blanket consent’ to sexual acts which is inconsistent with the spirit of the communicative model of consent reflected in sections 36 and section 37(1)(a).⁸⁴⁶ As noted in the Interim Report, it appears that the intent of the section was to ensure that consent is to be given to sexual relations each and every time such acts are proposed.⁸⁴⁷ To suggest otherwise could lead to resurrection of the idea that a woman who consents to sex on one occasion abandons her right to refuse on others.

INTERIM REPORT RECOMMENDATIONS ON CONSENT

7.34 The Interim Report recommended that the wording of the mandatory jury direction on consent should be changed to remove the word ‘normally’⁸⁴⁸ from section 37, to make it clear that the failure of the complainant to say or do anything is sufficient of itself to show lack of free agreement. As Bernadette McSherry⁸⁴⁹ has commented :

The use of the word ‘normally’ in this section seems to imply that the presumption of non-consent in such circumstances may be displaced if evidence can be produced showing that for some reason physical inactivity or silence did amount to consent.

846 This notion of ‘blanket consent’ is arguably similar to that of ‘implied consent’ applied by the trial judge in the Canadian case of *R v Ewanchuk* and upheld by the Alberta Court of Appeal: (1998) 212 A.R. 81. This case is discussed in Gavin Last, ‘Advances Less Criminal Than Hormonal: Rape and Consent in *R v Ewanchuk*’ (1999) 5 *Appeal: Review of Current Law and Law Reform* 18. The existence of implied consent within the law of sexual assault was emphatically denied by the subsequent Canadian Supreme Court decision: *R v Ewanchuk* [1999] 1 S.C.R. 330. The majority held in relation to consent (per Major J, Lamer CJC, Cory, Iacobucci, Bastarache and Binnie JJ concurring): ‘The absence of consent, however, is subjective and determined by reference to the complainant’s subjective internal state of mind towards the touching, at the time it occurred.’ (p348) And in relation to ‘implied consent’ (p349): ‘If the trier of fact accepts the complainant’s testimony that she did not consent, no matter how strongly her conduct may contradict that claim, the absence of consent is established and the third component of the actus reus of sexual assault is proven. The doctrine of implied consent has been recognized in our common law jurisprudence in a variety of contexts but sexual assault is not one of them. Canadian law defines consent very similarly to the Victorian legislation.’

847 Interim Report para 7.74.

848 See Recommendation 77, Interim Report.

849 Bernadette McSherry, ‘Legislating to Change Social Attitudes: The Significance of Section 37 (A) of the Victorian Crimes Act 1958’ (Paper presented at the Conference: Without Consent: Confronting Adult Sexual Violence, held 27-29 October 1992, Melbourne, 1993) 379.

7.35 The submissions opposed to our interim recommendations were those from the Victorian Bar, the Criminal Bar Association and Victorian Legal Aid.⁸⁵⁰ The Victorian Bar wrote:

The Bar does not believe it is necessary to change the meaning of consent. We accept the proposition that the definition of consent should reflect contemporary values about sexual relationships, such as mutual respect and communication. But it is simply going too far—in the sense that it is not consistent with these values—to suggest that the fact that a person did not do or say anything to indicate free agreement to the sexual act is evidence that the act took place without that person's free agreement.⁸⁵¹

7.36 This comment appears to suggest that the 1991 amendment relating to failure to say or do anything to indicate consent should be reversed.

7.37 By contrast, the majority of submissions to the Interim Report on this point were in favour of a change to the definition of consent which underlines the intention of the 1991 reforms.⁸⁵² For example, the Department of Human Services submission noted:

Legislative endorsement of a 'communicative model' of sexual relations would help deal with problematic social attitudes towards sexual practices that continue to persist.⁸⁵³

RECOMMENDATIONS

7.38 The Commission confirms the recommendation in the Interim Report that section 37 be changed to remove the word 'normally'. This change will reinforce the communicative model of consent and will make it more difficult for an accused to argue that a person who was too frightened or intoxicated to actively

850 VLA did not give any reasons of its own for disagreeing with the recommendation, but merely referred to the CBA submission.

851 Submission 48.

852 Submissions 19, 24, 26, 30, 40, 44 and 47 to the Interim Report were explicitly in favour of Recommendation 77. Submission 3 appeared to support the recommendation although did not address it specifically. Submissions to the Discussion Paper were less favourable. Submissions 7, 11, and 27 supported the change, while six submissions opposed it. The arguments in the opposing submissions were discussed in the Interim Report para 7.59.

853 Submission 44.

indicate their unwillingness to participate in sex was in fact consenting to the sexual act.⁸⁵⁴

7.39 The proposed change will overcome the decision in *R v Laz*.⁸⁵⁵ Here the Court of Appeal upheld an appeal against conviction in a case in which the trial judge had directed the jury that evidence that the woman did not say or do anything *is evidence* that she did not consent. Our recommendation also makes it clear that consent must be given at the time the act occurred.

7.40 In Chapter 3 we recommended prosecutor training and judicial education to assist judges to give jury directions which are consistent with this proposed legislative change.



RECOMMENDATION(S)

169. The mandatory jury direction on consent contained in section 37 of the Crimes Act 1958 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.’

JURY DIRECTIONS ON FACTORS NEGATING CONSENT

7.41 After defining consent as ‘free agreement’ section 36 goes on to provide a non-exhaustive list of circumstances in which a complainant is not to be taken to have freely agreed to an act (‘vitiating factors’). The list includes such factors as where a person is asleep, unconscious or so affected by alcohol or drugs as to be incapable of freely agreeing, where a person submits out of force or fear of force and where a person is mistaken about the sexual nature of the act or the identity of the person.

854 See Helen Jones, ‘Rape, Consent and Communication: Re-Setting the Boundaries?’ (2003) 6 *Contemporary Issues in Law* 23. She writes (p34): ‘In ‘date rape’, the focus is on the woman’s behaviour, her negotiation of risk, her responsibility, her signals, her communication (or lack of it). Little consideration is given to the man’s awareness of the risk he was taking.’

855 [1998] 1 VR 453. The Interim Report explains that the proposed change does not relieve the prosecutor of the obligation to prove the case against the accused and does not affect the right of the accused to remain silent, at para 7.79.

7.42 In the 13 matters in which one or more of the vitiating factors were assessed by the researchers as being relevant to the case⁸⁵⁶ only seven charges referred to the factors. The other six made no reference to the vitiating factors at all. See Table 6, Appendix 4.

7.43 It is significant that in the charges examined, judges directed juries on the vitiating factors in only about half the cases where one or more were arguably relevant to the issue of consent. The legislation does not require judges to direct on vitiating factors which may be relevant to the facts in issue. However it is obviously preferable that they do so in cases where one or more of these factors is relevant.

7.44 Trial 15 is a good example of a case in which one of the vitiating factors—intoxication—was clearly relevant to the issue of consent yet the judge did not direct according to section 36(d).⁸⁵⁷ This was a case involving the same accused and complainant as Trial 14 (the case involving alleged indecent assaults by a man on his former partner) but concerned separate offences. The judge⁸⁵⁸ gave the jury the mandatory consent directions. Among his 24 reiterations of the words 'beyond reasonable doubt' the judge directed the jury on how they might consider the significance of the complainant's state of intoxication at the time of the alleged offences:

856 The expanded categories of non-consensual sex were coded as relevant if:

the charge revealed the existence of undisputed facts relating to, for example, the complainant being asleep/unconscious/severely intoxicated at the time of the alleged offence; and

the charge revealed disputed facts that relate directly to one or more of the factors, for example where the complainant argued that she submitted through force or fear of force. Presumably, in all genuine rape cases, fear will be an element, so it was only where the complainant said that she *submitted* due to fear that the case was coded as such.

In two cases it was not known if the vitiating circumstances were relevant due to lack of adequate fact summaries in the charges.

857 Section 36(d) reads: '...Circumstances in which a person does not freely agree to an act include the following:...(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing.'

858 The same judge as for Trial 14.

The effect of intoxication on her behaviour may be relevant in two ways in this case, first of all depending on the state of intoxication that you find, it may affect her ability to have been aware of what was going on at the time and on the other hand, to be able to remember accurately, what went on, at the relevant time. Secondly, a state of intoxication may cause a person to do or say things at the time, which she may not have said or done if she had been sober. The state of intoxication may cause a person to more readily agree to do something, which she would not have agreed to, if she had been sober and which she might regret thereafter.⁸⁵⁹

7.45 Given the judge's lengthy exposition on the issue of the complainant's intoxication, it is noteworthy that he did not direct the jury pursuant to section 36(d).⁸⁶⁰ It is possible to read the judge's remarks as a suggestion that the complainant may have been so intoxicated that she was not capable of freely agreeing, but did not relate this possibility to the issue of non-consent as defined by section 36. This may have affected the extent to which the jury took into account the complainant's alleged intoxication in considering whether she freely agreed to the sexual acts.

7.46 In Trial 11 the complainant gave evidence that she was asleep and woke up to find the accused penetrating her vaginally. The judge did not direct on section 36(d).

7.47 Trial 22 involved rape allegations by a prostitute against her client. The complainant alleged that after the accused refused to pay for the services up front and she told him that she would not have sex with him he grabbed her by the throat so that she had difficulty breathing. She said that when she struggled he threatened to kill her, upon which she agreed that she would not struggle further and submitted to penetration. The judge did not direct in accordance with section 36(a) or (b).⁸⁶¹

7.48 These examples appear to be exactly the types of cases envisaged in section 36 as negating free agreement.

859 Trial 15. Contrast this direction with that of the judge in Trial 5, who referred to a woman not freely agreeing if 'so affected by alcohol that she does not understand her situation and is not capable of making up her mind.'

860 It should be noted here that the directions pursuant to ss 36(a)–(g) are not mandatory.

861 These sections read: Circumstances in which a person does not freely agree to an act include the following: ... (a) the person submits because of force or fear of force to that person or someone else; (b) the person submits because of the fear of harm of any type to that person or someone else...

7.49 Our study suggests that judges do not always instruct juries on factors which may negate consent in some cases where such factors are apparently relevant. Nor do prosecutors appear to be objecting to this omission or drawing attention to vitiating factors when arguing the question of actual consent. In Chapter 3 we have recommended judicial education and prosecutor training programs. Such programs should refer to the relevance of vitiating factors in instructing juries in sexual offence trials. Prosecutors should be made aware of the need to refer to relevant vitiating factors in their arguments and to be alert to any omissions by judges to draw attention to such factors in their charges to juries.

THE ACCUSED'S STATE OF MIND⁸⁶²

7.50 In order to obtain a rape conviction the Crown must prove beyond reasonable doubt that the accused intentionally sexually penetrated the complainant without her consent and that the accused knew that the complainant was not consenting or might not be consenting.⁸⁶³ Under the present law a person who had an honest belief that the complainant was consenting to the act (sexual penetration or an indecent act) cannot be convicted of rape or indecent assault even if that belief was objectively unreasonable.

7.51 Since 1991 the judge has been required (where relevant) to direct a jury that 'in considering the accused's alleged belief that the complainant was consenting to the sexual act, it must take into account whether that belief was reasonable in all the relevant circumstances'.⁸⁶⁴

7.52 In three quarters of the jury charges examined, the judges adhered to the wording of the legislation or paraphrased the legislation in directing juries on reasonable belief. An example of such a standard direction is:

862 The mental element of rape is discussed in detail in Chapter 8 of this Report. See also Interim Report paras 7.82–113.

863 *Crimes Act 1958* s 38.

864 *Crimes Act 1958* s 37 (1)(c).

The Crown must prove that the accused intended to commit the crime of rape in the sense that at the time he had the act of sexual penetration of the complainant he was aware that she was not consenting or else realised that she might not be consenting and determined to have sexual penetration of her whether she was consenting or not. In determining whether the accused believed the complainant was consenting you must take into account whether that belief was reasonable in all the circumstances.⁸⁶⁵

7.53 In comparison with the consent directions discussed above⁸⁶⁶ the judges did not elaborate much, if at all, on the standard direction on belief in consent. In six charges the judges went on to say that reasonableness was ‘one of the many guides the jury could use to determine the accused’s state of mind’.⁸⁶⁷

7.54 In a quarter of the charges examined, the directions on belief were other than ‘standard’. In one, the judge took an objective approach and told the jury that if they were satisfied beyond reasonable doubt that the accused’s belief in the complainant’s consent was not reasonable, ‘then the necessary guilty mind is proved. If you are not satisfied that the accused’s belief was unreasonable, then again you should acquit’.⁸⁶⁸ Defence counsel made no objection.

7.55 In the remaining five charges classed as ‘non-standard’ comprehensibility was sometimes an issue.⁸⁶⁹ For example, in Trial 14 the judge reiterated several times to the jury how they ought to treat the notion of reasonableness against the subjective standard of honest belief, to the extent that the direction became confusing and entangled. To illustrate:

But remember, the belief itself does not have to be a reasonable belief, if it is in fact held, even though it is unreasonable, then he can not be convicted, and that is so even if it is a mistaken belief.⁸⁷⁰

7.56 In Trial 3, the jury is likely to have found the direction on the accused’s state of mind difficult to follow because of the complex sentence structure used:

865 Trial 9.

866 Paras.7.25–34.

867 Trials 12, 17, 18, 19, 23 and 24.

868 Trial 5.

869 That is not to imply that the juries in the 18 charges in which a ‘standard’ direction on reasonable belief was given would necessarily have comprehended the somewhat artificial distinction inherent in the notion of an honest but unreasonable belief.

870 Trial 14.

In other words, to put it quite bluntly, if absence of consent which is not communicated may nevertheless satisfy the prosecution proof, any non-communication by a complainant to an accused may be all the more relevant in your eyes to proof or otherwise of an accused's awareness in his mind, what his belief was to the situations that you find in existence in sexual contact between persons where passions may be involved.

7.57 The same judge as for Trial 14, in Trial 15⁸⁷¹ again said on several occasions that an unreasonable belief honestly held must lead to an acquittal. After two and a half pages on this point, the judge went on to instruct the jury that in considering the question of whether it would have been reasonable for the accused to believe that the complainant was consenting to intercourse, '[y]ou should look at all the circumstances, not only the immediate circumstances surrounding that event, but indeed the broader circumstances that encompass their life and relationship in the last ten years and so on'.⁸⁷²

7.58 In this case the complainant alleged that the accused (her former de facto partner) dragged her out into the bushland surrounding her home, assaulted then raped her.⁸⁷³ The direction that the jury consider the past relationship of the parties to determine whether the accused believed that his former partner was consenting is legally correct. However it is clearly inconsistent with the spirit of section 37, which states that a person is not to be regarded as having freely agreed to a sexual act just because she freely agreed on an earlier occasion.⁸⁷⁴ We recommend below a change in the law to address this issue.

7.59 In a number of other charges juries were directed that past consensual sexual intercourse between the complainant and accused or complainant and others may be taken into account by the jury in deciding the issue of honest belief in consent. For example in Trial 1 the judge directed the jury as follows:

871 Trial 15 involved the same complainant and accused as Trial 14 (but separate offences).

872 Trial 15.

873 There were four charges of kidnapping, rape, intentionally causing injury and recklessly causing injury, the last two as alternatives to the first two.

874 *Crimes Act 1958* s 37(1)(b)(iii). The accused was acquitted on all charges in both Trials 14 and 15.

You are also more entitled to more readily accept, if you see fit, an accused statement that he believed a woman was consenting to multiple sexual partners, when she says to him that she had previously enjoyed such activity, or he is aware that she previously so enjoyed such activity.⁸⁷⁵

7.60 In Trial 8 the complainant alleged that the accused orally raped and indecently assaulted her whilst she was falsely imprisoned in a car. The accused argued in his defence that they had engaged in prior acts of consensual oral sex on a number of occasions. The judge gave all the mandatory consent directions, including that prior sexual acts do not equate to free agreement, and made a number of comments on the issue of reasonable belief. He went on to say:

...you must...take into account the past dealings between these people, if any, as you find them to be, to see whether you think it would have been reasonable for him to believe on this occasion that she was consenting to intercourse, given for example, their past sexual history, if you accept that occurred.

7.61 Such directions may be consistent with the present law relating to the accused's state of mind but they illustrate a deficiency in it. Section 36 of the *Crimes Act* says that consent requires 'free agreement' but this provision is undermined by the fact that evidence of previous consensual sexual activity can be taken into account in deciding whether or not the accused on this occasion honestly believed the complainant was consenting. For example if a woman tells two men at a party that she has on a previous occasion enjoyed a threesome and they later that night coerce the woman into having sex with them, the men would be entitled to rely on her statement in support of their argument that they honestly believed that she had consented to sex with them on the later occasion.

7.62 This contradicts the communicative model of consent introduced in section 36 and section 37 of the *Crimes Act 1958* and potentially allows an accused to avoid culpability by relying on previous statements or occurrences which arguably bear no relation to the act in question.

7.63 Chapter 8, which deals with the required mental element for non-consensual sexual offences, makes recommendations to deal with this issue.

875 This followed on directly from the quote in paragraph 7.30 which was discussed in the context of consent.

JURY DIRECTIONS ON DELAY IN COMPLAINT

THE CURRENT LAW

7.64 The Discussion Paper referred to the corroboration warnings which were routinely given in sexual offence cases.⁸⁷⁶ Until 1980 juries were routinely warned that it was dangerous to convict the accused unless the evidence of the complainant was corroborated. The requirement to give a corroboration warning was abolished by section 62(3) of the *Crimes Act* but this did not prevent judges giving a corroboration warning where they thought it appropriate to do so.⁸⁷⁷ In 1988 the former Law Reform Commission of Victoria recommended that the section should be amended to make it clear that the court should not give a warning that complainants in sexual offence cases are an unreliable class of witness.⁸⁷⁸ This provision is now found in section 61(1)(a) of the *Crimes Act*.

7.65 It is common for sexual offence victims to delay reporting the offence and in many cases not to report at all.⁸⁷⁹ The Commission's previous empirical research found that although just over half the reports of rape were made within a week, a significant proportion of reports were made five years or more of after the alleged offence occurring.⁸⁸⁰ Delays in reporting occurred more frequently and tended to be for a longer period in the case of penetrative offences other than rape.⁸⁸¹ These offences often involved child complainants.

7.66 Even when legislation removed the need to give corroboration warnings, the fact that a person did not tell anyone about a sexual assault as soon as it occurred was regarded as affecting the credibility of the complaint. In *Kilby v R*⁸⁸² the High Court said that the failure of a complainant to report a rape promptly could be an important factor in deciding on her credibility and that the jury

876 Discussion Paper para 8.135.

877 The provision did not remove the requirement for corroboration of witnesses with impaired mental functioning or children. This was removed by *Crimes (Sexual Offences) Act 1991*, s 3 which created new offences.

878 Law Reform Commission of Victoria, *Rape and Allied Offences: Procedure and Evidence Report 13* (1988) 42.

879 Interim Report para 2.43, Graph 3.

880 Ibid 11.5%.

881 In the case of penetrative offences other than rape, only about 16% of offences were reported within a week and over 30% were reported more than five years later. Ibid para 2.35.

882 (1973) 129 CLR 460.

should be instructed accordingly. This decision has been criticised on the basis that it ignored research which says that delay in reporting is common amongst victims of sexual assault.⁸⁸³

7.67 In 1991, following the former Law Reform Commission of Victoria's recommendation that judges should be required to warn juries that there may be good reasons for a delay in making a complaint of sexual assault, the Victorian Parliament amended section 61 of the *Crimes Act 1958*.⁸⁸⁴ The amended section 61 provided that in cases involving a delay in reporting, a judge be required:

- to warn the jury that delay in complaining does not necessarily indicate that the allegation is false; and
- to inform the jury that there may be good reasons why a victim of sexual assault may hesitate in complaining about it.⁸⁸⁵

7.68 A Department of Justice evaluation of these and other reforms undertaken during the mid 1990s—the Rape Law Reform Evaluation Project (RLREP)—reported that judges were generally giving the direction which was required by the legislation, but that the manner and approach in which this was done varied considerably.⁸⁸⁶ The authors expressed concern that some judges were continuing to give what were effectively ‘corroboration warnings’ i.e. directing the jury that it was unsafe to convict an accused on the uncorroborated evidence of a sexual assault victim. Recommendation 35 made by RLREP was that:

The legislature should consider re-wording the delay warning. As currently worded (‘...a delay in making a complaint...*does not necessarily* indicate that the allegation is false...), the direction carries the implication that there *is* a reason to suspect that late complaints may be false.⁸⁸⁷

7.69 Following this recommendation, section 61(1)(b) was amended to remove the word ‘necessarily’. The current section 61 provides that:

883 See Standing Committee on Law and Justice, Legislative Council, New South Wales Parliament, *Report on Child Sexual Assault Prosecutions* Report No 22 (2002) para 4.159. The Report goes on to say about *Kilby*: ‘Instead, the *Kilby* warning allowed conclusions about the complainant’s credibility to be drawn based on stereotypical views of how a victim ‘should’ act after being sexually assaulted.’

884 *Crimes Act 1958* s 61 inserted by *Crimes (Rape) Act 1991* s 3.

885 *Crimes Act 1958* s 61(1)(b).

886 Melanie Heenan and Helen McKelvie, *Crimes (Rape) Act 1991, An Evaluation Report* (1997).

887 *Ibid* 373.

- judges must not warn or suggest in any way to the jury that the law regards complainants in sexual offence cases as an unreliable class of witness;
- if evidence is given or a question or statement is made suggesting that there was a delay in making a complaint about the alleged offence, the judge must inform the jury that there may be good reasons why a victim of sexual assault may delay or hesitate in complaining about it;
- judges may, however, make comments about the reliability of the complainant's evidence if appropriate in the interests of justice;⁸⁸⁸ and
- judges may only make 'interests of justice' comments when that is necessary to ensure a fair trial.⁸⁸⁹

7.70 In her Second Reading Speech for the *Crimes (Amendment) Act 1997*, which amended the provisions relating to jury directions on consent and delay, the then Attorney-General Jan Wade said:

The current wording of the direction about delay carries an implication that there is a reason to suspect that late complaints may be false. The amendment removes that implication. This is an important move away from the stereotype of how a sexual assault victim behaves or ought to behave following a sexual assault. Further, there is a need to legislatively acknowledge that features such as delay in complaint, lack of forensic evidence and lack of other corroborative evidence are common to most sexual assault cases.⁸⁹⁰

7.71 The purpose of this legislation was to ensure that juries understood that many sexual assault cases involve delay and lack of corroborative evidence and to remove as far as possible stereotypical assumptions about the unreliability of evidence given by complainants in sexual offence cases.

7.72 However, the High Court in the case of *Crofts v R*⁸⁹¹ held unanimously that section 61(1) of the *Crimes Act* does not prevent a trial judge from making a

888 Section 61(2) *Crimes Act 1958* 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'.

889 Section 61(3) *Crimes Act 1958* states that 'Despite sub-section (2), a judge must not make any comment on the reliability of evidence given by the complainant in a proceeding to which sub-section (1) applies if there is no reason to do so in the particular proceeding in order to insure a fair trial'.

890 Jan Wade, Second Reading Speech for the Crimes (Amendment) Bill 1997 (9 Oct 1997).

891 (1996) 186 CLR 427.

Kilby direction and commenting that a delay in complaining of sexual assault could affect the credibility of the complainant. Such a warning has become known as the *Crofts* warning. The courts have also said where the complainant delays in complaining, section 61(1) does not remove the need to warn juries about the effect of delay on the ability of the accused to put forward a defence (the *Longman*⁸⁹² warning). These warnings are discussed in more detail below.

7.73 The result is that when the statutory directions and common law warnings are combined, juries may receive directions on delay which may seem to them to be contradictory. For example they may hear both that there are good reasons why a complainant may delay making a complaint and also that they should consider such delay when assessing the complainant's credibility.

7.74 Our research examined jury directions to ascertain:

- how judges were applying section 61(1)(a) and (b) of the *Crimes Act*;
- what judges tell the jury if the complaint is made soon after the offence is alleged to have occurred (the 'recent complaint' principle); and
- the circumstances in which *Longman* and *Crofts* common law warnings are being given and the form of those warnings.

How Judges Directed the Jury on Section 61

7.75 Where the issue of delay arises in the course of a trial, section 61 of the *Crimes Act* requires the judge to tell the jury that there may be good reasons for a complaint to delay or hesitate in complaining.⁸⁹³

7.76 In our study there were 14 cases in which judges gave a direction on delay.⁸⁹⁴ In 12 of these 14 cases the old form of warning—that delay does not necessarily indicate that the allegation is false—was given, even though the alleged offences occurred after the 1997 amendment came into effect.⁸⁹⁵ The prosecution did not raise an objection to this form of the direction in any of these cases.

892 *R v Longman* (1989) 168 CLR 79. The *Longman* warning is discussed below, paras 7.90–9.

893 See para 7.70 above.

894 It is interesting to note that only five of these were matters where there actually was a delay in complaint. See n 896 below.

895 In the other two the alleged offences occurred prior to 1 January 1998, the implementation date for the 1997 amendments. One of these two cases involved multiple offences occurring over a period of time. As the offence dates were uncertain and as the vast majority were alleged to have occurred prior to 1 January 1998, the old wording of section 61 was taken to be the correct version.

7.77 In four of the five trials in which there was actually a delay in complaint,⁸⁹⁶ the old section 61 wording was used. Only one of these matters involved some offences which had allegedly occurred before the 1997 amendment.

7.78 As discussed in 7.68–72 above, section 61(1)(b) was amended in 1997 to remove any implication that there is a reason to suspect that late complaints may be false. For offences allegedly occurring after the implementation date, the trial judge must only direct the jury that there may be good reasons for a delay in complaining. The Commission is concerned that the old version of the delay direction is being used for alleged offences occurring after the legislative amendment. We have made recommendations about training for prosecutors and judges in Chapter 3 of this Report.⁸⁹⁷ We make other recommendations about delay below.

Recent Complaint

7.79 Although many complainants delay in reporting sexual assaults to the police, some complainants do tell someone about the alleged assault shortly after it occurs. The expression 'recent complaint' is used to describe a 'complaint' made at the first available opportunity after the alleged events. In Chapter 4 of this Report we discuss the hearsay rule.⁸⁹⁸ 'Recent complaints' of sexual offences are an exception to the hearsay rule, which allow either the complainant or a third person to whom the complaint is made to give evidence of what the complainant said shortly after the alleged assault occurred. Evidence of a 'recent complaint' is not evidence of the truth of the allegation that the assault occurred, but can only be used to show consistency on the part of the complainant. The rule is based on the expectation that a victim of sexual assault can and should complain at the first opportunity. It assumes that as a matter of human experience victims will report immediately, an assumption that does not find support in the research on this issue.⁸⁹⁹

896 The five trials were: Trial 3 (2½ months), Trial 9 (2½ years), Trial 10 (10 to 11 days), Trial 11 (7½ years) and Trial 13 (6½ to 8½ years—the offences allegedly occurred over a two year period).

897 Recommendation 36–9; Recommendations 40, 41.

898 Chapter 4, paras 4.99–111.

899 See para 5.100 of the Interim Report. Children are even less likely than adults to report sexual assault immediately or even soon after the assault and typically report months or even years later. See Anne Cossins, 'The Hearsay Rule and Delayed Complaints of Child Sexual Abuse: The Law and the Evidence' (2002) 9 (2) *Psychiatry, Psychology And Law* 163. Cossins conducts an extensive review of psychological literature and concludes that delay in reporting sexual assault, rather than being an

7.80 In many charges judges gave lengthy and detailed directions on recent complaint. In nine charges⁹⁰⁰ judges explained the rationale and background to the rule. These judges told juries that the reason for the exception to the hearsay rule (which they also explained) is that 'when someone is compelled to sexual conduct they normally complain about it'. For example, the judge in Trial 18 said:

The evidence of the complaint is only given because it might have an effect upon the credibility of her story. In other words, you might think that a victim of a sexual assault is more likely, if it has happened, to complain about it than if she does not complain about it.

7.81 Although judges are required to tell juries that recent complaints are only admissible to bolster the complainant's credibility, the idea that victims of sexual assault normally complain about it promptly is inconsistent with the spirit of section 61.

7.82 Interestingly, Ormiston JA in the recent Court of Appeal case of *R v Munday*⁹⁰¹ commented that he would favour the omission of the explanation—given by 9 judges in our sample of 24—that the reason for the exception to the hearsay rule is that persons subjected to sexual assault generally complain about it:

I would not disagree that this sentence ['The reason for this exception is that it is considered in general that persons who are offended against sexually will complain about it'] might better be omitted from future charges, as appears now to be recognised in the most recent version in the County Court charge book.

7.83 The recent complaint rule is complex. For judges, directing lay people on recent complaint evidence and the use to which it can be put is clearly difficult. Many of the directions we examined were extremely complicated. Simon

aberrant response, is in fact typical for children. The NSW Standing Committee on Law and Justice in its recent report on child sexual assault prosecutions criticised the rules of hearsay evidence as they apply to children, saying that the 'fresh in the memory requirement' as interpreted by the High Court 'would lead to the exclusion of evidence of complaint of most victims of child sexual assault' because 'delayed disclosure of sexual assault is a *typical* feature of the way that victims respond to child sexual abuse.' Standing Committee on Law and Justice, Legislative Council, New South Wales Parliament, *Report on Child Sexual Assault Prosecutions* Report No 22 (2002).

900 Trials 4, 10, 16, 17, 18, 19, 21, 22 and 24. Only Trial 10 involved a delay.

901 *R v Munday* [2003] VSCA 189, para [18]. Callaway JA and Batt JA agreed with Ormiston JA's judgment.

Bronitt⁹⁰² argues that the rules and directions surrounding recent complaint are not only complicated, difficult for judges to explain and hard for the jury to understand, but they are a fertile ground for defence appeals. In particular, he argues that a direction on permissible and non-permissible use of such evidence is a difficult concept for jurors to grasp.⁹⁰³

7.84 In Trial 18 the judge gave a standard direction on recent complaint:

Now in considering the evidence which [the complainant] gave of the complaint she made to her friend and the evidence her friend gave of the giving of that complaint, you must bear in mind that that evidence springs from the same source as the evidence of the crime. It may or may not demonstrate consistency but it is not to be regarded as evidence independent of the complaint because it is not independent evidence...⁹⁰⁴

7.85 One has to wonder whether a lay person has any chance at all of understanding what this means. The previous Law Reform Commission of Victoria noted that it is 'unrealistic to expect a jury, no matter how well directed, to use evidence for one particular purpose but not for a more general purpose'.⁹⁰⁵

7.86 In Chapter 4 we recommended changes to the hearsay rule based on the provisions of the Uniform Evidence Act.⁹⁰⁶ This change would simplify jury directions by making it unnecessary for judges to explain that such evidence can be used only to demonstrate the consistency of the complainant's evidence.⁹⁰⁷

The Crofts Warning

902 Simon Bronitt, 'The Rules of Recent Complaint: Rape Myths and the Legal Construction of the "Reasonable" Rape Victim' in Patricia Eastal (ed) *Balancing the Scales: Rape, Law Reform and the Australian Culture* (1998).

903 Ibid 46.

904 Trial 18.

905 Law Reform Commission of Victoria, *Rape and Allied Offences: Procedure and Evidence*, Report No 13 (1988), 43.

906 Recommendations 87–93.

907 Children are even less likely than adults to report sexual assault immediately or even soon after the assault and typically report months or even years later. The NSW Standing Committee on Law and Justice in its recent report on child sexual assault prosecutions criticised the rules of hearsay evidence as they apply to children, saying that the 'fresh in the memory requirement' as interpreted by the High Court 'would lead to the exclusion of evidence of complaint of most victims of child sexual assault' because 'delayed disclosure of sexual assault is a *typical* feature of the way that victims respond to child sexual abuse.' Standing Committee on Law and Justice, Legislative Council, New South Wales Parliament, *Report on Child Sexual Assault Prosecutions* Report No 22 (2002) para 4.105.

7.87 In *Crofts v R*,⁹⁰⁸ the High Court held that the trial judge has discretion in individual cases to invite the jury to use lack of recent complaint to impugn the complainant's credibility. The judge may give a *Crofts* warning even though section 61(1)(a) of the *Crimes Act* prevents the judge from warning or suggesting to the jury that the law regards complainants in sexual offence cases as an unreliable class of witness and section 61(1)(b) requires the judge in a relevant case to tell the jury that there may be good reasons for a victim of a sexual assault to delay in complaining about it.

7.88 In our study, 11 judges⁹⁰⁹ gave the jury the *Crofts* warning—‘The absence of or delay in making a complaint may also be used to suggest inconsistency of conduct’.⁹¹⁰ Only two of these cases involved a delay in complaint. The Commission believes that judges should *not* give these warnings where they are clearly unnecessary.

7.89 Two issues are raised. First, judges may wish to consider whether it encourages jury overload and confusion to give a warning on delay when the facts do not suggest that there was any (or any significant) delay.

7.90 Secondly, there appears to be an inconsistency between the direction required by section 61 (that there may be good reasons why a complaint may delay or hesitate in complaining) and judicial warnings to the effect that delay in complaint may reflect on the complainant's consistency. As the New South Wales Standing Committee on Law and Justice⁹¹¹ commented recently:

908 *Crofts v R* (1996) 186 CLR 427.

909 Nine of these 11 were the judges who explained the background and rationale of the rule of recent complaint. The comment on inconsistency came in close proximity to the direction that victims of sexual assault complain about it.

910 Trial 19. In Trial 17, in the course of his direction on recent complaint, the judge linked aspects of it to ‘common sense’: ‘Absence or delay in making a complaint may also be used to suggest inconsistency of conduct. Of course these are common sense propositions to which you would apply your own view of the evidence in this case. Delay in complaining does not necessarily indicate that a complainant's allegations are false.’

911 Standing Committee on Law and Justice, Legislative Council, New South Wales Parliament, *Report on Child Sexual Assault Prosecutions* Report No 22 (2002) para 4.174. The section in quotation marks is cited by the Committee as follows: ‘Wood J at CL in *Regina v BWT* [2002] NSWCCA 60 at para 32.’

While the Committee notes the argument that the *Crofts* warning was “not meant to revive the stereotypical view that delay is invariably a sign of the falsity of the complaint,” the Committee is of the opinion that such is the unavoidable result of a warning to the jury that in assessing the complainant’s credibility, they should take into account the complainant’s failure to complain promptly.⁹¹²

7.91 There were a number of examples of jury directions on recent complaint which appear to be inconsistent with the purpose of section 61. In directions on recent complaint in Trial 4 the judge said:⁹¹³

In sexual cases the law looks to see if there is any complaint made by a victim shortly after the alleged incident. That evidence is an exception to the ordinary rules of evidence which exclude self-serving and hearsay evidence. The law does this in order to see whether there is a consistency of conduct on the part of the victim with the alleged offence having occurred, as persons who are compelled to sexual conduct complain about it...

Often allegations are made a significant time after the alleged offence by a girl or a woman that she has been sexually interfered with by a man. Such complaints are made [sic] and very difficult to disprove. Therefore, the law looks to see if immediately after or shortly after the alleged offence, there is a consistency of conduct on the part of the victim with her allegations. It negatives to some measure any suggestion that the victim has made up the story as to what happened. Of course I warn you that a delay in complaining does not necessarily indicate that the allegations are false.

7.92 This direction reinforces the notion that *real* rape victims complain immediately, an assumption which is clearly false. It also reiterates the historical view expressed by the seventeenth century English jurist, Sir Mathew Hale, that rape allegations are easy to make and difficult to disprove.⁹¹⁴

912 The Committee recommended that the *Criminal Procedures Act 1986* (NSW) be amended to explicitly prohibit judges from giving *Crofts* warnings in cases of child sexual assault which involved a delay in reporting (Recommendation 22), Ibid para 4.176.

913 This case did not involve a delay in complaining.

914 Regina Graycar notes that this comment has been repeated by many judges since, for example King CJ in *R v Sherrin (no.2)* (1979) 21 SASR 250, 254: ‘Human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute’ and Bollen J in *R v Johns* (Unreported, Supreme Court of South Australia, 26 August 1992): ‘Experience has taught the judges that there have been cases where women have manufactured or invented false allegations of rape and sexual attack. It is a very easy allegation to make. It is often very hard to contradict.’ Cited in Regina Graycar, ‘The Gender of

7.93 The comment that an immediate complaint ‘negatives *to some measure* any suggestion that the victim has made up the story...’ may imply to the jury that lack of immediate complaint should give them reason to doubt the veracity of the victim’s allegations. The use of the word ‘necessarily’ in the next sentence serves to consolidate these doubts.⁹¹⁵

7.94 In a recent article for the *Judicial Officers’ Bulletin*, Justice James Wood of the New South Wales Supreme Court⁹¹⁶ expressed his concern about the *Crofts* direction. He recognises the High Court’s justification for the direction—to ‘balance’ the statutory direction on delay⁹¹⁷—but argues that without some ‘firm basis’ for suggesting that the delay may have affected the complainant’s credibility, or evidence that the accused has in fact suffered actual prejudice as a result of the delay, the *Crofts* direction may tip the balance too far in favour of the accused.⁹¹⁸ In a recent conference on contemporary issues in adult sexual assault in New South Wales,⁹¹⁹ Justice Wood said in relation to the *Crofts* direction:

It is also arguable that the balancing direction in fact entirely negates that direction [section 107 under the NSW legislation, section 61(1)(b) under the Victorian], particularly where there has been no exploration of the complainant’s reasons for delay.

Judgments: An Introduction’ in Margaret Thornton (ed *Public and Private: Feminist Legal Debates* (1995) 271. For an historical discussion of the belief that women and children were inherently untrustworthy when testifying about sexual assault, see Constance Backhouse, ‘The Doctrine of Corroboration in Sexual Assault Trials in Early Twentieth-Century Canada and Australia’ (2001) 26 *Queen’s Law Journal* 297 para [5].

915 Of course, as this particular complainant had not delayed in making a complaint of sexual assault, the judge’s comments arguably did not affect her case.

916 (Justice) James Wood, ‘Complaint and Medical Examination Evidence in Sexual Assault Trials’ (2003) 15 (8) *Judicial Officers’ Bulletin* 63.

917 Ibid 64. Justice Wood refers here to the NSW provision: s 107 *Criminal Procedure Act 1986* which requires the judge to direct the jury that evidence of a failure to complain of an assault at the earliest reasonable opportunity does not necessarily mean that the complaint was untrue. The Victorian provision is contained in s 61(1)(b) of the *Crimes Act 1958* and requires the judge to inform the jury that there may be ‘good reasons why a victim of a sexual assault may delay or hesitate in complaining about it.’

918 Ibid 64.

919 (Justice) James Wood, ‘Sexual Assault and the Admission of Evidence’ (Paper presented at the Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, 12 February 2003, Sydney) para 51.

7.95 Justice Wood refers to *Suresh v The Queen*,⁹²⁰ where Gummow and Gaudron JJ described the assumption that a sexual assault victim will complain at the first reasonable opportunity as being of 'doubtful validity'. This may be contrasted with the directions in Trials 17 and 18 from our sample, where the judges described the 'warning' about delayed complaints suggesting inconsistency of conduct on the part of the complainant as 'common sense propositions':

Absence or delay in making a complaint may also be used to suggest inconsistency of conduct. Of course these are common sense propositions to which you would apply your own view of the evidence in this case.⁹²¹

7.96 The Commission believes that Justice Wood's view should be reflected in a legislative amendment which makes it clear that a *Crofts* warning must not be given in the absence of evidence indicating that the complainant's credibility was affected by delay and should not be given unless there is credible evidence to that effect. A formal recommendation to this effect is made in Recommendation 171.

Cases Where Complainants Reported Promptly

7.97 Where evidence of recent complaint was available and admissible—i.e. where the complainant had reported the alleged assault promptly—judges often told juries to pay little attention to this evidence. For example, in Trial 8 the judge told the jury that the complainant's immediate complaint of sexual assault (to her mother) was:

...no more than a self-serving statement, and an instance if you like of pulling yourself up by your own bootstraps.⁹²²

At the end of his lengthy direction on recent complaint the judge highlighted his concerns:

I have taken a lot of time over this matter, and I have done so because there is always with evidence such as evidence of this nature, there is always the risk that you will innocently misuse that evidence; that is, by giving it a value which it does not have, and thereby causing an injustice.⁹²³

920 (1998) 102 A Crim R 18, cited in Ibid 64.

921 Trial 17. The judge in Trial 18 made a similar comment.

922 Trial 8. The judge spent six and a half pages minimising the significance of the recent complaint evidence.

923 Trial 8.

A similar approach was apparent in Trial 15, where the prosecution case was that the complainant had been dragged into the bush near her house and raped by her former partner. The complainant returned to the house where she immediately told her sister what had happened.⁹²⁴

The Longman 'Dangerous to Convict' Warning

7.98 In the recent New South Wales Court of Criminal Appeal case of *R v BWT*⁹²⁵ Wood CJ at CL described the *Longman* warning as follows:

...the *Longman* direction (as reinforced in *Crampton* and *Doggett*), [advises] that by reason of delay, it would be "unsafe or dangerous" to convict on the uncorroborated evidence of the complainant 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...

When is a Longman Warning Required?

7.99 Although section 61(1)(b) prevents judges warning juries that complainants in sexual offence cases are an unreliable class of witness, it does not prohibit common law warnings such as the *Longman* warning.⁹²⁶

7.100 In *R v Longman*⁹²⁷ the High Court considered the effect of Western Australian legislation⁹²⁸ which abolished 'any rule or practice' that required the judge to warn a jury that it was unsafe to convict an accused in a sexual offence case on the uncorroborated evidence of the complainant.

7.101 Although there was unanimous agreement in *Longman* that there should not be indiscriminate warnings about the dangers of convicting accused on the uncorroborated evidence of sexual assault complainants, the High Court also said

924 This case is discussed in more detail in para 7.58 above.

925 (2002) 54 NSWLR 241, 250.

926 See Kathy Mack, "'You Should Scrutinise Her Evidence With Great Care': Corroboration of Women's Testimony About Sexual Assault' in Patricia Eastal (ed *Balancing the Scales: Rape, Reform and Australian Culture* (1998). As she comments: 'The statute being interpreted [in the case of *Longman*] was the only one in Australia at that time to specifically state that a judge ordinarily should *not* give a warning. If the High Court could decide that a warning was necessary under that statute, then warnings must surely be required under other legislation which has no such negative language or which expressly recognises that warnings can be given in the trial judge's discretion.' (p 67).

927 (1989) 168 CLR 79. Because the *Longman* case was discussed in detail in the Interim Report paras 5.103–24, we will only summarise it briefly here.

928 *Evidence Act 1906* (WA) s 36BE. This section was subsequently repealed by Act No. 70 of 1988, s 39.

that the trial judge *is* required to warn the jury about such danger 'whenever necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case'.⁹²⁹ In this case, the factor identified by the majority as necessitating a warning was the accused's lack of means of testing the complainant's allegations due to the long passage of time since the alleged offences.

7.102 Longman was on trial for sexual offences against his step-daughter that were alleged to have occurred 23 years prior to reporting. He was convicted and the Western Australia Court of Criminal Appeal affirmed the trial judge's refusal to warn the jury that it would be dangerous to convict the accused due to the long delay. The High Court, however, allowed Longman's appeal and ruled that such a warning should have been given. It was the possible 'forensic disadvantage' to the accused that was identified as necessitating a warning that it was unsafe to convict:

But there is one factor which may not have been apparent to the jury and which therefore required not merely a comment but a warning be given to them... That factor was the applicant's loss of those means of testing the complainant's allegations which would have been open to him had there been no delay in prosecution.⁹³⁰

7.103 *R v Doggett*⁹³¹ was an appeal from the Queensland Court of Criminal Appeal. The complainant made a statement to police concerning allegations of sexual abuse relating to the period between 1979 and 1986 when she was between the ages of 8 and 15. There was corroborating evidence, including a tape in which the accused made admissions of a general nature in response to the complainant's accusations of sexual abuse, and evidence from the complainant's mother and brother which supported her allegations. Despite the corroboration the High Court held that, due to the passage of time, the accused was prejudiced by the

929 (1989) 168 CLR 79, 86; joint judgment of Brennan, Dawson and Toohey J.

930 (1989) 168 CLR 79, 91; joint judgment of Brennan, Dawson and Toohey J. Apart from identifying 'forensic disadvantage' (which was common to both the joint judgments of Brennan, Dawson and Toohey J and the separate reasons of Deane J and McHugh J) as the one factor leading to the need for a warning, the judges referred to other factors as relevant to the question whether in all the circumstances a warning was required: the delay in prosecution, the nature of the allegations, the age of the complainant at the time of the events, the absence of complaint to her parents and the fact that she was said to have been woken from sleep by the assaults. These factors, however, were not considered of themselves enough to warrant a warning. The forensic disadvantage referred to was the defendant's inability to test the allegations which had been made against him, which he would have been able to do had there been no delay.

931 Ibid.

difficulties of recollection and by the lack of opportunity to test the allegations forensically and therefore a warning that it was dangerous to convict was required.

7.104 Since *Longman* and *Doggett* were decided, other ‘special circumstances’ have been identified as requiring a *Longman* warning.⁹³² At a recent conference, Justice Wood said in relation to the frequent use of *Longman* warnings in delay cases:

Of particular concern, and a regular occasion for appellate review, has been the *Longman* direction (*Longman v The Queen* (1989) 168 CLR 79) which is now required to be delivered in almost every case involving delay, even where there is some corroboration of the plaintiff...⁹³³

7.105 Ormiston JA in *R v Mazzolini* expressed a similar concern about the widespread use of *Longman* warnings:

As defence counsel catalogue the variety of ‘special’ circumstances seen by appellate judges (including, I confess, myself) as requiring warnings in particular cases, so trial judges will retreat to the safety of issuing *Longman* warnings for every such circumstance and every faintly analogous circumstance...⁹³⁴

932 For example, the age of the complainant, coupled with a long period of delay, has been identified as circumstances warranting a *Longman* warning in *R v TWK* [2003] VSCA 225 and *R v WEB* [2003] VSCA 205. However, Charles JA in *R v WEB*, para [35], cautioned that ‘to say this circumstance [of age] is a factor which underlines the need for a *Longman* warning is not at all to suggest that children are an unreliable class of witness.’ In *R v Salter* [2002] VSCA 128, the court held that a *Longman* warning was required because of the ‘selectivity’ employed by the complainant in making her complaints to the police. See para 7.98 below. In *R v Glennon* [2001] VSCA 17, it was held that the absence of corroboration was not a basis in itself for a *Longman* warning, although the absence of corroboration could be taken to suggest that it would be ‘dangerous to convict’ on the evidence of the complainants alone.

933 (Justice) James Wood, ‘Sexual Assault and the Admission of Evidence’ (Paper presented at the Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, 12 February 2003, Sydney), para 21. In this respect Kathy Mack notes that the High Court’s decision in *Longman* was made ‘despite the court’s recognition that “[t]he evidence of the complainant reads convincingly, and it is not surprising that the jury accepted her as an honest witness” and that the same could not be said of the defendant, who appeared to lie in court about the recent police interview, as well as about details of past incidents.’ Kathy Mack, ‘“You Should Scrutinise Her Evidence With Great Care”: Corroboration of Women’s Testimony About Sexual Assault’ in Patricia Eastal (ed) *Balancing the Scales: Rape, Reform and Australian Culture* (1998) 67.

934 [1999] 3 VR 113, 130.

7.106 The recent Victorian Court of Appeal judgment in *R v Salter*⁹³⁵ defines the current state of the law in relation to *Longman* warnings in Victoria:

In general terms, it can be said that such a warning should be given whenever it is necessary to avoid a perceptible risk of a miscarriage of justice arising from the circumstances of the case... There will usually have to be identifiable factors which call for such a judicial direction. They are factors of a nature the significance of which will or might not be readily apparent to the jury—left to their own devices with the assistance of counsels' addresses—but more apparent to the Judge. It should not be thought, however, that the so-called 'Longman warning' is confined to the circumstances which the High Court identified in that case as calling for such a warning.

How Judges Approached Longman Warnings

7.107 In our study, of the 24 jury charges examined there were five identified by the researchers as involving a delay in reporting.⁹³⁶ Of these five cases, two attracted strong *Longman* 'dangerous to convict' warnings. These were the cases which involved the lengthiest delays: 7½ years and 6½–8½ years.⁹³⁷ In Trial 11, the judge said:

I do so [give the warning] with the authority of my office as trial judge. In circumstances such as those in this case it is dangerous to convict an accused person on the unsupported evidence of the complainant... The reason why I give you the warning in this case is that there was a long delay between the date of the alleged offences and the time in which the allegations were first put to [the accused]... The significance of the delay is that it may result in a person losing the means of refuting a false allegation.

7.108 The judge went on to repeat another three times that it would be dangerous to convict without supportive evidence⁹³⁸ and then said:

935 *R v Salter* [2002] VSCA 128, para 10 (Winneke P).

936 The five trials were: Trial 3 (2½ months), Trial 9 (2½ years), Trial 10 (10 to 11 days), Trial 11 (7½ years) and Trial 13 (6½ to 8½ years—the offences allegedly occurred over a two year period).

937 Trial 11 (7½ years) and Trial 13 (6½–8½ years) respectively.

938 The judge did not inform the jury pursuant to s 61(1)(b) that there may be good reasons for the delay. Clearly some exception to this omission had been taken by the Crown prior to the summary of the evidence. The judge after this went on to direct the jury that there may be good reasons for delay.

In this case I direct you that there is no evidence which is capable as a matter of law of amounting to such supportive evidence.

7.109 Although a *Longman* warning is not intended to be akin to a direction to acquit, such a strongly worded warning as given here followed by the direction as to lack of evidence, may well be seen by the jury as just that—a direction to acquit. The judge in Trial 11 spent over a page talking about the ‘common human experience that memory fades with the passage of time’⁹³⁹ and mentioned that ‘[a]fter a considerable delay, a person might acquire a false memory’.⁹⁴⁰

7.110 Trial 13 was the other case involving delay in which a *Longman* warning was given. The accused was charged with seven counts of wilfully committing an indecent act and three counts of sexual penetration of a child under 16. The delay involved was between 6½ and 8½ years, the offences having been alleged to have occurred over a two year time period. The judge directed the jury in accordance with section 61 and went on to make a *Longman* warning, which he described as ‘not comments’...[but] ‘directions of law’:

This matter now arises out of the fact of the passage of so many years since these alleged events and it is a warning that I am giving you that it would be dangerous to convict [the accused] on the evidence of [the complainant] alone, unless after scrutinising her evidence with great care and considering the circumstances...you are satisfied beyond reasonable doubt of its accuracy and reliability.

In the same way as the judge in Trial 11, the judge spoke of the fallibility of human recollection in the context of ‘common experience’:

Experience has shown that human recollection, and perhaps particularly the recollection of events occurring in childhood and adolescence, is frequently erroneous and liable to distortion by reason of various facts.⁹⁴¹

939 On the issue of judges’ construction of ‘common human experience’, see below paras 7.135–40.

940 In this context, the judge drew the jury’s attention to a number of conflicts in the evidence.

941 The reference in these two charges to common human experience brings to mind some infamous charges in rape matters, for example Bollen J in *R v Johns* (Unreported, Supreme Court of South Australia, 26 August 1992): ‘Experience has taught the judges that there have been cases where women have manufactured or invented false allegations of rape and sexual attack. It is a very easy allegation to make. It is often very hard to contradict.’ Or Bland J in a Victorian County Court case in 1993: ‘it does happen, in the common experience of those who have been in the law as long as I have anyway, that no often subsequently means yes’. Both these cases are cited in Regina Graycar, ‘The Gender of Judgments: An Introduction’ in Margaret Thornton (ed *Public and Private: Feminist Legal Debates* (1995) 270–1.

7.111 There was one case (Trial 7) which attracted a *Longman* warning despite lack of delay in reporting. The warning was given on the basis of the 'unsatisfactory' nature of the complainant's evidence. The judge said to the jury: '[The complainant] had told a series of untruths and her memory was extraordinary in respect of what she did not remember'.

When Judges Gave the 'Scrutinise With Great Care' Warning

7.112 In the other three cases in our study where a delay in reporting was identified:

- In one (delay of 2½ months)⁹⁴² no warning was given and the judge directed the jury on how recent complaint evidence could have been used, had it been available. The judge reminded the jury several times that such evidence was not available.
- In two cases (delays of 10–11 days⁹⁴³ and 2½ years)⁹⁴⁴ the judges stopped short of a *Longman* warning and instead warned the jury to 'scrutinise' the complainant's evidence with great care.⁹⁴⁵

7.113 In three further charges that did not involve delay, judges also directed the jury to 'scrutinise' the complainant's evidence carefully.⁹⁴⁶

7.114 In the RLREP, Heenan and McKelvie reported on their interviews with judges in relation to delay and corroboration.⁹⁴⁷ In that study two thirds of the judges said that since the most recent amendment on corroboration warnings they had not directed juries that a complainant in a sex offence matter was 'an unreliable class of witness'. However they had regularly exercised their discretion to make a 'compromise' warning to juries 'to look very closely at the evidence of the complainant' and any corroborating evidence in the case.⁹⁴⁸ One judge commented that a warning to scrutinise the complainant's evidence closely was a 'compromise that you will find a lot of judges have fixed upon'.⁹⁴⁹

942 Trial 3.

943 Trial 10.

944 Trial 9.

945 In Trial 10 the judge made it clear that this was a non-binding comment.

946 Trials 8, 18 and 20.

947 RLREP, above n 886, 329–32.

948 Ibid 330.

949 Ibid.

7.115 The jury charge in Trial 9 from our study is worth examining in more detail. The accused, who was convicted of six counts of rape and acquitted of three,⁹⁵⁰ appealed on the basis that the trial judge failed to give a *Longman* warning and/or failed to adequately direct the jury as to the significance of the delay. The complainant and accused had been in a de facto relationship at the time the offences were alleged to have occurred. It appears that the relationship was characterised by a strong mutual sexual attraction but also by frequent bouts of physical violence by the accused towards the complainant. Throughout the relationship the complainant made several complaints about these assaults to friends and the police, which led eventually to the accused being imprisoned.⁹⁵¹ It was not until March 1999 that the complainant reported that the accused had in fact raped her several times dating back to September 1997, once at knife point. In explanation of her previous omission of these allegations, she said that she was afraid of the accused's threats, embarrassed and ashamed about the events and was apprehensive about the court process should she complain of rape.

7.116 The trial judge gave a detailed direction on delay. He directed the jury that there may be good reasons why a victim of sexual assault may delay complaining about it. He outlined the complainant's (above) explanations for her delay and pointed out that the fact that she was living in a de facto relationship with the accused:

might have meant that she would not readily complain of intimate matters in the relationship even though she was prepared to complain to her neighbours and to the police about physical assaults to her.⁹⁵²

7.117 The judge then went on to ask the jury to consider whether the accused had been significantly disadvantaged in defending himself because of the delay or whether the fact that the accused had been able to recall all but one of the alleged incidents and respond in detail meant that he was not so disadvantaged. Counsel for the accused asked that the judge make a *Longman* warning, but the judge declined to do so and instead directed as follows towards the end of his charge:

950 He was also acquitted of one count of assault with intent to rape. He was sentenced to 8½ years' imprisonment.

951 The complainant made her first complaint of physical assault in October 1997. This related to events which had allegedly occurred in September 1997.

952 Trial 9.

The nature of sexual offences often means that it is only the complainant and the accused who will have been present. For this reason you will obviously need in this case to carefully scrutinise the evidence of the complainant.⁹⁵³

7.118 The Court of Appeal, in a 2:1 majority, allowed the accused's appeal and ordered a new trial. In Winneke P's majority decision, with which Buchanan JA concurred, he discussed the purpose of the 1991 introduction of section 61 of the *Crimes Act 1958* and the abolition of the corroboration warning and commented:

However, as the courts have pointed out in many cases, the abolition of the rule was not intended to suddenly convert complainants in sexual cases into specially trustworthy witnesses.⁹⁵⁴

The judge went on to say that in the 'peculiar circumstances of this case'⁹⁵⁵ the trial judge's directions were 'altogether too bland to avoid the perceptible risk of a miscarriage [of justice] which was inherent in the circumstances of the case'⁹⁵⁶ and that the case called for:

a direction by the judge that it would be dangerous or unsafe to convict the applicant upon the evidence of the complainant alone unless, having thoroughly scrutinized her evidence, and paying heed to the warning, they were satisfied of its truth and accuracy.

7.119 This decision may be contrasted with *R v GTN*,⁹⁵⁷ another recent Victorian Court of the Appeal decision. In this case, the applicant was convicted in the County Court on three sexual offences committed against his grandniece and appealed on the basis that the trial judge did not direct correctly in relation to

953 Trial 9.

954 Victorian Court of Appeal decision, 2002. We have not provided the citation for this case as that would lead to the identification of the trial judge from our study. It was agreed that no judges who provided charges for our study would be identified.

955 The 'peculiar circumstances' referred to here by the judge were: 1. the nature of the complainant and applicant's relationship, which was characterised by a great deal of consensual activity but also physical violence; and 2. that the complainant had reported the physical assaults to various people but omitted mentioning the rapes which happened contemporaneously with the assaults.

956 The circumstance identified by Winneke P as prejudicial to the accused was the complainant's 'selectivity' in making her complaints to the police, which not only undermined her credibility as a truthful witness, but caused the situation whereby the accused came before the jury as a person convicted of violent offences which were inextricably linked with the events upon which the prosecution relied to prove the rape charges.

957 [2003] VSCA 38.

the *Longman* warning⁹⁵⁸ and also that the verdicts were unsafe and unsatisfactory. The complainant was five years old at the time of the VATE interview and the offences were allegedly committed two to 14 months prior to this. The Court of Appeal dismissed the appeal unanimously. Callaway JA said:

In my opinion it is inappropriate to speak of a *Longman* warning in a case where the delay between the alleged offences and the accusation is at most sixteen months. The question is simply whether there were features of the case that required a direction to the jury that was not given.⁹⁵⁹

...There must be a forensic disadvantage, or other factor, that makes a direction 'necessary and practical, in the circumstances of the case, to avoid a perceptible risk of miscarriage of justice' [*R v Miletic*⁹⁶⁰] There was no such disadvantage or other factor arising from the delay in this case.⁹⁶¹

Ormiston JA commented:

There *was* no delay or other factor of a kind which required the judge to inform the jury of the dangers of convicting the applicant.⁹⁶²

And Eames JA, after a lengthy examination of the necessity for and parameters of a Longman direction, concluded:

In my opinion, it would be moving a long way from *Longman* to conclude that as a matter of prudence a full *Longman* warning was to be given in almost every case (including this case) where there was some delay, even where no actual forensic disadvantage could be identified and where any potential disadvantage was of relatively limited significance.⁹⁶³

7.120 Appendix 6 contains a table setting out other recent Victorian Court of Appeal decisions concerning *Longman* warnings.

958 The trial judge did not use the words 'dangerous to convict' but he did instruct the jury about the dangers of convicting someone on the uncorroborated evidence of the complainants without first giving it the requisite close scrutiny. The specific disadvantage pointed to by defence counsel in the trial was that the accused deprived of being able to find an alibi because there was no certainty about when the offence was meant to have occurred. The other main factor relied on by defence counsel as necessitating a Longman warning was the complainant's young age.

959 Ibid para [6].

960 [1997] 1 VR 593, 605–6.

961 *R v GTN* [2003] VSCA 38, para [9].

962 Ibid para [1].

963 Ibid para [126].

7.121 The difficulty with the current law is that it offers almost no guidance to trial judges on the circumstances in which a warning might be required and is likely to produce broad variation in approach amongst trial judges. We have been told that trial judges may give *Longman* warnings in cases where the law may not require such a warning to be given, in order to minimise the possibility of appeal and protect complainants against the possibility that they may have to give evidence in a second trial if an appeal by the accused is successful.

SHOULD THE LAW ON LONGMAN WARNINGS BE CHANGED?

7.122 Not all judges agree with the current state of the law on *Longman* warnings. For example, Wood CJ at CL in *R v BWT*⁹⁶⁴ noted:

...any direction, framed in terms of it being 'dangerous or unsafe' to convict, risks being perceived as a not too subtle encouragement by the trial judge to acquit, whereas what in truth the jury is being asked to do is to scrutinize the evidence with great care.

7.123 Justice Wood, in his 2003 article for the Judicial Officers' Bulletin,⁹⁶⁵ criticises the assumption on which the *Longman* warning is based, namely that a delay in complaining means that the accused is not able to adequately test and meet the complainant's evidence. His Honour argues that this assumption is illogical where the accused is in fact guilty of the offence or where 'there was no evidence available capable of contradicting the complainant' and a better approach is to allow the warning to be given 'in terms that the delay might have created forensic difficulties for the accused in meeting the complaint'⁹⁶⁶ or confining the warning to cases in which there is some actual evidence of disadvantage to the accused.⁹⁶⁷

7.124 Ormiston JA in *R v Mazzolini* addresses the danger of warnings in sexual offence cases in a more general sense:

964 *R v BWT* (2002) 54 NSWLR 241, 251.

965 (Justice) James Wood, 'Complaint and Medical Examination Evidence in Sexual Assault Trials' (2003) 15 (8) *Judicial Officers' Bulletin* 63.

966 *Ibid* 63.

967 See also submission of County Court judge discussed in para 7.129–30.

Juries will not be left to resolve ordinary though serious issues of fact about which they must be and are always told to be satisfied beyond reasonable doubt. Instead they will become ‘punch-drunk’ with a miscellany of indiscriminate warnings in trials of sexual offences, such as will suggest, as before, that a complainant’s testimony is indeed unreliable. Since the issue seems only (or almost only) to arise on trials for sexual offences (and appeals therefrom), the impression might be given, if the distinction emphasised in the preceding paragraph [between circumstances that it is well within the ability of the jury to assess for themselves, and those the full significance of which may be more apparent to the judge] is not maintained, that judges are again, by a back door, treating complainants in such cases as ordinarily unreliable witnesses...⁹⁶⁸

SUBMISSIONS TO THE INTERIM REPORT

7.125 In the Interim Report the Commission recommended that the law on *Longman* warnings should be changed to prevent use of the words ‘dangerous to convict’ in a jury warning because these words were likely to be interpreted by juries as a direction to acquit.⁹⁶⁹ The Interim Report also recommended that the warnings about delay should not be given except in cases where the accused had in fact suffered a significant forensic disadvantage as the result of delay.

7.126 Submissions to the Commission on the issue of judicial warnings were mostly in favour of the proposed recommendations on jury directions from the Interim Report.⁹⁷⁰ For example, one complainant expressed her feeling that *Longman* warnings are ‘extremely unfair to the complainant’:

In particular it could be seen as discriminatory to women, as it sounds as though women are unable to be trusted and created allegations concerning sexual assault with no evidence. This would be extremely ruining to a victim/survivor and it is extremely unfair.⁹⁷¹

7.127 The Department of Human Services in its submission specifically supported both recommendations, saying in relation to Recommendation 42:

968 [1999] 3 VR 113, 130.

969 Interim Report Recommendation 42.

970 Interim Report Recommendations 42 and 43. The submissions explicitly in favour of Recommendations 42 and 43 of the Interim Report were Submissions 7, 28, 30 and 44. Those explicitly in favour of Recommendation 42 only were Submissions 26, 40 and 47. Submissions 6 and 15 did not address the recommendations specifically but were supportive of the ideas behind them.

971 Submission 6.

The nature of sexual assault offence cases, particularly in circumstances of childhood sexual abuse, means that most often there would not be independent evidence to substantiate the events having occurred.⁹⁷²

7.128 The Federation of Community Legal Centres commented in relation to Longman warnings:

The use of Longman warnings is a means of giving a corroboration warning in a variety of cases where it is not appropriate. We share the concerns expressed by Wood J in *R v BWT* and strongly support the Commission's Recommendation 42...⁹⁷³

7.129 A submission from a County Court judge stated that although warnings are probably necessary in some cases, particularly in cases involving long, unexplained delays in reporting:

...Those matters should be specifically brought to the attention of the jury. The actual warning should be given in clear and simple language. The words 'dangerous' or 'unsafe to convict' should not be used, and some better guidance should be given as to when a warning is likely to be required.⁹⁷⁴

7.130 This judge went on to say that section 61(1)(a)—the provision that a judge must not warn or suggest in any way to the jury that the law regards complainants in sexual cases as an unreliable class of witness—has little effect in operation due to sub-section (2).

7.131 Four submissions opposed the recommendations made in the Interim Report.⁹⁷⁵ The Criminal Bar Association said:

The *Longman* warning in its current form should be retained. It contains a measure of flexibility to ensure judges can tailor the direction to the circumstances. The mere fact of delay may prevent a person from being able to point to identifiable or specific forensic disadvantage apart from the obvious and logical matters to which the direction is currently aimed.⁹⁷⁶

972 Submission 44.

973 Submission 47.

974 The Commission will make a recommendation in this regard. See Recommendation 171 below.

975 Submissions 39, 42, 48 and 54.

976 Submission 42. Victorian Legal Aid (Submission 54) expressly agreed with the Criminal Bar Association's submission regarding Longman warnings.

In a joint submission by Judges Neesham, Nixon, Kelly and Hart, Recommendations 42 and 43 were described as:

...simplistic and [they] do not adequately take account of *Longman*. *Longman* goes beyond mere delay...

...The effects of the proposed recommendation would be to prevent a judge giving such a warning in cases where far more is involved than mere delay. The recommendation is an invitation to injustice and should be abandoned.⁹⁷⁷

RECOMMENDATIONS

7.132 The Commission remains of the view that the phrase ‘unsafe/dangerous to convict’ is likely to be interpreted by juries as a direction to acquit.⁹⁷⁸ Widespread use of *Longman* warnings may also serve to perpetuate old assumptions surrounding female victims of sexual assault—in particular that women lie about rape and are therefore unreliable witnesses.⁹⁷⁹ Such jury warnings should be restricted to situations where the judge is satisfied that certain specific situations exist—where there is evidence that the accused has suffered a forensic disadvantage as a result of a delay in reporting, or where there is evidence that the accused has been prejudiced in some other way as a result of other circumstances in the case. Ideally, judges will rarely, if ever, need to use the words ‘dangerous or unsafe to convict’ in warning juries in these circumstances. The Commission agrees with the submission of the County Court judge referred to above⁹⁸⁰ that warnings should be delivered in ‘clear and simple language’.

977 Submission 39.

978 In Geoffrey Flatman and Mirko Bagaric, 'Juries Peers or Puppets—The Need To Curtail Jury Instructions' (1998) 22 *Criminal Law Journal* 207 210–11, the authors say that judges arguably should not be making any warnings about the dangers inherent in certain types of evidence, in that the accused is already sufficiently protected by the ‘best safeguard of all—proof beyond reasonable doubt.’

979 See Kathy Mack, "'You Should Scrutinise Her Evidence With Great Care": Corroboration of Women's Testimony About Sexual Assault' in Patricia Easteal (ed *Balancing the Scales : Rape, Reform and Australian Culture* (1998). There has been a great deal written on the construction of women in sexual offence cases generally. Penelope Pether, for example, refers to ‘commonplace cultural understandings’ about women and female sexuality which have long been reflected in jury directions in rape trials, including ‘that many women lie about rape’ and that some women are more deserving of protection from non-consensual sex than others. Penelope Pether, 'Critical Discourse Analysis, Rape Law and the Jury Instruction Simplification Project' (1999) 24 *Southern Illinois University Law Journal* 53 para [88].

980 Referred to in para 7.129.

7.133 The second limb to the Commission's recommendations concerning delay relates to the *Crofts* warning.⁹⁸¹ This warning is often given in close proximity to a *Longman* warning. Such warnings may also be given in the course of a judicial direction on recent complaint evidence. Again, the Commission recommends that these warnings should be restricted to circumstances where there is evidence to justify the giving of such a warning.

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RECOMMENDATION(S)

170. Section 61 of the Crimes Act 1958 should be amended as follows (proposed amendments in bold text, existing provisions in normal text):

- (1) On a trial of a person for an offence under Crimes Act 1958 Part 1, Division (8A), (8B), (8C), (8D) or (8E)...
- (a) The judge must not warn, or suggest in any way to, the jury that the law regards complainants in sexual offence cases as an unreliable class of witness; and
- (b) (i) if evidence is given or 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 making a complaint about the alleged offence by the person against whom the offence is alleged to have been committed, the judge must inform the jury that there may be good reasons why a victim of a sexual assault may delay or hesitate in complaining about it.

(ii) The judge must not state, or suggest in any way to the jury that the credibility of a complainant is affected by a delay in reporting a sexual assault unless satisfied that there exists sufficient evidence in the particular case to justify such a warning.
- (c) The judge must not warn, or suggest in any way to the jury that it is dangerous or unsafe to convict the accused, unless satisfied that:

981 See paras 7.86–95 above.



RECOMMENDATION(S)

- (i) there is evidence that the accused has in fact suffered some specific forensic disadvantage due to a substantial delay in reporting; or
- (ii) there is evidence that the accused has in fact been prejudiced as a result of other circumstances in the particular case.
- (d) If the judge is satisfied in accordance with sub-section (c) that a jury warning is required, the judge may warn the jury in terms she or he thinks appropriate having regard to the circumstances of the particular case.
- (e) In giving a jury warning pursuant to sub-section (d), it is not necessary for the judge to use the words 'dangerous or unsafe to convict'.
- (2) Subject to s 61(1)(b)(ii), (c), (d) and (e), nothing in sub-section (1) prevents a judge from making any comment on evidence given in the proceeding that it is appropriate to make in the interests of justice.
- (3) Despite sub-section (2), a judge must not make any comment on the reliability of evidence given by the complainant in a proceeding to which sub-section (1) applies if there is no reason to do so in the particular proceeding in order to ensure a fair trial.

JUDICIAL OPINIONS

THE RELEVANCE OF JUDGES' EXPERIENCE

7.134 In the course of their jury charges, judges also make statements to juries based on their own knowledge and experience. Such statements often refer to 'common sense' or 'common knowledge'. In our study there were many examples of these statements. For example, the judge in Trial 11 commented that it is 'common human experience that memory fades with time...' in his direction about the complainant's delay in reporting the rapes. In Trial 13 also during the direction on delay, the judge said: 'Experience has shown that human recollection of events occurring in childhood and adolescence, is frequently erroneous and

liable to distortion by reason of various factors'. Comments of this kind may have a powerful influence on the outcomes of sexual offence trials.⁹⁸²

7.135 Commentators have drawn attention to the fact that statements of this kind tend to depict the experience of an individual judge as typical or universal⁹⁸³ and in doing so may ignore or marginalise different patterns of experience. For example, statements based on judges' ideas about likely reactions to sexual assault may not reflect the actual experience of sexual assault victims or may ignore the way in which complainants' cultural or social backgrounds can affect the way they respond. McHugh J drew attention to this problem in the High Court case of *M*⁹⁸⁴ when he warned that:

Attitudes towards sexual matters and the behaviour of young people have changed so much in recent years that in many instances the views of appellate judges about how teenagers behave, derived from their own past contact with teenagers, may well be out of date.⁹⁸⁵

7.136 It is unrealistic to expect judges to be uninfluenced by their own experiences, perceptions and values. As the Canadian Judicial Council said in a statement endorsed by six judges in the Supreme Court case of *R v RDS*:⁹⁸⁶

There is no human being who is not the product of every social experience, every process of education and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge.

7.137 It is important that the views expressed by judges on matters such as the effect of passage of time on a person's memory of a traumatic event, and the way

982 See Geoffrey Flatman and Mirko Bagaric, 'Juries Peers or Puppets—The Need To Curtail Jury Instructions' (1998) 22 *Criminal Law Journal* 207.

983 Pia van de Zandt, 'Heroines of Fortitude' in Patricia Easteal (ed *Balancing the Scales: Rape, Reform and Australian Culture* (1998) 138.

984 (1994) 181 CLR 487, 529. McHugh J was one of two dissenting judges in this case. The case is discussed in Kathy Mack, "'You Should Scrutinise Her Evidence With Great Care": Corroboration of Women's Testimony About Sexual Assault' in Patricia Easteal (ed *Balancing the Scales: Rape, Reform and Australian Culture* (1998) 68.

985 McHugh J's comments relate to teenagers, but could apply equally to the sexual behaviour of any of the younger generations.

986 *R v RDS* [1997] 3 SCR 484, cited in (Justice) Keith Mason, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676–678.

in which victims of sexual assault are likely to behave, are based on accurate information.

7.138 Judicial education can expose judges to research about sexual assault and to the perspectives of people who have been victims of sexual assault and family violence. In Australia the importance of providing judges with information of this kind is now well recognised. Informing judges on social and cultural issues relevant to their work enhances public confidence in the judiciary without exposing judges to political interference. The Australian Institute of Judicial Administration and the Judicial Commission of New South Wales have been running programs to inform judges about social issues for some time. For example, recent programs offered by the Judicial Commission include sessions on migrants, ethnicity, gender and the Islamic religion as practices in Australia. The Judicial College of Victoria has also presented seminars on cultural and social issues.

7.139 In Chapter 3 we recommend that the Judicial College of Victoria should continue to offer regular programs for judges and magistrates which facilitate discussion of issues commonly arising in sexual offences committals and trials. We recommend that such programs should not be confined to legal issues but should draw on research and other information on the circumstances in which sexual assault occurs and its psychological and other effects.

JUDICIAL COMMENTS ON THE FACTS

7.140 Judges' views may also be reflected in expressions of personal opinion about the facts of the particular case. In almost one third of the charges examined in our study, judges revealed or at least strongly hinted at personal opinions or beliefs in the course of making comments on the facts.⁹⁸⁷

7.141 In the RLREP, the researchers interviewed legal personnel about a number of matters including judicial directions on consent in sex offence matters. Prosecution barristers, defence barristers and solicitors reported that the personal views of the judges affected the way in which they delivered their directions, and also spoke of the subtle ways judges convey their opinions to juries. For example, one solicitor said:

987 See discussion below paras 7.144–8. Assuming the importance of non-verbal cues such as tone of voice—see para 7.141 below—it is possible that the true figure here is higher.

You don't pick it up from the transcript, but judges can get across to the jury that they think what she was saying was a lot of bunkum...the whole trial can run and there is nothing objectionable on paper...It's all the unwritten stuff that makes the difference.⁹⁸⁸

7.142 In an article in the Australian Law Journal, Justice Keith Mason (President, New South Wales Court of Appeal) discusses the problem of unconscious judicial prejudice in relation to the duties of neutrality and impartiality.⁹⁸⁹ He remarks:

...duties of neutrality and impartiality are concerned with more than avoiding the appearance of bias or even the risk of actual bias being found. They are also ethical legal duties and they go beyond compliance with external yardsticks like the rules of evidence, procedural fairness and the like, however much those yardsticks promote impartiality.⁹⁹⁰

...We have all encountered judges who did not transgress the boundaries of apprehended bias, but who appeared to display generalised dispositions for or against classes of litigants: women, black persons, immigrants, workers...and so on....⁹⁹¹

7.143 Judges must ensure that juries understand the presumption of innocence and are aware of issues relevant to the complainant's credibility. However, jury directions should also ensure that complainants are treated fairly. We refer below to jury directions which included comments about the complainant's sexual morality or which repeatedly emphasised points unfavourable to the complainant, while making little reference to the prosecution case. In some of these cases the directions given to the jury may not have achieved the appropriate 'balance of fairness'⁹⁹² between the interests of the accused, the complainant and the community.

988 RLREP, above n 886, 329. See also Pether's discussion of Bordieu's theory of language in: Penelope Pether, 'Critical Discourse Analysis, Rape Law and the Jury Instruction Simplification Project' (1999) 24 *Southern Illinois University Law Journal* 53 89.

989 (Justice) Keith Mason, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676.

990 Ibid 677.

991 Ibid 681.

992 See paras 7.7–8 above.

Comments on the Complainant's Sexual Morality or Credibility

7.144 The trial judge is faced with a dilemma in a case where s/he perceives that issues of sexual morality may influence the jury's determination process. Should the judge bring attention to these issues in order to remind the jury that they should not be relevant in assessing the guilt or otherwise of the accused, or is it better to say nothing about them? The danger with the former approach is that the judge risks giving unnecessary emphasis to issues which may or may not be of concern to the jurors, thereby potentially influencing their decision-making process. Jurors may also perceive such comments as an expression of personal opinion from the judge. The danger with the second approach is that potential juror prejudice may go unchecked. In Trial 1, the judge chose the former approach by drawing attention to evidence of 'sexual eccentricity' on the part of the complainant in the context of reviewing the background facts of the case.⁹⁹³ The judge, in directing the jury to decide the case 'free of bias or prejudice', then proceeded to draw to their attention to certain aspects of the complainant's sexual behaviour:

There has been talk of nipple rings and play about shaven pubic hair. There has been much evidence of sexual immorality on any view. There has been evidence of use of language which you may think is inappropriate. There is evidence of a willingness by all concerned to indulge in sequential sex. There is evidence of eccentric sexual habits on the part of [the complainant]. There is evidence of words like "Lebo cock," all those things may add colour to the canvas, but they are not matters that you should take into account in assessing the dilemma before you.

7.145 The judge in Trial 23 used words such as 'revulsion', 'disgust', 'distaste', 'normalcy' and 'common decency' in discussing the complainant's sexual background. This trial was somewhat unusual in that the jury observed two videos of the acts in question—12 counts of rape and two of indecent assault—that the accused had filmed as the complainant lay unconscious throughout.⁹⁹⁴ In alerting the jury to the fact that the court was not a 'court of morals', the judge nevertheless made clear his own moral stance through his choice of language:

993 It is clear from the transcript that counsel made objection to this description of the complainant, whereupon the judge after the break mentioned the matter again and directed that such 'sexual eccentricities' are irrelevant. This charge is discussed in detail in para 7.31 above.

994 The accused pleaded guilty to the two counts of indecent assault, however argued that he believed the remainder of the sexual acts were committed with the complainant's consent. He maintained that she had told him he could do anything he liked with her when she was 'out of it'.

There are a number of features in this case which might evoke an emotional response from ordinary people who have lifestyles where normalcy is the norm and common decency and normalcy are the norm and in particular, normalcy of sexual behaviour...
...you may experience distaste and indeed disgust at the conduct of a young woman in exposing the most intimate parts of her anatomy and allowing herself to be photographed in such poses as you observed in the Penthouse magazine and you might equally experience some personal revulsion that such a person could be so uninhibited in her approach to and conduct of sexual matters.

7.146 Although the judge allowed certain evidence relating to the complainant's work in the sex industry to be admitted⁹⁹⁵—the jury were shown explicit pictures of the complainant posing in Penthouse magazine and heard evidence that the complainant worked as a table top dancer at the time of the alleged offences—the judge was at pains to point out to the jury that the material was not relevant to the issue of consent in this case:

No matter how promiscuous the complainant may have been, she was still nevertheless entitled to place some limitations as she saw fit...

7.147 In another trial, Trial 13, the judge fairly early in his charge 'commended' to the jury the defence counsel's case on the complainant's credit:

The question for you is not really, it seems to me, whether she is being honest or truthful, it is not suggested that she is deliberately lying, as I understand it. In other words, she may well believe what she says...In addition to any deficiencies which you find in her evidence, and many were suggested by [defence counsel], for example...[the judge lists the alleged inconsistencies in the complainant's evidence]...and I commend to you all the matters put by [defence counsel].⁹⁹⁶

7.148 The judge spent the remainder of the relatively short charge drawing the jury's attention to issues which could potentially prejudice the accused—for example the effects of delay in reporting (it was 7½ years). He made no reference

995 As we were not privy to a full transcript, it is not possible to know on what basis the evidence was ruled admissible. Further, we do not know if the Prosecutor objected to admission of the evidence.

996 The judge went on to present to the jury 'other matters' for the jury's consideration, including 'her age at the relevant time and her level of maturity at that time, coupled with that is that fact of her being a child at one stage, and subsequently an adolescent with all the factors which your own experience of human behaviour tell you arise in childhood and adolescence...', 'her relationship with her mother, 'her relationship with her grandparents' and the 'years which have elapsed before she complained in the first instant [sic]'.

to the arguments put by the prosecution. Despite having summarised the defence case in relative detail and not touched on the prosecution case, at the end of his charge the judge told the jury: ‘...save to the limited extent that I have, I am not going to endeavour to summarise for you the arguments or submissions that each counsel made...’

Emphasis and Repetition

7.149 In Trial 11 the judge said, and repeated on three occasions, that it would be ‘dangerous to convict’ without supportive evidence (a ‘*Longman* warning’). He went on to direct the jury that there was no evidence capable of being seen as supportive evidence.

7.150 In Trials 2 and 8 the judge repeatedly told the jury that the accused does not have to prove anything and that it is up to the prosecution to prove the case beyond reasonable doubt. Counsel for the prosecution in Trial 2 took objection. He described the:

...constant urging by Your Honour to the jury to not forget the role that the Crown plays in this particular trial, in terms of the burden on the Crown and the fact that it’s the Crown’s duty to satisfy the jury beyond reasonable doubt was, in my respectful submission...so powerful...[that it has] moved the balance of this particular case to a point where this jury would have some difficulty now...the goal posts were moved from the middle of the Bar table down to the defence end of the Bar table as a result of your Honour’s charge.

The judge replied:

I’m grateful to you, because it...may be that I’ve just got into a particularly bad habit, or just tend to be repetitive, or too firm, or something or other.

7.151 The judge in Trial 14 repeated the phrase ‘beyond reasonable doubt’ a total of 24 times in his charge to the jury. It is, of course, appropriate that the judge instruct the jury on the importance of the concept of ‘beyond reasonable doubt’ but when the phrase is repeated on so many occasions, the judge not only risks losing the jury’s attention⁹⁹⁷ but also risks being seen to be placing undue emphasis on one particular, albeit important, aspect of the case.

7.152 In Trial 8, the judge summarised only the accused’s case in detail towards the end of the charge, before repeating his warning to ‘scrutinise’ the

997 See paras 7.155–9 below.

complainant's evidence very carefully and repeating several times that the jury had to be convinced beyond reasonable doubt of guilt. The judge summarised the Crown case in the following brief words: 'The Crown case is as I understand it, put very briefly, [the complainant] is telling the truth, accept what she says and find [the accused] guilty'. He spent over a page detailing the accused's arguments.⁹⁹⁸

7.153 Towards the end of the charge in Trial 7 the judge asked the jury to consider a range of questions, all of which seemed directed at supporting the defence propositions:

Can we be satisfied beyond reasonable doubt that the complainant was asleep at the time bearing in mind that the evidence is that the intercourse went on for some two minutes, there is no evidence that it was painful and bearing in mind the awkward position [man behind the woman] which was adopted here for sexual intercourse? Was there cooperation on the part of the complainant, and if so could she have been asleep?

Guiding Juries

7.154 In some cases judicial comments on the facts suggested lack of confidence in the juries they were directing. Some judges seemed to feel the need to 'steer' the jury in the 'right' direction. 'Steering' can easily slip into dangerous territory. Flatman and Bagaric describe the nature of this danger:

The gravest risk which follows as a result of a judge expressing his or her own views of the evidence and arguments is that the jury will not interpret such views as opinions but as fact, and in effect relinquish their judgment by adopting the convictions of the judges. This risk is ever present due to the standing of the judge and the authority that this standing brings to bear on judicial instruction.⁹⁹⁹

998 The charge in Trial 13 was similar. See para 7.147 above.

999 Geoffrey Flatman and Mirko Bagaric, 'Juries Peers or Puppets—The Need To Curtail Jury Instructions' (1998) 22 *Criminal Law Journal* 207 212.

7.155 The authors cite a passage from the 1953 case of *Pavlukoff*:

...it seems an absurdity for a judge after telling the jury the facts are for them...then to volunteer his opinions of the facts...If his [or her] opinion ought not to govern or influence the jury then why give his opinion to the jury. A judge who expresses his own opinion is in effect...undermining the plain instruction he has given to the jury that the 'facts are for them and not for him'...¹⁰⁰⁰

7.156 In reporting on its research into juries in criminal trials in New Zealand, the New Zealand Law Commission said: 'The danger is that juries could interpret remarks on factual issues by the judge as being directions on the law which they are bound to apply'.¹⁰⁰¹ In a study for the Australian Institute of Judicial Administration in 1994 based on juror surveys, Mark Findlay¹⁰⁰² found that significant numbers of respondents felt that judges' comments had affected their views about the facts or as to the guilt or innocence of the accused.

7.157 Judges have also warned against judges making detailed comments on the facts. Kirby J has spoken of the danger of 'factual errors and the risks of undue influence that may sometimes arise, even unconsciously, from judicial elaboration of the facts...'¹⁰⁰³ In *R v Mazzolini*¹⁰⁰⁴ Ormiston JA said:

Bearing in mind that the jury is the constitutional body entrusted with the duty of resolving issues of fact in criminal trials, it can only be where principle requires additional instruction to the jury that it is proper to interfere further with that function.

1000 Pavlukoff (1953) CCC249 at 267, cited in Ibid 213

1001 New Zealand Law Commission, *Juries in Criminal Trials—Part Two* Preliminary Paper 37, Vol. 1 (1999) para 60.

1002 Mark Findlay, *Jury Management in New South Wales* (1994), 89. 53% (as against 31%) felt that the judge's comments did not influence their view of the facts and 63% (as against 17%) felt that the judge's comments did not influence their view of the guilt or innocence of the defendant.

1003 (Justice) Michael Kirby, *'Speaking to the Modern Jury —New Challenges for Judges & Advocates: A Reflection on Changes in the Occupational, Ethnic and Age Make-Up of the Jury Today and their Implications for Communication with Jurors for Generation-X'* High Court of Australia 3. Justice Kirby comments that Australian judges follow the English practice, whereby judges are ordinarily expected to summarise the relevant facts and relate those facts to the legal principles involved. He describes this state of affairs as 'an added burden on judges...' (p3).

For another judge's perspective on this topic, see (Justice) Keith Mason, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676.

1004 Ormiston JA in *R v Mazzolini* [1999] 3 VR 113, 130.

7.158 Extended judicial comments on the facts may confuse the jury about the nature of their role. In Recommendations 7 and 172 we have recommended judicial education on social context issues. Judicial education should also address the extent to which it is appropriate for judges to guide juries.

CLARITY, LENGTH AND UNDERSTANDABILITY OF JURY DIRECTIONS

CLARITY

7.159 Earlier in this Chapter we referred to the complexity of directing a jury in a sexual offences case.¹⁰⁰⁵ The duty of the trial judge is to direct the jury accurately on the law¹⁰⁰⁶ so that the prospect of a successful appeal against conviction by the accused is minimised. The judge will also aim to deliver the jury charge in language that can be understood by jurors who may have little knowledge about legal matters. At a recent conference, Justice Eames made some pertinent comments on the trade-off between legal accuracy and jury comprehensibility:

Judges are well aware of the obligation that their directions be correct as to fact and law. If their directions in that respect cannot be faulted by the keenest eyed appellate court advocate, or by the Court of Appeal, most judges would regard their job as having been satisfactorily performed. Much less importance, if any at all, would be placed by many judges on the question whether by their directions they had met their additional obligation to communicate clearly with the jury.¹⁰⁰⁷

1005 See paras 7.5–6.

1006 County Court and Supreme Court judges in Victoria have available to them a book authored by Judge Kelly entitled: 'A Book of Directions to Judges in the Criminal Jurisdiction of the Supreme Court and County Court in the State of Victoria'. It contains sample directions. The judge with whom the Commission spoke about this issue believes that some judges use the sample charges almost word for word, while others craft their own directions. There is also in existence a Victorian Charge Book, which contains sample directions on rape. These directions do not cover recent complaint evidence or delay, two areas in which we found significant variation in charges.

1007 (Justice) Geoffrey Eames, 'Towards a Better Direction —Better Communication with Jurors' (Paper presented at the Supreme Court and Federal Court Judges Conference, 22 January 2003, Adelaide), 3. Justice Eames goes on to say: 'In common with most trial judges, I was often acutely aware when charging a jury that far from my instructions being clear, comprehensible and minimalist, they were usually replete with complex and elaborate discussion of questions of law, frequently involving over-subtle distinctions.' (p 3).

7.160 Justice Eames also pointed out that there has been little research on the comprehensibility of jury charges in Australasia.¹⁰⁰⁸ In 1998 the New Zealand Law Commission undertook some important research into jurors in criminal trials.¹⁰⁰⁹ They tracked a sample of 48 criminal trials over a period of nine months, during which jurors were surveyed and interviewed. Although jurors generally reported finding the judges' directions on the law helpful, in 35 of the 48 trials there were widespread misunderstandings about important aspects of the law, which significantly influenced the juries' deliberations.¹⁰¹⁰ The New Zealand Commission also reported that although over 80% of jurors said that the judge's summing up was helpful, several criticised the presentation on the ground that it was boring and 'conducive to sleep'.¹⁰¹¹

7.161 The New Zealand findings are supported by Australian research. Findlay, for example, found that fewer than 20% of jurors reported having understood legal terms and complex facts thoroughly¹⁰¹² and further, several indicated that they were confused after the judge's charge.¹⁰¹³ The RLREP reported that 88.9% of the directions they examined included long words and complex language.¹⁰¹⁴ A number of barristers interviewed were concerned that jury charges were usually long and complicated:

1008 However there is a large body of North American research which suggests that jury directions are poorly understood. See for example: Geoffrey Kramer and Dorean Koenig, 'Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project' (1990) 23 *University of Michigan Journal of Law Reform* 401. This article refers to numerous other studies.

1009 The findings of the project are published in: New Zealand Law Commission, *Juries in Criminal Trials—Part Two* Preliminary Paper 37, Vol. 1 (1999).

1010 Warren Young, Yvette Tinsley and Neil Cameron, 'The Effectiveness and Efficiency of Jury Decision-Making' (2000) 24 *Criminal Law Journal* 89. This article summarises some of the principal findings of the New Zealand Law Commission's jury research project. One of the misunderstandings listed on page 98 is that many jurors 'did not understand the nature or significance of a number of the standard instructions from the judge about the way in which they were to approach the evidence – for example, the direction on drawing inferences or on the weight to be attached to the fact that the accused had lied.'

1011 New Zealand Law Commission, *Juries in Criminal Trials—Part Two* Preliminary Paper 37, Vol. 1 (1999) paras 7.3–7.4. [p51].

1012 Mark Findlay, *Jury Management in New South Wales* (1994) 78.

1013 Ibid 88. 14% of respondents reported feeling confused as a result of the judge's summing up.

1014 Above n 886, 302.

The simpler you can keep the charge the better—the longer judges go on charging juries with the complications of the law, the more confused the jury get and the more likely they are to say, 'Bugged if I can understand this', and let him off. They're not going to convict a person if they don't know what's going on and if they get confused...

The thing is they go through the provisions but they don't put the book down, look at the jury, and explain them. I've never heard them do that – in other words, put it into layman's terms – because they're worried about being appealed and exceptions being made to their charge so they find it more comfortable to run through the provisions and do what they have to do.¹⁰¹⁵

7.162 Kirby J has spoken about the challenges for judges in communicating effectively with generation X'ers¹⁰¹⁶ who are accustomed to instantaneous communication via email and SMS and as a result have a different attitude to time than earlier generations, less tolerance for long-windedness and little practice in passive listening:

So far as judges are concerned, it argues strongly for briefer directions to juries; the avoidance of unnecessary repetition of descriptions of the evidence; the simplification and clarification of judicial directions on law; and the conduct of proceedings with a briskness suitable to the digital age.¹⁰¹⁷

7.163 The charges we examined often failed to meet Kirby J's ideal. The language used to explain legal concepts was often repetitive, convoluted and confusing. For example, in Trial 14, the judge repeated several times (over a space of over two pages) how the jury ought to treat the notion of reasonableness against the subjective standard of belief, to the extent that the direction became entangled, repetitive and circular.¹⁰¹⁸ Directions on recent complaint were also very complex.¹⁰¹⁹ In nine charges judges referred to the rationale for and historical

1015 Ibid 328.

1016 These people are born between 1961 and 1981.

1017 (Justice) Michael Kirby, *'Speaking to the Modern Jury—New Challenges for Judges & Advocates: A Reflection on Changes in the Occupational, Ethnic and Age Make-Up of the Jury Today and their Implications for Communication with Jurors for Generation-X'* High Court of Australia 12.

1018 Refer to paras 7.32–4 for a discussion of these cases.

1019 Refer to para 7.81 above for a discussion of our findings on recent complaint directions.

background to the recent complaint principle.¹⁰²⁰ It is debatable whether this information assists jurors in their decision-making.

7.164 As Ormiston JA in the Court of Appeal said, in the context of discussing the trial judge's direction on recent complaint:

One should say immediately that, on the whole, it is undesirable to try to explain to a jury the reasons which underlie propositions of law which have to be explained to them in the course of a charge. From time to time one sees examples of judges reading extracts from High Court judgments and textbooks to juries and ordinarily that has led to confusion at least. On the other hand a simple explanation or a pertinent example sometimes gives life to a rule which otherwise might appear a stark statement of some legal proposition.¹⁰²¹

LENGTH OF CHARGES

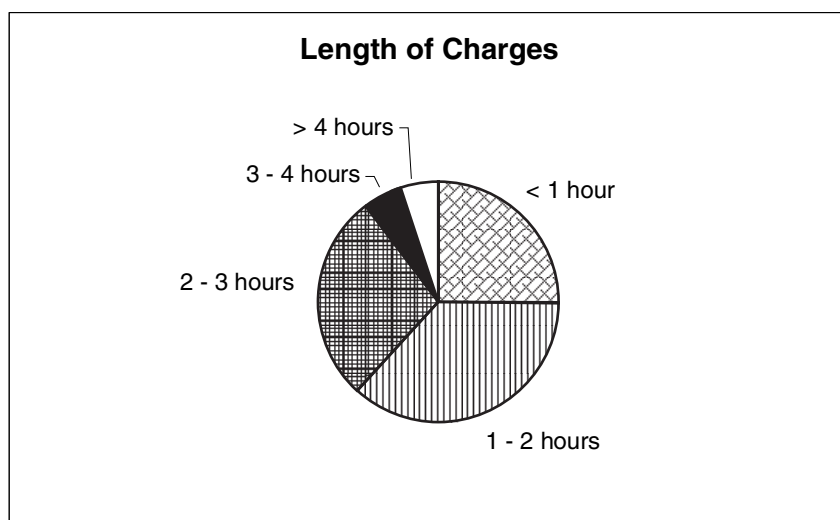
7.165 As we were not privy to starting and finishing times of charges, an estimate of the time taken for each charge was made based on the number of pages. The charges were all transcribed using identical font and spacing, which allowed these time estimates to be made. The time taken to read one page of charge out loud in a clear and unhurried manner was approximately one minute 40 seconds.

7.166 The charges we examined were generally quite lengthy, with eight extending into a second day.¹⁰²² Table 7 in Appendix 5 details the number of pages and estimated time taken to deliver each charge. The average length of charge was 60 pages and 101 minutes and the median 49 pages and 82 minutes. Only six charges were under an hour, with nine lasting between 1 and 2 hours, seven between 2 and 3 hours, one 3 to 4 hours and one over 4 hours.

1020 Trials 4, 10, 16, 17, 18, 19, 21, 22 and 24.

1021 *R v Munday* [2003] VSCA 189 (Unreported, Ormiston, Callaway and Batt JA, 26 November 2003) [18] (Ormiston JA).

1022 However, we did not have information on the time at which the charges commenced, so it is likely that some of these charges commenced later than the usual court start time.



7.167 It is interesting to compare our findings with those of the New Zealand Law Commission.¹⁰²³ It reported that the time taken for charges ‘varied enormously’, with the one extreme being charges that lasted for 20 minutes or less in 4% of trials, and the other extreme being the 20% of charges that were longer than one hour. As many as a third of jurors found the judge’s charge to be too long.¹⁰²⁴ Given that the charges we examined were significantly longer than the New Zealand charges, one would expect that many jurors found them too long. As one judge commented in the RLREP:

It must be a painful experience for a juror to have to sit and listen for this that goes on for no less than hour or an hour and a half, maybe extending to even two hours...the complexity and number of issues to be placed before a jury in a rape trial has increased and multiplied to an extent that a charge in a rape trial takes an inordinate length of time.¹⁰²⁵

1023 New Zealand Law Commission, *Juries in Criminal Trials—Part Two* Preliminary Paper 37, Vol 2 (1999) paras 7.6–7.8 [p52].

1024 Ibid. Half of these longer charges lasted more than 90 minutes.

1025 Above n 886, 315.

AIDS FOR THE JURY

7.168 In its 2001 Report on *Juries in Criminal Trials*, the New Zealand Law Commission reported that juries found written and visual aids a helpful aid to decision-making. In New Zealand juries are given a copy of the indictment, a list of witnesses and the relevant sections of the *Crimes Act*. New Zealand practitioners reported that they often used other aids such as flow charts to encapsulate the evidence.¹⁰²⁶ The Commission recommended that the use of aids by practitioners should be encouraged and that consideration should be given to the publication of a practice note providing guidance on the various types of written and visual aids which should be made available to the jury as a matter of course.¹⁰²⁷

7.169 In addition, the New Zealand Law Commission commented that giving the jury a written copy of the judge's directions or a summary of key points was likely to be helpful in many cases.¹⁰²⁸ While it approved of this practice, the Commission did not believe it was possible to be prescriptive about when such aids should be provided or the form that they should take. It was suggested that it should be left to the trial judge to decide what was appropriate in the particular case.¹⁰²⁹

7.170 In its 2003 *Guide to Jury Trial Practice* the New Zealand Criminal Practice Committee noted that '[t]he practice of giving juries flowcharts or written sequential issues as a structure for making decisions is becoming common and is generally a useful thing to do. Obviously such material is part of the summing up and will form part of the trial record'.¹⁰³⁰

7.171 In the charges we looked at, it was uncommon for judges to give juries written materials. The jury received parts of the transcript (usually at their request) in only a few cases. In two cases the jury was able to play back the accused record of interview. In only one case (Trial 9) a judge gave the jury some written material other than transcript to assist them in their deliberations. The jury was handed a document headed 'Elements of the offences, statutory provisions and matters to be proved by the Crown beyond reasonable doubt'. According to one County Court

1026 New Zealand Law Commission, *Juries in Criminal Trials* Report No 69 (2001), paras 355–9.

1027 Ibid para 359.

1028 Ibid paras 313–4.

1029 Ibid. The Report also supported providing the judge's notes to the jury; paras 341–51.

1030 Warren Young, Neil Cameron and Yvette Tinsley, *Guide to Jury Trial Practice* (2003) (Criminal Practice Committee, Ministry of Justice, NZ) 24.

judge with whom the Commission spoke, in the past it was regarded as inappropriate for judges to give the jury written aids, but that attitude is changing. He said that it was now more common for juries to receive copies of presentments and also transcripts upon request. It seems clear, however, that it is most uncommon for juries to be given the type of written aids they were provided with in Trial 9.

7.172 In our study, there were nine cases where the jury asked questions of the judge. Mostly they wanted clarification of specific directions. In one case the jury handed the judge a list of over 100 questions. Despite the obvious confusion or lack of understanding of juries on important matters, in none of these nine cases were the jurors given any written material to help them with their deliberations.

7.173 Trial judges in Victoria, in fact, have considerable discretion at common law to allow material to be provided to the jury which aids its understanding of the evidence and the proceedings generally. Under section 19(1) of the *Crimes (Criminal Trials) Act 1999* the trial judge may order, either on the application of the parties or on his or her own motion, that copies of certain documents be given to the jury 'for the purpose of helping the jury to understand the issues'. These documents may be 'in any form that the trial judge considers appropriate' and may include prosecution opening and closing speeches, the judge's summing up, any schedules, chronologies, charts, diagrams, summaries or other explanatory material, transcripts of evidence or 'any other document that the trial judge thinks fit'.¹⁰³¹

7.174 In its review of jury services, the Law Reform Committee of the Victorian Parliament recommended that model jury instructions be developed through a multi-disciplinary approach using the expertise of lawyers (to ensure legal accuracy), psycholinguists (to ensure that the language used is comprehensible) and psychologists (to test comprehensibility). As with the existing sample directions, such model jury instructions would simply be a guide to be adapted by the trial judge according to the circumstances of each case.

7.175 The Commission believes that it would be helpful for juries to receive more assistance in their deliberations in sexual offence trials. It is too much to expect that lay people will be able to apply complicated legal principles to equally complicated sets of facts after listening once to lengthy and complex directions from a judge.

1031 *Crimes (Criminal Trials) Act 1999* s 19(1).

SUBMISSIONS AND RECOMMENDATIONS

7.176 Of the seven submissions which addressed question 70 of the Commission's Discussion Paper¹⁰³²—‘Should the range of matters dealt with in jury directions be limited, so that greater reliance is placed on the common sense of juries?’—four were against any limitation and three were in favour of limitation. For example, in arguing against the imposition of any limitations on the content of jury directions, the Criminal Bar Association¹⁰³³ said: ‘...juries ought not to be left to deliberate at large in the hope that they know the laws of the land, know the rules of procedure and evidence, and can apply them to the facts as they find them to be’. The Law Institute of Victoria¹⁰³⁴ wrote: ‘...in the interests of consistency, the existing jury directions should be retained’.

7.177 The Corporate Policy Division of Victoria Police¹⁰³⁵ favoured the approach in the United States, where judges make only very brief directions to juries and do not summarise evidence or facts. And a submission from Peter Rush and Alison Young, two Melbourne University academics,¹⁰³⁶ argued that judicial directions to juries ‘be tightly controlled’. In particular, they were of the opinion that:

when directing the jury, the judge should be prohibited from providing a summary of the evidence of the facts. Such evidence has been heard by the jury and is presented by opposing counsel.

7.178 Seven submissions addressed Question 71 of the Discussion Paper—‘Are there any changes which could be made to ensure that jury directions and charges are understood by juries?’ All stated that they were in favour of such changes. For example, the submission from Peter Rush and Alison Young thought that the judge ‘should be required to present to the jury a *written summary* of the *definitional elements* which the jury must find proven, and of the prosecution and defence *arguments* in relation to each element’. John Hinchcliffe¹⁰³⁷ argued that judges should not give any verbal directions at all to juries and all directions

1032 Discussion Paper para 8.174.

1033 Submission 28 to the Discussion Paper.

1034 Submission 23 to the Discussion Paper.

1035 Submission 9 to the Discussion Paper.

1036 Peter Rush and Alison Young, Submission 5 to the Discussion Paper.

1037 Submission 7 to the Discussion Paper.

should be presented in writing. The Federation of Community Legal Centres¹⁰³⁸ suggested:

Judges should be trained to provide clear and understandable directions and explanations to juries...A court staff member could be appointed to liaise between the judge and jury and ensure that the jury adequately understands the directions and charges. Juries could be given a fact sheet about the legislation or juries in sexual offence cases could be given a training session on the legislation prior to the trial.

7.179 The Australian Institute of Judicial Administration is currently considering a research project on jury directions. In the meantime the Commission recommends that the judicial use of written and visual aids to assist juries should be encouraged. Judicial training should advise judges of the New Zealand Law Commission's research about how juries can be assisted by use of these aids. Training should also be provided on how to ensure that jury directions in sexual offence trials are comprehensible and as succinct as possible and on how to relate directions on legal issues to summaries of the facts and arguments.

7.180 In Chapter 3 we recommended that judicial education should include information on the social, cultural and psychological impact of sexual assault. Such training should include information about why victims of sexual assault may not report assaults or may delay reporting them.



RECOMMENDATION(S)

171. Judicial education on sexual assault should include:

- information about the social and cultural context of sexual assault (see Recommendation 7) and the factors that result in delays in reporting assault;
- training on the content and comprehensibility of jury directions and the appropriate balance between comments on the facts and discussion of the law; and
- information about the usefulness of providing written and visual aids to assist jury decision-making.

1038 Submission 27 to the Discussion Paper.



RECOMMENDATION(S)

172. Judges should consider providing juries with written and visual aids to assist their deliberation.

JURY ATTITUDES

7.181 In making decisions on the facts, juries as well as judges are likely to be influenced by their own experience and attitudes. Judges frequently tell jurors to draw on their own experience and knowledge. In our study, for example, the judge in Trial 14 appealed to the jury's 'common sense and experience of human behaviour' in the context of directing on consent.¹⁰³⁹

7.182 The perceptions and experiences which juries rely on in making decisions on the facts and assessing the credibility of witnesses may not accurately reflect empirical information about the context in which sexual assault occurs and the behaviour of those who have been assaulted. As Justice Wood has commented:

Of concern is the circumstance that normally expert evidence of human sexual behaviour, whether normal or abnormal, and of victim response, is not admissible, with the consequence that the determination by juries of such cases will to a large measure depend, in a practical sense, upon their own sexual orientation, experience, practices and beliefs. In many instances, although most particularly in relation to child sexual assault, the dynamics of such an assault and of the typical response of the victim may be quite unappreciated by lay jurors, many of whom may believe in several myths which surround such conduct.¹⁰⁴⁰

7.183 In the High Court case of *Murphy v The Queen*¹⁰⁴¹ Mason CJ and Toohey J questioned the accuracy of a statement by Lawton LJ in *R v Turner*¹⁰⁴² that jurors do not need experts 'to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life'. As they said:

1039 See para 7.134 above for other examples.

1040 (Justice) James Wood, 'Sexual Assault and the Admission of Evidence' (Paper presented at the Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, 12 February 2003, Sydney) 2.

1041 (1989) 167 CLR 94.

1042 [1975] Q.B. 834, 841, cited in *Ibid* 111.

There are difficulties with such a statement. To begin with, it assumes that “ordinary” or “normal” has some clearly understood meaning and, as a corollary, that the distinction between normal and abnormal is well recognized. Further, it assumes that the commonsense of jurors is an adequate guide to the conduct of people who are “normal” even though they may suffer from some relevant disability.¹⁰⁴³

A similar comment could be made about the experience of people who have been sexually assaulted.

7.184 One way of correcting misapprehensions and ensuring that jury decision-making is based on accurate information would be to allow admission of expert evidence on general matters relating to sexual assault. Such expert evidence could help to explain the behaviour of a complainant, for example the reason why a person may delay in making a complaint of sexual assault.

7.185 Evidence on the dynamics of sexual assault is rarely if ever led in Victoria. Under the present law there are several barriers to the admission of expert evidence about sexual assault. First, such evidence may not be regarded as relevant. The Commission believes that expert evidence will often assist juries in assessing the prosecution case and making judgments about the credibility of the complainant. The fact that juries are frequently advised to draw on their own knowledge and commonsense in reaching their verdict highlights the possible relevance of expert information about the dynamics of sexual assault.

7.186 It is of course important that expert evidence adduced by the prosecution and defence should not overwhelm the jury with information and statistics.¹⁰⁴⁴ As is the case in all trials the judge will retain his or her discretion to exclude evidence which is not sufficiently related to the facts in issue.

7.187 Secondly, the ‘common knowledge rule’ generally excludes the giving of expert evidence on matters about which ordinary people are able to form a sound judgment, without needing the assistance of a person who has specialised knowledge and experience in the relevant area.¹⁰⁴⁵ Traditionally the sexual behaviour of men and women has been regarded as falling within this category. Justice Wood’s statement quoted above questions this perception. In the Canadian Supreme Court case of *R v Lavallée* Wilson J said, in relation to cases involving domestic violence:

1043 (1989) 167 CLR 94, 111.

1044 Roundtable 24 February 2004.

1045 *Clark v Ryan* (1960) 103 CLR 486, 491 (Dixon CJ).

The need for expert evidence in these areas can... be obfuscated by the belief that judges and juries are thoroughly knowledgeable about 'human nature' and that no more is needed. They are, so to speak, their own experts on human behaviour.¹⁰⁴⁶

This comment is equally applicable to sexual assault.

7.188 Freckleton and Selby¹⁰⁴⁷ suggest that the 'common knowledge' rule has been interpreted fairly liberally. For example, in *Murphy v The Queen*¹⁰⁴⁸ the test applied by the High Court was whether expert evidence 'would be likely to assist' the jury. Despite this liberal interpretation, the Commission believes that it would be desirable to make it clear that expert evidence can be admitted on the dynamics of sexual assault and the typical response of victims, for example the fact that child sexual assault victims rarely report the assault immediately. The Commission understands that child psychologists have sometimes been called in child sexual abuse trials to explain how children who are sexually abused typically react, but that such evidence has rarely been called or admitted in Victoria. Expert evidence about the general dynamics of abusive relationships has been accepted by Australian courts as admissible when it has been relevant to the facts in issue.¹⁰⁴⁹ A legislative statement making it clear that similar evidence may be admissible in sexual offence trials would encourage counsel to consider whether it should be led.

7.189 Thirdly, for expert evidence to be admissible there must be a 'body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience'.¹⁰⁵⁰ As there is now a large body of research on sexual assault, this requirement may not prevent the introduction of expert evidence. This could be put beyond any doubt by legislation.

1046 [1990] 1 SCR 852, 874, cited in Regina Graycar, 'The Gender of Judgments: An Introduction' in Margaret Thornton (ed) *Public and Private: Feminist Legal Debates* (1995) 277–8.

1047 Ian Freckleton and Hugh Selby (ed) *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed) (2002) 160–3.

1048 *Murphy v The Queen* (1989) 167 CLR 94, 110 (Mason CJ and Toohey J), 126 (Deane J), 130 (Dawson J).

1049 *Osland v The Queen* (1998) 197 CLR 316, 376 (Kirby J).

1050 *R v Bonython* (1984) 38 SASR 45, 47 (King CJ), cited approvingly by Gaudron and Dummow JJ in *Osland v The Queen* 197 CLR 316, 336. Under the Commonwealth and NSW Evidence Acts, satisfying a 'field of expertise' test is not a prerequisite for admissibility. However, rules regarding irrelevant, prejudicial or misleading evidence would presumably operate to exclude the opinion of specialists in unreliable or unacceptable fields of expertise (Einstein J in *Lakatoi Universal Pty Ltd v Walker* [2000] NSWSC 633).

7.190 Expert evidence can only be given by people who qualify as experts. At common law it is probably unnecessary to show that a person has formal qualifications and in some cases people have been able to give evidence based on their experience alone.¹⁰⁵¹ In *R v Gadd*¹⁰⁵² a social worker who had extensive experience working with women who experienced family violence, and had worked as a coordinator of a women's health centre, a domestic violence resource centre and a women's refuge as well as doing counselling or crisis intervention work, was permitted to give evidence. In her evidence she explained the general nature and dynamics of violence, the difficulty women might experience in leaving violent relationships and women's tendency to hide the abuse. Similar evidence could assist juries in sexual offence cases when they consider factors which are argued to affect the complainant's credibility, for example the way in which she responded following the alleged assault.

7.191 As is the case in the area of family violence, the Commission believes that the concept of a field of expertise should be interpreted broadly.¹⁰⁵³ It might, for example, include academics who have undertaken research on sexual assault and people who have extensive experience working with victims of sexual assault, such as rape crisis centre workers and sexual assault counsellors.

7.192 Under Order 44 of the Rules of the Supreme Court, a person can now be accepted as an expert witness in the civil jurisdiction if their expertise is based on experience alone.¹⁰⁵⁴ This mirrors the approach taken in jurisdictions adopting the

1051 For example, in *Weal v Bottom* (1966) 40 ALJR 436 evidence from a truck driver experienced in driving semi trailers was held to be admissible. Barwick CJ held that evidence as to what an articulated vehicle was capable of doing in the circumstances of the case could be put forward by a person who had actual experience, although strictly speaking this evidence is not opinion evidence, nor is the person who gives it 'strictly within the category of expert' (p438). In *Price v The Queen* [1981] Tas R 306 it was held that evidence of addicts' opinions as to whether a drug was heroin were admissible and in *Anderson v The Queen* (1992) SASR 90 evidence given by a police officer as to the potential value of a crop of cannabis was held to be admissible as being to some extent primary evidence and to some extent expert opinion evidence. See also Julie Stubbs and Julia Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709 731.

1052 Transcript of Proceedings, *R v Gadd* (Unreported, Supreme Court of Queensland, commencing 27 March 1995, Moynihan J) 189–98 cited in *Ibid*, 731.

1053 Freckelton and Selby suggest that there is a recent trend for Australian courts to apply the expertise rule more rigorously, through examining the appropriateness, relevance and parameters of an expert's expertise. Above n 1047, 23–8.

1054 Order 44.01 of the Supreme Court (General Civil Procedure) Rules 1996 defines 'expert' as 'a person who has specialised knowledge based on the person's training, study or experience'.

Uniform Evidence Act,¹⁰⁵⁵ which deals with expert evidence in both civil and criminal cases. Section 79 of the Act does not define an expert but provides an exception to the rule against witnesses stating opinions ‘if a person has specialised knowledge based on the person’s training, study or experience’.¹⁰⁵⁶

7.193 Who may qualify as an ‘expert’ and what that person may give evidence about will depend on the particular qualifications and experience of the individual witness. The Commission therefore does not propose to attempt to define who might be an ‘expert’ for the purposes of giving this evidence, but encourages courts to recognise the broad range of individuals and professional backgrounds who may have expertise on sexual assault. The recommendation below will require an amendment to the *Evidence Act 1958*. It is intended that such amendment would encourage prosecutors to lead expert evidence in appropriate cases.



RECOMMENDATION(S)

173. The *Evidence Act 1958* should be amended to clarify that in sexual offence cases expert evidence about sexual assault is admissible. This evidence may include evidence on:

- the nature and dynamics of sexual assault;
- social, psychological and cultural factors that may affect the behaviour of people who have been sexually assaulted and may result in them delaying in reporting an assault.

1055 *Evidence Act 1995* (Cth) s 79; *Evidence Act 1995* (NSW) s 79; *Evidence Act 2001* (Tas) s 79. *Evidence Act 1995* (Cth) ss 4(1) and 8(4)(a) applies the Commonwealth Act provisions to proceedings in ACT courts, except to the extent they are excluded by regulation.

1056 Section 76 of the *Evidence Act 1995* (Cth) states: ‘Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.’

Chapter 8

The Mental Element of Rape

INTRODUCTION

8.1 This Chapter deals with the mental element for rape and for sexual assault. The mental element (or *mens rea*) is the state of the mind of the accused which must be established beyond reasonable doubt before the accused can be convicted. The Chapter recommends a change to the mental element. The proposed change will prevent an accused person from avoiding culpability if he did not take reasonable steps in the circumstances known to him at the time to ascertain whether or not the complainant was consenting.

THE CURRENT LAW

8.2 In Victoria, the prosecution in a rape case must prove that the accused intentionally sexually penetrated the complainant without her consent and also that the accused was aware that the complainant was not consenting, or might not be consenting. Victorian law reflects the House of Lords decision in *DPP v Morgan*,¹⁰⁵⁷ which established that an honest belief in consent, however unreasonable, prevents an accused from having the necessary *mens rea* for the crime. Lord Hailsham recognised that the absence of reasonable grounds for the belief could be relevant in deciding whether the accused held an honest belief.

8.3 This subjective approach to the mental element has been applied by Victorian, New South Wales, South Australian and ACT courts and codified in their statutes.¹⁰⁵⁸ In its 1991 Report on Rape the former Law Reform Commission

1057 [1976] AC 182. See the discussion of this case in the Interim Report paras 7.82–3. This case has been described as the ‘highpoint’ of subjectivism. See, for example, Brian Rolfes, ‘The Golden Thread of Criminal Law —Moral Culpability and Sexual Assault’ (1998) 61 *Saskatchewan Law Review* 87.

1058 *Crimes Act 1958* s 38, *Crimes Act 1900* (NSW) s 61I, *Criminal Law Consolidation Act 1935* (SA) s 48 and *Crimes Act 1900* (ACT) s 54. The subjective approach is also (presently) required in the Northern Territory: see *Director of Public Prosecutions Reference No 1 of 2002* [2002] NTCCA 11

of Victoria recommended that the subjective approach to the mental element should not be changed to an objective approach.¹⁰⁵⁹ However, the Commission recommended that juries should be directed that in reaching a decision on the state of mind of the accused they should take into account whether his alleged belief in consent was reasonable in the circumstances. This provision is now contained in section 37(1)(c) of the *Crimes Act 1958*.

8.4 Western Australia, Queensland and Tasmania do not apply *Morgan*. In their respective Criminal Codes, the mental state for rape is satisfied by a mere intention to have intercourse.¹⁰⁶⁰ The prosecution must prove that the complainant did not consent but does not have to prove that the accused knew the complainant was not consenting or that he was reckless as to consent. In his defence, the accused can, however, argue that he honestly and reasonably believed the complainant consented.¹⁰⁶¹ Once the defence is raised, the prosecution must prove beyond reasonable doubt that the accused did not have an honest and reasonable belief that the complainant consented.

8.5 In the Interim Report the Commission weighed up the arguments for and against moving towards a more objective approach to the mental element of rape and concluded that a stronger argument can be made for modifying the current subjective mental element than for retaining the current approach.

(Unreported, Martin CJ, Thomas and Bailey J, 19 December 2002), but note that special leave has been granted to appeal to the High Court. In this case the majority held that the trial judge was correct in directing the jury that the Crown must prove beyond reasonable doubt not only that the accused had sexual intercourse with the complainant without her consent but also that he intended to have sexual intercourse with her without her consent and that any mistaken belief in consent need not be based on reasonable grounds.

1059 Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure* Appendixes to Interim Report No 42 (1991).

1060 *Criminal Code Act 1913* (WA) s 325, *Criminal Code Act 1899* (Qld) s 349, *Criminal Code Act 1924* (Tas) s 185. Australian criminal law derives from legislation, decisions of courts (common law) or a combination of both of these. The Code jurisdictions of Qld, WA, Tas and the NT have codified the criminal law and in so doing have departed significantly from the common law principles. In the 'common law' States of Vic, SA, the ACT and NSW, the *mens rea* of rape is now statutorily defined, although it is broadly consistent with the common law as stated in *DPP v Morgan* [1976] AC 182.

1061 In *BRK and Ors v R*, the Western Australian Court of Criminal Appeal held that 'reasonableness' was to be determined 'by the standards of a reasonable person of the same 'age, background, and level of intellectual functioning as the accused.' *BRK and Ors v R* (Unreported, Supreme Court of Western Australia, Court of Criminal Appeal, Murray, Parker and Owen JJ, 25 May 2001), [36]. Further, the 'reasonable person' has been held to be a sober person: *Daniels v The Queen* (1990) 1 WAR 435, 445, Kennedy J.

WHY THE CURRENT SUBJECTIVE MENTAL ELEMENT SHOULD BE MODIFIED

8.6 The following arguments can be made in favour of modifying the mental element:

- the present law does not adequately protect the autonomy of people to refuse to participate in sexual activity;
- a person who has not given any consideration to whether another person has consented to a sexual assault should not be able to avoid culpability;
- the ‘communicative model’ of consent is undermined by the current subjective approach;
- the ‘mental element’ has an important influence on the outcome of sexual offence trials; and
- other jurisdictions have modified the subjective approach to the mental element.

These arguments are briefly outlined below.

THE PRESENT LAW DOES NOT ADEQUATELY PROTECT SEXUAL AUTONOMY

8.7 The present subjective approach does not provide adequate protection to women and children.¹⁰⁶² It supports the attitude that a person is entitled to have sex, unless the other person actively indicates they do not wish to do so. This places the onus on a person approached for sex to indicate lack of consent, instead of requiring the initiator to ascertain whether the other person is consenting.

8.8 Judges routinely direct juries that reasonableness is ‘one of many guides’ to be taken into account in deciding whether the accused was aware that the complainant was not consenting or might not be consenting.¹⁰⁶³ However the

1062 Women and children make up the overwhelming majority of sexual assault victims. See Interim Report para 2.22.

1063 *Crimes Act 1958* s 37(1)(c) reads: ‘in considering the accused’s alleged belief that the complainant was consenting to the sexual act it must take into account whether that belief was reasonable in all the relevant circumstances.’ See Chapter 7, paras 7.51–64 for a discussion of judges’ directions in relation to the accused’s state of mind. The Commission found that the comprehensibility of the directions on this varied somewhat between judges. Some were very unclear. For example, the judge in Trial 3 directed: ‘Now in dealing with the reasonableness of belief, take care to appreciate that in relation to the reasonableness of an accused’s belief an objective test is not involved. It is not what you might

Commission does not believe that this provision adequately protects sexual autonomy. The accused may have various distorted beliefs about sex. For example, he may believe that women like to struggle, that he has the right to have sex after buying a woman a meal, or that he has to ‘seduce’ a woman by overcoming her resistance. L’Heureux-Dubé J’s comments in the leading Canadian Supreme Court case of *R v Park*¹⁰⁶⁴ are relevant to these concerns:

Few would dispute that there is a clear communication gap between how most women experience consent, and how many men perceive consent. Some of this gap is attributable to genuine, often gender-based, miscommunication between the parties. Another portion of this gap, however, can be attributed to the myths and stereotypes that many men hold about consent.

8.9 A jury may or may not be sympathetic to an accused who argues that on the basis of his sexual experience he believed that silence and passivity on the part of the woman meant she had consented.

8.10 A mental element of rape in which an accused can be acquitted where he held an honest belief in consent runs the real risk of affirming and legitimising such myths and stereotypes. It has been argued that the subjective approach means that ‘the more drunk, insensitive, boorish, or self-delusional the male, the more likely that an acquittal will ensue’.¹⁰⁶⁵

AN ACCUSED PERSON SHOULD NOT BE ABLE TO AVOID CULPABILITY IF HE HAS NOT CONSIDERED THE ISSUE OF CONSENT

8.11 Under current Victorian law an accused may be able to avoid culpability where he did not give any thought at all as to whether the complainant was consenting or not. The Court of Appeal in *R v Ev Costa*¹⁰⁶⁶ held that there must be a conscious advertence to the question of the complainant’s consent in order to satisfy the mental element. Similarly, the Supreme Court has said that the accused must have been ‘aware that the woman was not consenting, or else realised that

have believed or others might have believed in the circumstances you find existed, it is the reasonableness of the belief held by the accused at the time, that is, his subjective belief; that is, you are looking at his state of mind...’

1064 [1995] 2 SCR 836, 864-5. L’Heureux-Dubé J’s judgment was agreed with by the majority of the Supreme Court of Canada.

1065 Brian Rolfes, ‘The Golden Thread of Criminal Law —Moral Culpability and Sexual Assault’ (1998) 61 *Saskatchewan Law Review* 87 para [88].

1066 *R v Paul E v Costa* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Phillips CJ, Callaway JA and Southwell AJA, 2 April 1996).

she might not be and determined to have intercourse with her whether she was consenting or not'.¹⁰⁶⁷

8.12 This approach may be compared with that in New South Wales. In *R v Kitchener*¹⁰⁶⁸ it was held that 'where consent to intercourse is withheld, a failure by the accused to avert at all to the possibility that the complainant was not consenting, necessarily means that the accused is "reckless as to whether the other person consents"...'¹⁰⁶⁹ which is sufficient to satisfy the *mens rea* of the offence in New South Wales. Kirby P, then President of the Court of Appeal, commented that:

To criminalise conscious advertence to the possibility of non-consent, but to excuse the reckless failure of the accused to give a moment's thought to that possibility, is self-evidently unacceptable. In the hierarchy of wrong-doing, such total indifference to the consent of a person to have sexual intercourse is plainly reckless, at least in our society today... Such a law would simply reaffirm the view that our criminal law, at crucial moments, fails to provide principled protection to the victims of unwanted sexual intercourse, most of whom are women.¹⁰⁷⁰

8.13 No accused should be acquitted just because he has completely failed to turn his mind to the question of consent. The act of penetration is an act which cannot be done accidentally. If an accused is physically capable of penetration and mentally capable of forming the intent to penetrate, then it should be expected that he is also able to turn his mind to whether or not the other person is consenting to the act.¹⁰⁷¹ The mental element should be changed to prevent an accused from escaping criminal liability if he has simply failed to consider whether the woman is consenting.

1067 *R v Flannery and Prendergast* [1969] VR 31, 33.

1068 (1993) 29 NSWLR 696.

1069 Ibid 703 (Carruthers J, with whom Kirby P and Smart J agreed).

1070 Ibid 697 (Kirby P). In *R v Tolmie* (1995) 37 NSWLR 660, 671 Kirby P. said: 'The criminal law, at least in respect of conduct as seriously invasive as sexual intercourse, should not fall more heavily on those who exhibit some attention to the rights of others while exculpating those who are so insensitive to the rights of others that they do not consider their wishes in respect of sexual intercourse although they are necessarily relevant and important in the process of initiation and continuation of sexual intercourse.'

1071 Toni Pickard, 'Culpable Mistakes and Rape: Relating Mens Rea to the Crime' (1980) 20 *University of Toronto Law Journal* 75–6.

THE PRESENT LAW UNDERMINES THE 'COMMUNICATIVE MODEL' OF CONSENT

8.14 Section 37(1)(a) of the *Crimes Act 1958* was intended to overcome the view that passivity is equivalent to consent and to encourage a more communicative approach to consent for sexual activity. The section reads:

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.

8.15 The current subjective mental test for rape, which focuses on the accused's *honest* belief in consent, does nothing to discourage the *assumption* of consent in ambiguous situations. Consider the case where the complainant is 'frozen' by fear and does not respond in any way to an accused's sexual advances. If the accused can convince a jury that he penetrated her on the basis of an 'honest' (but uninformed) belief that her silence means consent, he will be acquitted. This flies directly in the face of the communicative model of consent presented in section 37(1)(a) of the *Crimes Act 1958*.

8.16 In Chapter 7 we refer to jury charges in which judges directed that past consensual sexual intercourse between the complainant and accused or complainant and others may be taken into account by the jury in deciding whether the accused in this instance had an honest belief that the complainant consented. For example:

...you must...take into account the past dealings between these people, if any, as you find them to be, to see whether you think it would have been reasonable for him to believe on this occasion that she was consenting to intercourse, given for example, their past sexual history, if you accept that occurred.¹⁰⁷²

8.17 Section 36 of the *Crimes Act* says that consent means 'free agreement' and section 37(1)(a) requires that such free agreement is communicated in some way. These provisions are undermined if evidence of previous consensual sexual activity with the accused or others can be taken into account in deciding whether or not

1072 Trial 8. Trial 1 is another example of such a direction. There the judge directed the jury that: 'You are also more entitled to more readily accept, if you see fit, an accused statement that he believed a woman was consenting to multiple sexual partners, when she says to him that she had previously enjoyed such activity, or he is aware that she previously so enjoyed such activity.' See paras 7.52–5.

the accused on the occasion in question honestly believed the complainant was consenting.

8.18 The Commission believes that the law should encourage the initiator of sexual activity to take responsibility for ascertaining the wishes of the other person. When weighed against the serious harm of rape, such a simple step could hardly be said to be onerous. As Toni Pickard writes:

He is about to engage intentionally in the specific act which can itself be harmful, and whether or not the act is harmful in any particular instance cannot be determined without reference to the world outside him. That is sufficient reason to require him, as an initial matter, to inquire into consent before proceeding.¹⁰⁷³

8.19 In her study of 34 rape trials in the County Court of Victoria between 1996-98,¹⁰⁷⁴ Dr Melanie Heenan found that honest belief in consent was raised by the accused defence in the very trials in which it was unlikely that the complainants were capable of freely agreeing.¹⁰⁷⁵ Heenan found that in the four trials where belief in consent was argued, the complainants were either asleep or unconscious during the incident.

8.20 Our findings were similar. In our judges' directions study¹⁰⁷⁶ we found that belief in consent was argued in eight trials.¹⁰⁷⁷ Of these, *six* involved one or more of the vitiating factors listed in section 36.¹⁰⁷⁸

THE EFFECT OF THE SUBJECTIVE APPROACH ON TRIAL OUTCOMES

8.21 One of the reasons which the former Law Reform Commission of Victoria (LRCV) advanced for retaining the subjective mental element was that a change to a more objective approach would only affect 'belief' trials i.e. trials in which the defence explicitly argued that the accused had a mistaken but honest belief in

1073 Toni Pickard, 'Culpable Mistakes and Rape: Relating Mens Rea to the Crime' (1980) 20 *University of Toronto Law Journal* 75-6. She comments further: 'in terms of simple balancing of interests, it is sound policy to require reasonable care, given the capabilities of the actor' (p 77).

1074 Melanie Heenan, *Trial and Error: Rape, Law Reform and Feminism* (Unpublished PhD Thesis, Monash University, 2001). See also Interim Report para 7.69 for a discussion of this study.

1075 Ibid.

1076 Reported in Chapter 7.

1077 Trials 3, 5, 7, 8, 12, 14, 20 and 23.

1078 Section 36 defines consent as 'free agreement' then sets out a non-exhaustive list of situations in which a person does not freely agree to a sexual act. See paras 7.42-50.

consent.¹⁰⁷⁹ The LRCV examined 53 DPP files covering rape trials¹⁰⁸⁰ and reported that ‘belief in consent’¹⁰⁸¹ was the primary issue in only three cases (6%), and in another nine (17%) the accused relied on a mix of ‘consent’ and ‘belief in consent’ in their defence. The LRCV concluded that the mental element is rarely the main issue in rape trials.¹⁰⁸² It went on to say that this finding was not surprising. It was suggested that mistaken belief in consent was an unattractive line for the defence to take because it required a concession by the defence that the complainant may not have consented.

8.22 The LRCV argument that ‘belief’ cases are rare does not recognise that in the so called ‘straight consent’ trials the mental element of rape must still be established. It may not be the ‘main issue’ from the point of view of the lawyers but it cannot be assumed that the same is true of the jurors.¹⁰⁸³ Even if defence counsel does not explicitly argue that the accused had an honest belief in the complainant’s consent, the jury is obliged to consider the state of mind of the accused in their deliberations. Juries in Victoria are directed to consider each and every element of the crime of rape¹⁰⁸⁴ and be convinced beyond reasonable doubt on each.

1079 Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure* Appendixes to Interim Report No 42 (1991) 13–5.

1080 Reported in Ibid 84–91.

1081 ‘Straight belief’ cases were classified in the study as follows: there is ‘relatively little disagreement about what was said or done by either party and the defence conceded either directly or indirectly, that there was a real possibility of mistake on the part of the accused’. In contrast, ‘straight consent’ cases were those ‘characterised by marked disagreements about what had taken place...Logically, in such cases the accused was also asserting a belief in consent, but the claim was that this belief was well grounded, rather than the result of a possible mistake’. Ibid 86.

1082 Report No 43, above n 1079, 13.

1083 Any speculation about how and on what basis juries decide cases is just that, speculation.

1084 In Australia’s common law jurisdictions, trial judges have discretion to give only a minimal *mens rea* direction in cases where there is no ‘mistake’ argument i.e. where the accused is relying only on the argument that the complainant consented, but, as Jeremy Gans rightly points out: ‘Even assuming that those judges exercise that discretion in ‘straight consent’ cases, it cannot be assumed that the lack of an elaborate direction would cure any juror misconceptions that may arise. It could scarcely be argued that jurors will ignore a direction just because it is short or will not apply it just because its full legal content is not explained.’ Jeremy Gans, ‘When Should the Jury be Directed on the Mental Element of Rape?’ (1996) 20 *Criminal Law Journal* 247–259. For a fuller version of Jeremy Gans’ criticism of the interpretation of the LRCV study findings, see Jeremy Gans, ‘Rape Trial Studies: Handle with Care’ (1997) 30 *The Australian and New Zealand Journal of Criminology* 26–30. David Brereton did the original study and makes a reply to these criticisms in David Brereton, ‘A Response to Jeremy Gans’ (1997) 30 *The Australian and New Zealand Journal of Criminology*, 36.

8.23 It is likely that jurors place importance on the mental element of rape in both ‘consent’ and ‘straight belief’ trials¹⁰⁸⁵ even when the presence or absence of consent is the primary *legal* issue in a case. A jury may, for example, decide in a ‘straight consent’ case that the complainant did not consent, but nonetheless still acquit the accused because they consider he honestly but unreasonably believed the complainant had consented.¹⁰⁸⁶ Jeremy Gans argues that a ‘well-motivated juror, aware of the importance of the *mens rea* issue in a rape trial, may feel that a higher standard of prosecutorial proof is required for *mens rea* than for the issue of actual consent’.¹⁰⁸⁷

8.24 If the jury takes the view that the accused subjectively believed that the complainant consented they may also be more likely to accept that she was in fact consenting. In any event, it seems clear that the test applied to the mental element of rape is likely to influence how the issue of actual consent is decided.

8.25 In our view the effect of the subjective approach to the mental element is not confined to cases in which the accused relies on a mistaken belief in consent in his defence, but has a more far-reaching effect.

OTHER JURISDICTIONS HAVE MODIFIED THE SUBJECTIVE MENTAL ELEMENT

8.26 A number of other Commonwealth jurisdictions have moved away from an entirely subjective approach to the mental element. New Zealand abolished the *Morgan* principle when it adopted an objective test for the mental element of rape in 1985.¹⁰⁸⁸ The mental element required for rape in Canada includes an objective

1085 Jeremy Gans, ‘When Should the Jury be Directed on the Mental Element of Rape?’ (1996) 20 *Criminal Law Journal* 247–259. For a definition of what is meant here by ‘straight consent’ and ‘straight belief’ see above n 1081.

1086 In other words, as Gans says, the jury decides that ‘the complainant was raped but not by a rapist’. Ibid 261.

1087 Ibid 261.

1088 *The Crimes Act 1961* (NZ) s 128, as amended by s 3 of the *Crimes Amendment Act (No 3) 1985* reads: ... (2) A male rapes a female if he has sexual connection with that female occasioned by the penetration of her [[genitalia]] by his penis—

(a) Without her consent; and

(b) Without believing on reasonable grounds that she consents to that sexual connection.

See Rosemary Barrington, ‘Standing in the Shoes of the Rape victim: Has the Law Gone Too Far?’ (1986) *New Zealand Law Journal* 408 for a discussion of the NZ amendments. She concludes that the amendments represent a positive step and have definitely not gone too far.

component.¹⁰⁸⁹ Following an extensive review of sexual offences laws by the Home Office,¹⁰⁹⁰ England recently passed legislation which introduced an objective test for the *mens rea* of rape.¹⁰⁹¹ The rationale for this amendment was stated by the Home Office as follows:

We believe the difficulty in proving that some defendants did not truly have an 'honest' belief in consent contributes in some part to the low rate of convictions for rape. This in turn leads many victims, who feel that the system will not give them justice, not to report incidents or press for them to be brought to trial.¹⁰⁹²

The Code States in Australia (Western Australia, Tasmania and Queensland) also apply a largely objective approach.¹⁰⁹³ Thus, in modifying the current subjective

1089 See discussion below para 8.31. Here it should be noted that even the well-known Canadian subjectivist Professor Donald Stuart recognised the need for some degree of objectivity in the *mens rea* element of rape: 'The time had arrived for Parliament to declare some criminal responsibility for objectively unreasonable sexual behaviour.' Don Stuart, 'Sexual Assault: Substantive Issues Before and After Bill C-49' (1993) 35 *Criminal Law Quarterly* 241 255. Professor Stuart's objection to the model introduced by the Canadian Parliament in 1992 was not that it contained an objective element for *mens rea*, but that it failed to recognise the distinction in culpability between a deliberate rapist and one who was unreasonable in not anticipating that the complainant may not be consenting where he should have.

1090 Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences ; Volume 1. Summary, Report and Recommendations*. (2000).

1091 The *Sexual Offences Act 2003* (UK) s 1 (Rape) reads:

(1) A person (A) commits an offence if:

(a) he intentionally penetrates the vagina, anus or mouth of another person B with his penis,
(b) B does not consent to the penetration, and
(c) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

1092 Home Office, *Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences* (2002) 17.

1093 *Criminal Code Act 1913* (WA) s 324D, *Criminal Code Act 1899* (Qld) s 349, *Criminal Code Act 1924* (Tas) s 185.

In the main High Court case on mistake, *R v He Kaw Teh* (1985) 157 CLR 523, Brennan J regarded the question of whether the subjective or objective approach to the mental element of rape as unsettled and made some suggestions as to why an objective approach may be more favourable. This was, of course, obiter dictum, as the case concerned a statute on drugs. It is also worth noting that Victorian statutory sexual offences against children and young people allow a defence of honest and reasonable mistake as to the age of the child.

test, Victoria would be moving into line with a number of other Australian and overseas jurisdictions.

SUMMARY

8.27 The Commission believes that the law of rape should be changed to ensure that an accused cannot escape culpability where he failed to turn his mind to the question of whether or not the complainant was consenting, or failed to take any adequate initiative to ascertain whether she was consenting.¹⁰⁹⁴ The current test for the mental element of rape undermines the communicative model of consent in section 37(1)(a) of the *Crimes Act 1958*. A mental test which includes some objective elements would encourage responsible sexual relations in the community. It would protect sexual autonomy and make an important symbolic statement that the law no longer accepts outdated views on female sexuality, seduction and sexual conquest. Such an approach would be consistent with changes to the law in New Zealand, Canada, and England.

THE PROPOSED MODELS

8.28 The Interim Report discussed three possible ways of amending the law to place more emphasis on the reasonableness of the accused's belief that the complainant was consenting.

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.

8.29 The first model is a purely objective approach under which the prosecution would not have to prove that the accused was aware that the

Here it should also be noted that a partially objective approach (i.e. putting the evidential burden on the accused to raise mistaken belief in consent) was the law in Victoria in 1947. See *R v Burles* [1947] VLR 392, 404.

1094 Interim Report Recommendation 78.

complainant was not consenting. The accused would be convicted if the prosecution proved beyond reasonable doubt that a reasonable person would, in all the circumstances, have been aware that the complainant was not consenting or might not be consenting.

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.

8.30 Under this model, which applies in the Code States of Western Australia, Tasmania and Queensland, the prosecution is only required to prove that the accused had an intention to sexually penetrate the complainant and that the penetration occurred without her consent. Where the accused raises mistaken belief in consent as a defence (there must be some evidence in support of an assertion of mistaken belief), the prosecution must then prove, beyond reasonable doubt, that the belief was neither honest nor reasonable.

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 complainant was not consenting.*

8.31 This third option is similar to the Canadian approach.¹⁰⁹⁵ In Canada, a defence of honest but mistaken belief in consent is available to the accused once certain conditions are satisfied. The accused must raise some plausible supporting evidence to give an ‘air of reality’ to the defence of mistaken belief.¹⁰⁹⁶ The trial judge must then decide, based on all the evidence, whether or not there is sufficient evidence to put the defence to the jury. The Canadian Supreme Court has said:

Essentially, for there to be an ‘air of reality’ to the defence of honest but mistaken belief in consent, the totality of the evidence for the accused must be reasonably and realistically capable of supporting that defence...that evidence must amount to something more than a bare assertion. There must be some support for it in the circumstances.¹⁰⁹⁷

Once the trial judge decides there is sufficient evidence for the defence to go to the jury, the prosecution must prove beyond reasonable doubt that the accused did not have this belief.

SUBMISSIONS

8.32 The Commission called for submissions as to the most appropriate model for reform of the existing element for rape. Three submissions rejected all the proposed models outright and advocated retention of the status quo. The Criminal Bar Association was of the opinion that the ‘current law should be retained’.¹⁰⁹⁸ They wrote:

The retention of an entirely subjective test is consistent with the approach adopted in other offences contained within the *Crimes Act 1958*, such as the crime of theft. A person’s state of mind is subjective. Offences requiring the proof of *mens rea* render a person criminally culpable for their conscious and voluntary acts. A person ought not be held criminally culpable for conduct that was unintended...

1095 In 1992, a statutory definition of consent was enacted (Bill C 49). Criminal Code RSC 1985, c 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.

1096 A preliminary discussion of the Canadian model can be found in the Interim Report paras 7.109–13.

1097 *R v Park* [1995] 2 SCR 836, 853 (L’Heureux-Dubé J, with Lamer CJC, La Forest, Gonthier, Cory and McLachlin JJ concurring).

1098 Submission 42.

Victoria Legal Aid agreed with the Criminal Bar Association's submission on this point.

8.33 The Victorian Bar's attitude was similar:

The Bar opposes the adoption of any of the options suggested by the Commission for change in relation to the mental element for the crime of rape. We oppose the introduction of an objective test into an assessment of mental intention in the most serious criminal offences.¹⁰⁹⁹

The Victorian Bar expressed agreement with the principles stated in *DPP v Morgan*¹¹⁰⁰ and went on to say:

If the accused honestly believed that the woman consented, he should not be guilty of rape, even if that belief was unreasonable.

8.34 The County Court was opposed in principle to removing the 'element of subjectivity which has always been regarded as such a vital aspect of the mens rea of crime'.¹¹⁰¹ Although it rejected Options 1 and 2, it did not specifically reject Option 3, which it described as 'the least objectionable of the three'.

8.35 All other submissions that commented on this point supported a move to a more objective model but were divided about which model was preferable. Four submissions supported Option 1,¹¹⁰² one Option 2¹¹⁰³ and eight were in favour of Option 3.¹¹⁰⁴ For example, the Violence Against Women Integrated Services (VAWIS) said:

[W]e support Option 1: An Objective Fault Element for Rape, along with the other proposed changes to The Mental Element of Rape to ensure that an accused cannot escape culpability because he held an honest but unreasonable belief in the complainant's consent.¹¹⁰⁵

And the Domestic Violence Incest Resource Centre (DVIRC) stated:

1099 Submission 48.

1100 [1976] AC 182.

1101 Submission 52.

1102 Submissions 20, 24, 26 and 44.

1103 Submission 45.

1104 Submissions 16, 17 (supported both Options 2 and 3), 19, 27, 32, 40, 47 and 51.

1105 Submission 24.

[W]e support Option 1 because it promotes and upholds the communicative model of sexual relations which we believe is a necessary benchmark for sexual conduct in a just society.¹¹⁰⁶

The Department of Human Services also thought that Option 1 was the most appropriate model:

This model is preferred as it applies a strict standard when judging sexual behaviour, thus sending out a strong symbolic message to the community...¹¹⁰⁷

8.36 Barwon CASA preferred the model encompassed by Option 3:

because this puts the responsibility with the accused to show they took reasonable steps to ascertain that the complainant was consenting. Our experience indicates that some people ‘freeze’ as a reaction to an attack upon themselves and this has been taken as consent by some defence lawyers. Option 3 supports a communicable and mutual mode of sexual interaction.¹¹⁰⁸

The Federation of Community Legal Centres also supported Option 3:

We support Option 3...because it bolsters the communicative model. While the legislative change may have a limited impact on trial outcomes it is an important message to send to the community, and to those working in the CJS [criminal justice system]. Under this model the assertion by the accused that he believed the complainant was consenting is not sufficient. He must provide sufficient evidence that he held such a belief.

WHICH MODEL?

The Commission favours a variation on Option 3, which includes both subjective and objective elements. This model draws on but is not identical to the Canadian approach and is arguably simpler for juries and judges to apply than Options 1 or 2, or the present wholly subjective model. The recommended model is as follows:

1106 Submission 20.

1107 Submission 44.

1108 Submission 16. Three other CASAs also supported Option 3: Loddon Campaspe CASA (Submission 19), CASA House (Submission 27) and West CASA (Submission 32).



RECOMMENDATION(S)

174. The *Crimes Act 1958* should be amended to include the following formulation of the mental element of rape:
- 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.
 - The accused must produce some evidence that he had an honest belief that the complainant consented before this matter can be left to the jury. The mere assertion by an accused that he believed the complainant was consenting shall not constitute sufficient evidence of an honest belief as to consent.
 - 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 but mistaken belief in consent can be considered by the jury.
 - The defence of honest belief in consent is not available where:
 - the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting;
 - the accused did not turn his or her mind to the possibility that the complainant was not consenting; or
 - one or more of the circumstances listed in section 36(a)–(g) existed and the accused was aware of the existence of such circumstances.
 - In considering the question of whether the accused took reasonable steps in the circumstances known to the accused at the time to ascertain that the complainant was consenting, the jury shall not have regard to any evidence of the accused's self-induced intoxication.
 - If relevant to the facts in issue in a proceeding, the judge must direct the jury that—in considering the accused's alleged belief that the complainant was consenting to the sexual act it must take into account whether that belief was reasonable in all the relevant circumstances. [current section 37(1)(c) *Crimes Act 1958*].

HOW OUR RECOMMENDED MODEL WILL WORK

8.37 The model we propose has both subjective and objective elements. In this section we explain how it would work in practice. Because there are similarities between our proposal and the Canadian approach¹¹⁰⁹ to the mental element of rape, we draw on the Canadian jurisprudence which has developed following introduction of the 1992 *Criminal Code* provisions. The following section includes a discussion of:

- the evidentiary burden and the persuasive burdens of proof;
- the threshold test for the defence of mistaken belief in consent;
- issues which must be considered by the jury (reasonable steps, inadvertence, vitiating factors listed in section 36 of the *Crimes Act 1958*); and
- the effect of self-induced intoxication.

BURDENS OF PROOF

8.38 Under our recommendations the defence will have the burden of

'Evidential burden': the burden of introducing enough evidence to be placed before the jury or other tribunal of fact. To be decided by the judge.

'Persuasive burden': the burden of proof. To be decided by the jury in a jury trial.

producing some evidence of the existence of an honest but mistaken belief in consent (the evidentiary burden). For the reasons discussed in 8.42 this will not affect the normal right of the accused to decline to give evidence. The prosecution will still have to prove beyond reasonable doubt that

there was intentional sexual penetration of the complainant without her consent and, if the defence of honest but mistaken belief in consent is put to the jury, must also prove beyond reasonable doubt that the accused did not have an honest belief in consent.

THE THRESHOLD ISSUE—FOR THE TRIAL JUDGE

8.39 The trial judge will have to decide whether or not the evidential burden for the 'mistake defence' has been satisfied. Only then will it be necessary to direct the jury on this issue. In cases where the mistake defence is not raised or does not

1109 The models are not, however, identical and there are some important differences between them.

have an ‘air of reality’, the judge will direct the jury only on the requirement that there must be sexual penetration without the complainant’s consent.

8.40 The rationale behind requiring supporting evidence when raising the mistaken belief defence is expressed by McLachlin J in *R v Osolin*:

A person who honestly believes something is a person who has looked at the circumstances and has drawn an honest inference from them...A person who commits a sexual assault without some support in the circumstances for inferring the consent of the complainant has, at very least, been wilfully blind as to consent.¹¹¹⁰

8.41 The purpose of the threshold test is to ensure that the jury is only directed on issues which are relevant to the case. In other words, the jury should not be left to consider or instructed to consider the issue of the accused’s belief in consent if there is no evidence that it is in issue.¹¹¹¹ This overcomes the potential problem of jury speculation, discussed above.¹¹¹² Cory J in the Canadian Supreme Court case of *R v Osolin*¹¹¹³ gives a useful description of the threshold test:

The term ‘air of reality’ simply means that the trial judge must determine if the evidence put forward is such that, if believed, a reasonable jury properly charged could have acquitted. If the evidence meets that test then the defence must be put to the jury. This is no more than an example of the basic division of tasks between judge and jury.

8.42 In the determination of the threshold issue, there is no requirement for corroborating evidence as such, but the evidence must be more than a mere assertion by the accused.¹¹¹⁴ Supporting evidence may come from the testimony of

1110 *R v Osolin* [1993] 4 SCR 595, para [118]. L’Heureux-Dubé J quoted this passage with approval in *R v Park*, above n 1097, 853.

1111 L’Heureux-Dubé J in the leading Canadian Supreme Court case of *R v Park*, above n 1097, 846-63 analysed exhaustively the ‘air of reality’ test (Lamer CJC, La Forest, Gonthier, Cory and McLachlin JJ concurring). The judge made it clear that ‘[i]t is a legal threshold, not a factual one.’ (p 848). And further: ‘The test is the means by which a judge demarcates the limits of the jury’s fact-finding responsibilities. A jury must not be invited to speculate on issues that are not realistically before it.’ (p 848).

1112 See paras 8.21–5.

1113 *R v Osolin*, above n 1110, para [198]. This statement of Cory J is cited approvingly by L’Heureux-Dubé J in *R v Park*, above n 1097. See also *R v Pappajohn* [1980] 2 SCR 120 and *R v Esau* [1997] 2 SCR 777.

1114 Cory J for the majority in *R v Osolin*, above n 1110, para [208] held: ‘...the mere assertion that ‘I believed [he] was consenting’ will not be sufficient. What is required is that the defence of mistaken

the accused alone, from the complainant's evidence-in-chief or cross-examination or from evidence from other sources. It is important to note here that there is no obligation on the accused to testify in order to raise the defence. The accused's right to silence is therefore maintained.

8.43 In the Canadian context L'Heureux-Dubé J's analysis of the threshold test in *R v Park*¹¹¹⁵ provides guidance on when the defence of mistake should or should not generally be put to the jury. Where the accused's and complainant's evidence on the facts is similar and the only difference is in their interpretation of what happened, generally the defence should be put to the jury. Where their stories are opposed, for example, the accused argues that the complainant was a willing and active participant and the complainant argues that she did not consent, then the defence should generally not be put to the jury as it is merely a question of consent or no consent. Further, evidence which may support an honest belief on the part of the accused that the complainant *would* consent to sexual activity is not capable of supporting, on its own, the defence of honest but mistaken belief in consent. This is because consent can be withdrawn at any time¹¹¹⁶ and therefore may not be present at the time of the actual sexual activity.

8.44 Lamer CJ in the Canadian Supreme Court case of *R v Davis*¹¹¹⁷ attempted to give some guidance to trial judges in deciding the threshold issue, holding that the trial judge must consider the totality of evidence but not attempt to weigh it:

The sole concern is 'with the facial plausibility of the defence', and the judge should 'avoid the risk of turning the air of reality test into a substantive evaluation of the merits of the defence'. Care should be taken not to usurp the role of the trier of fact. Whenever there is a possibility that a reasonable trier of fact could acquit on the basis of the defence, it must be considered.

belief be supported by evidence beyond the mere assertion of a mistaken belief...more that a 'facile mouthing of some easy phrase of excuse'.

1115 *R v Park*, above n 1097, 858-9.

1116 Ibid 855 (L'Heureux-Dubé J). In the Saskatchewan Court of Appeal, Wakeling JA in the case of *R v Silva* (1994) 120 Sask R 139, 146-7 dismissed as unsupportive evidence of the complainant's alleged conduct prior to the rape, which the accused pointed to in support of his assertion of an honest belief in consent:

'If a woman engages in 'dirty dancing' during a party that would not normally give a man who is at the party along with others the right to think that later in the evening she is disposed to consensual sexual intercourse with that man. Similarly the fact that a woman consents to kissing and necking with a man would not normally give the man the right to think that she is also consenting to sexual intercourse with him.'

1117 [1999] 3 SCR 759, para [82], quoting in part from Major J in *R v Ewanchuk* [1999] 1 SCR 330.

8.45 A recent case in which the Alberta Court of Appeal held that there was no ‘air of reality’ to the accused’s defence provides another example of how the ‘air of reality’ test applies.¹¹¹⁸ The case was an appeal by the Crown against the acquittal of the respondent husband on sexual assault charges against his former wife.¹¹¹⁹ The relationship had been characterised by physical and mental abuse by the accused of his wife. Following separation, the accused had lured his wife out of her brother’s house and abducted her. Out of fear for her safety, she had agreed to have sexual intercourse with him. The Court of Appeal set aside the acquittal and entered a conviction, holding that the accused husband could not rely on the defence of honest but mistaken belief in consent as any such belief could only have arisen from his own wilful blindness and unwillingness to face the fact of the fear that he had caused his wife by his conduct. In the circumstances of the case there was no air of reality to his defence, knowing as he did that he had abducted his wife and that she was afraid of him.

ISSUES FOR THE JURY’S DETERMINATION

8.46 Once the accused has satisfied the trial judge that there is some evidence in support of his assertion that he honestly believed the complainant had consented, the judge must direct the jury to consider the defence. The jury will be directed that the prosecution must prove beyond reasonable doubt the following three things:

- that the accused intentionally sexually penetrated the complainant;
- that the complainant did not consent; and
- that the accused did not honestly believe that the complainant consented.

8.47 It should be noted that this retains the subjective aspect of the mental element of rape. However, under the Commission’s proposed model, the jury cannot find that the accused had an honest but mistaken belief in consent if :

- 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
- the accused did not turn his or her mind to the possibility that the complainant was not consenting; or

1118 *R v MacFie* [2001] A.J. No 207; (2001) ABCA 43.

1119 Note that it is not possible for the Crown to appeal against an acquittal in Victoria.

- one or more of the circumstances listed in section 36(a)–(g) [of the *Crimes Act* 1958] are applicable.

If the jury is convinced beyond reasonable doubt of any one of the above three factors, then the accused must fail on the defence of mistaken belief in consent.¹¹²⁰

‘Reasonable Steps’

8.48 One clear advantage of the Commission’s proposed model (and of the Canadian approach on which it is based) is that it avoids the problem of deciding whether the accused behaved like a reasonable person. As we pointed out in the Interim Report, this makes it unnecessary to define the characteristics of a hypothetical reasonable person. It also makes it unnecessary to consider whether certain attributes of the accused (for example their cultural background or intelligence) should be attributed to the so-called reasonable person.¹¹²¹ In other areas of the law the concept of a ‘reasonable person’ or an ‘ordinary person’ has given rise to difficulties.¹¹²²

8.49 ‘Reasonable steps’ obviously requires a consideration of standards of reasonableness, but not to the same degree as the reasonable person test. At the

1120 It is at this stage that the Commission’s proposed model differs significantly from the Canadian model. Under the Canadian *Criminal Code* RSC 1985, c. C-46, Part VIII, self-induced intoxication, recklessness or wilful blindness as to consent and failure to take reasonable steps in the circumstances known to the accused at the time to ascertain that the complainant was consenting will preclude the accused from raising the defence of mistake i.e. the defence will not get beyond the threshold stage (although it seems that since *Ewanchuk* was decided in 1999 (see below), ‘reasonable steps’ is to be left to the jury). The relevant section in the Canadian *Criminal Code* reads:

s 273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(a) the accused’s belief arose from the accused’s

(i) self-induced intoxication, or

(ii) recklessness or wilful blindness; or

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

Although the section has been interpreted differently in various courts, the current Supreme Court interpretation is represented by the majority decision in *R v Ewanchuk* [1999] 1 SCR 330 (Major J, Lamer CJC, Cory, Iacobucci, Bastarache and Binnie JJ), which held that the consideration of whether or not the accused took ‘reasonable steps’ is not part of the threshold ‘air of reality’ test but is rather an issue of fact for the jury to consider once the defence has been left to them.

1121 Interim Report paras 7.104–5.

1122 For a discussion of the conceptual uncertainty surrounding the ‘ordinary person’ test for provocation, see Victorian Law Reform Commission, *Defences to Homicide* Options Paper (2003) paras 3.83–90.

time of its passage in 1992, the then Canadian Minister of Justice (Kim Campbell) described the provision relating to ‘reasonable steps’ as a modified objective test because it takes into account the circumstances known to the accused at the time, not the circumstances the accused ought to have known.¹¹²³ She went on to say in her Second Reading Speech:

Clearly, consent to sexual activity cannot be assumed, presumed or believed unless reasonable steps have been taken to ascertain that consent has in fact been given.

Common sense and responsible conduct so demand.¹¹²⁴

8.50 The reasonable steps requirement appears to impose not only an obligation to be vigilant as to the possibility that no consent has been given, but a further obligation to take *affirmative action* to ascertain the existence of consent.¹¹²⁵

8.51 As for the meaning of ‘reasonable steps’, as yet there is relatively little case law from the Canadian Supreme Court to guide us. One of the clearest statements from a Supreme Court majority on the issue is contained in *R v Ewanchuk*.¹¹²⁶

Once the complainant has expressed her unwillingness to engage in sexual contact, the accused should make certain that she has truly changed her mind before proceeding to further intimacies. The accused cannot rely on the mere lapse of time or the complainant’s silence or equivocal conduct to indicate that there has been a change of heart and that consent now exists, nor can he engage in further sexual touching to ‘test the waters’.

8.52 Justice McLachlin in her dissenting opinion in *R v Esau*¹¹²⁷ made an even stronger statement concerning reasonable steps:

1123 See also John McInnes and Christine Boyle, ‘Judging Sexual Assault Law Against a Standard’ (1995) 29 *U.B.C.L. Rev.* 341 for a detailed discussion of the reasonable steps requirement.

1124 Cited in Brian Rolfes, ‘The Golden Thread of Criminal Law—Moral Culpability and Sexual Assault’ (1998) 61 *Saskatchewan Law Review* 87 para 80.

1125 It is conceivable that due to extreme circumstances, the only ‘reasonable steps’ open to a person is to stand back and wait for the other person to make a sexual advance of her own volition. An example of such a situation is where a man assaults and falsely imprisons a woman such that she is in fear for her safety.

1126 *R v Ewanchuk* [1999] 1 SCR 330.

1127 *R v Esau* [1997] 2 SCR 777, para [80].

A person is not entitled to take ambiguity as the equivalent of consent. If a person, acting honestly and without wilful blindness, perceives his companion's conduct as ambiguous or unclear, his duty is to abstain or obtain clarification on the issue of consent.

8.53 What is required of 'reasonable steps' will be different according to the particular circumstances of each case.¹¹²⁸ Where, for example, there is an extreme power imbalance between the parties, it may be necessary for the accused to wait for any initiation of sexual contact to come from the complainant herself.¹¹²⁹

8.54 The jury should be directed by the trial judge that in considering what reasonable steps were required of the accused in the circumstances known to him, no regard shall be had to any evidence of the accused's self-induced intoxication. We discuss the issue of self-induced intoxication in detail below.

Failure to Consider Consent

8.55 If the prosecution can convince the jury beyond reasonable doubt that the accused did not turn his mind to the possibility that the complainant was not consenting then the accused's defence of mistaken belief will fail.

1128 Elizabeth Sheehy has identified several lower court Canadian decisions in which guidelines for the 'reasonable steps' issue have been formulated. Elizabeth Sheehy, 'From Women's Duty To Resist To Men's Duty To Ask: How Far Have We Come?' (2000) 20 (3) *Canadian Women Studies* 98. She discusses: *R v Thompson* [1995] OJ no 4528 (Ct Just Gen Div); *R v KRC* [1995] YJ No 74 (Yukon Terr Ct), *R v TS* [1999] OJ No 268 (Ct Just Gen Div), *R v RJS* [1994] PEIJ No. 109; *R v RG* (1994) 38 CR (4th) 123 (BCCA), 130. In *R v KRC* the Yukon Territory Court held: 'Adequate freedom to say no, requires an absence of any real or apprehended coercion. Having said no while in the bathroom within the embrace of the accused or within his reach on the floor, the complainant was not afforded the physical space necessary to freely consider or reaffirm her initial position. It was unreasonable for the accused not to remove himself from the bathroom to ensure that the complainant could consider her position without real or apprehended coercion to consent and without fear of any harm if she refused...' (cited in Sheehy, 100–1).

1129 In *R v RG*, cited in Sheehy, Ibid 101, the accused and complainant were separated, although he continued to press for reconciliation. Prior to the sexual assault in question, the accused physically assaulted the complainant after she refused his advances, causing her vomit from fear. She later acquiesced to sexual intercourse with him out of fear as to what may happen if she 'upset' him again. Further, she was in a strange town where she knew no-one and had no money with which to get herself and her children home. The British Columbia Court of Appeal held that in such circumstances, 'it would require the most compelling evidence of a subsequent unequivocal indication of consent by the complainant to give a defence of honest but mistaken belief in consent any air of reality'.

8.56 This reverses the current law in Victoria, under which an accused may avoid culpability where he did not give any thought at all as to whether the complainant was consenting or not.¹¹³⁰

Relevance of Vitiating Factors from Section 36

8.57 The categories of non-consent are set out in section 36 of the *Crimes Act 1958* and are discussed in detail in Chapter 7 of this Report.¹¹³¹ The section provides a non-exhaustive list of circumstances in which a person ‘does not freely agree to an act’. These include where a person:

- is asleep, unconscious or so affected by alcohol or drugs as to be incapable of freely agreeing;
- submits out of force or harm or fear of force or harm to that person or someone else;
- submits because she or he is unlawfully detained;
- is mistaken about the sexual nature of the act; or
- is mistaken about the identity of the other person or is incapable of understanding the sexual nature of the act.¹¹³²

8.58 The Commission’s study of judges’ directions revealed that judges do not always direct the jury on these factors, even when they are apparently relevant on the facts of the case.¹¹³³ Under the Commission’s proposed model for the mental element of rape, the jury will be directed by the trial judge that if it is convinced that any of the vitiating factors existed and the accused knew about the existence of those circumstances, then he cannot succeed on the defence of mistaken belief in consent.¹¹³⁴

1130 See discussion above paras 8.11–3.

1131 See paras 7.42–50.

1132 Section 36 (a)–(g) *Crimes Act 1958*.

1133 In only seven out of thirteen cases where the expanded categories of non-consensual sex were assessed as being relevant did judges direct the juries on them. See para 7.43.

1134 This part of the model is based in part on s 75 of the new English legislation, the *Sexual Offences Act 2003* (UK).

8.59 This change should encourage prosecutors to make greater use of section 36¹¹³⁵ and will also emphasise the importance of the communicative model of consent intended by the legislation. It will send an important message to the community about the nature of consent in sexual relations.

INTOXICATION AND THE MENTAL ELEMENT OF RAPE

8.60 Research tells us that alcohol plays a large role in sexual assault. The Rape Law Reform Evaluation Project found that 40% of those accused of rape reportedly had a history of drug or alcohol dependence and just over 20% of accused were allegedly intoxicated at the time of the offence.¹¹³⁶ In Canada, selected police forces have reported that alcohol or drug consumption was apparent for 28% of accused.¹¹³⁷

8.61 There are two ways in which intoxication may be relevant to the required mental element for rape and other sexual assaults.¹¹³⁸ First, the defence may argue that the defendant was so drunk that acts which would otherwise be criminal were actually unintentional or involuntary. In the context of rape, for example, it would be argued that the accused was so intoxicated that he was incapable of being aware that he was sexually penetrating the complainant without her consent.¹¹³⁹ This principle is based on the High Court decision in *R v O'Connor*.¹¹⁴⁰

1135 Based on the Commission's study of judges' directions, as judges often failed to direct on the s 36 circumstances, it was assumed that prosecutors were not raising them in the course of their arguments.

1136 Melanie Heenan and Helen McKelvie, *Crimes (Rape) Act 1991, An Evaluation Report* (1997) 32. A total of 242 case files were examined that related to 255 accused and 282 complainants.

1137 Wolff, L. and Reingold, B. 'Drug Use and Crime', (1994) 14 (6) *Juristat*; p8, cited in Canadian Advisory Council on the Status of Women, *The Intoxication Defence in Canada: Why Women Should Care* (1995) 7. In these cases, 66% of the victims suffered physical injuries, compared with 59% of the women who were victims of men not known to have consumed alcohol or drugs.

1138 As Tolmie says: 'Intoxication has no independent status of its own.' Julie Tolmie, 'Intoxication and Criminal Liability in New South Wales: A Random Patchwork?' (1999) 23 *Criminal Law Journal* 218 236.

1139 Ibid. Such a defence is of course rare in practice and when raised, not often successful. See also George Smith, 'Footnote to O'Connor's Case' (1981) 5 *Criminal Law Journal* 270. Judge Smith makes the comment (p 277): '...any 'defence' of drunkenness poses enormous difficulties in the conduct of a case. To name but one, if the accused has sufficient recollection to describe relevant events, juries will be reluctant to believe that he acted involuntarily or without intent whereas, if he claims to have no recollection, he will be unable to make any effective denial of facts alleged by the Crown'.

1140 (1980) 146 CLR 64.

8.62 Second, it may be argued that, although the accused was not acting involuntarily, his alcohol consumption affected his assessment of the circumstances, so that he had an honest, albeit unreasonable belief in the complainant's consent. The policy question is whether legislation should be enacted to prevent the accused relying on irrational and wishful beliefs about another party's consent that come about because of his intoxicated state.

SHOULD THE O'CONNOR PRINCIPLE BE CHANGED?

8.63 Under the *O'Connor* principle a person who is grossly intoxicated, to the extent that he or she is incapable of forming an intention to commit a criminal offence, must be acquitted. *O'Connor* reflects the general principle of criminal responsibility that a person who is incapable of forming the intention to commit the crime should not be held criminally culpable. In essence the defence is not that the person was drunk but that his or her action was not voluntary.¹¹⁴¹

8.64 The Commission is aware that many members of the community find the *O'Connor* principle difficult to accept. However Australian law reform bodies that have reviewed *O'Connor* have generally recommended its retention.¹¹⁴² For example, in 1999 the Parliament of Victoria Law Reform Committee recommended that *O'Connor* should continue to be the law in Victoria.¹¹⁴³

8.65 The Commission does not recommend abolition of the *O'Connor* principle. The Commission believes that if such a fundamental change were to be made to the principles of criminal law, it would be inappropriate to do so in the

1141 Submission to Parliament of Victoria Law Reform Committee by Robert Richter QC, Minutes of Evidence, 30 March 1999, 117 cited in Law Reform Committee, Parliament of Victoria, *Criminal Liability for Self-Induced Intoxication* Report (1999) 103.

1142 For example see Law Reform Committee Ibid; Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility* Report No 34 (1990) paras 218–219; Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2, General Principles of Criminal Responsibility* Discussion Draft (1992) 51; South Australian Criminal Law and Penal Methods Reform Committee (1977), *The Substantive Criminal Law: Fourth Report*, 48. The New Zealand Law Reform Committee and the Law Commission of England and Wales have also recommended that the *O'Connor* approach to evidence of intoxication conforms best to general principles of criminal law: New Zealand Criminal Law Reform Committee (1984) *Report on Intoxication as a Defence to a Criminal Charge*: Report, para 45; Law Commission, *Legislating the Criminal Code: Intoxication and Criminal Liability* (London: HMSO, 1995) cited in Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001) 251.

1143 Law Reform Committee, Parliament of Victoria, *Criminal Liability for Self-Induced Intoxication* Report (1999) above, n 1141, Recommendation 3.

context of sexual offences alone. This approach is consistent with the view of the Criminal Bar Association that 'the question of self-induced intoxication as a defence should not be confined to sexual offence cases' and should be examined more generally.¹¹⁴⁴

8.66 In addition, we believe that changing the *O'Connor* principle would have a minimal effect on trial outcomes. This is confirmed by surveys which considered the practical effect of *O'Connor* and of *R v Daviault*,¹¹⁴⁵ the Canadian Supreme Court decision which applied the equivalent principle in Canada.¹¹⁴⁶ In the rare cases in which accused persons raise *O'Connor* in their defence, juries are unlikely to believe that an accused who was physically capable of sexual penetration was so incapacitated by alcohol or drugs as to be incapable of forming the intention to commit the act.

SHOULD AN ACCUSED BE PRECLUDED FROM RELYING ON HONEST BUT MISTAKEN BELIEF ON CONSENT WHERE THE BELIEF AROSE FROM SELF-INDUCED INTOXICATION?

The Situation in Canada

8.67 In *Daviault*, the Canadian Supreme Court held that an accused, whose gross intoxication prevented him from forming an intention to sexually penetrate

1144 Submission 42. Victorian Legal Aid agreed with the Criminal Bar Association's submission on this on this point (Submission 54).

1145 [1994] 3 SCR 63; (1994) 33 CR (4th) 165. For a detailed discussion of *Daviault* see Patrick Healy, 'Criminal Reports Forum on *Daviault*: Extreme Intoxication Akin to Automatism Defence to Sexual Assault: Another Round on Intoxication' (1994) 33 *Criminal Reports (4th) (Canada)* 269.

1146 In *R v Daviault*, Ibid the Canadian Supreme Court held in a 6 to 3 majority that self-induced intoxication could be a defence to rape in the 'rarest of cases' where the intoxication is so extreme as to be akin to automatism or insanity. Following the decision an exhaustive survey by two Canadian academics of reported and unreported judgments revealed only 11 '*Daviault*' cases over a 9 month period: see Martha Drassinower and Don Stuart, 'Nine Months of Judicial Application of the *Daviault* Defence' (1995), 39 CR (4th) 280, cited in Don Stuart, *Canadian Criminal Law: A Treatise* (4th ed) (2001) 441. See also Canadian Advisory Council on the Status of Women, *The Intoxication Defence in Canada: Why Women Should Care* (1995) 6. These survey results were similar to those of Judge G. Smith's survey of 510 trials in the District Court of New South Wales in the year following the *O'Connor* judgment: see George Smith, 'Footnote to O'Connor's Case' (1981) 5 *Criminal Law Journal* 270. The judge found that the intoxication defence was raised in only 11 cases (or 2.16 percent of the total) where it would not previously have been available. Three acquittals resulted, but the judge reported that in only one 'could it be said with any certainty that the issue of intoxication was the factor that brought about the acquittal' (p 277).

the complainant without her consent, could not be convicted. Legislation was, however, soon enacted to overcome the effect of the decision.¹¹⁴⁷ As a result of this legislation, which is now incorporated in the *Criminal Code*, accused persons cannot rely on their gross intoxication to relieve them from criminal liability in Canada.

8.68 The Canadian *Criminal Code* also provides that a person cannot rely on the defence of honest but mistaken belief in consent where that belief arose from the accused's self-induced intoxication.¹¹⁴⁸ This means that the defence of honest and reasonable belief will not be put to the jury if the trial judge is satisfied that the accused's belief in consent arose from self-induced intoxication. In this situation, the trial judge will instruct the jury that they need only determine that there was sexual penetration which occurred without the complainant's consent.

Submissions and Recommendations

8.69 There was considerable support in the submissions for legislation to explicitly prevent accused persons relying on self-induced intoxication in their defence. Eight out of the 10 submissions that addressed the issue of self-induced intoxication supported changing the law to ensure that accused persons in sexual assault matters cannot rely on self-induced intoxication in their defence.¹¹⁴⁹

1147 The amendment was known as Bill C-72. The provision is now contained in the Canadian *Criminal Code*.

RSC 1985, c. C-46, s 33.1 which reads:

33.1 (1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).

(2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders that person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.

(3) This section applies in respect of an offence under the Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

For a discussion of the Bill, see Isabel Grant, 'Second Chances: Bill C-72 and the Charter' (1995) 33 *Osgoode Hall Law Journal*, 379.

1148 *Criminal Code* RSC 1985, c. C-46, s 273.2. For the text of this section see n 1120.

1149 See Submissions 16, 17, 24, 26, 27, 30, 44 and 51.

8.70 We have set out above the reasons why the Commission is not recommending legislation to overrule the *O'Connor* principle.¹¹⁵⁰ However, the Commission has decided to recommend legislative change to the effect that evidence of self-induced intoxication is not a relevant consideration for the jury in its deliberations on the defence of mistaken belief in consent. The Commission recognises that there is some inconsistency in retaining the *O'Connor* principle and recommending that intoxication cannot be taken into account in determining whether the accused believed the complainant consented. However, due to the extreme rarity of *O'Connor-type* cases, the practical effect of this inconsistency is minimal.

8.71 The Commission has decided to adopt a variation of the Canadian approach.¹¹⁵¹ Under our model self-induced intoxication is not a threshold issue for the trial judge. It is relevant only once the defence of mistaken belief in consent has been put to the jury. At this stage the trial judge will instruct the jury that in considering whether the accused took reasonable steps, in the circumstances known to him at the time, to ascertain that the complainant was consenting, any evidence of self-induced intoxication should be disregarded.¹¹⁵²

8.72 The Commission considers that an explicit legislative reference to self-induced intoxication is necessary in relation to the 'reasonable steps' component of the mistake defence. This is intended to prevent an accused from arguing that 'in the circumstances known to him at the time'—the subjective element of the test—must take into account that he was intoxicated. An accused could argue that the reasonable steps required in the circumstances were less onerous than they otherwise might be by reason of the fact that he was intoxicated. Our recommendation will prevent the test being undermined in this way.

8.73 The jury could be directed to consider the issue of 'reasonable steps' as follows:

- Did the accused take reasonable steps, in the circumstances known to him at the time, to ascertain that the complainant was consenting? and

1150 See paras 8.64–6.

1151 The obvious problem with the Canadian approach is that of determining the necessary degree of intoxication to warrant exclusion of the defence of honest but mistaken belief in consent. How intoxicated does the accused have to be before he is precluded from relying on the defence? How is a trial judge to decide this as a threshold issue when such decision-making process precludes a weighing of the factual evidence? See the discussion of the threshold issue above paras 8.39–45.

1152 See Recommendation 175 above.

- In determining what reasonable steps were required of the accused in the circumstances known to him, no regard shall be had to any evidence of the accused's self-induced intoxication; and
- The 'reasonable steps' required of a drunken accused are exactly the same 'reasonable steps' required of a sober person in the same circumstances.

8.74 The Commission recognises that this approach requires the jury to consider a fiction. However, this 'fiction' is no more difficult for a jury to apply than that currently required in the Code States. In Western Australia, for example, it has been held that in considering the question of honest and reasonable belief in consent, the belief must be that 'held by a reasonable person in the circumstances of the accused person' but that such 'reasonable person is a sober person'.¹¹⁵³

8.75 A further potential criticism of this approach is that it arguably penalises the accused for being intoxicated but if the complainant is intoxicated her case is not affected. This disregards the likely fact that a complainant who was intoxicated at the time of the alleged offence may be less believable to the jury when she says she did not consent. Further, Victoria Police detectives report that when a complainant is intoxicated it is less likely that the brief will be authorised for prosecution.¹¹⁵⁴

CASE STUDY

8.76 In this section we apply the Commission's recommended model to a case study to illustrate how it may operate in practice. The facts of this case study are taken from an actual rape trial (the names are fictional). The jury charge in this trial was included the Commission's study on judges' directions reported in Chapter 7.

1153 The trial judge directed the jury that: 'The term 'reasonable' means that such a belief must be an objective belief, that is, a belief held by a reasonable person in the circumstances of the accused person. Plainly, the consumption of alcohol or indeed any other intoxicating substance is not relevant to that issue. In other words, if a person thinks something because they were intoxicated, then the fact that they think that because of the intoxicant doesn't make the belief a reasonable one. A reasonable person is a sober person...' Cited in *Labriola v The Queen* [2001] WASCA 341 (Unreported, Malcolm CJ, Wallwork and Anderson JJ, 6 November 2001) [26] (Malcolm CJ). The trial judge's direction was upheld in this appeal.

1154 See para 2.68.

**CASE STUDY**

Mary is 17 years old. She met David through some friends and spent most of that afternoon and evening with him and mutual friends. Mary was attracted to David and made no secret of the fact. David drove them to a quiet location where they kissed and fondled each other and removed some clothing. Mary said to David, when he started touching her genital area: 'I'm not going to have sex with you' to which he replied 'I won't have sex with you. You're one of Frieda's friends'. The kissing continued and after five or ten minutes, David moved to penetrate Mary. Mary said to him: 'No. I still don't want to do this. I thought you weren't going to have sex with me'. David however, proceeded to penetrate Mary, who said nothing more for a while. Eventually Mary said 'We have to go', at which David stopped.

David's story was essentially the same as Mary's until the point of penetration. He agreed that Mary told him that she didn't want to have sex with him, five to ten minutes prior to penetration. He said that after he had pulled his and her pants down and it was apparent that he wanted to penetrate her, Mary said nothing, so he proceeded to have sex with her. After he finished, he said that Mary grabbed his thighs and pulled him towards her as if she wanted more, so they had sex again. In his record of interview with police, David said: '...if she didn't want it I wouldn't have done it. I wouldn't have done it. She said 'No' but her actions didn't seem that way.'

ACTUAL CONSENT

David is entitled to argue that Mary changed her mind after initially saying no and to rely on his evidence of her alleged behaviour as indicating her change of mind. If his evidence about Mary's behaviour prior to and after penetration leaves the jury in reasonable doubt about the question of whether Mary freely agreed to penetration at the time of penetration, then David should be acquitted. It is unlikely that David's evidence as to Mary's silence prior to penetration will help him due to the existence of section 37(1)(a) of the *Crimes Act 1958* which states: '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 normally enough to show that the act took place without that person's free agreement'.¹¹⁵⁵

1155 For a discussion of the operation of this section see para 7.22–44.

THRESHOLD TEST FOR MISTAKE DEFENCE

8.77 David will attempt to raise the mistaken belief defence. He is likely to point to Mary's amorous behaviour as evidence in support of his honest belief in consent. In this case, both Mary and David agreed that Mary said 'I don't want to have sex with you' some five to ten minutes prior to penetration. According to David's evidence, after making that remark nothing in the circumstances changed; they continued kissing and fondling as before. When he prepared to penetrate Mary she said and did nothing. He may also rely on Mary's alleged amorous behaviour following penetration as supporting his argument that she had changed her mind regarding penetration.

8.78 It is likely that David will be excluded at the threshold stage from relying on the defence of honest mistake for two reasons. First, the evidence on which he seeks to rely—Mary's alleged amorous behaviour—is inconsistent with an important fact that is not in dispute in the trial, namely, that Mary said she did not wish to have sex with him. He can offer no evidence in support of a change of mind on her part. Given that silence or passivity cannot be taken as consent, Mary's apparent submission is clearly insufficient to indicate consent. David's denial of Mary's account that she said 'no' immediately before penetration is a mere denial of evidence of her non-consent at the time, rather than evidence of his belief that she had changed her mind. Second, David's account of Mary's alleged amorous behaviour after penetration clearly cannot support an argument about David's mistake prior to that time. That evidence goes only to the issue of Mary's non-consent.

8.79 If the trial judge is not satisfied that the evidential burden has been discharged, he or she will direct the jury that to convict David they must be convinced beyond reasonable doubt that Mary did not consent. Both David's and Mary's accounts can be considered by the jury on this issue. As sexual penetration is not in issue and as David has not produced sufficient evidence to satisfy the evidential burden in relation to his argument of honest belief in consent, actual non-consent is the only issue for the jury's consideration.

'REASONABLE STEPS' AND INADVERTENCE

8.80 If, on the other hand, the trial judge determines that the evidential burden has been discharged, the mistake defence is unlikely to succeed. David would not be able to point to any 'reasonable steps' he had taken to ascertain consent after Mary told him she did not wish to have sex. The circumstances known to him at the time included that Mary had said that she did not want to have sex with him

some five to ten minutes prior to penetration. David's own evidence reveals clearly his state of mind as regards Mary's consent: 'She said 'No' but her actions didn't seem that way'. This is a classic case of 'she said 'no' but she really meant 'yes''. It could also be argued by the prosecution that David failed to turn his mind to whether or not Mary was in fact consenting at the time of penetration, indicated by his lack of direct inquiry into the issue after being told 'no' a mere five to ten minutes earlier.¹¹⁵⁶

1156 In the real trial of this matter in the County Court, the result was a hung jury. Although a new trial was ordered, the Crown entered a *Nolle Prosequi* a short time later.

Chapter 9

Other Legislative Changes

INTRODUCTION

9.1 The Interim Report recommended changes to a number of sexual offences. Chapter 7 of this Report makes final recommendations for offences designed to protect people with a cognitive impairment. This Chapter discusses changes to:

- incest;
- sexual offences against children, including the offences of maintaining a sexual relationship with a child, participation in a sexual act with a young person by a person in a position of care, supervision or authority and procuring; and
- offences which involve compelling a person to commit a sexual act.

We also confirm recommendations made in the Interim Report for the inclusion of an objects and interpretation clause in the *Crimes Act 1958* and the *Evidence Act 1956*.

9.2 The Discussion Paper asked questions about a number of other offences. These related to:

- indecent acts;
- facilitating sexual offences with children;
- abducting a child;
- permitting unlawful sexual penetration to occur; and
- producing child pornography or procuring a child to participate in making child pornography.¹¹⁵⁷

1157 *Crimes Act 1958* ss 47, 49, 49A, 56, 54, 68 and 69.

9.3 In deciding whether changes to substantive offences should be recommended the Commission has taken account of the fact that such changes may make police and prosecution processes more complex. If offences are redrafted and offending behaviour occurs over a period of time it is necessary to charge an accused under the old offence for one period and the new offence from the period when the amendment comes into force. The Commission has decided that unless there is an obvious defect in the legislation, or a strong demand for change, substantive offences should not be changed. Based on our research and consultations we do not recommend any change to these offences.

INCEST

ISSUES

9.4 The Commission believes that the offence of incest needs to be updated to change the focus of the provisions from prohibiting sexual penetration in particular relationships¹¹⁵⁸ to protecting children and young people from exploitation and abuse within the family. This policy is already reflected in provisions which make the offence applicable to cases such as sexual penetration by a parent's de facto partner.¹¹⁵⁹ However in our view the current provisions require further amendment.

9.5 Arguments for reforming incest provisions are discussed at length in the Interim Report.¹¹⁶⁰ The main issues covered are:

- Lack of consent is not an element of the offence of incest. However use of the word 'incest' stigmatises victims of the offence and reflects powerful social myths which suggest that children (particularly girls) may be willing participants in sexual acts with siblings or parents.¹¹⁶¹ This is reflected in the dynamics of incest trials, where complainants are often cross-examined about whether they consented to penetration.¹¹⁶²

1158 Discussion Paper para 6.15.

1159 *Crimes Act 1958* s 44(2).

1160 Interim Report paras 8.1–20.

1161 See *R v J* (1982-83) 45 ALR 331,335–6, Toohey J.

1162 Elizabeth Ward, 'Rape of Girl-Children By Male Family Members' (1982) 15 ANZJ Crim 90; Leslie Feiner, 'The Whole Truth: Restoring Reality to Children's Narrative in Long-Term Incest Cases' (1997) 87 (4) *The Journal of Criminal Law & Criminology* 1385; Shannon Caroline Taylor, *The Legal Construction of Victims/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the*

- Sub-section 44 (3) of the *Crimes Act 1958*, which covers sexual penetration of a person aged 18 or older by family members,¹¹⁶³ is drafted in such a way that the offence can apply to both parties even though one person may initiate abuse and the other may be the victim of it. This is also the case with section 44(4) which involves sexual penetration by a sibling.¹¹⁶⁴ Although it is not common for the person who reports the abuse to be charged as a co-offender, we believe the possibility of charge may act as a disincentive for an adult victim to report the offence. Coercion is a defence but this is only useful to victims once they are charged and have gone to trial. Further, the exploitative power dynamics that can exist in families do not fit neatly within the notion of coercion.

9.6 Our interim recommendations were to:

- change the name of the offence from incest to ‘intra-familial sexual penetration’ which we think more accurately reflects the nature of the offence;
- retain two offences of intra-familial sexual penetration covering the same acts which are now treated as incest under section 44(1) and (2);
- create an offence of intra-familial sexual penetration to cover penetration by a person of their sibling who is under 18. This is an amendment to the current section 44(4); and
- create an offence of persistent sexual abuse of a sibling. This provision will cover circumstances where there is sexual intercourse between adult siblings, but where prior to that the accused has engaged in sexual contact with the victim.

9.7 Like the current offence of incest, the recommendations cover the case where a person over 18 takes part in an act of penetration with their parent, lineal ancestor or step-parent.¹¹⁶⁵ We propose that in that situation the parent could be prosecuted but not the child. This, of course, relates to the situation of abuse of

Victorian County Court of Australia in 1995. (Unpublished Ph.D, University of Ballarat, 2001) and see Interim Report para 8.3.

1163 *Crimes Act 1958* s 44(3) covers sexual penetration involving a father or mother or lineal ancestor or a step parent.

1164 Section 44(4) currently applies regardless of age of either sibling.

1165 Section 44(2) also covers the case where the de facto spouse of a parent sexually penetrates the child, lineal descendant or step-child of the parent, where the child is under the age of 18. No change is proposed to this provision.

the child by the parent. Where a child over 18 takes part in an act of penetration with a parent, without the parent's consent, the child could be charged with rape.

9.8 The proposed amendments also protect adults who are sexually penetrated by a sibling in cases where penetration is a continuation of abuse occurring during childhood.

SUBMISSIONS

9.9 Submissions to the Interim Report were overwhelmingly supportive of the proposed changes.¹¹⁶⁶ Three submissions¹¹⁶⁷ preferred the use of the terms 'intra-familial rape' and 'intra-familial sexual assault' for penetrative and non-penetrative offences. We understand the reasons why the term 'rape' is considered preferable to describe the nature of the offence but have avoided it because of the issues it raises in relation to consent. The Commission does not believe it is helpful to use terms that may raise the issue of consent in this context.

9.10 One submission, from the Domestic Violence and Incest Resource Centre, specifically supported the use of terminology referring to intra-familial sexual abuse as it recognises 'the unique violation of trust and respect involved in such crime'.¹¹⁶⁸

9.11 The only submission received that did not support our recommendations was from the Criminal Bar. The Criminal Bar submitted that the current law as to incest and related offences should be retained. They did not object to our recommendation that a person who takes part in such 'offending behaviour' under the coercion of the other person should not be guilty of an offence. However they disagreed with all other recommendations.

RECOMMENDATIONS FOR REFORM

9.12 We confirm the recommendations made in the Interim Report. The recommendation relating to persistent sexual abuse of a sibling has been amended slightly to make the elements clearer. It should also be noted that the presumption of relationship and the accused's knowledge of relationship in our recommendation is contained in the current incest provisions and does not change

1166 Submissions 16, 19, 20, 26, 27, 30, 37, 41, 44, 47, 48, 51.

1167 Submissions 30, 37, 47.

1168 Submission 20.

the current law. For the purpose of our recommendations the meaning of sibling also remains the same (it covers sister, half-sister, brother or half-brother).

!

RECOMMENDATION(S)

175. 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.
176. Consent should not be a defence to the above intra-familial sexual penetration offences.
177. 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.
178. 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.
179. A new offence should be created to make it an offence where:
- (1) the accused took part in an act of sexual penetration of his or her sibling when the sibling was 18 years or older; and



RECOMMENDATION(S)

(2) prior to the sibling attaining the age of 18 years, the accused took part in one or more acts that 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 person aged 16 or 17 under the care, supervision and authority of the accused); section 49 (indecent act with a person aged 16 or 17¹¹⁶⁹ under the care, supervision and authority of the accused); or the 'compelling sexual penetration offence (see para 9.13 below).

180. 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).
181. A prosecution for this offence must not be commenced without the consent of the Director of Public Prosecutions.

COMPELLING OFFENCES

9.13 Under section 38 of the *Crimes Act 1958*, a person commits the offence of rape if they compel a male person to sexually penetrate them or another person with his penis, or compel him not to withdraw his penis from them or another person. In the Interim Report¹¹⁷⁰ we recommended that compelling a person to penetrate another should be an offence regardless of the gender of the victim or whether the penetration is penile, digital, oral or by an object. We also recommended that it be an offence to compel someone to self-penetrate, or penetrate or be penetrated by an animal. This approach is consistent with that recommended by the Model Criminal Code Officers Committee.¹¹⁷¹

1169 *Crimes Act 1958*, s 49 currently covers only the case where the child is 16 years old. In para 9.19 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.

1170 Interim Report paras 8.21–23.

1171 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, 314.

9.14 Submissions received on this issue, including those from the Victorian Bar and VLA, were supportive of the recommendations.¹¹⁷² The only submission received that did not support the changes was from the Criminal Bar, which said that these behaviours are currently criminal acts and new provisions were unnecessary.¹¹⁷³

9.15 The Commission believes that it is important that the criminality involved in these actions should be made clear. We confirm our recommendations in the Interim Report.



RECOMMENDATION(S)

182. 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.

183. Section 38(4) of the *Crimes Act 1958* should be amended by removing the word 'male'.

184. *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.

1172 Submissions 19, 41, 44, 48 and 54.

1173 Submission 42.

SEXUAL OFFENCES AGAINST CHILDREN AND YOUNG PEOPLE

CARE, SUPERVISION AND AUTHORITY OFFENCES

9.16 Section 48 of the *Crimes Act 1958* makes it an offence for a person to take part in an act of sexual penetration with a person aged 16 or 17 to whom he or she is not married and who is under his or her care, supervision and authority. Section 49 creates an offence of committing or being party to 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 current legislation does not define what is meant by ‘care, supervision and authority’ or who might be in that position in relation to a young person.

Issues Raised in Interim Report

9.17 Issues related to these offences discussed in the Discussion Paper¹¹⁷⁴ and the Interim Report¹¹⁷⁵ were:

- whether the legislation should specify the relationships which are covered by way of an exhaustive or non-exhaustive list; and
- whether the age of consent should be consistent for both penetrative offences and participation in indecent acts.

9.18 We suggested that the inclusion of a non-exhaustive list in the legislation would educate the community about the types of relationships in which sexual contact is prohibited because it may involve exploitation of a young person. We further recommended that there was no rational basis for retaining a different age of consent for penetrative and non-penetrative offences. Protection against sexual exploitation within a relationship of care or authority should continue until a young person becomes an adult. As is currently the case it should be a defence that the accused reasonably believed that the young person was 18 or older.

Submissions

9.19 Submissions to the Interim Report were supportive of these recommendations,¹¹⁷⁶ apart from the Criminal Bar. The Criminal Bar

1174 Discussion Paper paras 6.76–88.

1175 Interim Report paras 8.56–67.

1176 Submissions 19, 41, 44, 48, 49, and 54.

submitted¹¹⁷⁷ that as the position of trust is an aggravating feature the list of relationships should be exhaustive. They also thought that the different age of consent relevant to penetrative and non-penetrative acts should be retained. In contrast, the Victorian Bar believed there would be advantages in setting out the types of relationships which might give rise to an offence, but stressed that a decision as to whether there was a relationship of care supervision and authority should be left to the jury.¹¹⁷⁸ The Department of Human Services thought that consistency in age across the offences was important.¹¹⁷⁹

Recommendations

9.20 Our interim recommendations are confirmed.

!

RECOMMENDATION(S)

185. Sections 48 and 49 of the *Crimes Act 1958* 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;¹¹⁸⁰
- religious instructors;
- employers;
- youth workers;
- sports coaches;
- counsellors;
- health professionals and young people who are patients; and

1177 Submission 42.

1178 Submission 48.

1179 Submission 44.

1180 Penetrative acts are already caught by the proposed offence of inter-familial sexual penetration.



RECOMMENDATION(S)

- police and prison officers and young people in custody.

186. 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.

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

PROCURING AND SOLICITING OFFENCES

9.21 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 the person to take part in that act with the child. Section 60(1) creates a summary offence of soliciting. This 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.

Issues from Interim Report

9.22 A detailed discussion of the issues and problems surrounding these offences can be found in the Interim Report.¹¹⁸¹ In summary:

- there is evidence that the development of the internet has created new opportunities to facilitate child sexual offences—current offences are inadequate to deal with soliciting or procuring conducted over the internet;
- although the current law covers attempts to commit offences, the offence of attempting to procure may not adequately cover sexual grooming activities commonly used by child sexual offenders.

9.23 Our interim recommendation was that an expanded general offence was preferable to an internet-specific offence. In our view the criminality of the conduct should not be based on the medium used by the alleged offender.

1181 Interim Report paras 8.68–86.

9.24 The need for reform in this area may to some extent be overtaken by proposed new Commonwealth legislation. The *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004*, which is proposed for introduction in the winter 2004 sitting of Federal Parliament, proposes new internet procuring and ‘grooming’ offences. Procuring offences will apply when the sender uses the internet to facilitate a meeting during which the child recipient is intended to engage in sexual conduct with the sender, another adult or another child in the presence of the sender or another adult. The ‘grooming’ offences cover the sending of an indecent communication to a child with the intention of making it easier to procure the recipient to engage in sexual activity, or making it more likely that the child will engage in or submit to sexual activity with the sender or another person.

9.25 In the Interim Report we recommend that 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. The new offence will require that the accused do something more than engage in sexually explicit conversation with the child. In our view a person should only be criminally liable once he or she has formed the intent to commit a wrongful act.

Submissions

9.26 Submissions received on this issue were supportive of the recommendations.¹¹⁸² This included the Victorian Bar, Criminal Bar and VLA. The Victorian Bar noted that:

There are circumstances where persons may escape prosecution for an offence because their behaviour, such as encouraging a child to perform an indecent act, is not presently adequately covered or covered at all by any statutory offence.¹¹⁸³

Recommendation

9.27 The Commission confirms the recommendations made in the Interim Report.

1182 Submissions 19, 42, 44, 48 and 54.

1183 Submission 48.



RECOMMENDATION(S)

188. Section 60 of the *Crimes Act 1958* 'Soliciting Acts of Sexual Penetration or Indecent Acts' should be repealed.
189. 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.
190. 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.

UNLAWFUL SEXUAL PENETRATION OF A CHILD

9.28 Section 45 of the *Crimes Act 1958* makes it an offence for a person to take part in an act of sexual penetration with a person under the age of 16. If the complainant is aged between 10 and 16, the accused can rely on several defences. One defence is that the complainant consented and the accused believed on reasonable grounds that the complainant was older than 16. Another is that the

complainant consented and the accused believed they were married.¹¹⁸⁴ In the Discussion Paper we examined two conflicting decisions relating to burden of proof, which raised the question as to whether the burden of proof should be clarified.¹¹⁸⁵

9.29 In the 1984 case *R v Douglas*,¹¹⁸⁶ the Supreme Court of Victoria decided that where an accused person relies on a defence based on facts which are ‘peculiarly within his own knowledge’, then the accused must convince the jury on the balance of probabilities that the defence is established. In relation to section 45, the accused would therefore have to prove that he held the belief and that his belief was reasonable.

9.30 Shortly after the decision of Douglas, the High Court decided the case of *He Kaw Teh v The Queen*.¹¹⁸⁷ That case involved a defence of honest and reasonable mistake of fact. The High Court applied the principle that if the defence arose on the facts in the case, the defendant did not have to prove the defence, but rather the prosecution had to disprove it.¹¹⁸⁸

9.31 Since *He Kaw Teh*, judges have disagreed as to which of these decisions applies to Section 45. In the Discussion Paper we asked:¹¹⁸⁹

- whether the burden of proof should be clarified; and
- if so, should the general principle apply, so that if the accused raises the defence of belief as to age the prosecution has to prove beyond reasonable doubt that it is not true, or should the burden of proof be on the accused to prove on the balance of probabilities that he believed the person was 16 or older?

Submissions

9.32 We received 10 responses to this issue.¹¹⁹⁰ Three submissions,¹¹⁹¹ including the Criminal Bar and Victoria Police, argued that the burden of proof should

1184 Since in Australia people usually can’t marry until they are 18, this is likely to apply only to couples married in another country who later came to Victoria.

1185 Discussion Paper paras 6.25–6.

1186 [1985] VR 721.

1187 (1985) 157 CLR 523.

1188 See, for example, (1985) 157 CLR 523, 574–5 (Brennan J) and 592–4 (Dawson J).

1189 Discussion Paper Questions 21 and 22.

1190 Submissions 4, 6, 7, 8, 9, 12, 13, 17, 23 and 28.

remain with the prosecution and that general principles should apply. The Law Institute endorsed the burden of proof being clarified. They noted that placing the burden on the accused:

is contrary to the common law presumption, and (it is) exceptional that an accused person who seeks to rely on a defence will be required to prove it... It is noted in the instance of...other 'affirmative' offences, if the defence is required to discharge a burden of proof, it is upon the balance of probabilities and, of course, not beyond reasonable doubt.

9.33 Six submissions supported the burden of proof being placed on the accused person. The Gatehouse Centre¹¹⁹² thought that it was unacceptable for the accused to raise the defence without having to justify why he or she held that belief.

Recommendation

9.34 The Commission is of the view that standards should be set particularly high for people who engage in sexual activity with children and young people over 10 and under 16.¹¹⁹³ We prefer the view of the Supreme Court of Victoria in the case of *Douglas*. The accused's belief is a fact 'peculiarly within his own knowledge' and he or she should be required to convince the jury on the balance of probabilities that the defence is established. In coming to this recommendation, we also take into account the fact that this defence is only available when the complainant consented to penetration.



RECOMMENDATION(S)

191. Section 45 of the *Crimes Act 1958* should be amended to make it clear that where the accused is charged with unlawful sexual penetration of a person aged between 10 and 16 and the complainant consented, the onus is on the accused to establish the defence of reasonable belief as to age or marriage on the balance of probabilities.

1191 Submissions 28, 9 and 17.

1192 Submission 13.

1193 Note that the defence of reasonable belief as to age does not apply if the child is under 10, see *Crimes Act 1958* s 45(4).

PERSISTENT SEXUAL ABUSE OF A CHILD

9.35 Section 47A of the *Crimes Act 1958* makes it an offence for a person to ‘maintain a sexual relationship’ with a person aged under 18. We discussed this offence in detail in the Discussion Paper.¹¹⁹⁴ Our view, expressed in the Discussion Paper, is that it is inappropriate to describe child sexual abuse as a ‘sexual relationship’. Our recommendation is that the offence should be renamed ‘persistent sexual abuse of a child’, as is recommended in the Model Criminal Code (MCC).¹¹⁹⁵

9.36 In the Discussion Paper we outlined some changes that were made to section 47A in 1997.¹¹⁹⁶ These changes broadened the range of offences covered by section 47A and changed the sub-section which sets out what the prosecution has to prove. This change made it clearer that the acts alleged did not have to be proved with the same degree of specificity as they would if the accused was charged with individual offences rather than under the ‘continuing’ offence of section 47A.

9.37 The Discussion Paper compared section 47A with the offence proposed in the Model Criminal Code¹¹⁹⁷ and asked a number of questions. In summary these were:

- whether the law in Victoria is working;
- whether the MCC approach to this offence is preferable;
- whether changes to section 47A are required to ensure that those who repeatedly sexually abuse a child over a period of time can be adequately prosecuted; and
- whether section 47A requires a provision which deals with double jeopardy (the double jeopardy principle prevents a person from being tried again for an offence for which they have previously been tried).¹¹⁹⁸

1194 Discussion Paper paras 6.35–66. Section 47A was not covered in the Interim Report.

1195 Above n 1171, 132.

1196 Discussion Paper paras 6.48–9.

1197 Above n 1171, 138.

1198 Discussion Paper paras 6.49–66, Questions 27, 28, 29 and 30.

Submissions and Consultation

9.38 Nine submissions to the Discussion Paper dealt with section 47A issues. Although some specific questions elicited support for the way the offence is drafted in the MCC, a general question as to whether the MCC offence overcame problems in prosecuting people who sexually abuse children over a long period of time did not elicit a positive response. None of the respondents were firmly of the view that the offence had overcome the problems.

9.39 The Criminal Bar¹¹⁹⁹ did not oppose the change of name to ‘persistent sexual abuse of a child’. However, they opposed any other amendment to section 47A, including an amendment which would enable it to cover situations where one of the unlawful acts was committed outside Victoria. They submitted that the elements of section 47A are clear and would not be assisted by the MCC approach. The submission pointed out the difficulties for the criminal justice system in dealing with sexual offences which occur over a lengthy period.

The inherent problems are common to the MCCOC recommendations. No amount of re-drafting will solve the problems associated with stale allegations, young witnesses or witnesses recounting events said to have occurred to them when they were of tender years, the absence of corroboration, the destruction of evidence and the frailty of human memory.

9.40 The Commission sought views on whether the provision could apply unfairly to an accused person who had been tried under section 47A, and was later charged with a specific sexual offence or offences which occurred during the same period covered by the section 47A offence. The Criminal Bar did not see any need for a specific provision relating to double jeopardy to be included in section 47A. They thought that this problem was already covered by the existing common law of double jeopardy, and referred to the Court of Appeal case of *R v GJB*.¹²⁰⁰ This case dealt with the application of the double jeopardy principle where a single presentment¹²⁰¹ included specific offences as well as a section 47A offence.

1199 Submission 28.

1200 *R v GJB* [2002] VSCA 54.

1201 A ‘presentment’ is the form used by the OPP to present charges against the accused. This case dealt with the situation where the accused was tried for both section 47A and specific offences, relating to the same time period, in the same trial. Double jeopardy more usually arises when the accused is charged later with an offence for which he has already been tried.

9.41 In *R v GJB* a man had been charged under section 47A with maintaining a sexual relationship. For that charge the prosecution relied on various acts of vaginal intercourse, which were said to have occurred over a specified period. He was also charged with specific offences, based on other acts of sexual penetration and indecent acts, which occurred over the same period. The separate sexual penetration charges involved different forms of sexual penetration from those acts relied on for the section 47A charge. The accused pleaded guilty to all offences but later appealed against his conviction on the separate sexual penetration charges.

9.42 The Court of Appeal found that each of the acts within the time period covered by the section 47A offence must be charged as particulars of that offence. To charge an accused with section 47A as well as specific sexual offences in relation to the same complainant, which occurred during the same period of time covered by the section 47A offence, was inconsistent with the principle of double jeopardy. The accused could be charged with specific offences as an alternative to the section 47A offence but could not be convicted of both.

There is nothing in the provisions of [section 47A] which entitles the prosecution to exclude from the particulars of the offence preferred under section 47A a portion of the known relevant acts done by an accused in relation to the girl within the period of the relationships sought to be proven, and to charge the excluded relevant acts as additional specific offences.¹²⁰²

9.43 The Court of Appeal said that it was ‘oppressive and unfair’ to the accused to charge him with both an offence under section 47A and also ‘by manipulation of particulars’ with a series of other substantive offences which could have supported the charge under section 47A.¹²⁰³ It appears to follow from this reasoning that the acquittal of a person of a charge under section 47A may prevent them from being prosecuted later for a specific offence which occurred over the same period. It is arguable however that if the accused was acquitted of an offence under section 47A which was based on allegations of indecent assault, and later evidence came to light that a penetrative offence had occurred during the same time period, the accused could be prosecuted separately for the penetrative offence because of the different nature of the offence.

1202 [2002] 4 VSCA 355, 364, Winneke P.

1203 [2002] 4 VSCA 355, 365, Winneke P.

9.44 The OPP did not provide a submission to the Discussion Paper. The Commission met with OPP solicitors¹²⁰⁴ to ascertain whether they thought that changes to section 47A were necessary. The OPP did not support any changes to section 47A and believe that it currently works well. In their view the way the offence is drafted in the MCC is less clear and more restrictive than the Victorian legislation.

9.45 In order to encourage police to thoroughly investigate offences against children and young people, OPP policy is to rely where possible on the child's specific recollections, and on specific offences. Despite that policy OPP solicitors say that section 47A is used more frequently since the 1997 amendments and often used as an alternative to specific offences. They were also of the view that there was no need for a specific double jeopardy provision in section 47A.

9.46 The issue of double jeopardy is currently under review by the Standing Committee of Attorneys-General. Their Model Criminal Code Committee has produced a Discussion Paper¹²⁰⁵ which recommends that the laws on double jeopardy be changed so that a person acquitted of an offence could still be prosecuted for an administration of justice offence or the original or related offence in three circumstances:

- prosecution for an administration of justice offence connected to the original trial;
- retrial of the original or similar offence where there is fresh and compelling evidence; and
- retrial of the original or similar offence where the acquittal is tainted.

It is also recommended that these amendments apply retrospectively. There is currently no agreement between Australian States and Territories as to the changes although the proposals are still being considered.

9.47 In light of the views expressed by the OPP and the Criminal Bar, and the fact that the double jeopardy principle is currently under review, the Commission does not support any change to section 47A other than changing the name of the offence.

1204 Meeting with Gary Ching, Gabriele Cannon, Luisa Dipietrantonio and Jacquelyn Verkade, 3 December 2003.

1205 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 2: Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals* Discussion Paper (2003).



RECOMMENDATION(S)

192. Section 47A of the *Crimes Act 1958* should be amended to replace the words 'maintain a sexual relationship with a child', wherever they appear, with the words 'persistent sexual abuse of a child'.

INCLUSION OF OBJECTS AND INTERPRETATION CLAUSE

9.48 In the Interim Report we discussed the need for education of participants in the criminal justice system about the social context and serious nature of sexual assault. Chapter 3 of this report makes final recommendations about strategies to promote cultural change within the criminal justice system. We also support the inclusion of objects and interpretation clauses at the beginning of the provisions on sexual offences in the *Crimes Act 1958* and in the *Evidence Act 1958*. The arguments for including such provisions are set out in the Interim Report.¹²⁰⁶

Submissions

9.49 Ten submissions received by the Commission commented on these recommendations.¹²⁰⁷ All the submissions supported the inclusion of an objects clause in the *Crimes Act 1958*. The Victorian Bar and the Criminal Bar¹²⁰⁸ both objected to the inclusion of interpretive clauses in the *Crimes Act 1958* and the *Evidence Act 1958*. The Criminal Bar believed that better understanding of the purpose of the legislation should be achieved through the educative process outlined in Chapter 3. The Victorian Bar thought that it was unnecessary and may lead to difficulties and that it was inappropriate to suggest legislation should be interpreted in a particular way. All other submissions were supportive of interpretive clauses although most wanted additions about specific issues.

Recommendations

9.50 The Commission acknowledges that many submissions asked for other matters to be added to the interpretive clause. We have made two small changes to include a reference to young people as well as children, and to people with disabilities. We have not made the many other additions suggested due to the

1206 Interim Report paras 8.87–9.

1207 Submissions 19, 20, 22, 30, 40, 41, 42, 44, 48, 49.

1208 Submissions 48 and 42.

length and detail which would result. In order to be effective these provisions need to be as succinct as possible. Apart from these additions, our recommendations remain as they were in the Interim Report.

! RECOMMENDATION(S)

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

The aim of subdivisions 8A to 8G are to:

- (i) 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;
- (ii) protect children, young people and people with cognitive impairment from sexual exploitation;

194. 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 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, children and young people, and people with disabilities are overwhelmingly the victims of sexual assault;
- offenders are commonly known to victims; and
- sexual offences occur in circumstances where there are unlikely to be any physical signs of an offence having occurred.

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

Chapter 10

Dealing With Juvenile Sexual Offenders

INTRODUCTION

10.1 Consistent with the terms of reference for this inquiry, the earlier chapters in this Report focus on recommendations to make the criminal justice system more responsive to the needs of complainants. In the Discussion Paper we indicated that we did not intend to examine research relating to, or programs for, sexual offenders.¹²⁰⁹ Although this Report does not deal with treatment of sexual offenders in detail, this Chapter discusses some ways in which young sexual offenders could be assisted to change their behaviour.

10.2 The Commission decided to examine this question for two main reasons. First, available information suggests there may be a significant number of young sexual offenders. Many of these offenders abuse younger children including siblings and other family members. Secondly, only a very small number of these offences are currently dealt with in the criminal justice process. We believe that policies which rehabilitate young offenders and support their families in responding to such behaviour will benefit the whole community including other children and young people who may be prospective victims of abuse.

10.3 If young offenders are not helped to change their behaviour they are likely to continue to offend.¹²¹⁰ Some offenders will continue to commit sexual offences as adults.¹²¹¹ Victims who are related to the offender often say they want the offender to be helped to change his behaviour so that other siblings or children are

1209 Discussion Paper para 1.13.

1210 Anna Grant, *The Historical Development of Treatment for Adolescent Sex Offenders* (2000) 2.

1211 Karen Flanagan and K Hayman-White, *Sexual Abuse Counselling and Prevention Program: A Five Year Review of Work with Victims and Adolescent Perpetrators of Sexual Abuse*, Children's Protection Society (1999).

not sexually assaulted. Taking action to reduce sexual assault by young people is consistent with these goals.

10.4 Research indicates that some young offenders have previously been the victims of sexual assault themselves. Even when this is not the case they need help to alter their behaviour. Processes designed to assist offenders must also recognise the psychological and physical effects of sexual assault, and must protect other children and young people from harm from potential re-offending while an offender is receiving treatment.

THE EXTENT OF THE PROBLEM

10.5 The Victoria Police Crime Statistics 2001/2002 record that sexual offences were reported against 436 alleged juvenile offenders in that year, amounting to 12.4% of a total of 3509 alleged offenders.¹²¹² In 2002 the Children's Court finalised 345 non-rape sexual offences and 14 rape offences.¹²¹³

10.6 An evaluation by the Children's Protection Society of clients (aged up to 17 years) referred to its young sex offender therapy program from December 1994 to June 1997 found that 71% were aged between 12-15 years; 94.3% knew their victims; almost half had sexually abused multiple victims; and almost 60% reported some form of penetrative assault.¹²¹⁴ A review of five years of its sexual abuse counselling and prevention program by the Children's Protection Society (CPS) found that of the 534 clients who attended the service one third had been sexually assaulted by a perpetrator aged 18 years or younger.¹²¹⁵

10.7 According to Department of Human Services data, adolescents account for approximately 20% of all recorded sexual offenders.¹²¹⁶ A recent English study of sexual assault of women aged over 16 found that 16% of rape and other assaults

1212 If multiple offences are reported the alleged offender will be recorded on multiple occasions.

1213 Department of Justice, Court Services, *Sexual Offences Finalised in the Children's Court of Victoria for the Period 1999/00–2001/02*.

1214 Children's Protection Society, *Adolescent Sex Offender Treatment Program, Evaluation/Client Profile Report, December 1994–June 1997* (1999) 2.

1215 See above n 1211.

1216 Department of Human Services, *Literature Review, Male Adolescent Sex Offending and Treatment* (1998) 2-4.

were committed by offenders under 19.¹²¹⁷ Among chronic adult sexual offenders, it is estimated that between 50% and 80% committed their first offence as adolescents.¹²¹⁸ International research indicates that between 20% and 40% of sexual abuse of children is perpetrated by people aged under 18.¹²¹⁹ As with other sexual assaults,¹²²⁰ sexual assault by young offenders is a significantly under-reported crime.

10.8 These statistics do not provide an accurate account of sexual offending behaviour by young people because they record only reported offences. The extent of child sexual assault has only recently been recognised. The high proportion of sexual assault perpetrated by young people has been even slower to reach public consciousness.¹²²¹ One of the barriers to ascertaining the extent of juvenile sex offending behaviour is that there is some confusion about what constitutes sexual assault by a child or young person. According to the Victorian Community Council Against Violence there is a 'lack of consistent understanding within the community of normal sexual behaviour for children and young people at various ages'.¹²²² The lack of a clear distinction between 'normal experimentation' and sexually abusive behaviour makes it difficult for parents, teachers, carers and others working with children to know when there is a problem and how to respond to it appropriately. We recommend below¹²²³ that the Department of Human Services should commission research into this issue to enable it to formulate clear guidelines regarding the identification of problematic sexual behaviours in children and young people.

10.9 Even when it is recognised that a young person has sexually assaulted someone¹²²⁴ a large proportion of sexual offences committed by young people are

1217 Home Office Research, Development and Statistics Directorate, *Rape and Sexual Assault of Women: The Extent and Nature of the Problem, Findings from the British Crime Survey* Research Study 237 (2002).

1218 Glen Davis and Harold Leitenberg, 'Adolescent Sex Offenders' (1987) 101 (3) *Psychological Bulletin* 417.

1219 Michael L Rourke and Brad Donohue, 'Assessment and Treatment of Juvenile Sex Offenders: An Empirical Review' *Journal of Child Sexual Abuse* Vol 5 (1) (1996) 47.

1220 See above paras 1.5–14.

1221 Simon Hackett and Helen Masson, Mapping and Exploring Services to Young People Who Have Sexually Abused: Literature Review (2001), 11.

1222 Submission 22.

1223 Recommendation 198.

1224 Discussion Paper 21–5.

not reported. The usual reasons for not reporting¹²²⁵ including shame, fear of the repercussions and not understanding what has occurred, may be particularly acute when the victim and the offender are both young people. Adults may minimise the seriousness of the behaviour because they do not know how to deal with it. Sibling sexual abuse presents considerable difficulties for families who must deal with both the victim and the offender. Many parents and family members are reluctant to involve the police or welfare authorities.¹²²⁶ Some will attempt to deal with the problem within the family, which may prevent the offender receiving assistance to change their behaviour and may expose the victim to further abuse.

VICTIMS OF YOUNG OFFENDERS

10.10 Victims of young offenders tend to be several years younger than the abuser. Two thirds of the victims of the abusers in the CPS study were aged nine or younger. Among MAPPS clients¹²²⁷ almost half offended against children aged 10 years or less.¹²²⁸ Studies have found that approximately two-thirds of victims of young offenders are female.¹²²⁹

SIBLING OFFENDERS

10.11 A small but growing body of literature explores the incidence of sibling sexual assault.¹²³⁰ Professionals are becoming aware that some children and young people commit serious sexual offences against their siblings and step-siblings.

10.12 The Children's Protection Society has recently published research indicating a significant increase in the number of sibling sexual abuse cases referred to its sexual offender treatment program. They examined 40 case histories

1225 See Ibid and Interim Report paras 3.6–43.

1226 'Not "Just Play": The Response to Children and Young People who Sexually Abuse' (Unpublished Research Victorian Community Council Against Violence 2002).

1227 The Male Adolescent Program for Positive Sexuality (MAPPS) is a treatment program run by Juvenile Justice for convicted sex offenders between ten and 21. See n 1227 for details.

1228 MAPPS, Offending Profile Statistics for the Year Ended 30 June 2002 (2003).

1229 M E Fromuth, B R Burkhart and C W Jones, 'Hidden Child Molestation: A Investigation of Adolescent Perpetrators in a Nonclinical Sample' (1991) 6 (3) *Journal of Interpersonal Violence* 376–84.

1230 Sue Rayment-McHugh and Ian Nisbet, 'Sibling Incest Offenders as a Subset of Adolescent Sexual Offenders' (Paper presented at the Child Sexual Abuse: Justice Response or Alternative Resolution Conference convened by the Australian Institute of Criminology, 1–2 May 2003, Adelaide) 3.

and compared young people who had sexually assaulted siblings to non-sibling abusers.¹²³¹ On average, the sibling abusers who commenced at an earlier age¹²³² committed acts of abuse over longer periods of time¹²³³ and perpetrated more serious acts of assault.¹²³⁴ Nearly two-thirds of all sibling offence cases resulted in no police action compared with less than half of non-sibling offence cases. Approximately one third of the non-sibling offending cases proceeded to court¹²³⁵ compared to none of the sibling offending cases.¹²³⁶ There was a greater delay between onset of offending behaviour and referral for treatment for sibling offenders¹²³⁷ than for non-sibling offenders.¹²³⁸

10.13 According to US research, young people who sexually offend against their siblings were found to perpetrate more abusive acts over longer periods of time. There was more likelihood of vaginal and anal penetration and multiple victims when the victims were siblings. Despite the greater seriousness of this behaviour, only one third of sibling offenders in a US study received court-ordered treatment compared to three-quarters of other offenders.¹²³⁹

1231 The average age of reported victims for both groups was around eight years. The gender of reported victims was 2:1 (female to male).

1232 The average age that sexually abusive behaviour commenced was 10.6 years for sibling offenders and 11.9 for non-sibling offenders.

1233 Sibling offenders were more likely than non-sibling offenders to have sexually abused their primary victims for a period of twelve or more months (6% and 47% respectively).

1234 Seventy per cent of the sibling abuse and 50% of non-sibling abuse involved penetration with the average age of victims approximately seven and a half years.

1235 N=7: six offenders received a sentence and one made an agreement to attend the Child Protection treatment program.

1236 A study by the Griffith Adolescent Forensic Assessment and Treatment Centre of 32 young male sexual offenders participating in a court mandated treatment program compared sibling offenders (n=13) with non-sibling offenders (n=19). They found that the sibling offenders had a significantly higher number of victims; were more likely to have other reported behavioural problems and were assessed as having a higher recidivism risk. Sue Rayment-McHugh and Ian Nisbet, 'Sibling Incest Offenders as a Subset of Adolescent Sexual Offenders' (Paper presented at the Child Sexual Abuse: Justice Response or Alternative Resolution Conference convened by the Australian Institute of Criminology, 1–2 May 2003, Adelaide), 7.

1237 3.1 years.

1238 1.5 years.

1239 Sue Righthand and Carlann Welch, *Juveniles Who Have Sexually Offended: A Review of the Literature* (2001) 1.

TREATMENT PROGRAMS FOR YOUNG SEXUAL OFFENDERS

10.14 Treatment can lower the rate of recidivism among young sexual offenders.¹²⁴⁰ There are a number of programs in Victoria specifically designed to treat young sexual abusers. Demand for these services is high and there are long waiting lists for some programs. There are limitations on access to programs in much of regional Victoria and there is little provision for specialised responses for young offenders with a cognitive impairment.

10.15 The Children's Protection Society is a non-government organisation that runs an adolescent sex offender treatment program combined with a program for victims of sexual assault and services to families. The program sees voluntary clients and those required to attend by the Children's Court. A precondition to attendance at the treatment program is that the behaviour is reported to the police. Usually the young person will also have to be removed from the home. Young people currently involved in proceedings before the Children's Court will not be seen by the CPS program.¹²⁴¹

10.16 The Australian Childhood Foundation is a charity that runs a program for children between four and 11 who exhibit sexualised behaviours. Children who display sexual behaviour that is unusual for their age, are compulsive and whose behaviour involves coercion, are eligible for the program and are usually referred either by Child Protection or, increasingly, by their parents.¹²⁴²

10.17 MAPPS (Male Adolescent Program for Positive Sexuality) is a program run by Juvenile Justice to provide assessment and treatment for young males who are convicted of sexual offences and receive an order, equivalent to probation or more onerous, from the Children's Court.¹²⁴³ The program works with young people aged between 10 and 21.

10.18 Other than the Australian Children's Foundation program for very young children, each of the dedicated programs¹²⁴⁴ requires at the least that the child or

1240 Anna Grant, *The Historical Development of Treatment for Adolescent Sex Offenders* (2000) 5.

1241 See the Children's Protection Society at <<http://www.cps.org.au/services/index.html>>.

1242 See the Australian Childhood Foundation at <<http://www.aaca.com.au/programs/counselling.asp>>.

1243 The Children's Court has the power to require a child to attend a treatment program pursuant to an undertaking (*Children and Young Persons Act* (1989) ss 137–143) or as a condition of bail (s 159), or as part of a Youth Supervision Order (s 164) or as part of a Youth Attendance Order (s 170).

1244 There are other sources of treatment for sexually abusive children and young people including certain of the State's Centres Against Sexual Assault, which will see some young offenders, usually if they are also victims and primarily those aged under 10.

young person's abusive behaviour has been reported to the police as a precondition of participation. This requirement stems from the therapeutic insistence that abusers accept responsibility for their actions.

10.19 As we have explained above, the proportion of sexually abusive behaviour by children and young people that is reported to police is small. This means that the requirement of a police report before specialised treatment is available severely limits the proportion of young people eligible for treatment. On the other hand, dropout rates from voluntary programs are high. Based on CPS statistics for December 1994 to September 1998, a quarter of the young people who initially agreed to attend the offender treatment program failed to do so and a further 12% withdrew before completion.

CHILD PROTECTION SYSTEM

10.20 Child Protection is a division within the Community Care Division of the Department of Human Services. The Child Protection Service (Child Protection) has an obligation¹²⁴⁵ to investigate any notification that a child may be in need of protection.¹²⁴⁶ The Service screens and investigates allegations of significant harm to children and young people whose parents or guardians are not considered to be 'acting protectively'.

10.21 Our research and discussions with Child Protection have indicated that the typical response to an allegation that a young person has committed a sexual assault focuses on the needs of the victim. Where the victim is outside the

Many families will access the services of private psychiatrists, psychologists or counsellors to deal with an sexually abusive child. Private practitioners practising in this area have varying levels of skill and experience and although in some cases the assistance received will be of a high quality, this will not always be the case.

The Child and Adolescent Mental Health Services (CAMHS) provides treatment services for children and young people who have or are at risk of, serious psychiatric disturbance. CAMHS sees many young people who have engaged in sexually abusive behaviour, either where they are referred to CAMHS specifically because of that behaviour or where they are referred for another reason and the sexual assault is later disclosed. The service is not a specialist provider and individual practitioners have varying skills in this area.

1245 *Children and Young Persons Act 1989* s 66.

1246 *Children and Young Persons Act 1989* s 63 defines a child in need of protection as one who, among other things, '(d) ...has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type; (e) ...has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected, or are unlikely to protect, the child from harm of that type.'

offender's family or home and where the victim's parents are considered to be acting protectively, Child Protection is likely to do little after the initial assessment. The fact that a young person displays sexually abusive behaviour does not of itself necessarily indicate that the abuser is at risk of harm according to Child Protection guidelines.

10.22 Where Child Protection does not consider there is a child in need of protection and where the police are not called or decline to become involved, there may be no response to the child's offending behaviour unless the child's family voluntarily seeks support.¹²⁴⁷ They may seek out a private practitioner for counselling for the juvenile or involve the child in a treatment program of some type. Access to treatment programs, as discussed above, will often be dependent on a police report being made and even if this criteria does not apply, or is satisfied, program availability is limited in numbers and in geographical coverage.

INADEQUACIES OF THE CURRENT SYSTEM

10.23 Currently neither the criminal justice system or the child protection system responds adequately to young people who sexually assault others.

LIMITATIONS IN THE CRIMINAL JUSTICE RESPONSE

10.24 Even if the young person's behaviour is reported to the police the criminal justice system may be unable to deal with it effectively. According to the Commission's research only one in seven reports involving offences against children result in any charge being laid.¹²⁴⁸ When the alleged perpetrator is under 10 years of age they cannot be prosecuted.¹²⁴⁹ A young person between the age of 10 and 14 is unlikely to be prosecuted.

10.25 In deciding whether to prosecute, first the police and then the Office of Public Prosecutions must determine whether there is evidence on which a prosecution could be based. The duty of the young person's lawyer is to assist

1247 According to our consultations with Child Protection, the Children's Court and MAPPS.

1248 Interim Report para 2.81.

1249 According to the common law, children under 10 years of age are presumed to be incapable of forming criminal intent. Children under 10 years are thus never charged with criminal offences. Children between 10 and 14 years cannot be convicted of a crime unless it can be proven that the child was capable of forming the relevant criminal intent. In practice, police and prosecutors view this presumption as a disincentive to pursue charges against children under 14 years.

their client to avoid conviction. Hence they will often advise the young person not to make any admissions.

10.26 A prosecution is unlikely unless the complainant would be a competent and credible witness. If the complainant is a child who is too young to testify effectively a prosecution is unlikely. When the offender and victim are siblings, the family and the victim child are likely to be reluctant for one sibling to testify against the other. The cumulative effect of these difficulties, as well as the difficulties of proof and the general community perception that sexual assault by children and young people is less serious than sexual assault by adults, results in a small number of prosecutions and a smaller number of convictions in cases of sexual assault by young people.

10.27 It will never be easy to prove sexual assault within the framework of the criminal justice system particularly when the offenders, and therefore in most cases the victims, are children or young people. While some alleged offenders will not have committed alleged offences, the low conviction rate for sexual assault cases means that some young people involved in sexual assault will escape legal responsibility.¹²⁵⁰

10.28 As we described above, many young sexual offenders may not participate in a sexual offenders treatment program unless they are convicted of an offence and ordered to do so by the Children's Court.¹²⁵¹ Research indicates that where young offenders undergo appropriate therapy, recidivism rates are reduced.¹²⁵² The Commission considers that the requirement to participate in a treatment program will often be the most effective way of changing the behaviour of a young person who has committed sexual assault.

1250 Of particular concern, are the high numbers of cases struck out in the Children's Court. In 2001/2, 34.78% of the non-rape sexual offences finalised by the Court (120 cases) were struck out. This means that the young people, against whom there was at least sufficient evidence to commence a proceeding, left the criminal justice process with no finding at all and no consequences for the behaviour of which they were accused. An inconclusive outcome such as this results in many young people escaping all responsibility and receiving no treatment.

1251 See above para 10.19.

1252 Eileen Vizard, Elizabeth Monck and Peter Misch, 'Child and Adolescent Sex Abuse Perpetrators: A Review of the Research Literature' in Ray Bull (ed) *Children and the Law: The Essential Readings* (2001).

LIMITATIONS IN THE CHILD PROTECTION RESPONSE

10.29 Where a child cannot be prosecuted for a sexual offence, the Child Protection system could provide an alternative way of requiring a young person to participate in a treatment program. Children who display sexually abusive behaviour often have life histories involving a range of other difficulties such as parental abuse or neglect, a history of other problem behaviour or a history of difficult peer relationships.¹²⁵³ Where these factors are present and an application is made for a child protection order, the orders¹²⁵⁴ made by the Children's Court include the power to require a person to give an undertaking.¹²⁵⁵

10.30 This power has been interpreted to include the power to make orders mandating attendance at therapeutic programs. As we have discussed,¹²⁵⁶ at present only young people subject to court orders are entitled to participate in some sexual offenders' treatment programs. Court orders requiring children displaying sexually offending behaviour to participate in a program would give them access to treatment which may otherwise be unavailable. However, where the child does not have other problems it is unlikely that a protection application will be made in relation to the offending child.¹²⁵⁷

10.31 At present it is not clear whether section 63 of the *Children and Young Persons' Act 1989* allows the Children's Court to make a child protection order in relation to a child whose 'need for protection' is based solely on the fact that they are sexually abusive. While some judicial members of the Children's Court take the view that section 63(e)¹²⁵⁸ already confers this power, this view is not uniformly held. This limitation could be overcome if section 63 were amended to provide that having committed sexually abusive behaviour may be treated as evidence that the child is in need of protection. Such an amendment would encourage Child Protection to apply to the Court for an order in appropriate cases.

1253 Children's Protection Society, *Sibling Sexual Abuse Prevention Project: A Research Project on the Nature and Characteristics of Sibling Sexual Abuse* (2003) 24–25.

1254 *Children and Young Persons Act 1989* s 84.

1255 *Children and Young Persons Act 1989* s 85.

1256 See above para 10.18.

1257 See above para 10.22.

1258 According to our consultations with the members of the Court.

10.32 Some other jurisdictions allow protection orders to be made for young people who engage in sexually abusive behaviour. In New South Wales, for example, the definition of a child at risk of harm is broader¹²⁵⁹ than the Victorian equivalent.¹²⁶⁰ A child between the age of 10 and 14 years who exhibits sexually abusive behaviour is explicitly considered by the legislation as the potential subject of care applications and orders.¹²⁶¹ In New Zealand a child or young person is considered to be in need of care and protection if, among other things, that child or young person is behaving in a way that is harmful to himself or others or (in the case of someone over 10 years but under 14) if the child has committed an offence.¹²⁶²

10.33 The Department of Human Services is currently involved in a review of the Child Protection area and the *Children and Young Persons' Act 1989*. It is therefore an appropriate time to consider whether the legislation should be modified in accordance with our recommendation. It would also be necessary for resources to be allocated to Child Protection to enable it to respond to any consequent increase in the demand for services.



RECOMMENDATION(S)

196. Section 63 of the *Children and Young Persons' Act 1989* should be amended as follows:

- Insert subparagraph (g) after (f) 'the child is displaying sexually abusive behaviour and an order of the Children's Court is necessary to ensure his or her access to, or attendance at, an appropriate therapeutic service'.

1259 *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 23.

1260 *Children and Young Persons Act 1989* s 42.

1261 'The Children's Court may make a care order in relation to a child or young person if it is satisfied that the child or young person is in need of care and protection [among other things]... in the case of a child who is under the age of 14 years, [if] the child has exhibited sexually abusive behaviours and an order of the Children's Court is necessary to ensure his or her access to, or attendance at, an appropriate therapeutic service.' *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 71.

1262 *Children, Young Persons, And Their Families Act 1989* (NZ), s 14.

IMPROVING THE PROCESS OF DEALING WITH YOUNG OFFENDERS

10.34 As we explain above, only very small numbers of cases of sexual assault by young people are currently being dealt with under either the criminal justice system or the child protection system. The changes we have proposed to the child protection system could result in more young sexual offenders receiving treatment and support. However without other changes the vast majority of young offenders will continue to avoid responsibility for their actions and will therefore be denied access to treatment that may assist in rehabilitation. The needs of victims (including child victims) who are abused by young offenders will also be unacknowledged.

10.35 In this section we refer to some alternative models for dealing with children and young people who are sexual offenders and for bringing them to acknowledge the harm done to their victims. The models discussed below usually involve diversion of young offenders from the criminal justice system. Some models also reflect the philosophy of restorative justice, a term which refers to the practice of involving those connected to a crime¹²⁶³ coming together with the aim of repairing it. One model of restorative justice widely practised in Australia and New Zealand provides for the offender and the victim, or a person representing the victim, to be brought together at a conference coordinated by a skilled facilitator. The purpose of the conference is to allow the offender to admit responsibility for their behaviour and agree to undertake agreed measures to repair the effects of the crime. These approaches may be combined with provision for the offender to participate in a treatment program.

10.36 We recommend the establishment of a Working Group to consider more effective ways of dealing with young sexual offenders. Because the *Children and Young Persons' Act* is currently being reviewed our discussion of this issue is only brief and is intended to suggest possible future directions rather than to put forward a detailed model for reform.

1263 Usually the perpetrator/s and the victim/s and/or their representatives. See Heather Strang and John Braithwaite (ed) *Restorative Justice and Civil Society* (2001) 1–13.

ALTERNATIVE MODELS

NEW ZEALAND

10.37 In New Zealand a child or young person who is alleged to have sexually offended may be dealt with at a family group conference. These conferences are facilitated by a separate unit based at Care and Protection (part of the Department of Youth, Justice and Family). A young person may be referred to a conference in one of three ways:

- They may come to the attention of the Youth, Justice and Family Department if the family contacts a therapeutic service directly and the service reports to the Department pursuant to its policy.¹²⁶⁴ In this situation they may be directly referred to a family group conference.
- A Care and Protection¹²⁶⁵ report may be made and the Care and Protection Unit may refer them to a family group conference.¹²⁶⁶
- The person may be reported to the police and be referred by the police to a family group conference.

10.38 The conference involves members of the alleged offender's family, members or representatives of the victim's family (usually), any professionals involved in the alleged offender's life such as a teacher, social worker or counsellor, a representative from a treatment program and a facilitator. The offender and/or the victim may be present.

10.39 If the victim is present, a range of supports are made available to ensure his/her wellbeing. If the police are the referring agency to the conference, a police member attends and the young person has an advocate present. The conference is governed by legal professional privilege so that what is said there may not be quoted elsewhere or used as evidence in court. The conference commences with an account of the incident¹²⁶⁷ and then the professionals leave the room and the

1264 There is no mandatory reporting in New Zealand. Thus, if an individual contacts a sex offender treatment program and discloses offences the service is not obliged to report it. However, the SAFE program's internal protocol requires it to report any matters that involve victims under 16 years to the Department of Youth, Justice and Family.

1265 A division of the Department of Youth, Justice and Family, the equivalent of Victoria's Child Protection agency.

1266 Pursuant to *Children, Young Persons, And Their Families Act 1989* (NZ), ss 18–35.

1267 If the police referred the child to conference, the conference begins with the formal reading of the charge and an entering of the plea but otherwise the chronology is the same.

families develop a plan with the assistance of the facilitator. Admission of responsibility by the offender is one of the factors which is taken into account in the development of the plan.

10.40 If the matter began with a police report, a plan will only be developed where the young person admits the offences. If he/she does not do so, the matter will be referred immediately to court. When the plan is agreed on it is presented to the professionals. If the families are in agreement regarding the plan, the role of the conferencing agency may then conclude and the plan will be implemented with supervision by the Care and Protection authority. If there is disagreement, the social worker from Care and Protection will have responsibility for developing a plan. If orders are required from the court, these will be part of the plan.

SOUTH AUSTRALIA

10.41 South Australia is the only Australian jurisdiction to use a diversionary process including family conferencing for young people accused of sexual offences. When a police officer charges a young person (aged over 10 and under 18) with a minor offence,¹²⁶⁸ the officer may deal with the matter by informal caution,¹²⁶⁹ formal caution,¹²⁷⁰ referral to family conference¹²⁷¹ or by laying a charge before the court.¹²⁷² The young person may have attended a treatment program for some time before they participate in the Conference.¹²⁷³ The conferencing scheme is run through Juvenile Justice and the Youth Court of South Australia and is coordinated by a member of the Family Conference Team and attended by the police, the young person and his/her support, the victim and his/her representative, and a member of the therapeutic program staff.

1268 A minor offence is any offence alleged to have been committed by a young person and which 'should, in the opinion of the police officer in charge of the investigation, be dealt with as a minor offence because of the limited extent of the harm caused... and the character and antecedents of the alleged offender; and the improbability of...re-offending; and where relevant—the attitude of the...parents...'. *Young Offenders Act 1993* (SA) s 4.

1269 Section 6.

1270 Sections 7(a) and s 8.

1271 Sections 7(b) and s 9.

1272 Section 7(c).

1273 In the study by Kathleen Daly, Sarah Curtis-Fawley and Brigitte Bouhours, *Sexual Offence Cases Finalised in Court, by Conference, and by Formal Caution in South Australia for Young Offenders, 1995-2001* (2003), 20% of young people were in the Mary St treatment program in the pre-conference period, 17.

10.42 A recent evaluation of the family conferencing approach¹²⁷⁴ in South Australia found that approximately 31% of the sexual assault cases finalised within the 6½ years of the study were disposed of by conference.¹²⁷⁵ The types of cases proceeding to court originally included more serious charges. However by the time that the court and family conference cases were finalised, the cases were similar in seriousness.¹²⁷⁶ This reflects the fact that many criminal prosecutions for sexual offences are likely to result in the charges being dismissed or withdrawn. Cases that went to conference were resolved more quickly than those that went to court. While all the conference cases involved some form of allocation of responsibility to the accused,¹²⁷⁷ in around half of the sexual offences cases that went to court, the accused was not convicted.¹²⁷⁸

10.43 According to the authors:

the comparison suggests that conferences have the potential to offer victims a greater degree of justice than court. The Young Person's [YP] admission to the offence serves as an important public validation of the harm suffered by the victim, and the conference offers a forum for apology and reparation. For victims whose cases go to court, half will be disappointed (and perhaps angry and disillusioned) when charges are withdrawn or dismissed after lengthy proceedings. On all measure of what YPs have to do for victims (apology), for the community (community service) and for themselves (Mary Street counselling) it appears that conferences outperform court.¹²⁷⁹

10.44 Over half the young people who went to a conference undertook to participate in the Mary Street sex offenders treatment program, compared with 33% of the young people who went to court.¹²⁸⁰ If a young person does not

1274 387 cases comprising all cases involving juvenile offenders with at least one sexual offence charge at the start of the case and finalised in South Australia (by police caution, family conference or in the Youth Court) between 1 January 1995 and 30 June 2001 were studied. Ibid

1275 Compared to 10% finalised by formal caution and 59% finalised in court.

1276 This was the cases after plea negotiation and after processes resulted in attrition of some charges.

1277 At the least, participation in the conference requires an admission by the accused and requires him to sit at the table, listen to an account of the offending behaviour and assist to develop a response plan.

1278 The more serious the offence, the less likely it was to be proved.

1279 Kathleen Daly, Sarah Curtis-Fawley and Brigitte Bouhours, *Sexual Offence Cases Finalised in Court, by Conference, and by Formal Caution in South Australia for Young Offenders, 1995-2001* (2003).

1280 Approximately 33% of the offenders convicted in court were ordered to attend Mary Street counselling compared to 53% of the young people whose cases were admitted at conference.

comply with a requirement of a family conference the police have the power to lay a charge before the Court for the original offence referred to the conference.¹²⁸¹

CHILDREN'S COURT CONFERENCING IN VICTORIA

10.45 Although conferencing is available in the Children's Court, it is only available as a pre-sentence option, after the young person or child has been charged and the offence has been found to have been proved. It is not currently available to young people or children who have been convicted of sexual offences. In theory the program could be extended to cover young people who commit these offences. However its link with the pre-sentencing process may limit its usefulness in dealing with alleged sexual offenders because so few of them are charged and convicted.

10.46 The Juvenile Justice Group Conferencing project was first piloted in 1995. The program is operated in Melbourne by Jesuit Social Services, and other agencies¹²⁸² are currently contracted to run pilot conferencing programs in Gippsland and Hume. The conference is attended by the young person, their family representatives, a police officer and the young person's lawyer and is convened by a member of the service provider agency. The victim or their representative may also attend. The participants in the conference discuss the offending behaviour and develop a plan which includes agreements about ways of dealing with the offence such as apology and/or paying for damage as well as assistance for the offender such as counselling and education. The plan is then reported by the convenor to the court and the judicial member takes it into account in sentencing.

OPTIONS FOR CHANGE

10.47 An intervention program for young sexual offenders could:

- extend the existing diversion program in the Children's Court;
- provide multiple pathways into treatment; and
- include a conferencing component.

1281 *Young Offenders Act 1993* (SA) s 12 (8)(b).

1282 Anglicare in Gippsland and Brayton Youth and Family Services in Hume.

CHILDREN'S COURT PROGRAM

10.48 A diversionary program for sexual offences committed by young offenders could be established as an extension of the current diversionary program run by the Children's Court. The existing expertise and processes developed within the conferencing program could provide a framework for sexual offences conferences. The outcome plans developed within the family group conference could include arrangements for offenders to attend therapeutic programs.

10.49 The disadvantage of this approach is that it would only apply to children and young people who had been charged with, and convicted of, an offence. An extension of the existing program is unlikely to result in a significant number of young sexual offenders taking responsibility for their actions and receiving appropriate treatment.

MULTIPLE PATHWAYS INTO THE SYSTEM

10.50 The New Zealand model has the advantage of providing a number of pathways into treatment for young sexual offenders. The Commission believes that this is an important aspect of the system. These pathways could include orders made in either the criminal or protective divisions of the Children's Court and a voluntary program with provision for referral by a range of agencies.

10.51 We have recommended that section 63 of the *Children and Young Persons' Act 1989* should be amended to allow a protection application to be made for young people who engage in sexually abusive behaviour. This could be combined with the establishment of a specialist unit within the Department of Human Services to deal with young people against whom sexual offence allegations have been made. This unit could handle matters referred to it by the Child Protection Service, those referred by the police and those directly referred, for example, as the result of an approach by someone connected to the young person.

10.52 In New Zealand this model provides a way into family group conferencing. We are aware that any discussion of the application of family group conferencing to sexual assault cases is very controversial. Some academics and victims' groups consider that the only appropriate response to sexual assault is to prosecute the offender through the criminal justice system.¹²⁸³ They consider that

1283 See an overview of these concerns in Kathleen Daly, Sarah Curtis-Fawley, Bridgitte Bouhours et al, *South Australia Juvenile Justice and Criminal Justice Research on Conferencing and Sentencing: Technical*

to advocate any alternative approach sends a message both to offenders and to victim/survivors that the crime of sexual assault is in some way less serious than other crimes.¹²⁸⁴ However Daly's evaluation of the South Australian conferencing process suggests that it has many positive features for victims and may be effective in holding accountable young people who would never have been prosecuted or convicted.¹²⁸⁵ In our view this model requires further investigation and assessment. We therefore recommend the establishment of a joint working party, including representatives of both the Children's Court and the Department of Human Services, to examine these issues.

! RECOMMENDATION(S)

197. The Department of Human Services should commission appropriate research to enable it to develop guidelines for the identification of problematic sexual behaviours in children and young people.
198. The Department of Human Services and the Children's Court should establish a working group, including representation from Victoria Police, to develop a wider range of options for responding to children and young people who have been involved in sexually abusive behaviour and to increase the numbers of young people held to account for this conduct.
199. Options to consider include:
 - expansion of existing treatment programs; and
 - introduction of a conferencing process, along the lines of the model which applies in South Australia.

Report No 3: Archival Study of Sexual Offence Cases Disposed in Youth Court and by Conference and Formal Caution (2003) 5–7.

1284 Ibid 7.

1285 Kathleen Daly and Hennessey Hayes, *Restorative Justice and Conferencing in Australia* (2001). See also Kathleen Daly, Sarah Curtis-Fawley and Brigitte Bouhours, *Sexual Offence Cases Finalised in Court, by Conference, and by Formal Caution in South Australia for Young Offenders, 1995-2001* (2003); Kathleen Daly, Sarah Curtis-Fawley, Bridgitte Bouhours et al, *South Australia Juvenile Justice and Criminal Justice Research on Conferencing and Sentencing: Technical Report No 3: Archival Study of Sexual Offence Cases Disposed in Youth Court and by Conference and Formal Caution* (2003); Kathleen Daly, 'Diversionary Conferences in Australia: A Reply to the Optimists and Skeptics' (Paper presented at the American Society of Criminology Annual Meeting, Chicago, 20-23 November 1996).

**RECOMMENDATION(S)**

200. In developing a wider range of responses to young people who have committed sexually abusive acts, the Working Group should consider:
- the respective roles which the Children's Court and Department of Human Services should play in overseeing the process;
 - the criteria which should determine eligibility to participate in the program and the body which should be responsible for applying those criteria;
 - the body which should be responsible for overseeing compliance with the program;
 - mechanisms to ensure the appropriate representation of victims' interests within the program; and
 - mechanisms for independent evaluation of the program.
201. Options for dealing with sexually abusive young people should provide for referral from a variety of sources including Victoria Police, the Child Protection Service and other agencies.

Appendix 1

AN ANALYSIS OF RAPE PROSECUTION OUTCOMES AND RELATIONSHIP BETWEEN COMPLAINANT AND ACCUSED

OVERVIEW

In order to analyse whether or not the relationship between complainant and accused affects the outcome of a rape case, the Commission tracked all matters for the two year period 1997/8–1998/9 in which there was at least one charge of rape at initiation. The analysis was restricted only to the matters which reached trial (whether on rape offences or other sexual offences or both). There were a total of 134 such matters identified in the designated period.¹²⁸⁶ The Commission had intended to analyse the relationship between delay¹²⁸⁷ and outcome, but this was not possible due to inconsistencies in the way PRISM data had been entered by the solicitors responsible for each file.¹²⁸⁸

As a result of the small sample size, no statistically significant results were obtained, however it appears that:

- Family members (excluding partners) are least likely to be convicted of rape compared with other relationship types.¹²⁸⁹
- Strangers or accused who met the complainant the same day are more often acquitted when compared with other relationship types.¹²⁹⁰

1286 For a breakdown of these matters see Table 2.

1287 'Delay' here refers to the delay between initiation and hearing.

1288 Some solicitors had entered 'initiation date' as the date of offence rather than the date of charge; others had entered it correctly.

1289 See Table 3.

1290 See Table 3.

- When the accused and complainant are current or former spouses/de factos, it is more likely that the accused will receive a rape conviction than a non-rape conviction as compared with other relationships.¹²⁹¹

METHODOLOGY

The Commission data was largely collected from the Office of Public Prosecutions PRISM database records of rape matters. The only data collected from the actual files themselves was data about the relationship between complainant and accused. The Commission data collection recorded only the ultimate outcome for each accused. Any changes in offences over the prosecution process, such as rape charges being dropped in favour of non-rape charges, were not recorded.

The relationship between complainant and accused was coded according to the following categories:

- Not applicable
- Stranger
- Met same day
- Acquaintance/ second order acquaintance/ neighbour
- Colleague/ fellow student
- Friend
- Family friend
- Former/ current boy/ girlfriend
- Former/ current spouse/ de facto
- Immediate family member, other relative, in-law
- Employer/ employee
- Other authority relationship
- Sex worker/ client
- Co-resident
- Co-inmate/ co-patient
- Other

1291 See Table 4.

- Parent/ step-parent/ child
- Not know

There were a number of matters in which there were multiple complainants:

TABLE 1: MULTIPLE COMPLAINANTS

		Number of Complainants (Categories)					
		One	Two	3-5	4-6	7 or more	Total
		Count	Count	Count	Count	Count	Count
Rape trial outcome	CC Convicted rape	24	0	3	1	0	28
	CC Convicted non-rape	26	1	5	0	2	34
	CC Acquittal / Directed acquittal	59	5	2	0	1	67
	CC No evidence led	2	0	0	0	0	2
	Permanent Stay	1	1	0	0	0	2
	Total	112	7	10	1	3	133

Thus, there were 112 matters in which there was only one complainant, 7 matters in which there were two complainants and so on. There was one matter in which the number of complainants was unknown.

There were also some matters where there was more than one accused. The statistical analysis does not take into account multiple complainants or accused. In

these cases, only the relationship between the primary accused and complainant was analysed.

TABLE 2: TRIAL OUTCOMES FOR MATTERS WHICH BEGAN WITH AT LEAST ONE RAPE CHARGE

Trial Outcome	Count	Column %
CC Convicted rape	29	21.6%
CC Convicted non-rape	34	25.4%
CC Acquitted/directed acquittal	67	50%
CC No evidence led	2	1.5%
Permanent stay	2	1.5%
TOTAL	134	100%

TABLE 3: RESULTS FOR RELATIONSHIP CATEGORIES COMBINATION 1

Relationship Categories Combination 1											
Stranger / met same day		Acquaint / friend / co-resident / neighbour / employer		Partner (spouse / boy-girl friend & includes former)		Family member		Total			
		Count	Column %	Count	Column %	Count	Column %				
Rape trial outcome	CC Convicted rape	5	27.8%	16	22.2%	7	28.0%	1	5.3%	29	21.6%
	CC Convicted non-rape	1	5.6%	21	29.2%	5	20.0%	7	36.8%	34	25.4%
	CC Acquittal / Directed acquittal	11	61.1%	34	47.2%	13	52.0%	9	47.4%	67	50.0%
	CC No evidence led	0	.0%	1	1.4%	0	.0%	1	5.3%	2	1.5%
	Permanent Stay	1	5.6%	0	.0%	0	.0%	1	5.3%	2	1.5%
	Total	18	100.0%	72	100.0%	25	100.0%	19	100.0%	134	100.0%

TABLE 4: RESULTS FOR RELATIONSHIP CATEGORIES COMBINATION 2

		Relationship Categories (Partner vs Other)					
		Partner (current & former)		Other relationship		Total	
		Count	Column %	Count	Column %	Count	Column %
Rape trial outcome	CC Convicted rape	10	32.3%	19	18.4%	29	21.6%
	CC Convicted non-rape	5	16.1%	29	28.2%	34	25.4%
	CC Acquittal / Directed acquittal	16	51.6%	51	49.5%	67	50.0%
	CC No evidence led	0	.0%	2	1.9%	2	1.5%
	Permanent Stay	0	.0%	2	1.9%	2	1.5%
	Total	31	100.0%	103	100.0%	134	100.0%

Appendix 2

RECOMMENDATIONS FROM INDIGENOUS AND NESB GROUPS

'FROM SHAME TO PRIDE' REPORT ON ACCESS TO SEXUAL ASSAULT SERVICES FOR INDIGENOUS PEOPLE

By Elizabeth Hoffman House and CASA House

1. That the From Shame to Pride Project endorses the Recommendations made at the Indigenous Forum on Sexual Assault. These Recommendations portray the views and aims of the Victorian Indigenous Communities.
2. The Indigenous State-wide Steering Committee on Sexual Assault be resourced to conduct its work over the next 2 years.
3. That Governments' recognise the immediate crisis faced by Aboriginal communities, families and workers in the field and provide funding to Aboriginal Communities for long term sustainable programs. This should also include funds to debrief and supervise workers dealing with traumatic experiences.
4. The development of an Indigenous State-wide Data System that accurately measures the levels of sexual and family violence and captures the type of support and services required. It is suggested that the Data System be made available across all Aboriginal Program areas and should include the legal services.
5. Aboriginal agencies develop and implement in-house data collection that accurately records the number of clients that they are unable to support and the types of issues they are facing. This would assist them to present accurate information on the number of clients they turn away.
6. That Aboriginal communities be adequately resourced and supported in the ongoing development of strategies; that enables them an opportunity to self determine the manner in which they address family violence and sexual violence within their respective communities.

7. That Victoria Police and Aboriginal Communities examine their relationships within their respective communities and explore mechanisms that improve their relationships particularly in the areas of family and sexual violence.
8. That Victoria Police examine the issue of non-reporting of sexual and family violence crimes as a component of the Victorian Police Steering Committees on Family Violence and Sexual Assault and develop strategies that increase the reporting of these crimes.
9. That Aboriginal Agencies be supported and resourced in the development of partnerships, protocols and MOUS that increase access to services and enhance the delivery of programs for victim survivors of family and sexual violence.
10. That the Family Court of Australia undertake cross-cultural training, provide culturally appropriate information and examine the possibility of the employment of an Indigenous Liaison Officer whose primary role would be to establish/improve relationships between Aboriginal agencies and the Family Court of Australia.
11. Similarly, the Magistrates' Courts should also undertake cross-cultural training particularly in the area of family and sexual violence.
12. The establishment of an Aboriginal Children's Hand Over Supervision Centre as a priority; particularly to begin to address the issues associated with the number of Aboriginal children who have come to the attention of Child Protection and the number of children involved in Family Court disputes involving family and sexual violence. This will require consultation with the Victorian Aboriginal Child Care Agency.
13. Funding bodies need to recognise that Aboriginal people do not have the same opportunities to disassociate themselves from the issues within their communities and hence, funding bodies need to consider the provisions of supervision, debriefing and access to adequate cultural training opportunities.
14. That CASAs further examine the development of partnerships and joint initiatives with Aboriginal organisations that increase access to their services.
15. That all CASA counsellor/advocates develop their awareness around the barriers that prevent Aboriginal people from accessing their services and develop their cultural awareness skills to assist them in enhancing the services they provide.

INDIGENOUS FORUM ON SEXUAL ASSAULT RECOMMENDATIONS:

1. To establish an Indigenous State-wide Sexual Assault Steering Committee.
2. For the newly established Steering Committee to feed into the broader State-wide Steering Committee on Sexual Assault.
3. To develop and deliver 'Responding to Sexual Assault' training to Aboriginal community members/workers.
4. To develop and distribute a Community Family Violence/Sexual Assault Resource Guide.
5. To develop a State-wide Sexual Assault Policy and Procedures Manual to ensure both a co-ordinated approach and set of practice standards throughout Victoria.
6. To facilitate a Men's Forum on Sexual Assault.
7. Undertake Community controlled research and data collection on sexual assault to inform and support requests for funding the development/evaluation of appropriate services.
8. To establish an Indigenous 'Helpline' for information/referral relating to Family Violence/Sexual Assault.
9. To develop and deliver (through broad range of media including Community radio, newspapers, kits) a Sexual Assault State-wide awareness/safety campaign.

RECOMMENDATIONS FROM NESB FORUM

1. Any community education strategy to increase awareness and understanding of issues involving sexual offences in NESB communities must take the following principles into account:
 - a. Any education or response strategy involving a particular community or communities must take place in the context of a long term, focused commitment to addressing the issue within that community.
 - b. Responses must be appropriate to the particular community: Diverse communities require diverse strategies.
 - c. Responses should be multi-level, flexible and creative.

- d. Any strategy or response must be grounded in an understanding of the various ways the concept of “family” is understood in different communities.
 - e. Strategies directed at refugee communities must be formulated with an understanding of the experience of being a refugee and how this impacts on culture.
 - f. It is necessary to combine direct and indirect responses to the issue of sexual offences.
 - g. It is necessary to take culture into account but not to use cultural difference as an excuse for a lesser or no response.
 - h. It is necessary to remember the limitations of translation – not all terms are capable of translation and translation alone is not an adequate way to account for cultural differences in understanding.
 - i. It is desirable to bear in mind the capacity of responses to serve a community development role and not to create narrowly focused strategies.
 - j. When a strategy is effective and generates increased awareness of the problem of sexual assault, it is important to provide adequate support services to respond to the increased need for services.
 - k. There must be a commitment to change that is meaningful and not tokenistic.
2. It is necessary to ensure that cultural awareness training for the legal community is of a high standard and relevant so that they can respond adequately to the needs of diverse communities.
 3. Immigration status is relevant to these issues – if reporting is encouraged, there will be implications for women and their families’ immigration status. It is necessary to provide education for relevant services and immigration workers around this issue.
 4. There should be community education about the Australian law regarding sexual offences and family violence provided for immigrants before their arrival in Australia.
 5. It is important to direct education at men as well as women. The idea of a men’s referral service should be explored.

Appendix 3

COURT OF APPEAL DECISIONS: SEVERANCE OF COUNTS

The following table contains all Victorian Court of Appeal cases that could be identified where severance was an issue in sexual offence cases involving multiple complainants. The cases were identified in two ways. An electronic search of all Court of Appeal judgements between 1998 and 2003 containing the word ‘severance’ was conducted. Several additional cases were also identified by the OPP. It is acknowledged that this list is not exhaustive.

TABLE 5: COURT OF APPEAL SEVERANCE DECISIONS

Name of case	No. of original counts at trial	No. of original complainants	Severance ordered by County Court?	Did Court of Appeal hold evidence was cross-admissible?	Result: Was the trial ruling re severance upheld in Court of Appeal? ¹²⁹²
<i>R v TJB</i> [1998] 4 VR 621	24	3	No	No ²	See note below ¹²⁹³
<i>R v KRA</i> [1999] 2 VR 708	8 re 2 compls, unknown re 3 rd .	3	Yes—partial severance. 2 matters heard together, third severed.	No—Court agreed with trial judge that it didn’t need to be for the charges to be joined.	Yes

1292 Where the County Court ordered partial severance, the Court of Appeal may have agreed that further severance was not required, or may have also commented on the appropriateness of the original severance.

1293 *R v TJB* was the first Court of Appeal decision to consider the effect of s 372(3AA)-(3AC). The decision was handed down in conjunction with *R v Best*, a decision concerning the admissibility of propensity evidence under the new section 398A. The two decisions must be read together. In *R v TJB* the trial judge had ruled that evidence in relation to each complainant was not mutually admissible. The Court of Appeal was prepared to accept this ruling as correct for the purposes of deciding the appeal and ordering a retrial; however, the Court noted (at p.634) that:

- if at the retrial the evidence was considered to be mutually admissible under s 398A, the counts would not be severed;
- if the evidence was not considered to be mutually admissible, it would be within the discretion of the judge hearing the retrial to sever the counts.

Name of case	No. of original counts at trial	No. of original complainants	Severance ordered by County Court?	Did Court of Appeal hold evidence was cross-admissible?	Result: Was the trial ruling re severance upheld in Court of Appeal? ¹²⁹²
<i>R v D</i> [1999] VSCA 148	14	5	Yes—partial severance. 3 matters heard together, and other 2 heard together.	Cross-admissibility not in issue. ¹²⁹⁴	Yes
<i>R v GAE</i> [2000] 1 VR 198	28	3	No	Some	Yes
<i>R v Mitchell</i> [2000] VSCA 54	30	10	Yes—partial severance. 9 matters heard together, 10 th severed.	Yes	Yes (Does not refer to any recent law – decided on 1991 case DPP v P ¹²⁹⁵ re striking similarity)
<i>R v Rainsford</i> [2000] VSCA 157	3	3	Yes—partial severance. 2 matters heard together, 3 rd severed. ¹²⁹⁶	Yes	Yes
<i>R v M.N.G.</i> [2002] VSCA 7	8	2	Yes, trials severed on basis of ‘prejudice’.	Yes ¹²⁹⁷	Court did not rule on severance as it had already been granted.
<i>R v Glennon</i> ¹²⁹⁸	1. 29	1. 6	Yes—partial severance.	1. Yes	1. Yes

1294 The accused had argued that the judge should have exercised his over-riding discretion to sever, because there was no underlying unity and because of the possible prejudice of hearing all matters together. The Court of Appeal agreed with the trial judge that there was underlying unity, and the probative value of the evidence exceeded its prejudicial effect.

1295 *DPP v P* [1991] 2 AC 447.

1296 See para. 4.174 for discussion of this case.

1297 This case involved offending against two sisters. The defence made application at trial for severance, and it was granted on the basis that the offending against sister one was much more serious than against sister two, and it would prejudice the accused’s defence for sister one’s evidence to be heard in the trial for sister two. However, the trial judge allowed sister two to give evidence at the sister one’s trial, which was heard first. The appeal was from the trial involving sister one, and the Court of Appeal upheld the trial judge’s ruling on admissibility on the basis of the new legislation and *R v Best* and *R v TJB*.

Name of case	No. of original counts at trial	No. of original complainants	Severance ordered by County Court?	Did Court of Appeal hold evidence was cross-admissible?	Result: Was the trial ruling re severance upheld in Court of Appeal? ¹²⁹²
[2001] VSCA 17	2. 10 3. 26	2. 5 3. 4	Matters split into 3 time periods.	2. No formal ruling re cross-admissibility 3. Yes	2. No ¹²⁹⁹ 3. Appeal lodged but not yet heard
<i>R v PJO</i> [2001] VSCA 213	25	6	Yes—partial severance. 5 matters heard together, 6 th severed.	Yes, for 5 of the complainants, no for the 6th	Yes ¹³⁰⁰
<i>R v A.L.P.</i> [2002] VSCA 210	18	4	No	Yes	Yes
<i>R v Neicho</i> [2003] VSCA 38	5	2	No	No, but ruled that prejudice to accused could be overcome by directions to jury.	Appeal on other grounds
<i>R v Papamitrou</i> [2004] VSCA 12	15	6	No	Yes	Yes ¹³⁰¹

1298 When this matter was first brought to trial, it was on 65 counts pertaining to 15 complainants. The accused sought severance of all matters so there would be 15 separate trials. This was refused by the trial judge. The OPP proposed to sever the original presentment so as to have 3 trials, dividing the offences up into 3 time periods. The trial judge accepted that proposal, and each of the 3 trials trial then proceeded one after another. Glennon appealed against conviction in relation to the first two trials, and those appeals were heard together. At the time of publication the third appeal had not yet been heard.

1299 The Court of Appeal held that the 5th complainant's matter should have been severed, that it was 'dangerous' to receive that evidence in the trial 'partly because of its anomalous character and partly because the defence could not reveal to the jury that she was (one of the other complainant's) sister.'—see para 157.

1300 The case involved offences against the daughter of the defendant, and 5 of his wife's sisters. The matters relating to his daughter were severed at trial by the judge, after application by the defendant to sever all matters. The appeal was on the basis that counts in relation to the sisters should also have been severed. The Court of Appeal found that the evidence in relation to offences against those complainants was mutually admissible, and therefore it was correct not to sever those counts.

1301 See paras 4.174–78.

Appendix 4

TABLE 6: VITIATING FACTORS REFERRED TO IN CONSENT DIRECTIONS

Trial No.	Vitiating factor relevant to case – section number	Type of factor	Judge directed on factor/s?
1	s. 36(a)	force or fear of	Yes
3	s. 36(a), (b)	force/harm or fear of	Yes
4	s. 36(a), (b)	force/harm or fear of	Yes
5	s. 36(d)	intoxication – alc.	Yes
7	s. 36(d)	intoxication – alc./drugs	Yes
9	s. 36(a), (b)	force or fear of	No
11	s. 36(d)	asleep	No
12	s. 36(d)	intoxication – alc.	No
14	s. 36(d)	intoxication – alc./drugs	No
15	s. 36(d)	intoxication – alc.	No
22	s. 36(a), (b)	force or fear of	No
23	s. 36(d)	unconscious, intoxication – alc./drugs	Yes
24	s. 36(d)	asleep, intoxication – alc./drugs	Yes

Appendix 5

TABLE 7: LENGTH OF CHARGES

Trial No.	Day 1 - pages	Day 2 - pages	Total pages	Estimated time in minutes
1	68	48	116	193
2	38	-	38	63
3	55	-	55	92
4	93	-	93	155
5	29	44	73	122
6	49	-	49	82
7	75	32	107	178
8	45	-	45	75
9	28	15	43	72
10	49	-	49	82
11	34	10	44	73
12	22	13	35	58
13	20	-	20	33
14	18	-	18	30
15	25	-	25	42
16	61	20	81	135
17	50	-	50	83
18	75	-	75	125
19	154	-	154	257
20	31	-	31	52
21	37	-	37	62
22	51	53	104	173
23	80	-	80	133
24	27	-	27	45

Appendix 6

COURT OF APPEAL DECISIONS: *LONGMAN* WARNINGS

TABLE 8: *LONGMAN WARNINGS 2001—COURT OF APPEAL*

Name of case	Adult or child complainant?	<i>Longman</i> warning given?	If given, was the warning considered adequate?	Notes
<i>R v Glennon</i> [2001] VSCA 17	Child	Yes	Yes	
<i>R v GEC</i> [2001] VSCA 146	Child (at trial adult)	Yes	Yes	Appeal succeeded on another ground relating to <i>Jones v Dunkel</i> inferences.

TABLE 9: *LONGMAN WARNINGS 2002—COURT OF APPEAL*

Name of case	Adult or child complainant?	<i>Longman</i> warning given?	If given, was the warning considered adequate?	Notes
<i>R v Aden</i> [2002] VSCA 79	Adult	No		<i>Longman</i> warning not required because no delay and whilst there were inconsistencies in the complainant's evidence, they were not of a kind requiring a <i>Longman</i> warning.

Name of case	Adult or child complainant?	<i>Longman</i> warning given?	If given, was the warning considered adequate?	Notes
<i>R v Salter</i> [2002] VSCA 128	Adult	No		<i>Longman</i> warning should have been given. Trial judge erred in that the warning given not emphatic enough.
<i>R v Alexander; R v McKenzie</i> [2002] VSCA 183	Child	Yes	NA	The <i>Longman</i> warning itself (which was not given in relation to delay but rather coupled with a direction on corroboration) was not subject to appeal. Applicant argued that judge should have given a <i>Kilby</i> warning re the delay. Held: such warning should have been given (due to delay and age of complainant) however failure to give it did not cause any substantial miscarriage of trial.
<i>R v MWL</i> [2002] VSCA 221	Child	Yes	No	Trial judge erred in not adequately acquainting the jury with the danger created by the delay: miscarriage of justice. The <i>Longman</i> warning given by the trial judge was diluted from one of the danger of convicting the

Name of case	Adult or child complainant?	<i>Longman</i> warning given?	If given, was the warning considered adequate?	Notes
				applicant to 'a somewhat vague statement' of delay creating a potential for error.
<i>R v FVK</i> [2002] VSCA 225	Child	Yes	Yes	Although not a "model" <i>Longman</i> warning, it was sufficient to ensure a fair trial for the applicant.

TABLE 10: LONGMAN WARNINGS 2003—COURT OF APPEAL

Name of case	Adult or child complainant?	<i>Longman</i> warning given?	If given, was the warning considered adequate?	Notes
<i>R v GTN</i> [2003] VSCA 38	Child	No		<i>Longman</i> warning not required because no substantial delay (delay was at most 16 months).
<i>R v Knigge</i> [2003] VR 181	Child	No		Although the lack of <i>Longman</i> warning formed one ground of the appeal, no decision was made in regards to whether there was a need for a <i>Longman</i> warning. Appeal succeeded on other grounds - retrial ordered.
<i>R v GAM</i> [2003] VSCA 185	Child	No		No requirement on the trial judge to give

Name of case	Adult or child complainant?	<i>Longman</i> warning given?	If given, was the warning considered adequate?	Notes
				a <i>Longman</i> warning because no such warning was called for by counsel and the circumstances of the case did not require the trial judge to give one.
<i>R v TWK</i> [2003] VSCA 225	Child	Yes	No	Longman warning given not adequate because did not follow the wording of the High Court in <i>Longman</i> . (28 or 29 year delay)
<i>R v WEB</i> [2003] VSCA 205	Child	Yes	No	Not sufficiently emphatic (a delay of between 6 and 14 years).
<i>R v O'Neill</i> [2003] VSCA 204	Child	Yes	Yes	An appropriate Longman warning was given.

Appendix 7

PROPOSED MODEL JURY CHARGE FOR RAPE (WHERE CONSENT IS IN ISSUE AND THE DEFENCE OF HONEST BELIEF IN CONSENT HAS BEEN SUCCESSFULLY RAISED)

[Assumes that the judge has already directed the jury on the meaning of important legal concepts such as ‘beyond reasonable doubt’, direct and circumstantial evidence, inferences, etc]

The law says that a person is guilty of rape if he intentionally sexually penetrates another person without that person’s consent. For you to find Mr Y guilty, the prosecution must prove to you beyond reasonable doubt that there was intentional sexual penetration and that Ms X did not consent to the penetration. In this case there is no dispute that there was intentional sexual penetration. There is, however, dispute over consent. Ms X has given evidence that she did not consent. Mr Y says that she did.

It is a defence to a charge of rape that the accused honestly believed that the complainant had given her consent to the sexual act in question. The accused has raised this defence. The prosecution must therefore also satisfy you beyond reasonable doubt that the accused did not believe the complainant consented.

You will remember that the defence does not have to prove anything. The prosecution must prove its case beyond reasonable doubt. So, to find Mr Y guilty of rape, the prosecution must satisfy you beyond reasonable doubt of two things:

- that Ms X did not consent; and
- that Mr Y did not honestly believe that she had consented. When you consider Mr Y’s belief—and when you consider whether or not that belief was honest—you will need to consider some laws which provide that, in certain circumstances, Mr Y’s belief cannot be honest. I will discuss those laws in a few minutes.

First, in relation to Ms X's consent.

If you conclude that in fact Ms X consented, then of course you must find Mr Y "not guilty". Also, you must find him "not guilty" if you have a reasonable doubt as to whether Ms X consented or not. You will recall that Ms X gave evidence that...[briefly summarise the complainant's evidence on consent]. Mr Y gave evidence that...[briefly summarise the accused's evidence on consent].

Secondly, in relation to the defence of honest belief in consent.

Even if you are satisfied beyond reasonable doubt that Ms X did not consent, that alone is not enough to find Mr Y guilty because Mr Y has raised the defence of honest belief in consent. To find him guilty, you must also be satisfied beyond reasonable doubt that Mr Y did not honestly believe Ms X had consented.

The accused's case is that he honestly believed that the complainant had consented to sexual intercourse. The prosecution case is that he did not. The prosecution says that the only inference reasonably open on the evidence is that the accused must have known that the complainant did not consent. What did the complainant tell you? [Briefly summarise the complainant's evidence in this regard] The defence says....[Briefly summarise the accused's evidence to support his assertion of an honest belief in consent]

You must here compare the accounts given by the complainant and the accused. If you have no reasonable doubt about the accuracy of the complainant's evidence, then you must find the accused guilty.

The law says that in certain circumstances a person cannot honestly believe that someone else is consenting to sexual penetration. So, because of that law, you must find that the defence of honest belief fails if you are satisfied of any one or more of the following [direct jury only on those that are relevant according to the evidence]:

- (1) Mr Y did not take reasonable steps, in the circumstances known to him at the time, to find out whether or not Ms X was consenting;
- (2) Mr Y did not turn his mind to the possibility that Ms X was not or may not be consenting;
- (3) Mr Y was aware of the existence of circumstances which the law regards as having prevented Ms X from giving her free consent. There are 7 of those sets of circumstances.

Let us consider what is meant by ‘reasonable steps’

The law says that you cannot form an honest belief that the person with whom you anticipate having sexual intercourse has given his or her consent without some reason for believing that. A belief simply is not honest unless it is based on solid evidence. A mere hope or expectation that the other person is consenting is not enough. Similarly, silence or passive acquiescence cannot be taken to mean that the person is consenting. There must be some positive indication from the other person, whether that be by word or gesture, that she is consenting to sexual intercourse. So, if a person thinks that his companion’s conduct is ambiguous or unclear, his duty is to stop any further sexual activity or get clarification on the issue of consent before continuing.

If a person has indicated that she does not want to participate in sexual contact, the other person must stop all sexual contact until he knows that she has truly changed her mind. He cannot rely on a lapse of time or the other person’s failure to say anything to show that there has been a change of heart and that consent now exists.

How then can he know that the complainant has had a change of heart and has given her consent? He must take reasonable steps to discover the true position. What is reasonable will depend on the circumstances of each case. You will recall that the prosecution argues that Mr Y did not take reasonable steps to find out if Ms X was consenting...[briefly summarise the prosecution arguments in relation to reasonable steps]. And the defence argues.....[briefly summarise the prosecution arguments in relation to reasonable steps].

[Direct jury on the following only if self-induced intoxication on the part of the accused is relevant] In deciding on what steps were required of the accused in the circumstances known to him, the law says that you must not consider any evidence of the accused’s self-induced intoxication. In other words, the ‘reasonable steps’ required of a drunken accused are exactly the same ‘reasonable steps’ required of a sober person in the same circumstances.

To summarise the position here: the defence of honest belief in consent must fail if the prosecution has satisfied you that the accused did not take reasonable steps, in the circumstances known to him at the time, to ascertain that the complainant was consenting.

What does it mean to say that someone did not turn their mind to the possibility that the other person was not consenting?

The law says that you cannot form an honest belief if you do not turn your mind to the question of whether the other person is consenting. How can you have an honest belief that the person with whom you are having sexual intercourse has consented to it if you have never even considered the possibility that she has not? If you find that Mr Y did not even consider the question of whether or not Ms X was consenting to sexual intercourse with him, his defence of honest belief in consent must fail.

Let us consider the sets of circumstances that are relevant to this case in which the law says that Ms X cannot have given her free consent.

Those sets of circumstances are [direct jury only on those that are relevant]:

- First, if Ms X submitted and consented because of force, or a fear of force, to her or to someone else.
- Secondly, if Ms X submitted and consented because of the fear of harm of any type to her or to someone else.
- Thirdly, if Ms X submitted and consented because she was unlawfully detained.
- Fourthly, if Ms X was asleep, or unconscious, or so affected by alcohol or any other drug that she was incapable of freely agreeing.
- Fifthly, if Ms X was incapable of understanding the sexual nature of the act.
- Sixthly, if Ms X was mistaken about the sexual nature of the act or the identity of the other participant in it.
- Seventhly, if Ms X mistakenly believed that the act was for medical or hygienic purposes.

If you are satisfied that any one or more of those circumstances was the case, and that Mr Y was aware of the existence of those circumstances, then Mr Y's belief cannot have been honest and the defence of honest belief in consent must fail.

So, to sum up, if you have a reasonable doubt about whether Ms X consented or not, then you must find Mr Y "not guilty". Also, if you believe that Ms X did not consent, but—even so—you think that it is reasonably possible that Mr Y may have honestly believed that she had consented—within the meaning of the laws I have just described to you—then you must also find Mr Y "not guilty".

If, on the other hand, you are satisfied beyond reasonable doubt that Ms X did not consent and also that Mr Y did not honestly believe that she consented, then you must find Mr Y “guilty”.

Appendix 8

LIST OF SUBMISSIONS RECEIVED

No	Date received	Name	Affiliation
1	18 June 03	Robert Rofe AM & Joan Rofe	
2	18 June 03	Professor C R Williams	Faculty of Law, Monash University
3	24 June 03	CONFIDENTIAL	
4	30 June 03	Simon Gillespie-Jones	Barrister
5	1 July 03	Sheree Wolfe	Mildura Senior College
6	27 June 03	Katie Elliott	
7	30 June 03	Brian Coe (PART CONFIDENTIAL)	Emile Zola Society
8	1 July 03	Lisa Hannan	Magistrates Court of Victoria
9	1 July 03	CONFIDENTIAL	
10	18 July 03	Lloyd Davies	
11	31 July 03	Lisa Cox	Children's Protection Society Inc.
12	26 Aug 03	Paula Grogan	Youth Affairs Council Of Victoria

No	Date received	Name	Affiliation
13	26 Aug 03	Nell Ellis	Glastonbury Child and Family Services
14	28 Aug 03	Michelle Earle	Eastern Victims Assistance Program
15	24 Aug 03	Heather Ambrose	
16	25 Aug 03	Pam O'Neill	Barwon CASA
17	29 Aug 03	M.C &R.K Honor	
18	29 Aug 03	CONFIDENTIAL	
19	1 Sept 03	Judy Flanagan	CASA - Bendigo
20	1 Sept 03	Jenni Southwell	DVIRC
21	1 Sept 03	Joanne Sheehan	Mallee Sexual Assault Unit
22	1 Sept 03	Mary Amiridis	Vic Community Council Against Violence
23	1 Sept 03	Mrs R Beard	
24	29 Aug 03	Helen Wilson	Violence Against Women Intergrated Partnership
25	29 Aug 03	Sarah Lindenmayer	UnitingCare Victoria & Tasmania
26	31 Aug 03	Carolyn Worth	South Eastern CASA
27	30 Aug 03	Sarah Crookes	CASA House
28	2 Sept 03	Julie Beales	Gatehouse Centre - RCH
29	29 Aug 03	Helen Wilson	South Western CASA

No	Date received	Name	Affiliation
30	9 Sept 03		VOICES
31	3 Sept 03	Phil Grano	Office of the Public Advocate
32	5 Sept 03	Deb Bryant	West CASA
33	8 Sept 03	Lieut- Colonel Ian Hamilton	The Salvation Army
34	3 Sept 03	Kathleen Mohekey	
35	12 Sept 03	Elizabeth Newnham	
36	9 Sept 03	Jennifer Grylls	
37	17Sept 03	Dr.S. Taylor, Ms C&K Trusler	Children Of Phoenix Foundation
38	22 Sept 03	Dr Diane Sisley	Equal Opportunity Commission Victoria
39	22 Sept 03	Judge Neesham	County Court
40	25 Sept 03	Jonathon Goodfellow	Disability Discrimination Legal Service
41	30 Sept 03	Joe Tucci	Australian Childhood Foundation
42	14 Oct 03	Reg Marron	Criminal Bar Association
43	16 Oct 03	Det Sen Constable Pixie Fuhrmeister	Sexual Crimes Squad, Victoria Police
44	29 Oct 03	Patricia Faulkner	Department of Human Services
45	31 Oct 03	Nola Martin	

No	Date received	Name	Affiliation
46	25 Sept 03	CONFIDENTIAL	
47	25 Sept 03	Debbie Kirkwood	The Federation of Community Legal Centres
48	26 Nov 03	Ross Nankivell	The Victorian Bar
49	11 Dec 03	Judge Graham Anderson	County Court of Victoria
50	18 Dec 03	Grace McAllister	Australian False Memory Association Inc.
51	18 Dec 03	Marg D'Arcy	Victorian CASA Forum
52	6 Jan 04	Judge Roland Williams	County Court of Victoria
53	29 Jan 04	Nerelle Searles	
54	24 Feb 04	Tony Parsons	Victoria Legal Aid
55	19 Apr 04	Rowan Payne (CONFIDENTIAL)	
56	2 March 04	Annie Davie	Witness Assistance Service

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