



Attorney General's
department of nsw

Criminal Justice Sexual Offences Taskforce

Responding to sexual assault: the way forward

December 2005

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Terms of Reference

1. Evaluate alternate models for the prosecution of sexual assault offences

To examine alternate methods used in other jurisdictions to prosecute sexual assault offences to see if any of the methods employed would:

- be capable of being utilised in or adapted to the NSW legal system;
- improve the way sexual assault offences are prosecuted;
- minimise the secondary victimisation of complainants;
- not impact detrimentally upon the provision of a fair trial;
- reduce recidivism; and
- be financially feasible and time and resource-effective.

In particular, to evaluate jurisdictions which employ:

- specialist sexual assault courts;
- specialist sexual assault jurisdictions; and
- specialist listing/case management methods (for example, dedicated trial lists and compulsory pre-trial case management).

2. Evaluate proposals for legislative and procedural change in sexual assault prosecutions

To examine existing provisions relating to sexual assault prosecutions to see if reform will:

- assist in improving the way sexual assault offences are prosecuted;
- provide greater recognition of the reality of sexual assault;
- reduce the stress and trauma sexual assault complainants face when giving evidence; and
- not impact detrimentally upon the provisions of a fair trial.

To research and evaluate trial directions, appellate decisions and provisions contained within the Evidence Act 1995; Crimes Act 1900; Criminal Procedure Act 1986; and relevant acts relating to children.

3. Identify areas of possible reform in relation to the provision of services for sexual assault victims

Pre-trial sexual assault services include such things as:

- police training and responses where reports are made;
- the gathering of forensic evidence by health providers;
- the testing of forensic evidence;
- the provision of counselling and witness assistance (referral, availability, location and co-ordination between services); and
- the provision of services for particularly vulnerable complainants such as Aboriginal people, complainants with intellectual and physical disabilities and complainants from non-English-speaking backgrounds.

Executive Summary

Background

1. In December 2004 the NSW Attorney General, the Honourable Bob Debus, announced the establishment of the Criminal Justice Sexual Offence Taskforce (the Taskforce) to examine issues surrounding sexual assault in the community and the prosecution of such matters within the criminal justice system. The Taskforce was to advise the Attorney General on ways to improve the responsiveness of the criminal justice system to victims of sexual assault, whilst ensuring that an accused person receives a fair trial.

2. A number of Government and Non-Government agencies were invited to be represented on the Taskforce including the Director of Public Prosecutions, the Legal Aid Commission of NSW, the NSW Law Society, Public Defender's Office, NSW Bar Association, Judicial Officers from the Supreme Court, District Court and Local Court, the Judicial Commission, the Crown Advocate the Office for Women, Premier's Department, Women's Legal Services NSW, Senior Academics, the Department of Community Services, Victims Services, Attorney General's Department, the Violence Against Women Specialist Unit, NSW Police Service, NSW Health, and NSW Rape Crisis Centre.

Terms of Reference

3. The Taskforce was responsible for creating its own terms of reference based on its knowledge and experience of the issues affecting the responsiveness of the criminal justice system. The three terms of reference were to:
 - evaluate alternate models for the prosecution of sexual assault offences;
 - evaluate proposals for legislative and procedural change in the area of sexual assault prosecutions in NSW; and
 - identify areas of possible reform in relation to the provision of services for sexual assault victims.
4. The Taskforce was assisted in settling the Terms of Reference by recent inquiries conducted in other States, academic literature and judicial comment. In particular the following documents were instrumental in guiding the work of the Taskforce:
 - NSW Adult Sexual Assault Interagency Committee: *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW*, November 2004;
 - Victorian Law Reform Commission, *Sexual Offences: Law and Procedure Final Report* 2004;
 - The former Chief Judge at Common Law, Justice Wood QC AM, *Child Witnesses Best Practices for Court*, 30 July 2004;
 - Legislative Council Standing Committee on Law and Justice: *Report on Child Sexual Assault Prosecutions: Report 22*, October 2002;
 - The ALRC *Review of the Uniform Evidence Act*, Issues Paper, 28 and Discussion Paper 69, 4 July 2005.
 - Statistics presented by the NSW Bureau of Crime, Statistics and Research.

Taskforce Representation

5. The representation of the Taskforce reflected the diversity of stakeholders interested in the criminal justice response to sexual offences and, in particular, to the manner in which victims are treated by the system. Consultation on major issues was confined to this key group of stakeholders due to the:
 - complexity and number of issues;
 - timeframe within which the Taskforce was required to report; and
 - expertise of the members within this area.
6. Where there were matters beyond the expertise of the Taskforce members, relevant experts were consulted. There was no specific public consultation. However, the Taskforce was informed by responses from victims and service providers to the online surveys conducted in August 2005 by the Violence Against Women Specialist Unit, Department of Community Services.

Surveys

7. The Taskforce sought to examine why victims of sexual assault may not report to police, or if a charge is laid, why a victim may decide not to continue with the prosecution. The Taskforce conducted two surveys facilitated by the Violence Against Women Specialist Unit, Department of Community Services. The first survey was directed to service providers who work with victims, including counsellors, health workers, police, ODPP solicitors and witness assistance service staff and court staff.
8. The second survey was aimed at victims who had been in contact with health services and the criminal justice system in the last 10 years and sought to understand some of the obstacles victims face in the criminal justice process and factors that may encourage victims to continue and give evidence at court.
9. The surveys were made available online from 14 July to 12 August 2005. Over 105 victims and 191 service providers responded to the surveys, providing a valuable source of contemporary information to the Taskforce about the concerns and problems encountered in the criminal justice system. The results of the surveys were analysed by the Violence Against Women, Specialist Unit, Department of Community Services and forwarded to the Taskforce to be taken into account when making recommendations.

Management of the Taskforce

10. A Project Plan was adopted by the Taskforce at its meeting in April 2005 outlining the issues to be discussed over the course of the year. Discussion at meetings was facilitated by the production of a series of Discussion Papers developed and written by the Criminal Law Review Division, outlining the relevant law and issues and posing draft recommendations to be considered.
 - how to improve the management of sexual offences cases through the courts and reduce delays; and
 - whether any alternative models or approaches should be included in any recommended specialised model.
 11. The Discussion Papers canvassed the current law in NSW and other jurisdictions with respect to sexual assault offences and what amendments may be desirable and worthy of implementation. In particular, the Taskforce examined:
 - the number of reported sexual assault cases that are prosecuted and the outcomes of those matters, including the number of victims whose cases may not proceed through the criminal justice system and why so many cases do not proceed;
 - how to improve the provision of information and services to people who have been sexually assaulted;
 - the law in relation to consent;
 - the test for the admissibility of evidence of sexual experience and reputation;
 - the efficacy and practice regarding committal proceedings involving adult sexual assault complainants;
 - pre-trial disclosure and case management;
 - non-publication orders in sexual assault trials;
 - directions to juries in sexual assault trials;
 - the test for the admissibility of tendency and coincidence evidence;
 - whether there should be a presumption that multiple complainants should be dealt with together in the same trial against the accused;
 - the evidence of children and whether existing mechanisms and court practices provided adequate safeguards against children being re-traumatised by the court process;
 - practices and procedures regarding the safety, protection and rights afforded to people with intellectual disabilities and other cognitive impairment and people living in aged care residential facilities in light of their vulnerability to sexual assault;
 - whether there should be a specialist court, or a dedicated and specialised approach to prosecuting and hearing sexual offence cases;
 12. Members had the opportunity to advance their views at the meetings and to provide written submissions. Members were encouraged to debate the issues and explore, in detail, the advantages and disadvantages of proposed reforms.
 13. In order to cover all the material and obtain further information from relevant agencies involved in the Taskforce, three working groups were established to examine the following matters:
 - rates of attrition in sexual assault matters;
 - evidence of children and vulnerable witnesses; and
 - improved interagency approach.
 14. The assistance of government agencies and their co-operation in sharing data and knowledge is greatly appreciated.
- How were the recommendations reached and what do they mean?
15. From January to December 2005 the Taskforce met every six weeks to consider issues raised in the Discussion Papers. The papers were circulated to the Taskforce members prior to the meeting, and a series of questions and draft recommendations posed for consideration. The report to the Attorney General records the position of members with respect to each proposal, including comments made orally and also where written submissions were made. The composition of the Taskforce membership and their different experiences, knowledge and philosophies meant that on certain issues there was long debate. On some issues, the position of members changed over time and towards the end of the process, some compromise was able to be reached on some matters.
 16. As a result, the recommendations in this report fall into two categories:
 - Taskforce recommendations, and
 - Criminal Law Review Division recommendations.

17. Where there was either unanimous agreement, or near unanimous agreement (with the exception of one or two members opposed to a proposal) the recommendation is cited as a “**Taskforce recommendation**”. Where a Taskforce member did not support, or was opposed to a proposal, this is referenced in the body of the report in the discussion, with the views and reasons outlined.
18. On a number of key issues, members held diametrically opposed views that could not be reconciled. This reflected members’ backgrounds and expertise as well as their philosophy on a number of issues. Where there was clear division between members with respect to a proposal, the Criminal Law Review Division considered the oral contributions, discussions and written submissions of individual members and determined that it would be more pragmatic to use this material to frame a ‘**Criminal Law Review Division Recommendation**’ (CLRD) to the Attorney General. The discussion within the body of the paper reflects those members who supported the proposal, as well as those who were opposed to it, and the reasons given.
19. Not all members of the Taskforce adopted a position for all proposals. Some were of the view that certain issues were outside their area of expertise and knowledge, whilst others did not have such strong views to warrant comment. In addition, during the course of this year-long project, a number of members resigned from their positions. This partially explains why not all Taskforce members’ views are referenced where opinion was divided.
20. The Taskforce membership initially included a member representing the interests of Aboriginal communities in NSW, however, this person was unable to continue being involved and no replacement was put forward. The Taskforce has therefore not sought to make recommendations relating specifically to Aboriginal complainants, and considers that separate consultation is required with agencies and individuals who have the relevant knowledge and experience relating to Aboriginal persons and their experiences with the criminal justice system as victims of sexual assault. Recommendation 70 is to this effect.

Concurrent enquiries

21. The Taskforce has experienced some difficulties when examining areas currently under review by other law reform agencies or subject to appellate review. For example, the concurrent Australian Law Reform Commission Review of the Uniform Evidence Acts. The Taskforce has therefore endeavoured to take into account the relevant issues discussed by other inquiries, bearing in mind that changes to the law and practice may be brought about by other means.

Recommendations

- 1 **TASKFORCE RECOMMENDATION**
With respect to complaints of sexual offences, further research should be undertaken as to:
 - the reasons for criminal proceedings not being commenced following a police investigation; and/or
 - the reasons for prosecutions being discontinued and the point in the court process when this occurs.

This research should examine whether the following factors have a bearing on matters not proceeding:

 - the relationship between the complainant and the accused;
 - the delay in complaint, that is, the staleness of the offence;
 - the delay in the matter proceeding through the criminal justice system;
 - the impact of any committal proceedings;
 - whether there is forensic evidence to support the complaint;
 - age/race/ethnicity of the complainant/accused;
 - whether the allegation is one involving the use of a weapon;
 - whether the complainant actively expresses non-consent;
 - whether the complainant felt supported through the process; and
 - where admissions are made by the accused.
- 2 **TASKFORCE RECOMMENDATION**
The Data collection methods of NSW Health, NSW Police, DoCS, ODPP and Courts should be improved, to collect and collate clear information about why sexual assault complaints made by both adults and children do not proceed through the criminal justice system.
- 3 **TASKFORCE RECOMMENDATION**
There should be immediate action taken to ensure there is consistent and accurate information in a variety of formats given to victims from the outset by service providers about their rights and the criminal justice process.
- 4 **TASKFORCE RECOMMENDATION**
There should be further research conducted into understanding the most effective way of providing information to victims from Aboriginal communities, victims with an intellectual disability and other disabilities; and to victims from non-English speaking backgrounds.

5 TASKFORCE RECOMMENDATION
NSW Ministers from relevant portfolios (Police, Health, DoCS, AG's) should give serious consideration to the development of "one-stop-units" to provide co-ordinated service delivery for adult sexual assault victims. 'One-stop-shops' could be established within Sexual Assault Services, NSW Health with separate and directed funding.

6 TASKFORCE RECOMMENDATION
Consideration should be given to the role of a case manager within the 'one-stop-shops.' The introduction of a case manager and other issues of case planning and management of victims matters, joint collaboration and accountability should be referred to the Human Services CEOs to determine the best way to use existing health facilities so that the following duties are performed:

- organise ongoing training of sexual assault counselling staff;
- ensure victims receive accurate and appropriate written and verbal information about their rights, the medical examination, the Sexual Assault Investigation Kit, including the fact that they do not have to consent to the release of the Sexual Assault Investigation Kit at that time if they do not wish to;
- ensure that medical and forensic experts understand their role in the process and are applying interagency guidelines in their work;
- ensure sexual assault counsellors are drafting a case management plan for victims;
- referral of victims (where necessary) to other appropriate services that may be required, for example, accommodation, drug and alcohol treatment etc;
- liaison with police to ensure they arrive promptly at the unit to take the victim's statement and that police comply with Interagency protocols;
- liaison with the Witness Assistance Service once charges are laid to advise them of the case management plan and provide for smooth transition to this phase of the process; and
- fostering relationships with other agencies.

7 TASKFORCE RECOMMENDATION
Further and directed funding be prioritised to:

- sexual assault counselling services, NSW Health and relevant NGO funding;
- Health (in the form of training Sexual Assault Nurse Examiners);

- Witness Assistance Service, ODPP;
- Enhancement of existing infrastructure in Health and Courts; and
- Aboriginal Family Health Strategy (NGOs, child sexual assault, sexual assault, support person and liaison person).

8 TASKFORCE RECOMMENDATION
Consideration should be given to establishing interagency meetings at the local level involving Health, Sexual Assault Services, NSW Police Local Area Commands, and ODPP, at each District Court and co-located ODPP (eg, Sydney Metropolitan, Campbelltown, Penrith, Parramatta, Wollongong, Newcastle, Dubbo, Gosford, Lismore, Wagga Wagga and Bathurst). These meetings should ensure that Interagency Guidelines are followed, problem cases discussed, informal networks are created and the information provided to each agency is consistent. One agency should take the lead role in co-ordinating such meetings.

9 CLRD RECOMMENDATION
NSW should include a statutory definition of consent in the Crimes Act 1900 (NSW).

10 CLRD RECOMMENDATION
A definition of consent should be adopted, partially based on the UK definition; that is: *a person consents if he or she freely and voluntarily agrees to the sexual act and has the capacity to make that choice.*

11 TASKFORCE RECOMMENDATION
The list of circumstances in s 61R Crimes Act 1900 that vitiate consent should be expanded to include:

- where consent is given as a result of the unlawful detention of the complainant by the accused;
- where the complainant was incapable of understanding or appreciating the nature of the act (this is unnecessary if the UK definition of consent is adopted).

12 TASKFORCE RECOMMENDATION
Section 65A Crimes Act 1900 should be repealed.

- 13 TASKFORCE RECOMMENDATION
Section 61R Crimes Act 1900 should be redrafted to indicate a non-exhaustive list of circumstances that must be taken into account when determining whether there was consent, if proved, such as:
- non-violent threats directed to the complainant by the accused or another so as to coerce the complainant to engage in sexual activity with the accused or another;
 - the complainant is intoxicated.
- 14 TASKFORCE RECOMMENDATION
The NSW Attorney General’s Department should give further consideration to whether the common law should be modified to adopt an objective fault element for offences of sexual intercourse without consent, or by introduction of a new provision creating a separate offence.
- 15 TASKFORCE RECOMMENDATION
There should be no legislative attempt to define recklessness.
- 16 CLRD RECOMMENDATION
Further research should be conducted by the Attorney General’s Department on the effectiveness and fairness of s 293 Criminal Procedure Act 1986.
- 17 TASKFORCE RECOMMENDATION
Section 578A Crimes Act should be amended to add to the non-exhaustive definition of ‘publish’ – *dissemination of information on the internet or other service carrier.*
- 18 TASKFORCE RECOMMENDATION
Section 292 Criminal Procedure Act 1986 should be amended to insert a definition of ‘publish’ in identical terms to s 578A Crimes Act 1900.
- 19 TASKFORCE RECOMMENDATION
Section 292 Criminal Procedure Act 1986 should be amended to provide that the Magistrate should consult with the complainant when determining whether to make an order for non-publication in similar terms to s 578A Crimes Act.
- 20 TASKFORCE RECOMMENDATION
Where a non-publication order is in place appropriate signage should be placed at the entrance to the court to inform members of the public that the proceedings are subject to a non-publication order.

- 21 TASKFORCE RECOMMENDATION
Legislation should be introduced to give the District Court and Local Court the power to maintain a non-publication order after verdict or judgment in order to reduce delays and adjournments due to adverse publicity.
- 22 CLRD RECOMMENDATION
Committal proceedings should not be abolished in sexual offence proceedings.
- 23 CLRD RECOMMENDATION
The “special reasons” test in s 93 is an appropriate threshold test to be met to require a victim of violence to give evidence at committal.
- 24 CLRD RECOMMENDATION
Section 91(8) Criminal Procedure Act 1986 should not be amended to include adult sexual offence complainants. The “special reasons test” in s 93 is appropriate and strikes a fair balance between the rights of the complainant and the accused.
- 25 CLRD RECOMMENDATION
Sections 91 and/or s 93 Criminal Procedure Act 1986 should be amended to clarify that even where there is consent between the parties, if a Magistrate is not satisfied that there are special reasons in the interest of justice for the alleged victim to be called at committal the alleged victim must not be called to give evidence.
- 26 TASKFORCE RECOMMENDATION
Section 91(4) Criminal Procedure Act 1986 should be amended to clarify that the statement of a witness directed to attend to give evidence at committal may be admissible as their evidence in chief, namely, where the parties consent, or the Magistrate is satisfied that it is in the interests of justice.
- 27 TASKFORCE RECOMMENDATION
The threshold test of “significant probative value” is an appropriate test in ss 97 and 98 Evidence Act 1995 (NSW).
- 28 TASKFORCE RECOMMENDATION
Section 101 Evidence Act 1995 (NSW) strikes an appropriate balance in determining the admissibility of evidence, for the reason that this type of evidence has great potential to cause prejudice.

- 29 TASKFORCE RECOMMENDATION
A working party should be established to monitor the impact of *R v Ellis* on the admissibility of tendency and coincidence evidence in sexual assault trials, with particular focus on exclusion of evidence on the basis of concoction. The working party should report to the Attorney General within 12 months.
- 30 TASKFORCE RECOMMENDATION
The Bench Book should be amended to provide clear guidance on the need for an inquiry as to whether there is a real possibility of joint concoction where the defence raise this as a basis to exclude tendency and/or coincidence evidence.
- 31 CLRD RECOMMENDATION
NSW should not create a presumption that multiple counts of an indictment be tried together where the evidence on one count is not admissible against the accused on another count. In considering an application for separation of counts, the interests of justice should be paramount.
- 32 CLRD RECOMMENDATION
If the above recommendation is not accepted, there should be limited amendment to s 21 Criminal Procedure Act 1986 to make it clear that when considering whether to sever a count on an indictment, the court must not only consider the interests of the accused in receiving a fair trial, but also the interests of the community in reducing trauma and distress to children and other vulnerable witnesses.
- 33 TASKFORCE RECOMMENDATION
A Longman style direction should be retained in appropriate cases.
- 34 TASKFORCE RECOMMENDATION
Such a direction should only be given in cases where a party requests that a direction be given, and the court is satisfied that there is some evidence that the accused has suffered a specific forensic disadvantage due to the delay.
- 35 TASKFORCE RECOMMENDATION
In giving the direction, there is no requirement that a particular form of words be used, and the words ‘dangerous to convict’ need not be used to give effect to the warning; or as a secondary recommendation; that the words ‘dangerous convict should not be used’.
- 36 TASKFORCE RECOMMENDATION
Section 294 Criminal Procedure Act 1986 should be retained.
- 37 TASKFORCE RECOMMENDATION
There should be legislative amendment to provide that a *Crofts* direction should not be given in cases where there is a delay in complaint.
- 38 TASKFORCE RECOMMENDATION
Where there is a delay in complaint a judge may only give a direction that the jury should take into account the delay when assessing the credibility of the complainant where there is sufficient evidence to justify such a warning.
- 39 TASKFORCE RECOMMENDATION
There should be legislative amendment to provide that a judge is prohibited from giving a warning that a complainant in a sexual assault case is an unreliable class of witness.
- 40 CLRD RECOMMENDATION
Any legislative amendment should also prohibit a judge from giving a general warning of the danger of convicting on the uncorroborated evidence of a sexual assault complainant.
- 41 TASKFORCE RECOMMENDATION
Further training should be made available to JIRT officers with respect to one-on-one reviews, refresher courses, training involving children and expert feedback.
- 42 TASKFORCE RECOMMENDATION
Research should be conducted to determine what training methods are most effective.
- 43 TASKFORCE RECOMMENDATION
An independent review panel, similar to that proposed by the VLRC should be established to assess the admissibility and forensic quality of interviews.
- 44 TASKFORCE RECOMMENDATION
Section 11(1A) of the Evidence (Children) Act 1997 should be amended to allow a recorded statement made by a complainant when he or she was less than 16 years of age to be admitted at any criminal proceedings, no matter what age they are at the time of the proceeding.

- 45 TASKFORCE RECOMMENDATION
Regulation 4 of the Evidence (Children) Regulation 2004 should be amended to provide that despite a failure to comply with the Notice Requirements, the evidence of the recording should be admitted if: the parties consent; or the accused has had an opportunity to view the recorded interview and it would be in the interests of justice to admit the evidence.
- 46 TASKFORCE RECOMMENDATION
The DPP should utilise s 130A Criminal Procedure Act 1986, by requesting pre-trial hearings to determine matters affecting the child's evidence, including the admissibility of the JIRT tape, with a view to ensuring that the child complainant will commence giving their evidence on the first day of trial.
- 47 TASKFORCE RECOMMENDATION
That:
 - there should be case management and best practice time frames developed for child sexual assault matters; and
 - the Government should consider adopting the Western Australian model of pre-recording the evidence and cross-examination of children, particularly in remote and regional areas.
- 48 TASKFORCE RECOMMENDATION
There should be further judicial education and training to ensure that questions are asked of children in an age appropriate manner.
- 49 TASKFORCE RECOMMENDATION
That the ALRC proposal be adopted, and that legislative amendment should allow for expert evidence to be admitted:
 - on child development and behaviour generally; and
 - on the development and behaviour of sexually abused children.
- 50 TASKFORCE RECOMMENDATION
Expert evidence should be adduced by the relevant party wishing to call it in their case. The Court should utilise the existing rules to ensure that proceedings do not become unduly lengthened by expert evidence, which is not genuinely in dispute.

- 51 TASKFORCE RECOMMENDATION
The NSW Police Service should consult with specialists in cognitive impairment with a view to provide better training to officers regarding:
 - the identification of people with a cognitive impairment; and
 - improved interviewing techniques of people with a cognitive impairment.
- 52 TASKFORCE RECOMMENDATION
Provision should be made for trained support persons to be available to victims and witnesses with a cognitive impairment.
- 53 TASKFORCE RECOMMENDATION
The Attorney General should give consideration to amending the Criminal Procedure Act 1986 to introduce additional measures to assist witnesses in sexual offence proceedings in giving evidence by:
 - allowing the use of an intermediary by a witness who has difficulty communicating unaided or a communication deficit; and
 - allowing a witness to use a communication device when giving evidence, if that witness usually employs the device to communicate.
- 54 TASKFORCE RECOMMENDATION
NSW Police should give consideration to introducing as Police Operating Procedure, video recording of a statement to police of a complainant with a cognitive impairment.
- 55 TASKFORCE RECOMMENDATION
The Criminal Procedure Act 1986 should be amended to provide for the admission of a video-recording of the statement of a complainant with a cognitive impairment (as exists for the recording of a child's statement).
- 56 TASKFORCE RECOMMENDATION
The Attorney General should consider extending s 91(8) Criminal Procedure Act 1986 to prohibit the calling of a complainant with a cognitive impairment (adopting the same definition that is developed with respect to recommendation 60) in a sexual offence proceeding at committal proceedings.

57 TASKFORCE RECOMMENDATION
The ALRC proposal to create an exception to the credibility rule to allow expert evidence on the nature of the impairment of a person with a cognitive impairment, should be adopted.

58 TASKFORCE RECOMMENDATION
Training programs should be developed for criminal justice personnel on issues relating to persons with cognitive impairment. This should take the form of experts in the field and/or experienced practitioners conducting continuing legal education seminars or electronic courses.

59 TASKFORCE RECOMMENDATION
The definition of “intellectual disability” for offences under s 66F (1) Crimes Act 1900 should be amended.

60 TASKFORCE RECOMMENDATION
Specialists should be consulted with a view to formulating an appropriate definition that meets the objective of providing protection to, and criminal sanction of, sexual offences committed against vulnerable people who require supervision or assistance in their daily activities, including but not limited to persons with:

- an intellectual disability;
- a cognitive impairment as a result of acquired brain injury;
- a cognitive impairment arising from a neurological disorder;
- a cognitive impairment arising from a developmental disorder (for example Asperger’s Disorder);
- dementia; and
- autism.

61 TASKFORCE RECOMMENDATION
The words “an intellectual disability” in s 66F (2) and (3) Crimes Act 1900 should be replaced with the term identified as appropriate following consultation with specialists.

62 TASKFORCE RECOMMENDATION
If the definition is amended, the circumstance of aggravation that the victim has a serious intellectual disability under s 61J(2)(g) Crimes Act 1900 (Aggravated Sexual Intercourse without Consent), should be amended in similar terms.

63 TASKFORCE RECOMMENDATION
The offence pursuant to s 66F(2) Crimes Act 1900 should be re-drafted to:

- cover all carers including volunteers and staff of home-based care providers, but exclude consumers of the same service and people who are in a married or defacto relationship.
- cover all sexual acts as prohibited conduct, but exclude acts done in the course of an appropriate and generally accepted medical, therapeutic or hygienic procedure; and
- to provide a lesser penalty if the prohibited conduct is an act of indecency.

64 TASKFORCE RECOMMENDATION
Section 66F(3) Crimes Act 1900 should be retained in the current form, but the definition of the person protected be amended in the same form as recommended for s 66F(2).

65 TASKFORCE RECOMMENDATION
There should be mandatory criminal record checks on employed and volunteer care givers, who provide services to aged and cognitively impaired clients in a residential setting (similar to the Working with Children check).

66 TASKFORCE RECOMMENDATION
Sexual assault matters should be subject to a call-over and specialised case management hearings; and courts, equipped with the appropriate technology, be set aside and available for hearing sexual assault matters. Case management should be supported by:

- court space, equipped with appropriate technology and specialised personnel, including court officers and interpreters;
- access to CCTV rooms and the court via a separate entrance to accommodate and provide for victim safety;
- a process of court listing and pro-active case management to ensure that cases are brought promptly without undue delays;
- utilisation of pre-trial binding directions to ensure the commencement of the trial is not delayed;
- court registry staff to co-ordinate and support listing arrangements and attempt to ensure parties have complied with court orders;
- referral of victims to appropriate specialist services;

- utilising a set of specially trained and highly skilled judges;
- employing specially trained prosecutors who continue with the matter from bail to trial;
- an ongoing training program for prosecutors, including support services to enable opportunities for debriefing to prevent burn-out;
- the creation of case management system internal to the ODPP to ensure sexual assault cases are being prepared to a high standard, that conferences are held with complainants, and to keep abreast of the listing of all matters and to solve problems which are preventing the efficient disposition of matters;
- the establishment of a data collection method (possibly through BOCSAR) to allow for an evaluation of the court's effectiveness and the assignment of a specific group to manage, monitor and evaluate the court;
- the employment of a specific person or persons within the Attorney-General's Department to drive the reforms and co-ordinate implementation; and
- the creation of a cross-agency monitoring body to assess and evaluate a dedicated and specialised court with alternate listing arrangements and the performance of all contributors to the project. This body should provide all the necessary accountability – and should be set up in such a way as to provide leadership for the project.

67 TASKFORCE RECOMMENDATION

Further and tied funding should be made available to:

- courts and the Legal Aid Commission to allow for special listing practices in sexual offence matters; and
- the ODPP to allow for special and alternative listing practices, continuity of prosecutors, early briefing of Crown Prosecutors, and training and debriefing of prosecutors in sexual offence matters.

68 TASKFORCE RECOMMENDATION

There should be further funding for the Division of Analytical Laboratories (DAL) to assist with facilitating timely analysis of forensic material. DAL should be independent from the Department of Health and established as an independent body with separate funding and regulation.

69 TASKFORCE RECOMMENDATION

Training programs should be developed regarding legislation specific to sexual assault cases, how to deal with vulnerable witnesses and the dynamics of sexual assault for all criminal justice personnel. The programs should be run through existing education bodies with responsibility for training. Such programs should be made available to:

- judges;
- prosecutors;
- police;
- court staff;
- defence representatives;
- social workers; and
- health workers.

70 TASKFORCE RECOMMENDATION

The Attorney General's Department should engage in further consultation with relevant stakeholders to assess the needs of Aboriginal complainants giving evidence in sexual assault proceedings and subsequent recommendations.

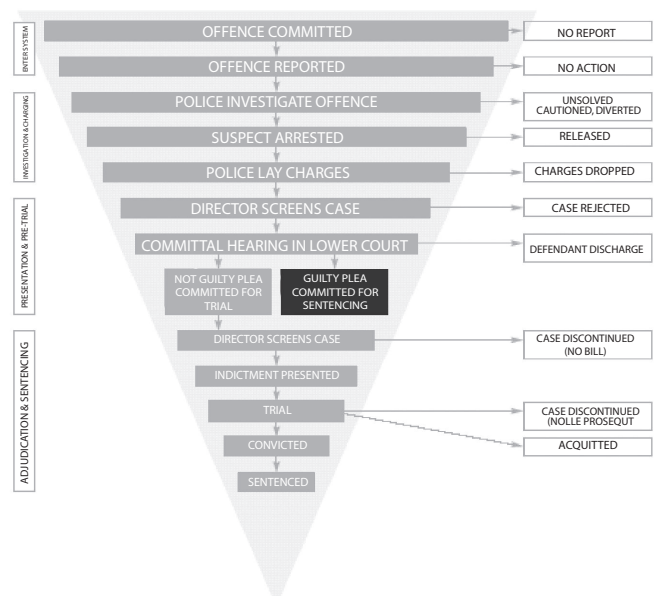
Chapter 1 Attrition in Sexual Offences

The exact incidence of sexual assault in the community is unknown. This is partly due to the difficulty or reluctance by some victims to inform anyone of the assault and also due to the social and cultural factors that prevent some victims from identifying their experience as a sexual assault.¹ Evidence derived from past surveys shows that only a small proportion of sexual assaults enter the criminal justice system, and many of these are filtered out or do not proceed to a conviction. This is referred to as the attrition process. It is extremely difficult to quantify the number of sexual assaults that are reported to government agencies, but do not proceed to finality in the criminal justice system. This is partly due to the records kept in health and criminal justice agencies that do not comprehensively record or track whether victims continue through the criminal justice system.

Once a report is made to police, some records are kept, and from these records three key points of attrition have been identified:

- the investigation stage;
- a decision by the DPP not to proceed to trial; and
- acquittal after trial or defended summary hearing.²

Figure 1: Decision Points for Indictable Sexual Offences



Reference: Lievore, D., *Prosecutorial decisions in adult sexual assault cases, Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, January 2005, at 6

¹ Lievore, D., 2005a, *No Longer Silent: A study of women's help-seeking decisions and service responses to sexual assault*, Australian Institute of Criminology.

² Acquittal following a trial is seen by some authors as a form of attrition as there is no criminal sanction.

The estimated incidence of sexual assault

The Crime and Justice Survey, conducted by the Australian Bureau of Statistics (ABS) in 1998 asked female respondents aged 18 and over about their experience of sexual assault³ in the previous 12 months prior to the survey. The results showed that an estimated 30100 women across Australia experienced 47300 incidents of sexual assault in the previous 12 months. In the most recent incident, more than 80 percent of victims knew the offender, a large proportion of whom were intimate partners, ex-partners, or other family members.⁴ Purpose designed studies of violence against women tend to produce better estimates than general victimisation surveys such as the Crime and Justice Survey.

Based on information obtained during the ABS Women's Safety Survey⁵ 1996 it was estimated that:

- 133 100 Australian women 18 years and over experienced sexual violence in the last year, and of those, 75 percent of these (100 000 women) experienced sexual assault (the remainder were sexual threats);⁶ and that
- 1 228 400 women (18 percent) had experienced sexual violence in their lifetime (since age 15).
- 1 064 900 women had been sexually assaulted and 338 600 threatened with sexual violence.⁷

That survey also showed that most women were sexually assaulted by someone known to them. The most common relationships were boyfriend/date (27.8 percent), previous partner (22.8 percent), other known men (33.5 percent which includes friend 22.4 percent and family 3.9 percent)⁸.

Other findings from the Women's Safety Survey include:

- most women reported being sexually assaulted by one perpetrator (87.1 percent);⁹
- most women were not physically injured (74 percent of those who reported abuse in the last 15 years, 77.6 percent for last 12 months);¹⁰ and
- alcohol was involved in approximately 40 percent of incidents.¹¹

It is important to keep these characteristics in mind when considering issues relating to attrition. Often atypical cases capture the attention of the media and the public, possibly creating a distorted view of sexual assault, and these are not the most suitable vehicle for influencing the development of policy in this area.¹²

A complex range of procedural, evidential and non-legal considerations influence the attrition process. High attrition rates during the court process may reinforce the

problem by potentially discouraging reporting, as victims may believe that if they report, there will be long delays before the matter comes before the court; they may be treated with disbelief by police and other criminal justice agencies; and if they do go to court and give evidence, a conviction may be unlikely.¹³

Factors that affect the decision to report

Only 33 percent of the respondents to the Crime and Safety Survey notified police of the most recent incident of sexual assault. While some women cite negative perceptions of the criminal justice system as a barrier to reporting, the majority provide personal reasons. According to Lievore, sexual assaults by intimate partners are least likely to be reported.¹⁴

According to ABS statistics, each year 10-30 percent of adult female sexual assault victims report their victimisation to police.¹⁵ The 1996 ABS survey found that sexual assaults are more likely to be reported where there are injuries and where the person responsible is a stranger.¹⁶ As victim's accounts often deviate from the stereotype, some victims are uncertain whether a crime has been committed, or blame themselves for the attacks, while others fear they will not be believed.¹⁷

³ For the purposes of the survey, "sexual assault" was defined as an incident of a sexual nature involving physical contact, including rape, attempted rape, indecent assault, and assault with the intent to sexually assault. Sexual harassment (that did not lead to sexual assault) was excluded. Only people aged 18 years and over were asked sexual assault questions.

⁴ Statistics quoted by Lievore D: *Intimate partner sexual assault: The impact of competing demands on victim's decisions to seek criminal justice solutions*, Conference paper 12-14 Feb 2003 at 3

⁵ The first Women's Safety Survey (WSS) was conducted from February to April 1996. Information was collected from approximately 6,300 women aged 18 and over about their safety at home and in the community. In particular, information was collected about women's experiences of physical and sexual violence, the nature of the violence, the actions women took after experiencing violence and the effect on their life. Additional information was collected about incidents of stalking and other forms of harassment.

⁶ ABS (1996) *Women's Safety Survey Australia* (Cat. No. 4128.0) ABS, Canberra, at 6. These figures are quoted in Stubbs, J., (2003) "Sexual assault, criminal justice and law and order", *Women Against Violence*, Issue 14 (July) 14-26.

⁷ *Ibid*, at 12,14

⁸ *Ibid*, Table 3.21, at 25

⁹ *Ibid*, Table 3.8, at 15

¹⁰ *Ibid*, Table 3.14, at 20

¹¹ *Ibid*, Table 3.16, at 22

¹² Stubbs, J., *Sexual Assault, Criminal Justice and Law and Order*, Presentation for Practice and Prevention: Contemporary Issues in Adult Sexual Assault in NSW Conference, 12-14 February 2003, www.lawlink.nsw.gov.au/cpd.nsf/pages/stubbs

¹³ Kelly, L., and Regan, L., 2001, *Rape: The Forgotten Issue?* Child and Woman Abuse Studies Unit, University of North London, London.

¹⁴ Lievore, D., 2003a, *Intimate Partner Sexual Assault: The Impact of Competing Demands in Victims' Decisions to Seek Criminal Justice Solutions* Conference Paper, presented at Steps forward for families: research, practice and policy, Eighth Australian Institute of Family Studies Conference, Melbourne, 12-14 February 2003, at 4.

¹⁵ Australian Bureau of Statistics 2004, *Crime and Safety*, April 2004, Cat No. 4509.1, ABS, Sydney

¹⁶ ABS (1996) *Women's Safety Survey Australia* (Cat. No. 4128.0) ABS, Canberra, at 29

¹⁷ Lievore, D., 2003a, *op cit*, at 3

Contextual considerations

A substantial number of ABS survey respondents whose experiences can be categorised as sexual assault hesitate to define it as a crime. It may be that some women have difficulty in reconciling intimate partner sex with criminality. Police intervention may not therefore necessarily be regarded as an appropriate option for intra-familial matters. This may be because notifying the police may result in undesired outcomes such as the offender being arrested, gaoled or labelled a criminal. Other factors relating to economic and social resources are also likely to impact on a decision to report the incident to police.¹⁸

According to Lievore, the very expectation that a victim of sexual violence will go to the police fails to take into account the debilitating effects of sexual violence on self-esteem, confidence and autonomy of the victim, or the complexity of the social context within which decisions to report to the police are made. Sexual victimisation can paralyse victims' ability to act and generate reluctance to expose painful personal secrets to others who may blame them for the attacks or not believe the allegations.¹⁹ It may be argued that the manner in which the criminal justice system conceptualises sexual violence is flawed. In particular, the long-held view that a delay in reporting should be treated with suspicion is at odds with the dynamics of sexual assault.

The reporting and non-reporting of sexual offences is often driven by different motivations and controlled by different conditions. Many women who report are motivated by a desire for retribution, self-protection and to protect others, particularly if the offender is a stranger. At the same time, reporting is a difficult step that involves taking action to make public what most women consider a private matter.²⁰

In a recent study conducted by Lievore, she found that decisions to report to police were often made after other people confirmed this was a serious criminal offence and that they would support the victim if she decided to bring the matter to police attention.²¹ The findings of her study show that survivors' help-seeking solutions are formed through relationships with others, within social contexts, and at multiple decision points. Where the victim discloses the assault, the reactions of and support offered by the recipients of these disclosures are often highly influential on the victim's future actions. In Lievore's findings other people act as information sources to assist women to clarify the nature of ambiguous experiences, verify and validate their experiences and determine what to do next or at least establish what choices are available.²²

Perceptions of the criminal justice system

Given the increasing media attention given to sexual assault prosecutions,²³ the community has been made aware that participation in the criminal justice system may involve secondary re-victimisation at court. That women are aware of, and take into account re-victimisation caused by the legal system, may be reflected in their reporting decisions. For example, in a 1995 Australian study 77 percent of respondents agreed that the criminal justice system treats rape victims badly.²⁴

The experience of re-victimisation may occur during reporting, investigation or the trial process, but tension between victims' needs and police requirements during reporting may be a contributing factor. Victims may prioritise the need to deal with the trauma and establish feelings of control and safety, while police are required to establish the veracity of the account, the details of the incident, the identity of the offender and collect evidence.²⁵

¹⁸ Ibid, at 5

¹⁹ Ibid, at 7

²⁰ Ibid, at 6

²¹ Lievore, 2005a, at v.

²² Ibid, at vii.

²³ See for example, 'Mother of four raped by gang', Daily Telegraph, 12/06/05; 'Gang rape nightmare', Daily Telegraph, 29/06/05; 'Police swoop: three men charges after alleged rape', Sydney Morning Herald, 29/06/05; 'Gang-rape brothers guilty of attacks', Daily Telegraph, 21/07/05; 'Boys on gang rape charges', Sydney Morning Herald, 04/08/05; 'Gang rapists' reduced jail terms condemned', Sydney Morning Herald, 17/09/05; 'Teenage girl gang raped in suburban parkland', Sydney Morning Herald, 30/10/05.

²⁴ Office of the Status of Women, 1995, *Community Attitudes to Violence Against Women: Detailed Report*, Department of the Prime Minister and Cabinet, Canberra.

²⁵ Bagen, J., and Fishwick, E., 1995, *Sexual Assault Law Reform: A National Perspective*, Office of the Status of Women, Office of the Status of Women, Canberra.

Attrition following a police investigation

The NSW Bureau of Crime Statistics and Research (BOCSAR) determined that the major points of attrition for sexual offences in the criminal justice system lie between reporting to police and “clear up” of the investigation, and between “clear up” and the commencement of legal proceedings.²⁶ BOCSAR estimates that more than 80 percent of sexual offences reported to police do not proceed to prosecution.²⁷

In 2003, 9570 incidents of sexual offences committed against both adults and children were reported to NSW Police; 74 percent of offences reported had occurred in that year.²⁸ Of the incidents reported, 68 percent were offences of child sexual assault, a category that includes matters reported by a complainant who is an adult at the time of report, but was a child at the time of the offence.²⁹

Of the total reports, 8957 were accepted (93.6 percent). In 65 percent of reports accepted by police, a person of interest was identified. In 21 percent of the incidents that were accepted for investigation by police, legal proceedings were commenced.³⁰ Of the remainder, the data system did not record the reasons why the case did not proceed to the laying of a charge, however this number would include those matters in which an investigation was continuing.

The BOCSAR study indicates that there are certain factors that are potentially relevant in determining whether the complaint of sexual assault will result in legal proceedings. Firstly, incidents of indecent assault reported to police are more likely to result in legal proceedings than incidents of sexual assault.³¹ Incidents of both sexual assault and indecent assault are more likely to proceed where reporting occurs without significant delay,³² where the victim is female,³³ where the victim is over the age of 11 at the time of the offence³⁴ and where the offender is known to the victim.³⁵ Reports of sexual assault involving an aggravating factor led to legal proceedings in 17.6 percent of cases compared with 13.4 percent of cases with no aggravating circumstances.³⁶

According to statistics collected by BOCSAR, in 2004, 28 percent of sexual offence incidents involving children and 32 percent of those involving adults were cleared within 180 days. BOCSAR concluded that it is at this point, that the largest number of matters are lost from the criminal justice system.³⁷

Attrition in cases involving children

Information collected with respect to child sexual assault cases by police is more comprehensive. In child sexual assault cases, the process of attrition begins with the decision, usually made by parents, whether or not to report the case to the police. Where the parents are not willing to cooperate with police in a case of extra-familial abuse, or the child is not willing to make a statement, the police have limited options to pursue the matter further.³⁸ The police also play a significant filtering role. In a study conducted by Patrick Parkinson between 1988 and 1990, of 69 cases of child sexual abuse reported to police, there were 25 cases in which no charge was laid. In 16 of those, a perpetrator was identified. In some cases, insufficient evidence or the lack of a sufficiently clear account from the child was cited as a reason for declining to proceed.³⁹ Parkinson states that in the other cases, the decision not to charge was based on the cogency of the evidence, age of the child and concern to protect the child from distress.⁴⁰

²⁶ Fitzgerald, J., *The attrition of sexual offences from the New South Wales criminal justice system*, NSW Bureau of Crime Statistics and Research, Forthcoming at 6.

²⁷ *Ibid*, at 15

²⁸ Information provided by NSW Police Service.

²⁹ 3996 of those incidents involved a victim who was a child at the time of report. 2117 incidents involved an adult victim at the time of report, but who was a child at the time of the incident.

³⁰ *Ibid*

³¹ 14.5% of sexual assault incidents reported to police in 2004 resulted in legal proceedings and 19.4% of indecent assault incidents: Fitzgerald, *op cit*, at 7

³² Incidents of sexual assault reported on the same day or the following day led to legal proceedings in 17.4% of cases. The figure drops to 15.2% for incidents reported within one year and 8.8% for those incidents reported more than ten years after the offence: Fitzgerald, *op cit* at 7

³³ Sexual assaults involving female victims proceeded in 16.5% of cases, 10.3% where the victim is male: Fitzgerald, *op cit* at 7.

³⁴ Incidents of sexual assault involving a victim aged 0-5 years proceeded in 5.7% of cases, compared with 13.7% for victims aged 6-10 years, 17.5% for victims aged 11-15 and 16.9% for victims aged 16-30: Fitzgerald, *op cit* at 7-8.

³⁵ Incidents of sexual assault involving a partner or ex-partner offender proceeded in 18.2% of cases, 15.8% of cases where the offender was a family member, 16.6% of cases where the offender was another person known to the victim and only 9.6% of cases where the offender was unknown to the victim: Fitzgerald, *op cit* at 8.

³⁶ Fitzgerald, *op cit* at 7.

³⁷ A cleared criminal incident is one that the police are no longer investigating either because they have commenced legal proceedings against a suspect or for another reason, such as withdrawal of the complaint. Incidents that are not cleared are not likely to proceed any further: Fitzgerald, *op cit*, at 4.

³⁸ Parkinson, P. N., Shrimpton, S., Swanston, H.Y., O’Toole, B.I., and Oates, R. Kim, “The Process of Attrition in Child Sexual Assault Cases: A Case Flow Analysis of Criminal Investigations and Prosecutions,” *Australian and New Zealand Journal of Criminology*, Vol 35, No. 3, at 357.

³⁹ This study relied on parents’ perceptions of why charges were not laid, not police accounts of why proceedings were not initiated. There may, therefore be issues of reliability and accuracy in their reporting.

⁴⁰ Parkinson, P. N., et al, *op cit*, at 247- 362, and 357.

Evidence from studies conducted in NSW⁴¹, and a study conducted in South Australia⁴² suggests that there is a high level of discretion in the decision to lay charges or prosecute cases of alleged child sexual assault. While a major consideration is whether there is a reasonable prospect of conviction, other factors such as the wishes of parents, and the interests of the child victim also play a role.⁴³

The JIRT (Joint Investigation Response Team) database, which is maintained by the NSW Police Service⁴⁴ provides information on the “primary consideration”⁴⁵ for the finalisation of cases.⁴⁶ Between April 2004 and February 2005, of 2332 finalised cases⁴⁷, 19 percent of children were unwilling to make a statement, 14 percent did not disclose the commission of a criminal offence when interviewed, and in 10 percent of cases the parents did not want any action taken against the offender.⁴⁸

Attrition following charges being laid

Of those matters that were “cleared”, legal proceedings were commenced against a ‘person of interest’ in 59 percent of matters involving an adult victim and 53 percent of matters involving a child victim.⁴⁹ Therefore, of the total sexual offences reported to police, a suspected offender was charged in 18.6 percent of incidents involving an adult victim and 14.8 percent of incidents involving a child victim.⁵⁰

Attrition at the prosecution stage

Victims of sexual assault face a number of personal and legal barriers in going to trial, which result in additional cases being filtered out at the prosecutorial level⁵¹:

- **Victim withdrawal:-** some women were so distressed following the committal that they were either unwilling or unable to cope with the trial and either did not attend court, or chose not to follow through with the complaint.⁵²
- **Evidential sufficiency:-** evidentiary matters, including whether the evidence is admissible and reliable, are pivotal in the decision to proceed to prosecution. The majority of sexual assaults take place without witnesses, and delayed disclosure is a common feature of sexual abuse.⁵³
- **Police response:-** victims sometimes perceive a lack of commitment by police. However, police sometimes feel that it is important to warn a complainant about the potential difficulties with the case, particularly if the evidence is weak. This action may deter some complainants, while others feel that they are actively being discouraged to withdraw their allegations. Even where police treat

allegations as crimes, they may exercise their discretion not to institute proceedings if the chances of a successful prosecution are considered slight.⁵⁴

- **Prosecutorial discretion in charging:-** the DPP provides advice to the police with respect to appropriate charges, and ultimately determines which charges will proceed to trial. Prosecutorial discretion is influenced by a variety of factors, including the burden of proof and the prospects of a conviction. Charge negotiations with respect to accepting a plea of guilty to a lesser charge is a common practice, based on a consideration of the prospects of conviction and may also be influenced to some degree by attempts to spare the complainant from giving evidence.⁵⁵
- **Discontinuation by the DPP:-** The criteria for determining whether to proceed to trial centres on the sufficiency of the evidence and whether it is in the public interest to prosecute. Determinations to proceed to trial are reliant on an assessment that there is a reasonable prospect of conviction. Deficiencies in investigations, such as an inadequate police brief and inappropriate interviewing techniques may also affect that assessment.⁵⁶

⁴¹ Of 113 cases reported to NSW Police; in 52 cases statements were taken from the child, and the alleged offender was charged in 36 of those. See Humphreys, C., 1993, *The referral of families associated with child sexual assault*, NSW Department of Community Services.

⁴² More than half the cases considered substantiated by police were considered unsuitable for prosecution. 32 out of the 51 cases in which there was considered to be insufficient evidence, involved children younger than 7 years. See Hood, M. and Boltje, C., 1998, “The progress of 500 referrals from the child protection response system to the criminal court”, *Australian and New Zealand Journal of Criminology*, 31, at 182-195.

⁴³ Parkinson, P.N., et al, op cit, at 358

⁴⁴ To monitor Joint Investigation Response Team caseloads only.

⁴⁵ A police officer is required to identify the main reason for finalisation of the case. Other factors may also impact on the determination. This is a limitation of the database.

⁴⁶ Finalisation includes the laying of charges (which occurred in 12% of cases) as well as other methods of disposition.

⁴⁷ A “case” in the JIRT database generally relates to one complainant, however in cases involving siblings, it may involve more than one complainant. There may be a number of incidents of child sexual assault alleged in each “case”.

⁴⁸ Information provided by NSW Police Service.

⁴⁹ Ibid

⁵⁰ Fitzgerald, op cit, at 6

⁵¹ Lievore, D., 2003b, *Non Reporting and hidden recording of sexual assault: An International Literature Review*, Canberra: Commonwealth Office of the Status of Women, at 48-49

⁵² Department for Women, 1996, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault*, Woolloomooloo.

⁵³ Crime and Misconduct Commission, 2002, *The Handling of Sexual Offence Matters by the Criminal Justice System*, Discussion Paper, <http://www.cmc.qld.gov.au/library/CMCWEBSITE/DiscussionPaper.pdf>

⁵⁴ Lievore, 2003b, op cit, at 49

⁵⁵ Ibid

⁵⁶ Ibid, at 50

Decisions to discontinue prosecutions are based upon the Director's Guidelines. These guidelines direct prosecutors to make decisions based on an assessment of whether it is in the public interest to prosecute. This will be determined by consideration of a number of factors including, for example, the seriousness of the offence, whether or not the alleged offence is of considerable public concern, the need for deterrence, and the attitude of the victim.⁵⁷ The views of the complainant in proceeding is given great weight, however, it is not determinative. In sexual assault matters, the most important witness for the prosecution, if not the only witness, will be the complainant. If a complainant expresses a reluctance to proceed, or demonstrates that his or her psychological or physical wellbeing will be compromised if forced to give evidence, then the prosecutor may determine that in those circumstances a prosecution should not occur.

Victim Withdrawal

The issue of a complainant withdrawing from the prosecution process is vexing. Some complainants may express a desire to withdraw from the prosecution process as a result of:

- intimidation;
- reconciliation with the offender;
- dependency on the offender;
- after police tacitly or covertly prompt victims to withdraw the complaint.⁵⁸

Victims may be dissuaded from pursuing the matter following intimations by police that the allegations are false, that the victims were somehow responsible for the assaults, or that the case is doomed to fail at trial. This may be the case when there is a prior relationship between the perpetrator and the victim, as women may question their role in the attack.⁵⁹

The likelihood of a guilty plea

The proportion of accused persons who plead guilty to sexual offences is low compared to other offences. In 2004, a plea of guilty was entered by 35.3 percent of accused persons charged with a sexual offence in the higher courts.⁶⁰ By way of comparison, a plea of guilty was entered in 65.1 percent of assault matters, and for 70.7 percent of all offences generally. In the Local Court, people appearing for sexual offences are much less likely to enter a guilty plea than other accused persons. Only 24 percent of accused persons charged with a sexual offence plead guilty to the charges, compared with 48 percent of persons appearing in relation to assault charges.⁶¹

Recent BOCSAR figures suggest that in the higher courts people charged with a child sex offence are more likely to plead guilty than people charged with adult sex offences. In 2004 45 percent of persons charged with a child sex offence entered a guilty plea, compared with just 23 percent of people charged with adult sex offences.⁶² It is unclear why there is such a difference in these figures. One reason could be that because consent is not an issue in child sex offence cases, DNA or other evidence suggesting that intercourse occurred is more compelling.

The higher rate of guilty pleas in child sex offences may also reflect the fact that a child's statement is now videotaped, ensuring that the prosecution evidence is captured. This differs from adult sex offence matters where the complainant will be required to recount the offence in great detail before the court. The defence may proceed to trial with the hope that the complainant may not be able to recount the offence accurately or in the detail required for court.

It can be seen from the BOCSAR data that of cases that proceed to court a high proportion of sexual offences go to trial. This has considerable implications for complainants who will be required to give evidence and be subject to cross-examination.⁶³

The impact of prosecutorial discretion

There is little empirical research on the function of prosecutorial discretion in sexual assault cases. However, it has been suggested that another point of attrition occurs when matters are withdrawn by the prosecution. Court data shows that many reported offences do not proceed on the basis of advice from prosecutors.⁶⁴ In 2004, in the higher courts, charges were discontinued against 23.3 percent of sexual offence defendants.⁶⁵ This can be compared to a discontinuance rate of 8.4 percent against all defendants generally. In almost every case the discontinuance arose due to an application by the Crown.⁶⁶ In the Local Court, persons charged with a sexual offence are more likely to have charges withdrawn prior to hearing than other defendants with 36 percent of persons charged with a sexual offence having their matter withdrawn, compared to 7 percent of all defendants.⁶⁷

⁵⁷ See, for example, NSW DPP Prosecution Guideline 4

⁵⁸ Lievore, D., 2003b, op cit, at 48

⁵⁹ Ibid

⁶⁰ Fitzgerald, op cit, at 10

⁶¹ Ibid, at 12

⁶² Ibid, at 10.

⁶³ Stubbs, op cit, at 4

⁶⁴ Ibid

⁶⁵ Fitzgerald, op cit, at 10

⁶⁶ Ibid

⁶⁷ Ibid, at 12

In order to describe and analyse factors influencing prosecutorial decisions to proceed with, discontinue, or enter into charge negotiations in cases of sexual assault, a study was undertaken by Lievore on behalf of the Australian Institute of Criminology of 141 cases in 5 Australian jurisdictions. The study analysed a sample of sexual assault matters that were referred by the relevant DPPs between 1 July 1999 and 30 June 2001. Lievore, however, concedes that the results may be skewed due to the high number of cases reviewed from the Northern Territory and Western Australia⁶⁸ and the unique factors of those particular jurisdictions, in particular the high proportion of indigenous offenders and victims. It is also worthy to note that files analysed represented all of the sexual assault cases dealt with by Tasmania, the ACT and the Northern Territory. In contrast, only 34 cases from NSW were analysed, representing a very small proportion of the overall number of sexual assault matters dealt with in NSW. For example, as of November 2005, the NSW DPP had 817 cases of sexual assault in committal and trial states, of which 339 prosecutions involved adult complainants.⁶⁹

The findings of Lievore's study were that:

- 62 percent of cases either proceeded to trial or were finalised by way of guilty plea;
- of the 29 percent that proceeded to trial, only 38 percent of these resulted in a guilty verdict;
- 33 percent were finalised by way of guilty plea, and 51 percent of pleas followed negotiations to reduce the number/level of charges;
- cases involving strangers were more likely to proceed;
- almost half of the cases were withdrawn due to the victim's reluctance to proceed; the majority involving current partners, former partners and other known defendants; and
- cases were significantly more likely to proceed if the defendants used force and the victims actively expressed non-consent.⁷⁰

Lievore concluded that the exercise of prosecutorial discretion accounted for a relatively large degree of case attrition, with 38 percent of cases withdrawn.⁷¹

As the decision to prosecute often involves evidential or legal issues that are matters of professional judgment and involve a degree of subjectivity, different prosecutors may have different perspectives. As the probability of a conviction relies heavily on the victim's ability to articulate the events and convince a jury beyond reasonable doubt that a crime occurred, her credibility is integral to prosecutorial decisions.⁷² Some authors have expressed

concern that prosecutors' appraisals of credibility may be filtered through prejudicial gender stereotypes and moral norms.⁷³

Sometimes a case may not proceed to trial due to the reluctance of the victim to continue with the matter and give evidence. When a victim does not want to proceed, prosecutors must consider: the seriousness of the offence; whether the victim is making a free choice; and whether she retracts the allegation and states that it was fabricated. A decision to proceed with a case against the victim's wishes may be in the public interest where: the offences are more serious; there is a suspicion that the victim's reluctance is a result of intimidation; and the victim does not state she fabricated the allegation.⁷⁴ The public interest sometimes overrides the individual's wishes, usually where there is a possibility of repeat victimisation or offending.⁷⁵

Recent reviews in NSW and Queensland indicate that prosecution policies provide adequate guidelines for decision-making.⁷⁶ Prosecutorial decisions to proceed with or discontinue sexual assault cases are shaped by both structural and attitudinal factors. The literature shows that to a large extent, the exercise of prosecutorial discretion is driven by legal considerations and by guidelines relating to evidentiary sufficiency, the prospects of conviction and the public interest. There is also evidence that organisational goals, systemic processes, personal understandings, and wider community attitudes towards women and sexual assault influence these important decisions.⁷⁷

⁶⁸ These matters comprised 56% of the sample.

⁶⁹ Data provided by the Office of the Director of Public Prosecution, NSW

⁷⁰ Lievore, D., 2005b, *Prosecutorial decisions in adult sexual assault cases, Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, at 3

⁷¹ *Ibid*, at 5

⁷² Lievore, D., 2004a, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study*, Canberra: Office of the Status of Women, at 11.

⁷³ Madigan, L., and Gamble, NC, (1989), *The second rape: society's continued betrayal of the victim*, New York, Lexington Books, at 130

⁷⁴ Lievore, D., 2004b, "Victim Credibility in Adult Sexual Assault Cases", *Trends and Issues in Crime and Criminal Justice*, No. 288, at 4.

⁷⁵ See DPP Prosecution Guideline 19 that sets out the obligations on a prosecutor to consider the views of the victim in making decisions about prosecutions, and Appendix E (ODPP Protocol for Reviewing Domestic Violence Offences).

⁷⁶ Crime and Misconduct Commission 2003, *Seeking Justice: An inquiry into how sexual offences are handled by the Queensland criminal justice system*, Brisbane; Samuels G., 2002, *Review of the NSW Director of Public Prosecutions' Policy and Guidelines for charge bargaining and tendering of agreed facts* http://www/agd.nsw.gov.au/report/lpd_reports.nsf/pages/report_gsamuels

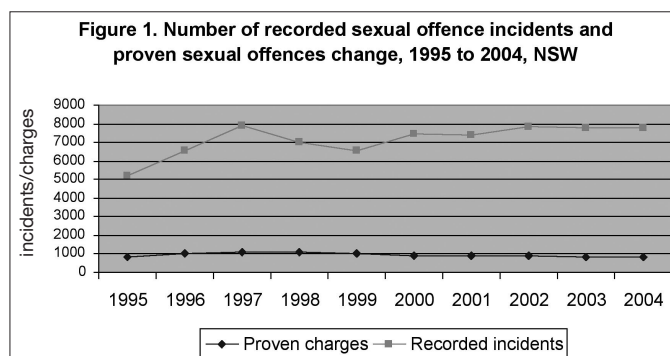
⁷⁷ Lievore, D., 2004a, *op cit*, at 11.

Trial outcomes

The lack of convictions following a trial has also been identified as a point of attrition. In 2004, 37.8 percent of defendants charged with a sexual offence in the higher courts proceeded to trial. Of those that went to trial, 67.2 percent were acquitted of all charges, while 31.1 percent were convicted of at least one charge, 35.3 percent pleaded guilty, 23.3 percent were dismissed without hearing⁷⁸, and 3.6 percent of charges were otherwise disposed of.⁷⁹ This can be compared to 19.8 percent of defendants charged with an assault charge who proceeded to trial. In assault trials only 58.5 percent of defendants were acquitted of all charges.⁸⁰ In the Local Court, 41 percent of defendants charged with sexual offences were found guilty of at least one sex offence compared with 73 percent of assault defendants.⁸¹

In 2004, of 619 persons appearing for a sexual offence not involving children, 259 (41.8 percent) were convicted of at least one offence of this type.⁸² In the Local Court, 61 percent of persons who plead not guilty and proceed to a defended hearing were acquitted of all charges. This can be compared with a rate of 46 percent for all offences in the Local Court.⁸³

BOCSAR found that between 1995 and 2004, the number of charges proven in the Local and District Courts was always less than 16 percent of the number of incidents reported to police. There has been no significant change over that 10-year period in either the number of incidents reported to police or the number of charges proven in the courts.⁸⁴



Reference: NSW Bureau of Crime Statistics and Research, 2005, *The attrition of sexual offences from the New South Wales criminal justice system*, Sydney.

There are numerous possible reasons for sustained low convictions rates in sexual assault prosecutions. A recent study undertaken by the Australian Institute of Criminology⁸⁵ into the impact on jury verdicts by the method in which a complainant's evidence is adduced, identified other factors that impact on a verdict in sexual offence prosecutions. A key finding of that study was that, to a high degree, jurors believe many of the "myths" which surround rape. The jurors in the study had strong expectations about how a "real" victim would behave before, during and after an alleged sexual assault, and these expectations impacted on their perception of the complainant's credibility.⁸⁶

A key issue that kept recurring throughout the study was the trouble juries had in defining reasonable doubt; that is, what is reasonable doubt, and how did they know if they had it or not? Most jurors in the study had difficulty identifying whether their doubt was sufficient to be "reasonable" or not.⁸⁷

The study also highlighted that jurors had difficulty understanding what was meant by "consent", despite a definition being provided by the trial judge. Some of the questions that jurors had included: i. What is the point at which consent is given? ii. What defines whether consent has been given? iii. At what point does "yes" become "no"; and iv. To what degree should the accused reasonably be able or expected to distinguish between them?⁸⁸

Heenan has identified several factors that can influence jury decision-making and sexual assault trial outcomes. They include:

- location (higher acquittal rates outside the city);
- the level of physical injury sustained by the victim;
- admissions of guilt by the accused;
- whether a medical examination was conducted; and
- community attitudes towards sexual violence.⁸⁹

⁷⁸ Most commonly applications for no further proceedings by the Crown.

⁷⁹ Most commonly cases where the accused either failed to appear or died.

⁸⁰ Fitzgerald, op cit, at 10

⁸¹ Ibid, at 11-12

⁸² Ibid, at 5

⁸³ Ibid, at 12

⁸⁴ Ibid, at 3

⁸⁵ Australian Institute of Criminology, November 2005, *The impact of pre-recorded video and CCTV testimony by adult sexual assault complainants on jury decision making: An experimental study*, Australian Government, Canberra.

⁸⁶ Ibid, at 45

⁸⁷ Ibid, at 46

⁸⁸ Ibid

⁸⁹ Heenan, M., 1997, "Sex Crimes and the Criminal Justice System", *The Australian Feminist Law Journal*, vol. 9, at .90-9

The factors outlined by Heenan seem to be consistent with myths about what constitutes real 'rape'. They may both reflect and reinforce stereotyped assumptions about women and women's sexuality.⁹⁰ Recently there has been an increase in what is referred to as the 'CSI phenomenon.' Suzanne Blackwell recently delivered a paper commenting on preliminary findings of her study into the attitudes of jurors in New Zealand. She argues that jurors involved in child sex offence trials who have watched forensic television shows want to see 'instantaneously available, highly technical and scientific forensic evidence'⁹¹ before they will convict.

Studies of prosecutorial decision making

The international literature indicates that rape law reforms may have led to higher reporting of "simple" rapes and greater police willingness to pursue "borderline" cases.⁹² In turn, it is possible that prosecutors are being forwarded more cases that are less likely to result in convictions. They may then either choose to prosecute or to exercise their discretion to reject, discontinue or negotiate charges in cases that appear less likely to succeed.⁹³

Both the Australian and international literature⁹⁴ suggests that cases that proceed to trial tend to be those that are the most serious and have the strongest evidentiary basis. DNA evidence can be a significant predictor of prosecutorial decisions, although it has no probative value where consent is the issue at trial⁹⁵. Various studies have found that physical evidence, such as injury or genital trauma, is significantly associated with prosecutor's decisions to file charges, and with the likelihood of a verdict.⁹⁶ These results support the view that prosecutorial decisions are predicted by the severity of the offence, evidentiary sufficiency, or by reduced discretion in serious cases.

Australian prosecutors are required to consider victim credibility in their case decisions, which is crucial in sexual assault cases which rely solely on the word of the victim. As the probability of conviction relies on the victim's ability to articulate the events and convince a jury that a crime occurred, prosecutors will be reluctant to proceed if the complainant's credibility, character or behaviour is questionable, or open to adverse inference.⁹⁷ Heenan expresses concern that legal judgments about credibility may be filtered through stereotypical images about "real rapes", "appropriate" victim behaviour, victims' blameworthiness, or assumptions about the nature of heterosexual relationships.⁹⁸

Most studies that have examined decision-making processes have been conducted in the US and it is not clear whether the findings can be generalised to the Australian criminal justice system due to differences in criminal prosecutions and the role of the prosecutor.⁹⁹ In fact, the results of Liovore's study showed that in decisions to proceed, discontinue or negotiate charges, Australian prosecutors interviewed differed somewhat from US studies on one notable dimension. The findings indicate that Australian prosecutors may be more conservative about discontinuance and less likely to look for reasons to reject cases than the literature suggests.¹⁰⁰

In Liovore's study, the files considered indicated that prosecutors believed that victims who chose to withdraw from prosecutions were telling the truth. In some of those cases the prosecution faced evidentiary difficulties, but it is not possible to determine whether prosecutors subtly encouraged victims to withdraw, even if for altruistic reasons.¹⁰¹ In the interviews with Crown Prosecutors, concern for victims' welfare was cited as a fundamental consideration in many decisions to withdraw cases where victims were reluctant to proceed. Decisions not to subpoena victims were based on prosecutors' awareness of the potential for re-victimisation and on the pragmatic view that a reluctant, if not hostile, witness is likely to undermine the prospects of conviction.¹⁰²

⁹⁰ Stubbs, op cit, at 5.

⁹¹ Blackwell S et al, 'Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand.' Paper delivered at the *Children and Courts Conference*, National Judicial College of Australia, 5 November 2005, at 13.

⁹² Spohn, C., Beichener D., and Davis-Frenzel E., 2002, "Prosecutorial justifications for sexual assault case rejection: Guarding the "gateway to justice", *Social Problems*, Vol 48, No. 2, at 206-235

⁹³ See Albonetti, C.A., 1987, 'Prosecutorial discretion: The effects of uncertainty', *Law and Society Review*, Vol 21, No. 2, at 291-313 and Temkin, J., 2002, *Rape and the Legal Process*, (2nd ed.) Oxford, Oxford University Press

⁹⁴ See for example: Kerstetter, W.A., (1990), "Gateway to Justice: Police and prosecutorial response to sexual assaults against women", *Criminology*, Vol 81, No. 2, pp.267-313, Kingsnorth, R.F., MacIntosh, R.C., and Wentworth, J., 1999, "Sexual Assault: The role of prior relationship and victim characteristics in case processing", *Justice Quarterly*, Vol. 16, No. 2, 275-302, and Spohn, C., Beichener D., and Davis-Frenzel E., 2002, "Prosecutorial justifications for sexual assault case rejection: Guarding the "gateway to justice", *Social Problems*, Vol 48, No. 2, at 206-235.

⁹⁵ Liovore, 2004a, op cit, at 13

⁹⁶ For example, Henning, T., 2000, *Consent and mistaken belief in consent in Tasmanian sexual offences trials*, Hobart: University of Tasmania Law School, and Law Reform Commission of Victoria, 1991, *Rape: Reform of law and procedure, Appendixes to interim report No. 42*, Melbourne: Law Reform Commission of Victoria

⁹⁷ Liovore, 2004a, op cit, at 17

⁹⁸ Ibid, at 17

⁹⁹ Ibid, at 20

¹⁰⁰ Ibid, at 51

¹⁰¹ Ibid, at 30

¹⁰² Ibid, at 49

Cases were significantly more likely to proceed when: the victim was injured; the victim physically expressed non-consent; the assault was more severe; there was additional evidence linking the defendant to the assault; the defendant used force; the defendant was non-Caucasian; and the defendant was a stranger.¹⁰³ Decisions to withdraw cases were almost equally divided on the basis of prosecutors' assessments of the cases and victims' reluctance to proceed.¹⁰⁴

Prosecutors who believed that sexual assault cases are more difficult to prosecute than other types of cases said that relationship cases pose more problems than stranger cases. This group of prosecutors stated that the inherent difficulties associated with sexual assault are that there is rarely an eyewitness, medical or forensic corroboration; and the emotions connected with sexual assault.¹⁰⁵

According to Lievore, there is ample empirical evidence that attrition in sexual assault cases at the prosecution stage is usually related to evidentiary matters, which are most complex in cases where the victim and the defendant are acquainted.¹⁰⁶ This is consistent with the findings of BOCSAR that show a higher proportion of prosecutions among cases where the victim could be regarded as more credible, and/or when victim testimony can be corroborated by other evidence.

Cases involving current or former partners are often discontinued due to victim withdrawals and insufficient prospects of conviction. Lievore states that is understandable then that experienced prosecutors, who are mindful of the limits imposed by the substantive evidence and procedure laws of sexual assault, would assess the prospects of conviction by considering prior relationship in combination with other factors, such as the strength of the evidence. At the same time, it is also clear that cultural assumptions about consensual sex impact on legal definitions of consent and the conduct of trials.¹⁰⁷

The results of the Australian study conducted by Lievore suggest that the prosecution guidelines provide a reasonable safeguard against biased decision-making. This conclusion is accompanied by the caution that the findings should be considered in light of the study's limitations.¹⁰⁸

High rates of attrition in sexual assault cases¹⁰⁹ within the criminal justice system reduces the capacity of criminal sanctions to act as a deterrent to offending, and undermines community confidence in law and justice processes. The critical policy issues are:

- Is it possible to increase the reporting of offences to police?
- What processes can be put in place to offer greater support to victims of sexual offences?
- Can better methods of evidence gathering be employed so that more criminal prosecutions are commenced?
- Can the community, and therefore juries, be better informed of the realities of sexual assault, so as to dispel myths that pervade this area of the law; and increase the likelihood of prosecutions proceeding to trial and conviction?
- Is it possible to increase conviction rates in sexual offence prosecutions?

These issues will be further explored in the next chapter, and are the subject of a number of recommendations by the Taskforce.

¹⁰³ Ibid, at 32-33

¹⁰⁴ Ibid, at 37

¹⁰⁵ Ibid, at 45

¹⁰⁶ Ibid, at 49

¹⁰⁷ Ibid.

¹⁰⁸ Ibid, at 52

¹⁰⁹ There may be different attrition rates for different offences; in particular there may be very high attrition rates for offences involving vulnerable complainants: See Chapter 8 "Disabilities and Aged Care Issues".

TASKFORCE RECOMMENDATIONS:

- 1 With respect to complaints of sexual offences, further research should be undertaken as to:
 - the reasons for criminal proceedings not being commenced following a police investigation, and/or
 - the reasons for prosecutions being discontinued and the point in the court process when this occurs.

This research should examine whether certain factors have a bearing on matters not proceeding, such as:

- the relationship between the complainant and the accused;
 - the delay in complaint (that is, the staleness of the offence);
 - the delay in the matter proceeding through the criminal justice system;
 - the impact of any committal proceedings;
 - whether there is forensic evidence to support the complaint;
 - age/race/ethnicity of the complainant/accused;
 - whether the allegation is one where a weapon is used;
 - whether the complainant actively expresses non-consent;
 - whether the complainant felt supported through the process;
 - when admissions are made by the accused.
- 2 The Data collection methods of Health, NSW Police, DoCS, ODPP and Courts be improved, to collect and collate clear information about why sexual assault complaints made by both adults and children do not proceed through the criminal justice system.



Chapter 2

Improving the Provision of Services Pre-trial

Introduction

Recent Australian research highlights the impact of formal and informal responses on a victim's decision to report sexual assault to police and seek access to other support services. The recently published report by Lievore: *No longer silent: A study of women's help-seeking decisions and responses to sexual assault*¹¹⁰ refocusses attention on what responses are important in helping female victims of sexual violence understand and define their experiences and make informed and rational choices about what actions to take following the assault. The report is a timely contribution to the field and complements the work of the Criminal Justice Sexual Offences Taskforce into how to improve access to services for all sexual assault victims.

Online surveys conducted by the Violence Against Women Specialist Unit

In order to obtain a better understanding of the issues of greatest importance to victims and those who work in providing services to victims of sexual assault, two online surveys were conducted on behalf of the Criminal Justice Sexual Offences Taskforce (the Taskforce) between 14 July 2005 and 17 August 2005, hosted at www.micromex.com.au/sexual_assault_surveys.htm.

The first survey was aimed at adult sexual assault victims (those over the age of 16 years at the time of the offence) who had been in contact with health services and/or the criminal justice system in the last 10 years. It sought to understand some of the obstacles victims face in the criminal justice process and factors that may encourage victims to continue with the court process and give evidence at court.

The second survey was directed to service providers who work with victims, including counsellors, health workers, police and prosecutors. The aim of the survey was to understand how the provision of information and improved processes may encourage victims to report to police and proceed through the prosecution process. The Violence Against Women Specialist Unit (VAWSU) also conducted two focus groups in the Sydney Metropolitan area with homeless women and women with disabilities, who may not have had access to the online surveys.

¹¹⁰ Lievore: *No Longer Silent: A Study of Women's help-seeking decisions and service responses to sexual assault*, June 2005, Australian Institute of Criminology.

The survey design and mode of delivery means that there are some inherent limitations to the survey. However, the number of responses was encouraging and provides an invaluable source of current information on the obstacles faced by victims and the views of service providers. The information obtained is also NSW specific. In comparison, Lievore's research is Australia wide and relies on interviews with 30 women, of which only five are from NSW. Similarly, Lievore consulted with 65 individual workers from a number of service providers, however, only three organisations were from NSW.¹¹¹

The work of the VAWSU is therefore an important contribution that identifies some of the gaps in service delivery and highlights the need for an integrated and consistent approach to service delivery. Questions were also asked of service providers about whether any areas of the law required reform. Whilst the responses were informative and of a high quality, they have not been canvassed here in detail, as the focus of this chapter is on pre-trial services as per the terms of reference.

Overview of survey results

There were 105 responses from adult sexual assault victims. They identified the following obstacles:

- the need for more information on victims' rights, the purpose of forensic medical examinations, the court process and progress of the case;
- increased services for health and counselling, particularly in regional and rural areas;
- the need for better quality and thorough police investigations;
- lack of care and sensitivity from police;
- lack of commitment from the ODPP and continuity of prosecutors;
- difficulty with cross-examination;
- delays and adjournments; and
- greater access to CCTV and closed courts.

There were 191 responses from individuals who provide services to sexual assault victims representing the views of 44 agencies, with a high number of responses from the Office of the Director of Public Prosecutions, NSW Police, and sexual assault counsellors. They identified:

- the problem of court delays and need for better case management;
- greater access to CCTV and separate entrances to the court complex;
- the need for law reform, including changes to the law on consent, jury directions, and cross-examination of complainants;
- creating a framework of increased interagency collaboration, the need for each agency to

understand its role in the process and the role of others;

- more resources for the Witness Assistance Service for court support;
- a need for greater education, training, communication and sensitivity for police, legal practitioners, court staff and judges;
- a designated liaison person for sexual assault within police; and
- greater continuity of prosecutors.

¹¹¹ They were Bega Valley Sexual Assault Service, Northern Sydney Health Sexual Assault Service, and Education Centre Against Violence (ECAV) Sydney Appendix A of *The No Longer Silent Report*.

Responses from Victims

Health

When asked what was the most important information to give someone who has been sexually assaulted, 75 percent of victims identified information on counselling. When asked who should provide this information and the best method of conveying it, 82 percent of respondents were of the view that information on sexual assault and the criminal justice process should be delivered by a sexual assault worker; 87 percent said this should be done verbally, whilst 69 percent said that this information should be provided in writing.

A recurring theme was the need for support and counselling throughout the criminal justice process. A primary issue was delay in accessing counselling services, and lack of resources. Respondents from rural areas commented on the lack of available services. Of the survey respondents, 65 percent had tried to use counselling and support services, 64 percent had tried sexual assault services; 64 percent had contacted the police; 30 percent had tried to access victim's support or advocacy services and 23 percent had tried to use health services.

The questionnaire asked: *"If you had any difficulty in using these services or agencies, what could have made it easier for you?"*, and of the respondents:

- 47.3 percent said information on service availability;
- 42 percent said being able to speak to the same counsellor; and
- 34 percent said an increased number of counselling sessions would have eased the experience.

Medical Care

Respondents were asked whether they had received medical care after the assault. Alarming, only 40.8 percent had received medical care. Those who did not obtain medical care were asked what could have encouraged them to do so; 51 percent said an assurance that the assault was not their fault; 30.6 percent said an option for a male or female nurse/doctor, information about the confidentiality of health information and option of having a support person.

Forensic examination

Only 32 percent of respondents received a forensic medical examination. Of those who did, 72 percent said that it was a good choice for them. Those who did not undergo a forensic medical examination were asked what could have encouraged them to do so:

- 55 percent said not having to repeat information about the assault to another person;
- 43.3 percent said knowing you could make a report to police about the assault without being identified; and
- 33 percent said information on the use of Sexual Assault Information Kits.

NSW Police

When asked what was the most important information to give someone who has been sexually assaulted, 57 percent of victims said information about the police. Of the respondents who answered this question, 79 percent had reported the sexual assault to police. All of those people made statements. In 58 percent of cases charges were laid and the matter proceeded to court. Of the 38 identified cases where the matter did not proceed to court, 45 percent of those respondents said they did not receive an explanation for this. Of those who received an explanation, 82 percent were not satisfied with it. Lack of respect from police was a recurring theme throughout the survey, as was the view that the police did not investigate the matter thoroughly, nor did police prioritise sexual assault investigations. Not surprisingly, those who said they had not received an explanation, highlighted the need to be kept informed of the progress of their matter. A secondary theme was the need for protection from the offender following the assault, including the prevention of stalking and harassment.

Respondents were also asked if at any time they decided not to proceed and if so, when that was. Of the 18 victims who responded, 11 said they decided not to proceed with the prosecution after reporting the matter to police. When asked what could have encouraged them to continue, a number cited greater support from police and ODPP.

Some respondents believed that there ought to be more female police, and one respondent stated there should be a special unit to deal with sexual assault victims. Some respondents commented that police required education about the dynamics of sexual assault.

A sample of comments is outlined below:

- *“The police did not investigate my complaint properly. I had to call the investigator once a month to try and encourage him to interview people from the work ...party¹¹² where I was raped. The officer made jokes whilst I read and signed my complaint. The police told me that they had insufficient evidence to take my case to court and it was too expensive for them to take the risk. They could have helped me by doing their job properly, by assigning a female police officer to my case and being more respectful of my situation.”*
- *“Police told me there were more important cases to investigate.”*
- *“Police could have been more sensitive and sincere towards me.”*
- *“Told me what the process involved and the fact that I would not hear from DPP until day of court. Also that whatever was on my statement was the only thing to be used in court and that very little effort was going to be made to substantiate my claims”.*
- *“The original investigating police based at¹¹³were hopeless at providing information. The detectives in the strike force investigating the rapes could not have been better. They were always available to answer questions and were most supportive.”*
- *“The police were great with their support and assistance and were really encouraging and supportive in decisions I made throughout my sexual assault complaint.”*

Office of the Director of Public Prosecutions

When asked what was the most important information to give someone who has been sexually assault 64 percent of respondents said information on court processes. Some respondents said that greater respect from the DPP would have assisted them to continue with the court process. Four individuals commented that the court process would have been easier if prosecutors did not change, and if prosecutors had more time to prepare their case. One respondent commented that their lack of preparation made the trial experience worse than the sexual assault. Victims consistently suggested that there needed to be greater provision of information on the court process and progress of the case.

When asked: *“What could have made the court process easier?”* victims responded that there needed to be more information about the court process from the police and ODPP and said it would have been better to meet the Crown Prosecutor before the day of the trial. When asked: *“What could have made it easier to give evidence at court?”*, victims responded that they were troubled by

the manner in which they were asked questions by the defence and the adversarial nature of the proceedings. One survey respondent felt as though she was treated with disdain by the judge.

When asked *“What could have made giving evidence at court easier”*, 67 percent of the 57 people who responded to this question said that the use of a screen or CCTV, and 39 percent suggested the presence of a support person. When asked about the result of their court case, 37 individuals responded. They reported that the accused was found not guilty in 14 cases, the accused pleaded guilty in 7 cases, the accused was found guilty after trial in another 7 cases, the case was withdrawn in 1 case and 13 identified with other outcomes. For example, some matters were still pending (3), and a number of victims indicated that they had been through a trial and there was a hung jury (5). One person indicated that the matter was overturned on appeal. Only 9 people of the 48 who responded to this question (18.8 percent) indicated that they were satisfied with the outcome.

Respondents were asked why they were or were not satisfied with the outcome, which elicited a number of responses:

- *“Because he pleaded guilty to a lesser charge.”*
- *“He got away with it”*
- *“I did not believe justice was served and I thought the DPP’s lack of application was disgraceful.”*
- *“I had to wait almost four years for him to plead guilty when there was plenty of evidence (including DNA). He had the chance to play the system.”*
- *“I was pleased I didn’t have to testify in court but I was frustrated at how long it took to convict my attacker.”*
- *“I was satisfied after I’d given evidence because I felt that I had been able to send a message that what he did was not okay. Having him found guilty was validating and reassuring.”*
- *“In an appeal my story/evidence was distorted by the defence with little ability of the DPP to prevent this.”*
- *“The DPP did not try and help us.”*
- *“The lack of interest by the QC. Upon meeting me the morning of the trial he asked me not to go ahead with it and one of his reasons being he didn’t like losing and rape cases are always hard to win and the fact he had only been given the case 48 hours prior to it starting.”*

¹¹² Identifier removed.

¹¹³ Identifier removed.

Courts

In 33 percent of matters, there was a period of 2 years or more between complaint to police and the commencement of the court case. At least 9 respondents commented that the court process would have been easier if they did not have to come face-to-face with the accused. Others commented that it would have been easier if they had not had to confront the accused or his/her supporters outside the court, and closed courts would have helped. Five victims said that the number of adjournments made them feel disempowered and caused additional trauma. Five victims indicated that the length of time for the court case was a factor in deciding not to proceed.

There was dissatisfaction with the cross-examination method employed by the defence. This was a recurring concern, including the lack of opportunities for victims to explain themselves. When asked what would have encouraged them to continue, one respondent replied:

“Only didn’t continue after the jury did not reach a unanimous verdict at the hearing. Did not want to proceed with another hearing as in my view it was pointless because it seemed that searching for the truth was not the main agenda of the judge and the court, it was more about how clever the defence could be.”

Responses from service and agencies

There were 191 individuals from services who responded to the online survey. Of those who responded, 22 percent were from the Office of the Director of Public Prosecutions (ODPP); 19 percent were from the NSW Police Service; 18 percent were from sexual assault services; 11 percent from counselling and support services; and 9 percent from NSW Health. Of the respondents 67 percent were from metropolitan areas, 31 percent identified as being from a rural area and 3 percent from a remote area.

Of the respondents, 70 percent were of the view that laws or procedures needed to be changed; 25 percent were unsure and 5 percent did not think that changes needed to be made. When asked what could be changed there were 108 individual responses, many of which contained multiple issues. Respondents were also asked whether they had anything additional they would like to add, which elicited individual responses containing multiple issues. The first part of the survey concentrated on the provision of information to victims, including information sought, how this was provided and improving this process.

Forensic medical examinations

Questions were asked about what type of information or assistance may have assisted victims in undertaking a forensic medical examination. The responses generally related to the provision of information from health and police. Respondents suggested there needed to be more qualified doctors and nurses, particularly in rural and remote areas and that information should be provided to victims in written form so they understand their rights and the purpose of the forensic examination. Responses from NSW Police suggest they are concerned that victims are being persuaded not to undertake the forensic examination after speaking with counsellors and/or other hospital staff.

Levels of under-reporting within the community

Survey participants were asked whether their service or agency needed any assistance to support victims to report the matter to police. Responses to this question were diverse, however, there were some common themes. In particular, a number of respondents stated that increased police sensitivity and training would assist, as well as a designated police liaison officer or contact dealing with sexual assault (7 responses). Educational campaigns in the community were also cited as a way to promote reporting, particularly in schools and Aboriginal communities, as well as particular support mechanisms for male victims and sex workers.

Services

A number of suggestions were made to improve service provision and co-ordination, including:

- the need for a one-stop-shop for victims where police, medical and counselling services are available 24 hours; and
- more emotional, financial, accommodation and counselling support for victims who actually report to police.

Difficulties faced when assisting victims through the court process

Services were asked what difficulties they faced when assisting a sexual assault complainant through court.

Responses generally fell into three categories:

- the need for more information and better communication about the court process;
- increased training and sensitivity of those involved in the court process; and
- more resources, particularly for courts.

A number of respondents identified:

- the problem of court delays (10);
- the need to prioritise sexual assault matters (3);
- more frequent country court sittings (4);
- the need for increased resources for WAS officers (10);
- training and improved communication for police (6); support agencies (4); judges (11) ODP staff (10); and court staff (6) – in particular Aboriginal cultural awareness and awareness of intellectual and physical disabilities.
- greater access to CCTV (6);
- access to secure and remote facilities for victims to give their evidence (9);
- a separate representative for victims (2).

A number of comments have been reproduced below:

- *“Specific training for police/judges/DPP solicitors on victim care and sexual assault dynamics”;*
- *“A more systematic, efficient and effective way of determining start dates of hearings and trials so that services and clients can reliably know the matter will or will not commence. Greater resources enabling more frequent District Court sittings in regional areas in an attempt to reduce delays.”;*
- *“Overhaul the DPP and legislation and local/district court procedures”;*
- *“Having special sexual assault courts that hear matters within 6 months of charging”;*
- *“Judges who know what the rights of victims of crime are. Systemic changes to expedite sexual assault prosecutions. Judiciary that will enforce time frames and the political will that will*

adequately fund legal representation and prosecution. Victims have a representative; at present they are a non-party to the proceedings.”

- *“WAS officers are a fantastic resource, so more of them?”*

Respondents also commented upon the need for increased resources for support workers and the DPP, greater continuity within the DPP and increased brief preparation; better transport arrangements for victims, and problems of cross-examination, particularly for children. These issues were also commented upon in response to the next question, which was: *“Are there ways of improving interagency collaboration between support services, police and justice agencies, that would assist in evidence gathering for sexual assault?”*

Interagency collaboration: evidence gathering

Responses to this question generally fell within two categories:

- the need for a more collaborative approach with respect to the prosecution of individual cases and the sharing of information/ evidence between agencies about the victim/case (5). It was suggested this could take the form of joint meetings between service providers and/or debriefings; and
- creating a framework for increased interagency collaboration and understanding about each other's role generally (3); the provision of appropriate joint training/information sessions (16); increased feedback from other agencies (5) and establishing committee's at the local level involving relevant practitioners rather than management (7). There were also a number of comments about formulating memorandums of understanding (2) between key agencies.

Other practical proposals specifically directed towards improving evidence gathering included:

- the need for better police and JIRT investigations;
- creating better environments within police stations for victims to disclose;
- improving relationships between police and counselling services;
- ensuring that urine samples are taken from victims at the earliest opportunity where drug facilitated sexual assault is suspected;
- encouraging victims to participate in a forensic medical examination;
- increased resources for more forensic doctors and nurses and training in Sexual Assault Investigation Kit (SAIK) protocols, particularly in rural areas and with regard to male victims;

- improvements in the quality of expert medical statements;
- increasing resources for the Division of Analytical Laboratories (DAL) in the preparation of expert DNA reports which can impact on the responsiveness of police and prosecution;
- fostering better interagency discussions between the DPP and police to enhance the gathering of evidence;
- the creation of a specific liaison officer between each agency.

Interagency collaboration: reducing stress and trauma for victim giving evidence

Survey respondents were asked: *“What could improve interagency collaboration in order to reduce stress for complainants when they give their evidence in court?”*. Again, many responses indicated that there needed to be a better understanding between counselling services, police and the DPP. A number of respondents suggested the need for a multidisciplinary approach when preparing the victim for trial, involving a staged approach, thereby giving the victim greater confidence within the trial environment (6). Meetings could also take place to discuss the barriers to giving evidence.

Delays and problems with cross-examination were cited as problems which needed to be addressed to reduce stress. Suggestions were also made to reduce stress for victims by:

- increasing the number of remote rooms like the one at Parramatta;
- ensuring CCTV is available in all venues and for it to be tested regularly;
- ensuring separate entrances to court complexes where remote facilities are not available;
- allowing all complainants to give their evidence by way of pre-recorded video;
- police giving greater attention to assessing the special needs of victims in advance of taking a statement, including Aboriginality, intellectual disability, literacy, culture etc and to pass this information on to other relevant agencies, including the DPP;
- police passing the contact details of the victim on to the DPP as soon as possible;
- having a designated key worker in place to co-ordinate a case management approach with all players;
- limiting cross-examination by defence where questions are clearly unacceptable;
- providing education to judges and DPP solicitors, particularly in the way they relate and speak to children;
- allowing for multiple complaints to be heard together rather than ordering separate trials.

Conclusions

A number of issues about training key participants, including judges, prosecutors and police; the need for continuity, CCTV and problem of delay are discussed further in Chapter 9, and it is not proposed to discuss those issues here. The remaining section of this chapter outlines some of the possible solutions to the problems identified by victims and service providers.

Interagency collaboration and co-ordination

One of the most important matters to consider is how to improve interagency collaboration. In her recent report, Lievore notes that whilst good collaboration exists in some regions, the concept of a *‘co-ordinated approach has not been institutionalised at a government, system or practice levels’*.¹¹⁴

She writes:

Co-ordinated service delivery is not a *fait accompli* simply because a policy document has been written and distributed. Sexual assault task forces, committees, or coalitions play an integral role in developing and maintaining networks that provide better services for victims. Their most important function include bringing together key people to develop and implement strategies for preventing sexual assault and linking different agencies to improve service delivery.¹¹⁵

The NSW Interagency Guidelines for responding to victims of sexual assault are currently being re-drafted.¹¹⁶ This is an inter-agency guideline between NSW Health, NSW Police and the Office of the Director of Public Prosecutions, setting out the formalised approach to responding to reports of sexual assault. The document sets out the roles and responsibilities of each agency and provides general statements about the need for interagency collaboration. However, once the guidelines are available the most important questions are:

- how the Guidelines are to be communicated to those people working daily in the field with victims, eg forensic examiners, general duties police, Local Area Commands, solicitors and Crown Prosecutors;
- how the Guidelines are to be implemented; and
- what inbuilt mechanisms there are for compliance with the Guidelines.

¹¹⁴ Lievore at 143

¹¹⁵ Lievore at 133

¹¹⁶ Olle: *Mapping health sector and interagency protocols on sexual assault*, (2005) No. 2, Australian Centre for the Study of Sexual Assault at 17. According to Olle, ‘there are no specific guidelines to address how each of the agencies might coordinate an appropriate response. Rather, the guidelines distinguish how each agency should undertake their exclusive role in responding to sexual assault’. Attached to the Guidelines is the Charter of Victims Rights, NSW Police Investigation and Management of Adult Sexual Assault and Standard Operating Procedures; ODPP Guidelines, Local Coordination Committee Meetings, Sexual Assault Review Committee (SARC), and the NSW Adult Sexual Assault Interagency Committee. See Appendix for the role of these committees and membership.

Working Group Meeting of Service Providers

On 20 October 2005, a Working Group was convened of key agencies involved in the delivery of services to victims of sexual assault, including NSW Health, NSW Police, Violence Against Women Specialist Unit, Department of Community Services, Victims Services, Witness Assistance Service, ODPP and NSW Rape Crisis Centre to discuss better interagency collaboration. The findings of the VAWSU survey were discussed. The Working Group was asked to provide their views on how to create a framework to assist in strengthening service provision and co-ordination.

The most important issues identified by the Working Group as needing immediate redress were:

- the provision of accurate information to all victims of sexual assault about their rights, in appropriate and accessible formats;
- the need for case management of individual matters through the criminal justice system;
- the need for accountability within the system and between agencies.

Proposed solutions

The Working Group examined a number of the solutions proposed by survey participants, and how these may be implemented as part of a best practice model, bearing in mind cost implications for the relevant agencies. The following best practice proposals were raised by the Working Group as matters for consideration by the Taskforce:

- the provision of up-to-date and accurate information in a variety of formats and languages,¹¹⁷ including audio formats, Braille, Internet sites, and pictorial representations;
- the provision of a designated contact or advocate who can accompany the victim and assist the victim through the health and criminal justice system and act as an advocate if information to which the victim is entitled is not being provided in a timely or appropriate manner;
- one-stop-units where a victim of sexual assault can be taken to receive appropriate medical care, counselling, forensic examination and make a police statement if the victim so desires. Interaction of service providers at this initial point to assist the victim in making informed decisions and ensuring victim safety;¹¹⁸ and
- a case manager to oversee that all relevant agencies have met the minimum standards required by their agency and that interagency protocols have been complied with.

Provision of information

Victims who responded to the surveys indicated that they required information on a range of issues, including their rights, the court process, forensic/medical examinations and other issues, such as accommodation, mental health, drug and alcohol counselling. Victims may require different information at different points in the criminal justice process, however, it is important that information is clear and accurate and available at multiple stages. Lievore suggests that a lack of information about options and the criminal justice process can contribute to secondary victimisation of complainants. According to Lievore's study, information provided by sexual assault counsellors was generally highly valued, however, other support services that offered help and counselling, such as crisis help lines, community organisations and mental health services were seen as less helpful and empathetic.¹¹⁹

Victims from Aboriginal communities,¹²⁰ victims with an intellectual disability,¹²¹ victims from non-English speaking backgrounds¹²² and homeless women, may also find access to appropriate information more difficult. The VAWSU survey also suggested that there was a lack of appropriate information and service provision for men, sex workers and transgender people.

¹¹⁷ The Education Centre Against Violence, NSW Health – has a number of brochures on sexual assault available in different languages, including Vietnamese, Chinese, Spanish, Italian, Korean, Hindi, Punjabi Turkish, Arabic and Khmer speaking communities. These booklets provide information about adult sexual assault, counselling, how to use interpreters, the role of Sexual Assault Services and how to get help. They were published between 1999 and 2001 and it is not clear how current the information is, whether it contains all necessary information and how it is delivered to those people who need to access it.

¹¹⁸ See Discussion Paper 7 for an outline of service models that exist in specialist courts in Wynberg, South Africa and Manitoba, Canada.

¹¹⁹ Lievore at 76.

¹²⁰ For a recent discussion on service provision and access to information for women for Aboriginal communities, see Lievore at 109-115. She writes: "Indigenous women's service needs are either not being met by mainstream sexual assault services, or they do not have access to services. Moreover, where services are available their options may be limited... Indigenous women need to be given the choice of accessing skilled Indigenous workers and mainstream services staff are trained to deliver culturally appropriate services". Service providers responses in Lievore's study noted the importance of education campaigns in Aboriginal communities. She writes: "In some areas, pamphlets are available that provide phone numbers for victims to call, but their effectiveness may be limited by the fact that they do not contain enough information about sexual assault or the types of services available. There is also a need to provide literature or posters that are aimed at younger women and girls, which 'are brought down to their level of understanding, using language that they can understand'.

¹²¹ See Lievore at 95 – 102, where she recommends: 'that specific funds are allocated for research among victim/survivors with disabilities, as little if any research has tapped into their experiences with and view on the criminal justice process, or the level of needs of victim/survivors who are identified as having disabilities.'

¹²² See Lievore at 102- 109, who makes a number of recommendations, including up-skilling of interpreters, bilingual bicultural workers, female doctors from different cultural backgrounds and need for further analysis.

The provision of information directly to victims either via pamphlets, Internet, or audio is one of the least costly solutions to the problems identified by victims. The challenge with providing information to victims directly is to ensure that the information is consistent, up-to-date and accurate. In order to achieve this it is imperative that there is input and approval from all relevant agencies in information design and delivery. It is also important that victims have the opportunity to access the information at multiple stages and in a variety of formats.

It is proposed that Victim Services, Attorney General's Department, take a lead role in increasing co-ordination and delivery of accessible and accurate information to victims of sexual assault. Victim Services is currently engaged in the process of developing an interactive website explaining the court process that aims to cater to both adults and children.

Accreditation of sexual assault counsellors is also suggested to ensure that accurate and appropriate information is being provided from the outset to victims. A number of courses are currently run through the Education Centre Against Violence, NSW Health which could form the basis for accreditation.¹²³ Women's Legal Services was also of the view that the Education Centre Against Violence would be the most suitable organisation to consult regarding the best way to communicate information to complainants; a view that was shared by the Rape Crisis Centre. The Taskforce agreed that immediate action ought to be taken to ensure that consistent and accurate information about victims' rights and the criminal justice process is provided to complainants from the outset. In addition, the Taskforce supported further research into understanding the most effective way of providing information to victims from Aboriginal communities, victims with an intellectual disability and other disabilities; and to victims from non-English speaking backgrounds.

Currently, for victims whose cases are prosecuted by the ODPP, the Witness Assistance Service (WAS) shoulders the burden of providing information to victims about their rights and the court process and conducting court familiarisation. This includes showing the victim the CCTV facilities, the court, explaining the role of the support person, explaining the role of others in the court and the process generally. WAS also liaises with other agencies to ensure that victims are able to access counselling and other services. WAS provides a crucial role within the ODPP and feedback from the surveys conducted earlier this year suggested that WAS does an excellent job and that more of them were required.

Designated contact or advocate

Responses from service providers suggested that there should be a designated person to contact within police regarding sexual assault and a more collaborative approach with respect to the prosecution of individual cases and the sharing of information/ evidence between agencies about the victim. The Working Group gave in principle support to the idea of a designated liaison person who works with the victim as a point of referral to other agencies, however, there was little support for this role to be performed by someone within the NSW Police Service. Concern was raised that by shifting responsibility for sexual assault to a designated person within NSW Police (like the current domestic violence liaison officer (DVLO)), other police officers, including general duties police, may defer all enquiries, and initial reports to that person, rather than taking sexual assault matters seriously, undertaking training and dealing with these matters themselves.

Why is a designated liaison or advocate needed for victims and what function should this person perform? The Working Group suggested that the liaison officer or advocate could perform a referral role and relieve the burden on sexual assault counsellors. Indeed, if the role of the liaison officer is limited to providing information to victims regarding their rights under the Charter of Victims Rights, reporting to police and how to access health services, accommodation options etc, it is arguable that it is not necessary or desirable for this role to be situated within police.

One possibility that was canvassed at the Working Group meeting was to create new and separate liaison positions at arms length from agencies. These positions could be contracted out to suitably qualified and accredited non-government organisations, as has occurred with the Domestic Violence Court Intervention Program (DVCIP) being piloted at Campbelltown and Wagga Wagga. Such an approach may also mean that responses to victims are localised and other identified needs, such as whether victims are Aboriginal, from a non-English speaking background (NESB) may be more appropriately met. Outreach programs could operate to ensure that the same service operates in rural and remote communities. It is envisaged that the liaison officer would have a different skill set to sexual assault counsellors and therefore may attract people from various communities, including people from Aboriginal communities.

¹²³ For information on the Education Centre Against Violence see: <http://www.health.nsw.gov.au/ecav/>

The main disadvantage with this proposal is that it introduces yet another player into the delivery of services to victims; a proposal that was not well received by the Taskforce, with some members concerned that it would duplicate aspects of the roles of sexual assault counsellors and the Witness Assistance Service. This may be more confusing and unnecessarily complicate the process. Responses from victims suggest that they do not want to have to repeat their story to yet another person. In addition, unlike the advocate in the DCVIP, who has contact with the victim for 12 weeks until the charge in the local court is finalised, sexual assault proceedings take much longer, and it is questionable whether resources would permit the continuation of an advocate for a 12 to 18 month period. More importantly, co-ordination, case management and referral to other services is currently performed by the Witness Assistance Service (WAS) where a prosecution has commenced. Where charges are laid immediately or soon after the offence and the matter is referred to the ODPP, there may be a duplication of resources. However, it must be borne in mind that there are some matters where the investigation or arrest period may take some time and no WAS involvement may take place during this period where no charge has been laid or the matter has not been referred to the ODPP. The issue of who is best placed to perform the role envisaged by the Working Group will be discussed again later in this chapter.

Case manager

In order to ensure each agency complies with its responsibilities and obligations in sexual assault matters, the Working Group considered whether there should be a centralised case manager to oversee the operations of all agencies. Experience from the Joint Investigation Response Team (JIRT) (co-ordinated response from NSW Police, Department of Community Services and counsellors) suggests that a centralised agency to oversee operations is essential to success. The Working Group proposed that designated case managers could report to the Chief Executive Officers of the relevant agencies on whether interagency guidelines are being complied with. In addition, a reporting mechanism could be included in each agency performance contract/or agreement outlining a certain level of service provision and key targets to be met.

How would this role be different to the dedicated victim's advocate, and how many such managers would be required to oversee all sexual assault prosecutions (adult and children) in NSW? Detective Superintendent Kim McKay stated that such an initiative would inevitably require increased resources. What level of information

would they be provided with, given issues surrounding confidentiality, communications privilege and legal privilege? To which agency should the case manager be primarily responsible? The role of the case manager remains unclear and again, care must be taken not to duplicate the work that is currently undertaken by existing agencies. In particular, Detective Superintendent Kim McKay expressed concern that this approach may devolve accountability from the agencies themselves. In her opinion, the key objective is to provide a better response to victims of sexual assault, and that this was more likely to be achieved by shifting accountability to senior officer interagency groups. The Taskforce were somewhat ambivalent to the idea of case managers, instead favouring the centralised service delivery proposal.

One-stop-shops

'One-stop-shop' units that co-ordinate medical, forensic and sexual assault counselling services do exist in some NSW hospitals, however, it appears that these facilities are not utilised to the maximum potential, with some rooms being used for other purposes.¹²⁴ In addition, there does not appear to be any consistency between health services with regards to this model. Most importantly, police are not an integrated part of the current model.

In other jurisdictions, such as Victoria, the United Kingdom,¹²⁵ Manitoba and South Africa, one-stop-shops operate which have forensic/medical examination rooms, interview rooms, waiting rooms for the victim and family members. Some are equipped with showers and a change of clothing. All services come to the victim, rather than transporting the victim from place to place, which can further add to trauma.¹²⁶ A by-product of this approach has been an increase in co-ordination of services and understanding of each other's role in the process.

¹²⁴ Oral contributions, NSW Health 20 October 2005.

¹²⁵ See Lovett, Regan and Kelly: *Sexual Assault Referral Centre: developing good practice and maximising potentials*, (2004) Home Office Research 285, Development and Statistics Directorate. For a brief outline see also Lievore: No Longer Silent at 147.

¹²⁶ For an example of a one-stop-unit, see the website of the Havens which services the London area: http://www.thehavens.org.uk/havens_about.htm

Whilst some co-ordinated models have a room for police, it is not envisaged that this would be necessary and may not be preferable as the permanent presence of police may be upsetting and intimidating for some victims.¹²⁷ It is suggested that once a victim has made an informed choice to report to the police, the police could be contacted and attend the unit with the necessary equipment (laptop and digital camera) to take a statement from the complainant. The police involvement would therefore be responsive to a victim's decision to report an assault. Detectives could be on-call to attend immediately to meet with the victim and discuss the criminal process. If the victim wishes to provide a statement, this can then be done in an environment where the victim already feels safe, or an appointment may be made for a full statement to be taken at a later time. It is suggested that there could also be some liaison or oversight of Local Area Command detectives by the Child Protection and Sex Crimes Squad, to provide a back-up solution if no detectives are available to attend the unit.

Further co-ordination with relevant agencies would be required before a final recommendation can be made with respect to this matter. Integral to the success of such a proposal would be a consideration of the role of each agency and quantifying the resources required for training of forensic doctors and nurses, and ensuring accessibility of similar services in regional and remote NSW.¹²⁸ Access to related services, for example, the provision of emergency housing, would also need to be an essential feature to assist victims.

This proposal received the full support of the Taskforce; the Rape Crisis Centre applauding the idea as it restricts a sexual assault victim's contact to detectives who are specially trained in the area of sexual assault. The Taskforce was, however, mindful of the fact that for the proposal to succeed it required the commitment of NSW Police and the Department of Health. Another issue that requires attention, is the management of the facility; how will it be managed, and by whom?

It is suggested that the need for case management, joint collaboration and designated officers, may be best achieved by the introduction of a case manager at the one-stop-unit, rather than an outsourced liaison officer. The case manager of the one-stop-unit could perform the following duties:

- be responsible for ensuring that sexual assault counsellors working in the unit are suitably accredited;
- be responsible for the ongoing training of sexual assault counselling staff;

- be responsible for ensuring that victims receive accurate and appropriate written and verbal information about their rights, the medical examination, the Sexual Assault Investigation Kit, the fact that they do not have to consent to the release of the SAIK at that time if they do not wish to;
- ensure that medical and forensic experts understand their role in the process and apply interagency guidelines in their work;
- work with sexual assault counsellors in drafting a case management plan for victims;
- assist in referring victims (where necessary) to other appropriate services that may be required, for example, accommodation, drug and alcohol treatment etc;
- liaise with police to ensure they arrive promptly at the unit to take the victim's statement and comply with Interagency protocols;
- once charges have been laid and the matter referred to the ODPP, liaise with WAS to advise them of the case management plan and provide for smooth transition to this phase of the process; and
- look to fostering relationships with other agencies;

The advantage of locating such a position within the one-stop-unit is that the case manager can take responsibility for ensuring best practice compliance with personnel who work within that unit, including police who attend. If the position is based in a sexual assault unit in a local hospital, relationships can also be more easily forged with the Local Area Command, local ODPP managing lawyer, WAS and other local services. Funding for the positions could be a joint initiative between the agencies so they all have a sense of responsibility for the case manager role.

Other matters

The Working Group stressed the importance of interagency meetings at the localised level and leadership to assist in developing best practice models based on the needs of that location. This was a matter that was stressed in the service providers survey and a strong theme in the research of Lievore.

¹²⁷ In South Africa if a person reports to police following an assault, the police transport the victim to the sexual assault centre so that the health and well being of the victim is attended to first if this is what the victim wants.

¹²⁸ This point was of particular concern to the ODPP, submissions 14 December 2005.

Other recommendations for improved co-ordination of service responses to sexual assault victims made by Leivore in her report and with equal application for NSW include:

- clearly designated leadership within and across agencies;
- creation and implementation of practical guidelines on how to implement service provision (the NSW Sexual Assault Interagency Protocol is currently being updated);
- strategies implemented to monitor compliance and ensure accountability;
- adequate resources allocated to all partner agencies;
- formal meetings and informal networking opportunities;
- regular interagency meetings at the local level;
- dedicated and leadership position in government agency;
- cross-sectoral training;
- enhancing professional expertise of doctors who participate as expert witnesses;
- recruiting more female doctors with forensic training;
- introducing forensic nurses (Sexual Assault Nurse Examiners); and
- the need for further research that investigates criminal justice responses to different groups, including prison populations.

TASKFORCE RECOMMENDATIONS:

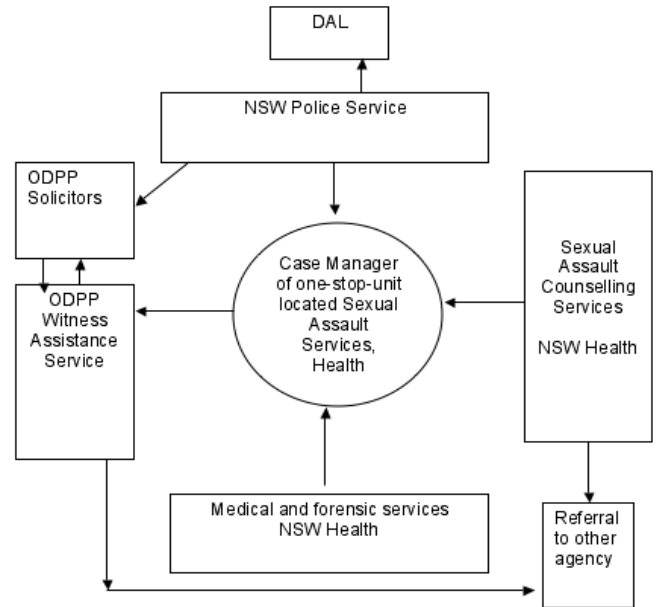
- 3 There should be immediate action taken to ensure there is consistent and accurate information in a variety of formats given to victims from the outset by sexual assault services about their rights and the criminal justice process.
- 4 There should be further research conducted into understanding the most effective way of providing information to victims from Aboriginal communities, victims with an intellectual disability and other disabilities; and to victims from non-English speaking backgrounds.
- 5 NSW Ministers from relevant portfolios (Police, Health, DoCS, AG's) should give serious consideration to the development of "one-stop-units" to provide co-ordinated service delivery for adult sexual assault victims. 'One-stop-shops' could be established within Sexual Assault Services, NSW Health with separate and directed funding.
- 6 Consideration should be given to the role of a case manager within the 'one-stop-shops.' The introduction of a case manager and other issues of case planning and management of victims matters, joint collaboration and accountability should be referred to the Human Services CEOS to determine the best way to use existing health facilities so that the following duties are performed, to:
 - organise ongoing training of sexual assault counselling staff;
 - ensure victims receive accurate and appropriate written and verbal information about their rights, the medical examination, the Sexual Assault Investigation Kit, the fact that they do not have to consent to the release of the Sexual Assault Investigation Kit at that time if they do not wish to;
 - ensure that medical and forensic experts understand their role in the process and are applying interagency guidelines in their work;
 - ensure sexual assault counsellors are drafting a case management plan for victims;
 - refer victims (where necessary) to other appropriate services that may be required, for example, accommodation, drug and alcohol treatment etc;
 - liaise with police to ensure they arrive promptly at the unit to take the victim's statement and that police comply with Interagency protocols;

- liaise with the Witness Assistance Service to advise them of the case management plan and provide for smooth transition to this phase of the process; and
- foster relationships with other agencies.

- 7 Further and directed funding be prioritised to:
- sexual assault counselling, NSW Health and relevant NGO funding;
 - Health (in the form of training Sexual Assault Nurse Examiners);
 - Witness Assistance Service, ODPP; and
 - Enhancement of existing infrastructure.
 - Aboriginal Family Health (NGOs, child sexual assault, sexual assault, support person and liaison person).

- 8 Consideration should be given to establishing interagency meetings at the local level involving NSW Health, Sexual Assault Services, NSW Police Local Area Commands, and ODPP, at each District Court and co-located ODPP (eg, Sydney Metropolitan, Campbelltown, Penrith, Parramatta, Wollongong, Newcastle, Dubbo, Gosford, Lismore, Wagga Wagga and Bathurst). These meetings should ensure that Interagency Guidelines are followed, problem cases discussed, informal networks are created and the information provided to each agency is consistent. One agency should take the lead role in co-ordinating such meetings.

Interagency collaboration concept for improved service delivery



Chapter 3

The Law of Consent

1. What is meant by consent?

In NSW sexual offences against adults, with the exception of incest and attempt incest¹²⁹, require the prosecution to prove that the complainant did not consent to the sexual conduct. This is part of the *actus reus*¹³⁰ of the offence, and a matter of fact for the jury to determine by reference to the complainant's subjective state of mind at the time the sexual conduct occurred.

In NSW there is no statutory definition of consent. The current NSW Bench Book states "consent involves conscious and voluntary permission by the complainant to engage in sexual intercourse with the accused".¹³¹ It can be given verbally, or expressed by actions. Similarly, absence of consent does not have to be in words; it may be communicated in other ways. The common law provides that consent obtained after persuasion is still consent.¹³² However, the law specifically provides that a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse; s 61R (2)(d) Crimes Act 1900 (NSW). A complainant may freeze and say nothing, but that does not equal consent.¹³³ A list of circumstances that vitiate consent is set out in s 61R of the Crimes Act 1900 (NSW) and is discussed below.

Recent issues in NSW

A number of recent cases in NSW have considered the issue of consent. In *R v Mueller* [2005] 62 NSWLR 476 the appellant argued that the trial judge misdirected the jury

on what was meant by consent. It was submitted that the trial judge's use of the words 'freely and voluntarily' when explaining the concept of consent to the jury, unduly narrowed the issue, conveying that consent after persuasion or with reluctance was not really consent. In examining this issue, Studdert J noted that the expression 'freely and voluntarily' is used in both the Western Australia Criminal Code and Queensland Criminal Code where consent is defined. Additionally, he observed that in Victoria, consent is defined by s 36 of the Crimes Act as meaning "free agreement". His Honour also considered the decision of *R v Clark* (unreported NSWCCA 18 April 1998), where Simpson J expressed the view that for the purpose of NSW law, consent meant 'consent freely and voluntarily given'.¹³⁴

¹²⁹ Section 78A and 78B Crimes Act 1900 (NSW), see also s 73 and 66F Crimes Act 1900 (NSW).

¹³⁰ The actus reus is the physical act or state of affairs that constitutes the offence.

¹³¹ See the discussion of Simpson J in *R v Clark* [1998] (unreported, NSWCCA, 17 April 1998) and Hunt AJA and Hulme J in *R v Mueller* [2005] 62 NSWLR 476 discussed below.

¹³² *R v Holman* [1970] WAR 2 at 6.

¹³³ *R v Porteus* [2003] NSWCCA 18.

¹³⁴ In this case the accused and complainant were inmates at a prison in Albury. The complainant alleged the accused offered to protect him from others in the gaol in return for sexual favours. When the complainant refused this offer the accused grabbed him from behind and sexually assaulted him. The accused admitted that he offered to protect the complainant in return for sexual favours, but that the sexual intercourse which followed was consensual. The trial judge directed the jury that a complainant does not need to show physical resistance in order to prove consent. A question from the jury prompted the trial judge to explain: "If it is a question of a person putting up with the inevitable without a struggle that is not the same as consent.". Simpson J stated that although the term freely and voluntarily given is not used in NSW it is the appropriate test to apply when determining consent. According to Simpson J s 61R(2)(c) does not simply refer to threats or terror which may come from the accused person, but also those which emanate from other persons.

After reviewing the statutory definitions employed in the other Australian States, Studdert J adopted the common law principle of consent stated in South Australia in *Question of Law (No 1 of 1993)* (1993) 59 SASR 214 where the court said: “*The law on the topic of consent is clear. Consent must be free and voluntary consent.*”¹³⁵ Studdert J was of the view that whilst there was no statutory requirement in NSW for a judge to give a direction that consent must be freely and voluntarily given, the direction given in *R v Mueller* was not erroneous when viewed in context.

In contrast, both Hunt AJA and Hulme J indicated they held reservations about this statement of law. Hulme J expressed the view that in summing up in a sexual assault case judges should avoid, or at least be very careful in referring to consent being ‘freely and voluntarily given’. Referring to dictionary definitions of these two words, he observed that ‘freely is defined as: “*of one’s own accord, spontaneously; without restraint or reluctance; unreservedly, without stipulation; readily willingly*”; whilst ‘voluntarily’ includes in its definition: “*arising or developing in the mind without external constraint; not constrained, prompted or suggested by another.*” His Honour noted that the law is clear that consent need not accord with many of these dictionary meanings, particularly as consent given reluctantly, or after a deal of persuasion, is still consent. Hunt AJA agreed with these remarks, stating:

There will inevitably be difficulties for a jury in understanding how consent may at the same time be both (a) freely and voluntarily given and (b) given reluctantly or after persuasion. If both directions are given because of the necessity to do so in the particular case, the judge should also give assistance to the jury as to how each of those directions is relevant to the facts of the particular case, with an explanation which removes the likelihood of confusion.

The comments made by Hunt AJA and Hulme J squarely raise for consideration whether NSW should include a definition of consent in the Crimes Act (1900) NSW.¹³⁶ The meaning of consent was not discussed when the Government first introduced the Crimes (Sexual Assault) Amendment Act 1981 (NSW). This Act sought to produce a paradigm shift in the way that sexual assault was defined and viewed in NSW. The common law crime of rape was recodified into categories of sexual assault which attracted different penalties and the definition of sexual assault was drafted in gender neutral terms in order to emphasise the violent and degrading nature of the crime. In the Parliamentary debates the then Attorney-General used the expression ‘consents freely and

voluntarily’, however, this was in the context of explaining that a lack of physical resistance does not mean a person is deemed to consent.¹³⁷

There is a considerable body of academic literature on the inherent problems with the legal concept of consent and how to define consent so as to give it appropriate contextual and contemporary meaning. For example, feminist legal theorist Nicola Lacey criticizes the common law notion of consent as presupposing the subordinate position of the victim. In this context consent is not understood in terms of mutuality, but rather a set of arrangements initiated by the defendant with a passive recipient, reinforcing stereotyped binaries such as active/passive and possessing/possessed.¹³⁸ Similarly, Ngaire Naffine has suggested that the common law crime of rape assumes a sexual subject who proposes sex to a sexual object; “*The implicit form of the transaction is one of the proposal by an initiating party to an act of sexual intercourse to which consent must be extracted from the offeree.*”¹³⁹ Naffine argues that this presupposes a coercive element and, as such, consent for the purposes of the law of rape does not mean free agreement. This issue was also discussed in the Model Criminal Code Officer’s Report on Sexual Offences. The authors of the report recommended that a definition of consent in the terms ‘free and voluntary agreement’ be adopted.¹⁴⁰

¹³⁵ “The law on the topic of consent is not in doubt. Consent must be a free and voluntary consent. It is not necessary for the victim to struggle or scream. Mere submission in consequence of force or threats is not consent. The relevant time for consent is the time when sexual intercourse occurs. Consent, previously given, may be withdrawn, thereby rendering the act non-consensual. That may occur as a consequence of persuasion, but, if it does, the consequent consent must, of course, be free and voluntary and not mere submission to improper persuasion by means of force or threats.”

¹³⁶ Others have expressed the view that the decision in *Mueller* does not change the law, as Hunt AJA agreed with Studdert J at [1] and other statements by him were not an attempt to change the law.

¹³⁷ “Proposed s 61D gives various circumstances which will be deemed to amount to non consent notably where the consent is obtained by threats or terror...also makes it clear that the victim of a sexual assault will not be deemed to have consented merely because no actual physical resistance was offered...The question is not whether a victim of a sex attack fights back; it is whether she consents freely and voluntarily” Mr Walker, *Hansard Legislative Assembly Parliamentary Debates*, Wednesday 18 March 1981, No 41 at 4771.

¹³⁸ Lacey Nicola: “Unspeakable subjects, Impossible Rights; Sexuality, Integrity and the Criminal Law” (1998) 11 *Canadian Journal of Law and Jurisprudence* 47 at 60

¹³⁹ Naffine Ngaire: “Reinterpreting the Sexes (through the crime of rape)” in *Feminism and Criminology*, Allen and Unwin, Sydney 1997 at 108

¹⁴⁰ Model Criminal Code Officer’s Committee of the Standing Committee of the Attorney’s-General, May 1999 at 23 and 43

Other jurisdictions

A number of Australian jurisdictions contain a definition of consent. In 1991 s 36 Crimes Act 1958 (Vic) was amended to define consent as: free agreement. Section 36(a)-(g) sets out a non-exhaustive list of circumstances in which a person does not freely agree to an act. The Victorian model is based on the 'communicative model' of sexual relations and seeks to reflect contemporary values of sexual relationships. Similarly, s 348 of the Queensland Criminal Code states consent means 'freely and voluntarily given by a person with the cognitive capacity to give the consent'. As with the Victorian legislation the Queensland Code sets out the circumstances when a person's consent is deemed not to be freely and voluntarily given. Section 319 of the Western Australian Criminal Code states that consent means 'consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means'. The section further provides that where an act would be an offence if done without the consent of a person, a failure by that person to offer physical resistance does not of itself constitute consent to the act.

Other common law countries

In Canada, consent is defined in s 273.1 (1) of the Criminal Code as "the voluntary agreement of the complainant to engage in the sexual activity in question." The use of the word 'agreement' reinforces that consent should be seen as a positive state of mind, and focuses the jury on the sexual autonomy and freedom of the complainant; *R v Ewanchuk* [1999] 1 S.C.R 330. A non-exhaustive list of circumstances is provided where no consent can be obtained; s 273.1(2)(a)-(e).

By far the most radical change to the law on consent has occurred in the United Kingdom. The introduction of the Sexual Offences Act 2003 United Kingdom in May 2004, saw numerous amendments to the law in relation to consent, including the abolition of the *Morgan* test; discussed below. These changes arose from a comprehensive overview of the law in relation to sexual assault in the UK and a series of consultations and discussion papers. Originally the Home Office recommended that consent should be defined as 'free agreement'.¹⁴¹ However, by the time the Act was drafted this was altered so that s 74 of the Act reads "a person consents if he agrees by choice, and has the freedom and capacity to make that choice." Sections 75 and 76 then set out a number of evidential presumptions and conclusions about consent. The use of the words 'freedom' and 'choice' seek to bring about a shift in the way society views sexual relations.¹⁴²

Discussion

The majority of Taskforce members, including the DPP, NSW Health, Detective Superintendent Kim McKay, Women's Legal Services, Dr Cossins, Associate Professor Stubbs, Office for Women, Violence Against Women Specialist Unit, Victims Services and NSW Rape Crisis Centre supported adopting a definition of consent, however, this was vigorously opposed by the Law Society, Bar Association and Public Defenders Office and not supported by the Legal Aid Commission. Members of the judiciary did not think that it was necessary to define consent and expressed concern that the adoption of a definition may either unduly broaden or unduly narrow the current common law meaning.¹⁴³

Those in favour of defining consent advised that a definition would make it clearer for the community to understand what does and does not amount to consent, may serve an educative function,¹⁴⁴ as well as ensuring that standard directions are given.¹⁴⁵ It was also submitted that the adoption of a definition of consent in other jurisdictions, such as Canada, has had a positive impact, in that acquiescence is far less likely to be transformed into consent.¹⁴⁶ Those against adopting a definition of consent were concerned that the definitions adopted in other jurisdictions were at odds with how the common law definition of consent has evolved in NSW,¹⁴⁷ and were of the view that it should be left to the courts to further develop this concept.¹⁴⁸ Concern was expressed that the words 'free and voluntarily' were unclear and would create problems where consent was given following persuasion.¹⁴⁹

¹⁴¹ Home Office: *Setting the Boundaries: Reforming the law on sex offences*, Summary Report and Recommendations July 2000 at 6, http://www.homeoffice.gov.uk/docs/set_summ.pdf

¹⁴² Sections 74, 75 and 76 are set out fully in Appendix 1.

¹⁴³ Oral contributions of Magistrate Quinn, Justice Buddin and Judge Ellis, 7 December 2005.

¹⁴⁴ Submission Dr Anne Cossins, 29 June 2005.

¹⁴⁵ Submission Women's Legal Services, 1 July 2005.

¹⁴⁶ Submission Associate Professor Stubbs, 17 October 2005.

¹⁴⁷ Submission Mr Phillip Gibson, Law Society of NSW, 17 October 2005.

¹⁴⁸ Oral contributions of Mr Stephen Odgers SC, Bar Association, 1 June 2005

¹⁴⁹ Oral contributions of Mr Stephen Odgers SC.

One judicial officer was of the view that the current directions on consent were adequate and that in the case of *Mueller*, a difficulty arose because the trial judge had departed from the standard directions.¹⁵⁰ However, a recent report commissioned by the NSW Attorney General's Department and conducted by the Australian Institute of Criminology (AIC) on juror's perceptions of sexual assault victims, suggests that consent is a difficult concept for juries to understand. The study analysed whether the mode of delivery of victim's evidence affected the level of jury empathy with the victim, views on the victim's credibility and overall impression of the victim. The study involved eighteen mock juries, hearing the same evidence from a female adult sexual assault complainant, where the only issue in dispute was consent. Despite the definition of consent provided by the judge (and taken from the NSW Bench Book), many jurors had difficulty in understanding what was meant by consent and asked the following questions:

- "What is the point at which consent is given?"
- "What defines whether consent has not been given?" and
- "At what point does 'yes' become 'no' and to what degree should the accused reasonably be able to distinguish between them?"

The findings of the AIC study suggest there is a strong argument for adopting a definition of consent. The issue of lack of consent is ultimately a matter of fact to be determined by a jury. However, clear guidance should be given as to what this means. Defining consent in positive terms may give greater effect to the protection of the sexual autonomy of the complainant.

Whilst the Taskforce members were divided on this issue, the CLRD is of the view that recent judicial comment and the experience of other jurisdictions provides a strong argument for adopting a definition of consent in NSW. Simply because definitions employed elsewhere may not be consistent with how the law has evolved in NSW, does not mean the law should remain the same. Parliament should make laws that reflect contemporary values. After consideration of all of the issues raised, it is recommended by the CLRD, based on the submissions of some members, that a statutory definition of consent be adopted.

If a definition of consent is adopted, what should it be?

The Taskforce considered whether the term '*free agreement*' which is used in Victoria, should be adopted as a definition of consent. Whilst there was some support for this¹⁵¹, a number of members expressed a preference for the definition employed in Queensland, which states that consent means '*freely and voluntarily given by a*

person with the cognitive capacity to give consent'.¹⁵² This definition entails an active decision to engage in sexual activity, rather than passive acquiescence and may also be helpful in taking into account the categories of sexual assault complainants and their features, such as intellectual disability.

Others were in favour of the United Kingdom definition that '*a person consents if he agrees by choice and has the freedom and capacity to make that choice*'¹⁵³ which, it was submitted, recognises that certain people do not have the capacity to consent. The UK definition and the Victorian definition are compelling because of the use of the word 'agree' which suggests some degree of mutuality and consideration of the sexual activity that will take place. The UK definition also indicates that the jury must consider whether the complainant freely chose to engage in the activity, and had the freedom and capacity to make that choice, not limited to cognitive capacity.

CLRD RECOMMENDATIONS:

- 9 NSW should include a statutory definition of consent in the Crimes Act 1900 (NSW).
- 10 A definition of consent be adopted, partially based on the UK definition, that is: *a person consents if he or she freely and voluntarily agrees to the sexual act and has the capacity to make that choice.*

¹⁵⁰ Oral contributions of Judge Ellis, 1 June 2005.

¹⁵¹ Submissions Associate Professor Julie Stubbs and Office for Women. Whilst the Law Society opposed the introduction of a definition of consent, it advised that if a definition was adopted it preferred the words: "free agreement".

¹⁵² This was the preferred definition of the DPP, VAWSU, Office for Women and Women's Legal Services.

¹⁵³ This was the preferred definition of Detective Superintendent Kim McKay NSW Police, Ms Jo Spangaro NSW Health, Dr Anne Cossins and Victims Services. The UK definition was the second preferred definition of the ODP and the VAWSU.

2. Circumstances that vitiate consent

Section 61R Crimes Act 1900 (NSW) provides a non-exhaustive list of the circumstances that negate consent. Section 61R(2)(c) states that a person who submits to sexual intercourse with another person as a result of threats or terror directed to that person or another person, is to be regarded as not consenting. Furthermore, a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse; s 61R(2)(d). These two circumstances were the focus of the section when it was introduced in 1981.¹⁵⁴

Section 61R(2)(a) states that *without limiting the grounds* on which it may be established, consent to sexual intercourse is vitiated where the victim consents:

- under a mistaken belief as to the identity of the other person, or
- under a mistaken belief that the other person is married to the person.

Subsection 61R(2)(a)(i) reflects the common law as stated in *R v Dee* (1884) 15 Cox CC 579. However, subsection (ii) was enacted to cure a particular deficiency in the common law identified by *R v Papadimitropoulos* (1957) 98 CLR 249. In that case the accused fraudulently convinced the complainant they were married after they signed and lodged a notice of an intention to marry with the registry office. The complainant, who did not speak English, believed they were married and sexual intercourse took place. There was some evidence to suggest the complainant would not have consented to sexual intercourse had she known she was not married. The High Court held that the accused's fraud did not vitiate consent.¹⁵⁵

Section 61R(2)(a1) was also inserted to address a particular situation not covered by the common law. The Criminal Legislation (Amendment) Act 1992 was passed following a decision in Victoria where the court held that a radiographer who performed vaginal examinations on patients for no real medical purpose, was not guilty of rape.¹⁵⁶ Section 61R(2)(a1) therefore provides that a person who consents to sexual intercourse under a mistaken belief that it is for medical or hygienic purposes (or any other mistaken belief about the nature of the act induced by fraudulent means) is taken not to consent to the intercourse.

Recent issues

Recently the NSWCCA has had cause to examine the terms of s 61R and in particular, its relationship with s 65A Crimes Act 1900 (NSW).¹⁵⁷ In *R v Aiken* [2005] NSWCCA 328 the CCA observed that consent is not defined in NSW, and discussed the circumstances where consent is vitiated. The question on appeal was whether non-violent threats can vitiate consent pursuant to s 61R. The Court asked:

...must there be a threat of physical violence as opposed to some lesser threat? It cannot be that any type of threat necessarily enlivens the operation of 61R(2)(c)...The alternatives contemplated in s 61R(2)(c) are 'threats or terror' .

The court went on to examine the dictionary definition of these words and was persuaded by an argument that when the word threat in s 61R(2)(c) is read in conjunction with s 65A (sexual intercourse procured by intimidation, coercion, and non-violent threats), the meaning of threat in s 61R is confined to threats of violence. The court asked: "*If s 61R(2)(c) extended to threats not involving a threat of physical force, why introduce s 65A?*" The impact of this decision will be considered later, however, it is cause to consider whether the circumstances where consent is vitiated should be clarified or extended.

Should the list of vitiating circumstances be expanded?

Whilst s 61R is drafted in non-exhaustive terms, it appears that the NSWCCA has not expressly considered what other situations may vitiate consent and a question arises as to whether additional matters should be included in the list of circumstances that vitiate consent. In order to address this issue it is useful to look at additional factors that vitiate consent in other jurisdictions.

¹⁵⁴ Formerly s 61D Crimes Act 1900 (NSW).

¹⁵⁵ Rather the court said: "...such a consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. But once consent is comprehending and actual, the inducing causes cannot destroy its reality and leave the man guilty of rape."

¹⁵⁶ *R v Mobilio* [1991] 1 VR 339

¹⁵⁷ Section 65A provides that it is an offence for a person to procure sexual intercourse by the use of non-violent threats or coercive conduct, if in the circumstances the complainant could not reasonably be expected to resist. This carries a maximum penalty of 6 years imprisonment

The NSW Adult Sexual Assault Interagency Committee paper, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* sets out the additional circumstances that exist in other jurisdictions:

- unlawful detention (NT, ACT, VIC, UK);
- the victim was asleep or unconscious or affected by drugs (NT, ACT, VIC, UK);
- the threat to use extortion (ACT);
- threats to publicly humiliate, disgrace or mentally harass (ACT);
- abuse of authority or professional or other trust (QLD, ACT, Canada);
- fraudulent misrepresentation of any fact (ACT);
- the agreement is expressed by words or conduct of a person other than the complainant (Canada);
- the complainant expresses by words or conduct a lack of agreement to engage in the activity or to continue to agree in the activity (Canada).¹⁵⁸

The NSW Adult Sexual Assault Interagency Committee has proposed that NSW adopt a number of these additional circumstances.¹⁵⁹ In considering the other proposals, it is important to acknowledge that they may currently be relied upon to prove lack of consent. However, to deem that the presence of these factors should automatically negate consent entails a significant shift in legal policy. For that reason, a closer examination of each of the proposals is required.

a. Should unlawful detention of the complainant vitiate consent?

Arguably, the fact that someone is unlawfully detained may already be covered by s 61R(2)(c), as the person may submit to intercourse as a result of terror arising from detention. However, if this is only arguable, consideration should be given to including this as an additional factor within s 61R(2)(c). The DPP submitted that the unlawful detention of the complainant be limited to unlawful detention of the complainant by the accused person.¹⁶⁰ The Taskforce agreed that if consent is given as a result of the unlawful detention of the complainant by the accused, this should vitiate consent.¹⁶¹

b. Should the fact that the complainant is unconscious, asleep or affected by drugs be added as a factor that vitiates consent?

At common law it is clear that where a complainant is unconscious or asleep, he or she cannot give consent to sexual intercourse and is incapable of consenting.¹⁶² Difficulties arise, however, where it may not be clear whether the complainant was conscious or not, or where the complainant is affected by drugs or alcohol. Often this will be a matter of fact for the jury to determine; *R v TA* [2003] NSWCCA 191.

If a definition of consent was adopted similar to that used in the UK, it may be unnecessary to include unconsciousness or sleep as a specific factor that vitiates consent.¹⁶³ However, it is important to note that s 75(2)(d) the Sexual Offences Act UK states that the complainant is taken not to have consented where the complainant was asleep or otherwise unconscious at the time of the relevant act.¹⁶⁴ In addition, s 273.1(3) of the Canadian Criminal Code provides that no consent is obtained if the complainant is incapable of consenting to the activity. It may therefore be appropriate to explicitly state that consent is vitiated if the complainant is unconscious or asleep.

Judge Ellis suggested that as consent cannot be given when someone is unconscious or asleep, it would be inaccurate to include this as a matter that 'vitiates' consent.¹⁶⁵ The list of vitiating circumstances is based on the premise that the 'consent' given is not a real consent at all. It would therefore seem to be more accurate to say in legislation that '*consent cannot be present if a person is asleep or unconscious*', if this was considered necessary.

Currently, where the effect of alcohol or drugs is in issue, it is important that the trial judge clearly direct the jury to differentiate between those situations where the consumption of alcohol or drugs may give rise to a lack of inhibition; and those situations where the effect of the substance is such as to exclude voluntary and conscious consent. This will be a matter of fact and degree in each case; *Chant & Madden* NSWCCA, 12 June 1998. No doubt there will be circumstances where a person is so intoxicated as to be unable to consent. Expert evidence may be called on this issue to give the jury a further understanding of the complainant's inability to comprehend. However, a person may be 'affected' by alcohol or drugs, but still be aware and capable of voluntarily consenting. As such, it does not seem appropriate to include this as a circumstance, which if present, automatically negates consent. Legislating in this manner would appear to create an inflexible rule, unable to respond to particular individuals, in certain circumstances.

¹⁵⁸ NSW Adult Sexual Assault Interagency Committee: *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW*, November 2004 at 33

¹⁵⁹ *Ibid.* at 34

¹⁶⁰ Submission ODP, 14 June 2005

¹⁶¹ Those in favour of including unlawful detention; ODP, Women's Legal Services,

¹⁶² The Law Society submitted there may be certain factual scenarios where a person is unconscious or asleep, but consent is still an issue.

¹⁶³ A number of Taskforce members recognised that the list of vitiating circumstances may not need to be extended if the UK definition of consent is adopted; submissions NSW Health 24 June 2005, Dr Anne Cossins 29 June 2005, Associate Professor Julie Stubbs 17 October 2005, Detective Superintendent Kim McKay, 15 July 2005.

¹⁶⁴ Section 75 (2)(f) provides that the complainant is taken not to have consented if any person administered or caused the complainment to take, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

¹⁶⁵ Oral contributions of Judge Ellis, 7 December 2005.

The NSW DPP suggested that s 61R could be redrafted so as to provide a non-exhaustive list of factual circumstances that *may* vitiate consent.¹⁶⁶ Following the decision on *Aiken*, there is an argument that s 61R should be redrafted to make it clear that factors not specifically listed as vitiating circumstances, *may* nonetheless vitiate consent, for example substantial impairment by alcohol or drugs.¹⁶⁷ This may provide a clearer framework for issues surrounding consent.

c. Should extortion, threats to humiliate, disgrace, or harass automatically vitiate consent?

Section 65A Crimes Act 1900 (NSW) currently provides that it is an offence for a person to procure sexual intercourse by the use of non-violent threats or coercive conduct, if in the circumstances the complainant could not reasonably be expected to resist. This carries a maximum penalty of 6 years imprisonment. The accused person must know that the complainant submits to the intercourse as a result of the non-violent threat. The offence does not have the same proof elements as s 61. This section was introduced by the Crimes (Personal and Family Violence) Amendment Act 1987 and was aimed at ensuring that women who submit to sexual intercourse due to non-violent threats have recourse to the law. The main question is in what circumstances will it be deemed that a complainant could not reasonably resist? The legislature has made it clear that this is a matter of fact for the jury to determine.¹⁶⁸

The most difficult hurdle in bringing a prosecution under this section is proving beyond a reasonable doubt that the complainant could not reasonably resist. This imparts both a subjective and objective assessment of the complainant's situation, and his or her decision to submit will be determined by prevailing community standards. There has been no judicial interpretation of what this means. Not surprisingly, this section has not been widely utilised. Statistics from the Judicial Commission for the period 1997 to 2004 show only two convictions and sentences for this offence in the District Court following a plea of guilty.

The distinction made between violent and non-violent threats has been brought into sharp relief by the decision in *Aiken*. Whilst acknowledging that there may be cases where the effect of a non-violent threat is such as to force the complainant to submit to sexual intercourse, this will always be a matter of degree based on the circumstances of the case.

Adopting extortion or other non-violent threats as a specific vitiating circumstance, however, may lead to situations where any type of threat would automatically negate consent. The Model Criminal Code Officer's Committee (MCOCC) notes that there is one very important difference between a threat of violence and a threat of extortion, which must not be overlooked and that is: - a threat to terminate a person's employment, or disclose information to others, unless they engage in sexual activity, does not involve the complete lack of one's sexual 'choice'.¹⁶⁹ This is no doubt the reason why the words 'could not reasonably resist' are used in s 65A.

MCOCC found the arguments put forward by Temkin to be persuasive. She writes:

The distinction between threats of violence and lesser threats...is best perceived in terms of the principles of sexual choice. Rape...should be confined to cases where the victim's sexual choice is eliminated. The defendant who threatens his victim with violence denies her the choice of whether to have intercourse with him or not. He means to have intercourse with her in any event....On the other hand, where the threat is to terminate a woman's employment, she is left with a choice, albeit an unpalatable one, as to whether to have intercourse with the defendant or not. In cases such as this where sexual choice remains but is unacceptably limited or confined, liability for an offence which is less serious is appropriate.¹⁷⁰

Whether the threats are so destructive so as to prevent '*free and voluntary agreement*' is a matter of degree. It may not be the case that each and every threat or harassment will be sufficient to negate consent. However, whilst it may not be appropriate to extend the list of circumstances that automatically vitiate consent to include non-violent threats, in light of the decision in *Aiken*, there may be scope for redrafting s 61R to include factors that *may* vitiate consent, such as non-violent threats.¹⁷¹ This would reflect the difference in 'choice' as outlined by Temkin and alert the jury to the fact that there may be some circumstances where a 'non-violent' threat may vitiate consent.

¹⁶⁶ Submission ODPP, 14 June 2005

¹⁶⁷ Submission Associate Professor Stubbs, 17 October 2005.

¹⁶⁸ "The question of what could not, in the circumstances, be reasonably be resisted, will be a question of fact for the jury." Mr Unsworth, Premier, Second Reading Speech, Legislative Assembly, Hansard, 29 October 1987, at 15466

¹⁶⁹ MCOCC Report at 47

¹⁷⁰ Temkin J: "Towards a Modern Law of Rape" (1982) 45 *The Modern Law Review* 399 at 411

¹⁷¹ This position appears to be supported by the DPP, Associate Professor Stubbs, Office for Women: "The Office for Women supports the view that extortion, threats to humiliate, disgrace or harass, abuse of authority or trust and fraudulent misrepresentation are not sufficient in and of themselves to automatically negate consent, but does consider that they may do so on some occasions."

Consequently, s 65A could be repealed. Given that this provision has not been utilised, this would appear to be an appropriate and sensible course of action. It is suggested that the phrase 'non-violent threats' could be used to cover a broad range of behaviours such as extortion, or threats to humiliate. Such an approach would also recognise that a person who submits to sexual intercourse in such circumstances may also be highly traumatised and vulnerable.

d. Should the abuse of authority or professional or other trust vitiate consent?

The NSW Government has adopted a particular approach to protect against the abuse of power in matters involving the most vulnerable members of the community. The legislature has created offences where consent is no defence if the accused person held a position of trust or authority in relation to the complainant; ss 66F and 73 Crimes Act 1900 (NSW).¹⁷² In addition, where sexual intercourse without consent has occurred, or the complainant is under 16 years of age, the fact that the accused was in a position of authority is an aggravating factor that gives rise to a higher maximum penalty. The introduction of a model whereby consent is deemed not to exist in certain relationships where there has been an abuse of trust would be a significant policy shift in the way in which sexual relations are governed in NSW.

Inclusion of this factor as a vitiating circumstance is clearly aimed at protecting against the abuse of power in certain types of relationships. The difficulty with this proposal is that it is not confined to any specific relationship and has the potential to affect a wide range of societal relationships where there may be an implied trust. In addition, it is not clear what kind of abuse need be present in order to negate consent. Sexual intercourse within the context of certain professional relationships, such as doctor-patient, may be deemed unethical, however, this does not necessarily mean it should be criminal. Careful consideration needs to be given to the precise circumstance in which intercourse took place, and whether the abuse of trust was such as to eliminate the complainant's capacity to freely choose.

One can certainly envisage circumstances where consent may not be considered to be free and voluntary due to an abuse of the relationship, for example, a treating psychiatrist who withholds medication unless a person submits to sexual intercourse. However, there are real problems with including this as a condition, which automatically negates consent. One member of the

Taskforce submitted that an abuse of authority should be considered as a further vitiating circumstance. Although a person may have the capacity to choose to engage in intercourse, it is not really a free choice, but a choice between the lesser of two evils.¹⁷³ Other members of the Taskforce also thought a similar provision should be included¹⁷⁴ or at least set out as an evidential presumption like the UK legislation (although this is not actually one of the factors set out in the UK legislation).¹⁷⁵

Despite these concerns, care must be taken to ensure that a person's sexual choice is not inadvertently undermined by the use of such an inflexible statutory mechanism.¹⁷⁶ There is also a question as to whether this provision is really necessary. Whilst not specifically vitiating consent, a jury may nonetheless determine that consent is lacking where there is a gross breach of trust on the basis that it was not a free and voluntary choice. This should be the real focus of the enquiry.

e. Should a fraudulent misrepresentation vitiate consent?

Section 61R has evolved in a rather piecemeal fashion to accommodate situations not recognised by the common law. This is particularly so where a fraud has been perpetrated in order to obtain consent. There has been judicial resistance to the idea that consent is vitiated by fraud or mistake. One of the earliest cases to consider this issue is *R v Clarence* (1888) 22 QBD 23 where it was held that causing a person to become infected with a sexually transmitted venereal disease did not amount to an infliction of grievous bodily harm. Consideration was given to the accused's failure to disclose his condition to the complainant, and whether this affected her consent. Willis J was of the view that it could not. This reasoning was adopted in *Papadimitropoulos*, where the Court held:

¹⁷² Section 73 provides that any person who has sexual intercourse with a person who is under his or her 'special care' and above 16, but under 18 years of age is liable to imprisonment for 8 years. Where the person is over 17, but under 18 years, they are liable to imprisonment for 4 years. Consent is no defence; s 77 Crimes Act. For the purposes of this section a person is under the special care of the accused if the accused is either: a. A step-parent, guardian or foster parent of the victim, b. A school teacher and the victim is their pupil, c. In an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim, d. a custodial officer of an institution where the victim is an inmate, e. a health professional and the victim is their patient. Section 66F Crimes Act provides that where a person has sexual intercourse with someone who has an intellectual disability, whilst that person is under their authority in connection with any facility or service provided to persons who have intellectual disabilities, that person is liable to imprisonment for 10 years.

¹⁷³ Submission Detective Superintendent Kim McKay, 15 July 2005.

¹⁷⁴ Submission ODPP.

¹⁷⁵ Submission VAWSU

¹⁷⁶ MCCOC at 49

...in considering whether an apparent consent is unreal it is the mistake or misapprehension that makes it so. It is not the fraud producing the mistake which is material so much as the mistake itself....it is easy to see why the stress has been on fraud. But that stress tends to distract attention from the essential inquiry, namely, whether the consent is no consent because it is not directed to the nature and character of the act. The identity of the man and the character of the physical act that is done or proposed seem now clearly to be regarded as forming part of the nature and character of the act to which the woman's consent is directed. That accords with the principles governing mistake vitiating apparent manifestations of the will in other chapters of the law.¹⁷⁷

The decision in *R v Papadimitropoulos* has been subject to criticism for its restrictive view of consent, which only requires an appreciation by the complainant of the physical nature of the act, rather than any understanding of the purpose or significance of the act.¹⁷⁸ The question therefore arises, as to what facts are integral to an appreciation by the complainant of the physical nature of the act. For example, is it an appreciation of the sexual act, or any consequence of consenting to that act, such as the passing of a grievous bodily disease? This issue has not been directly considered by NSW, but has been the subject of discussion in Canadian case law.

Extension of the common law – failure to disclose HIV
In *R v Cuerrier* [1998] 2 SCR 371¹⁷⁹ the Supreme Court of Canada held that a failure to disclose HIV status was a type of fraud, which was capable of vitiating consent, for the purpose of the offence of aggravated assault. The provision in the Canadian Criminal Code states that no consent for the purpose of the law of assault is obtained where the complainant submits or does not resist by reason of fraud. This had previously been presumed to be limited to fraud regarding the nature or quality of the act, or fraud as to the identity of the other person, as per *R v Clarence*.

In *Cuerrier* the court found that the word 'fraud' was not so limited. The majority said:

...an accused's failure to disclose that he is HIV positive is a type of fraud which may vitiate consent to sexual intercourse. ... The accused's actions must be assessed objectively to determine whether a reasonable person would find them to be dishonest. The dishonest act consists of either deliberate deceit respecting HIV status or non-disclosure of that status. Without disclosure of HIV status there cannot be a true consent.

The majority¹⁸⁰ took the view that not all 'fraud' vitiated consent. Rather, it introduced a requirement that the dishonesty must result in a deprivation, "*which may consist of actual harm or simply a risk of harm*"; and to reach this standard "*the Crown needs to prove that the dishonest act had the effect of exposing the person consenting to a significant risk of serious bodily harm.*" The majority acknowledged that in relation to a person who has HIV or another serious sexually transmissible disease, the careful use of condoms might reduce the risk of harm so that it could no longer be considered significant.

Not all the members of the Court agreed on the proper test to apply. Her Honour L'Heureux-Dubé formed the view that fraud of any sort should vitiate consent, regardless of whether or not the act was particularly risky and dangerous. In her opinion, this interpretation of fraud had the effect of maximising an individual's right to consent to physical contact with another. However, McLachlin and Gonthier JJ took a more conservative approach. They were gravely concerned with the reasoning of the majority and abandonment of the common law. They were of the view that whilst Parliament was generally better equipped to deal with these issues, it was open for courts to make incremental changes by extending the common law concepts of the nature of the act and identity, provided the ramifications of the changes were not overly complex: "*It is the proper role of the courts to update the common law from time to time to bring it into harmony with the changing needs of society.*" In their view where a person represents that they are disease free and consent is given on that basis, the deception goes to the very nature of the sexual act. On their construction, deceit as to venereal disease can vitiate consent where the accused knows that there is a "high risk" of infection.

The issue was considered again in *R v Williams* [2003] 2 S.C.R. 134¹⁸¹ where the Court adopted the principles in *Cuerrier*.

Without disclosure of HIV status there cannot be true consent. The consent cannot simply be to have sexual intercourse. Rather it must be consent to have intercourse with a partner who is HIV positive. True consent cannot be given if there has not been a disclosure by the accused of his HIV positive status. A consent that is not based upon knowledge of the significant relevant factors is not consent.

¹⁷⁷ *R v Papadimitropoulos* (1957) 98 CLR 249 at 261

¹⁷⁸ Simon Bronitt: "Rape and Lack of Consent" (1992) 16(5) *Criminal Law Journal* 289.

¹⁷⁹ http://www.lexum.umontreal.ca/cscscc/cgibin/disp.pl/en/pub/1998/vol2/html/1998scr2_0371.html.

¹⁸⁰ Cory, Major, Bastarache and Binnie JJ

¹⁸¹ http://www.lexum.umontreal.ca/csc-scc/cgi-bin/disp.pl/en/pub/2003/vol2/html/2003scr2_0134.html.

Discussion

There are policy arguments on both sides as to whether fraudulent conduct should be deemed to automatically negate consent. One argument is that there is little justification for distinguishing between fraud as to the identity or nature of the act, and fraud aimed to induce consent. Indeed, NSW has already recognised that a complainant's mistake as to marriage should vitiate consent, whether or not induced by fraud. The question arises as to how far this concept should be extended and to what situations.

In considering fraud, MCOCC noted that to automatically deem a lack of consent on the basis of any fraud, may undermine the seriousness of the offence. It would mean that a very serious offence would be committed by mere deceit or trickery. One must acknowledge that the term 'fraud' is very broad and the possibilities of misrepresentation are endless; ranging from a lie as to marital status, background, job, sexual prowess, declarations of love, or failure to make payment for sexual services. Should a failure to disclose any factor, or any significant factor that may influence a person's decision to engage in sexual conduct, mean that no true consent was given? It may be argued that had the complainant known the truth, he or she would not have consented, but does this mean the other person should be liable for the offence of sexual assault? The effect of the deeming provision would be to substantially encroach on a very complex set of societal values and motivations surrounding sexual relations. However, are there particular types of fraudulent conduct that should be deemed to vitiate consent?

Should a deliberate failure to disclose one's disease status vitiate consent?

The majority of the Taskforce were of the view that the law relating to sexual assault is an inappropriate vehicle to deal with this type of fraudulent conduct.¹⁸² However, some members were of the view that further consideration needs to be given to this issue. One of the main objections to introducing this as a vitiating circumstance was that it may have unwanted and inadvertent health ramifications, with people choosing not to undertake appropriate health checks and curbing open communication about HIV with regards to sexual activity.

A second question that arises is - does the criminality lie in the deceit in inducing the consent or the consequences, that is, causing a grievous bodily disease? Questions arise as to whether the accused should be held liable where he or she has used protection in order to eliminate or substantially reduce the risk. If so, what threshold as to likely consequences should be

adopted? Depending on how the provision is framed, an accused person may be liable even where no grievous bodily disease is transferred.¹⁸³

The DPP was of the view that if safe/protected sex is contemplated, then a defendant who fails to disclose HIV status would not be caught by any extension of the law as they have taken steps to avoid transmission and there is no significant risk of transmission. The DPP also suggested the creation of a separate offence to criminalise such conduct.¹⁸⁴ One further way to limit the offence is to confine it to those circumstances where one a person has lied with respect to their HIV status in order to induce a person to have unprotected sexual intercourse. This would mean that if there was no discussion at all on the topic, a defendant would not be caught by the legislation, and it would only apply where a defendant was deliberately deceitful in inducing consent. Similarly, if someone was unaware of their HIV/AIDS positive status, they would not be able to commit the offence.

Is s 35 Crimes Act NSW of maliciously inflicting grievous bodily harm a more appropriate mechanism for legislating against this sort of behaviour?¹⁸⁵ Or should the law recognise that the failure to disclose the disease means that no true consent can be given? Two very important questions arise with respect to this issue. Should the law in this area be extended? And, if so, what is the policy basis for it? Is it because knowledge of a person's HIV status is considered so fundamental to an appreciation of the nature and quality of the act of intercourse in modern society? Or that a deliberate failure to disclose a significant factor, relevant to the question of whether to engage in intercourse, means that no true consent can be given? Or is it because the consequences that flow from deliberately failing to disclose a sexually transmitted disease are so serious, that as a matter of public policy, the fraudulent act that led to those consequences should be subject to criminal sanction? Given the lack of support for the introduction of this factor as a vitiating circumstance and current potential to prosecute such offences under s 35 of the Crimes Act, it is not recommended that it be included as a specific factor that vitiates consent.

¹⁸² Those who were against extending s 61R to cover this situation included, Jo Spangaro NSW Health, Office for Women, Bar Association, Judge Ellis, Legal Aid Commission NSW, Women's Legal Services, Associate Professor Julie Stubbs. Those in favour of extending s 61R to cover the failure to disclose HIV included Dr Cossins.

¹⁸³ Please note that a number of these questions have been considered in England. In *R v Dica* [EWCA] Crim 1103 (5 May 2004) the Court of Appeal overruled *Clarence*: "To the extent that Clarence suggested that consensual sexual intercourse of itself was to be regarded as consent to the risk of consequent disease, again, it is no longer authoritative". In that case the accused had failed to disclose his HIV status to the complainant. A prosecution was brought pursuant to s 20 of the Offences Against the Person Act 1861, which states that a person who unlawfully and maliciously wounds or inflicts any grievous bodily harm is guilty of an offence.

¹⁸⁴ This was also suggested by Dr Anne Cossins.

¹⁸⁵ This was supported by the Office for Women.

TASKFORCE RECOMMENDATIONS:

- 11 That the list of circumstances in s 61R Crimes Act 1900 that vitiate consent be expanded to include:
 - where consent is given as a result of the unlawful detention of the complainant by the accused;
 - where the complainant was incapable of understanding or appreciating the nature of the act (this is unnecessary if the UK definition of consent is adopted).
- 12 Section 65A Crimes Act 1900 should be repealed.
- 13 Section 61R Crimes Act 1900 should be redrafted to indicate a non-exhaustive list of circumstances that must be taken into account when determining whether there was consent, if proved, such as;
 - non-violent threats directed to the complainant or with respect to another person made by the accused or another person so as to coerce the complainant to engage in sexual activity with the accused or another;
 - the complainant was intoxicated.

3. Fault elements – state of mind for criminal responsibility

One of the most controversial areas of the law relates to the *mens rea* that the Crown must prove to establish sexual intercourse without consent. Once a jury is satisfied that the complainant was not consenting to the sexual conduct, they must then consider whether the accused *knew* that the complainant was not consenting. The Crown must prove beyond reasonable doubt that the accused knew that the complainant did not consent. This is a completely subjective, and not an objective test, requiring an assessment of what was going on in the mind of the accused person. The accused may honestly, though wrongly, believe the complainant was consenting to intercourse. This is often referred to as mistaken belief in consent.¹⁸⁶ In *R v Banditt* [2004] NSWCCA 208 the NSW Court of Criminal Appeal reinforced that if it were reasonably possible the accused believed the complainant was consenting, the accused would have to be acquitted, whether or not there were any reasonable grounds for such a belief. The trial judge would, of course, be entitled to tell the jury that in determining whether the appellant believed, or might reasonably possibly have believed the complainant was consenting, the jury could examine whether there were any grounds for such a belief.¹⁸⁷

Recklessness

Section 61R Crimes Act 1900 states that for the purposes of ss 61I, 61J and 61JA, a person who has sexual intercourse with another person without the consent of the other person, and who is reckless as to whether the other person consents to the sexual intercourse, is to be taken to know that the other person does not consent to the sexual intercourse. It is therefore sufficient if the prosecution proves the accused was reckless as to whether the complainant consents or not. The concept of recklessness is not defined in the Crimes Act 1900 (NSW) and has been interpreted by the courts.¹⁸⁸

¹⁸⁶ *DPP v Morgan* [1976] AC 192

¹⁸⁷ *R v Banditt* [2004] NSWCCA at [93]. Special leave to appeal to the High Court was granted and a case argued before the High Court on 8 September 2005. A copy of the transcript is available from the High Court website, HCA Trans 683, <http://www.hcourt.gov.au/> and judgment was delivered on 15 December 2005.

¹⁸⁸ Recently the NSWCCA has held that the concept of recklessness equally applies to an offence of assault with act of indecency; *R v Mueller* [2005] NSWCCA 47

The issue of recklessness often arises when there is a real question of fact as to whether the complainant was fully awake, so intoxicated as to be unable to consent, or where a prior sexual relationship has existed between the accused and the complainant. According to the NSW Bench Book, in order to establish that the accused has been acting recklessly, the Crown must prove beyond reasonable doubt, either:

- The accused's state of mind was such that he or she realised the possibility that the complainant was not consenting but went ahead, determined to have intercourse, regardless of whether the complainant was consenting or not: *R v Murray* (1987) 11 NSWLR 12 at 15; *R v Hemsley* (1988) 36 A Crim R 334 at 337-338. Again, this is a wholly subjective test. This has been referred to as 'advertent recklessness'.
- The accused's state of mind was such that he or she simply failed to consider whether or not the complainant was consenting at all, and just went ahead with the act of sexual intercourse, notwithstanding the risk that the complainant was not consenting would have been obvious to someone with the accused's mental capacity if they had turned his or her mind to it: *R v Kitchener* (1993) 29 NSWLR 696 at 697; *R v Tolmie* (1995) 37 NSWLR 660; *R v Milton* [2002] NSWCCA 124. This is a wholly subjective test and is often referred to as 'non- advertent recklessness'.

Most sexual offences are not offences of specific intent.¹⁸⁹ Therefore, the fact that the accused may have been drinking and intoxicated (where intoxication is self-induced) at the time of the commission of the offence is irrelevant in considering whether he or she had the *mens rea* for the offence, that is the knowledge or belief that the complainant was not consenting.¹⁹⁰

Recent issues - What is the appropriate test for recklessness?

Recently the NSWCCA and High Court considered the test to be applied in determining when an accused should be liable on the basis of recklessness, where they are conscious of a risk that the complainant may not be consenting.

¹⁸⁹ Section 61K is the only sexual offence that is an offence of specific intent. Evidence that a person was intoxicated at the time of the conduct may be taken into account in determining whether the person had the intention to cause the specific result. However, such evidence cannot be taken into account if the person (a) has resolved to become intoxicated to do the relevant conduct, or (b) became intoxicated in order to strengthen his or her resolve to do the relevant conduct.

¹⁹⁰ s 428B, 428D Crimes Act 1900.

Case study

In *R v Banditt* it was alleged that the appellant broke into the complainant's house late at night, went to the complainant's bedroom and proceeded to have sexual intercourse with her without her consent. The complainant gave evidence that before going to bed she locked all the doors and windows of the premises. She remembered waking up with someone on top of her who was trying to push his penis into her vagina. The complainant realised it was the appellant and told him to get off and get out. Evidence showed the appellant had gained entry to the premises via the toilet window and a DNA profile matching the profile of the complainant was located on the appellant's underwear.

When first spoken to by the police the appellant said he went to the complainant's place, but as everything was locked and no-one answered, he left and stayed with a friend. When later interviewed by way of Electronically Recorded Interview with Suspected Person (ERISP) he said that when he went to the complainant's house, the back door was unlocked and he went inside. He woke the complainant up and asked if he could stay. She said no and he left. At trial the appellant gave a third version, that on the night of the alleged offence he knocked on the windows and doors of the complainant's house, but there was no response. He entered the house via the downstairs toilet window and went up to the complainant's bedroom. The appellant saw her lying on the bed and called out her name and shook her leg. The appellant gave evidence that 'she woke up a little bit', and he lay down beside her. He put his arm around her and they started kissing and hugging. He then got on top of her and engaged in sexual intercourse, before she pushed him off and said no. The appellant said he initially lied to police, as he was too embarrassed to tell the truth in the presence of his uncle who had attended the police station with him. The appellant gave evidence that he and the complainant had engaged in consensual sexual intercourse a few months prior. The complainant denied this.

The appellant said he thought the complainant was awake and consenting. He gave evidence at trial that he thought the complainant was "vaguely awake", that she did not say 'yes', but showed consent by stroking him. Under cross-examination the complainant said that when the accused was trying to push his penis inside of her it was like a dream, because she was half asleep. The trial judge told the jury that if the complainant was asleep at the time when the appellant penetrated the complainant, no issue of consent could arise. However, if the jury thought there was a period of time during which the complainant was neither asleep nor really awake, then the jury would need to consider the issue of recklessness. The issue on appeal was whether the trial judge erred in his directions on recklessness.

On appeal His Honour James J stated that recklessness consists in an accused actually realising there is a possibility that the complainant is not consenting and, having that realisation, deciding to proceed to have sexual intercourse. In his view, the accused must foresee this as more than a *mere* or a *bare* possibility. His Honour said:

However, if an accused person is aware of a real possibility that the complainant does not consent to sexual intercourse, he acts recklessly if, having that knowledge, he decides to proceed to have sexual intercourse, even if he considers it probable that the complainant does consent to sexual intercourse.

Special leave was granted by the High Court to consider the appropriate test for recklessness. Is recklessness proved if the accused is aware of the possibility that the person is not consenting? The question for the Court to determine was whether recklessness requires more than advertence to the possibility of lack of consent or if it requires an additional determination to proceed with intercourse regardless of the lack of consent.

Mr Odgers SC, who argued the case for the appellant before the High Court, submitted that the test adopted by the NSWCCA with respect to the meaning of recklessness departs from the law as established by *Morgan* and other earlier authorities. He argued that the approach of the NSWCCA is inconsistent with the proposition that recklessness is not in issue where there is honest, but mistaken belief in consent:

The likely explanation is that James J considered that awareness of a possibility of absence of consent negates a 'belief' that consent is present. It is submitted that this approach is flawed.¹⁹¹

Before the High Court, the appellant argued that recklessness is a concept of indifference and that not only must there be an awareness of the possibility that the complainant is not consenting, but this must be accompanied by a determination to have sexual intercourse with the complainant whether she is consenting or not:

...our contention is that the courts have been in a sense led astray by the daily formulation, which begins with this focus on awareness of risk, awareness of possibilities, and in truth – you do not need to ask a jury to even look at that. The Court of Criminal Appeal, on their approach says, "Well, a jury would have to be told if you're satisfied beyond reasonable doubt that he was aware that it was a slight possibility she wasn't consenting, then he's not guilty. But if you're satisfied beyond reasonable doubt that he was aware that it was a real possibility, then he is guilty". We submit that this is

fanciful; this is not the real world. It would be far preferable for this Court to endorse the approach of the House of Lords in *Morgan*, which does not even talk about possibilities or probabilities but, rather says, to a jury very simply, "Has it been proved beyond reasonable doubt that the accused did not believe that consent was present and simply did not care whether the complainant consented or not?" That direction is, we say, the proper approach to recklessness....It is simple, it is understandable and it makes sense.

The Crown disagreed that in order to prove recklessness there needed to be any additional independent requirement that the accused be determined to have intercourse with the complainant whether she is consenting or not, relying upon the language of the statute and a number of South Australian and NSW authorities.¹⁹²

On 15 December 2005, the High Court, Gummow, Hayne and Heydon JJ in a joint judgment and Callinan J agreeing in a separate judgment, unanimously dismissed the appeal; *Banditt v The Queen* [2005] HCA 80. The Court held that the trial judge's direction on recklessness in relation to consent was appropriate. Gummow, Hayne and Heydon JJ commented that when directing a jury on recklessness it is inappropriate to simply invite the jury to consider the concept of recklessness without further explanation. Their Honours accepted the submission of the Crown that in a particular case one or more of the expressions used in *Morgan* may properly be used in explaining what is required by s 61R. The trial judge's explanation to the jury, - that if an offender is aware of the possibility that the woman is not consenting, but goes ahead anyway, he is reckless - was appropriate. No additional mental state, as submitted by the appellant, was required.

In a separate judgment Callinan J dismissed the appeal, but was of the view that any attempt to explain the concept of reckless as used in s 61R was unnecessary:

It is true, as Gummow, Hayne and Heydon JJ point out that in different branches of the law and difference enactments recklessness may have different elements. It is equally true that on occasions in the law a word will need explanation, elaboration or definition, but that need tends to arise most often by reason of an uncertain or ill-expressed context in which it forms part. Section s 61R is not such a context. The clause "who is reckless as to whether the other person consents to the sexual intercourse" is a perfectly simple one. I do not accept that it is beyond the capacity of a jury to understand and give effect to it...¹⁹³

¹⁹¹ At paragraph 3.15 of the appellant's submissions for special leave.

¹⁹² See *R v Wozniak and Pendry* (1977) 16 SASR 67

¹⁹³ *Banditt v The Queen* (2005) HCA at (108)

Prior to the judgment in *Banditt*, the Taskforce was asked whether there should be legislative guidance on the appropriate test for recklessness.¹⁹⁴ Mr Odgers SC argued that the appropriate test for recklessness should be one of indifference, that is, recklessness means not caring whether or not the complainant consents. If that approach was rejected by the Taskforce he suggested that the definition used in 5.4 of the *Model Criminal Code* should be adopted, which provides that a person is reckless if: (a) he or she is aware of a substantial risk; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk. He submitted that this approach is preferable, as it requires that the accused is aware that there is a substantial risk that the complainant is not consenting, and recognises that the jury may conclude that in some instances it may be reasonable to take the risk. This appears to be a much higher test than the one set in *R v Banditt*.

The DPP submitted that there should not be an attempt to define recklessness, but advised that there was merit in replacing recklessness with indifference, that is, 'did not care' as interpreted in *Morgan*. This was because recklessness appears to cause many problems in the law. NSW Health, Associate Professor Stubbs and Women's Legal Services did not think that legislative guidance would be necessary if a different model, such as the Victorian model were adopted. A similar submission was made by Detective Superintendent Kim McKay in the context of discussing the UK model:

If the UK model of the accused's state of mind for criminal responsibility is adopted then the test for recklessness should be defined. Emphasis should be on the fact that the accused acted indifferently – that is not caring whether the complainant consented to the act.

The comments of Callinan J suggest that attempts to define reckless give rise to uncertainty:

"Reckless" is an old and well understood English word. It has been said that there are no true synonyms in the English language. The search for a truly synonymous phrase or expression will equally, frequently be likely to be futile.

On balance it is considered that there should be no legislative attempt to define recklessness.

One may argue that the formulation adopted by the NSWCCA puts an onus on the accused person to stop at any point where it occurs to him or her that there is a real possibility that the other person may not be consenting, even if they resolve that on balance this is probably not

the case. In other jurisdictions the concept of recklessness has either been removed, or ameliorated by placing the onus on the accused to take reasonable steps to determine whether in fact consent has been given. The issue of adopting an objective fault element is therefore a far broader issue for the Taskforce to consider.

Should NSW adopt an objective fault element in consent?

One of the most controversial issues has been whether the defence of honest, but mistaken belief in consent should continue in its current form. There are arguments both for and against the importation of a reasonableness component. Many of these were discussed in detail by MCOCC when determining the standard that should be adopted in the Model Criminal Code.¹⁹⁵

Criticisms of the current common law test, are that:

- the accused can simply assert that he or she held an honest belief in consent which is difficult to refute, regardless of how unreasonable the belief is;
- the subjective test in *Morgan* encourages myths that women desire to be overpowered or are afraid to articulate their true desires;
- the present law does not adequately protect the autonomy of people to participate in sexual activity.

It is argued that the adoption of the reasonableness test would refocus the mind of the jury on the standards that the community expects. Proponents of this test argue that as a matter of policy, the law should ensure that a reasonable standard of care is taken to ascertain whether a person is consenting before embarking on what could be potentially damaging behaviour.

¹⁹⁴ Mr Odgers SC proposed that s 61 of the *Crimes Act* could be redrafted to define rape as where a person has sexual intercourse with another person without consent of the other person and either (a) knows that the other person does not consent to the sexual intercourse, or (b) is indifferent to whether the person does or does not consent to the sexual intercourse, carrying a penalty of 14 years imprisonment. Section 61R(1) which deems 'recklessness' to be knowledge could then be repealed. He suggested that a new offence then be created of negligent sexual intercourse without consent carrying 5 years imprisonment, which states that a person is guilty of an offence who has sexual intercourse with another person without the consent of the other person and negligent as to the lack of consent. A person is negligent if the person's conduct involves such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and such a high risk that consent to intercourse is or will be absent that the conduct merits criminal punishment. All other members rejected this proposal.

¹⁹⁵ MCOCC at 69 -73

Those in favour of retaining the current common law approach rely on what is said to be a fundamental principle of criminal responsibility, that is, where a person is exposed to possible imprisonment for a serious criminal offence, the standard of proof should be that the accused was aware of the circumstances which made his or her conduct criminal.¹⁹⁶

This is taken directly from the decision in *Morgan*, where it was said:

...to insist that a belief must be reasonable to excuse is to insist that the accused is to be found guilty of intending to do that which in truth he did not intend to do, or that his state of mind although innocent of evil intent, can convict him if it be honest but not rational.¹⁹⁷

In order to be criminally responsible, it is considered that a person must have intended the harm, or that it has arisen as a result of recklessness. This concept was recently discussed by Kirby J in *Director of Public Prosecutions (NT) v WJI* [2004] HCA 47, in determining whether an accused must have an intention to have sexual intercourse without consent for the purposes of the Northern Territory Code.¹⁹⁸

In such circumstances, it is not self-evident that a person who engages in “sexual intercourse” with another, believing that other to be consenting to the “sexual intercourse”, should be liable to conviction of such a crime and exposed to condign punishment. This conclusion is not inapplicable simply because the other person was not in fact consenting and although the belief of the accused in the existence of consent might be viewed as unreasonable....Criminal responsibility for such a serious crime as sexual intercourse without consent, with such serious consequences upon conviction, is therefore only imposed by the NT Code where the accused’s conduct is culpable and, as in most crimes of this kind, where it involves a deliberate element (intention or foresight). It is thus the intention of the accused to have sexual intercourse without the consent of another, or although the accused has foreseen that such a lack of consent is a possible consequence of the conduct and continues uncaring and regardless, that attracts criminal responsibility.¹⁹⁹

It is argued that if an objective test was introduced, a person may be punished who did not believe that what they were doing was wrong, but because their belief did not accord to a standard of reasonableness determined by the community. Although there are strict liability offences with substantial penalties within the criminal law, such as dangerous driving occasioning grievous bodily harm, these are the exception, rather than the norm.

However, it is important to note that in NSW the courts have already recognised that an accused person possesses the requisite intent to have non-consensual intercourse (or guilty mind) when they have failed to turn their mind to the issue at all:

The criminal law, in its important function of controlling behaviour, should promote standards of acceptable consensual sexual behaviour of the community....Lack of the merest advertence to consent in the case of sexual intercourse is so reckless that it is also the criminal law’s business. In this, the law does no more than reflect the community’s outrage at the suffering inflicted on victims of sexual violence.²⁰⁰

Some of the most persuasive arguments against introducing an objective standard of reasonableness relate to the pragmatic difficulties that may arise. For example, how should an objective standard of reasonableness be formulated? Should a jury examine the accused’s conduct by reference to some hypothetical reasonable person, or from the perspective of what would have been reasonable for a person who had the same qualities as the accused.²⁰¹ Such difficulties have been the source of considerable confusion and debate in the context of the law of provocation. Some commentators have also argued that the adoption of an objective test may not enhance notions of proper conduct and consent, but instead be narrowly constructed to reflect historical legal standards of reasonableness.²⁰²

Questions also arise as to what circumstances would transpire where a jury would be satisfied that the accused’s belief was genuine, but not reasonable. Consideration of the issue of genuineness, often involves an assessment of whether there was a reasonable basis for that belief. A jury is more likely to consider a belief was genuine where there are reasonable grounds for formulating that belief. Conversely, a jury is more likely to reject that the accused held an honest belief where there appears to be a lack of evidence to support that belief,

¹⁹⁶ This was the view expressed by Mr Richard Button SC of the Public Defenders Office.

¹⁹⁷ [1976] AC 182 at 210¹⁹⁶ s 192(3) of the NT Code provides that any person who has sexual intercourse without consent of the other person is guilty of a crime. The question on appeal was whether the prosecution need only prove, a. the accused intended to have intercourse and b. the complainant did not consent; without having to prove that the accused intended to have sexual intercourse without the complainant’s consent. The judgment is generally concerned with principles of statutory interpretation of s 192(3) and s 31(1) (mental element) and what is considered the relevant ‘act’; that is, whether it was sexual intercourse or sexual intercourse without consent.

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¹⁹⁹ Per Kirby J at [100]

²⁰⁰ *R v Tolmie* (1995) 37 NSWLR 660 at 672 per Kirby P (as he was then).

²⁰¹ In *BRK v The Queen* [2001] WASC 161 the court held at [13] that there was no error in the direction the reasonableness be determined by the standards of a reasonable person of the same age, background and level of intellectual functioning as the accused.

²⁰² Bronitt “Rape and Lack of Consent” (1992) 16 *Criminal Law Journal* 289 at 307

for example, where the accused broke into the complainant's home and the complainant said nothing as to the issue of consent. In *DPP v WJC* Kirby J remarked, "...the prospects of a jury acquitting an accused of sexual intercourse without consent who had no reasonable basis for believing that the complainant had consented to the act, are extremely remote."²⁰³

In contrast to the observations made by Kirby the Supreme Court of Canada has noted that although cases involving a true misunderstanding between the parties to a sexual encounter may arise infrequently, they are of profound importance to the community's sense of safety and justice.²⁰⁴ In addition, the Victorian Law Reform Commission has suggested that the current common law test does not adequately provide protection for women where an accused has distorted views about sex, or endorse a communicative model for sexual relations.

Whilst the Public Defenders Office, Law Society and Legal Aid Commission argued that the current law should be retained, there was considerable support for the importation of an objective fault element to this area of the law, from the DPP, Detective Superintendent Kim McKay, VAWSU, NSW Health, Women's Legal Services, Dr Cossins, Office for Women, Victim's Services, NSW Rape Crisis Centre and Associate Professor Stubbs. If the common law test was modified, what should it look like and how might it work in practice?

Other jurisdictions

The test as set out in *Morgan* does not apply to the code states of Western Australia, Queensland and Tasmania. In those States the prosecution must prove that the complainant did not consent, but does not have to prove that the accused knew that the complainant was not consenting or that the accused was reckless as to consent. The accused may raise a defence that he honestly and reasonably believed that the complainant was consenting.²⁰⁵ The onus is on the prosecution to prove that there was no such honest and reasonable belief. The author of the Queensland Code Samuel Griffiths said; "...under the criminal law of Queensland...it is never necessary to have recourse to the old doctrine of *mens rea*, the exact meaning of which has been the subject of much discussion."²⁰⁶ The question in the code jurisdictions has generally been considered to be: "*Did the accused believe that the complainant was consenting?*" *If so, was that belief reasonable?*"²⁰⁷

In Victoria, the law reflects the common law decision of *Morgan*, being that the accused does not have the *mens rea* for the offence of sexual assault if they have an honest belief that the complainant was consenting, regardless of whether it is unreasonable. Following a report from the former Law Reform Commission of Victoria in 1991, s 37 *Crimes Act* (Vic) was inserted which provides that a direction should be given to juries that in considering the accused's alleged belief that the complainant was consenting, it must take into account whether that belief was reasonable in all the relevant circumstances— and relate any direction given to the facts, so as to aid the jury's comprehension.

Despite this direction, the Victorian Law Reform Commission has recommended that the law be further amended, to prevent an accused person from avoiding culpability if he did not take reasonable steps in the circumstances to ascertain whether or not the complainant was consenting. The Commission considered the provisions employed in other jurisdictions, with preference for the approach adopted in Canada. Before discussing their final recommendations it is useful to examine the legislation in the United Kingdom and Canada.

²⁰³ *DPP v WJC* [2004] HCA 47 at 106.

²⁰⁴ *R v Ewanchuk* [1999] SCR 330

²⁰⁵ S 325 *Criminal Code Act 1912* (WA): A person who sexually penetrates another person without the consent of that person is guilty of a crime and is liable to imprisonment for 14 years. S 24 of the Code on criminal responsibility applies to sexual offences: A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist. The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject. See *Hancock v The Queen* [2003] WASCA 218. See also s 349 (rape) and s 24 (mistake of fact) of the *Queensland Criminal Code* 1899.

²⁰⁶ *Widgee Shire Council v Bonney* (1907) 4 CLR 977 at 981

²⁰⁷ MCOCC at 73

United Kingdom

One of the most important changes introduced by the comprehensive reform of the UK law on sexual assault was to override the common law as set out in *Morgan*. Section 1 of the Sexual Offences Act 2003 (UK) provides that the offence of rape is committed if an accused person intentionally penetrates another person, where that person does not consent and the accused person does not reasonably believe the other person consents. Whether a belief is reasonable is to be determined by having regard to all the circumstances, including the steps the accused person has taken to ascertain whether the complainant consents. The Crown Prosecution Service anticipates that an assessment of this belief will include an accused's attributes such as disability, or extreme youth.²⁰⁸ When recommending the introduction of this section, the Home Office formed the view that such an amendment would not affect the burden of proof or the presumption of innocence, fundamental to English justice.²⁰⁹

Canada

In Canada, the *mens rea* of sexual assault is the intention to touch, knowing of, or being reckless or wilfully blind to a lack of consent, either by words or conduct of the person being touched.²¹⁰ Further, s 273.2 of the Criminal Code states that 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, where (a) the accused's belief arose from (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. This section was interpreted in *R v Ewanchuk* [1999] SCR 330, where the majority held that if the accused's belief is found to be mistaken, then the honesty of the belief must be considered.

As an initial step, the trial judge must determine whether any evidence exists to lend an air of reality to the defence. The question of whether or not the accused took reasonable steps to ascertain whether the complainant is consenting is an issue for the jury to determine only after the 'air of reality test' has been met.²¹¹ There is no obligation for the accused to testify in order to raise this defence, however the accused must raise some plausible supporting evidence to give an 'air of reality' to the defence of mistaken belief. 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.

In considering whether an accused had taken reasonable steps, the court said:

Common sense should dictate that, once the complainant has expressed her unwillingness to engage in sexual conduct, the accused should make certain that she has truly changed her mind before proceeding with further intimacies...²¹²

Victorian Law Reform Commission

As discussed above, the VLRC favoured the approach in the Canadian Criminal Code with a number of qualifications. The Commission's recommendation sought to ensure that an evidentiary threshold was met, to support the mistaken belief of fact, before it could be left to the jury. It was preferred that this threshold test be enshrined in legislation. The VLRC Report stressed that there was no obligation on the accused to testify in order to raise the defence. Support for this belief may be inferred from the evidence of the accused, the complainant's evidence in chief, cross-examination or other sources.

Once a trial judge is satisfied that there is some evidence to support the accused's assertion of an honest, but mistaken belief in consent, the jury will be directed that the prosecution must prove:

- i the accused intended to have intercourse with the complainant;
- ii the complainant did not consent; and
- iii the accused did not honestly believe that the complainant consented.

However, the jury cannot find that there has been an honest, but mistaken belief in consent if;

- 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; or
- iii one or more circumstances listed in s 36(1)(a)-(g) applies, and one of these matters is proved beyond a reasonable doubt.²¹³

²⁰⁸ www.cps.gov.uk/legal/section7/sexoffencesact2003.html

²⁰⁹ Home Office: *Setting the Boundaries: Reforming the law on sex offences, Summary Report and Recommendations 2000*

²¹⁰ *R v Ewanchuk* [1999] SCR 330

²¹¹ The air of reality test is discussed in *R v Osolin* [1993] 4 SCR 595, *R v Park* [1995] 2 SCR 836, *R v Davis* [1999] 3 SCR 759, *R v MacFie* [2001] A.J. No.207 ABCA 43.

²¹² *R v Ewanchuk* [1999] 1 SCR 330 per Major J

²¹³ Over Page

The Commission is of the view that its proposal avoids the dilemma of deciding whether the accused behaved like a reasonable person, or what attributes this person should be endowed with.²¹⁴ Whilst the term ‘reasonable steps’ demands a consideration of ‘standards of reasonableness’, the Commission is of the view that this test does not criminalise the accused for what he ought to have known, but rather imposes an obligation on the accused to take affirmative action to ascertain the existence of consent.

What is the appropriate test?

Taskforce submissions supporting the importation of an objective fault element were divided on the model that should be adopted, with each of the four models favoured by at least some participants. The NSW Adult Sexual Assault Interagency Committee submitted that the law should set standards on acceptable behaviour by importing an element of reasonableness in assessing whether the complainant consented to sexual intercourse. The Committee proposes that the Crimes Act be amended to introduce an objective fault element, whereby a person commits sexual assault if he or she intentionally engages in sexual intercourse without another person’s consent, but the accused can raise a defence of honest and reasonable belief that the complainant was consenting. The Committee has endorsed the approach adopted in the Australian Code jurisdictions, where the prosecution does not have to prove that the accused had knowledge or was reckless as to whether the complainant was consenting or not. The Committee suggested that:

...this would make the position on consent the same as that in the Northern Territory, WA, Queensland and Tasmania, and would be consistent with the established application of honest and reasonable mistake of fact.²¹⁵

The DPP also expressed a preference for the model used in the Code States: “*There is an existing body of Australian case law on the subject and adoption of that model would ultimately assist in national standardization.*” This was also the preferred model of the Office for Women.

The Law Society opposed the inclusion of an objective fault element and submitted that one difficulty with adopting the model employed in the Code States is that it removes the requirement for the prosecution to prove that the defendant did not know that the complainant was not consenting. The Law Society argued this would be a significant departure from the current law and, if any change was made, the onus of proof should remain on the prosecution. At the same time the Law Society suggested that changing to the Code model may have little practical effect on a sexual assault trial.²¹⁶

Detective Superintendent Kim McKay expressed support for the United Kingdom’s requirement that the accused has to show reasonable grounds for the belief that the complainant was consenting, taking into account the steps the accused person has taken to ascertain whether the complainant consents. This model was also supported by the VAWSU.

NSW Health and Victims Services suggested adopting the VLRC model, as adapted from the Canadian provisions. Dr Cossins also favoured the recommendations of the VLRC as a way to avoid the problem of whether the accused behaved like a reasonable person and to place a positive obligation on the accused to take action to ascertain the complainant’s consent. Women’s Legal Services and Associate Professor Stubbs favoured the Canadian approach, called a quasi-objective approach, on the basis that it is a balanced approach and empirical evidence suggests that it has been effective. The Adult Sexual Assault Interagency Committee indicated that it held reservations about adopting the Canadian approach, which would introduce a unique position to Australia without existing case law for guidance.

²¹³ Recommendation 174 reads:

A person commits rape if he intentionally sexually penetrates another person without that person’s consent.

- It is a defence that the accused held an honest belief that the complainant was consenting to the sexual penetration.
- The accused must produce some evidence he had an honest belief 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 to consent.
- Where an accused alleges he believed the complainant consented to the sexual penetration, a judge must be satisfied there is sufficient evidence of the existence of such a belief before the defence of honest but mistaken belief can be considered by the jury.
- The defence of honest, but mistaken belief 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 mind to the possibility that the complainant was not consenting.
 - 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 should 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 circumstances. VLRC Final Report at 422

²¹⁴ VLRC Final Report at 427

²¹⁵ NSW Interagency Report: *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* November 2004 at 35 and 36.

²¹⁶ The submissions of the Law Society were supported by the Legal Aid Commission.

Whilst the approach adopted by Canada does represent a significant departure from the common law, it is in some ways a less dramatic one for NSW than the approach adopted in the Code States, which have removed any requirement that the prosecution prove the accused knew or was reckless as to whether the complainant was not consenting. In addition, the recent High Court interpretation of the Northern Territory Code, demonstrates that such a provision may be read down, unless there is careful drafting. The Law Society specifically rejected the adoption of the Canadian model, as in order to successfully maintain a defence of honest and reasonable mistake under this model, the accused must prove that the complainant communicated consent. The Canadian provision has been considered by the court in Canada which said;

Consent is an integral component of the *mens rea*, but considered from the perspective of the accused. In order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her own mind, wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence.

There is a difference in the concept of "consent" as it relates to the state of mind of the complainant vis-à-vis the actus reus of the offence and the state of mind of the accused in respect of the mens rea. For the purposes of the actus reus "consent" means that the complainant in her mind wanted the sexual touching to take place. In the context of mens rea — specifically for the purposes of the honest but mistaken belief in consent — "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused. The two parts of the analysis must be kept separate.²¹⁷

Should the objective fault element be reflected in a separate offence with a lower maximum penalty?

Whilst the Taskforce was divided on whether to adopt the Canadian model with respect introducing an objective fault element, a further proposal was put forward by Mr Stephen Odgers SC on 7 December 2005 suggesting that there may be some middle ground on this issue. He was of the view that whilst an accused's failure to take reasonable steps to ascertain consent should not be incorporated as an objective fault element in the current offence, a second and lesser offence could be created to criminalise this type of conduct. In his view, an accused person who holds a honest belief in consent, but has failed to take reasonable steps to ascertain whether there is consent, has less moral culpability than a person who has sexual intercourse without consent knowing the complainant is not consenting; or reckless as to consent. He proposed the following:

- 1 That s 61I be redrafted so that the a person who has sexual intercourse with another person without the consent of the other person and either:
 - knows that the other person does not consent to the sexual intercourse, or
 - is indifferent (or reckless) as to whether the person does or does not consent to the sexual intercourse is liable to imprisonment for 14 years.
- 2 That s 61R which deems recklessness to be knowledge should be repealed.
- 3 That a new offence should be created, namely 61IA:

Any person who has sexual intercourse with another person without the consent of the other person and who fails to take reasonable steps to ascertain whether the other person consented, is liable to imprisonment for 5 years.
- 4 That a new section be created so that if on trial for an offence under s 61I the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied on the evidence that the accused is guilty of an offence under s 61IA, it may find the accused guilty of the latter offence and the accused is liable to punishment accordingly.

²¹⁷ *R v Ewanchuk* [1999] SCR 330.

Mr Odgers appears to have taken one aspect of the Canadian sexual offence and used this to create a new offence. In Canada the concept of 'reasonable steps' has been imported so that before the accused can raise honest and mistaken belief in consent, the court must be satisfied that he had done something to satisfy his belief that the complainant was consenting. Once satisfied the Crown must prove that the accused did not in fact hold this belief. The proposal of Mr Odgers SC is novel and it does not appear that any such provision exists in any other jurisdiction. Under his proposal the Crown would still have to prove beyond reasonable doubt that reasonable steps were not taken by the accused.

The main point that Mr Odgers SC appears to be concerned with is that a person convicted of a sexual offence because they failed to take reasonable steps to ascertain consent, should not be held liable to the same maximum penalty as a person who knows that there is no consent or is reckless as to consent. He says that if the reasonable steps test was included as an objective fault element in the s 61I offence (as in Canada), there would be no way of knowing on what basis a jury had convicted the accused. As such, it would be left to the sentencing judge to determine upon which facts to sentence the accused, and in particular, whether it was because the accused was reckless or failed to take reasonable steps.

Due to the timeframe for discussion, members of the Taskforce were unable to properly consider the proposal, but agreed further consideration ought to be given to it. However, in considering the proposal in the future, matters that should be borne in mind include:

- what is the purpose of creating a secondary, but lesser offence?
- if s 61I is redrafted with the word 'reckless' instead of 'indifference' will it assume its common law meaning?
- what is the reasonableness standard? Is it the standard of a reasonable person in the community, or the reasonableness of a person in the position of the accused?
- should there be some evidence of 'reasonable steps' that can be pointed to by the defence before the second offence can be left to the jury?
- should a second offence with a lower maximum penalty be created so that the trial judge does not have to make findings of fact with respect to the basis upon which the jury convicted? This is presently done with respect to many offences and a common problem when sentencing.²¹⁸
- would the creation of a lesser offence, presented to the jury as a statutory alternative, lead to

compromised verdicts on behalf of the jury who may select the 'middle option' even though the evidence does not support it?

- if a new offence is created with a maximum penalty of 5 years imprisonment, would these offences be Table offences for election by the Crown?

After careful consideration of the submissions the CLRD is of the view that if there is to be a change in NSW based on either the Canadian model or VLRC proposal on which it is based, further consultation and consideration is required. In this model it is clear that the onus remains on the prosecution to prove that the accused knew or was reckless as to consent. However, honest, but mistaken belief in consent is modified to incorporate an examination of whether the accused took reasonable steps to ascertain consent, from a subjective point of view. It is considered that there is merit in further investigating a model based on the Canadian legislation, which would appear to be the most appropriate model to adopt in NSW to reflect contemporary societal expectations surrounding sexual relationships.

TASKFORCE RECOMMENDATIONS:

- | | |
|----|--|
| 14 | NSW Attorney General's Department should give further consideration to whether the common law should be modified to adopt an objective fault element for offences of sexual intercourse without consent, or by introduction of a provision creating a new offence. |
| 15 | There should be no legislative attempt to define recklessness. |

²¹⁸See comments of Gleeson CJ, Hayne and Gummow JJ in *Cheung v The Queen* [2001] HCA at [5]: "The decision as to guilt of an offence is for the jury. The decision as to the degree of culpability of the offender's conduct, save to the extent to which it constitutes an element of the offence charged, is for the sentencing judge. If, and insofar as, the degree of culpability is itself an element of the offence charged, that will be reflected in an issue presented to the jury for decision by verdict. In such an event, the sentencing judge will be bound by the manner in which the jury, by verdict, expressly or by necessary implication, decided that issue. But the issues resolved by the jury's verdict may not include some matters of potential importance to an assessment of the offender's culpability. That is not unusual. It is commonplace"

Chapter 4 Evidence and Procedure

1. Evidence of sexual experience or sexual history

Section 293(2) of the Criminal Procedure Act 1986 (NSW)²¹⁹ imposes an absolute prohibition on admitting evidence of sexual reputation. In addition, s 293(3) places a blanket prohibition on the admissibility of evidence that discloses or implies the complainant has or may have had sexual experience or a lack of sexual experience, or has or may have taken part in any sexual activity, subject to six exceptions. Sexual experience evidence may be admitted where it is alleged to have formed part of the 'connected set of circumstances' of the offence,²²⁰ or if it relates to an existing relationship between the accused and the complainant.²²¹ Evidence is also admissible where the accused denies that intercourse took place and such evidence is relevant to explain the presence of semen, pregnancy, disease or injury.²²² Also, where the accused indicates that intercourse did take place, evidence of prior sexual conduct may be admitted to determine whether the accused was responsible for the transmission of a sexually transmitted disease²²³ or pregnancy.²²⁴

A further exception is provided where evidence has been given by the complainant in cross-examination in response to a question allowed pursuant to subsection (6). That section states that where the court is satisfied that it has been disclosed or implied in the case for the

prosecution that the complainant has sexual experience, or a lack of sexual experience or activity, of a general or specified nature, and the accused person might be unfairly prejudiced if the complainant could not be cross-examined on it, then the complainant may be cross-examined, but only in relation to the experience or activity specified.

²¹⁹ Formerly s 105 Criminal Procedure Act; and before that, s 409B Crimes Act 1900.

²²⁰ s 293(3) a) where it is evidence (i) of sexual experience or lack of experience of, or of sexual activity or lack of sexual activity taken part in by the complainant at or about the time of the commission of the alleged sexual offence; and (ii) of events which are alleged to form part of a connected set of circumstances in which the alleged prescribed offence was committed.

²²¹ s 293 (3)(b) - if the evidence relates to a relationship that was existing or recent at the time of the commission of the alleged prescribed sexual offence, being a relationship between the accused person and the complainant.

²²² s 293 (3) (c) where (i) the accused person is alleged to have had sexual intercourse with the complainant, and the accused person does not concede the sexual intercourse so alleged, and (ii) the evidence is relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged to have been had by the accused person

²²³ s 293(3)(d) if the evidence is relevant to: (i) whether at the time of the commission of the alleged prescribed sexual offence there was present in the complainant a disease that, at any relevant time, was absent in the accused person, or (ii) whether at any relevant time there was absent in the complainant a disease that, at the time of the commission of the alleged prescribed sexual offence, was present in the accused person.

²²⁴ s 293(3)(e) - where it is evidence relevant to whether the allegation that the prescribed sexual offence was committed by the accused person was first made, following a realisation of a discovery of the presence of pregnancy or disease in the complainant.

These exceptions apply where the ‘probative value of the evidence outweighs any distress, humiliation or embarrassment the complainant might suffer.’ Where a determination is made to allow evidence to be admitted pursuant to an exception, this must be done in the absence of the jury and a written record made of the nature and scope of the evidence that is so admissible and the reasons for that decision.²²⁵

Section 293 was introduced to restrict evidence of past sexual history and exclude all evidence of sexual reputation. The section reflects the underlying ideology that consent should not be assumed on the basis of sexual behaviour with others. The provision seeks to protect complainants from humiliating and irrelevant questioning and attempts to move the focus away from the morality of the complainant. In his second reading speech, the then Premier stated:

That humiliation involves their being forced to recount... in minute detail the most humiliating and degrading experiences they have ever gone through and then to suffer under cross-examination the imputation and insinuation about the victim’s own responsibility for the offence and against the victim’s character and morals.²²⁶

The provision attempts to alleviate the problem of antiquated attitudes, by removing judicial discretion to admit evidence of past sexual conduct.²²⁷ However, evidentiary provisions such as this will not necessarily remove stereotypes about women that operate within legal discourse. A broad interpretation of some of the exceptions, may be seen in some sectors as a failure of the legislation to alter entrenched assumptions about the conduct of sexual assault complainants. Conversely, it may be argued that the restrictive nature of the provisions has led to a broad interpretation of what is an essentially unworkable piece of legislation.

Judicial Interpretation of s 293

As stated, s 293(3)(a) allows evidence of past sexual history to be admitted where it is alleged to form part of the ‘connected set of circumstances’. To satisfy this requirement the event must have occurred at or about the time of the alleged offence. Whether or not the temporal relationship is satisfied is a question for the judge. The construction of this second limb was first considered in *R v Morgan* (1993) 30 NSWLR 543. In that case the NSWCCA considered whether the complainant could be cross-examined about consensual sexual intercourse engaged in by the complainant a few hours after the alleged assault.

Mahoney J considered what was meant by the phrase ‘connected set of circumstances’:

What precisely sub-par (ii) requires is by no means clear. The sub-paragraph requires that the set of circumstances be “connected” but gives no indication of what is an acceptable connection..... As I have said, the section is drafted upon the assumption that the evidence deemed “inadmissible” would otherwise be admissible. Putting aside admissibility on credit alone (a matter to which part (a) does not appear to be primarily directed) the existence of a connection based on probative value would presumably always exist..... Established principles of construction and of justice require that the court adopt a construction which favours the liberty of the accused. Section 409B may result in an accused person, male or female, being imprisoned where otherwise he or she would not be.

Gleeson CJ (as he was then) also stated:

The nature of the connection that will suffice is left at large by the statute, and the facts and circumstances of each individual case need to be considered. However, it is the subject matter of the legislation that will ordinarily provide the best guide to whether circumstances are relevantly connected. There will necessarily be a temporal relationship between the events in question and the alleged sexual offence; otherwise one would not get past s409B(3)(a)(i). The relationship to which s409B(3)(a)(ii) directs attention is circumstantial. The facts that could give rise to such a relationship are widely variable.

Since the evidence in question is, by hypothesis, relevant and of probative value (otherwise it would be inadmissible without the need for any statutory exclusion), no narrow approach should be taken to that part of the statutory provision which permits its reception.

Although the court said that sexual intercourse between the complainant and her boyfriend could not be used to damage the complainant’s credibility, it was considered: “...*properly open to the jury...to conclude that for her to have sexual intercourse an hour or two after forced intercourse [was] (sic)...unlikely or contrary to human experience.*” The case has been criticised for the court’s inability to divorce itself from stereotyped visions of the experiences of women as sexual assault victims. It may be argued that the reliance on ‘ordinary human experience’ does not take into account the diverse range of reactions people may have when faced with a highly traumatic event.

²²⁵ s 293(8) *Criminal Procedure Act* 1986 (NSW)

²²⁶ New South Wales Parliamentary Debates, Legislative Assembly 1981, 4763.

²²⁷ This provision was based on the model developed in Michigan, USA.

On the other hand, it has been suggested that the issue is not whether the sexual experience shows or proves the offence charged, but whether it is relevant to that issue.

In its review of the then s 409B the NSW Law Reform Commission defended the decision in *Morgan*. The Commission argued that s 409B was implemented to prevent judges from making determinations of relevance based on outdated views of morality.²²⁸ The Commission argued that ‘generalisations about human behaviour’ are different from morality based presumptions about women’s behaviour.

In *R v Dimian* (1995) 83 A Crim R 358 the court held that the word ‘injury’ in s 293(3)(c) not only includes direct physical injury caused by intercourse, such as tears or bruising to the complainant’s vagina, but also includes evidence of distress and dishevelment. In *Dimian*, the prosecution raised the distressed emotional state of the complainant to corroborate the sexual assault allegation. The court held that the accused was entitled to admit evidence that the complainant had engaged in consensual sexual intercourse with her boyfriend six hours earlier, in order to provide an alternative explanation for her state. In examining this decision, the Law Reform Commission agreed that the section was introduced to allow an accused to provide for an alternative scenario.²²⁹ However, one might question the admission of evidence of consensual intercourse to explain distress, particularly where it appears to perpetuate a discourse that women are somehow emotional and irrational when it comes to sexual activity.

Justice Hunt stated:

To exclude the sexual component of their conduct – with all the emotional sequelae which sometimes follows from that conduct – is to expect counsel for the appellant to fight his client’s case with one (if not both) hands tied behind his back.

A more recent decision of the NSWCCA suggests that there has been an acceptance of the legislation and what it seeks to achieve. In considering an appeal against conviction on the basis that the trial judge had not allowed evidence of prior sexual experience to be adduced, the court examined the legislation and its purpose. In determining whether the evidence could be admitted under one of the exceptions, McLellan CJ at CL and Grove J considered the importance of s 293(4).

Even if the test provided by s 293(4) is satisfied, before the evidence could be admitted it would have to have a probative value which “outweighs any distress, humiliation, or embarrassment that the complainant might suffer as a result of the admission.” It is important

to keep in mind that s 293(4) provides exceptions to what is otherwise a prohibition on tendering of evidence of a complainant’s sexual experience. It has at least two purposes. One is to ensure that complainants are not unnecessarily distressed, humiliated or embarrassed by the trial process. Another is to ensure that the jury is not diverted from consideration of the true issues in the trial by evidence in relation to a complainant’s other sexual activities.

Section 293 may be effectively implemented to prevent unnecessary questioning of the complainant about sexual experience that does not go to the heart of the issues,²³⁰ however, the literature suggests that this does not always occur.

Does s 293 work in practice?

Commentators have suggested that when considering whether to admit evidence pursuant to s 293 the judiciary have not taken into account whether the material is actually relevant to the issues in dispute. It has been argued that if the evidence can be made to fit under one of the exceptions, it is admitted without further scrutiny.²³¹ Indeed, it has been suggested that the failure of the court to scrutinise evidence or require counsel to identify its relevance in the terms of the applicable legislation enables evidence to be adduced which does not genuinely qualify for admission and has minimal probative value.²³²

According to the 1996 *Heroines of Fortitude* Report the ‘recent relationship’ exception is the most commonly used.²³³ The term relationship has been interpreted as not needing to have an emotional basis, but it must be more than a mere acquaintance.²³⁴

²²⁸ NSW Law Reform Commission, Report 87 (1998) – *Review of Section 409B of the Crimes Act 1900*; <http://infolink/lrc.nsw.gov.au/pages/r87toc> at paragraph 4.71

²²⁹ NSWLRC Report 87 (1998) – *Review of Section 409B of the Crimes Act 1900* at paragraph 4.73

²³⁰ See *R v Mosegaard* [2005] NSWCCA 361

²³¹ Simon Bronnitt and Terese Henning: “Rape Victims on Trial: Regulating the Use and Abuse of Sexual History Evidence” in Eastaerl P (ed) *Balancing the Scales: Rape Law Reform and the Australian Culture*, Federation press, Sydney 1998, at 82

²³² NSW Department of Women at 240-249. However, the decision of *R v Mosegaard* [2005] NSWCCA 361 is a good example of the correct procedures being followed as envisaged by the legislation.

²³³ NSW Department of Women, *Heroines of Fortitude: The experience of Women in Court as Victims of Sexual Assault, Gender Bias and the Law Project*, Pirie Printers, Canberra, 1996.

²³⁴ *R v Henning* (CCA NSW, 11 May 1990, unreported)

The Heroines of Fortitude report indicated that evidence relating to the complainant's sexual reputation was admitted in 12 percent of trials studied, whilst defence counsel raised evidence of sexual experience in 76 percent of cases studied. Where this occurred, the prosecution objected to the admission of the evidence in 35 percent of such instances. These statistics were challenged by the NSW Law Reform Commission for a failure to take into account pre-trial agreements to admit such evidence.²³⁵ Unfortunately there is no current data from NSW courts or the ODPP on the rate of the admission of such evidence.

Why is it that s 293 has not been considered more effective in protecting complainants from cross-examination about their sexual experience? It has been submitted that the failure of the legislation to be effective resides with the courtroom players; a poor understanding of the legislation or disregard of it; and the provisions being circumnavigated by agreements between defence and the prosecution to allow such questioning.²³⁶ However, it may also be argued that resistance to implementing the full force of s 293 has led to an extremely liberal interpretation of the exceptions and in some cases resulted in a stay of proceedings.²³⁷ Indeed, it has been argued that the blanket prohibition imposed on the admission of sexual experience evidence and restriction on judicial discretion has begun to 'unravel'.²³⁸

Conversely, others may argue that the liberal interpretation of the exceptions has occurred due to the unworkable nature of the legislation. Frustrated by the inability of the section to take into account certain situations relevant to the accused, His Honour Justice Badgery-Parker canvassed the possibility of adopting a further exception or introducing a residual judicial discretion.²³⁹ Judges have expressed dissatisfaction with the provisions and its straight-jacket approach, and registered concern that the balance between the right of the accused and protection of the complainant has been tipped too far in favour of the prosecution.²⁴⁰ In *M* (1993) 67 A Crim R 549 the NSWCCA strongly criticised the rules-based approach of s 409B and the legislature's assumption that it could foresee all possible situations where an exception to the general prohibition might be appropriate. His Honour Allen J said;

The legislature has endeavoured to foresee all the exceptions which justice requires and to provide specifically for them. It has excluded all others. It has taken the risk that experience will throw up circumstances, which it has failed to foresee and expressly provide for, in which the denial of evidence disclosing or implying that the complainant has, or may have had sexual experience or lack of experience, or has

or may have taken part or not taken part in any sexual activity, results in injustice to an accused at his trial. The wisdom of so Draconian a restriction upon judicial discretion and so bold a presumption of perfect prescience may be questioned.

The matters that have attracted the most criticism from defence counsel for causing unfairness to the accused, relate to the exclusion of evidence in two main categories and predominantly involve children. The first involves evidence the complainant was sexually abused by someone other than the accused at an earlier stage. The second relates to evidence that the complainant has made 'false' allegations of sexual abuse on other occasions. Due to the problems posed by the case law in this area and the inability for the legislation to cover all possible scenarios, the High Court recommended that s 409B (as it then was), be reviewed.²⁴¹ In response to this recommendation, the NSW Law Reform Commission conducted a review of the operation of the provisions and published a Final Report in 1998.

NSW Law Reform Commission Recommendations

One of the main difficulties with the current provision arises in relation to the admissibility of prior sexual abuse. According to the Commission this evidence may be relevant in two ways. Firstly, it may be relevant to explain why a young child has an understanding of intimate sexual acts, not expected to be within the knowledge of a child that age. Alternatively, evidence of prior abuse may be relevant to indicate why the child has physical injury.²⁴² The Commission argued that in such instances it may be important for the jury to be aware that the child has gained such knowledge or physical injury from previous sexual abuse by another similar to the alleged offence. Without such information it is possible that the jury would more likely conclude that the accused had abused the child.

²³⁵ NSWLRC Report (1998) – *Review of Section 409B of the Crimes Act 1900* at para 4.88

²³⁶ Submission from Women's Legal Services

²³⁷ *R v Morris*, CCA NSW, 18 October 1990, unreported; where evidence related to the fact that the complainant had been sexually abused in the past was considered not to fit under one of the exceptions, preventing the accused from making full answer and defence and thus the case was stayed on the grounds of unfairness. See also *R v McIlvanie*, (CCA, NSW 30 August 1994, unreported)

²³⁸ Jenny Bargon and Elaine Fishwick, *Sexual Assault Law Reform: A National Perspective*, Office of the Status of Women, 1995 at 85.

²³⁹ *R v Bernthaler* (CCA, NSW, 17 December, 1993, unreported) "[I]t may be that the appropriate course would be to incorporate into the section a residual discretion allowing a trial judge to determine whether despite the general principle of exclusion, evidence or cross-examination of the proscribed kind should be admitted in a particular case.

²⁴⁰ *R v PJE* (1996) 70 ALJR 905

²⁴¹ "[I]t is the unanimous view of the Court, however, that the provision of s 409B of the Crimes Act clearly warrant further consideration by the legislature in light of the experiences of its operation" per Brennan J, *R v PJE* (1996) 70 ALJR 905.

²⁴² NSW Law Reform Commission (1998) – *Review of Section 409B of the Crimes Act 1900*; <http://infolink/lrc.nsw/pages/r87toc> at, paragraph 4.11. Although, given the definition of injury, this would seem to fall under s 293(3)(c).

There are a number of problems with trying to adduce evidence of this type and what evidentiary basis should be met before allowing the cross-examination of the complainant on this issue. Whilst evidence of this type may be relevant in some instances, it does not mean it will be relevant in each case. These issues were examined by the High Court in *HG v The Queen*²⁴³ where the Court acknowledged that the fact that a complainant has been abused by someone else (even if established) does not mean that he or she has not also been abused by the accused.²⁴⁴

The second basis upon which the Commission asserts that the operation of the section may cause injustice, is where it excludes evidence of a prior false allegation. Defence lawyers have argued that such evidence is relevant to suggest that the complainant has a general propensity to lie or make false allegations.²⁴⁵ Alternatively, it may be relevant to illustrate that the complainant is a sexual fantasist,²⁴⁶ or has made the allegation on the basis of an improper motive.²⁴⁷

The Commission admitted there is a problem in determining whether an allegation is false, but was unable to provide a solution as to how this should be determined. According to the Commission, whether or not the evidence is included in the trial will depend on its probative value. The degree to which the previous allegation may be shown to be false will affect the extent to which it is relevant in determining whether the complainant has fabricated the allegation against the accused.

Submissions received by the Commission argued that there must be a very tight definition of what constitutes a false allegation. Is an allegation false if there has been a previous trial and the accused was acquitted? Is it one where the complainant has admitted they were lying or has made a retraction? Victims of sexual assault may withdraw an allegation of assault for many reasons, including when faced with pressure from family or friends or threats from the accused. Within Aboriginal communities in particular, there may be intense pressure to withdraw from proceedings. Evidence of a previous allegation may need to be examined within a broader social context of the complainant.²⁴⁸

Due to the potential injustice posed by the inability of the accused to adduce evidence of prior abuse and false allegations the Commission outlined a number of options for the reform of s 409B.²⁴⁹ The Commission proposed that s 409B (as it was then) be repealed and replaced with a provision that would make sexual experience evidence

generally inadmissible, but provide the judge with discretion to admit or reject the evidence. The Commission argued that this option would ensure that highly relevant evidence was not excluded for failure to come under an exception. Such flexibility would provide greater fairness for the accused by allowing the judge to assess the merits of each individual case.²⁵⁰ This option was strongly rejected by certain groups who were of the view that 'relevance' may not be an objective enough standard to determine the admissibility of evidence.

In her analysis of similar legislation in Canada, Her Honour Mme L'Heureux-Dubé outlined the dangers of relying on notions of relevancy:

Whatever the test, be it one of experience, common sense or logic...it is a decision particularly vulnerable to the application of private beliefs. Regardless of the definition used, the content of any relevancy decisions will be filled by the particular judge's experience, common sense and/or logic.²⁵¹

Should judicial discretion be re-introduced into s 293? The question of whether to remove or limit judicial discretion in determining the admissibility of prior sexual experience has been considered in other jurisdictions. New South Wales remains the only jurisdiction that adopts a strict exclusionary rule with the fixed exceptions model.²⁵² In South Australia, Western Australia and Tasmania, the legislature allows for the judge to make the determination. In those jurisdictions evidence of prior sexual experience is inadmissible unless the probative value of the evidence outweighs the distress, humiliation, or embarrassment of the complainant.²⁵³

²⁴³ (1999) 72 ALJR 281

²⁴⁴ Submissions to the Law Reform Commission suggested that women with intellectual disabilities, particularly those living in group homes, may be the target of abuse on more than one occasion. Women and men who are institutionalised (including prison) may be subject to sexual abuse on more than one occasion.

²⁴⁵ *R v Bernthaler* (CCA NSW, 17 December 1993, unreported)

²⁴⁶ *R v M* (1993) 67 A Crim R 549

²⁴⁷ *R v PJE* (1996) 70 ALJR 905

²⁴⁸ John Upton: *By Violence, By Silence, By Control: The Marginalisation of Aboriginal Women under White and 'Black' law* (1992) 16 *Melbourne University Law Review* at 869.

²⁴⁹ The Commission actually canvassed six different options, but the one cited represents the model the Commission considered to be most viable.

²⁵⁰ NSWLRC Report (1998) – *Review of Section 409B of the Crimes Act 1900* at paragraphs 6.36-6.38.

²⁵¹ *R v Seaboyer* [1991] 83 SLR 193 at 228

²⁵² Submission Mr Stephen Odgers, 7 December 2005.

²⁵³ s 341 *Evidence Act* (South Australia), s 194M *Evidence Act*, (Tasmania), s 36BC *Evidence Act* (Western Australia).

Recently, the Victorian Law Reform Commission considered whether s 37A Crimes Act (Vic) should be amended to remove judicial discretion to determine the admission of prior sexual history evidence in order to further protect complainants.²⁵⁴ The VLRC considered adopting the approach in NSW, but rejected this option. Instead, they preferred a model which retained discretion, but required the judge to weigh up a number of factors when exercising this discretion. The VLRC adopted a number of the provisions within the Canadian legislation and some proposals put forward by the NSWLRC. The recommendation is set out in full in the Appendix.²⁵⁵

Canadian experience

The experience in Canada is important to consider when examining whether there should be judicial discretion incorporated into s 293. Central to the development of the Canadian rape shield laws was the decision in *R v Seaboyer* (1991) 83 DLR 193. In this case, s 246.6 Canadian Criminal Code was struck down on the basis that it absolutely excluded evidence of sexual experience which did not fall into one of the four listed exceptions. The provision was similar to s 293 and was found by the Supreme Court of Canada to be unconstitutional as it interfered with the accused's right to make full answer and defence under s 7 of the Charter of Rights and Freedoms.

Justice McLachlin, who was in the majority, argued that the rules based approach of the provision was fundamentally flawed in two respects. First, it failed to distinguish between legitimate and non-legitimate use of prior sexual history evidence, and second, it adopted a pigeon hole approach that amounted to predicting relevancy based on a series of categories.

With respect to the legislation, she said:

In achieving its purpose — the abolition of the outmoded, sexist-based use of sexual conduct evidence — it overshoots the mark and renders inadmissible evidence which may be essential to the presentation of legitimate defences and hence to a fair trial. In exchange for the elimination of the possibility that the judge and jury may draw illegitimate inferences from the evidence, it exacts as a price the real risk that an innocent person may be convicted. The price is too great in relation to the benefit secured, and cannot be tolerated in a society that does not countenance in any form the conviction of the innocent.²⁵⁶

As a result of this decision s 276 Canadian Criminal Code was introduced to regulate the admission of evidence relating to sexual activity, including a residual judicial

discretion. The Canadian legislation provides an absolute prohibition on what is regarded as an illegitimate use of prior sexual history evidence - whether with the accused or any other person, - to support an inference that by reason of the sexual activity the complainant is more likely to have consented to sexual activity with the accused or is less worthy of belief. Evidence of prior sexual experience may be admissible, however, the defence must provide the prosecution with 7 days notice. In addition, judges must address a list of considerations in determining whether to admit sexual history evidence, such as potential prejudice to the complainant's personal dignity and right of privacy and the right of the accused to make full answer and defence.²⁵⁷

In a challenge to the procedural notice requirements the Canadian Supreme Court has considered the provision to be constitutional and the court has endorsed the approach, which seeks to codify the principles set out in *Seaboyer*.²⁵⁸

There is a concern that although guidelines may be in place to advert judicial discretion to an array of competing interests, the judiciary may be more inclined to invoke the accused's right to a fair trial than fully assess what is fair in the circumstances. Research in Canada suggests some judges will simply mouth the guidelines and admit evidence without giving due consideration to the issues.²⁵⁹

In light of this reasoning is it doubtful whether the exercise of judicial discretion can offer the same level of protection s 293 (NSW) currently affords complainants. Recent analysis of the Canadian experience suggests that s 276 of the Canadian Criminal Code may not be successful. Judicial discretion has led to a number of successful applications for evidence to be adduced about a complainant's past sexual history.²⁶⁰ Gotell examined 107 sexual assault cases between 2000 and 2004, and found 22 involved an application to cross-examine the complainant on sexual history.

²⁵⁴ The VLRC was presented with Dr Heenan's 2001 study, *Trial and Error: Rape, Law Reform and Feminism* which found that sexual history evidence was admitted in 76.5% of cases analysed (26/34) often in circumstances that were highly irrelevant. See VLRC *Interim Report* at 180.

²⁵⁵ For a recent discussion of the development of the law in the UK in this area see, Kibble "Judicial Discretion and the Admissibility of Prior Sexual History Evidence under s 41 of the Youth Justice and Criminal Evidence Act 1999: Sometimes sticking to your guns means shooting yourself in the foot" in *Criminal Law Review* (2005) 263

²⁵⁶ *R v Seaboyer* (1991) 83 DLR 193 at 274

²⁵⁷ s 276.(1) Canadian Criminal Code – See Appendix for copy of the section.

²⁵⁸ *R v Darrach* [2000] 2 SCR 443

²⁵⁹ Sheehy Elizabeth: 'Legalising Justice for All Women: Keynote Address in the Project for the Legal Action Against Sexual Assault 'Legalising Justice for All Women', *National Conference of Sexual Assault Law Reform*, Melbourne, November 28-30. Compiled by Heenan, Melbourne, Project for Legal Action Against Sexual Assault 1996 1 at 19.

²⁶⁰ Gotell L: "The Discursive Disappearance of Sexualized Violence: Feminist Law Reform, Judicial Resistance and Neo-liberal Sexual Citizenship" (Forthcoming)

In nearly half of all those cases (10) admission or partial admission of sexual experience was permitted. She found that judicial interpretation had ‘undermined the legislative scheme for assessing the admissibility of sexual history’ and that judges did not always consider the factors laid out in s 276(3); intended to guide the decision as to whether the evidence is more prejudicial than probative. When they did consider these factors, this consideration was often cursory.²⁶¹ Unfortunately, whilst a list of decisions is provided, the facts of the cases relied upon are not discussed in any detail nor whether such evidence would nonetheless have been admitted under the law in Canada before *Seaboyer*, or within one of the six exceptions under NSW law.

If judicial discretion is re-introduced what is the most appropriate model to adopt?

The NSWLRC acknowledged that there is a concern that judges may not exercise their discretion properly, however, it did not believe this justified the imposition of inflexible rules. According to the Commission the trial judge is in the best position to determine the probative value of the evidence in the circumstances of the case. At the same time the Commission conceded that trial judges should not be given a broad discretion.²⁶² The NSWLRC proposed a model retaining the blanket prohibition on the admission of evidence relating to sexual reputation, however, where there is an overlap between evidence relating to sexual experience and sexual reputation, this evidence is not necessarily excluded, as these two categories of evidence may not be mutually exclusive.²⁶³

The NSWLRC proposal²⁶⁴ provides that evidence of sexual experience or activity shall not be admitted, except with the leave of the court. This is a major shift from the current law. Leave to admit evidence of sexual experience may be granted where the evidence has significant probative value to a fact in issue or to credit. In addition, the “...*probative value of the evidence sought to be admitted [must] substantially outweigh the danger of prejudice to the proper administration of justice.*” The Commission’s proposal draws on legislative provisions in Victoria and Canada to address the problem of inferences being made about the type of person the complainant is.

The recommendation states that evidence of a complainant’s sexual experience or activity is not admissible to support an inference that, by reason only of the fact that the complainant has engaged in sexual activity or has sexual experience, the complainant is either:

- the type of person who is more likely to have consented to the sexual activity; or
- less worthy of belief.

Sexual experience evidence is not to be regarded as having substantial relevance to the facts in issue by virtue of any inference it may raise as to the complainant’s general disposition. This last matter has been supported by the NSW Adult Sexual Assault Interagency Committee.²⁶⁵

The Commission’s proposal state that when determining whether or not the probative value of the evidence outweighs the danger of prejudice to the administration of justice, the court must take into account matters including:

- the interests of justice, including the right of the accused to make a full answer and defence;
- the distress, humiliation, or embarrassment which the complainant may suffer as a result of leave being granted;
- the risk that the evidence may unduly arouse discriminatory belief or bias, prejudice, sympathy or hostility in the jury;
- the need to respect the complainant’s personal dignity and privacy;
- whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case; and
- any other factor which the court considers relevant.

²⁶¹Ibid p 19 - 25

²⁶²“We are conscious of the fact that sexual offence proceedings have been particularly susceptible in the past to sexist assumptions by the judiciary about what is relevant. For this reason, although we maintain that discretion is the fairest means of assessing admissibility, we have adopted a guide to the exercise of judicial discretion.” LRC Report para 6.112

²⁶³See NSWLRC (1998) – *Review of Section 409B of the Crimes Act 1900* discussion at paragraphs 4.81-4.85.

²⁶⁴NSWLRC Proposal. See Appendix for full copy of proposal

²⁶⁵NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW*, November 2004 at 6.

Under the Commission's model the defence will not be able to raise evidence of past sexual history unless they have made a written application for leave prior to the trial. The party seeking leave must set out the nature of the evidence sought to be adduced and how the evidence has significant probative value to a fact in issue or to credit. An application for leave may be made to the court in the absence of the jury and the public. The provisions appear to be designed to protect the complainant from unnecessary distress. During the application for leave the complainant is not compelled to give evidence.

In order to curb the unjustified use of sexual experience evidence, judges must provide reasons for their decision to admit evidence and where leave is granted, the court must specify what sort of material can be raised. Additionally, where such evidence is admitted the trial judge must give a warning to the jury not to draw an inference, by reason only of sexual experience, that the complainant is less worthy of belief or a type of person who is more likely to have consented to the alleged sexual activity.

The model differs from the previous Canadian provisions and the current NSW legislation primarily in that the prohibition is not on the admissibility of sexual experience evidence, but where such evidence is admitted there is a prohibition on using it in a particular way. The NSW Law Reform Commission has clearly sought to re-introduce judicial discretion to provide greater justice for the accused. However, it is also important to consider whether the use of restricted judicial discretion may also be of benefit to complainants. The use of judicial discretion may offer greater scope for looking at the individual circumstances of the case. The Commission's proposal to allow restricted judicial discretion with a number of guidelines, may mean that judges are forced to think more self consciously about the broader issues involved in each case and assess their own underlying assumptions.²⁶⁶

Discussion

The Taskforce was generally of the view that s 293 (old s 409B) causes a number of difficulties in practice. Members from the Public Defenders Office, Bar Association and Law Society were of the view that this was because it operated unfairly on the accused. In contrast, many other members of the Taskforce did not think the provision was adequately protecting women from cross-examination about irrelevant and inappropriate past sexual experience, although it was seen as a definite improvement from past practices, and its limitations were not a reason to reintroduce judicial

discretion.²⁶⁷ A number of members expressed the view that it would be desirable to have access to current research and data so to inform their decision.²⁶⁸

Women's Legal Services submitted that possible reasons for s 293 not working in practice may be that judges, prosecutors and defence lawyers have difficulty in understanding what evidence is covered by the provisions; that the legislation is not well understood; and that the application procedure outlined in the legislation may not be complied with if the parties make an informal agreement to allow evidence to be adduced. Women's Legal Services suggested that judges needed to be more proactive in managing evidence adduced in this area, and that this may be achieved by greater judicial training. The VAWSU also submitted that the focus should be on how s 293 can achieve its purpose.

Judicial discretion

There was a clear division amongst members about whether discretion should be introduced. The Public Defenders Office, Bar Association, Legal Aid Commission, Justice Buddin and Law Society advocated that there should be a tight residual discretion on the basis that the provision operated unfairly in some cases. This was supported by Judge Ellis and Magistrate Quinn, but only if there was a right for the Crown to appeal from such decisions regarding the admissibility of sexual experience evidence. Mr Stephen Odgers SC, supported the reintroduction of an element of 'principled flexibility' in s 293; on the basis that the current law may lead to the conviction of some innocent people, that NSW is alone in the legislative approach it has taken, and that s 293 can be improved upon. The Law Society submitted that the current exceptions to s 293 should remain, but there should be judicial discretion.

²⁶⁶ "Judicial inquiry in to the factual, social and psychological context within which litigation arises is not unusual. Rather, a conscious, contextual inquiry has become an accepted step towards judicial impartiality...What makes it possible for us to genuinely judge, to move beyond our private idiosyncracies and preferences, is our capacity to achieve enlargement of mind. We do this by different perspectives into account. This is the path out of blindness of our subjective conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective....It is the capacity for enlargement of mind that makes autonomous impartial judgment possible R v RDS cited in Hackett D: 'Finding and Following 'The Road Less Travelled': Judicial Neutrality and the Protection and Enforcement of Rights in Criminal Trial Courts' (1998) 10 *Canadian Journal of Women and the Law – Feminist Reflection on Litigation* 129 at 133.

²⁶⁷ Submission DPP.

²⁶⁸ Women's Legal Services, revised submission 18 October 2005, Legal Aid Commission 17 October 2005.

The introduction of discretion was strongly opposed by other members of the Taskforce, with the majority preferring that the current provision be retained.²⁶⁹ The DPP submitted that the possibility of previous sexual history being raised is a deterrent to women and men proceeding through the criminal justice process, and that the reintroduction of discretion would not assist in encouraging more reporting and persistence in prosecuting matters. Moreover, there was no strong evidence as to why any reform should take place.²⁷⁰ Women's Legal Services submitted that research studies have shown that complainants rarely benefit from the operation of judicial discretion, and the reintroduction of judicial discretion would lead to an erosion of the limited protections complainants now have.

Whilst strongly opposing the introduction of judicial discretion, Women's Legal Services suggested there may be scope for creating an additional exception to s 293 to narrowly cover issues, such as clear probative evidence of other sexual abuse. In contrast, the VAWSU submitted this was an insufficient basis upon which to allow questions relating to sexual experience evidence, particularly as issues surrounding previous sexual abuse and the making of false allegations are based on the many myths surrounding the sexual assault of women and children.

Two written submissions supported a proposal to extend s 293 to provide that where evidence of sexual experience is admitted, directions should be given, to the effect that the jury must not draw an inference by reason only of the complainant's sexual experience that he or she is less worthy of belief or more likely to have consented to the sexual activity.²⁷¹ There is merit in pursuing this idea further, as it is clearly directed at advising juries that they should not be making decisions about the guilt or otherwise of the accused based upon the perceived morality of the complainant.

Other submissions also called for a definition of sexual reputation to be included in the legislation, as advocated by the authors of the *Fair Chance* report, because of the overlap between sexual history and reputation.²⁷² Detective Superintendent Kim McKay submitted that the legislation should state: '*evidence that the complainant was accustomed to sexual activity shall not be regarded as having relevance to the facts in issue only because an inference is raised by the defence about the complainant's general disposition.*' Women's Legal Services submitted that sexual reputation should be clearly, but not exhaustively defined in the legislation, so that judges, juries, prosecutors and defence may be clear in determining what might fall under the provisions. It was submitted:

Any definition of sexual reputation is to be distinguished from the term 'sexual experience'. Generally, evidence of sexual reputation would relate to evidence adduced about the way in which a person is regarded by others. Reputation does not include specific incidents of sexual activity or experience. Reputation evidence is evidence relating to 'generally' held beliefs and opinions about the character of the complainant and propensity for promiscuity.'

There were calls for further judicial education and research into this area,²⁷³ to highlight whether the provisions needed to be tightened, further exceptions created, or whether judicial discretion would assist.

Due to the unlikelihood of resolving this issue within the Taskforce, it does not appear that any recommendation can be made with respect to this issue. The polarized nature of the discussions suggest that this is an area which will continue to cause concern and debate. A number of members wish to see a tightened residual discretion introduced, whilst the remaining members recommend that s 293 *Criminal Procedure Act* be retained in its current form. Whilst the debate within the Taskforce focused on cases where the current provision may create an unfairness or injustice to the accused, there did not appear to be much interest from participants in discussing whether further limited exceptions could be introduced into the current section to address these scenarios, with the exception of Women's Legal Services.

The CLRD would be greatly assisted by further contemporary research in this area before making any recommendation for change. In particular, it would be of benefit for there to be some comparison between jurisdictions to evaluate whether the same evidence that is currently excluded under the NSW legislation is excluded in those jurisdictions, which have a limited judicial discretion. Actual cases where it is perceived that the balance has tipped too far in favour of the prosecution should also be drawn to the attention of the CLRD.

²⁶⁹ Submissions DPP, Office for Women, Dr Cossins, NSW Health, Victims Services, VAWSU, NSW Rape Crises Centre NSW, Women's Legal Services; "WLS fervently rejects any attempt to reintroduce judicial discretion into s 293 of the CPA. Reintroducing judicial discretion would not assist in the provision achieving its legislative purpose."

²⁷⁰ A similar view was expressed by Victims Services.

²⁷¹ Detective Superintendent Kim McKay, Office For Women.

²⁷² Submission Office for Women, Detective Superintendent Kim McKay, Victims Services, NSW Health, Women's Legal Services and VAWSU

²⁷³ The VAWSU recommended that a study be undertaken about how judges and defence lawyers approach this provision and that this should involve a comparative element to those jurisdictions where there is some judicial discretion.

CLRD RECOMMENDATION:

- 16 That further research be conducted by the Attorney General's Department on the effectiveness and fairness of s 293.

2. Non-publication orders

Publication of the identity of a complainant in a sexual assault trial may further traumatise complainants, increase the stigma attached to the offence and in some cases may jeopardise the safety of the complainant. The law recognises that complainants in sexual assault matters should be free to come forward and give their evidence without the additional stress and trauma of having their names and other identifying details published in the media.

There are a number of sections governing the non-publication of material in sexual assault trials including:

- Section 292 Criminal Procedure Act 1986. This section provides a court with the power to make an order prohibiting the publication of the whole or any part of the evidence in the proceedings; or of any report or account of that evidence.²⁷⁴
- Section 578A Crimes Act 1900 prohibits the publication (which includes broadcast by radio or television) of any matter (which includes a picture) that identifies a complainant in prescribed sexual offence proceedings, or any matter which is likely to lead to the identification of the complainant. The section does not apply to a publication authorised by the judge, however, the judge must first seek and consider the views of the complainant, and be satisfied that the publication is in the public interest, or where publication is consented to by the complainant.²⁷⁵
- Section 11 Children (Criminal Proceedings) Act 1987 prohibits the broadcast or publication of the name of a person involved in criminal proceedings (a witness or the accused) who at the time the offence was committed, was a child.

Is the scope of the legislation clear?

Section 292 Criminal Procedure Act 1986 and s 578A Crimes Act 1900 are drafted in broad terms, to be able to meet the particular facts and circumstances of each case. For example, in s 578A, "matter" includes "a picture". The definition is inclusive and can be used to prohibit the publication of not only pictures of the complainant, but also pictures of any other object or person that may identify the complainant, for example, the complainant's place of work or residence. It is a matter for the trial judge, whether it be on his or her own motion, or on the application of the prosecutor, to identify and expressly state those matters for which publication is prohibited.

²⁷⁴ Section 292 (1) In any proceedings against a person for a prescribed sexual offence, the court may from time to time make an order forbidding publication of the whole or any part of the evidence tendered in the proceedings or of any report or account of that evidence. (2) If the prosecutor or the accused person (or his or her counsel, if any) indicates to the court that it is desired that any particular matter given in evidence should be available for publication, no such order is to be made in respect of that matter. (3) Any person who contravenes an order under this section is guilty of a summary offence and liable to a maximum penalty of 20 penalty units.

²⁷⁵ Section 578(3) applies even though the prescribed sexual offence proceedings have been disposed of. S 578A(5) provides that the Judge or Justice must not authorise a publication unless the Judge or Justice has (a) sought and considered any views of the complainant, (b) is satisfied that the publication is in the public interest

The Taskforce considered whether the different legislative provisions were clear and consistent. The Taskforce agreed that s 578A Crimes Act should be amended to add to the non-exhaustive definition of ‘publish’ – *dissemination of information on the internet or other service carrier*. Similarly, a definition of ‘publish’ should be inserted in s 292 Criminal Procedure Act in the same terms.

Some members of the Taskforce submitted that s 292 Criminal Procedure Act should also be amended to require the judge to consult with the complainant and consider his or her wishes before determining whether to forbid publication,²⁷⁶ in accordance with recommendations made by the NSW Adult Sexual Assault Interagency Committee.²⁷⁷ Introducing this element would bring consistency between the tests employed when determining whether to make a non-publication order under s 292 and s 578A.

The Taskforce also formed the view that the making of a non-publication order may have no effect if orders are not properly communicated to the media and other members of the public who may be sitting in the court.²⁷⁸ Ensuring that appropriate signage is placed at the entrance to courts hearing matters in which a non-publication order is in place would be a relatively simple and effective way of informing members of the public of the prohibition and the consequences of failing to comply with the order. The Taskforce was of the view that the principal courts administrator of each jurisdiction should be approached with respect to this issue.

What difficulties have arisen with respect to non-publication orders?

The Taskforce examined whether the current provisions relating to non-publication are adequate. In particular, members of the Taskforce identified that one of the limitations with the current legislation was that neither the Local Court or District Court had the power to prohibit the publication of a verdict in a criminal trial, notwithstanding serious concerns that such publication would mean a fair trial could not be had in separate criminal proceedings: *John Fairfax Publications Pty Ltd & Anor v District Court of NSW & Ors* [2004] NSWCA 324. In that case the Chief Justice observed that, even in the case of a ‘back to back trial’ ‘express statutory authority is required’ for ‘a power to prohibit publication of a verdict’²⁷⁹ and stated that ‘[l]egislative intervention is desirable’.

A guilty verdict may be overturned on appeal if it is held that adverse media publicity at the time of a co-accused’s trial prevented the accused from receiving a fair trial.²⁸⁰ This may result in numerous delays, which is

unfair to both the accused person and to the complainant. Similar problems may also arise with respect to back-to-back trials for the same accused.

The principle of open justice requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom. “The fundamental rule of the common law is that the administration of justice must take place in open court”: per McHugh JA in *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 476 and *A-G (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 345-50; *R v Savvas* (1989) 43 A Crim R 331. However, it appears that there may be a compelling case to continue non-publication orders after verdict where there is the possibility of creating adverse publicity for an accused facing a back-to-back trial, or trial of a co-accused, so to avoid unnecessary delays and potential injustice, particularly in matters that have received widespread media publicity.

The NSW Bar Association strongly supports the introduction of legislation empowering the District Court to maintain a non-publication order after verdict in order to reduce delays due to adverse publicity. The Taskforce supports passing legislation to give the District Court and Local Court the power to maintain a non-publication order after verdict or judgment in order to reduce delays and adjournments due to adverse publicity.

²⁷⁶ This was supported by the DPP, Office for Women, NSW Health, Victims Services, Women’s Legal Services, VAWSU, Dr Anne Cossins and the Legal Aid Commission.

²⁷⁷ NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW*, November 2004

²⁷⁸ Sections 290-291 of the Criminal Procedure Act, passed on 4 May 2005 provides that evidence of a sexual assault complainant must be held in camera, unless the court otherwise directs, and sets out various considerations. This provision commenced on 25 November 2005 and may alleviate some of the concerns outlined above.

²⁷⁹ See paragraph [63].

²⁸⁰ See *R v S* (2004) 144 A Crim R 124. In this matter the court said that ‘it is imperative that media coverage of related trials – especially sensational sexual offence trials – be factored into the arrangement of such trials.’

TASKFORCE RECOMMENDATION:

- 17 Section 578A Crimes Act should be amended to add to the non-exhaustive definition of ‘publish’ – *dissemination of information on the internet or other service carrier.*
- 18 Section 292 Criminal Procedure Act should be amended to insert a definition of ‘publish’ in identical terms to s 578A Crimes Act.
- 19 Section 292 Criminal Procedure Act should be amended to provide that the Magistrate should consult with the complainant when determining whether to make an order for non-publication in similar terms to s 578A Crimes Act.
- 20 Where a non-publication order is in place, appropriate signage should be placed at the entrance of the court to inform members of the public that the proceedings are subject to a non publication order.
- 21 Legislation should be introduced to give the District Court and Local Court the power to maintain a non-publication order after verdict or judgment in order to reduce delays and adjournments due to adverse publicity.

3. Committal proceedings

A committal hearing is a preliminary hearing in the Magistrate’s Court to determine whether there is sufficient evidence to satisfy a reasonable jury properly instructed on the law, that the accused has committed the offence for which he or she has been charged. If the Magistrate is satisfied, he or she will commit the accused person to stand trial. In NSW there is no automatic right to a full committal hearing, that is one where all witnesses are called to give evidence, however, a Magistrate may direct the attendance of a witness to give evidence at a committal hearing for a serious indictable offence if satisfied that there are substantial reasons in the interests of justice why the witness should attend to give oral evidence.²⁸¹ Where an application is made to call a witness by an accused person or the prosecutor, and the other party consents to the witness being called, the Magistrate must give the direction for the witness to attend.

Section 93 of the Criminal Procedure Act 1986 (NSW) provides that where the accused is charged with an offence involving violence,²⁸² including prescribed sexual offences, the Magistrate may not direct the attendance of an alleged victim unless there are special reasons in the interests of justice why the victim should give oral evidence. The court may not make a direction in proceedings for a child sexual assault offence where the complainant was under the age of 16 at the time of the offence, and under the age of 18 at the time of the committal: s 91(8). This provision was introduced by the Crimes Legislation Amendment Act 2003 as a direct response to the experience gained in the Child Sexual Assault Pilot Jurisdiction.

The NSW Adult Sexual Assault Interagency Committee has expressed the view that the committal hearing is potentially more distressing for a victim of a sexual assault because the defence is unrestrained in cross-examination without the presence of a jury, and may take the hearing as a chance to ‘test the victim’. In their view, the committal process adds to the trauma of a victim having to give evidence at trial. The Taskforce considered proposals raised by the Interagency Committee, including whether the committal process should be retained or abolished for prescribed sexual offence proceedings.

²⁸¹ s 91 of the Criminal Procedure Act 1986

²⁸² s 94 Criminal Procedure Act 1986 defines “offence involving violence” to include a prescribed sexual offence:

a) offences under section 61I, 61J, 61JA, 61K, 61L, 61M, 61N, 61O, 65A, 66A, 66B, 66C, 66D, 66EA, 66F or 80A of the Crimes Act 1900, or
b) an offence that includes the commission, or an intention to commit an offence in paragraph a), or
c) an offence of attempting, or of conspiracy or incitement to commit an offence in paragraph a) or b)

Should committal hearings for sexual offence proceedings be abolished?

The NSW Adult Sexual Assault Interagency Committee's report, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW*, referred to statistics from the *Heroines of Fortitude* report which showed that complainants were present at 17 percent of committal hearings. It is unclear how many adult complainants are called to give evidence at committal in NSW as statistics on this are not collated by any agency. However, material provided by the ODPP suggests that calling complainants at committal is not uncommon and that a number of adult complainants were called to give evidence at committal during 2004.

The Interagency Committee has proposed that committal hearings in sexual assault matters be abolished. This is not without precedent. In 2002 Western Australia abolished committal hearings for all offences by the passage of the Criminal Law Procedure (Amendment) Bill 2002. The Bill also reformed the law as it related to pre-trial disclosure by introducing an onerous, ongoing statutory disclosure requirement for the Police, DPP, and limited formal pre-trial disclosure requirements for defendants. The statutory obligations to disclose are closely supervised by the Magistrate's Court.

The Victorian Law Reform Commission also considered abolishing committals in sexual offence cases, but decided against this.²⁸³ It took the view that although there may be advantages in abolishing committal hearings generally, there would be difficulties in abolishing them for sexual offences alone. This was because it would create anomalies in cases where a person was charged with both sexual and other criminal offences, and would afford some accused people a procedural right that would be denied to others. The VLRC also commented that it would still be desirable to have another mechanism to 'filter out' cases before they go to trial, where there is no reasonable prospect of a conviction. Another argument in favour of retaining committal hearings was that the committal process may encourage some offenders to plead guilty to all or some of the offences, to take advantage of the discount afforded on sentence to an early guilty plea.

The fundamental objective of committal proceedings is to facilitate a fair trial in the event that the accused person is committed for trial.²⁸⁴ The nature and purpose of a committal proceeding is to receive, examine and permit the testing of evidence introduced by the prosecutor before the magistrate, in order to determine whether there is sufficient evidence to warrant the person charged being put on trial and, if not, to discharge that person.²⁸⁵

The importance of committal proceedings in the criminal process should not be underrated. It enables the person charged to hear the evidence against him or her and to cross-examine the prosecution witnesses. It enables him or her to put forward a defence if he or she wishes to do so. It serves to marshal the evidence in deposition form. Notwithstanding that it is not binding,²⁸⁶ the decision of a magistrate that a person should or should not stand trial has in practice considerable force so that the preliminary hearing operates effectively to filter out those prosecutions which, because there is insufficient evidence, should not be pursued. Abolishing committal hearings in all sexual offence proceedings would deny a category of accused people a procedural right afforded to others.

The DPP, NSW Health and Detective Superintendent Kim McKay submitted that committals should be abolished for sexual offence proceedings in accordance with the recommendations outlined in the *Fair Chance* report. Detective Superintendent Kim McKay submitted that while committal proceedings could be beneficial, she supported their abolition to shorten time frames and alleviate stress for victims in having to attend court on numerous occasions. However, she conceded that if these goals were met by appropriate case management and pre-trial hearings, abolition of committals may not be necessary. NSW Health also submitted that the abolition of committals was the most simple and cost effective way to achieve early resolution of matters and reduce stress on victims.

The call to remove the committal process was not supported by members of the judiciary represented on the Taskforce, the Bar Association, Public Defenders Office, Associate Professor Stubbs, the Office for Women, Dr Cossins, the Legal Aid Commission or the Law Society. However, the Office for Women and VAWSU submitted that committal hearings in sexual offence matters should be confined to an assessment of the brief of evidence by a Magistrate, or what is colloquially known as a 'paper committal'.

In NSW, there are and will be, sexual offence cases in which there are good reasons to require witnesses, other than the complainant, to attend to give evidence.

²⁸³ Victorian Law Reform Commission, *Sexual Offences: Law and Procedure Final Report*, pp. 149-165

²⁸⁴ *Hanna v Keamey & DPP* (1998) 5 Crim LN 46

²⁸⁵ *Moss v Brown* [1979] 1 NSWLR 114 at 125

²⁸⁶ The Director of Public Prosecutions may present an ex officio indictment against a person who has been discharged at committal.

Some examples are where dates and times of the offences may be in issue, DNA evidence, expert evidence, observations made by witnesses, or admissions made by an accused person need to be tested. Committal proceedings have an important function in the criminal justice process, both for the accused person and prosecution, and should therefore be retained for all offences.

Should the prohibition on calling child sexual assault complainants be expanded to include adult sexual assault complainants?

The real question for the Taskforce was whether there should be a prohibition on calling adult complainants at committal in sexual assault matters. Section 93 provides that a Magistrate may not direct the attendance of an alleged victim of violence unless there are special reasons in the interest of justice to do so. The DPP presented some bare statistics with respect to the incidence of complainants in sexual offence proceedings being directed to attend to give evidence at committal for the period, 1 January 2004 to 31 December 2004. According to the information presented by the DPP, during this period, the Information Technology branch identified 76 possible matters where the complainant might have been called at the committal hearing pursuant to s 93 Criminal Procedure Act. The DPP advised that it was not possible to indicate what percentage of the overall matters this figure represented and further analysis of these matters was undertaken by the DPP by examining the brief of evidence, committal transcripts and discussions with the committal solicitor.

Of the 76 matters referred to, 8 were excluded from further analysis as they were child sexual assault cases, a further 6 were excluded as the complainant was not called at the committal, 4 matters were withdrawn prior to the committal hearing, in 1 matter a plea was taken prior to committal, and 1 matter proceeded as a summary hearing. A further 5 matters could not be obtained. Of the remaining 51 files considered suitable for analysis a senior lawyer within the DPP considered the reasons why the complainant was called. In 44 cases the DPP consented to the complainant being called, in 7 matters the complainant was ordered to attend to give evidence over an objection by the DPP. The status of two matters was unknown. Of the 44 cases where there was an agreement between the DPP and the defence that the complainant be called at committal, the paperwork suggested that in 28 cases an agreement was made that the complainant's statement could be tendered.²⁸⁷

One important question that was asked by the Taskforce was whether there was any change to the charges or outcome following the committal. The DPP advised that in their study of the 51 complainants called, in 13 cases the time frame on the indictment was amended, however, in 36 cases there was no change to the charges. However, the evidence given assisted in other ways; in 7 cases there were further and better particulars adduced through the committal process, in 6 cases a plea was accepted to a reduced charge, and in 16 cases the prosecution was withdrawn.²⁸⁸

The Victorian Law Reform Commission undertook an empirical project at the Melbourne Magistrate's Court between September 2003 to December 2003, looking at all sexual offence matters that had a committal hearing, to determine whether complainants were routinely cross-examined at committal. In 39 of the 40 sexual offence matters identified, the defence made an application to cross-examine the complainant. All but one application was granted, including 14 cases involving child complainants. As a result, the VLRC recommended that there should be a prohibition on the cross-examination of children and witnesses with cognitive impairment. As set out above, NSW already prohibits the calling of a child under the age of 18 years (who was under the age of 16 years at the time of the offence) in sexual assault proceedings at committal.

It should also be borne in mind that the VLRC's study of committal hearings was in the context of the liberalisation of cross-examination rules in 2001. In Victoria, a defence application seeking leave to cross-examine a witness only has 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*".

²⁸⁷ The DPP further advise that of the matters where the complainant was called, the transcript of the committal proceedings was obtained to determine the nature of the areas the complainant was required to be cross-examined on. There was often more than one area of cross-examination and in the analysis cases were divided up into recent and historical cases. In the historical cases, 24 complainants were called to be cross-examined about time frames, 11 about the specifics of the offences, 15 on peripheral details, 17 on delay in complaint, 2 about drug or alcohol use, 8 regarding concoction/collusion/repressed memory, and 2 in relation to inconsistencies with other witnesses. In the recent matters, 16 were called to be cross-examined on what was seen as peripheral issues, 1 with respect to time frames, 8 on delay in complaint, 4 on drug and alcohol use and 5 regarding collusion/concoction/repressed memories.

²⁸⁸ The solicitor conducting the review formed the opinion that in many of the historical cases there was insufficient information in the complainant's statement, but that many of the matters raised at committal regarding time frames and specificity could have possibly been gleaned by police obtaining a more thorough statement, rather than defence exploring these issues at committal. She also suggested that there needed to be a more concerted effort to hold a conference with the complainant to seek clarification of these issues and if necessary obtain a new statement: Information provided by NSW DPP, 25 November 2005.

Importantly, there is no threshold test regarding the calling of a child under 18, instead, there are a range of factors which must be taken into account in determining whether the questioning of a witness is justified. The court must take into account the need to minimise trauma that might be suffered by the witness, any characteristics of the witness including any mental, physical or intellectual disability, the importance of the witness to the prosecution case, and the existence or lack of corroborating evidence.

The provisions of the Criminal Procedure Act 1986 (NSW) clearly impose a much more restrictive test than Victoria to determine whether it is in the interests of justice to direct the attendance of an alleged victim of violence. The appellate courts in NSW have held that cross-examination for the purpose of discrediting the complainant does not constitute a special reason.²⁸⁹ In *O'Hare v DPP* [2000] NSWSC 430, Justice O'Keefe summarised the considerations to be taken into account in determining whether or not special reasons arise in a particular case,²⁹⁰ such as:

- special in relation to the particular case;
- solid, that is substantial, in nature;
- not common or usual;
- out of the ordinary;
- unusual or atypical;
- clearly distinguishable from the general run of cases; and
- relevant to the interests of justice.

Relevance to the interests of justice will involve a consideration of the interests of the defendant and interests of the complainant as well as other wider considerations of justice. In this context it involves a consideration of:

- the strength or weakness of the prosecution case;
- that there will be a real risk of an unfair trial should oral evidence not be permitted;
- the prospect of prejudice to the defendant beyond the ordinary;
- the real possibility that a defendant may not have to stand trial if oral evidence is permitted;
- the existence of inconsistent statements or different versions by a complainant or witness.

The requirement of “special reasons” in s 93(1) is a more stringent test than that of “substantial reasons” required by s 91(3).²⁹¹ Where the particulars given by the prosecution in a sexual assault case are vague as to the dates upon which the offences are said to have occurred and the cross-examination is aimed at bringing more

certainty to those dates, then cross-examination may be justified.²⁹²

When introducing the Crimes Legislation Amendment Bill 2003, which amended s 91 to prohibit child sexual offence complainants being called at committal, the Hon. John Hatzistergos said:

The first of these amendments exempts child complainants in sexual assault proceedings from giving evidence in committal hearings. Under the amendments made by items [1] and [2] of schedule 8, child complainants in sexual assault proceedings will be completely exempted from being subject to a direction by the court to attend to give oral evidence at committal. A “child complainant” will include a child who was under 16 years of age when the alleged offence was committed, and is less than 18 years of age at the time the committal hearing proceeds.

Giving evidence at committal hearings can be more distressing for children than giving evidence at trial as counsel may not be as restrained at committal where a jury is not present. This amendment will reduce the number of times a child is subject to cross-examination over the course of a sexual assault prosecution, thereby reducing the retraumatisation associated with multiple court appearances.²⁹³

The aim of the amendment was to limit the negative effects on children of giving evidence. At the time the Government did not choose to extend the provisions to all sexual assault complainants.

²⁸⁹ In *R v Kennedy* (1997) 94 A Crim R 341 at 352, Hunt CJ at CL said: “Something more than disadvantage to the accused from the loss of the opportunity to cross-examine the complainant at the committal must be shown. There must be some feature of the particular case by reason of which it is out of the ordinary and which establish that it is in the interest of justice that the complainant be called to give oral evidence. Two cross-examinations are not justified simply in order to discredit the witness at the trial...What are special reasons and what are not will vary from case to case and cannot be defined in advance. The decision should not be approached in an unduly restrictive way; what must be shown is that such evidence will serve the true purposes of committal proceedings, which exists in order to achieve a fair trial in the court”.

²⁹⁰ Relying on propositions outlined by Studdert J in *B v Gould and Director of Public Prosecutions* (1993) 67 A Crim R 297

²⁹¹ *DPP v Losurdo* (1998) 44 NSWLR 618 at 623; *Tez v Longley* (2004) 142 A Crim R 122. It has been held that s 93 can apply to a situation where the victim of one offence is also a witness in respect of an offence committed against another person and where both matters are being dealt with together: *McKean v DPP* (SC(NSW), Grove J, 22 April 1993, unreported).

²⁹² *R v Kennedy* (1997) 94 A Crim R 341 (where the prosecution was criticised for objecting to cross-examination of a witness at committal proceedings where the refusal of cross-examination would result in an unfair trial). This approach was followed in *TS v George* (1998) 5 Crim LN 32 where it was observed that a lack of precision as to dates of alleged offences in the complainant's statement inhibited the accused's effective preparation for trial.

²⁹³ Legislative Council, 2nd Reading Speech, Hansard, 25 June 2003, at page 2039

In 2002, the Director of Public Prosecutions, Nicholas Cowdery AM QC, gave evidence before the Standing Committee on Law and Justice inquiring into the prosecution of child sexual assault matters. His comments with respect to the reasons for children previously having been required to give evidence at committal proceedings applies equally to adult complainants:

There may have been inconsistencies in statements made by the victim in the course of the investigation and those inconsistencies may need to be explored at the committal hearing. There may be inconsistencies between what the witness says and what another witness says, or what another piece of evidence exposes and that inconsistency needs to be tested. There may be uncertainty about time or place where events happened and defence counsel wants to explore that. But the courts have become better at protecting witnesses from unnecessary examination and in many cases a court, when making the order to allow a witness to be cross-examined, will confine the areas in which that cross-examination may take place. Nevertheless, that does not happen all the time and there are still cases where child victims are required to testify and be cross-examined.²⁹⁴

Discussion

The Taskforce was divided on the issue of whether or not an adult complainant in sexual offence proceedings should be exempt from giving evidence at committal in the same way as children. The DPP submitted that the same protection should be afforded to adult complainants and they should not be called at committal. He suggested that matters of detail in the evidence, such as dates and place “may be settled by consultation between the parties”.²⁹⁵ This approach was endorsed by NSW Health, Women’s Legal Services, VAWSU and Dr Cossins,²⁹⁶ who was of the view that if complainants are being called at committal as the rule, rather than the exception, then the ‘special reasons’ test was not striking a fair balance. She did not think that extending s 91(8) to adult complainants would produce greater unfairness to accused persons.

The Office for Women accepted that there would be occasions where it is appropriate for a complainant to be required to attend to give evidence.²⁹⁷ Detective Superintendent Kim McKay was of the view that given the number of adults giving evidence at committal the current test was not stringent enough. Victim’s Services expressed concern that the spirit of the legislation was not being met. A number of members indicated that they would prefer to have more accurate data with respect to the number of complainants being called to give evidence at committal before making recommendations on the best course to adopt.

Justice Buddin opposed any further incursions into the committal process. Magistrate Quinn agreed, stating that the committal process had an important place.²⁹⁸ Neither the Legal Aid Commission nor the Law Society thought s 91(8) should be amended to include adult sexual assault complainants.²⁹⁹ The Law Society suggested that now that Magistrates have an obligation to stop improper questioning pursuant to s 275A Criminal Procedure Act, cross-examination of complainants at committal proceedings would have to be more closely monitored.

Whilst it is acknowledged that giving evidence at committal is stressful for complainants, the CLRD is of the view that the committal serves a legitimate purpose in screening matters, refining issues, and ensuring that the accused receives a fair trial. In some cases, it will be appropriate for the complainant to be cross-examined; if there are issues that cannot be resolved between parties, or by obtaining a further statement from the complainant or other witnesses.

²⁹⁴ Legislative Council Standing Committee on Law and Justice: *Report on Child Sexual Assault Prosecutions*, Report 22, November 2002 at 80.

²⁹⁵ Submission DPP, 14 June 2005.

²⁹⁶ Submission, Women’s Legal Services and VAWSU

²⁹⁷ Submission Office for Women, 15 June 2005.

²⁹⁸ Oral contributions to discussions 22 June 2005.

²⁹⁹ Submissions Legal Aid Commission 17 October 2005, Law Society, 17 October 2005.

The role of the Magistrate where the parties consent to a victim of violence being called to give evidence at committal

If committal proceedings are retained and provision remains for a complainant to be called in certain circumstances, is there any way in which the provisions can be strengthened to ensure that complainants are not called to give oral evidence unless there are in fact special reasons?

Section 91(2) Criminal Procedure Act 1986 provides that the Magistrate must give a direction where the application is made by the accused person or the prosecutor, and the other party consents to the direction being given. Subsection (3) states:

In any other circumstance, the Magistrate may give a direction only if satisfied that there are substantial reasons why, in the interests of justice, the witness should attend to give oral evidence. A direction may not be given if the written statement has already been admitted in evidence.

Section 93 falls under the heading, 'Victim witnesses generally not to be cross-examined' and provides:

Despite section 91, in any committal proceedings in which the accused person is charged with an offence involving violence, the Magistrate may not, under that section, direct the attendance of an alleged victim of the offence who made a written statement unless the Magistrate is of the opinion that there are special reasons why the alleged victim should, in the interests of justice, attend to give oral evidence.

On one view, s 93 operates to provide a Magistrate with the discretion to refuse to direct a victim of violence to attend to give evidence, even where the parties consent to the witness being called. The provision is in a separate section of the Act, and the use of the words, '*despite s 91*', suggests the section creates an additional requirement that a Magistrate must be satisfied of special reasons, in order to direct the attendance of a victim of violence. On this view, s 91(2) has no application where the witness is the alleged victim. Magistrate Quinn was of the view that this was the correct interpretation of the legislation and that s 93 overrides s 91(2). The alternate view is that s 93 merely sets out the threshold test for calling an alleged victim at committal, and must be read in conjunction with s 91 so that a Magistrate must direct that the witness attend to give evidence if the parties have agreed to it.³⁰⁰

If s 93 merely sets the threshold test for calling victims of violence, and does not affect consent agreements, then it is left to the prosecution and defence to decide if a victim should be called. In practice, this decision will invariably fall to the prosecution as most applications to call victims at committal are made by the accused. The DPP Guideline 19 directs prosecutors to the extent that it is relevant and practicable, to have regard to the Charter of Victims Rights. Point 9 of the New South Wales Charter of Victims Rights, established by the Victim Rights Act 1996 states: *A victim should be relieved from appearing at preliminary hearings or committal hearings unless the court otherwise directs.*

Given the terms of the Charter, it is worth considering what role a Magistrate should assume where both parties seek a direction that the victim attend to give evidence. Should the Magistrate merely perform an administrative task and direct the witness attend, or should he or she act as a "gatekeeper" to ensure that the legislative provisions are implemented?

The Office for Women was concerned that the intent of the legislation was not being observed, and suggested there should be a more stringent legislative standard developed as well as an amendment to make it clear that a Magistrate has the discretion to refuse to direct the complainant to attend, even where the application is supported by both parties.³⁰¹

³⁰⁰ Such a view may be held because the provisions of the repealed s 48E. (1) For the purposes of committal proceedings, the Justice or Justices may give a direction requiring the attendance at the proceedings of a person who has made a written statement for the purposes of this Subdivision. The direction may be given on the application of the defendant or informant or on the motion of the Justice or Justices. (1A) The Justice or Justices must give the direction if an application is made by the defendant or the informant and the other party consents to the direction being given. (2) In any other circumstance, the Justice or Justices may give the direction only if: (a) in the case of a witness in proceedings that relate to an offence involving violence who is the alleged victim of the offence—the Justice or Justices are of the opinion that there are special reasons why, in the interests of justice, the witness should attend to give oral evidence, or (b) in any other case—the Justice or Justices are of the opinion that there are substantial reasons why, in the interests of justice, the witness should attend to give oral evidence.

³⁰¹ Submission Office for Women, 15 June 2005.

Similarly, Women's Legal Services and VAWSU agreed that a Magistrate should be required to actively determine whether special reasons exist for calling a complainant even if there is agreement between the parties. Associate Professor Stubbs agreed that ss 91 and 93 should be amended to clarify that a Magistrate does have the discretion to refuse to direct an alleged victim to give evidence. Detective Superintendent Kim McKay also supported this, if it would assist in limiting victim's attendance at court.³⁰² Victims Services supported a Magistrate having some discretion concerning the victim's attendance at committal, provided the Magistrate has clearly considered the Charter of Victims Rights.

The argument against giving the Magistrate a discretion to refuse to direct a witness attend to give evidence where both parties consent to the calling of the witness

While the issue of calling witnesses at committal is not expressly addressed in the Prosecution Guidelines, solicitors are directed to the provisions of the Charter in carrying out their functions. They should be mindful of the rights afforded to victims of violence when making decisions to consent to the calling of such witnesses at committal. Most importantly, the function of prosecuting criminal matters is entrusted to the DPP and his officers. It is arguable that for this reason decisions made by the prosecutor in fulfilling his or her obligation to ensure a fair trial for the accused, should be free from interference.

The DPP was of the view that an agreement between the parties should be sufficient for the victim to be called, as in an adversarial system it is the parties, not the court, who determine what issues will be litigated and how this will be done.³⁰³ The Law Society and Legal Aid Commission also supported this view, as in their experience the DPP takes its responsibility very seriously and does not lightly consent to the cross-examination of complainants. In their view, where the parties agree to a particular course then the judicial officer would need a very good reason to depart from this.

There are undoubtedly a number of difficulties with the manner in which the current legislation is framed. The majority of Taskforce members appear to be of the view that the legislation should make it clear that where the parties consent to a witness being called, a Magistrate must also be satisfied that special reasons in the interest of justice are made out before making an order for the victim to attend to give evidence. This raises real difficulties, where there are legitimate reasons for the prosecution to consent to the calling of the complainant, which may not be readily apparent to the Magistrate, who has only the written brief of evidence.

The parties to proceedings may be in a better position to determine this issue, particularly where they have sought to clarify matters between themselves or by obtaining further statements, but without success. What should be clear, however, is that in order to give effect to the spirit of the legislation, the parties should satisfy themselves that there are special reasons in the interests of justice for the witness to be called. This may be a better way of framing the legislation.

One further issue to consider in this context is the admissibility of the complainant's statement if he or she is to give evidence following an agreement by the parties. Section 91(4) of the Criminal Procedure Act currently provides that where a witness has been directed to attend committal, that witness' written statement is inadmissible (unless the direction that the witness attend is withdrawn, or the statement has already been admitted before the direction was given).

This rule leads to unnecessary wasting of court time, creates unnecessary stress for witnesses, and contradicts the practice—enshrined in s 91(7) of the Criminal Procedure Act—that a direction for a witness to attend will often be limited to cross-examination about certain aspects of his or her evidence. In practice, s 91(4) has the effect that a witness who attends committal must repeat the entirety of his or her written statement, including any parts relating to the crime that are distressing or embarrassing, even if the reason for directing the witness to attend is limited, for example, to the circumstances in which the witness identified the alleged offender.

If the committal process is retained, there should be legislative amendment to allow proper flexibility for a witness' statement or part of the written statement to be tendered as their evidence in chief. In addition, even contentious parts of the witness' statement may be given in writing where the Magistrate is satisfied that the interests of justice dictate that the witness should not be required to give that evidence orally at committal.

³⁰² Submission Detective Superintendent Kim McKay.

³⁰³ Submission DPP 14 June 2005.

Procedure where the accused is a child

Where a young person is charged with a serious children's indictable offence (s 61J, s 61JA or s 61K of the Crimes Act 1900); the Criminal Procedure Act 1986 applies to those proceedings. In committal proceedings, the prosecution evidence is tendered in written form, unless orders are made directing the attendance of the complainant or other witnesses to give evidence. The Magistrate determines if the evidence is capable of satisfying a jury that the young person has committed the offence adopting the same procedure as for adults, and if there is sufficient evidence the young person will be committed to stand trial.

Where the offence is not a serious children's indictable offence³⁰⁴, but an indictable offence, such as s 61I (sexual intercourse without consent), and the Prosecution seeks to have the young person dealt with "according to law"³⁰⁵, the provisions of the Criminal Procedure Act 1986 do not apply until:

- all the evidence for the prosecution has been taken;
- the court is of the view that the evidence is capable of satisfying a jury beyond reasonable doubt that the child has committed an indictable offence; and
- the court is of the view that the charge may not be properly disposed of in a summary matter: s.31(3) Children (Criminal Proceedings) Act 1987.

This means that a summary hearing must take place, involving the calling of all witnesses (including any victims of violence), before a determination can be made that the offence is to be dealt with "at law".³⁰⁶

Under the current procedure there is no opportunity for an application to be made under either ss 91 or 93 Criminal Procedure Act 1986 as all of the prosecution evidence has been adduced by the time a determination is made as to whether the matter is to proceed as a committal hearing. In addition, s 91(8) Criminal Procedure Act 1986, which prohibits the calling of a child sexual assault complainant, has no application whatsoever.

If a Magistrate determines that the matter is to be dealt with "at law", and the matter proceeds to trial, the entirety of the evidence is to be led again in the superior court. This means that all sexual assault complainants, whether they be an adult or child, will be required to give evidence on at least two occasions. Such a procedure is at odds with the policy that sexual assault complainants are to be relieved from giving evidence at preliminary hearings unless it is necessary to ensure a fair trial for the accused.

The legislative provisions that govern proceedings in the Children's Court also conflict with the protections afforded to victims of violence by the Criminal Procedure Act 1986. While it may be argued that there are different policy considerations regarding children being prosecuted under the criminal law, the Children (Criminal Proceedings) Act 1987 makes express provision for committal proceedings where a young person is charged with a serious children's indictable offence. The Act gives the Children's Court the jurisdiction to deal with the committal proceedings pursuant to the Criminal Procedure Act 1986.³⁰⁷

³⁰⁴ Serious children's indictable offences are: homicide, an offence punishable by imprisonment for life or 25 years, offences under s.61J (otherwise than in circumstances offence where the victim is under 16 years of age) or s 61K, offences involving the manufacture or sale of firearms carrying a maximum penalty of 20 years.

³⁰⁵ In the District Court or Supreme Court, and where the maximum penalty for the offence(s) applies.

³⁰⁶ Section 31 falls under the heading "*Hearing of charges in Children's Court*", Subsection (1) creates a presumption that charges will be dealt with summarily. This means that the matter will proceed as a summary hearing in which the prosecution presents its case by calling oral evidence of witnesses and/or by the tender of material. Subsection (2) is directed to the child electing to have the matter dealt with at law. The election can be made "*at any time during, or at the close of, the case for the prosecution*". Read with subsection (1), this may occur at any point during the summary hearing. Subsection (3) provides the Court with the power to order the matter proceed by way of committal, if "*after all of the evidence for the prosecution has been taken*" the court is of the opinion that the matter cannot properly be dealt with by the Children's Court. Read with subsection (1), this will take place only after all of the prosecution evidence has been called. Subsection (3) further provides that where the court is satisfied pursuant to (3)(b), the proceedings shall be dealt with in accordance with Divisions 2-4 of the Criminal Procedure Act 1986, and as if the court had formed the opinion referred to in s 62 of that Act.

³⁰⁷ s 28(1)(b) Children (Criminal Proceedings) Act 1987.

Where the Prosecution seeks to have the child dealt with “at law”, should the procedure be modified so as to spare sexual offence complainants from giving evidence at a preliminary hearing?

The issue arises as to whether the procedure in the Children’s Court ought to be modified to accord with the protections provided for victims of violence in the Criminal Procedure Act 1986. Prosecutors routinely make decisions regarding the jurisdiction in which to prosecute an offence.³⁰⁸ Where the prosecutor indicates an intention to deal with the child “at law”, it is suggested that it may be more efficient if the Magistrate determined that issue by reference to the brief of evidence. If, after considering the brief, the Magistrate forms the view that the court lacks adequate sentencing scope then the provisions of the Criminal Procedure Act 1986 governing committal proceedings could apply. The young person could then make application under s 91 or s 93 to cross-examine a witness.

If the Magistrate is of the opinion that the Children’s Court can adequately deal with the matter, then a summary hearing will take place. By adopting a procedure whereby the Magistrate determines the jurisdictional question on the written evidence, complainants may be spared from giving evidence in preliminary hearings in the Children’s Court. This may save court time and associated costs of conducting summary proceedings for the purpose of committal of the young person to a superior court.

One argument against this, is that evidence disclosed in the written statements may not be given at trial; it may be weakened following cross-examination; or it may disclose a lesser number of charges or less serious charges. Some may argue it is impossible for a Magistrate to make an objective assessment of the nature of the evidence without hearing and seeing it. It must be borne in mind that Magistrate’s routinely do this in the Local Court when conducting committal proceedings. If the above procedure is adopted, there would be provision for the young person to make an application for witnesses to be called under the Criminal Procedure Act 1986, if the Magistrate directs that the matter be dealt with “at law”.

In addition, if a decision is made to deal with the young person “according to law” and he or she is convicted, the superior court may redetermine whether to deal with the young person under the Children (Criminal Proceedings) Act 1987 or according to law for the purposes of sentencing. In determining this question a court must have regard to:

- the seriousness of the indictable offence concerned;
- the nature of the indictable offence concerned;

- the age and maturity of the person at the time of the offence and at the time of sentencing;
- the seriousness, nature and number of any prior offences committed by the person; and
- such other matters as the court considers relevant.

Alternatively, the court may remit the matter to the Children’s Court for punishment. These provisions would adequately address any situation where the evidence adduced in the superior court is vastly different to that on which the Magistrate made a determination that the young person be dealt with “at law”. During 2005 a separate Working Party examined issues in relation to the Children’s (Criminal Proceedings) Act. As part of this process the Working Party also examined whether the relevant DPP prosecutor should be given discretion to elect to have a certain class of offences, including certain sexual offences, dealt with according to law. Any decision made by the DPP to elect could be re-viewable by the Children’s Court if necessary. The recommendations of the working party are yet to be finalised. It would be prudent to revisit this issue when the Working Party has determined its position.

³⁰⁸ The Criminal Procedure Act 1986 sets out in Tables 1 and 2 to Schedule 1, offences to which the prosecution may elect to deal with on indictment, See also Guideline 8, DPP Prosecution Guidelines

CLRD RECOMMENDATIONS:

- 22 Committal proceedings should not be abolished in sexual offence proceedings.
- 23 The “special reasons” test in s 93 is an appropriate threshold test to be met to require a victim of violence to give evidence at committal.
- 24 Section 91(8) should not be amended to include adult sexual offence complainants. The “special reasons test” in s 93 is appropriate and strikes a fair balance between the rights of the complainant and the accused.
- 25 Sections 91 and/or 93 should be amended to clarify that even where there is consent between the parties, if a Magistrate is not satisfied that there are special reasons in the interest of justice for the complainant to be called at committal the complainant must not be called to give evidence.

TASKFORCE RECOMMENDATION:

- 26 Section 91(4) should be amended to clarify that the statement of a witness directed to attend to give evidence at committal may be admissible as their evidence in chief, where the parties consent or the Magistrate is satisfied that it is in the interests of justice.

Chapter 5

Tendency and coincidence evidence

Sexual offences are often difficult to prosecute, as in most cases the only direct evidence of the offending conduct is evidence given by the complainant. Evidence from other witnesses who have experienced similar sexual misconduct by the same accused person therefore assumes particular importance in a sexual assault trial as it adds weight to the credit of the complainant, and may show that the offence was more likely to have occurred because the accused engaged in similar conduct on another occasion. This type of evidence is often referred to as tendency evidence. The admissibility of this kind of evidence is fertile ground for legal argument. The decision of whether or not to admit tendency and/or coincidence evidence has an enormous impact on whether multiple complainants can be called at the same trial, or whether separate trials are ordered. The consequence of separate trials are that complainants may be required to give evidence a number of times, and that the jury is unaware of multiple allegations against the accused.

What is tendency evidence?

Tendency evidence is evidence that shows that because a person has acted in a certain way on previous occasions, the person is more likely to have acted in a similar way on another occasion. At common law, it is known as “propensity evidence”. For example, in sexual assault prosecutions, tendency evidence can be other acts by the accused against the complainant or acts by the accused against another person, which are of a similar nature and show a pattern of behaviour. It may also be used in sexual assault cases and other matters to show that the accused has a particular *modus operandi*³⁰⁹ or system. Tendency evidence is not admissible unless the evidence has, either on its own, or in combination with other evidence, significant probative value.³¹⁰

³⁰⁹ See *R v Fletcher* [2005] NSWCCA 338 where this issue was discussed in the context of sexual offences against children and the allegation of ‘grooming’ made by the Crown. See also *R v Milton* [2004] NSWCCA 195, which involved the accused fostering relationships with 2 boys the same age, employing them and giving them drugs as part of a system. See also *R v Ellis* – where tendency went to the modus operandi of a series of break and enters in rural NSW.

³¹⁰ s 97 *Evidence Act* 1995 “Significant probative value” is not defined in the Act, however, “probative value of evidence” is defined, and means the extent to which the evidence could reasonably affect the finding of a fact.

What is coincidence evidence?

Coincidence evidence is evidence that shows that a particular act was not an isolated event, nor occurred by accident. At common law, it is known as “similar fact evidence”:

The law is that sometimes there may be such a striking similarity between different events that a jury may safely conclude that they did not all happen by coincidence. Putting it another way, the circumstances of the events are so remarkably similar that it would be an affront to common sense to conclude that they all happened naturally and coincidentally.³¹¹

According to s 98 Evidence Act 1995, coincidence evidence is not admissible unless it has, either on its own or in combination with other evidence, significant probative value. For evidence to fall within s 98, it must meet the following test of “related events” in that:

- the events are substantially and relevantly similar; and
- the circumstances in which the events occurred are substantially similar.

There will be occasions when strikingly similar evidence will qualify as both tendency and coincidence evidence.³¹²

The additional test for tendency and coincidence evidence

The courts have long held the view that tendency and coincidence evidence is dangerous in criminal trials³¹³, as it permits a person to be judged by their prior conduct. For example:

- it creates an undue suspicion against the accused and undermines the presumption of innocence;
- tribunals of fact, particularly juries, tend to assume too readily that behavioural patterns are constant and that past behaviour is an accurate guide to contemporary conduct;
- common assumptions about the improbability of sequences are often wrong, and when the accused is associated with a sequence of deaths, injuries or losses, a jury may too readily infer that the association ‘is unlikely to be innocent’; and
- in many cases the facts of the other misconduct may cause a jury to be biased against the accused. (This may be particularly so in a crime such as child sexual assault).

Due to the dangers of tendency and coincidence reasoning, s 101 of the Evidence Act 1995 imposes an additional restriction on evidence adduced by the prosecution. This requires that: “*the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant*”.³¹⁴

³¹¹ *R v Folbigg* [2005] NSWCCA 23, at [98]

³¹² For further examination of this see: Justice Simpson in *R v Nassif* [2004] NSWCCA 433: “...the Crown may wish to proceed by arguing that, if a jury found the applicant guilty of any one count, they could use his guilt of that offence in considering his guilt of any other offence, as evidence of his tendency to commit such crimes; and successive findings of guilt as accumulating or strengthening evidence of such a tendency. That would be true tendency reasoning. The more numerous the claims of tendency evidence, and the more specific, the stronger the probative value, and thus the more likely the admission of the evidence.... Alternatively, the Crown might argue, in terms of s 98, that the applicant was guilty of all offences because of the improbability of the events occurring coincidentally. In this respect the Crown would be entitled, under ss(2), to point to the similarities of the events, and the similarities of the circumstances in which they occurred. Again, the more numerous the items of similarity, and the more precise, the stronger the inference of improbability and the more likely the admission of the evidence.”

³¹³ To have a prejudicial effect, evidence must be shown to constitute a danger that the tribunal of fact will use the evidence upon a basis logically unconnected with the issues in the case. An example is that a jury might reason that they could accept the evidence of the complainants merely because of the similarity of their accounts: *R v Milton* [2004] NSWCCA 185 at [32]

³¹⁴ s 101 does not apply if the prosecution leads tendency or coincidence evidence to explain or contradict tendency or coincidence evidence adduced by the accused: s101(3) and (4). The requirement for the court to exclude all evidence unfairly prejudicial to the defendant, pursuant to s 137 also applies. The construction of s 101 has recently been considered by Justice Simpson in *R v Fletcher* [2005] NSWCCA 338 who said: “To my mind, s 101(2) presents real problems of construction. It has generally been treated as an exclusionary rule: see for example, *R v Ellis* [2003] NSWCCA 319. However, in my opinion, there is a real question as to whether s 101(2) is indeed a provision about admissibility. It is not so framed. It proceeds upon the basis that the evidence has been adduced....”

1. Is the test for the admission of tendency/ coincidence evidence appropriate?

In November 2003, the NSWCCA gave an important decision in *R v Ellis* [2003] NSWCCA 319 that clarified the test to apply in determining the admissibility of tendency and coincidence evidence pursuant to s 101 Evidence Act. Prior to this, there was uncertainty as to whether the common law test in relation to the admission of tendency³¹⁵ and coincidence evidence still applied (known as the *Pfennig* test). The *Pfennig* test said that tendency and coincidence evidence was not to be admitted unless there was “no reasonable explanation other than the implication of the accused in the offence charged”.³¹⁶

In *R v Ellis* [2003] NSWCCA 319 a five judge bench was specially constituted to resolve the conflict of authorities as to whether, in determining the admissibility of tendency and coincidence evidence, the trial judge is required to apply the stringent common law test in *Pfennig*, or the less onerous balancing test in s 101(2) of the Evidence Act 1995. The Court of Criminal Appeal unanimously agreed that the statutory test applied. Spigelman CJ said at [89]:

The reasoning in *Pfennig* applied the “no rational explanation” test to a common law principle that probative value outweighs prejudicial effect. That reasoning is, in my opinion, inapplicable to a statutory test that probative value *substantially* outweighs prejudicial effect.

The Court held that the statutory regime for the admissibility of tendency and coincidence evidence in the Evidence Act 1995 was intended to cover the field to the exclusion of the common law.³¹⁷ Special leave to appeal to the High Court was rescinded and in revoking leave, the High Court confirmed the decision of the NSWCCA.

What if the defence raise the possibility that the allegations have been concocted?

The Taskforce considered whether the decision of *Ellis*, alleviates some of the concerns previously raised with respect to the operation of s 101, particularly where the accused raises the possibility that the allegations have been “concocted”.³¹⁸ At common law, as determined in *Hoch v The Queen* (1988) 165 CLR 292, similar allegations by another complainant are not admissible if they are “reasonably explicable on the basis of concoction”, that is, if it is reasonably possible that the complainants got together and concocted the allegations or there was cross-contamination.

The rationale for this rule is that such a possibility will mean that there is “a reasonable explanation” for the evidence other than the guilt of the accused. As a result, many trials involving multiple complainants have been separated.³¹⁹

Mr Odgers submits that now that the High Court has confirmed that the *Pfennig* test is not applicable in NSW, the rationale for the decision in *Hoch* falls away. It is no longer permissible to hold such evidence inadmissible on the basis that there is “a reasonable explanation” for the evidence other than the guilt of the accused. However, he also submitted that there is good reason to believe that NSW courts will continue to apply *Hoch*, on the basis that the reasonable possibility of joint concoction or cross-contamination necessarily means that the evidence lacks “significant probative value” for the purposes of ss 97 or 98 or lacks sufficient probative value for the purposes of substantially outweighing any prejudicial effect from the evidence under s 101.³²⁰

³¹⁵ Referred to as propensity evidence under the common law.

³¹⁶ *R v Pfennig* (1995) 182 CLR 461 at 481-482

³¹⁷ *R v Ellis* (2003) NSWCCA 319

³¹⁸ Such concerns were raised by the Australian Law Reform Commission in its Report 84: *Seen and Heard Priority for Children in the Legal Process* (1997). The ALRC and HREOC were concerned that by disallowing tendency and coincidence evidence that supports a complainant’s version, a real injustice can result where the complainant’s credibility is attacked, because such evidence is kept from the jury. As a result, they recommended that the rules against tendency and coincidence evidence be reviewed in light of the hardship they cause to child victims. The NSW Legislative Council Standing Committee on Law and Justice: *Report on Child Sexual Assault Prosecutions* (November 2002) also recommended that in the prosecution of child sexual assault offences, tendency evidence relevant to the facts in issue should be admissible and not affected by the operation of ss 97, 98 and 101, effectively removing child sexual assault prosecutions from the Evidence Act regime. Where such evidence was admitted a court must apply the balancing test set out in s137, take into account the matters referred to in s 192, and should also have regard to the nature of other evidence in the proceeding, the public interest in admitting all relevant evidence and the likelihood of any harm that may be caused by excluding the evidence. The Committee recommended that in applying the balancing test under s 137, the court should not take into account the prior relationship between the complainant and other witnesses, in a clear attempt to remove the difficulties previously encountered due to the concoction test.

³¹⁹ Submission Odgers SC.

³²⁰ Submission Odgers SC; (see *R v Colby* [1999] NSWCCA 261 at [107]; *W v The Queen* (2001) 189 ALR 633 at [99]; *R v OGD (No 2)* (2000) 50 NSWLR 433 at [77]; *Tasmania v S* [2004] TASSC 84; *Tasmania v Farmer* [2004] TASSC 104)

Other cases

In *R v Colby* (decided before *Ellis*) the court determined the issue of concoction in accordance with the balancing exercise required under s 101(2). The court held that “*a real possibility of concoction must exist before the disputed evidence is rendered inadmissible.*”³²¹ In his judgment President Mason agreed with the approach of Justice Ambrose in *R v Robertson*³²² that the “possibility” test required by *Hoch* refers to a *reasonable possibility as distinct from a speculative or conjectural one*.

...Stated shortly it is necessary for the trial judge to determine whether there is a real chance of concoction or contamination rather than a merely speculative chance. Similar facts could not be reasonably explained on the basis of concoction unless there was a real chance of it...³²³

Following *Ellis*, a decision of the Supreme Court of Tasmania dealt with the issue of alleged concoction. The relevance of the “possibility” of concoction to the balancing test in s 101 was considered by Underwood J, who referred to the judgment of *Ellis* and commented that:

...it seems to me that [in] the proper exercise of the balancing act that is demanded by the Act, s 101(2) requires that evidence of possibility of concoction be taken into account, and if there is a reasonable possibility of concoction, then the prejudicial effect will ordinarily outweigh the probative value of the tendency or coincidence evidence.³²⁴

Underwood J noted that there needs to be ‘*a reasonable possibility, based upon some factual foundation and not merely fanciful possibility*’, and that the question for the judge is whether there is ‘*a real chance of concoction or contamination rather than a merely speculative chance*’. His Honour held a *voir dire* on the issue and in light of the evidence received on the *voir dire*, concluded that there was no rational factual basis to suggest a possibility of concoction.³²⁵

In the recent case of *R v Fletcher* [2005] NSWCCA 338, the NSWCCA considered the admissibility of tendency and coincidence evidence. In passing Simpson J observed at [60]:

Of course, decisions such as *Hoch* no longer govern the admissibility of evidence of tendency (see *Ellis*). But that does not necessarily render cases such as *Hoch* irrelevant. There is no reason why the reasoning that led the High Court to accept the admissibility of similar fact evidence in appropriate cases before the enactment of the Evidence Act should not guide the reasoning process in the evaluation of whether tendered evidence is capable of having, or would have, significant probative value.

Where the prosecution seeks to adduce tendency or coincidence evidence, and ‘concoction’ is raised as an explanation by the defence, how will this affect the balancing exercise under s 101(2)? If the decision in *Hoch* continues to have application in either an assessment of ‘significant probative value’ or alternatively, as part of the balancing exercise undertaken in s 101, then it may be argued that it will continue to be difficult to satisfy the court that tendency and coincidence evidence should be admitted where the defence raises a possibility of concoction between the alleged victims.

Calls for reform to abolish the common law concoction test

The NSW Adult Sexual Assault Interagency Committee has argued that “*It is not in the public interest for wider patterns of sexual abuse or uncharged sexual conduct on other parties to be held to such strict tests of admissibility...*”. With respect to the difficulties experienced due to the concoction test, they submitted:

These tests are....difficult to satisfy as the evidence must be excluded if there is a reasonable possibility of concoction on the part of the witness: *R v OGD (No. 2)*.³²⁶ At present this test can be satisfied with little proof of the concoction, (apart from the fact that they have some relationship, including merely knowing each other, or other facts such as attending the same school, sports group etc). Further, the concoction test needs to accommodate the social reality that complainants will often know each other and will have some form of relationship.³²⁷

They proposed that ss 97 and 98 be amended to make tendency evidence and coincidence evidence prima facie admissible if relevant to a fact in issue in a sexual assault trial; and a new section should be introduced into the Evidence Act abolishing the ‘concoction’ test, and creating a new higher threshold to apply when determining whether concoction has occurred.

³²¹ *R v Colby* [1999] NSWCCA 261

³²² (1997) 91 A Crim R 388

³²³ *Ibid*, at 409

³²⁴ *Ibid*, at [11]

³²⁵ *Ibid*, at [33]

³²⁶ (2000) 50 NSWLR 433

³²⁷ *A Fair Chance: Proposals for Sexual Assault law Reform in NSW*, November 2004, at 8.

The Australian Law Reform Commission has also observed that the additional requirement under s 101 Evidence Act is a major impediment to the admission of tendency and coincidence evidence of child witnesses. The prejudice that must be outweighed is the *possibility that the evidence of child victims is affected by concoction*. Often where an accused is charged with offences against more than one alleged child victim, the children will know each other. In referring to the decision of *Hoch v The Queen*,³²⁸ the ALRC noted this gives rise to a reasonable possibility of concoction of their evidence, rendering evidence of an offence against one child inadmissible in the trial of another.³²⁹

The ALRC asked:

Should s 101 of the uniform Evidence Acts be amended to provide that, where the probative value of tendency or coincidence evidence substantially outweighs any prejudicial effect it may have, it must not be ruled inadmissible merely because it may be the result of concoction, collusion or suggestion? If so, should this provision relate only to proceedings involving offences by the same accused against multiple child victims, or should it apply generally to all offences?

Should there be special provisions applying to the revelation of other incidents where a series of sexual offences are alleged by child complainants, or any complainants?

The ALRC considered alternative approaches to the admissibility of this type of evidence as adopted in Queensland and Victoria, however, at the time of writing, their final report had not been made public.

Queensland

Queensland makes specific allowance for the admission of tendency and coincidence evidence despite the fact that there may be a possibility of concoction. The possibility of collusion or suggestion is only relevant to the weight to be given to the evidence, which is ultimately a question for the jury.

Section 132A of the Evidence Act 1977 (Qld) provides:

In a criminal proceeding, similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the ground that it may be the result of collusion or suggestion, and the weight of that evidence is a question for the jury, if any.

The provision has been described as countering '*the dire consequences of the mere possibility of collusion, both evidentially and in the framing of indictments*' that were created by the common law test.³³⁰ Evidence is not

rendered inadmissible simply because there is a possibility that the evidence is the result of collusion or suggestion. The balance between probative value and prejudice is to be undertaken by assuming that the evidence is true.³³¹ An alternative construction of the legislation is that there may be situations in which the court will find, that because there is a 'real possibility' of concoction, the evidence will be deprived of the required probative value.³³² Indeed, the Queensland Law Reform Commission is of the view that s 132A will only apply where the possibility of concoction is merely speculative³³³. In practice, it may be that the test under s 132A provides no greater likelihood of admissibility of tendency or coincidence evidence than the Evidence Act (NSW).

Victoria

Victoria has taken an alternative approach. Section 398A Crimes Act 1958 (Vic) which has been in place since 1997, provides:

(2) Propensity evidence relevant to facts in issue in a proceeding for an offence is admissible if the court considers that in all the circumstances it is just to admit it despite any prejudicial effect it may have on the person charged with the offence.

(3) The possibility of a reasonable explanation consistent with the innocence of the person charged with an offence is not relevant to the admissibility of evidence referred to in sub-section (2).

(4) Nothing in this section prevents a court taking into account the possibility of a reasonable explanation consistent with the innocence of the person charged with an offence when considering the weight of the evidence or the credibility of a witness.

(5) This section has effect despite any rule of law to the contrary.

Any category of propensity evidence will be inadmissible unless its probative value is sufficiently great to make it just to admit the evidence despite any prejudicial effect it may have on the accused.³³⁴ A judge is to assess the probative value of the evidence, on the assumption that it is true, for the purpose of deciding whether it is admissible. However, the evidence must have a high probative value in order for its admission to be just.³³⁵ Questions of collusion and unconscious influence are left to the jury.

³²⁸ (1988) 165 CLR 292, a case that followed the decision in *Pfennig*

³²⁹ Australian Law Reform Commission, Discussion Paper 69, Review of the Uniform Evidence Acts (2005) 124-125

³³⁰ *R v S* [2001] QCA 501, at [32]

³³¹ Queensland Law Reform Commission (2000) *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (Report No.55 Part 2), Queensland Law Reform Commission: Brisbane

³³² *Ibid*, at 369

³³³ *Ibid*.

³³⁴ *R v Best* [1998] 4 VR 603 at 607

³³⁵ *R v Best*, above, at 619.

The Victorian Law Reform Commission considers that the approach in *R v Best* “appears to indicate that, as long as there is sufficient similarity between the various counts, propensity evidence that may not have previously been admissible is now being treated as admissible in Victoria”.³³⁶ The VLRC reports that it is now less common for sex offences involving more than one complainant to be tried separately in Victoria, but also reports that counts are still commonly separated.³³⁷

Australian Law Reform Commission Discussion Paper 69

In their recent review of the uniform Evidence Acts, the Commissions (ALRC, NSWLRC and VLRC) undertook a comparison of the rules of admissibility of tendency and coincidence evidence under the uniform Evidence Acts and those under s 398A Crimes Act 1958 (Vic). The Commissions preferred the approach of the uniform Evidence Acts as compared to the Victorian provisions.³³⁸ On balance, it was suggested that there is a greater risk of wrongful conviction under s 398A and the requirements of the uniform Evidence Acts appropriately address that issue without raising the bar too high.³³⁹

The Commissions found that the impact of the two approaches on the fact-finding process is difficult to assess on the basis of current authority, and it cannot be said that the two approaches have produced significantly different outcomes. However, in the Commissions’ view, the uniform Evidence Acts better serve a number of other policy objectives, notably: a fair trial; minimising the risk of wrongful conviction; accessibility; predictability; cost and time; and uniformity.

In its Discussion Paper 69, the ALRC preferred the reasoning of Spigelman CJ in *Ellis* as a matter of construction and as a matter of policy. They did not propose any amendment to s 101.³⁴⁰ It should be noted that this approach was supported in the majority of submissions and consultations addressing the issue.

Does *Hoch* present a fundamental difficulty or is it a matter of trial procedure?

The DPP submitted to the Taskforce that anecdotally it would appear that the decision of *R v Ellis* has not changed the way in which tendency and coincidence evidence is being admitted at trial. Additionally, most trials involving multiple complainants continue to be separated. He submitted that legislative change is needed, and that s 398A Crimes Act (Vic) is the preferred legislative model to implement in NSW.³⁴¹

Detective Superintendent Kim McKay was of the view that recommendations advanced by the NSW Adult Sexual Assault Interagency Committee should be adopted, that is, introducing a higher threshold test to be applied when considering the issue of the possibility of concoction. Whilst appreciating that the decision in *Ellis* may go some way to assisting the use of tendency and coincidence evidence in trials, she supported monitoring of tendency cases to see whether there was any change in practice to such evidence being admitted. She submitted that serious consideration should be given to requiring Judges to test the facts in relation to ‘concoction’ before a determination is made as to the admissibility of the evidence.

Women’s Legal Services NSW agreed that some of the concerns about s 101 may have been alleviated by the decision in *Ellis*, however, they were still concerned with continued application of the ‘concoction test’. In their view it is very common for an accused person to commit offences against more than one person. A child sex offender may have assaulted many children who know each other. In their view s 101 of the Evidence Act is currently interpreted in such a manner that the simple fact that children know each other may bring a reasonable possibility of ‘concoction’ to their evidence, resulting in highly probative and corroborative evidence being excluded. Women’s Legal Services submitted that the unique features of sexual assault offences and child sexual assault offences require unique legislative solutions. These solutions must reflect the realities for sexual assault complainants, and the fact that complainants will often have some form of connection or relationship with each other. Women’s Legal Services NSW supported the introduction of a new ‘higher threshold test’ to be applied where concoction is raised by the defence.

Mr Stephen Odgers SC advised that it was his personal view that *Hoch* was wrongly decided and that the Evidence Act should be amended to over-ride it. In his view the definition of “probative value” in the Dictionary to the Act should be qualified, at least in this context. Probative value is defined as: “the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.”

³³⁶ Victorian Law Reform Commission (2001), *Sexual Offences: Law and Procedure (Discussion Paper)*, Victorian Law Reform Commission: Melbourne, at 135

³³⁷ *Ibid.*, at 136

³³⁸ ALRC Discussion Paper 69, *Review of the Uniform Evidence Acts* (2005) at [10.118]

³³⁹ ALRC Discussion Paper 69, *Review of the Uniform Evidence Acts* (2005) at [10.112]

³⁴⁰ ALRC Discussion Paper 69, *Review of the Uniform Evidence Acts* (2005) at [10.48]

³⁴¹ Submission DPP, 27 September 2005.

He submitted that s 94 of the Act should have the following sub-section added to it:

(4) For the purposes of this Part, the probative value of the evidence of a witness is to be determined on the basis that it will be accepted.

According to Mr Odgers SC, when properly interpreted, this provision should have the effect of over-riding *Hoch*, since the trial judge will be required to assume that the evidence of the various complainants is reliable for the purposes of applying ss 97 and 98 and s 101.

The Law Society opposed any change to the current tests for admissibility of tendency and coincidence evidence and submitted that neither the Victorian or Queensland models should be adopted. In their view the admission of tendency or coincidence evidence is inherently prejudicial to an accused. The decision in *Ellis* is clear and therefore there is no need for further diminution of the threshold test in this area. Despite this position, the Law Society and Legal Aid Commission both supported the establishment of a working party to monitor the effect of *Ellis*.

Should there be a clear requirement to conduct a voir dire?

The NSW Criminal Trials Bench Book states:

When considering whether the probative value of the respective evidence is outweighed by the danger of unfair prejudice to the accused under s 101, the trial judge should explain what was unfairly prejudicial about the evidence and why the prejudice was such that it mandated the rejection of the evidence, rather than simply the giving of directions or warnings to the jury.³⁴²

The Bench Book states that special care must be exercised by a trial judge in sexual assault cases, where the indictment contains separate counts involving more than one alleged victim. However, it suggests that a voir dire is not necessary in order to rule on this issue.³⁴³

This is consistent with what was said in *R v Hoch*. Mason CJ, Wilson and Gaudron JJ agreed that:

It is not a matter that necessarily involves an examination on a voir dire. If the depositions of witnesses in committal proceedings or the statements of witnesses indicate that the witnesses had no relationship with each other prior to the making of the various complaints, and that is unchallenged, then, assuming the requisite degree of similarity, commonsense and experience will indicate that the evidence bears that probative force which renders it admissible. On the other hand, if the depositions or the

statements indicate that the complainants have a sufficient relationship to each other and had opportunity and motive for concoction then, as a matter of common sense and experience, the evidence will lack the degree of probative value necessary to render it admissible. Of course there may be cases where an examination on the voir dire is necessary, but that will be for the purpose of ascertaining the facts relevant to the circumstances of the witnesses to permit an assessment of probative value of the evidence by reference to the consideration whether, in the light of common sense and experience, it is capable of reasonable explanation on the basis of concoction. It will not be for the purpose of the trial judge making a preliminary finding whether there was or was not concoction.

Justices Brennan and Dawson also considered this issue, however, they appeared to give more emphasis to the importance of holding a proper inquiry in these circumstances:

In this case, the trial judge did not examine on a voir dire whether the similar fact evidence might be accounted for by a cause common to the witnesses and it is therefore a matter of speculation whether he would have excluded the evidence if a voir dire had been conducted. Was it incumbent on the trial judge to examine the evidence on a voir dire? It is not always necessary for a trial judge to do so. Whether a voir dire is necessary depends upon the state of the evidence disclosed on the depositions and on the issue for the judge's determination...a duty to determine whether similar fact evidence is to be accounted for by a cause common to the witnesses arises when the circumstances of the case raise a real question. Here, his Honour identified the circumstances of association between the complainants which plainly raised the question whether there was a real chance that they had put their heads together to concoct their allegations. That is not to say that a trial judge should lightly conclude that there is a "real chance" of conspiracy among complainants in sexual cases, whether children or adults. Contact or antecedent friendship between complainants may be quite insufficient to found such a conclusion. But the circumstances of their contact or friendship may warrant an inquiry whether there was a real chance that they had agreed to concoct their allegations. When such circumstances appear, the judge must inquire.

³⁴² *R v Harker* [2204] NSWCCA 427 at [58]

³⁴³ It is of note that the Bench Book gives the following guidance to trial judges: "In such circumstances, the judge is obliged to reject tendency or coincidence evidence unless he or she is satisfied that there is no possibility that it was the product of concoction. This question need not necessarily involve an examination on the voir dire. It may be appropriate in many cases to resolve the question by perusal of the depositions in the committal proceedings or the statements of witnesses. If the possibility of concoction exists, then separate trials should be ordered: *Hoch v The Queen* (1988) 165 CLR 292.

In their view, the failure of the trial judge to conduct this level of inquiry to determine whether there was a real chance of a conspiracy between the complainants to concoct their allegations was an error in the conduct of the trial. Whilst the same view is not expressed in the majority, it would appear from the reasoning of Brennan and Dawson JJ that there are good and sound reasons to conduct a voir dire before determining such issues.

Members of the Taskforce acknowledged that often complainants will know each other, for example, they may be members of the same family, school, or sporting teams. If there is no legislative amendment to remove the common law test devised in *Hoch*, members agreed that separating proceedings on the basis that there is a “possibility” of concoction is not satisfactory; instead a proper inquiry should be held into whether there is a “real possibility” that concoction or contamination has occurred. It is uncertain whether there is a need for legislative clarification that this evidence ought to be heard on a voir dire. It may be possible to achieve that goal by utilising the Bench Book to state that oral evidence should be received when determining this issue. Alternatively, s 189 of the Evidence Act in relation to voir dires could be amended to make it clear that this inquiry should take place on the evidence of the witnesses where concoction is raised as a basis for excluding tendency and coincidence evidence.

Discussion

The majority of criticism of the tests for admissibility of tendency and coincidence evidence pre-date the decision of *Ellis*. It is possible that the decision of *Ellis* may alleviate some of the concerns previously raised about the stringency of the tests applied to the admission of tendency evidence. However, the main complaints in this area of the law are directed to the problems associated with cases where the defence raises the possibility of joint concoction, and the application of the test in *Hoch*. It is by no means clear how the law in this area will develop.

It may be argued that whether or not there is a real possibility that the evidence is the product of joint concoction is a matter of fact to be entrusted to the jury. Invariably determining the probative value of this kind of evidence involves an assessment of credit. As such, should this not be left as a matter for the jury to determine, with appropriate warnings as to how they can use such evidence? The approach devised by Mr Odgers SC therefore has appeal, particularly as it would relate to all offences, and would not be limited to sexual offences alone.

However, concerns remain as to whether legislative intervention in this area may unfairly prejudice an accused person and erode the presumption of innocence. Mr Richard Button SC, Public Defender, articulated his concerns before the Legislative Council Standing Committee in 2002.

It is fundamental to our system that if a person is accused of a crime, except in exceptional circumstances, evidence of other crimes said to have been committed by that same person will not be led against them....That is a rule of fairness and freedom from prejudice in front of juries. And it is even more important, I think, if the allegations are unproven or not admitted by the accused. The general exception is when there is a striking similarity between the allegations...and clearly that is predicated on the lack of contact between the complainants, because if there has been contact the striking similarity loses its force...³⁴⁴

Such concerns are echoed in the submissions of the NSW Law Society and Legal Aid Commission. The principle that underlies the common law test relating to admissibility of propensity or similar fact evidence, is to forbid evidence that suggests that the accused is a person who commits certain types of crimes, or is of bad character. It is this type of evidence that creates prejudice in the minds of the jury against him or her. Great care therefore needs to be taken to ensure that appropriate protections exist to ensure a fair trial. If there is a real possibility that the evidence has been concocted or has been the product of collusion, and there is evidence to support this, perhaps the law should err on the side of caution, and in favour of the accused who is presumed innocent, so as to exclude the evidence. Once the evidence has been admitted it is difficult to tell the jury not to rely upon it, and there may be a concern that the jury will engage in a process of reasoning “that where there is smoke there must be fire”.

Unless there is clear evidence to show that the current tests under the Evidence Act continue to operate in such a stringent manner to exclude relevant and significantly probative tendency and coincidence evidence, it is recommended that the current tests be retained. Cases involving the admission of tendency and coincidence reasoning should be monitored closely, with the assistance of the DPP, to see whether following the decision in *Ellis*, there needs to be legislative amendment to clearly over-ride the decision in *Hoch*. If so, this issue may be revisited.

³⁴⁴ Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault*, (2002) at 15.

Recommendation

At this point in time, the Taskforce recommends that the application of *R v Ellis* in sexual assault prosecutions be monitored for 12 months. Since the NSWCCA decision, there has been insufficient time in which to ascertain whether the common law test in *Hoch* is impacting on assessments of whether evidence has significant probative value pursuant to sections 97 and 98, or whether the probative value of evidence outweighs any prejudicial effect pursuant to section 101.

Legislative amendment to counter the effects of *Hoch* at this time would be premature. It may be that since the decision of *Ellis* the test in *Hoch* is not affecting the admissibility of tendency and coincidence evidence. In addition, it is desirable to await the recommendations of the Australian, Victorian and New South Wales Law Reform Commissions review of the Uniform Evidence Acts before embarking upon statutory change.

If after a 12 month period, significant probative tendency and coincidence evidence is being excluded because of the continued application of *Hoch*, there may then be merit in considering legislative amendment similar to that proposed by Mr Odgers SC.

It is further recommended, in the meantime, that the Bench Book be amended to provide strong guidance that a proper inquiry should be held, including the receiving of oral evidence to determine whether there is a real possibility of concoction before making a ruling on the admissibility of tendency or coincidence evidence. Relying upon the evidence contained in statements, depositions or JIRT tapes alone, may not be sufficient to properly rule on this point.

TASKFORCE RECOMMENDATIONS:

- 27 The threshold test of “significant probative value” is an appropriate test in ss 97 and 98 Evidence Act 1995 (NSW).
- 28 Section 101 Evidence Act 1995 (NSW) strikes an appropriate balance in determining admissibility of evidence, for the reason that his type of evidence has great potential to cause prejudice.
- 29 A working party should be established to monitor the impact of *R v Ellis* on the admissibility of tendency and coincidence evidence in sexual assault trials, with particular focus on exclusion of evidence on the basis of concoction. The Working Party should report to the Attorney General within 12 months.
- 30 The Bench Book should be amended to provide clear guidance on the need for an inquiry as to whether there is a real possibility of joint concoction where the defence raise this as a basis to exclude tendency and/or coincidence evidence.

2. Separate trials where multiple offences are alleged against the accused

It is a principle of the common law that where the evidence admissible to prove one offence is not admissible to prove another offence, and the risk of prejudice to an accused is high because of that evidence, the offences should be tried separately.³⁴⁵ Sexual offences have been cited as a special class of offences where separate trials should take place because of the risk of prejudice where evidence is not admissible to prove all counts.³⁴⁶

In NSW, ss 21 and 29 Criminal Procedure Act 1986 direct the circumstances in which charges may be heard together. The court may separate a trial or count on the indictment if it is of the opinion that:

- an accused person may be prejudiced or embarrassed in his or her defence by reason of being charged with more than one offence in the same indictment, or
- for any other reason it is desirable to direct that an accused person be tried separately for any one or more offences charged in an indictment³⁴⁷.

Section 29(3) of the Act further provides:

- Proceedings related to 2 or more offences or 2 or more accused persons may not be heard together if the court is of the opinion that the matters ought to be heard and determined separately in the interests of justice.

Should there be a presumption that multiple counts be tried together?

In 1997 the ALRC and HREOC recommended that:

Multiple proceedings involving more than one incident concerning the same child victim and accused or more than one child victim and the same accused should be joined in a single trial to avoid the necessity of children giving evidence in numerous proceedings over long periods of time and the problems associated with rules against tendency and coincidence evidence. To this end, joinder rules and rules against tendency and coincidence evidence should be reviewed in light of the hardship these rules cause to particular child victim witnesses.³⁴⁸

One of the submissions to the ALRC and HREOC demonstrated the problems separate trials cause for child witnesses, particularly siblings who give evidence in their own and their sibling's trial regarding abuse by the same offender. One mother described this situation:

The fact that there were two trials meant a duplicity of stress for my children. As it stands now, one daughter's trial has been completed with a Not Guilty verdict brought in... [it was] very distressing for the girls to go back once more for the second trial two days later — back to back. The second trial was mistrialed after two days... Now my children have to go back to court [on a specific date] to suffer this hell once again.³⁴⁹

In considering the ALRC and HREOC recommendation, the Police Royal Commission Paedophile Inquiry was of the view that the recommendation was very broad, and commented that in many instances the joint trial of multiple charges involving different complainants may work real prejudice to the accused.³⁵⁰ The Commission stated that in some cases, particularly those involving allegations of familial abuse, there may be good reasons for joinder. In these cases, it may be appropriate to have regard among other considerations to the impact of severance on the witnesses, when determining whether to direct separate trials.³⁵¹

To this end, the then Commissioner Justice Wood, recommended that:

...consideration be given to permitting judges to take into account, as a relevant circumstance, in any application to sever counts in a trial, involving more than one complainant, any adverse impact that may have on complainants aged under the age of 16 years.³⁵²

³⁴⁵ *De Jesus v R* (1986) 68 ALR 1.

³⁴⁶ per Dawson J in *De Jesus v R* (1986) 68 ALR 1

³⁴⁷ s.21 Criminal Procedure Act 1986

³⁴⁸ *Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), at 334-335

³⁴⁹ *Ibid* at [14.88]

³⁵⁰ *Ibid*, 1098 at [15.157]

³⁵¹ *Police Royal Commission: Paedophile Inquiry* (Volumes 4-6), (1997) at 1098 at [15.158]

³⁵² *Ibid*, at [15.158]

The NSW Legislative Council Standing Committee considered that because of the practice of separating counts where the possibility of concoction and prejudice to the accused arises, the jury does not obtain the full picture of the allegations against the accused, which may reduce the likelihood of a guilty verdict. A NSW Judicial Commission study in 1997 compared the outcomes of child sexual assault trials for single trials involving multiple complainants, with multiple trials involving separate complainants. They found that separating the trials reduced the likelihood of a conviction.³⁵³

Dr Cossins notes that where separate trials are granted, they proceed on the basis that there is no evidence to corroborate that particular complainant's evidence, thereby depriving the jury of all relevant evidence. She suggests that lack of corroboration may account for the lower conviction rates that have been found in relation to separate trials.³⁵⁴

The Legislative Council Standing Committee agreed that injustice would be caused to the prosecution case by the separation of trials, and were of the view that reforms to the admission of tendency and coincidence evidence would reduce the incidence of separate trials. The Legislative Council Standing Committee, however, did acknowledge that separate trials will still be granted on the basis of the risk of unfair prejudice.³⁵⁵ The Legislative Council Standing Committee was of the opinion that in child sexual assault prosecutions there should be a presumption that multiple counts be tried together and that rules for separating trials should be set out in the Criminal Procedure Act 1986. In considering an application for separation of charges, the interests of justice should at all times be the paramount concern.³⁵⁶

Victoria

Victoria has attempted to reduce the occurrence of separate trials by the insertion of subsections 3AA, 3AB into s 372 Crimes Act 1958 (Victoria) (see Appendix). Except for those amendments s 372 of the Crimes Act (Vic) is in almost identical terms to section 21 of the Criminal Procedure Act 1986 (NSW). The amendment creates a presumption in sexual offence trials that multiple counts are to be heard together, and this presumption is not rebutted merely because evidence on one count is not admissible on another count.³⁵⁷

The Court of Appeal in Victoria considered the new s 372 in *R v Bullen*.³⁵⁸ It suggested there may be a tension between the test for admissibility (under s 398A) and the presumption in favour of trying counts together. The Court held that the interest in ensuring an accused's right to a

fair trial must be the paramount consideration in the exercise of the discretion,³⁵⁹ and that an application for severance should always be granted in cases where it is both '*desirable and practicable to ensure a fair trial*'. The risk of non-compliance by a jury with a judge's directions is unacceptably high in cases of sexual offences, "*which because of their repulsive nature, are calculated to inflame the jury*".³⁶⁰

Callaway CJ said:

If the judge has already decided that the prejudicial effect of the evidence...against A is so great that it is not just to admit that evidence in relation to the offence against B, how can he or she not conclude that the same prejudice that has led to the evidence being inadmissible also requires severance of the presentment?³⁶¹

It is argued by Arenson that the provision under s 372 (3AA) cannot be reconciled with the common law right of an accused to a fair trial.³⁶²

³⁵³ Judicial Commission of NSW, *Child Sexual Assault*, Monograph Series 15/1997, p x.

³⁵⁴ The proportion of guilty and not guilty verdicts was quite close when there was one trial, while for multiple trials, the vast majority resulted in not guilty verdicts. Gallagher, P and Hickey, J (1997) *Child Sexual Assault: An Analysis of Matters Determined in the District Court of NSW during 1994*, Judicial Commission of NSW: Sydney, p.20

³⁵⁵ Legislative Council Standing Committee on Law and Justice, *Report on Child Sexual Assault*, (2002) at 106-107

³⁵⁶ *Ibid*, at 107

³⁵⁷ (3) Where before trial or at any stage of a trial the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same presentment or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in a presentment the court may order a separate trial of any count or counts of such presentment.

(3AA) Despite sub-section (3) and any rule of law to the contrary, if, in accordance with this Act, 2 or more counts charging sexual offences are joined in the same presentment, it is presumed that those counts are triable together.

(3AB) The presumption created by sub-section (3AA) is not rebutted merely because evidence on one count is inadmissible on another count.

³⁵⁸ (unreported judgment of the Supreme Court of Victoria, Court of Appeal, 23 July 1998)

³⁵⁹ per Callaway JA *R v Bullen*, unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Callaway and Buchanan JJA, 23 July 1998, at 10, 12-14

³⁶⁰ *Ibid*, at 14

³⁶¹ *Ibid*, at 15

³⁶² *Arenson, Propensity Evidence in Victoria*, op cit.

Queensland

The Queensland Law Reform Commission (QLRC) considered the issue of ordering separate trials, and examined the Victorian legislation. The QLRC argued that the adoption of the Victorian provision could lead to the jury hearing unacceptably prejudicial evidence that would not otherwise be admissible, and ultimately recommended against changing the law.³⁶³

Views of the Taskforce

Women's Legal Services NSW submitted that the practice of separating trials for different counts in order to prevent the possibility of concoction and prejudice to the accused, means that juries do not receive the full picture, context and circumstances of the alleged offence. They were of the view that separating trials is particularly problematic for child witnesses in child sexual assault matters, and all complainants in intra-familial matters.

According to Women's Legal Services NSW trials are often separated in the 'interests of justice' because of the perceived prejudice to the accused. However, in their view the interests of justice must be more broadly construed to include 'injustice' to complainants, particularly child complainants. Women's Legal Services NSW supported the creation of a presumption in favour of trying multiple counts in the same trial along the lines of the Victorian model, that is, where the presumption is not rebutted merely because evidence on one count is not admissible on another count. The DPP and Detective Superintendent Kim McKay also supported legislative amendment to achieve this outcome.

The Law Society and Legal Aid Commission opposed any legislative amendment to create a presumption that multiple counts in sexual offence proceedings be heard together, in circumstances where evidence is not to be adduced as tendency evidence. The Law Society submitted that such an approach would render the test under s 101 redundant and instead create a separate test for sexual assault trials with the potential to cause enormous prejudice to an accused.

Discussion

After weighing up the arguments put forward, the CLRD consider it undesirable to introduce a presumption in similar terms to that in Victoria because of the real danger that juries may use evidence in relation to one count on a prohibited basis when considering another count. There is a real danger in such cases for the jury to engage in tendency or coincidence reasoning, where that evidence has not met the test under the Evidence Act 1995. Such a legislative change is unlikely to have a real impact in circumstances where the interests of justice have led to the rejection of tendency or coincidence evidence, as the same prejudice would generally preclude the counts being heard together. The Victorian CCA decision in *Bullen* confirms that their courts have interpreted the legislation in this way.

³⁶³ Queensland Law Report Commission *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No. 55, Part 2, December 2000, at 400

CLRD RECOMMENDATIONS:

- 31 NSW should not create a presumption that multiple counts of an indictment be tried together where the evidence on one count is not admissible against the accused on another count. In considering an application for separation of counts, the interests of justice should be paramount.
- 32 If the above recommendation is not accepted, there should be limited amendment to s 21 Criminal Procedure Act 1986 to make it clear that when considering whether to sever a count on an indictment, the court must not only consider the interests of the accused in receiving a fair trial, but also the interests of the community in reducing trauma and distress to children and other vulnerable witnesses.

Chapter 6

Jury directions in sexual assault trials

Introduction

In a jury trial, a judge is required to address the jury on the relevant law to apply when considering the evidence. Judicial directions or warnings are given to the jury where it is considered that the accumulated experience of the courts has provided knowledge about a particular matter that would not be expected to be within the province of the average juror. A direction warns a jury against following an impermissible path of reasoning and cannot be ignored. The common law requires a judge to give a warning wherever it is necessary so as to avoid a perceptible risk of a miscarriage of justice. A judge may also give an opinion about the evidence in a trial, by way of comment. However, a comment is different from a direction and does not have to be followed by the jury.

In *R v BWT*³⁶⁴ Justice Wood CJ at CL commented on the numerous directions, generally required to be given to a jury in a sexual assault case involving delay in complaint, in addition to other standard directions given in a criminal trial. In his view a “*trial judge is faced with a somewhat formidable task in sufficiently directing a jury in this category of case.*” More importantly, the jury is also faced with a “*potentially bewildering array of considerations, some of which may appear highly technical, if not inconsistent...*”³⁶⁵

The three directions for discussion in this chapter are known as the *Longman* direction, *Crofts* direction and *Murray* direction. The rationale, content and terms of these directions, as well as when they should be given has recently been raised by members of the judiciary as matters requiring consideration and review.³⁶⁶

Briefly, the three directions may be summarised as follows:

1. **Longman:** A warning should be given that because of the passage of so many years, it would be dangerous to convict on the complainant’s evidence alone unless the jury is satisfied of its truth and accuracy, having scrutinised the complainant’s evidence with much care.³⁶⁷

³⁶⁴ (2002) 129 A Crim R 153

³⁶⁵ *Ibid.*, at [33] and [34].

³⁶⁶ Child Witnesses Best Practices for Court, *Speech presented by Wood CJ at CL, 30 July 2004 at 12*

³⁶⁷ *Longman v The Queen* (1989) 168 NSWLR 79, as reinforced by *Crampton v The Queen* (2000) 75 ALJR 133 and *Doggett v The Queen* (2001) 182 ALR 1

2. **Crofts:** If a jury is informed, in accordance with s 294 of the *Criminal Procedure Act* 1986 (NSW), that a delay in complaint does not necessarily indicate that the allegation is false and there may be good reasons why a victim of sexual assault hesitates to complain, *then* the jury should also be informed that the absence of a complaint or a delay in complaint may be taken into account in evaluating the evidence of the complainant, and determining whether to believe him or her.³⁶⁸

3. **Murray:** Where there is only one witness asserting the commission of the crime, the evidence of the witness is to be scrutinised with great care before a verdict of guilty is entered.³⁶⁹

1. The Longman Direction

The most potent direction in a sexual assault trial is what is referred to as the *Longman* direction.³⁷⁰ This is a warning that is required to be given to a jury in cases where there has been a substantial delay between the time of the alleged offence and the complaint. For example, in *Longman*, a complaint was made more than 20 years after the alleged offence. The warning provides that because of the delay the accused has been unable to adequately test and meet the evidence of the complainant.

The warning is generally given in terms, that:

Because of the passage of so many years, it would be unsafe or dangerous to convict on the complainant's evidence alone unless the jury are satisfied of its truth and accuracy, having scrutinised the complainant's evidence with much care, considered the circumstances relevant to its evaluation and paid careful heed to this warning.³⁷¹

The rationale for the *Longman* warning arose as it was considered that the effect of significant delay on an accused's ability to test the complainant's allegations may not be readily apparent to a jury. If the allegations were made soon after the alleged offence it would have been possible to explore those circumstances and perhaps adduce evidence throwing doubt upon the complainant's story or confirming the accused person's denial. The rationale reflected the view that after such a long delay, such as twenty years, this opportunity was lost and the complainant's recollection of events could not be adequately tested. As such, it was seen that the fairness of the trial was impaired.

Recent Comments from the Judiciary

In *R v BWT*³⁷² both Wood CJ at CL and Sully J expressed their concern with the interpretation and re-statement of the *Longman* direction by the majority of the High Court in the decisions of *Crampton v The Queen*³⁷³ and *Doggett v The Queen*³⁷⁴. In the case of *R v BWT* the appellant was convicted in relation to a number of sexual offences. He appealed the conviction on the basis that the trial judge failed to give the jury adequate directions in accordance with the *Longman* warning. By reason of the lengthy delay in complaint of some 20 years, the court was of the view that such a warning was appropriate. The question was whether the warning given was sufficient. In the course of their remarks, both Sully J and Wood CJ at CL examined the rationale behind giving such a warning, the requirements of when such warning should be given and the terms and manner of the warning as determined by the High Court.

The irrebuttable presumption

Wood CJ at CL was of the view that following the High Court decisions of *Crampton* and *Doggett* a court was required to give a direction in equally positive terms, in every case involving a substantial delay, irrespective of whether or not there was any evidence, or basis beyond suspicion, that the delay in complaint, or trial had *in fact* denied the accused a proper opportunity to meet the charge or charges brought.

His Honour said:

Put another way, the effect of these decisions has been to give rise to an irrebuttable presumption that the delay *has* prevented the accused from adequately testing and meeting the complainant's evidence; and that, as a consequence, the jury must be given a warning to that effect irrespective of whether or not the accused was in fact prejudiced in this way. The difficulty which I have with this proposition is that it elevates the presumption of innocence, which must be preserved at all costs, to an assumption that the accused was *in fact* innocent, and that he or she might have called relevant evidence, or cross examined the complainant in a way that would have rebutted the prosecution case, had there been a contemporaneity between the alleged offence and the complaint or charge. That consideration loses all of its force if, in fact, the accused did commit the offence.³⁷⁵

³⁶⁸ *Crofts v The Queen* (1996) 186 CLR 427

³⁶⁹ *R v Murray* (1987) 11 NSWLR 12

³⁷⁰ As formulated by the High Court in *Longman v The Queen* (1989) 168 CLR 79, (Brennan, Dawson and Toohey JJ (joint judgment), Deane J and McHugh J in separate judgements, on appeal from the Supreme Court of Western Australia. This test has been reformulated and restated in more recent decisions of the High Court.

³⁷¹ As taken from the NSW Bench Book. For the exact wording of the majority in *Longman*, see [30] of the joint judgment.

³⁷² (2002) 129 A Crim R 153

³⁷³ (2000) 176 ALR 369

³⁷⁴ (2001) 182 ALR 1 by majority judgment of Gaudron and Callinan JJ, Kirby J agreeing for different reasons, Gleeson CJ and McHugh dissenting in separate judgments

³⁷⁵ *R v BWT* (2002) 129 A Crim R 153 at [14] and [15].

His Honour expressly indicated that he did not have any difficulty with the decision in *Longman*, or subsequent decisions, if understood as decisions on their own facts, that is; - where the delay was of such an inordinate degree that it was impossible for an accused to even begin to investigate the circumstances alleged. He also indicated that he did not have any problems with the warning now required in those circumstances where there is evidence, or good reason to suppose positively, that the accused has been prejudiced.

His main concern was with the unequivocal nature of that warning:

...I would respectfully raise for consideration, whether some modification should be made to the warning which, it seems to me, must now be given, in invariable and emphatic terms, of the fact of prejudice. In that regard I do not consider it unimportant that, in the various passages cited, the reasons given for the warning have at times spoken in terms of the possibility, rather than the fact, of prejudice, as underpinning it.³⁷⁶

Warning vs. Comment

According to the joint judgment in *Doggett*, where there is substantial delay a *Longman* direction must be given and must be given in terms of a warning that it would be dangerous to convict. In examining this issue Sully J held that the form of the warning “*must be such as bears unmistakably the imprint of the Court’s own authority.*” The terms of the direction and the way in which it has been interpreted by the courts, has meant that any deviation from the standard form of words can potentially give rise to a ground of appeal and if successful, the ordering of a retrial or entry of a verdict of acquittal. The need to give a warning in the terms mandated by the High Court has caused serious difficulties for trial judges. There have been a number of successful appeals based on this very technical aspect of the summing up.³⁷⁷

In her recent Issues Paper for the Tasmania Law Reform Institute, Terese Henning wrote:

Appeal courts have focused particularly on the adequacy of trial judge’s directions. The direction must be in the form of a warning. If what is said is couched as a comment only or a caution it will be insufficient.... Departure from the terms of the warning.... will provide fertile grounds for appeal. ³⁷⁸

Wood CJ at CL has commented that one of the difficulties with the *Longman* warning is that it is framed in terms that it may be ‘*dangerous or unsafe*’ to convict. In his view, this:

...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. ³⁷⁹

Sully J also shared this view. He was concerned that the jury may be unduly influenced by what they perceive to be the trial judge’s encoded message to acquit. This concern was shared by the majority of Taskforce members.

When the warning should be given

Sully J also expressed his concern about how trial judges are to implement the majority decision of *Doggett*. In particular, he indicated that it was unclear from the decisions of the High Court what time lapse or delay would generally be regarded as not calling for a *Longman* direction. He notes that whilst this lack of guidance continues trial judges will have to err on the side of caution and give such directions:

...it seems to me that the only prudent approach of a trial Judge is one that regards any delay between offence and complaint as sufficient to raise for consideration the need for a *Longman* direction.³⁸⁰

In *R v Heuston*³⁸¹ Hodgson J suggested that it was difficult to determine whether such a warning should have been given in a case where the delay in complaint was as little as four months and in the context of a robbery and home invasion. Sully J was of the view that the joint judgment in *Doggett* regarded the margin of discretion of the trial Judge on whether to give the *Longman* direction, as being very narrow:

It seems to be their Honour’s position that such residual discretion is available for the purpose of strengthening what I might describe as the basic *Longman* direction; but that it is not available so as to water the basic direction down in any way.

³⁷⁶ *R v BWT* (2002) 129 A Crim R 153 at [22].

³⁷⁷ Henning T: Warnings in sexual offences cases relating to delay in complaint, *Issues Paper* 8 June 2005, Tasmania Law Reform Institute at 10. Henning sets out the number of successful appeals in all jurisdictions, including NSW.

³⁷⁸ *Ibid.* at 8. Henning notes that it was held in *R v Kesisyau* (2003) NSWCCA 259 that no specific form of words is required in giving the *Longman* direction provided that the essential purpose of the direction is carried out per Meagher JA. See also Sully J: “I agree with that in the sense that BWT need not be understood as laying down an exact form of words, the failure of any part of which would necessarily vitiate the particular direction given in the individual case’ at [20].

³⁷⁹ *R v BWT* at [34].

³⁸⁰ *R v BWT* at [95].

³⁸¹ [2003] NSWCCA 172

Has a practice developed of the *Longman* direction being given, even when it is not necessary?

There appears to be a growing trend to give the *Longman* direction 'just in case'. Andrew Haesler SC, from the Public Defenders Office suggests that the decisions of the NSWCCA have encouraged trial judges to 'appeal-proof' their directions, to make sure that if a conviction is secured, it will not be lost on appeal due to a failure to give a *Longman* warning.³⁸² This is clear from the advice given by Dunford J in *R v LTP*:

Judges in such trials will be well advised to use the list of Wood CJ at CL in *R v BWT* as a check list in such cases, bearing in mind that it is preferable to give the directions, even if the judge considers one or more of them unnecessary in the particular case, rather than have convictions upset on appeal because of the failure to give them.³⁸³

Haesler argues that fear of an appeal and the decisions of the CCA have "...led some judges to give every conceivable jury direction, without proper consideration of what is required for a specific trial." According to Haesler, this practice may unduly add to the length of the trial, make the issues in dispute more complicated than they really are, and may actually be counter-productive and give rise to an appeal.

Both judges and commentators have sought to emphasise that a trial judge must make sure that the summing up and jury directions do not become a series of formulae that have no application to the facts of the case. Boniface has argued that within the sexual assault trial 'ritual incantation is beginning to emerge.'³⁸⁴ This concern is shared in other jurisdictions where the *Longman* direction applies.³⁸⁵

In the Victorian case of *R v Mazzolin*³⁸⁶ Ormiston JA noted the trend for judges to give *Longman* warnings, even where they may not be required:

As defence counsel catalogue the variety of "special" circumstances seen by appellate judges (including, I confess, myself) as requiring warnings in particular cases, so the trial judges will retreat to the safety of issuing the *Longman* warnings for every such circumstance and every faintly analogous circumstance.³⁸⁷

Research conducted by the VLRC has examined the circumstances in which the *Longman* and *Crofts* warnings were given and the form of the warnings. In their report the VLRC stated:

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 they may have to give evidence in a second trial if an appeal by the accused is successful.³⁸⁸

Mr Stephen Odgers SC submitted that there is considerable authority now emerging around Australia that warnings need not be given unless some actual prejudice can be pointed to and that where the warning is required, no particular form of words need be used. He suggests that this area of the law should be left to the normal process of common law development. Whilst it is true that jurisdictions like Western Australia³⁸⁹ have not taken such a strict approach to the need to give a *Longman* warning, in terms of when it should be given and the language used, the same trend is not apparent in either NSW or Victoria.

The effect of *Longman* on appeal

Within NSW there has been no comprehensive study on the manner in which *Longman* style directions are communicated to juries and no data as to what actual impact they have on a jury's decision to convict or acquit. Boniface makes the same point in her article.³⁹⁰ She argues that there is a need for jury research to determine the utility of the directions and warnings in sexual assault trials, as presently it is not known how juries use the directions.

However, the NSW Judicial Commission has recently examined the impact of the *Longman* direction once a conviction has been entered and an appeal lodged. The Commission examined successful appeals against conviction in sexual assault trials for the period 2001 to June 2004. During this time the Court of Criminal Appeal allowed 70 of 136 appeals arising from sexual assault trials (51.5 percent).³⁹¹ The Commission examined 69 of the successful appeals and divided these into legal categories for allowing the appeal, bearing in mind that more than one legal error can occur.

³⁸² Andrew Haesler SC: Sexual Assault Update: How the prudent judge can avoid error, (2005) 17 *Judicial Officers Bulletin* 5 at 1

³⁸³ *R v LTP* [2004] NSWCCA 109 at [47]

³⁸⁴ D Boniface: "The Common Sense of Jurors v The Wisdom of the Law: Judicial Directions and Warnings in Sexual Assault Trials (2005) *University of New South Wales Law Journal* 11(1) Forum at 5

³⁸⁵ Henning at 12 quoting Miller J in *Gaulard* [2000] WASCA 218 who stated, "I agree that the words used by the majority in *Longman* are not a formula which is to be parroted by a trial judge without reference to individual circumstances".

³⁸⁶ [1999] 3 VR 113 at 130

³⁸⁷ *Ibid*, per Ormiston JA, as referred to in the VLRC Final Report at 380

³⁸⁸ VLRC Report at 379

³⁸⁹ Western Australian appellate courts have not followed the same strict interpretation of *Crompton* and *Doggett* as seen in NSW and Victoria. See in particular, *Liddington v WA* [2005] WASCA 60 where there was a delay of 1 year and 11 months and the question on appeal was whether the warning at trial was adequate. The Court held that the case did not require the judge to give a direction on the forensic disadvantage, and that the delay was not so great, when considered in combination with other circumstances so as to give rise to a forensic disadvantage.

The Commission's empirical analysis found the following:

- a misdirection occurred in 54 percent (37 of 69) of the cases;³⁹²
- the verdict was set aside by the CCA on the ground that it was unreasonable or unsupported by the evidence in 20 percent of cases (14 of 69);
- inadmissible evidence was admitted in 20 percent (14 of 69) of cases;
- in 20 percent (14 of 69) the trial miscarried for some other forensic reason or "on any other ground whatsoever there was a miscarriage of justice" as provided for by s 6(1) Criminal Appeal Act 1912.

The preliminary findings of most relevance, is the number of cases where a defect in the *Longman* warning was the basis for the misdirection. The Commission's analysis showed that in 60 percent of the sexual assault cases where there was a successful appeal on the basis of a misdirection (22 of the 37 cases), there was a deficiency in the *Longman* warning resulting in an error of law. In 18 of those 22 cases, the *Longman* warning was the only error identified. In the four remaining cases, the *Longman* warning and some other misdirection was found to have occurred.³⁹³ The Commission findings reveal that of the 22 cases where there was a *Longman* misdirection giving rise to a successful appeal, a retrial was ordered in 14 of those cases, but in 8 cases an acquittal was entered by the court.³⁹⁴

Calls for reform

Members of the judiciary and commentators have indicated that the *Longman* warning is in need of review. Others have asked whether the effect of the *Longman* direction is such as to undermine public confidence in the system and prevent others from coming forward. It has been suggested that the *Longman* warning may potentially reinstate 'by the back door', false stereotypes about the unreliability of complainants in sexual offence cases.³⁹⁵

In 2002 the NSW Legislative Council Standing Committee on Law and Justice recommended that the Attorney General amend the Criminal Procedure Act 1986 to prohibit the issuing of the *Longman* judicial warning where there is no evidence or good reason to suppose that the accused was prejudiced by the delay in complaint.³⁹⁶ In November 2004 the NSW Interagency Adult Sexual Assault Committee went further and suggested that all warnings to the jury on a delay in complaint should be abolished.³⁹⁷ Recently, both the Victorian Law Reform Commission and Tasmania Law Reform Institute³⁹⁸ issued papers indicating that reform in this area was

required, given the unduly complicated nature of the directions and trend to give the direction in cases where the accused has not in fact been prejudiced.

Victoria

Research by the Victorian Law Reform Commission into charges given to the jury in a sexual assault trial found that the directions take an inordinate length of time and that the language used by judges to explain legal concepts was often repetitive, convoluted and confusing. Members of the judiciary have also commented upon the fact that the application of the *Longman* warning appears to re-create sexual assault complainants as an inherently unreliable class of witness:

Since the issue seems only (or almost only) to arise on trials for sexual offences (and appeals therefrom), the impression might be given,.... that judges are again, by a back door, treating complainant's in such cases as ordinarily unreliable witnesses....³⁹⁹

See also, *RBK v The Queen* [2004] WASCA 216, *Woods v The Queen* [2003] WASCA 252, *Allegretta v The Queen* [2003] WASCA 17, where Roberts-Smith J suggests that the concerns expressed by Wood CJ at CL in *BWT* regarding the perceived problem with *Doggett* and *Crampton* overstates the problem. See also the comments of Penney Lewis, that some courts have resisted the High Court's presumption of forensic disadvantage – although this has predominantly been in cases involving short delays, "A comparative examination of forensic disadvantage directions in delayed prosecutions of child sexual abuse" (2005) 29 *Crim LJ* 281 at 284.

³⁹⁰ Dorne Boniface: "The Common Sense of Jurors vs The Wisdom of the Law: Judicial Directions and Warnings in Sexual Assault Trials (2005) *University of New South Wales Law Journal* 11(1) Forum at 9

³⁹¹ This study was prompted by findings on the number of successful appeals in the same period in relation to child sexual assault matters. In the Commission study, *Sentencing Offenders Convicted of Child Sexual Assault*, the following success rate for appeals was reported:

- In 2000, 20 of 46 appeals were successful (43.5%)
- In 2001, 21 of 32 appeals were successful (65%)
- In 2002, 14 of 25 appeals were successful (56%)
- In 2003, 11 of 15 appeals were successful (73%)

See Hazlitt, Poletti, Donnelly (2004) *Sentencing Offenders Convicted of Child Sexual Assault at 6*.

³⁹² Research conducted by Dorne Boniface, shows that in 2004, 28.3% of all appeals against conviction related to sexual assault matters. Boniface found that in 55.5% of appeals against conviction the grounds of appeal related to inadequate warnings by trial judges. This figure is similar to that arrived at by the Judicial Commission using data from 2000 to 2003, D Boniface: "The Common Sense of Jurors v The Wisdom of the Law: Judicial Directions and Warnings in Sexual Assault Trials (2005) *UNSWLJ* 11(1) Forum at 2.

³⁹³ See *R v Lewis* [2003] NSWCCA 180 (*Longman*, *Murray* and other misdirections); *R v Channell* [2002] NSWCCA 187 (*Longman* plus misdirection as to impact of any reasonable doubt); *R v GJH* [2001] NSWCCA 128 (*Longman*, plus misdirection as to lies); *R v Mayberry* [2000] NSWCCA 531 (*Longman* and *Mitchell* misdirection)

³⁹⁴ Examples of where the Court of Criminal Appeal determined that there should be an acquittal entered instead of ordering a re-trial: *R v Eyles* [2002] NSWCCA 510, [48-50], [66-68]

³⁹⁵ Henning T: Warnings in sexual offences cases relating to delay in complaint, *Issues Paper 8* June 2005, Tasmania Law Reform Institute at 18

³⁹⁶ Legislative Council Standing Committee on Law and Justice: *Report on Child Sexual Assault Prosecutions*: Report 22, October 2002 at 132 (Recommendation 23)

³⁹⁷ NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW*, November 2004 at 16.

³⁹⁸ See Victorian Law Reform Commission Final Report and Henning: "Warnings in sexual offences case relating to delay in complaint" *Issues Paper No 8*, Tasmania Law Reform Institute June 2005 at <http://www.law.utas.edu.au/reform/>

³⁹⁹ per Ormiston JA in *R v Mazzolini* [1999] 3 VR 113 at 130, referred to in VLRC Final Report at 380.

The VLRC Interim Report recommended that the *Longman* warning be changed to prevent the use of the words ‘dangerous and unsafe to convict’, as this phrase was likely to be seen by the jury as an instruction to acquit. The Interim Report also recommended that the warnings about delay should not be given, unless the accused had in fact suffered a significant forensic disadvantage as a result of delay. A number of submissions favoured this recommendation. However, the Victorian Bar Association and a number of Judges strongly opposed it.⁴⁰⁰

Following its consultation, the VLRC remained of the view that amendment was required. In particular, the VLRC considered that widespread use of the *Longman* warning may perpetuate myths that women are an unreliable class of witness. It suggested that a warning should be given in clear and simple language.

They formulated Recommendation 170, which states:

(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:

- 1 there is evidence that the accused has in fact suffered some specific forensic disadvantage due to a substantial delay in reporting; or
- 2 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 subsection (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”.

The VLRC has not only sought to give effect to the proposal put forward by Wood CJ at CL, but has also sought to deal with other criticisms of the *Longman* direction, such as its inflexibility and requirement for the warning to be given in a particular way, which may not be suited to the facts of the case. This model has a number of attractive elements which may be desirable to implement within NSW. Whilst the proposed model appears to shift the onus to the accused to point to some evidence that he or she has been disadvantaged, it does not appear that the accused would have to satisfy the court on the balance of probabilities. Rather, the accused would simply need to point to some evidence to allow the court to decide whether the warning is warranted.

The only other issue that may arise in relation to the proposed model, is whether it ‘leaves the door open’ to allow a Judge to give a comment on the possible effect of delay. The provision is currently drafted in terms that a judge must not warn or suggest in any way that it is ‘dangerous or unsafe’ to convict unless a certain criteria is met. If such a provision was read narrowly, this may not prevent a Judge from making a comment about the effect of delay, provided that he or she did not suggest it was ‘dangerous or unsafe’ to convict.

Tasmania

Terese Henning from the Tasmania Law Reform Institute also clearly favours the tests expressed by Wood CJ at CL. She states:

While it is acknowledged that delay in making a complaint can disadvantage many accused in preparing their defence, where there has been no such disadvantage, or where no specific disadvantage can be indicated, application of the *Longman* warning is irrational.⁴⁰¹

In Henning’s view a *Longman* warning should be limited to those matters where an accused person can show that a specific disadvantage has been caused by the delay in proceedings, rather than some presumed hypothetical disadvantage. She sees that there are strong arguments for reform, due to the uncertainty of the warning, its potential to resurrect false stereotypes about complainants, and the form of the warning, which may be seen by jurors as encouragement to acquit. Henning suggests a number of options for reform. She notes that before any such amendment would be effective s 165 (5) Evidence Act, which preserves the power of the trial judge to give a common law warning, would need to be repealed.⁴⁰²

Henning argues that what might be required to displace the ‘irrebuttable presumption’ now mandated by *Longman*, is a clear statement that no such presumption is to be applied. In addition, there should be a clear statement that a *Longman* warning is only to be given where the existence of a specific forensic disadvantage is established on the balance of probabilities, and that such a disadvantage cannot be established by delay alone. Alternatively, a warning may only be permitted where there are *exceptional* circumstances and that delay alone will not establish those circumstances.⁴⁰³

⁴⁰⁰ VLRC *Final Report* at 381-382.

⁴⁰¹ Henning T: Warnings in sexual offences cases relating to delay in complaint, *Issues Paper 8* June 2005, Tasmania Law Reform Institute at 20

⁴⁰² S 165(5) states: This section does not affect any other power of the judge to give a warning to, or to inform, the jury.

⁴⁰³ Henning T: Warnings in sexual offences cases relating to delay in complaint, *Issues Paper 8* June 2005, Tasmania Law Reform Institute at 23

Australian Law Reform Commission

In November 2004, the Australian Law Reform Commission (ALRC) released Issues Paper 28, *Review of the Evidence Act*. They asked at Question 14-9:

Should the uniform Evidence Acts be amended to provide for other common law warnings such as the *Longman* direction, and if so, how?

On 4 July 2005, the ALRC released its Discussion Paper 69. In response to the question posed, the NSW ODPP submitted that it would be useful if the *Evidence Act* included a provision for the *Longman* direction, which identified the circumstances when the warning may be required.⁴⁰⁴ The NSW Public Defenders Office submitted that the *Longman* direction should be incorporated in the *Evidence Act*.⁴⁰⁵ Whilst the Law Council for Australia supported careful warnings in certain cases, it was of the firm view that the question of whether directions were adequate should be determined on a case by case basis.⁴⁰⁶

The ALRC noted the criticisms and proposals put forward by the VLRC and the Tasmania Law Reform Institute in relation to *Longman*. Given these recent proposals, the ALRC, determined not to put forward any proposal of its own.⁴⁰⁷ The ALRC asked at question 16-1:

Should the recommendations proposed by the Victorian Law Reform Commission or the Tasmania Law Reform Institute in relation to *Longman* warnings (or any other models) be adopted under the Uniform Evidence Acts.⁴⁰⁸

Should the *Longman* direction be retained in its current form?

Despite the criticism directed at the *Longman* direction, there has been little suggestion for the direction to be abolished completely. Although, this is the view of the authors of the *Fair Chance* report, and also Detective Superintendent Kim McKay and the Office for Women. All argue that the issue of delay in complaint should be a matter left to the jury on the evidence alone. This view is not shared by other critics of the direction and very few arguments have been advanced as to why *Longman* should be abandoned altogether.

One question that arises is how the law would deal with the situation where an accused person is able to point to evidence that he or she has been severely prejudiced due to delay if a *Longman* style warning could not be given. Could the abolition of the *Longman* direction in all cases of lengthy delay give rise to an increase in the number of permanent stay applications in NSW?

A *Longman* warning is often given to cure the prejudice that an accused suffers due to the delay. If there is evidence that the accused has suffered prejudice and lost important evidence due to delay, and there is no longer the option to give a *Longman* warning, would judges be more likely to grant a permanent stay of proceedings on the basis that the accused cannot be afforded a fair trial?⁴⁰⁹ This may leave complainants in historical sexual assault matters without ever having the opportunity to present their story to the court.

It is suggested that a *Longman* style warning, if given correctly, with some flexibility and in the appropriate circumstances, retains a legitimate place in the criminal law. The DPP, Mr Odgers SC, Dr Cossins, Women's Legal Services, the Legal Aid Commission, and Law Society agree with this proposition. Most commentators and judges appear to be of the view that the decision in *Longman* is correct. However, it is the extension of *Longman*, that is most problematic.⁴¹⁰ Terese Henning writes:

...logic tells us that lengthy delay is capable, in many cases, of impacting adversely upon an accused's ability to challenge the Crown case. Nevertheless, delay may not always have this effect and the irrebuttable presumption that it does so is problematic.⁴¹¹

⁴⁰⁴ ALRC, Discussion Paper 69, *Review of the Uniform Evidence Acts*, (2005) at [16.105] <http://www.alrc.gov.au/inquiries/current/evidence/index.htm>

⁴⁰⁵ *Ibid.* [16.106]

⁴⁰⁶ *Ibid.* [16.108]

⁴⁰⁷ "Having regard to the fact that the VLRC and TLRI inquiries were carried out recently, the Commissions consider that it would be premature to put forward any proposals. These issues require further consultation within the current Inquiry" *Ibid.* [16.121]

⁴⁰⁸ Whilst the ALRC indicated that it was not putting forward any proposal of its own, it spent some time examining alternative means of reform. The ALRC raises whether a further category of 'unreliable evidence' could be added to s 165(1) of the *Evidence Act* to deal with cases where there has been a great delay. Section 165(1) currently provides that a warning should be given with respect to certain types of unreliable evidence, such as identification evidence, or prison informer evidence. An additional category of unreliable evidence would allow for a warning to be given on the application of one of the parties where: "there is evidence that may be unreliable but not demonstrably so, because of the inability to test adequately for any reason, including the passage of time." However, the ALRC acknowledged that this test may not adequately deal with all the issues raised with respect to *Longman* and further suggested that s 165(3) of the *Evidence Act* may also need to be amended so that a judge does not have to give such a warning unless satisfied that there are 'good reasons for doing so'

⁴⁰⁹ See Mason CJ in *Jago v District Court of New South Wales* (1989) 168 CLR 23 for the general principles regarding a permanent stay based on delay. See also *R v Westley* [2004] NSWCCA 192 at paragraph 27, when considering the issue of whether a permanent stay should be granted. 'Of course, in a case such as this where there has been a lengthy delay in complaint in a sexual assault case, the judge would be required to give a direction in accordance with *Longman v The Queen* (1989) 168 CLR 79, and the other warnings and directions which are conveniently summarised by Wood CJ at CL in *R v BWT* [2002] NSWCCA 60, 54 NSWLR 241 at para [32]. These are the things that the Court can do to prevent the trial being unfair, and provided these warnings are given, the accused will receive a fair trial.'

⁴¹⁰ Williams: "Warnings occasioned by delay in paedophile prosecutions" (2003) 27 *Criminal Law Journal* 70 at 78

⁴¹¹ Henning T: Warnings in sexual offences cases relating to delay in complaint, *Issues Paper 8* June 2005, Tasmania Law Reform Institute at 19

As raised by Wood CJ at CL, it is the unequivocal nature of the *Longman* warning that requires modification. It is the difficulty imposed by an 'irrebuttable presumption that the accused has in fact been prejudiced'; and the uncertainty surrounding when the warning should be given, that requires reform. It must be acknowledged that in some cases a delay in complaint may prejudice an accused person; by denying the accused the ability to marshal witnesses who may have died or may no longer be able to be located. Prejudice may also be occasioned due to a loss of evidence, for example the destruction of school records, medical records, employment records, or photographs which may have otherwise been able to cast doubt on the evidence of the complainant. These are real issues that do and will continue to arise in jury trials. These issues may not necessarily be apparent to the jury, who are not entitled to speculate on evidence that it is not before them.

It may also be argued that a *Longman* warning is required to counter the prejudice caused by lengthy delay due to the inevitable lack of detail that can be given by the complainant about the alleged offence. Indeed, it is not uncommon for an indictment in historical sexual assault matters to lack specificity and allege that a particular offence occurred between dates which span months and sometimes years. For example, an indictment may allege:

that XX did have sexual intercourse with a child between 10 and 16 years between 1 February 1986 and 16 August 1986.

One important question, which may be raised by defence lawyers, is how will they even begin to attempt to answer an allegation presented in such a form. The lack of specificity and inability to recall in detail is also discussed by Lewis, who suggests that delay may dull the potency of cross-examination as a means of exposing unreliable evidence.⁴¹² Interestingly, Williams writes that these same forensic difficulties which may prejudice the accused due to delay in complaint, also dog the prosecution:

Delay continues to operate as an impediment to the discovery of truth. Forensic difficulty arising from delay in cases of sexual offences against children, however, is occasioned not just to the accused, but to the prosecution also. Delay has the characteristic of making it more difficult to establish the truth of what occurred in terms of a party presenting evidence and testing the evidence presented by the other side. A warning couched solely in terms of the difficulty occasioned to the accused person appears to go beyond what is required to guard against wrongful conviction.⁴¹³

Williams is particularly concerned that where there is credible evidence supporting the evidence of the complainant, the possible significance of delay should not be given as a mandatory warning, which is directed only towards the difficulties faced by the accused. Indeed, there appears to be merit to this proposal.

Based on the research, comments made by members of the judiciary, and views of a number of members of the Taskforce, there is a strong argument that the *Longman* warning in some form should be retained in appropriate cases. The real question is what are the circumstances that should trigger the giving of a warning?

If the *Longman* direction is retained, should it be modified?

The primary submission of the Legal Aid Commission⁴¹⁴, Mr Odgers SC and the Law Society was that the *Longman* direction should be retained in its current form. The majority of the members, however, were of the view that urgent amendment was required. Wood CJ at CL has clearly expressed the view that without some firm basis for the suggestion that the delay may have affected the complainant's credibility or some evidence pointing to actual prejudice, it is arguable that the balance has been tipped too far in favour of the accused. He has indicated that he would prefer that the direction be given in terms of a *possibility* of forensic difficulties having been occasioned, or that it be confined to cases where there is some positive evidence of disadvantage. This approach is clearly favoured by the Legislative Council Standing Committee, the VLRC and the Tasmanian Law Reform Institute. The Taskforce had great difficulty identifying the circumstances where it would be considered appropriate to give a warning that the accused has or may have suffered a forensic disadvantage due to delay.

⁴¹² P Lewis: "A comparative examination of forensic disadvantage direction in delayed prosecutions of childhood sexual abuse" (2005) 29 *Crim LJ* 281 at 291

⁴¹³ C R Williams: Warnings occasioned by delay in paedophile prosecutions, (2003) 27 *Criminal Law Journal* 70 at 75

⁴¹⁴ The Legal Aid Commission argued that there should be a presumption that delay in reporting a complaint, particularly where the delay is significant, disadvantages the defendant. The Commission indicated that it was concerned with the requirement that the defendant produce evidence of a specific forensic disadvantage in order to obtain a *Longman* style direction. They argued that there may be cases where the delay has caused the defendant a forensic disadvantage of which he or she is not aware.

In attempting to give effect to Justice Wood's proposal, the Legislative Council Standing Committee on Law and Justice proposed that the Attorney General amend the *Criminal Procedure Act* 1986 to prohibit the issuing of the *Longman* judicial warning where there is no evidence or good reason to suppose that the accused was prejudiced by the delay in complaint.⁴¹⁵ There is no further elucidation of what would constitute a good reason, nor is there any examination of whether the terms of the warning should be limited so that a certain formula should or should not be used.

The issues surrounding the giving of a direction due to delay in sexual assault cases has also been recently discussed by Lewis, who compares the circumstances where a *Longman* direction is required to be given in Australia, to the giving of similar directions in England. She writes:

The central difference between the English and Australian approaches to the forensic disadvantage or prejudice associated with delays is the Australian presumption that forensic disadvantage occurs in all delays cases. By contrast, in order to gain an entitlement to a warning, an English defendant must point to the ways in which his defence has been prejudiced by the delay.⁴¹⁶

In England a direction is not required in all cases of delay and although the Judicial Studies Board Criminal Law Bench Book sets out an example direction to be given where it is considered appropriate, there is no requirement that it be given in those terms.⁴¹⁷ Lewis summarises the Australian position, proposals for reform suggested by Wood CJ at CL (as he was then) and the English position as follows:

- presume forensic disadvantage or prejudice in all cases of delay and warn the jury of it (*Longman* and its progeny or what might be described as the Australian situation);
- warn the jury that there is a forensic disadvantage or prejudice in cases where there is evidence to that effect, and warn them of the possibility of forensic disadvantage or prejudice in all other cases of delay (she cites this as the approach of Wood CJ at CL in *BWT*);
- warn the jury that there is a forensic disadvantage or prejudice only in cases where there is evidence to that effect (the English position).

Lewis ultimately concludes that the middle approach may prove to be the fairest and most sensible approach with the following caveats; namely, that the format of the warning should depart from *Longman* in favour of the more flexible English approach and that a failure to give a warning should not automatically result in the accused's conviction being quashed.⁴¹⁸

Discussion

The Taskforce agrees that there should be legislative amendment to provide that the *Longman* warning should not be mandatory. The models proposed in other jurisdictions are persuasive and generally give effect to Wood CJ at CL's proposal. It is submitted that the VLRC proposal should be considered for the purpose of amending NSW law. The adoption of the VLRC proposal was the preferred approach of the DPP, the Office for Women⁴¹⁹ and Dr Cossins. Women's Legal Services also supported such an approach where the giving of a *Longman* direction is confined to those cases where there is evidence that the accused has suffered a specific forensic disadvantage due to the delay. In their view, the accused must be required to prove on the balance of probabilities that he or she has suffered such a disadvantage. Dr Cossins further submitted that the *Longman* warning should only be given where the defendant can show actual forensic disadvantage as a result of delay in complaint. However, she did not think that a judge should be able to warn juries in terms they think is appropriate, rather she would prefer a specifically worded provision containing the warning.

Dr Cossins agreed that a provision should be created which prevents the giving of a *Longman* warning in its present form and where the words "dangerous and unsafe" must not be used.

⁴¹⁵ Legislative Council Report 22, October 2002 at 132

⁴¹⁶ P Lewis: "A comparative examination of forensic disadvantage direction in delayed prosecutions of childhood sexual abuse" (2005) 29 *Crim LJ* 281 at 290

⁴¹⁷ The Bench Book direction is set out by Lewis at 288-289 of her article, It is in the following terms: "1. We are now concerned with events which are said to have taken place a long time ago. You must appreciate that because of this there may be a danger of real prejudice to a defendant. This possibility must be in your mind when you decide whether the prosecution has made you sure of the defendant's guilt...2. You should make allowances for the fact that with the passage of time memories fade. Witnesses whoever they may be, cannot be expected to remember with crystal clarity events which occurred [many years ago]. Sometimes the passage of time may even play tricks on memories. 3. You should also make allowances for the fact that from the defendant's point of view, the longer the time since an alleged incident, the more difficult it may be for him to answer it..." Ibid.

⁴¹⁸ Ibid at 295.

⁴¹⁹ The Office for Women submitted that they would be prepared to conditionally support this, but only where there is evidence that the accused has in fact been disadvantaged by the delay; and where the provisions are reformulated to closely mirror the proposals of the VLRC.

Dr Cossins was of the view that this warning may be given where the:

- judge is satisfied that the accused has shown that he or she has suffered a specific forensic disadvantage or prejudice as a result of delay in complaint; and
- is satisfied that a warning is required.

In those cases a:

- judge may warn the jury that there is evidence to show that the defendant has suffered a disadvantage in meeting the prosecution case; and
- the jury is required to take that fact into account in deciding whether the prosecution has proved its case beyond reasonable doubt.

Whilst Mr Odgers SC appreciated some of the concerns in this area of the law, he was of the view that much of the difficulty in interpretation had been created by legal misconceptions. Nevertheless, he advised that if legislative intervention was to occur, great care is required. In particular, he was concerned that any provision not impact on other aspects of the common law where directions may be required, for example, where the absence of detail in a complaint may prejudice the defence;⁴²⁰ and also submitted that it must be clear that the defence only need point to some type of evidence of which it has been deprived in some relevant way by delay, before a warning should be given. In particular, he suggested that guidance will have to be given to the nature of the warning and it will not be good enough simply to state that the trial judge give an ‘appropriate warning’.

Given the criticisms of *Doggett*, the Taskforce agree that it may be appropriate for a *Longman* style direction to only be given cases where a party requests that a warning be given and there is:

- some evidence that the accused has suffered a specific forensic disadvantage due to the delay.

If such a direction is to be given, it should be in a form that the trial judge thinks appropriate, bearing in mind all the circumstances of the case. The discretion of the trial judge to give a warning appropriate to the circumstances of the case should not be fettered by rigid rules as to the standard or form of words required. There may be situations where despite the apparent forensic disadvantage to the accused, the strength of the Crown case and other corroborative evidence would not require that there be a warning that it was dangerous and unsafe to convict. All Taskforce members acknowledged, with the exception of the Law Society, that the words

‘dangerous and unsafe to convict’ should not have to be used to give effect to the warning.

Submissions received from Taskforce members suggested that consideration should also be given to drafting a provision to state that the words ‘dangerous and unsafe to convict’ must not be used if giving a warning.⁴²¹ Detective Superintendent Kim McKay submitted that the words “dangerous and unsafe” are emotive and powerful, and it may lead the jury to believe the judge is suggesting that there should not be a conviction.

There is a need for flexibility and for warnings to be appropriately tailored to the case, otherwise, it is suggested the law is brought into disrepute and confidence in the legal system is eroded.

It is suggested that in giving a direction:

- there should be no requirement that a particular form of words be used;
- the words ‘dangerous and unsafe to convict’ do not need to be used to give effect to the warning; and
- a direction should only be given where the accused can point to some specific forensic disadvantage that has been occasioned due to the delay.

⁴²⁰ *R v DBG* (2002) 133 A Crim R 227

⁴²¹ This was supported by the DPP, Women’s Legal Services and the Office for Women.

TASKFORCE RECOMMENDATION:

- 33 A *Longman* style direction should be retained in appropriate cases.
- 34 Such a direction should only be given in cases where a party requests that a direction be given and the court is satisfied that there is some evidence that the accused has suffered a specific forensic disadvantage due to the delay.
- 35 In giving the direction, there is no requirement that a particular form of words be used, and the words ‘dangerous and unsafe to convict’ need not be used to give effect to the warning, or as a secondary recommendation; that the words ‘dangerous and unsafe to convict’ should not be used.

2. The Crofts Direction

Section 294 of the Criminal Procedure Act 1986 (NSW), provides that where evidence is given or a question is asked about a delay in complaint in a sexual offence case, a judge must warn the jury that the absence of complaint or delay in complaining does not necessarily indicate that the allegation is false, and must inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault. This section was introduced in NSW in 1981.⁴²² The provision was (and is) intended to make it clear to a jury that a delay in complaint does not mean that it was more likely that the allegation had been fabricated.

However, the High Court has since indicated that if a warning is given in terms that there may be good reasons for not complaining, *then* the jury should also be informed that the absence of a complaint or a delay in the making of it may be taken into account in evaluating the evidence of the complainant, and in determining whether to believe him or her: *Crofts v The Queen*,⁴²³ giving effect to what is known as the *Kilby*⁴²⁴ direction.

In *Crofts*, the Court examined the Victorian equivalent of s 294 Criminal Procedure Act 1986 (NSW).⁴²⁵ The Court said that whilst the legislative provision was intended to reform the law, it was not intended to remove the balance of the jury instruction as to delay nor “to convert complainants in sexual misconduct cases into an especially trustworthy class of witnesses”.⁴²⁶ Whilst the direction requires that the jury have regard to the issue of delay when assessing the credit of the complainant, this direction is not to be given in terms that revive the stereotyped view that complainants in sexual assault cases are unreliable or that delay is invariably a sign of the falsity of the complaint. Terese Henning has commented, ‘How this is reasonably to be achieved remains a mystery.’⁴²⁷

⁴²² Formerly s 107 Criminal Procedure Act (1986) and first introduced as s 405 Crimes Act 1900 (NSW)

⁴²³ (1996) 186 CLR 427

⁴²⁴ *Kilby v The Queen* (1973) 129 CLR 460. See also *R v Davies* (1985) 3 NSWLR 276

⁴²⁵ s 61(1)(a) Crimes Act (Vic)

⁴²⁶ Joint judgment of Toohey, Gaudron, Gummow and Kirby JJ at 451

⁴²⁷ Henning T: Warnings in sexual offences cases relating to delay in complaint, *Issues Paper 8* June 2005, Tasmania Law Reform Institute at 10. Henning sets out the number of successful appeals in all jurisdictions, including NSW at 9.

Recent Judicial Comment

Both judges and commentators have suggested that the two competing warnings to juries are unnecessarily complex and render the directions meaningless. The most criticism has been levelled at the underlying rationale for the direction which fails to take into account the multitude of reasons why a victim of sexual assault may not make an immediate complaint; such as fear; feelings of guilt, shame and embarrassment; the relationship between the accused and complainant, including any power imbalance; trauma, shock; and in particular the complainant's age and understanding of the wrongdoing.

Both Gaudron and Gummow JJ have noted that the assumption that the victim of sexual assault will complain at the first reasonable opportunity is of doubtful validity.⁴²⁸ In identifying the inherent conflict between the *Crofts* direction and s 294, Wood CJ at CL (as he was then) has also questioned the underlying assumption that victims of sexual assault will complain at the earliest opportunity, particularly with respect to children.⁴²⁹ Howie J has also commented:

I do not understand how any inference can legitimately be drawn about the veracity of a young child from the fact that the child does not complain about sexual misconduct at the first reasonable opportunity especially when the conduct is perpetrated by a close family member. Certainly courts should not be encouraging such a line of reasoning on the basis of some supposed collective experience or understanding of the behaviour of children in such a situation....⁴³⁰

Should the *Crofts* direction be retained?

In her recent article, Boniface argues that a jury is capable of understanding when a delay in complaint has importance, and therefore there is no need for directions to be given. She clearly states that in an adversarial trial defence counsel will no doubt make the jury aware of the importance of delay and the jury can effectively make up their own minds.⁴³¹ She is of the view that where there is a good reason for not complaining immediately, such evidence should be admitted on the basis of relevance, and therefore the current directions are unnecessary.

Indeed, there is a real question as to whether the issue of delay in sexual assault is a matter particularly within the knowledge of the judiciary, or whether it should be left for the jury to determine. Do judges have any greater insight than members of the public about these issues? In the past this may have been the case, as sexual assault was not generally discussed in the public arena. However,

issues surrounding sexual assault, including delayed complaint, are routinely addressed in newspapers, novels, countless television programs and by people in their everyday life. In *BWT*, Justice Wood observed:

...special considerations do apply in relation to the sexual assault of children and particularly in relation to delay in the emergence of any complaint, and it is not at all clear to me that judges, even experienced trial judges, have any greater insight into this aspect of human behaviour than lay citizens.⁴³²

In 1993, a US survey was conducted of adults from the general public and jurors on whether they agreed that delay in disclosing a sexual assault was common among children who had been abused. The findings suggested that lay people tend to believe that delayed disclosure is common in such cases.⁴³³

Proposals have been put forward for the removal of any requirement to give a direction with respect to delay in complaint. The authors of *A Fair Chance* state that there are compelling reasons why victims of sexual assault do not immediately complain, including stress, shock, embarrassment, fear and shame. In their view, legislation should be introduced to abolish all warnings to a jury on the delay in complaint.⁴³⁴ A similar recommendation was made by the Legislative Council Standing Committee on Law and Justice in 2002, which sought legislative amendment to expressly prohibit a judge from giving a direction that the credibility of the complainant is affected by a failure to report or delay in reporting in respect of a child sexual assault.⁴³⁵ However, this recommendation was only raised in the context of child sexual assault and it is not clear whether the same recommendation would be made with respect to adults. Dr Cossins was of the view that there are no grounds for retaining a *Crofts* direction; to do so is to perpetuate myths that women and children lie about being sexual assaulted, and that there is a link between a false complaint and delay. She suggests this is a logical fallacy.

⁴²⁸ See *Suresh v The Queen* (1998) 153 ALR 145

⁴²⁹ Wood CJ at CL, *Practice and Prevention: Contemporary Issues in Adult Sexual Assault* in NSW Conference, 12-14 February 2003.

⁴³⁰ *R v LTP* [2004] NSWCCA 109 at [123]

⁴³¹ Boniface D: The Common Sense of Jurors vs The Wisdom of the Law: Judicial Directions and Warnings in Sexual Assault Trials' in (2005) *UNSWLJ* 11(1) Forum at 8.

⁴³² *R v BWT* at [36]. See also the comments made by Simpson J in *R v LTP* [2004] NSWCCA 109 at [116]: "To hold that, in the absence of a direction formulated precisely in accordance with Kilby, a miscarriage of justice has occurred is, in my opinion, to underestimate the intelligence and common sense of the jury"

⁴³³ London, Bruck, Ceci and Shuman: Disclosure of Child Sexual Abuse: What does the Research Tell Us About the Ways That Children Tell? *Psychology, Public Policy and the Law*, 2005 Vol 11 at 220

⁴³⁴ NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW*, November 2004 at 16

⁴³⁵ Legislative Council Committee on Law and Justice: *Report on Child Sexual Assault Prosecutions*, November 2002, Report 22 at 130 (Recommendation 22)

In contrast, others, including the Law Society, have indicated that the current provisions should be retained. In his evidence before the Legislative Standing Committee Mr Richard Button, Public Defender, opposed the Committee's recommendation and supported the current judicial warnings. He did not think that a jury was incapable of understanding the directions. He provided an example of when a warning should be given, such as where a complaint has not arisen until after a custody dispute. The example given, however, is not necessarily directed solely at the issue of delay on the credit of the complainant, but rather at the timing and context of the complaint and its effect on credit. Dr Cossins argued that to link delay with issues such as a custody dispute or unwanted discipline, is to deny the very type of circumstances that may trigger a person to actually complain.

One may argue that there is scope for retaining the direction with respect to delay in complaint, but only where there is some correlation between the timing of the complaint and some other significant event which may raise a doubt as to the complainant's testimony, such as the allegation coinciding with the complainant getting into trouble for forging the accused's signature on school notes, or some other conflict between the complainant and the accused. However, this line of reasoning was rejected by a number of members, as it is likely to be the subject of vigorous cross-examination, and the issue would more than sufficiently be raised for the jury to consider.⁴³⁶

If the direction is retained, when should it be given? Although the *Crofts* warning has been criticised by members of the judiciary, it may still have some relevance in certain circumstances. Wood CJ at CL has indicated that he would prefer to see the balancing direction confined to those cases where there is *at least a prima facie basis for suggesting that the delay was a sign of want of credibility, for example, where there is an absence of any evidence suggesting a reason for it.*⁴³⁷ In his view, without some firm basis for the suggestion that the delay might have affected the complainant's credibility, the balance has been tipped too far in favour of the accused.

In order to give effect to such a provision the Crown may need to clearly adduce evidence from the complainant of the reason for the delay in complaint. This may pose difficulties in those cases where the complainant is very young, or suffers an intellectual disability or mental illness and is unable to articulate their reasons for not disclosing earlier, such as fear of not being believed, fear for other family members, shame or guilt.⁴³⁸ Indeed, one wonders

whether a person who has been subject to sexual assault will be ever be able to fully express the reasons why they were unable to come forward. However, for the most part, a complainant will be able to give some general indication of why they did not say anything at the time.

Wood CJ at CL's concern is that if a direction is given that there be an appropriate balance. In his view it is appropriate for an explanation to be given to the jury that evidence showing a reason for the delay should be taken into account in assessing a complainant's credibility, although he also points out that such directions must not invite speculation or suggest reasons that are not supported by the evidence. Where there is a *firm* basis for the suggestion that delay might have affected the complainant's credibility or where there is actual prejudice to the accused due to delay, then in his view it is appropriate to give an explanation to the jury of the prejudicial effect of the delay.⁴³⁹

Victoria

The Victorian Law Reform Commission has sought to give legislative effect to the proposal put forward by Wood CJ at CL. Recommendation 170 of the VLRC effectively provides that a judge must not suggest that the delay in complaint has any effect on the complainant's credibility, unless there is good reason for it. What constitutes a good reason though, is not explored in any detail by the VLRC and there is no attempt to indicate the types of matters that will justify such a warning.

⁴³⁶ Written submissions Office for Women and Women's Legal Services.

⁴³⁷ Wood CJ at CL: *Child Witnesses – Best Practice for Courts*, 20 July 2004 at 15

⁴³⁸ This difficulty was acknowledged in the written submission of Women's Legal Services.

⁴³⁹ Wood CJ at CL: *Complaint and Medical Examination Evidence in Sexual Assault Trials* (2003) 15 *Judicial Officer's Bulletin* 8 at 2

The recommendation seeks to extend the current provision of s 61(b) of the Crimes Act 1958 (Vic):

In relation to sexual assault trials:

- 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
 - (i) if evidence is given or a question is asked of a witness or a statement made in the course of an address on evidence which tends to suggest that there was a 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 reason 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 the 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.*

Queensland

In Queensland the decision on *Crofts* has been overridden by s 4A(4) Criminal Law (Sexual Offences) Act 1978 (Qld). This section commenced 5 January 2004 and provides:

If a defendant is tried by a jury, the judge must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary complaint or other complaint.

It must also be noted that s 4A(2) provides that evidence of how and when any preliminary complaint was made by the complainant about the alleged commission of the offence by the defendant is admissible in evidence, regardless of when the preliminary complaint was made. This effectively removes the requirement for the complaint evidence to be recent or fresh as required in NSW.⁴⁴⁰ However, such evidence may be excluded where it would be unfair to admit the evidence.⁴⁴¹

There does not appear to be any case law examining the Queensland provision in detail at this stage.⁴⁴² This provision would appear to reflect the type of model envisaged by Boniface, - where no direction is given to the jury on what to do with the evidence, and where they are to apply their own 'commonsense' and values as to what the failure to promptly complain means. As Henning points out, the difficulty with this model is that there does not appear to be any basis for a judge to indicate that delay does not necessarily mean that the complainant

lacks credibility, particularly where defence counsel have attempted to bring this issue to the fore. This may produce less fair outcomes for complainants' as a jury's attention will not be drawn to the fact that there may very well be good reasons why a person does not complain. This may be particularly so, where there is little evidence adduced by the complainant or others on the reason for the complainant's failure to say anything at the time.

Tasmania

In her recent review of the *Crofts* warning Terese Henning proposed that the law be amended to reflect that a delay in complaint will only have a genuine impact on the truthfulness of the complainant's account in *exceptional* circumstances. Henning suggests that s 371A of the Tasmanian Code should be amended to prevent a judge from suggesting or warning that an absence of recent complaint may reflect on the credit-worthiness of the complainant's account. A judge should only give such a warning in exceptional circumstances. According to Henning, exceptional circumstances would require that it be shown on the balance probabilities that the delay in complaint can be attributed to a fabrication of the allegations of sexual assault or alternatively that it has a genuine and identifiable connection, apart from the mere fact of delay, to the complainant's credibility. She asks the following:

Do you support [the law] being amended to preclude trial judges in sexual offence cases from suggesting or warning that absence of proximate complaint may reflect on the creditworthiness of the complainant's account unless there are exceptional circumstances? Namely:

- where it is shown on the balance of probabilities that the delay in complaint can be ascribed to fabrication of the allegations of sexual assault, or
- delay has a genuine and identifiable connection, apart from the mere fact of delay, to the complainant's credibility.

⁴⁴⁰ For further discussion of these issues see s 66 and 108 of the Evidence Act and *Graham v The Queen* (1998) 195 CLR 606

⁴⁴¹ The legislation cites the following by way of example. Soon after the alleged commission of a sexual offence, the complainant discloses the alleged commission of the offence to a parent ("complaint 1"). Many years later, the complainant makes a complaint to a secondary school teacher and a school guidance officer ("complaints 2 and 3"). The complainant visits the local police station and makes a complaint to the police officer at the front desk ("complaint 4"). The complainant subsequently attends an appointment with a police officer and gives a formal witness statement to the police officer in anticipation of a criminal proceeding in relation to the alleged offence ("complaint 5"). After a criminal proceeding is begun, the complainant gives a further formal witness statement ("complaint 6"). Each of complaints 1 to 4 is a preliminary complaint. Complaints 5 and 6 are not preliminary complaints.

⁴⁴² See *R v RH* [2004] QCA 225 at [13], which stated that the provision in s 4A(4) does not prevent the trial judge from giving a direction that evidence of the preliminary complaint does not constitute proof that the offence actually did occur.

With respect, the first test devised may be problematic. Before the judge would be entitled to give a warning about the effects of the delay in complaint, he or she would have to be satisfied on the balance of probabilities that the delay was due to the allegations being fabricated. It is undesirable that a trial judge be required to make such a determination of fact and record such a determination. Should the trial judge do so, give the warning and the trial proceed to conviction, the view of the trial judge is likely to be raised on a subsequent appeal.

The second proposal is neatly framed, that is, that the delay has some connection with another issue which would appear to require greater scrutiny of the complainant's credit. For example, as mentioned previously, the fact that it coincides with a custody dispute, or unwanted disciplining from the accused or some other factor that might add further doubt as to the complainant's truthfulness.

Options for reform in NSW

There are two approaches to reforming the law in this area:

1. abolish all warnings and let the jury decide without judicial guidance; or
2. retain s 294 and statutorily amend the current test for when the *Crofts* warning should be given, so that it does not apply unless there is a good reason in the circumstances of the case.

Removing all warnings

Abolishing all warnings in relation to delay in complaint would mean that the issue was simply left to the jury to decide. This is the favoured position of Detective Superintendent Kim McKay. Whilst the adversarial process may draw the issues surrounding delay to the attention of the jury, - this will not always be a balanced view. Defence counsel may ask numerous questions of a complainant as to why they did not complain and cross-examine on all the opportunities the complainant failed to complain. Defence counsel may also spend a great deal of time in their closing arguments inviting the jury to consider the lack of complaint, or delay in complaint when assessing the credit of the complainant. In contrast, a complainant may give limited reasons for not telling. The rules of evidence do not allow leading questions to be used to elicit this information from the complainant. The reasons for not complaining immediately may be difficult for a complainant to verbalise, although there may be good reasons. In addition, the prosecution must not invite the jury to speculate on the reasons where none have been given.

This approach places great faith in the jury to understand the complexities of sexual assault, particularly child sexual assault, without deference to the literature and research conducted in this area, unless of course expert evidence is given. The question of whether expert evidence should be adduced in child sexual assault cases, to give the jury a better appreciation of the reasons why children may not complain of sexual abuse for many years, is inextricably linked to the question of whether warnings should be given at all.

In Tasmania s 79A Evidence Act provides that a person who has specialised knowledge of child behaviour, (including specialised knowledge of the impact of sexual abuse on children and their behaviour during and following the abuse) may, where relevant, give evidence in child sexual offence proceedings in relation to either:

- child development and behaviour generally;
- child development and behaviour if the child has had a sexual offence, or any offence similar in nature to a sexual offence, committed against him or her.

The ALRC has also asked whether the Uniform Evidence Act should be amended to clearly allow for the admission of such evidence.⁴⁴³ This was further addressed in their recent Discussion Paper. The ALRC acknowledged that it may be appropriate to admit expert evidence to assist the jury in understanding the behaviour of child witnesses. The ALRC noted that at common law there has been a reluctance to admit such evidence and there is a currently a tendency for expert evidence on children's behaviour to be excluded.

The NSW Public Defenders Office opposes a special provision like the one employed in Tasmania. In their view, matters of credibility of the child witness should be left to the jury 'untainted' by expert opinion. Others support a provision similar to the one in Tasmania. The NSW ODP submitted:

Such evidence may place in context behaviour which is otherwise perplexing, such as the absence of complaint, or the continued association with the alleged offender after the alleged offence. Its purpose would be to address common misconceptions held by jurors arising from lack of information about or experience of the behaviour of children generally.

⁴⁴³ See Question 6-9 ALRC Issues Paper 28, November 2004: "Should the Evidence Act 1995 (Cth) be amended to clearly allow for the admission of expert evidence regarding the credibility or reliability of child witnesses? Does s 79A of the Evidence Act 2001 (Tas) achieve this purpose or is further clarification required."

The ALRC was of the view that s 79 of the Evidence Act is currently broad enough to allow the admission of expert opinion on child development and behaviour. The ALRC recognises that there is a danger in admitting this evidence, however, in their view, any danger could be adequately addressed by the giving of an appropriate warning. The ALRC does not see s 79A in the Tasmanian Evidence Act as a major departure from existing law.

Removing the requirement to give a balancing warning as per *Crofts*

A refinement of this option would be to retain the direction pursuant to s 294 Criminal Procedure Act 1986 (NSW), that is, that there are good reasons why someone would not complain, but without giving the balancing warning demanded by *Crofts*. This is favoured by Dr Cossins, Women's Legal Services and Office for Women. In their view s 294 is a realistic assessment of delay in complaint and there are no grounds for requiring a balancing direction. This may present no difficulty in those cases where the complainant is able to articulate his or her reasons for not complaining earlier. However, one difficulty with this approach is, that if a judge were only to give a warning about why there may be good reasons for a delay in complaint, this could be interpreted by the jury as the judges' own view and elevated to the level of imprimatur. If the judge presents no counter-view as to the meaning of the delay, it may be argued that in some cases this is unfair and could potentially lead to a miscarriage of justice.

Providing a balance where there is a good reason for the warning to be given

A further option is to provide legislation which removes the requirement for the *Crofts* warning to be given on the basis of delay alone, but allows the warning to be given in certain limited cases, as suggested by Wood CJ at CL. For example, where there is other evidence suggesting a want of credibility of the complainant. The Legal Aid Commission submitted that if the direction is modified so as to remove the mandatory nature of the warning, there must be a requirement for a balancing direction where the defendant is able to point to circumstances that justify a warning, in order to put the delay in complaint in another context. The Legal Aid Commission, however, did not believe that there should be a requirement that the defendant adduce evidence about this.

Section 294 Criminal Procedure Act could be amended as proposed by the VLRC, or by adopting the test devised by Henning. The VLRC proposal is preferred to the Henning proposal, because the formulation of the first limb of the Henning test is problematic. That is because it would

require the judge in each case to determine whether the delay in complaint was due to the allegations being fabricated. It is undesirable that a trial judge be required to make such a determination of fact and record such a determination. Should the trial judge do so, give the warning and the trial proceed to conviction the view of the trial judge is likely to be raised on a subsequent appeal.

Section 294 of the Criminal Procedure Act (NSW) could be amended to provide:

- (1) This section applies if, on the trial of a person for a prescribed sexual offence, evidence is given or a question is asked of a witness that tends to suggest:
 - (a) an absence of complainant in respect of the commission of the alleged offence by the person on whom the offence is alleged to have been committed; or
 - (b) delay by that person in making any such complaint.
- (2) In circumstances to which this section applies, the Judge:
 - (a) must warn the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false, and
 - (b) must inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault and
 - (c) The judge must not state, or suggest in any way to the jury that the credibility of the complainant is affected by a delay in reporting a sexual assault unless satisfied that there is sufficient evidence to justify such a warning in the particular case.

Discussion

Reform in this area is a particularly vexed issue and there is no real consistency of approach amongst Taskforce Members. Three options for reform have been canvassed and there is no consensus on which to adopt. Mr Odgers SC cited difficulty with the VLRC model on the basis that it would create uncertainty about when a warning would be required; what criteria would be applied; and what the defence would be required to show, before it was given.

Instead, he would prefer that s 294 be amended in a manner that requires a balanced direction in all cases, that is, the absence of complaint, or delay in complaint should be taken into account by the jury in assessing the credibility of the complainant's evidence and may be regarded as reducing the complainant's credibility. However, the jury is not required to treat the evidence of the complainant as less credible by reason of the delay. Delay does not necessarily indicate that the allegation is false, and the jury should bear in mind that there may be

good reasons for the absence of a complaint or delay. Whilst appreciating the concerns with the other proposed tests, it is unclear whether Mr Odgers SC suggestion really untangles the problems with the current direction.

The VLRC approach was supported by the DPP and conditionally supported by the Office for Women. Whilst cognisant of the arguments for removing a *Crofts* style balancing warning completely, it appears that in certain circumstances such a warning may be warranted where there are additional factors in combination with the delay, that should properly be drawn to the jury's attention. After reconsideration of these issues at a later meeting the Taskforce determined to support the recommendations.

TASKFORCE RECOMMENDATIONS:

- 36 Section 294 Criminal Procedure Act 1986 should be retained.
- 37 There should be legislative amendment to provide that a *Crofts* direction should not be given in cases where there is a delay in complaint.
- 38 Where there is a delay in complaint a judge may only give a direction that the jury should take into account the delay when assessing the credibility of the complainant where there is sufficient evidence to justify such a warning.

3. The Murray Direction

Sexual assault invariably takes place in private and there is generally only one witness to the assault. Corroboration for the assault may exist by way of an admission, DNA evidence, medical evidence, recent complaint, or tendency evidence, - although for the most part, particularly in child sexual assault matters, such evidence may be rare. Despite the fact that s 164(3) Evidence Act (NSW) provides that it is no longer necessary for a judge to give a warning that it is dangerous to act on the uncorroborated evidence of a witness, it appears that a *Murray* warning is frequently given in sexual assault trials in NSW. This direction is to the effect that;

Where there is only one witness asserting the commission of the crime, the evidence of the witness is to be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in.⁴⁴⁴

Should the *Murray* direction be retained?

Concern has been expressed as to why this direction is required. Boniface has suggested that the rationale for the traditional corroboration warning is highly questionable:

As a contribution to rational adjudication the warning was either superfluous where the complainant's unreliability was obvious and useless where the complainant was a skilled and convincing liar.⁴⁴⁵

She asks whether it is really necessary in the modern day for juror's attention to be drawn to the patently obvious.

Wood CJ at CL has also asked what the *Murray* direction actually means.⁴⁴⁶ He notes that whilst the standard directions as to burden and standard of proof may not adequately address the situation where the only evidence comes from the complainant, consideration could be given to toning down the warning.

The NSW Adult Sexual Assault Interagency Committee has also questioned the rationale for the warning, as there is no evidence to suggest that complainants in sexual assault matters are a particularly unreliable class of witness. The authors of the report argue that the warning potentially undermines a complainant's evidence and perpetuates myths about women. The Committee notes that the direction has a significant impact on complainants in sexual assault trials and leaves them feeling powerless. They recommend that s 164 of the Evidence Act 1995 (NSW) be amended to provide that a judge must not warn or suggest in any way to the jury that the law regards complainants in sexual assault cases as an unreliable class of witness.⁴⁴⁷

A similar provision was enacted in relation to children by s 165A of the NSW Evidence Act (1995). This section provides that a judge must not give a warning about the unreliability of children as a class of witness.⁴⁴⁸ This section commenced in July 2002 and sought to remedy a number of concerns raised by the Royal Commission into the New South Wales Police Service.

Both the ODPP and the Public Defenders Office have submitted to the ALRC that s 165A of the Evidence Act 1995 (NSW) appears to be working satisfactorily. The Law Council of Australia also submitted that:

S[ection] 165 should be clarified to at least discourage judges from warning that evidence of a certain class is generally unreliable. In the case of some category of witnesses, children and victims of sexual assault, legislation exists in many jurisdictions to prohibit such general comments and the Council supports similar provisions...⁴⁴⁹

The Taskforce agreed that there should be legislative amendment to provide that a judge is prohibited from giving a warning that may suggest that a complainant in a sexual assault case is an unreliable class of witness.⁴⁵⁰

What model for reform would be appropriate in NSW?

The NSW Legislative Council Standing Committee on Law and Justice noted that despite s 165A, a warning may still be given that a particular child's evidence may be unreliable as a result of their age and a warning may be given to the jury that they should scrutinise the complainant's evidence with care. The Committee said that whilst a warning should be given in appropriate cases to examine the evidence with care, the absence of corroboration could result in juries unfairly doubting the credibility of the complainant.

⁴⁴⁴ See *R v Murray* (1987) 11 NSWLR 12

⁴⁴⁵ Dorne Boniface: "The Common Sense of Jurors vs The Wisdom of the Law: Judicial Directions and Warnings in Sexual Assault Trials (2005) *University of New South Wales Law Journal* 11(1) Forum at 5

⁴⁴⁶ Wood CJ at CL (2003) *Sexual Assault and the Admission of Evidence*, Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales

⁴⁴⁷ NSW Adult Sexual Assault Interagency Committee: *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW*, November 2004

⁴⁴⁸ (1) A judge in any proceedings in which evidence is given by a child, must not warn a jury, or make any suggestions to a jury, that children as a class are unreliable witnesses. (2) Without limiting subsection (1), that subsection prohibits a general warning to a jury that the danger of convicting on the uncorroborated evidence of any child witness. (3) Sections 164 and 165 are not subject to this clause.

⁴⁴⁹ Submission made by the Law Council of Australia to the ALRC at [16.88] of Discussion Paper 69.

⁴⁵⁰ Written submissions of Detective Superintendent Kim McKay, DPP, Dr Cossins, Office for Women, Women's Legal Services and Legal Aid Commission, and oral contributions 20 July 2005.

The Committee recommended that the Criminal Procedure Act 1986 (NSW) be amended so that a judge may advise the jury that whilst they are required to scrutinise the evidence before the court with great care, the evidence of one witness, if believed, is sufficient to prove a fact in issue in the trial.⁴⁵¹ The Committee's proposal has been strongly criticised by the NSW Bar Association. Unfortunately, the proposed direction does appear to misstate the law and could be misleading for jurors, that is, - the jury must do more than believe the complainant, - they must be satisfied beyond reasonable doubt.⁴⁵²

The NSW Adult Sexual Assault Interagency Committee favour the approach adopted in Victoria. Section 61 of the Crimes Act 1958 (VIC) provides that:

The judge must not warn, or suggest in any way, to the jury that the law regards complainants in sexual assault offence cases as an unreliable class of witnesses.

Given that there is general support for s 165A with respect to children, consideration could be given to afford similar protections to complainants in sexual assault cases, a proposal which was supported by the majority of Taskforce written submissions. This would prevent a general warning being given about scrutinising the evidence of the complainant with great care, simply because he or she is alleging sexual assault. However, where there is specific evidence, which suggests that aspects of a complainant's evidence may be unreliable, a comment may still be made about needing to treat such evidence with care. The Taskforce recommends legislative amendment to provide that a judge is prohibited from giving a warning that a complainant in a sexual assault case is an unreliable class of witness.

TASKFORCE RECOMMENDATION:

- 39 There should be legislative amendment to provide that a judge is prohibited from giving a warning that a complainant in a sexual assault case is an unreliable class of witness.

CLRD RECOMMENDATION:

- 40 Any legislative amendment should also prohibit a judge from giving a general warning of the danger of convicting on the uncorroborated evidence of a sexual assault complainant.

⁴⁵¹ NSW Legislative Council Standing Committee on Law and Justice, Report 22, November 2002, Recommendation 24 at 134.

⁴⁵² Bar Association Response to Legislative Standing Committee Recommendation at 9.

Chapter 7

Evidence of Children in Sexual Assault Cases

Introduction

There is no doubt that child sexual assault victims find the criminal justice process to be a daunting and traumatic process. Some commentators have argued that the re-traumatisation of child sexual assault complainants by the criminal justice system gives rise to a form of state sanctioned abuse against a child. The criminal justice system was never designed with child witnesses in mind. Over the last 15 years numerous attempts have been made to accommodate children and take into account their vulnerability by providing special measures for the giving of evidence, such as video recorded statements; use of CCTV; closed courts and support persons. Despite these reforms, child sexual assault prosecutions remain extremely difficult. Delay in matters proceeding, poor communication and ill equipped facilities have contributed to the traumatisation of child complainants. Whilst it is acknowledged that procedural reforms do not provide the whole solution, this chapter outlines some areas of practice, procedure and law, which could be utilised to make the experiences of children less traumatic and improve the criminal justice response in this area.

This chapter will examine:

- the method by which the police take video evidence from a child complainant;
- whether there should be pre-trial disclosure to narrow the issues in matters involving children;
- the recording of a child's cross-examination and re-examination prior to trial;
- protecting children from harassment when they are giving evidence; and
- whether expert evidence should be admissible concerning the experience of child witnesses and children who have been sexually assaulted.

1. Practice and procedure of conducting police interviews with children

On 1 August 1999 the Evidence (Children) Act 1997 (NSW) was proclaimed, providing a new legislative regime for the investigation, recording and admission of statements made by child complainants in sexual assault matters. The Act enabled audio recordings or videotaped interviews with children and young people to be played as their evidence in chief in sexual offence proceedings and matters involving physical abuse and neglect.⁴⁵³ The Act provides that a child must not be present or be visible or audible by CCTV while the recording is being played in court. Evidence may only be given in this manner if the child was under the age of 16 at the time the statement was recorded and under the age of 18 when they give their evidence.⁴⁵⁴ A child must not give evidence by means of a recording if it is not in the interests of justice to do so.⁴⁵⁵ The success of the Act has been largely dependent upon the quality and standard of the interviews conducted; the technical quality of the recording; the availability of equipment, and an acceptance by lawyers and members of the judiciary to evidence given by way of recorded videotape.

The Joint Investigation Response Team (JIRT) conducts the recorded interview with the child. This is a co-ordinated response between NSW Police and officers from the Department of Community Services.⁴⁵⁶ The interview with the child is generally conducted in a child friendly room at one of the JIRT facilities. Only one JIRT officer conducts the interview, however, a second JIRT officer listens to the interview via an audio feed and may also ask questions of the child via the primary interviewer who wears an earpiece. The interview serves the dual purpose of gathering evidence about an alleged assault and assessing the child's care and protection needs, so as to avoid exposing the child to multiple interviews.

In 2002 McConachy conducted an evaluation of children's electronically recorded evidence in NSW. The aim of the evaluation was to determine whether the admission of a recording made the court experience less stressful for children; assess the quality and completeness of the evidence taken; identify factors that enhanced or impeded the tender of JIRT tapes and identify strengths and weaknesses of interviewer training.⁴⁵⁷ McConachy sought the views of approximately 300 professionals with varying degrees of experience and tracked 350 cases accepted by JIRT.⁴⁵⁸ Information collected at the time of the study revealed that the provisions of the Act had not been widely used at court. However, the findings need to be treated with some caution as in a number of cases

tracked, no arrest was made, the matter was no billed or withdrawn or there was a plea of guilty. At the time of McConachy's evaluation only 16 cases in the sample had been finalised in court. A more recent evaluation into child sexual assault prosecutions in NSW by Associate Professor Judy Cashmore suggests that the recorded evidence of the child complainant is generally used by the Crown and admitted as the child's evidence in chief.⁴⁵⁹

In the 2002 evaluation McConachy identified the following barriers to the admission of the JIRT tape:

- quality of the interview;
- limited play-back facilities,
- lack of familiarity with provision on behalf of some lawyers and members of the judiciary;
- the child was too old to allow for the tape to be played in accordance with the legislation.⁴⁶⁰

McConachy also noted that some interviews were lengthy and contained irrelevant material from a risk assessment or evidentiary perspective. In addition, some prosecutors preferred not to submit an electronic recording as evidence-in-chief as it was considered long and confusing, contained leading questions or other inadmissible material. Some prosecutors also indicated a preference for the child to give evidence in court, as this made a greater impact.⁴⁶¹ However, a 1995 study conducted in the United Kingdom on the use of a child's pre-recorded evidence in chief at trial revealed that whether a child gave evidence on video tape or by live link did not impact the trial outcome.⁴⁶²

⁴⁵³ s 9 and 11 of the Evidence (Children) Act 1997

⁴⁵⁴ s 11(1A) Evidence Children Act 1997

⁴⁵⁵ s 15 Evidence Children Act 1997

⁴⁵⁶ There are 9 JIRT's located at Ashfield, Chatswood, Kogarah, Liverpool, Newcastle, Parramatta, Penrith, The Entrance, and Wollongong. 12 co-located JIRT in NSW regional centres.

⁴⁵⁷ Diana McConachy: *Evaluation of the Electronic Recording of Children's Evidence: Final Report*, May 2002.

⁴⁵⁸ A matter is accepted by JIRT when it is substantiated. This is a lower threshold than is required when determining whether a charge should be laid. A matter may also be accepted and substantiated but there may be no identified accused person.

⁴⁵⁹ Cashmore J: *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot 2005*.

⁴⁶⁰ In the following matters cited by McConachy, the JIRT tape was not used: Crown Prosecutor believed the case would be stronger if the child gave evidence (6 matters); The young person was 16 years or older at the time of the hearing (4 matters); the child wanted to testify (3 matters); the ODPP amended charges making parts of the tape no longer relevant (2 matters); the child's statement changed (1 matter); and the tape was of poor quality.

⁴⁶¹ The NSW Attorney General commissioned the Australian Institute of Criminology to conduct a study of mock jurors attitudes and responses to sexual assault complainants when the complainant's evidence is given across various conditions; in court testimony, evidence given via CCTV, and pre-recorded evidence. A final report was made available to the Attorney General in November 2005. Taylor and Joudo: *The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: an experimental study*, Research and Public Policy Series No. 68, Australian Institute of Criminology 2005.

⁴⁶² Davies G, Wilson C, Mitchell J (1995): *Videotaping Children's Evidence: An Evaluation*. London, Home Office cited by McConachy.

At the time of McConachy's study education had not been offered to judges or magistrates to educate and familiarise them with the provision of the Evidence (Children) Act 1997. There is currently no information contained in the Local Court Bench Book with respect to the Act and the special provisions that relate to children. An example provided to the CLRD earlier this year indicated that a serving magistrate was unaware that there were any provisions governing the admissibility a child's pre-recorded statement.⁴⁶³

Whilst the JIRT interviews are generally considered to be an improvement upon past practices, there are clear limitations with present recordings. McConachy recognises that:

- disclosure is a complex process and a single taped interview may only give a fragmented or incomplete description of the assault;
- the child still has to be cross-examined; and
- the electronic recording will increase the level of scrutiny on the child's evidence and by implication, the interviewing process, the skills of the interviewer and the interviewer training program.

There is a considerable body of literature about the suggestibility of children and the need to ensure that interviewers do not resort to suggestive questioning so as to mislead children. Associate Professor Bussey, child psychologist from the Macquarie University School of Behavioural Sciences, observes that such practices may lead to allegations that the child's evidence has been contaminated and that it should not be admitted on the basis that it is unreliable. Whether or not the interview is reliable and therefore admissible is a legal question, and only once it is admitted will issues of credit arise.⁴⁶⁴

Undertaking interviews with children requires specialised knowledge of child interviewing techniques, criminal law and evidence. A JIRT officer is expected to be skilled in the art of eliciting evidence from a child about a traumatic event and comply with the rules of evidence. This is not an easy task. In addition the dual goals of assessing the child's protection needs and criminal investigation purposes, also create tension.

The JIRT recorded statement is often the foundation of the prosecution. JIRT training is provided over 12 days and endeavours to cover many issues, including interviewing children from a non-English speaking background, children with developmental delays and Attention Deficit Hyperactivity Disorder and interviewing Aboriginal children. Yet, problems continue with respect to the use of leading questions, the length of the interview,

and introduction of irrelevant material, which often leads to the extensive editing of the JIRT tape, causing further delays at the time of the trial.

How do we improve the quality of interviews?

It appears that there is little research on the efficacy of training courses and whether what is being taught is actually being implemented in the field. Dr Powell from the School of Psychology, Deakin University notes:

Given that the interview process represents the first and arguably the most important point of contact, one would assume that a high priority would be placed on ensuring that best practice guidelines are translated into practice.⁴⁶⁵

Powell notes that it is extremely important that interviews elicit an account in the child's own words, and use open-ended questions (free narrative). Studies conducted overseas in the United Kingdom and the United States suggest that knowledge obtained during training may have little impact in practice. In Powell's view it is imperative that interviewers should receive one-on-one feedback, have opportunities to practise their skills in appropriate environments and participate in refresher courses.⁴⁶⁶ In addition it is considered that the best way for an interviewer to practise their skills is to stage an innocuous event at a school and then allow the interviewer to elicit information from a child about what he or she has seen or heard.⁴⁶⁷ Clearly, staging such an event requires co-ordination and resources, however, it is understood that such a practice is adopted in the initial JIRT training course.

Associate Professor Bussey has also been examining different ways to elicit clear and accurate information from children. She and her colleagues have devised a 'socio-cognitive' interview designed to elicit a coherent account of events. The technique is said to result in more complete sequencing, detail, less inconsistency and increases the amount of information elicited.

⁴⁶³ Example forwarded by NSW Police Service

⁴⁶⁴ Bussey K: "Accurate and Truthful Disclosures, False Allegations, and False Denials" reproduced on the South Eastern Centre Against Sexual Assault website: www.secasa.com.au

⁴⁶⁵ Powell: "Specialist Training in Investigative and Evidential Interviewing: Is it Having Any Effect on the Behaviour of Professionals in the Field?" (2002) 9 (1) *Psychiatry, Psychology and the Law* 44. See also Keenan, Davis, Hoyano and Maitland: "Interviewing Allegedly Abused Children with a View to Criminal Prosecution" [1999] *Criminal Law Review* 863 for a discussion of an evaluation of recording interviews with children in the United Kingdom.

⁴⁶⁶ *Ibid.* at 45.

⁴⁶⁷ *Ibid.* at 52

The research into the ways in which children disclose and the best methods of interviewing children is constantly evolving. It is imperative that JIRT officers are provided with up to date information, refresher courses and feedback on their field performances. Clearly there are cost implications for providing this type of training. However, continual training may not only assist in improving the quality of interviews, but contribute to a JIRT officer's level of work satisfaction and retention rates.

The Victorian Law Reform Commission made a number of recommendations with respect to video and audio tapes of children. It recommended that Victorian Police should establish an independent evaluation of video taped and audio taped statements given by children and of the use of these statements in evidence. It was also recommended that a panel, including a magistrate, police officer, a judge, defence barrister, prosecutor and child psychologist with expertise in methods of questioning children should view sample videos to assess admissibility, forensic quality and appropriateness of interview techniques.⁴⁶⁸ Research should also be conducted on Australian and international best practice regarding the preparation of video recordings with a view to making recommendations about changes to police training, which may be necessary to improve the quality and admissibility of interviews. In addition there should be similar training for prosecutors. It was recommended that a joint Working Party for Victorian police and OPP be established to oversee implementation of the recommendations.⁴⁶⁹

If an independent panel was established to assess the forensic quality of the JIRT interviews in detail, this may provide valuable feedback and consistency in this area. In NSW the JIRT State Management Group meets to discuss aspects of JIRT Management. The ODPP, NSW Health, Department of Community Services and NSW Police are represented on the Group. The JIRT CEOs meets twice annually. There is also a training sub-committee, which generally meets shortly after the State Management Group meeting. Any recommendations with respect to training and procedure should be made in consultation with this Group.

The Taskforce agreed that further training should be made available to JIRT officers with respect to one-on-one reviews, refresher courses, training involving children and expert feedback⁴⁷⁰. Increased training for police, NSW Health, DPP and DOCS was advocated by Detective Superintendent Kim McKay.

The Legal Aid Commission suggested that current problems with JIRT recordings were exacerbated by the use of poor technical equipment with a lack of audio quality. The Taskforce was in favour of upgrading current technology to digital recording. According to Detective Superintendent Kim McKay, some of the difficulties currently encountered with the content of recorded interviews is due in part to the dual aims of the interview, resulting in a great deal of material which is not relevant to the criminal prosecution.

Detective Superintendent Kim McKay did not support the establishment of a panel to assess the forensic quality and child-appropriateness of interviewing techniques arguing that regular meetings of such a group would be near impossible. In contrast, the DPP, Dr Cossins, Associate Professor Stubbs, Victims Services, Womens Legal Services and the Legal Aid Commission supported establishment of such a panel.

⁴⁶⁸ Recommendation 115.

⁴⁶⁹ Recommendation 116 and 117.

⁴⁷⁰ It was noted by Detective Superintendent Kim McKay that one-on-one reviews interviewing techniques would be extremely labour and resource intensive and therefore not achievable without increases to training staff. She instead preferred refresher training for officers. She also supported research into the most effective way to improve training for experienced child interviewers. The NSW Police Service recognises that continuing review and monitoring is necessary; and this is currently undertaken by the JIRT training sub-committee which consists of DOCS, DPP, police from JIRT, and Education Services.

TASKFORCE RECOMMENDATIONS:

- 41 Further training should be made available to JIRT officers with respect to one-on-one reviews, refresher courses, training involving children and expert feedback.
- 42 Research should be conducted to determine what training methods are most effective.
- 43 An independent review panel, similar to that proposed by the VLRC should be established to assess the admissibility and forensic quality of interviews.

2. The Evidence (Children's) Act 1997

The Evidence (Children's Act) 1997 is still relatively new and practices and procedures are still being clarified and the legislation tested. In December 2001 the Act was amended to permit children to give evidence by way of electronic recording if the child was under 16 at the time of the statement and under 18 at the time of giving evidence in the proceedings.⁴⁷¹ This amendment resolved one of the problems identified by McConachy, who reported that 4 complainants whose statement had been electronically recorded gave evidence in chief in person as they had turned 16 between the time of the interview and the court hearing so the tape could not be tendered.

If a child participates in an interview with JIRT when he or she is less than 16 years of age, but turns 18 before the commencement of the trial, there is no provision in the Act to allow the recorded interview to be tendered as the evidence in chief. Given the lengthy delay in proceedings that can occur in some trials, this places a young person who has just turned 18 years of age at a significant disadvantage. The Taskforce generally⁴⁷² agreed that the interview should be admissible as evidence in chief, even where the child has attained the age of 18 years by the time of the proceedings as it is unfair to a young person to require them to give their evidence *viva voce*, in circumstances where if the proceedings had commenced at some earlier time, they would have been entitled to rely upon the recorded interview with police.

Under s 12(2) Evidence (Children's) Act a recording is only admissible if an accused person and his/her lawyer are given a reasonable opportunity to listen to or view the recording as set out in accordance with the Evidence (Children) Regulation 1999. Regulation 4 provides that for the purposes of s 12(2) of the Act, if a prosecuting authority intends to adduce evidence of a previous representation by a child wholly or partly by means of a recorded interview or a transcript of a recorded interview, in a criminal proceeding where the child who made the representation is not the accused person, the prosecuting authority must notify the accused person or his or her lawyer (if any) of the intention. A notice *must* be in writing and given to the accused person or his or her lawyer at least 14 days before the evidence for the prosecution is given.

⁴⁷¹ Criminal Legislation Amendment Act 2001 – Schedule 9

⁴⁷² Stephen Odgers SC, DPP, Detective Superintendent Kim McKay, DPP, Legal Aid Commission, Dr Cossins, Associate Professor Stubbs, Victims Services, Womens Legal Services, and DOCS support amendment.

Informal submissions received from individual Crown Prosecutors suggest that where objection is made to the admission of the tape because of a failure to comply with Regulation 4, there appears to be no discretion to allow for it to be admitted. Where service of the notice cannot be proved, the Crown will be obliged to seek an adjournment of two weeks if they wish to rely upon the tape. This is the case even where the defence has had an opportunity to view the recording. Such technical objections appear to be motivated by a desire to force the child to give evidence *viva voce*.⁴⁷³

Clearly, this was not the purpose of the Regulations, which are designed to facilitate access to a recording. In child sexual assault matters a transcript of the recording is served, and a Regulation 4 notice should also be served. To avoid the undesirable consequences of a breach where no unfairness flows to the accused, a number of Taskforce members⁴⁷⁴ were in favour of amending the Act to provide that if the notice has not been given in accordance with the Regulation, the court may, on the application of a party direct that the evidence be admitted, where the parties consent, or the accused has had an opportunity to view the recorded interview, and it would be in the interests of justice to admit the evidence. This approach would bring the Evidence (Children) Act 1997 in line with other notice provisions in the Evidence Act 1995 which give the court the discretion to allow the evidence, despite a failure to comply with the notice requirements. The Law Society was opposed to such an amendment, arguing that the Crown should act as a model litigant and comply with notice provisions as fixed by Parliament.

TASKFORCE RECOMMENDATIONS:

- 44 Section 11(1A) of the Evidence (Children) Act 1997 should be amended to allow a recorded statement made by a complainant when he or she was less than 16 years of age to be admitted at any criminal proceedings, no matter what age they are at the time of the proceeding.
- 45 Regulation 4 of the Evidence (Children) Regulation 2004 should be amended to provide that despite a failure to comply with the Notice Requirements, the evidence of the recording should be admitted if: the parties consent; or the accused has had an opportunity to view the recorded interview and it would be in the interests of justice to admit the evidence.

⁴⁷³ These comments have been forwarded informally by 3 separate individuals

⁴⁷⁴ Stephen Odgers SC, Detective Superintendent Kim McKay, DPP, Dr Cossins, Associate Professor Stubbs, Victims Services, Womens Legal Services and DOCS supported amendment. The Legal Aid Commission supported amendment provided that it is in similar terms to the notice provisions of the Evidence Act 1995.

3. The Giving of Evidence of Children in Court

Delay

Delay is an important issue for all for child complainants in sexual assault trials. The NSW Bureau of Crime Statistics and Research (BOCSAR) reported in September 2004 that there has been an improvement in the time taken to finalise all matters in the District Court since 1988. In 2003, it took about 214 days to dispose of a trial in the District Court where the accused person was on bail.⁴⁷⁵

Data from BOCSAR for 1999 and 2000 suggests that it takes longer for child sexual assault matters to be finalised in the District Court. According to BOCSAR the median number of days for child sexual assault matters to be finalised in the District Court and Supreme Court, where the offender entered a not guilty plea or did not plead guilty were as follows:⁴⁷⁶

Year	No of days from arrest to committal	No of days from committal to outcome	Total no. of days days from arrest to outcome
1999	113	357	509
2000	149	343	552

A recent study by Cashmore examined 45 child sexual assault cases in the District Court in metropolitan Sydney in 2003 and 2004. From the study it would appear that the speed in which matters are being finalised has improved since 1999, however, it is still taking a long time for matters to get to trial. The median number of days from arrest to committal for a child sexual assault case in the sample was approximately 184.1 days, and the median number of days from committal to outcome was approximately 209 days. The overall median number of days for a matter to proceed from arrest to outcome was 405.5 days. The shortest number of days for the resolution of a matter was 166 days and the longest was 1523 days.⁴⁷⁷ What is significant is that the median time spent in the District Court in the recent study was significantly less than in 1999 and 2000. Conversely, the median number of days a matter was in the Local Court stage has increased since 1999 and 2000.

Evidence received at the Legislative Council Standing Committee on Law and Justice: *Report on Child Sexual Assault Prosecutions* was highly critical of the delay between the reporting of a complaint and the commencement of committal and trial. Such delay may be even longer than represented in the statistics if there is a lengthy delay between initial disclosure and the JIRT interview or a delay between formal disclosure and arrest.

Work practices and resource restrictions of the agencies involved in the gathering of evidence may contribute to this delay⁴⁷⁸.

The issue of delay with respect to the progress of child sexual assault matters within the court system is a matter of great concern. Children who are waiting for a trial to commence often feel that they cannot get on with their lives and are constantly reminded of the sexual abuse as they prepare for court. The delay may also affect a child's ability to recall times and details and therefore reduce their ability to give their best evidence as to what happened.

Once trial dates are set, further delays may be encountered due to lengthy voir dire hearings, effectively pushing back the trial date. This is often very unsettling for children who have prepared to come to court on a particular day and are then told to come back on another occasion. The issue of delay in child sexual assault proceedings due to continuing and lengthy legal arguments is of primary concern.

In his evidence before the Legislative Council Standing Committee on Law and Justice the Director of Public Prosecutions, Nicholas Cowdery QC AM, acknowledged the problem of delays and observed that delays have specific impacts in relation to child complainants, including:

- frustration and build up of anxiety for the complainant and the family;
- memories that become less clear over time and which can impact on evidence and defence arguments about consistency, accuracy and "false memory";
- child development in linguistic ability may mean inconsistency in language used and interpretation by the court;
- child protection issues when the accused is known to the complainant.⁴⁷⁹

⁴⁷⁵ BOCSAR statistics.

⁴⁷⁶ For matters disposed of in the Local Court it took 448 days from arrest to outcome in 1999 and 508 days in 2000.

⁴⁷⁷ These figures are based on the work of Cashmore J: *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot 2005*.

⁴⁷⁸ Written submission of Detective Superintendent Kim McKay.

⁴⁷⁹ Legislative Council Standing Committee on Law and Justice at 146 – 148.

The Wood Royal Commission into the NSW Police Service also criticised excessive delays in the prosecution of child sexual assault matters.

It is plainly unsatisfactory for a young child to have the prospect of a court attendance hanging over his or her head for a period as much as 12 to 18 months after the suspected offender is charged. It is understandable that health professionals should have identified the criminal justice system as itself a contributor to the abuse of children in these cases, since it is important that they be allowed to resume their lives, and try to get over the event, as quickly as possible. Moreover there is a real risk that justice will not be done to the child, where there is a substantial delay between the complaint and trial...⁴⁸⁰

Some of the factors contributing to delay and adjournments in child sexual offence cases include:

- legal arguments;
- unrepresented accused;
- late requests for Legal Aid;
- late briefing of Crown Prosecutors;
- editing of video tapes;
- problems with technology;
- over-listing in the District Court;
- interlocutory appeals pursuant to s 5F(3) or (3A) Criminal Appeal Act 1912 regarding the exclusion of evidence sought to be led by the Crown.⁴⁸¹

How can we reduce delays in child sexual assault prosecutions?

There appear to be two different approaches to reducing delay. The first would be to create fixed timetables to ensure that matters are prepared quickly and adopt pre-trial directions hearings to avoid delay on the day the trial is due to commence. The second approach, which has been adopted in other jurisdictions, is to pre-record the child complainant's cross-examination and re-examination early at a preliminary hearing, so that they do not have to wait around for the trial to commence.

Adopting strict time frames for child sexual assault matters

The Wood Royal Commission considered it imperative that the time taken for bringing on trials involving children less than 16 years was reduced. The Commission was of the view that for children in this age group it is not appropriate that the trial should be brought on for hearing any more than *six months* from the time of charge.⁴⁸² The Department of Community Services (DoCS) recommended a similar approach in evidence before the Legislative Council Standing Committee on Law and Justice. The DoCS argued that there should be statutory time limits for each stage of the complaint and prosecution process to prevent delay. Time limits could

be placed on all steps of the process, from complaint to charge, charge to committal, and from committal to trial.⁴⁸³

It is unclear at this stage whether the Government's criminal case conferencing initiative, which is to be dealt with administratively between the ODPP and Legal Aid Commission will assist in reducing delays in the Local Court and bringing matters on to trial more quickly. The aim of the scheme is to prevent pleas of guilty being entered at a very late stage in the proceedings, especially on the first day of the trial. It is anticipated that conferences will take place between defence and the ODPP at an earlier stage in the proceedings to discuss the prospect of a plea of guilty and to potentially narrow the issues in dispute. It was widely acknowledged amongst Taskforce members that improved listing practices for child sexual assault prosecutions is required to avoid delays⁴⁸⁴. In addition, priority listing for child sexual assault matters in country courts is necessary so that they receive priority over all other matters.

A number of members⁴⁸⁵ were in favour of adopting strict time standards for child sexual assault matters in an attempt to minimise further traumatisation of children. However, concerns were raised by the DPP and the Legal Aid Commission regarding extraneous factors that may continue to contribute to delay such as the length of investigation and subsequent service of a brief, and delays in obtaining legal representation for the accused⁴⁸⁶. The Legal Aid Commission opposed strict time standards, pointing to a number of factors that may affect delay in criminal proceedings.⁴⁸⁷ Similarly, DoCS opposed the introduction of strict time standards because this would have considerable resource implications for investigating agencies, and may potentially have undesirable results, for example, charges being dismissed. DoCS argue that best practice time standards would be a more achievable and less punitive option.

⁴⁸⁰ Royal Commission in NSW Police Service Vol 5 at 1100

⁴⁸¹ In 2003-2004 there were three sexual assault cases, which gave rise to a 5F appeal. All three appeals were allowed. In 2004-2005 there were four 5F Crown appeals relating to sexual assault cases, of which two were allowed, one dismissed and one reserved. Statistics provided courtesy of the ODPP. See in particular the case of *MM* [2004] NSWCCA 364 where a s 5F appeal was lodged and the proceedings were adjourned for a further four months in order to resolve the issues.

⁴⁸² Royal Commission into NSW Police Service Volume 5, at 1101.

⁴⁸³ Submission 70 to Legislative Standing Committee on Law and Justice.

⁴⁸⁴ Detective Superintendent Kim McKay, DPP, Dr Cossins, Associate Professor Stubbs, Victims Services

⁴⁸⁵ Detective Superintendent McKay, Victims Services, Womens Legal Services. Dr Cossins, however, was of the view that strict time standards would be most appropriately implemented as a feature of specialisation in sexual offence proceedings.

⁴⁸⁶ Written submission of the DPP.

⁴⁸⁷ For example, delays in processing and obtaining forensic evidence, the length of time taken to obtain transcripts of interviews, telephone intercepts and listening devices. In addition, delays may arise in the granting of legal aid where an applicant does not lodge an application at an early stage of the proceedings, or the applicant does not produce verification of income and assets.

Practice directions and timetables

Even if strict time frames were adopted in legislation to ensure matters proceed through the courts quickly, legal and evidentiary issues in dispute can still cause delays once the trial is due to commence. For this reason, the Government recently introduced legislation, the aim of which is to provide for better case management of sexual assault trials. The provisions⁴⁸⁸ make pre-trial orders made by a Judge binding on the later trial judge. Previously, pre-trial orders made by one judge were not binding on a different judge, thereby discouraging the parties seeking early resolution of matters likely to impact on the commencement of the trial. The commencement of the legislation coincided with the issue of a Practice Note⁴⁸⁹ directed to case management of sexual offence trials.

The stated purpose of the Practice Note is to ensure the timely management and expeditious hearing of trials for prescribed sexual offences, by requiring orders relating to the hearing to be made prior to the trial date wherever possible. It requires that issues relating to the manner in which a child is to give evidence, and the editing of the recording of the child's statement are to be addressed before the day of trial. The prosecution is also to advise the court of any pre-trial orders sought and a pre-trial application will then be listed on a date prior to the trial date. This applies also to matters in which the complainant is an adult. It is expected that the combined effect of the legislation and Practice Note will be that a complainant will give their evidence on the day that the matter is fixed for trial.

Pre-recording a child's examination in chief and cross-examination

Whilst the Legislative Council Standing Committee was of the clear view that delays were unacceptable, it was not confident that set time frames could be implemented given the lack of success of previous genuine attempts.⁴⁹⁰ The Committee instead recommended that the Attorney General amend the Evidence (Children) Act to provide for child witnesses' evidence to be recorded in full prior to the trial and enable the electronic recording to be admitted into evidence at the trial proper.⁴⁹¹

Currently in NSW interviews with children are recorded, pursuant to s 7 Evidence (Children) Act 1997 ("the Act") and are admissible as the child's evidence in chief.⁴⁹² There is currently no provision for a child's in court evidence to be pre-recorded. The cross-examination of the child complainant is generally to be given at court via CCTV.⁴⁹³ The Court has the discretion to order that CCTV

not be used if it is satisfied there are special reasons, in the interests of justice, for the child's evidence not to be given by such means.⁴⁹⁴ Given the recent legislative amendments to allow a record of a complainant's initial evidence to be admitted at a retrial following a successful appeal against conviction, it may be prudent for a video recording to be made of the child's evidence at trial as a video recording is the best record.⁴⁹⁵

Should NSW consider adopting the same method used in Western Australia where the child complainant's evidence in chief and cross-examination are both recorded prior to trial in order to reduce delays at the time of trial and provide greater certainty for the complainant?

The practice of pre-recording a child's examination in chief and cross-examination is used in Western Australia. Section 106I Evidence Act 1906 (WA) provides that a prosecutor may apply to a judge for an order directing that the whole of the child's evidence, including cross-examination be taken at a special hearing and recorded on a visual recording. It is then to be presented in the form of the visual recording, and the child need not be present at the trial proper. Section 106K Evidence Act 1906 (WA) provides that a judge may make directions as to the conduct of the special hearing, including who may be present with the child; and who may have possession of the recording. At a special hearing the defendant is not to be in the same room as the child when their evidence is being taken, but able to observe the proceedings by means of CCTV and have means of communicating with counsel. This hearing is aimed at reducing the delay between the time of the complaint and the child giving evidence in court. Under this system, legal issues surrounding the admissibility of the child's evidence may still arise at the time of the hearing. Approximately 580 children have given evidence via the special provision since it was introduced in 1995.⁴⁹⁶

⁴⁸⁸ The Criminal Procedure Amendment (Sexual Offence Case Management) Act 2005 inserts section 130A into the Criminal Procedure Act 1986.

⁴⁸⁹ District Court Practice Note 5: Management Of Prescribed Sexual Offence Proceedings.

⁴⁹⁰ See in particular s 359A(1) Crimes Act (Vic) 1958

⁴⁹¹ Recommendation 34: Legislative Standing Committee on Law and Justice: Report on Child Sexual Assault Prosecutions 2002 at 189.

⁴⁹² s 11 Evidence (Children) Act 1997

⁴⁹³ s 18 Evidence (Children) Act 1997

⁴⁹⁴ s 15 Evidence (Children) Act 1997

⁴⁹⁵ s 306A-F Criminal Procedure Act 1986

⁴⁹⁶ Victorian Law Reform Commission: *Final Report* (2004) at 281 citing Chris Corns: "Videotaped Evidence of Child Complainants in Criminal Proceedings: A Comparison of Alternative Models" (2001) 25 *Criminal Law Journal* 75 at 84.

Judge Jackson from the Western Australian District Court suggests that the legal fraternity have accepted the provisions without difficulty. In his view, conviction and acquittal rates had not changed, but the experience is less stressful for children.⁴⁹⁷ In writing about the experiences of children in Western Australian Courts, Judge Jackson stated:

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.⁴⁹⁸

It is arguable that adopting the approach used in Western Australia may benefit NSW in terms of reducing delays, particularly where adjournments are granted on the day of trial due to changes in legal representation, legal arguments and issues surrounding the admissibility of portions of the child's tape. It may also be an advantage in regional and remote NSW where matters may be adjourned for weeks or months due to the unavailability of the court. The pre-recording of evidence in this manner may also provide advantages to the ODPP in terms of briefing Crown Prosecutors, as there should be no doubt that the matter will proceed, given there is no waiting for a jury and legal arguments as to the admissibility of evidence may be heard after the cross-examination is finalised and later edited out of the final version of the recording.

The Commissioner for Children and Young People, Gillian Calvert, has expressed her support for allowing a pre-trial recording of a child's entire testimony to be admitted as their evidence. To her knowledge the special hearing in Western Australia usually occurs within a few months of the accused being charged. She was of the view that there were a number of advantages to the Western Australian model:

...the advantage of having the child give evidence early on or close to the time of disclosure. So the memory of the child certainly around peripheral events is probably going to be fresher. It also has the advantage of being able to have the child give their evidence continuously rather than in an interrupted way, which sometimes happens now through court listing delays and so on. It also has the advantage, from the child's point of view, of getting it over and done with early on so that they can get on with the process of living their lives and whatever healing and recovery they might need.⁴⁹⁹

The Legislative Standing Committee considered it "*essential in the interests of justice that child complainants are able to testify in circumstances that allow their evidence to be given accurately and without intimidation.*"⁵⁰⁰ The Committee recommended that the Evidence (Children) Act 1997 (NSW) be amended to provide for a child witnesses' evidence to be recorded in full prior to the trial and to enable electronic recording to be admitted into evidence to replace the child's evidence-in-chief, cross-examination and re-examination.⁵⁰¹ The Committee further recommended that the Attorney General ensure that pre-trial recording provisions allow for the court to order the editing of the video recording in order to omit irrelevant or prejudicial material prior to the trial.⁵⁰² The Committee submitted that any legislative amendment of this kind should create a presumption in favour of having a child give evidence by way of a pre-recording, however, a discretion could be retained that this not be done where it is not in the child's best interests, the child prefers that it not be pre-recorded, or where it would not otherwise be in the interests of justice to allow the evidence to be admitted in that format.⁵⁰³ The Committee recommended that a child may be recalled to give evidence, but only where it would be not be feasible to make an additional pre-trial recording.

The Legislative Council Standing Committee recognised that there may be some disadvantages to the accused by adopting this scheme. In particular, by cross-examining the complainant well before trial, the accused is forced to reveal his or her case. This may allow the prosecution to gather further evidence to meet any arguments put forward by the defence. However, under existing provisions the defence already has an obligation to give notice of an alibi defence.

⁴⁹⁷ Judge Jackson: "Child Witnesses in the Western Australian Criminal Courts" (2003) 27(4) *Criminal Law Journal* 199 at 205.

⁴⁹⁸ Judge Jackson: "Child Witnesses in the Western Australian Criminal Courts" (2003) 27(4) *Criminal Law Journal* 199 at 210, also cited in the VLRC: *Final Report* at 282.

⁴⁹⁹ Legislative Council Standing Committee on Law and Justice: *Report on Child Sexual Assault Prosecutions* (2002) at 183

⁵⁰⁰ Legislative Council Standing Committee on Law and Justice: *Report on Child Sexual Assault Prosecutions* (2002) at 188

⁵⁰¹ Recommendation 34.

⁵⁰² Recommendation 36.

⁵⁰³ Recommendation 38 and 39.

In 1997 the NSW Children's Evidence Taskforce recommended against the introduction of the pre-trial recording of evidence on the basis that pre-trial hearings would not facilitate the taping of a child's evidence in the investigative phase or reduce trauma to the child and that there would be practical difficulties in arranging for the same prosecutor, defence counsel and judge to be available for both the pre-trial hearing and trial. The Wood Royal Commission rejected these arguments on the following bases:

- recording an out of court statement is not excluded by the existence of a pre-trial hearing;
- the context in which evidence is taken is not unimportant.
- there may be less stress in a preliminary hearing; and
- the need for the same personnel at the trial, although desirable, is not critical.

The Wood Royal Commission supported the use of pre-trial recordings as it enables recording the child's evidence while it is still relatively fresh; the child can put events behind him or her at an early stage; counselling, which may have been postponed in order to avoid tainting the child's evidence can begin at an earlier stage; and where a re-trial is required after a hung jury, aborted trial or successful appeal, the child's evidence may be presented in the form of the same videotape. In addition, inadmissible evidence may be excluded ahead of time by judicially approved editing of the video tape. The last matter would appear to be a particular advantage to NSW in ensuring that matters are not further delayed in circumstances where the trial has commenced and the jury empanelled.

Other jurisdictions

Victoria

The issue of whether to pre-record a child's evidence in chief, cross-examination and re-examination was considered by the Victorian Law Reform Commission (VLRC). The majority of submissions, including submissions received from magistrates and judges to the VLRC supported a process similar to that utilised in Western Australia. The Victorian Bar and Criminal Bar Association opposed the implementation of such a procedure, submitting that '*taped evidence is not as illuminating for a jury as evidence given 'live'*'.⁵⁰⁴ The Criminal Bar Association was also concerned that the pre-recording of the cross-examination may occur when the defence was not adequately prepared. It suggested that the procedures employed in Western Australia may cause problems with the rule in *Browne v Dunn* (1894) 6 R 67 which requires a party who wishes to introduce contrary or inconsistent evidence in their case, to put that version to the witness and give them an opportunity to comment upon it.

In examining this issue the VLRC noted that in Western Australia a judge may order that the child give further evidence at another special hearing or attend the court to give the further evidence. The VLRC were advised that this provision is rarely used, however, in their view it would meet the concerns raised about the rule in *Browne v Dunn*. The VLRC also noted that in the United Kingdom a child can only be ordered to attend if a party becomes aware of an issue that could not have been ascertained with reasonable diligence at the time the pre-recording was conducted or it is otherwise in the interests of justice.

The VLRC considered the resource impact of pre-recording. Whilst acknowledging that it would add to judicial workload and the defence would be required to prepare earlier, the VLRC formed the view that these costs were justified. The VLRC recommended that a pre-recording be made of the child's evidence in chief and cross-examination, to be presided over by a Judge where the accused and counsel for the prosecution and defence are present.⁵⁰⁵ The VLRC also recommended that 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 they could not have been aware with reasonable diligence at the time of the pre-recording, or it is in the interest of justice for the court to permit the child to be re-examined or cross-examined; or if the child were to give evidence in court in the normal way the child could be recalled to give further evidence and it would be in the interests of justice to make the order.⁵⁰⁶

⁵⁰⁴ Submission to Victorian Law Reform Commission cited in Victorian Law Reform Commission: *Final Report*, 2004 at 279.

⁵⁰⁵ Recommendation 123, VLRC Final Report.

⁵⁰⁶ Recommendation 129, VLRC Final Report.

In November 2005, Victoria introduced a Bill into the Legislative Assembly allowing for the evidence of a child complainant (and complainants with a cognitive impairment) to be video recorded at a special hearing and the recording later used in any legal proceeding other than a committal hearing.⁵⁰⁷ The whole of the child complainant's evidence, including cross-examination and re-examination may be presented in this manner. Under the Act, the video recorded evidence will be admissible in any rehearing, retrial or appeal arising from the proceeding.⁵⁰⁸ Additionally, the judge must warn the jury not to draw any inference adverse to the defendant or give the evidence of the witness any greater or lesser weight because it is recorded.⁵⁰⁹ In his second reading speech, the Victorian Attorney-General Mr Robert Hulls⁵¹⁰ stated that the purpose of the provision was to ensure that children and complainants with a cognitive impairment are protected from having to repeatedly give evidence and from further trauma resulting from unnecessary delays.

Queensland

Pre-recording a child's evidence is standard practice in Queensland. Section 21AA and 21AK Evidence Act 1977 (QLD) sets out the relevant provisions that apply to recording the evidence of a child. Section 21AA states that the purpose of the division is to preserve, to the greatest extent practicable, the integrity of an affected child's evidence; and to require that an affected child's evidence be taken in an environment that limits, to the greatest extent, the distress and trauma that otherwise might be experienced by the child when giving evidence. Section 21AB of the Act sets out how this purpose is to be achieved. A child's evidence is to be pre-recorded in the presence of a judicial officer, but in advance of the proceeding, and if this cannot be done a child should give their evidence by way of audio visual link or with the benefit of a screen. Section 21AK provides that the child's evidence must be taken and video-taped at a hearing presided over by a judicial officer and presented at trial. The section specifically provides that it does not matter whether the same judicial officer and counsel from the preliminary hearing are the same at the trial. A party may apply to the court for the child to give further evidence at another preliminary hearing or attend the actual trial. An order must not be made unless the court is of the view that the child could be recalled and it is in the interests of justice. Such an order may only be made if it is not possible for another preliminary hearing.

United Kingdom

In the United Kingdom, the Youth Justice and Criminal Evidence Act 1999 provides a number of special measures for vulnerable witnesses, including children who are required to give evidence. The Act provides that a video recording of an interview with a child may be admitted as his or her evidence in chief. A direction may also be given that any cross-examination of the child and any re-examination is to be recorded by means of a video recording and for such a recording to be admitted as evidence of the child. The recording must be made in the presence of such persons as the rules of the court or directions provide. It should be in the absence of the accused, but in circumstances in which the judge and legal representatives acting in the proceedings are able to see and hear the examination of the witness and to communicate with the person in whose presence the recording is being made. The accused should be able to hear any such examination and to communicate with any legal representative acting for him.⁵¹¹

Discussion

The pre-recording of children's evidence appears to have been employed successfully elsewhere and has received support from the NSW Legislative Council Standing Committee. However, the adoption of such a proposal would have significant cost implications for NSW. Although the defence would be required to prepare earlier to cross-examine at a preliminary hearing, it is suggested that early preparation by both parties should be encouraged and defence preparation could be facilitated by a grant of legal aid to prepare for the preliminary hearing. Care must be taken though to ensure that a procedure is not passed into legislation if the technology, infrastructure and resources cannot be found to support it. In addition, the duplication of time for court staff, judges and counsel who need to be present to hear the cross-examination of the child at the preliminary hearing and then later (whether or not it is the same judge or counsel) by way of a pre-recording played to the jury, should also be borne in mind.

⁵⁰⁷ s41G(2) Crimes (Sexual Offences) Bill 2005 (Vic)

⁵⁰⁸ 41H(1)(b) Crimes (Sexual Offences) Bill 2005 (Vic)

⁵⁰⁹ s41H(5) Crimes (Sexual Offences) Bill 2005 (Vic)

⁵¹⁰ Second Reading, Crimes (Sexual Offences) Bill 2005, by the Attorney General, Mr Robert Hulls, Hansard, Victorian Legislative Assembly, 16 November 2005.

⁵¹¹ Sections 27 and 28 of the Youth Justice Criminal Evidence Act 1999.

There is no doubt that the time frame for resolving child sexual assault matters should be remedied. Whether this should be achieved through tighter time frames imposed by courts with clear sanctions and practice directions to avoid delays, or whether the expedition of matters would be better facilitated through pre-recording all evidence is open to debate.

Pre-recording cross-examination and re-examination was favoured by a number of Taskforce members including Detective Superintendent Kim McKay, Dr Cossins, Associate Professor Stubbs, Victims Services, Womens Legal Services and the DPP. Detective Superintendent Kim McKay was of the view that country sittings would especially benefit from such a provision given that limited court sitting time results in a number of cases being adjourned and hence delayed because they are not reached. Advantages include better memory recall, fewer opportunities for inconsistencies, and less trauma to the child. According to Womens Legal Services, pre-recording of evidence would be advantageous in the event that the trial was aborted, or a verdict was unable to be reached, for the reason that the child would not need to again attend court for the purpose of giving evidence. The DPP was in favour of pre-recording of the child's evidence, on the proviso that there was a guarantee that a child would not be called during the trial on a spurious basis.⁵¹²

Stephen Odgers SC and the Law Society were against adopting the WA approach, arguing that there would not be sufficient time to prepare a proper cross-examination. The Legal Aid Commission also opposed the proposal, concerned with the cost implications and that it would undermine the principle of fairness to the accused. The Commission argued that early cross-examination of the complainant would force the defence to disclose its case prior to trial. Scepticism was expressed as to whether the proposal would be effective given that taking of the complainant's evidence in isolation from other evidence in the case may ultimately require the child to be recalled at trial so that additional material or evidence can be put to the witness. Further, it was submitted that double-handling of matters caused by additional hearings would substantially increase the costs of these proceedings to the Commission. Judge Ellis also suggested that this approach may raise a number of practical difficulties.

⁵¹²Written submission of the DPP.

TASKFORCE RECOMMENDATIONS:

- 46 The DPP should utilise s130A Criminal Procedure Act 1986, by requesting pre-trial hearings to determine matters affecting the child's evidence, including the admissibility of the JIRT tape, with a view to ensuring that the child complainant will commence giving their evidence on the first day of trial.
- 47 That:
 - there should be case management and best practice time frames developed for child sexual assault matters;
 - the Government should consider adopting the Western Australian model of pre-recording the child's evidence and cross-examination, particularly in remote and regional areas.

4. Special needs of child witnesses

Improper questions

On 23 March 2005 the Government introduced legislation to amend the law in relation to improper questions put to witnesses. Victoria has recently introduced a similar provision⁵¹³. It is anticipated that this will go some way to ensuring that witnesses, particularly children, can give their evidence free from undue harassment. Section 275A Criminal Procedure Act commenced on Friday 12 August 2005. Under this section a court will be required to disallow a question put to a witness in cross-examination, or to inform the witness that it need not be answered, if the question: (a) is misleading or confusing, or (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or (d) has no basis other than a sexist, racial, cultural or ethnic stereotype.

The factors which may be taken into account by the court in determining whether a question should be disallowed are extended to include the age and level of maturity and understanding of the witness, the ethnic and cultural background of the witness, and the language background and skills of the witness. The parties to proceedings are entitled to object to a disallowable question. However, the duty imposed on the court by the new provision applies whether or not a party objects.

There is a real question as to whether the recent reforms in relation to improper questioning will reduce re-traumatisation of complainants. The legislation will only be effective if it is applied consistently by judicial officers and if they have the relevant understanding about what is an age appropriate question for a child. In her recent study into child sexual assault cases, Cashmore provides a useful insight from a non-legal perspective. She notes by way of example that questions framed as: “*I put it to you...*” are confusing for children as they do not understand that they are being asked a question.⁵¹⁴ The style of questioning for a child is crucial in that the language in its structure, vocabulary and length should be manageable for the child.⁵¹⁵

Whether additional training and education of prosecutors and Judges would assist in ensuring that questions are asked in age appropriate language?

Judicial officers may recognise that a child is having difficulty in understanding a question. However, whilst judges may be more inclined to intervene with the commencement of s 275A, they may not be equipped with the appropriate tools with which to communicate

effectively with a young witness. In a recent study of child sexual assault prosecutions in NSW, it was observed that where a judge sought to rephrase a question for a child, it was not made any clearer for the witness.⁵¹⁶ Detective Superintendent Kim McKay was of the view that the best method for ensuring that questions were asked of a child in an age-appropriate manner is through specialisation of judges, who could be trained to be cognisant of this issue. Alternatively, further judicial education and training was supported if specialisation is not favoured⁵¹⁷. The majority of Taskforce members⁵¹⁸ agreed that further judicial education and training is required. DoCS stated that with specific understanding of the special needs of child witnesses, judicial officers would be in a position to better promote fair and useful questioning of a child, and to reduce the risk of further traumatisation to the child witness.

Should there be an intermediary present who can interpret the questions into more appropriate language?

Given the difficulties that may arise in ensuring that questions asked are appropriate to the age and capabilities of a child, a number of jurisdictions have adopted a provision to allow an intermediary to place the question into language the child can understand. Section 106F Evidence Act (Western Australia) allows counsel to seek the assistance of an appropriately qualified person to communicate with a child witness who may have difficulty understanding questions. However, Judge Jackson, from the Western Australia District Court, suggests that this provision has been little, if ever used. In addition, it appears there is no training program for this role.⁵¹⁹

⁵¹³ Section 41F Crimes (Sexual Offences) Bill 2005 disallows any questions put to a child complainant during cross-examination that is, in the opinion of the court, confusing or misleading, phrased in inappropriate language or is annoying, harassing, intimidating, offensive, oppressive or unduly repetitive.

⁵¹⁴ Cashmore J: *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot 2005*.

⁵¹⁵ Brennan and Brennan 1988: *Strange Language Child Victims Under Cross-examination* cited in speech given by Paul Rofe QC: *Focussing on the Child*, Paper presented at the Child Sexual Abuse: Justice Response or Alternative Resolution Conference convened by the Australian Institute of Criminology and held in Adelaide 1 –2 May 2003.

⁵¹⁶ Cashmore J: *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot 2005*.

⁵¹⁷ Written submission of Detective Superintendent Kim McKay.

⁵¹⁸ DPP, Legal Aid Commission, Victims Services, Associate Professor Stubbs and DOCS. Dr Cossins stated that further judicial education and training is unlikely to have any real of practical effect, and that practical methods should be preferred. Womens Legal Services submitted that in the absence of specialist judges, to ensure that children are asked questions in an age-appropriate manner, mandatory training for judges is necessary.

⁵¹⁹ Judge Jackson: “Child Witnesses in the Western Australian Criminal Courts” (2003) 27(4) *Criminal Law Journal* 199 at 204.

A similar provision also exists in the United Kingdom. Section 29 of the Youth Justice and Criminal Evidence Act 1999 provides that a direction may be given for any examination of the witness to be conducted through an intermediary. The function of the intermediary is to communicate questions put to the witness and to any persons asking such questions, the answer given by the witness and to explain such questions or answers so far as necessary. It is not known whether this provision has been used and who would be considered an appropriate intermediary. The United Kingdom Judicial Studies Board Bench Book states:

Given that this provision departs for the first time from the rule that evidence must be given by the witness in their own words, great care must be taken in allowing the use of the services of an intermediary and in ensuring that the defendant is not prejudiced by the way in which the intermediary conveys to the court the meaning of the answers given by the witness.⁵²⁰

There does not appear to be any clear guidance on who an intermediary should be and if they should be independent or someone known to the witness who may be more keenly aware of their capabilities. Detective Superintendent Kim McKay did not support the use of intermediaries, expressing the view that ensuring that a witness understands a question or proposition is the role of the trial judge.⁵²¹ Dr Cossins submitted that while there is little data available as to the effectiveness of the use of intermediaries, it is probably the best way to give effect to s 275A Criminal Procedure Act 1986; a view that was shared by Victims Services. The DPP also supported the use of intermediaries.⁵²² Other members opposed the use of intermediaries on the basis that their use would lengthen proceedings, and therefore increase costs to the parties and the court.⁵²³

Other measures

The “Speaking up for Justice” Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System, June 1998, Home Office provided the background for a number of the reforms implemented in the Youth Justice and Criminal Evidence Act 1999. It made a number of other recommendations which may be worth considering adapting to the NSW context, in particular:

- vulnerable or intimidated witnesses should not be denied the emotional support and counselling they may need both before and after trial.⁵²⁴

- a court liaison officer should be appointed to ensure that measures ordered by the Court to assist vulnerable or intimidated witnesses at Court are in place on the day of the trial.⁵²⁵
- in the case of multi-defendant cases, in order to reduce the trauma of repeated examination on the same points, once a particular point has been made during cross-examination counsel for the co-accused should be encouraged to say: *“I adopt the challenge of previous counsel on point x but wish to question you on additional point y”*.⁵²⁶
- consideration should be given to the use of pagers so that witnesses can wait outside the court building and be called only when they are needed to give evidence.⁵²⁷

⁵²⁰ http://www.jsboard.co.uk/etac/etbb/benchbook/et_04/et_mf08.htm

⁵²¹ Written submission of Detective Superintendent McKay.

⁵²² Womens Legal Services and Associate Professor Stubbs were reluctant to support the use of an intermediary without further information about the nature of the role and the appropriate qualifications required.

⁵²³ Written submission of the Legal Aid Commission.

⁵²⁴ Recommendation 28 (paragraph 6:35).

⁵²⁵ Recommendation 31 (paragraph 6:48).

⁵²⁶ Recommendation 44: (paragraph 8:54).

⁵²⁷ Recommendation 51: (paragraph 8:85).

TASKFORCE RECOMMENDATION:

- 48 There should be further judicial education and training to ensure that questions are asked of children in an age appropriate manner.

5. Expert evidence

Justice Wood (as he then was) has previously raised whether expert evidence should be admissible concerning child witnesses in order to minimise the danger of insufficiently informed jurors bringing their own prejudices, and stereotypes founded on myth. He raises in particular whether expert evidence should be considered in relation to the dynamics of child sexual assault; circumstances in which complaints are made and limitations of a child's vocabulary.⁵²⁸ These issues were also raised in the Australian Law Reform Commission's Discussion Paper 69, released on 4 July 2005. There are two distinct areas of expert evidence which need to be considered; the first deals with the development and capacity of the child generally, and the second deals with the more controversial area of expert evidence about children who have been sexually assaulted.

Whether expert evidence should be admitted in relation to the development and capacity of a child witness?

In order to give the greatest effect to s 275A Criminal Procedure Act 1986 so that questions are in fact age appropriate, the use of expert evidence may be used by the Court to understand the cognitive capability of the child witness and determine whether a question should be disallowed. Such evidence could be called where the complainant is a child, or where any young child is a witness.

The admission of expert evidence as to the developmental capacity of the child may also assist the jury to appreciate the evidence of the child and the fact that a lack of recall or memory on certain matters is normal for a child of that age. It may be argued that most jurors themselves are parents, so there is no need for expert evidence, as an understanding of the development of children is within the province of the average juror. However, it is not clear whether this assumption is sound. The DPP, Dr Cossins, Associate Professor Stubbs, Womens Legal Services and Victims Services were in favour of expert evidence being called to outline the cognitive and developmental capabilities of a child⁵²⁹.

⁵²⁸ See *Child Witnesses Best Practices for Court*, Speech presented by Wood CJ at CL, 30 July 2004

⁵²⁹ Written submission of DPP.

Womens Legal Services argued that adducing expert evidence about general child development and behaviour will, to some extent, ensure that the jury is provided with information derived from research and experience, instead of relying upon their own assumptions that may be incorrect and misconceived.

In contrast, the Legal Aid Commission did not support expert evidence being led on the development of children because this is unlikely to be in issue in the majority of trials. The Commission also cited as a reason against adopting this course, that it would involve an increase in costs where the defence disputes the evidence of the expert.

Other jurisdictions

In Queensland expert evidence is generally admissible about the child's level of intelligence including their powers of perception, memory, and expression, or another matter relevant to their competence to give evidence on oath, or ability to give reliable evidence.⁵³⁰ Such evidence is also admissible in Tasmania.⁵³¹

The Victorian Law Reform Commission recommended obtaining an expert witness report in child sexual assault cases in terms of commenting on a child's competence to give sworn and unsworn evidence.⁵³² The VLRC did not consider calling experts to give evidence on child development and dynamics of child sexual assault. Instead, the VLRC considered the need for participants in the court process to have adequate training and knowledge in effectively communicating with children of different ages and backgrounds. It recommended that the Bench Book include material about children's development and communication⁵³³ and that judicial education and training should include material that addresses developmental patterns of children and appropriate ways to question child witnesses⁵³⁴ and information from specialists in child development about best practice for questioning of a child witness.⁵³⁵

In November 2005, the Victorian Government introduced a bill which states that in a sexual offence proceeding where a child complainant (or a complainant with a cognitive impairment) is called as a witness, the court may receive expert evidence for the purpose of determining whether or not the child is competent to give sworn or unsworn evidence.⁵³⁶

At a recent Taskforce working group meeting with representatives from the ODP, NSW Police, Health and DoCs, there was a strong view that consideration should be given to the admission of evidence with respect to the

development of children and the capacity to answer questions. Members emphasised that if such evidence were utilised, it would be important that children were not subjected to further interviews with psychologists and defence experts.

Whether expert evidence should be admitted in relation to the dynamics of sexual assault?

The issue of whether expert evidence should be admitted about the dynamics of child sexual assault has been debated extensively in NSW and other jurisdictions. One of the most important questions to consider is whether juries need such information or whether this is already within the knowledge and province of the jury?

In 2002 the NSW Legislative Council Standing Committee on Law and Justice heard that the admission of evidence which explained the dynamics of child sexual assault and children's development would be useful in ensuring that a jury's deliberations are not misled by common misconceptions about the behaviour of children and responses to traumatic events.

The Committee was advised that studies suggested that juror's knowledge and understanding about the responses of children who have been sexually assaulted is relatively poor and based on a number of misconceptions.⁵³⁷ The studies suggested that many jurors were unaware of the typical reactions to child sexual abuse and that they erroneously held views, which could impact upon their ability to properly evaluate the evidence.

Associate Professor Judy Cashmore gave evidence to the Committee that:

...typical reactions like delayed complaint, a gradual getting out of the story and so on are seen as evidence of inconsistency, making it up, having ulterior motives, telling the story because the child becomes angry with the person for something else. Those sort of misinterpretations.⁵³⁸

⁵³⁰ s 9C(2) *Evidence Act* 1977. See also *R v D* [2003] QCA 151.

⁵³¹ s 79A *Evidence Act* (Tas)

⁵³² Recommendation 138.

⁵³³ Recommendation 145.

⁵³⁴ Recommendation 146.

⁵³⁵ Recommendation 148.

⁵³⁶ *Crimes (Sexual Offences) Bill* 2005 (Vic), s41C.

⁵³⁷ Legislative Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, Report 22, November 2002 at 117, quoting a study by Susan Morison and Edith Greene, "Juror and Expert Knowledge of Child Sexual Abuse", *Child Abuse and Neglect*, Vol 16, 1992 at 607.

⁵³⁸ *Ibid.* at 118

The Committee recommended that the Evidence Act be amended in line with s 79A of the Evidence Act (Tasmania) to permit the admission of expert evidence relating to child development and the behaviour of child sexual assault victims.

Detective Superintendent Kim McKay was of the view that because child behaviour around sexual abuse is complex and may not be understood by lay people, incorrect assumptions may therefore be drawn from the evidence, for example, lay people may not appreciate why a child continues to associate with the person who abused them, or why the child did not disclose the abuse immediately. The Legal Aid Commission argued against allowing expert evidence that relates to evidence of credibility. The Commission submitted that such evidence is likely to be misinterpreted by a jury and used impermissibly to bolster the credibility of a witness, with the potential to produce an unjust and unfair outcome for the accused. Womens Legal Services also opposed the use of this type of evidence, on the basis that child complainants may be “syndromised” and the veracity of the child called into question if they do not conform to the ‘usual’ indicators of abuse.

Is there any need for a specific provision to allow such evidence?

The ALRC asked whether the Uniform Evidence Act should be amended to clearly allow for the admission of expert evidence on the dynamics of child sexual assault. In its Issues Paper 28, released November 2004 it asked at question 6-9:

Should the Evidence Act 1995 (Cth) be amended to clearly allow for the admission of expert evidence regarding the credibility or reliability of child witnesses? Does s 79A of the Evidence Act 2001 (Tas) achieve this purpose or is further clarification required.

This issue was further addressed in their recent Discussion Paper. The ALRC acknowledged that it may be appropriate to admit expert evidence to assist the jury in understanding the behaviour of child witnesses. At common law there has been a reluctance to admit such evidence and there is a tendency for expert evidence on children’s behaviour to be excluded by the courts.

In its submission to the ALRC, the NSW Public Defenders Office opposed the introduction of a special provision like the one employed in Tasmania. In their view, matters of credibility of the child witness should be left to the jury ‘untainted’ by expert opinion. This view is consistent with the evidence given by Mr Richard Button and Mr Winch of the Public Defenders’s Office at the Legislative Council

Standing Committee on Law and Justice in 2002. The following concerns were raised with respect to such evidence; whether:

- there is a field of accepted specialized study;
- the aspects on which the ‘expert’ can give evidence are outside the common sense of the jury;
- the witness has the relevant expertise or standing in their field;
- calling such evidence could lead to a ‘battle of the experts’;
- the evidence can usefully be related to the actions of the complainant;
- or not a child’s response is consistent or inconsistent should be secondary to the main issue, which is whether the child is telling the truth.

Others support a provision similar to the one employed in Tasmania. The NSW ODPP submitted to the ALRC:

Such evidence may place in context behaviour which is otherwise perplexing, such as the absence of complaint, or the continued association with the alleged offender after the alleged offence. Its purpose would be to address common misconceptions held by jurors arising from lack of information about or experience of the behaviour of children generally.⁵³⁹

The ALRC was of the view that s 79 of the Evidence Act is currently broad enough to allow the admission of expert opinion on child development and behaviour, however, comments received suggested a general reluctance to admit this evidence.⁵⁴⁰ The ALRC observed that the operation of the credibility rule in s 102 Evidence Act and its exceptions make it difficult for the prosecution to be able to call an expert witness solely for the purpose of bolstering the credibility of a child. The ALRC suggests that there may be doubt over whether evidence, if deemed only relevant to credibility, would be admitted to show why a child delayed in making a complainant. However, if the evidence was relevant beyond its credibility use, then it may be admitted.

Evidence may be admitted to re-establish credibility pursuant to s 108(3) Evidence Act, where there has been a prior inconsistent statement or where there is an implied or express suggestion that the witness has fabricated or re-constructed the evidence. Given that in most child sexual cases, this suggestion would be one of the few avenues of cross-examination available to the accused, there is a strong argument that s 108(3) may currently be relied upon to admit such evidence and there may be no need to create additional provisions.

⁵³⁹ Australian Law Reform Commission Discussion Paper 69: *Review of the Uniform Evidence Act*, 4 July 2005, at 265.

⁵⁴⁰ ALRC at 265

The ALRC recognises that there is a danger in admitting expert evidence about the dynamics of child sexual assault. In particular, a jury may reason improperly that a child who behaves in a manner which is consistent with other children who have been sexually abused, is more likely to have been abused or is more likely to be telling the truth. However, in their view, any danger could be adequately addressed by the giving of an appropriate warning.

The ALRC does not view s 79A of the Tasmanian Evidence Act as a major departure from existing law. Rather, in their view a similar provision would highlight the admissibility of such evidence and remove any doubt in this area. The ALRC suggests that if such a provision were adopted in the Uniform Evidence Act, it should be drafted more carefully and in such a manner to ensure it is consistent with other exceptions to the opinion rule. In their view, it would also be necessary to include a section to provide that it is an exception to the credibility rule.

The ALRC proposed the following at 8-1:

To avoid doubt, the uniform Evidence Acts should be amended to provide an exception to the opinion and credibility rules for expert opinion evidence on the development and behaviour of children.

The ALRC proposed the following legislative amendments to s 79(2) and 108AA(2) set out in the Appendix of the Report:

- (1) S 79 (1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.
- (2) To avoid doubt, sub-section (1) applies to evidence of a person who has specialised knowledge of child development and child behaviour (including specialised knowledge of the effect of sexual abuse on children and of their behaviour during and following the abuse), being evidence in relation to either or both of the following:
 - (a) the development and behaviour of children generally;
 - (b) the development or behaviour of children who have been the victims of sexual offences, or offences similar to sexual offences.

And further, the following amendment to s 108AA(2):

- (1) If a person has specialised knowledge based on the person's training, study or experience, the credibility rule does not apply to evidence given by the person, being evidence of an opinion of that person that:
 - (a) is wholly or substantially based on that knowledge; and
 - (b) could substantially affect the credibility of a witness; and
 - (c) is adduced with the court's leave.
- (2) To avoid doubt, subsection (1) applies to evidence of a person who has specialised knowledge of child development and child behaviour (including specialised knowledge of the effect of sexual abuse on children and of their behaviour during and following the abuse), being evidence in relation to either or both of the following: the development and behaviour of children generally; the development or behaviour of children who have been the victims of sexual offences, or offences similar to sexual offences.

The ALRC did not provide any further guidance on what direction should be provided to a jury to ensure that the evidence is not misused or misinterpreted, nor did they discuss whether this evidence should be called by the Crown or a court appointed expert. Although the ALRC raise provisions used in other jurisdictions, there is no exploration of the strength or weaknesses of these approaches.

Other jurisdictions

Western Australia

There is no legislative provision in Western Australia, however, it is understood that the Western Australian Attorney General is looking at whether to implement provisions relating to expert evidence.

South Australia

The South Australian Supreme Court considered the admissibility of expert evidence on the dynamics of sexual assault on a child in *C v R* (1993) 70 A Crim R 378. Evidence had been admitted at trial by a psychiatrist on why the complainant continued to associate with the accused after the abuse and delayed in making a complaint. King CJ said: "*if the typical responses of sexually abused children is a fit subject of expert evidence, there is no reason why it should not be admitted for the purpose of rehabilitating the credit of the alleged*

victim.” He then went on to say that in the present case the evidence did *not* go so far as to establish the existence of a scientifically established body of knowledge; and that the type of insights offered by the psychiatrist were not necessary to allow the jury to reach a just decision and were inadmissible in South Australia.⁵⁴¹

Tasmania

In Tasmania s 79A Evidence Act 2001 provides that a person who has specialised knowledge of child behaviour, (including specialised knowledge of the impact of sexual abuse on children and their behaviour during and following the abuse) may, where relevant, give evidence in child sexual offence proceedings in relation to either:

- child development and behaviour generally;
- child development and behaviour if the child has had a sexual offence, or any offence similar in nature to a sexual offence, committed against him or her.

Consultation with the Tasmanian ODPP suggests that there have only been two cases in Tasmania where expert evidence has been called pursuant to s 79A Evidence Act (Tasmania). In those two cases, expert evidence was called by the Crown; the evidence was not challenged, the expert evidence did not form a ground of appeal upon conviction; the defence did not call their own expert, defence counsel advised the jury that they did not have to accept what the expert said and that it did not necessarily apply to that case. Tasmania has a panel of two experts, Dr Kerr and Dr Ian Sale. There is no additional code of conduct with respect to the giving of this type of evidence.⁵⁴²

The experience in Tasmania is of limited assistance when assessing the effectiveness of s 79A and usefulness of such evidence. However, it is of interest to note that there is no provision for a court appointed expert and evidence is given in the traditional adversarial mode adduced by a party to the proceedings.

United States

A number of States of the United States of America appear to have accepted that expert evidence may be admissible, but only: - to counter claims that the testimony or behaviour of the complainant is inconsistent with abuse or not otherwise credible; or to give an opinion that the behavioural characteristics of the child conform to other known reports of abuse. Such evidence appears to be limited in certain jurisdictions to questions about why:

- a victim would delay in reporting an offence;
- a victim may be unable to recall exact dates and times of the alleged offence;
- a victim omitted details of the incident when they first disclosed abuse.

However, such evidence is not admissible to prove the fact that the abuse actually occurred. Such evidence is still somewhat controversial, and there are concerns about how such evidence may be used by the jury. In *Bobby Joe Steward v State of Indiana*, Supreme Court of Indiana, 23 June 1995, the Supreme Court directly considered the admissibility of such evidence and in particular whether expert evidence regarding sexual abuse syndrome is unreliable and unscientific and therefore inadmissible. In determining this question the Court clearly set out the difficulties associated with this type of evidence and the need to balance the use of such evidence with the presumption of innocence.

The Court set out the relevant psychological research in this area associated with the syndrome identified by Summit in 1983 and the approaches adopted in other State jurisdictions. For example, the Pennsylvania Supreme Court prohibits all expert testimony concerning behaviour patterns of children, which has been adduced to rehabilitate credit and explain why a victim may delay in reporting, recall exact details and omit details of the incident when they first told their story.⁵⁴³ In contrast, the Supreme Court of Michigan allowed such testimony to give the jury a framework of the possible alternatives for the behaviour of the victim. The evidence is limited to whether the behaviour exhibited is common to the class of reported child abuse victims. The Michigan Supreme Court concluded that experts should be permitted to rely on their experience and knowledge to rebut an inference that specific patterns of behaviour of the victim are not uncharacteristic of the class of child sexual abuse victims, however, there should be no reference to the behaviours constituting a ‘syndrome’.⁵⁴⁴

⁵⁴¹ See paragraphs 18, 19 and 20 of the judgment. This case does not appear to have been placed in its proper context by the ALRC, see reference at 8.156 of Discussion Paper 69.

⁵⁴² Telephone consultation with Mike Stoddart, Sexual Assault specialist, Tasmanian ODPP, 19 July 2005.

⁵⁴³ *Dunkle*, 602 A.2d at 831.

⁵⁴⁴ *Beckley*, 456 N.W.2d at 408.

In Indiana, the majority of the Supreme Court in *Bobby Joe Steward v State of Indiana* held that expert evidence was generally excluded on the basis that it had the potential to be misapplied by the jury. However, the Court held that ‘*once the child’s credibility is called into question, proper expert testimony may be appropriate*’. The court was of the view that it is not unfairly prejudicial as the evidence merely informs the jury that commonly held assumptions are not necessarily accurate and allows them to fairly judge credibility. For further analysis of the position in the United States see in particular: *State of South Dakota v Edleman*, 593 N.W.2d 419 (21 April 1999).

New Zealand

Section 23G Evidence Act 1908 (New Zealand) allows for expert evidence to be given by a medical practitioner whose scope of practice includes psychiatry or child psychiatry *and* who has experience in the professional treatment of sexually abused children. Alternatively, evidence may be given by a child psychologist, who is practising in that field, and who has experience in the professional treatment of sexually abused children. Evidence may be admitted about intellectual attainment, mental capability and emotional maturity of the child witness, based on an examination of the complainant before the complainant gives evidence or an observation of the complainant giving evidence, whether directly or by video tape. Evidence may also be given about the general development of children of the same age group as the complainant.

Evidence may also be given on the question of whether any evidence given during the proceedings by any person relating to the complainant’s behaviour is, from the expert witnesses professional experience or knowledge of professional literature, consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant.

Section 23G appears to have been the subject of intense criticism and been subject to a number of appeals to the New Zealand Court of Appeal.⁵⁴⁵

The controversial aspect of s 23G is that of permitting expert evidence about the consistency or inconsistency of the complainant’s behaviour with that of sexually abused children of the same age group. Finding where the proper boundaries of such evidence begin and end has proved problematic.⁵⁴⁶

Some judicial comments have been perceived as suggesting that s 23G evidence should not be given. In *R v J*, the New Zealand Court of Appeal said:

We remark, in passing, that the Bench presently constituted, with its trial experience, has reservations about resort to s 23G in contemporary circumstances. It is not often invoked by the Crown, perhaps through recognition of the practical difficulties of staying within the permissible scope and because of the significant potential for unfairness should that not be achieved.

The section was considered recently by the New Zealand Court of Appeal in *R v Aymes* (2004) 2 NZLR 376. In this case an expert witness was called by the Crown to give evidence about the overtly sexualised behaviour of the complainant, who was 9 years old. The expert’s evidence was criticized for the use of statistics quoted in only one study and a conclusion offered that the complainant’s behaviour had a strong correlation with sexual abuse.

One of the grounds of appeal was the Crown’s failure to disclose a copy of the expert report until 3 days prior to the commencement of the trial (This ground of appeal was not successful). Consequently, the defence suggested that they did not have time to brief an expert to appear and the psychologist with whom they did consult may not have been considered an expert under the NZ provision. A further ground of appeal was the absence of a direction by the judge on what use the jury could make of such evidence. The Court also made the following comments about the section:

- when giving evidence of the consistency or inconsistency of the child’s behaviour with sexual abuse, the expert had to articulate how consistent it was and also say whether it was consistent with other factors (a bald statement that evidence is consistent is of no probative value);
- there is a limitation on the role of the expert, who must not comment on the credibility of the complainant or whether the child has been abused;
- the section would not be needed where the behaviour commented on is within what could be assumed to be the ordinary collective experience of the jury;
- it would be preferable for questions of admissibility of this type of evidence to be dealt with by way of pre-trial application.

⁵⁴⁵ See *R v Ellis* [2000] 1 NZLR 513 and comments by Andrea Ruffell: “NZ Court allow review of Ellis case” *NZ Lawyer, Lawyer’s Weekly*, 28 January 2005 at <http://www.lawyersweekly.com.au>

⁵⁴⁶ Legal Research Foundation: “Victims and the Criminal Law: the last 30 years and on to the future” 12 March 2004, *Northern Clip Auckland* at 21.

The Crown was also strongly criticized for calling the expert evidence prior to calling evidence from the complainant, which was a departure from conventional practice. The Court was of the view that this practice, combined with the failure to give a direction on what use could be made of the expert evidence, led to a miscarriage of justice. The Court held that the way in which the case was conducted shifted the emphasis away from the charges the jury had to consider and moved it to the question of whether there had been abuse in a general sense. In addition, a clear direction should have been given to the jury about what use they could make of the evidence:

...it is important that the jury is reminded that it is for them to decide how much weight or importance they give to the expert's evidence, that they can disregard it and that the evidence is merely one factor that they can take into account, along with all of the other evidence, to decide whether the particular charges are proved. Otherwise there is a risk that undue weight will be given to the expert's evidence.⁵⁴⁷

In a recent review of this section, it is understood that the New Zealand Law Commission recommended repealing s 23G in its entirety. The New Zealand Government is reforming the Evidence Act and it is understood that a Bill is now before the Select Committee. Blackwell indicates that the proposed provision on the admissibility of expert evidence generally replicates part of the Uniform Evidence Act of Australia, as it states that an opinion is not inadmissible simply because it is about the ultimate issue or a matter of common knowledge.⁵⁴⁸

Victoria

The Victorian Law Reform Commission found that juries in sexual offences are often instructed to draw on their own experience and knowledge when making decisions. However, juror perceptions of a witness when assessing credibility may not reflect empirical evidence about the responses and behaviour of sexual assault victims.⁵⁴⁹ The VLRC recommended legislative changes to overcome existing barriers to the admission of expert evidence about sexual assault.

Victoria has recently introduced a Bill that will allow for expert evidence to be admitted on the nature of sexual offences⁵⁵⁰ and the social, psychological and cultural factors that may affect the behaviour of a person who is alleged to be the victim of a sexual offence. This evidence may include an explanation of why a victim may delay in making a complaint.⁵⁵¹

Discussion

The issue of the use of expert evidence was discussed at a Working Group meeting with representatives of the ODP, DoCs, Health, and NSW Police. All participants were of the view that such evidence was useful for the jury in properly understanding the issues facing a child who has been abused and the dynamics of sexual assault. The Working Group was of the view that the current provisions of the Evidence Act may be broad enough to allow the admission of such evidence.

The situation in New Zealand clearly demonstrates that the passing of legislation in this area needs to be carefully thought out and the real purpose of eliciting such evidence needs to be made clear. The majority of Taskforce members were in favour of legislative amendment to clarify that expert evidence may be admitted on the development and behaviour of victims of child sexual assault, and supported adoption of the ALRC model.⁵⁵² Stephen Odgers SC suggested that the ALRC model merely clarifies the common law. The ALRC model was also supported by Detective Superintendent Kim McKay, however she was of the view that the evidence ought to be admissible even where the child's credit is not under attack.⁵⁵³

Expert evidence must be lead skilfully, so as not to mislead the jury about the use they can make of the evidence. There also continues to be issues surrounding its validity as a specialised field. If legislation were to be introduced it should be clear that the admissibility of the evidence should be determined by way of *voir dire* and if such evidence is admitted, it must specifically relate to evidence that is adduced at trial. Mr Odgers SC was of the view that the same tests that govern whether the evidence falls within a specialised field of knowledge would apply. Moreover, directions should be given to the jury about what use they can make of the expert evidence.

⁵⁴⁷ *R v Aymes* 2 NZLR 376 per Glazebrook J at 402.

⁵⁴⁸ Suzanne Blackwell: *Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand*, Paper presented to the Children and the Courts Conference, National Judicial College of Australia, 5 November 2005 at 10 and 11.

⁵⁴⁹ Victorian Law Reform Commission *Sexual Offences: Law and Procedure* Final Report (2004), 402.

⁵⁵⁰ *Crimes (Sexual Offences) Bill* 2005 (Vic), s37E(a).

⁵⁵¹ *Crimes (Sexual Offences) Bill* 2005 (Vic), s37E(b).

⁵⁵² DPP, Stephen Odgers SC, Dr Cossins, Associate Professor Stubbs, Victims Services. The Legal Aid Commission only supports an amendment that states that expert evidence may be admissible. Womens Legal Services support the ALRC proposal insofar as it clarifies that evidence relating only to general child development and behaviour may be admissible.

⁵⁵³ Written submissions of Detective Superintendent Kim McKay.

TASKFORCE RECOMMENDATION:

49 That the ALRC proposal be adopted, and that legislative amendment should allow for expert evidence to be admitted:

- on child development and behaviour generally;
- on the development and behaviour of sexually abused children.

If such evidence is admitted, should this be by way of court appointed expert or by the Crown adducing such evidence?

There does not appear to be any precedent for expert evidence of this type to be given by a Court appointed expert in a criminal trial. Rather, it appears that where expert evidence is called by one party on this issue, the expert is made available for cross-examination in accordance with the general rules of practice in the adversarial mode. The issue of whether there should be a court appointed expert in such matters was canvassed by the Legislative Council Standing Committee on Law and Justice, where it was submitted that the calling of experts by parties would increase costs for both parties.⁵⁵⁴

There has been a trend in the civil jurisdiction in NSW and in the Family Court of Australia to narrow issues at hearing, by having experts attend a conference and indicate what areas they agree on and those areas where their opinions differ. Conferencing of experts is utilised by the Family Court of Australia to assist parties achieve just, quick and cost effective disposal of matters. The conference serves to narrow issues that will require judicial determination. Rule 15.69(3) provides that at the conference the experts must: identify the issues that are agreed and not agreed; if practicable, reach an agreement on any outstanding issue, identify the reason for the disagreement on any issue; identify what action may be taken. At the end of the conference the experts submit a joint statement to the court (15.69(3)(e)).

Similarly, in NSW, the Supreme Court Rules set out procedures for the conduct of expert conferences in criminal proceedings. A Court may on application by a party or on its own motion direct that an expert witness, confer, endeavour to reach agreement, provide the Court with a joint report specifying matters agreed and matters and reasons for non agreement. The content of the conference shall not be referred to at trial unless the parties affected agree.⁵⁵⁵ There is no equivalent in the District Court for criminal proceedings.

⁵⁵⁴ Legislative Council Standing Committee on Law and Justice: *Report on Child Sexual Assault Prosecutions* (2002) at 120.

⁵⁵⁵ Part 75, Rule 3KA Supreme Court Rules

The new Uniform Civil Procedure Rules 2005 provide alternative arrangements for the giving of expert evidence in civil matters in the Supreme and District Courts. The Court may direct experts to attend a conference, endeavour to reach agreement on outstanding matters and provide a joint report to the court (31.25). Where two or more experts are called to give opinion evidence in court about the same or a similar question, a court may make a direction that the experts be sworn, one immediately after the other, and give their opinion and answer questions.

An expert may be cross-examined and re-examined in the usual way, or a direction may be made that cross-examination be conducted by putting each question to each expert witness in turn. A direction may also be given that any expert witness giving evidence be permitted to ask questions of other expert witnesses who are giving evidence.

The Uniform Civil Procedure Rules also provide that where a question for an expert witness arises in any proceedings the Court may on its own motion or application by a party appoint an expert to inquire into and report upon the question. The expert is bound by the code of conduct and a copy of the report should be forwarded to the registrar. Any party affected may cross-examine the expert and the expert shall attend court for examination or cross-examination if so requested on reasonable notice by the registrar or by a party affected. The Court shall fix remuneration of the expert.⁵⁵⁶

Discussion

Where expert evidence is to be adduced in this area, it is preferable for the parties to the proceedings to brief the expert. This view was shared by the DPP, who agreed that where a party seeks to rely on the evidence of an expert, the expert should be called by the party who wishes to adduce the evidence.⁵⁵⁷ He was, however, of the view that court-appointed experts may become more attractive in the future depending on the success of present initiatives in the civil jurisdiction. The Legal Aid Commission, as set out earlier, expressed concern at the likely cost implications of being required to call expert witnesses where expert evidence adduced by the Crown is disputed.

Other members of the Taskforce preferred the evidence to be led from a court-appointed expert on the basis that the jury would not be required to consider competing expert opinions,⁵⁵⁸ and evidence from only one expert would ensure that proceedings are not unnecessarily lengthened.

If expert evidence is called in the Supreme Court, the Court can take advantage of existing Rules to ensure that issues are narrowed prior to trial so that proceedings are not unduly lengthened and the area on which expert evidence is to be adduced is clearly defined and understood before it is placed before the jury. Generally, this occurs informally when expert evidence is adduced in other criminal matters.

⁵⁵⁶ See Uniform Civil Procedure Rules 31.28 – 31.34 .

⁵⁵⁷ Associate Professor Stubbs agreed that this type of evidence should be adduced by the party who seeks to rely upon it.

⁵⁵⁸ Dr Cossins, Womens Legal Services and DOCS favoured court-appointed experts.

TASKFORCE RECOMMENDATION:

- 50 Expert evidence should be adduced by the party wishing to call it in their case. The Court should utilise the existing rules to ensure that proceedings do not become unduly lengthened by expert evidence, which is not genuinely in dispute.

Chapter 8

Disability and aged care issues

Introduction

People who have a cognitive impairment are more vulnerable to sexual assault and abuse because they depend on others for assistance with daily life.⁵⁵⁹ Other factors that are likely to increase vulnerability to criminal victimisation are: their impaired judgment, deficits in adaptive behaviour, accompanying physical disabilities which may inhibit the person conveying sexual victimisation, the high risk environments in which they live and work, their lack of knowledge about their rights, and the attraction of some abusers to environments in which they will encounter vulnerable victims.⁵⁶⁰

The most frequently recorded crimes against intellectually disabled people are sexual offences and physical assault.⁵⁶¹ Most sexual assaults occur in the victim's place of residence,⁵⁶² and often the abuser is someone known to the victim.⁵⁶³ Despite statistics that indicate that between 50-90 percent of persons with an intellectual disability will be sexually assaulted in their lifetime,⁵⁶⁴ there are very few prosecutions of offences committed against persons with an intellectual disability. The ODPP reports that in the period 2000 to 2005, 21 matters were prosecuted under s 66F Crimes Act 1900.⁵⁶⁵

Where a prosecution does proceed with respect to a complainant with an intellectual disability, it is important that the process appropriately recognises the special needs of the complainant.

Recent legislative amendments have addressed some concerns previously raised with respect to the effective participation in the criminal justice system of sexual offence complainants with an intellectual disability, for example the:

- prohibition of unrepresented accused persons from personally cross-examining complainants in sexual offence proceedings,⁵⁶⁶

⁵⁵⁹ NSW Co-ordination Unit Sexual Assault of People with an Intellectual Disability Final Report (1990)

⁵⁶⁰ Hayes, S., 'Sexual Violence Against Intellectually Disabled Victims', *Without Consent: Confronting Adult Sexual Violence*, pp. 201-208, at 203

⁵⁶¹ Johnson K., Andrew R., and Topp V., 1988, *Silent Victims: A Study of People with Intellectual Disabilities as Victims of Crime*, Victorian Office of the Public Advocate, Melbourne.

⁵⁶² Carmody, M., 'Invisible Victims: Sexual Assault of People with an Intellectual Disability' (1991) 17 (2) *Australia and New Zealand Journal of Development Disabilities* 229-236.

⁵⁶³ Turk, V. and Brown, H. 'The Sexual Abuse of Adults with Learning Disabilities: Results of a Two Year Incidence Survey' (1993) 6 (3) *Mental Handicap Research*, 212.

⁵⁶⁴ Carmody, M., (1990), op cit; McCarthy, M., & Thompson D., (1996) Sexual Abuse by Design: an Examination of the Issues in Learning and Disability Services, *Disability and Society*, Vol.11, No. 2 1996, pp 205-17; Sobsey D., & Doe T., (1991) Patterns of Sexual Abuse and Assault, *Sexuality and Disability* (3) pp. 243-259; Crossmaker M., (1991) 'Behind Locked Doors-Institutional Sexual Abuse', *Sexuality and Disability* (3) pp.10-219

⁵⁶⁵ This information was provided after conducting a basic search of the DPP electronic case management system. This does not reflect the number of prosecutions which may have been commenced pursuant to s 611, or 61JA where the complainant may have had an intellectual disability.

⁵⁶⁶ s 294A Criminal Procedure Act 1986 - commenced 3 September 2003.

- creation of a presumption in favour of all complainants in sexual offence proceedings being allowed to use alternative arrangements for giving evidence which include;
 - giving evidence by closed circuit television (CCTV) or some other form of video link;
 - where CCTV is not available, using screens or alternative seating arrangements to prevent the victim from having to come into direct contact with the accused;
 - allowing a support person to be present near the complainant when giving evidence.⁵⁶⁷
- creation of a an obligation on judges to protect witnesses from improper questioning;⁵⁶⁸ and
- creation of a presumption in favour of closing the court when an adult sexual assault complainant gives their evidence. There is an exception for a support person or persons so complainants do not face the process alone.⁵⁶⁹

1. Police Responses

Identification of intellectual impairment

A report prepared by the Intellectual Disability Rights Service⁵⁷⁰ (IDRS) observed that there is confusion amongst police in NSW as to what constitutes an intellectual disability. The NSW Police officers interviewed said that they were reasonably confident that they were identifying complainants with an intellectual disability, however, tended to look for objective proofs such as physical disability, a pension card or confirmation from a support person. Those officers did not indicate any specific methods used to identify complainants with a mild intellectual disability.

Support persons

The “Disability Issues” section of the NSW Police Service Handbook requires police to ascertain whether victims or witnesses want or need a support person and, if they do, to take steps to find one. In Victoria, Police Operating Procedures require an independent third person (ITP) to be present when taking a statement from a victim with a cognitive impairment. The role of the ITP is to facilitate communication with the person being interviewed and to prevent questions being asked that are not clearly understood by the interviewee.

The Attorney General’s Committee on Intellectual Disability and the Criminal Justice System (“ the Committee”) recommended in May 2002 that provision be made for trained support persons to be available to adult and child victims and witnesses with an intellectual disability.⁵⁷¹ This recommendation is supported by IDRS

who argue that it is necessary that a qualified support person is available to assist intellectually disabled persons in making a statement. The role of the support person would primarily be one of emotional support and the facilitation of communication. The Committee took the view that the victim or witness should be able to elect someone known to them, however, written guidelines as to the role of the support person should be made available to all private support people prior to the interview.

Interviewing

For the reason that people with a cognitive impairment are often more open to suggestions, acquiescence and confabulation,⁵⁷² the method of interviewing assumes critical importance.

‘Cognitive interviewing’ is a model developed by cognitive psychologists Fisher and Geiselman.⁵⁷³ Essentially, the interview model:

- Seeks to elicit a narrative description of an event from the interviewee using only open questions and few interruptions from the interviewer; then
- the interviewee is invited to recall the incident in full from different points in the chronology related to the incident; and finally
- police probe important aspects of the incident using open questions.⁵⁷⁴

⁵⁶⁷ s 294B *Criminal Procedure Act* 1986 - commenced 6 July 2004.

⁵⁶⁸ s 275A *Criminal Procedure Act* 1986- commenced 12 August 2005.

⁵⁶⁹ s 291 *Criminal Procedure Act* 1986-commenced 25 November 2005.

⁵⁷⁰ Keilty, J. and Connelly, G. (2000) *Making a Statement: An Exploratory Study of the Barriers Facing Women with an Intellectual Disability when they are Making a Statement to the Police about Sexual Assault*, Intellectual Disability Rights Service, Sydney, NSW, Australia, p.6. The IDRS interviewed 13 police officers in 7 Local Area Commands and 27 sexual assault workers. All police identified as having experience in taking a statement from a woman with an intellectual disability, and some had received relevant training. Telephone interviews were conducted with 4 officers from the predecessor to Court and Legal Services, who provide advice to police on whether to proceed to prosecution, and how to conduct the prosecution.

⁵⁷¹ Recommendation 14, Attorney General’s Department, Committee on Intellectual Disability and the Criminal Justice System, *Police Interviewing of People with Intellectual Disabilities*, May 2002, p.17.

⁵⁷² Tully, B. and Cahill, D (1984) ‘Police Interviewing of the Mentally Handicapped: An Experimental Study’, The Police Foundation, London; Sigelman, C. et al (1981) ‘Asking Questions of Retarded Persons: A Comparison of Yes/No and Either/Or Formats’, *Applied Research in Mental Retardation*, Vol 5, pp.347-357. Sigelman, C. et al (1981) ‘When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded People’, *Mental Retardation*, Vol. 19, pp.53-58; Clare, I. And Gudjonsson, G. (1993) ‘Interrogative Suggestibility, Confabulation and Acquiescence in People with Mild Learning Disabilities (Mental Handicap): Implications for Reliability During Police Interrogations’, *British Journal of Clinical Psychology*, 32, 295-301.

⁵⁷³ Charles C. Thomas, *Memory Enhancing Techniques for Investigative Interviewing: The Cognitive Interview*, (1992), Springfield.

⁵⁷⁴ Fisher and Geiselman 1992, cited in Savidge, N. (1996) ‘Investigative Interviewing: Paper Presented at Investigation Techniques Conference’, Royal Institute of Public Administration, Australia, 25-26 June 1996. A study in the UK, where the technique has been adopted by the Home Office, indicated an improvement of 14-55% in relevant crime information.

Cognitive interviewing is recommended in the new training course provided by the NSW Police Academy, however in the study conducted by IDRS, they observed that police interview practice does not generally employ it.⁵⁷⁵ Instead, the way in which a statement was taken varied greatly, with some officers going to great lengths to accommodate the victim's needs, and others not adapting the interview procedure at all.

Research into techniques for interviewing people with an intellectual disability demonstrate the damage that inappropriately framed questions can have on recall. Obtaining sufficient and accurate evidence is an extremely difficult task requiring skill and planning. In discussions with the Northern Sydney Health Sexual Assault Service, they advocate better training of officers in the interviewing of complainants with a cognitive impairment. They were of the view that it would be desirable for at least one investigator in each Local Area Command to be specially trained in interviewing people with a cognitive impairment, and investigation of offences committed against such persons.

Discussion

The Taskforce generally agreed there should be increased resources directed to training of NSW police officers in the identification and interviewing of complainants with a cognitive impairment. While supporting increased training in this area for police officers, Detective Superintendent Kim McKay was mindful that such a recommendation would have significant resource implications for Education Services and the Police Service as a whole.

In the course of consultation with a number of agencies with expertise in the area of cognitive impairment, representations were received from a number of those supporting increased training of police.⁵⁷⁶ Presently, training relating to these issues appears to be targeted at only a small proportion of specialist detectives involved in investigating sexual assault. This is so, despite the fact that many other officers, in particular general duties officers, will come into contact with cognitively impaired victims who make a complaint of sexual assault. The Intellectual Disability Rights Service (IDRS) currently provides training to specialist detectives; the content of which aims to develop a general understanding of intellectual disabilities enabling participants to conduct investigative interviews in an understanding and sensitive environment appropriate to the person's needs by:

- understanding what intellectual disability is, identifying that a person has an intellectual disability, and distinguishing between intellectual and other disabilities;
- identifying and understanding the impact of community attitudes and values towards people with an intellectual disability;
- developing strategies for preparing and conducting investigative interviews; and
- identifying different communications styles and adopting appropriate techniques for interviewing.

The IDRS advocates that all NSW Police should receive training in the identification of, and effective communication with people with intellectual disability and other cognitive impairment. In support of this, Associate Professor Hayes believes that training should be included in college curriculum and also be reinforced through in-service training courses, which attract training credit points.

Regarding the need for trained support persons to provide emotional and communication assistance to victims and witnesses with a cognitive impairment; the Legal Aid Commission, Women's Legal Services, Victims Services, Dr Cossins, Associate Professor Stubbs, and the ODPP support provision of such a service. Detective Superintendent Kim McKay supported the recommendation in principle, however, envisaged that it will have cost implications for not only Police, but also the ODPP, and NSW Health.

⁵⁷⁵ *ibid*

⁵⁷⁶ Written submission of the Intellectual Disability Rights Service (IDRS), Associate Professor Hayes, Honorary Professor Gething, and the Public Guardian.

TASKFORCE RECOMMENDATIONS:

- 51 The NSW Police Service should consult with specialists in cognitive impairment with a view to provide better training to officers regarding:
- The identification of people with a cognitive impairment, and
 - Improved interviewing techniques of people with a cognitive impairment.
- 52 Provision should be made for trained support persons to be available to victims and witnesses with a cognitive impairment.

2. Procedural Issues Regarding Complainants with a Cognitive Impairment

Can vulnerable witnesses be better accommodated?

The need for special arrangements for some “vulnerable” adult witnesses, including witnesses with an intellectual disability, has been recognised in all Australian jurisdictions.

Section 21A Evidence Act 1977 (Qld) and s 106R Evidence Act 1906 (WA) make provisions for special witnesses. “Special witnesses” in Queensland include children, and persons who as a result of mental, intellectual, or physical impairment are likely to be disadvantaged as a witness.⁵⁷⁷ In WA a “special witness” includes persons who by reason of physical or mental impairment would be unlikely to be able to give evidence, or to give evidence satisfactorily.⁵⁷⁸

The court may order that a video-taped recording of the evidence of the special witness be made, and that the video-taped evidence be viewed and heard in the proceeding instead of the direct testimony of the special witness.⁵⁷⁹ In Queensland, the court may also make orders about the giving of evidence including a direction about rest breaks, that questions be kept simple, that questions be limited by time, and that the number of questions be limited.⁵⁸⁰

In both the Northern Territory and New Zealand, provisions exist for the evidence of children and persons who suffer from an intellectual disability in sexual offence proceedings to be pre-recorded. If the entirety of the evidence is to be given by audio-visual means, this is done at a special hearing of the court.⁵⁸¹

⁵⁷⁷ “Special witness” also includes a person who would be likely to suffer severe emotional trauma, or would be likely to be so intimidated as to be disadvantaged as a witness.

⁵⁷⁸ “Special witness” also includes persons who would be likely to suffer severe emotional trauma, or be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily.

⁵⁷⁹ This measure is also available to child witnesses: s 106I Evidence Act 1906 (WA)

⁵⁸⁰ s 21A(2)(f) Evidence Act 1977 (Qld)

⁵⁸¹ s 21B Evidence Act 1939 (NT), s 23E(e) Evidence Act 1908 (NZ). In NZ, the term “mentally handicapped” is used.

The United Kingdom also provides special measures in the case of “vulnerable and intimidated witnesses”.⁵⁸² The special measures include the admission of a video recording as evidence in chief, and the admission of a video recording of cross-examination and re-examination. The UK also provides for the use of an intermediary. The function of the intermediary is to communicate questions put to the witness, the answers given by the witness, and to explain such questions or answers so far as is necessary to enable them to be understood by the witness.⁵⁸³ The court can also direct that the witness be provided with such a device as the court considers appropriate with a view to enabling questions or answers to be communicated to or by the witness despite any disability or disorder or other impairment which the witness has.⁵⁸⁴

The New South Wales Law Reform Commission (NSWLRC) commented that the rationale for allowing child witnesses and witnesses with an intellectual disability to use special arrangements to give evidence is that they are necessary to enable the witness to give his or her evidence, or to give it effectively.⁵⁸⁵ While NSW has gone some way in providing for special measures with respect to victims of sexual violence, there is scope for assisting vulnerable witnesses to give the best evidence they can by introducing measures that apply to a special category of witness:

- allowing the use of an intermediary by a special witness who has difficulty communicating unaided;
- allowing a witness to use a communication device when giving evidence, if that witness usually employs the device to communicate; and
- requiring the court to assist the witness in giving their best evidence by providing for rest breaks.

The rationale behind the introduction of special arrangements for vulnerable witnesses; - that they are necessary in order to facilitate the witness giving their best evidence, supports the introduction of the use of intermediaries and communication aids in NSW. Where in their day-to-day living, a vulnerable person relies upon an aid to communicate, that aid should also be available for their use in giving evidence before a court to assist with their communication deficit.

Likewise, the use of an intermediary may also be essential in communicating the evidence of a witness who generally communicates in this manner. The use of an intermediary ought to be available to assist a witness to understand questions being asked of them, and to communicate their answers. Members of the Taskforce agreed that flexible options for vulnerable witnesses should be explored, including the use of communication devices where appropriate. These provisions should only be utilised where the court is satisfied that they are necessary in order to assist the witness to give evidence.

Should a practice be introduced of video recording the statement by a complainant with a cognitive impairment? If so, should there be a presumption in favour of admitting a video recorded police statement as the evidence in chief of the complainant with a cognitive impairment?

The Victorian equivalent provision to s 11 Evidence (Children) Act 1997 (NSW) (which allows admission of an audio or video-recording of an interview with a child as their evidence in chief) extends to persons with ‘impaired mental functioning’.⁵⁸⁶ Western Australia and Queensland provide for the entirety of the child witness’s evidence to be recorded prior to trial, including cross-examination and re-examination. Section 41G of the recently introduced Victorian Bill, follows the lead from Western Australia by requiring the whole of the evidence of a child complainant or complainant with a cognitive impairment to be taken at a special hearing and video recorded for the purpose of later tendering that recording at the trial.⁵⁸⁷ The NSWLRC considered and rejected both the use of a pre-trial video recording of evidence in chief on the basis that it would interfere with the accused’s right to hear and answer the case against him or her.⁵⁸⁸

The IDRS report stated that the literature identifies three significant barriers to effective communication in interview settings; memory, recall and suggestibility. Given that these barriers will affect the evidence of a person with an intellectual disability, it is argued that measures ought to be put in place to overcome the disadvantages faced by such witnesses in the criminal justice system. To address the issues identified by IDRS, Taskforce members agreed that police should video record statements made by complainants with a cognitive impairment, however, were not in favour of extending video recording to all adult complainants generally. In recognition of the significant impact that delay has on witnesses with cognitive impairments, the Taskforce also agreed that the recordings should be allowed to be admitted as the evidence in chief of the witness. This proposal is also supported by the Northern Sydney Health Sexual Assault Service, Office of the Public Guardian, and IDRS.

⁵⁸² A witness is eligible for assistance where they are a child, or the court considers that the quality of their evidence is likely to be diminished by the fact that the witness suffers from a mental disorder, or has a significant impairment of intelligence and social functioning, or that the witness has a physical disability or is suffering from a physical disorder.

⁵⁸³ s 29 Youth Justice and Criminal Evidence Act 1999 (UK)

⁵⁸⁴ s 30 Youth Justice and Criminal Evidence Act 1999 (UK)⁵⁸⁵ NSWLRC Report 80, *People with an Intellectual Disability and the Criminal Justice System*, December 1996, [7.15]

⁵⁸⁶ s 37B Evidence Act 1958 (Vic)

⁵⁸⁷ Crimes (Sexual Offences) Bill 2005, introduced in the Legislative Assembly on 16 November 2005 by the Attorney General, Mr Robert Hulls.

⁵⁸⁸ NSWLRC Report 80, op cit, [7.18]

IDRS argue that the video recording will provide an accurate record of the complaint made by the victim, thereby avoiding paraphrasing by police. In supporting the introduction of a provision allowing a video recording to be tendered as the evidence in chief of the complainant, IDRS point to the fact that because intellectual disability is often characterised by a deficit in communication; court hearings and the giving of evidence will often be more difficult for persons with an intellectual disability than other people. A person with an intellectual disability will give their best evidence if the number of times that they are required to tell their story is reduced. It is also the case that a person with an intellectual disability will find giving evidence more stressful than a person without a disability, partly because they find it harder to adapt to new environments and situations.⁵⁸⁹ These arguments can be extended to complainants who have other types of cognitive impairment.

Should the prohibition on child complainants being called at committal be extended to complainants with a cognitive impairment?

Research shows that people with cognitive impairment are at a special disadvantage as witnesses.⁵⁹⁰ The issue of delays in proceedings poses particular difficulties for persons with an intellectual disability whose grasp of concepts such as time may be limited, and whose short term and long term memory may be affected by their disability.⁵⁹¹ Cross-examination of these witnesses at committal contributes to delay. The Victorian Law Reform Commission (VLRC) recommended that there should be a prohibition on cross-examination of people with cognitive impairment at committal hearing.⁵⁹² As a result, the Crimes (Sexual Offences) Bill 2005 includes a provision prohibiting cross-examination at committal of a child complainant or complainants with a cognitive impairment in sexual offence proceedings.⁵⁹³

In July 2003, the NSW Government introduced s 91(8) Criminal Procedure Act 1986 that prohibits a child complainant in a sexual offence proceeding from being called at committal. In the Minister's Second Reading Speech the policy reasons behind the provision were stated:

Giving evidence at committal hearings can be more distressing for children than giving evidence at trial as counsel may not be as restrained at committal where a jury is not present. This amendment will reduce the number of times a child is subject to cross-examination over the course of a sexual assault prosecution, thereby reducing the re-traumatisation associated with multiple court appearances⁵⁹⁴.

Arguably, the same policy considerations apply to witnesses who are vulnerable to further traumatisation by reason of cognitive impairment. The Legal Aid Commission were not in favour of expanding the categories of witnesses who may not be called at committal. In the Commission's opinion, committal proceedings perform a vital function that should not be further eroded by the exclusion of another category of witness. Other members, including Detective Superintendent Kim McKay, Women's Legal Services, Dr Cossins, Associate Professor Stubbs, Victims Services and the DPP support extension of the prohibition under s 91(8) Criminal Procedure Act 1986 to include witnesses with a cognitive impairment. IDRS have expressed concern at the prospect of an accused person using the opportunity of a committal hearing to confound a complainant with a cognitive impairment, and focus on minor inconsistencies to discredit the complainant.⁵⁹⁵

Should there be an exception to the credibility rule to allow expert evidence to be given regarding the nature, extent and characteristics of the complainant's cognitive impairment?

The NSWLRC noted that a witness or an accused person with an intellectual disability may have a short attention span and memory recall, appear nervous and hesitant, or frustrated and angry⁵⁹⁶, and recommended that:

the trial judge should have the power to allow expert evidence to be led to explain the characteristics and demeanour of a witness with an intellectual disability if his or her characteristics and demeanour are outside normal experience⁵⁹⁷.

It is fundamental that judges, magistrates and juries are able to make an accurate assessment of all the evidence including that of persons with an intellectual disability. Expert evidence would explain to the court the particular nature of the intellectual disability, recognising the broad spectrum of intellectual disability. The Attorney General's Committee were of the view that such expert evidence should be considered as an aid to the court in informing itself about how to assess the evidence of a witness.⁵⁹⁸

⁵⁸⁹ Written submission of IDRS.

⁵⁹⁰ 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: 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 (2002).

⁵⁹¹ Carmody, M., NSW Women's Co-ordination Unit, *Sexual Assault of People with an Intellectual Disability Final Report*, 1990, p.22

⁵⁹² NSWLRC Report 80, Recommendation 42

⁵⁹³ Section 41, Crimes (Sexual Offences) Bill 2005,⁵⁹⁴ per the Hon. John Hatzistergos, Hansard, p.34, 25 June 2003

⁵⁹⁴ Written submission of IDRS.

⁵⁹⁵ NSWLRC Report 80, [7.30]

⁵⁹⁶ Recommendation 31, NSWLRC Report 80

⁵⁹⁸ Attorney General's Department, Committee on Intellectual Disability and the Criminal Justice System, *People with an Intellectual Disability-Giving Evidence in Court*, June 2000, p.16. The report can be accessed at http://infolink/lawlink/clrd/ll_clrd.nsf/pages/CLRD_intell_disab

The Attorney General's Committee agreed with the NSWLRC's recommendations and proposed that "*the court be provided with a discretion to allow expert evidence to be called as to the nature, extent and characteristics of a witness's intellectual disability*".⁵⁹⁹

The ALRC in their joint report with the NSWLRC and the Victorian Law Reform Commission in July 2005 sought submissions on the question:

Question 8-2 Should the uniform Evidence Acts be amended to provide for the admissibility of expert opinion evidence of the credibility or reliability of other categories of witness, such as victims of family violence or people with an intellectual disability?⁶⁰⁰

The submission from the Director of Public Prosecutions (NSW) stated that consideration should be given to recommending the enactment of an exception to the credibility rule which would permit the adducing of evidence in relation to complainants with an intellectual disability.⁶⁰¹ Presently, where a complainant has an intellectual disability, but the disability is not charged as an aggravating feature of the offence, the prosecution cannot lead evidence of the nature of the complainant's disability and the effect such a disability has on behaviour and development. Where aspects of a witnesses' evidence associated with their disability, may be assessed by a jury as an indicator that the account is fabricated, evidence from an expert on the nature of the disability may assist the jury in evaluating the truthfulness and reliability of the witness.⁶⁰²

The Legal Aid Commission and Law Society were opposed to allowing expert evidence on this issue. In their view, such expert evidence is likely to be misinterpreted by a jury and used impermissibly to bolster the credibility of a witness. Another reason for their opposition to expert evidence in such cases, is that where the evidence is disputed by the accused, the defence will be required to call an equally qualified expert which will place a further strain on the financial resources of the Commission. Others on the Taskforce⁶⁰³, however, were in favour of allowing this evidence. Further consultation by the Criminal Law Review Division with Intellectual Disability Rights Service, Honorary Professor Gething and Associate Professor Hayes suggest that those who work in this field all support the proposal, arguing that an expert can explain the condition from which the victim suffers, how the diagnosis was made, and what the implications are for the victim's ability to live an independent life, and understand and implement complex decisions. The experts who were consulted stated that the relevant qualifications of an expert would depend upon the type of

cognitive impairment, and the issue for consideration.⁶⁰⁴

The Criminal Law Review Division is of the view that there is merit in the proposal of the ALRC. It is fundamental that judges, magistrates and juries are able to make an accurate assessment of all the evidence, including that of persons with an intellectual disability. Expert evidence would explain to the court the particular nature of the intellectual disability. Such evidence would assist the tribunal of fact in determining the truthfulness and reliability of the evidence, where otherwise, certain mannerisms or difficulty in recalling details may lead to doubt as to the credit of the witness.

The CLRD agrees that there should be an exception to the credibility rule to allow expert evidence to be adduced with respect to the nature of a person's intellectual disability, where the credit of the witness has been, or is likely to be put in issue.

Are criminal justice personnel equipped to identify and assist complainants with a cognitive impairment?

During the course of its review, the NSWLRC became aware of the limited understanding of intellectual disability by people involved in the criminal justice system. Judges, Magistrates and lawyers may not know how to identify a person with an intellectual disability, may be unable to recognise the disadvantages the person may suffer, and may not be able to communicate effectively with a person with an intellectual disability. The NSWLRC recommended that government agencies responsible for the administration of the criminal justice system should ensure that staff receive appropriate training.⁶⁰⁵

⁵⁹⁹ Ibid

⁶⁰⁰ Australian Law Reform Commission, NSW Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Act: Discussion Paper*, July 2005, p.267

⁶⁰¹ Submission E17, 15 February 2005

⁶⁰² Submission E17, 15 February 2005, cited in ALRC Discussion Paper 69 [8.170-171]

⁶⁰³ Detective Superintendent Kim McKay, Women's Legal Services, Dr Cossins, Associate Professor Stubbs, Victims Services and DPP.

⁶⁰⁴ Written submissions of Associate Professor Hayes and Honorary Professor Gething

⁶⁰⁵ NSWLRC Report 80, Recommendation 43.

Some submissions to the NSWLRC suggested that judicial officers need training in intellectual disability issues. Despite a general concern about the lack of awareness and understanding of issues pertaining to persons with a cognitive impairment, there are encouraging examples of judicial officers who have taken steps to address the difficulties faced by persons with a cognitive impairment when they are required to give evidence in court. A publication of the Northern Sydney Health Sexual Assault Service⁶⁰⁶ provides a case study in which the trial judge went to great lengths to facilitate the evidence of a complainant with an intellectual disability, who was also quadriplegic and had no speech.

In that case, the judge admitted expert evidence outlining the complainant's disabilities and method of communication, prior to the complainant giving evidence. The court layout was re-arranged so the judge was able to closely observe the complainant who communicated by eye movement, and frequent breaks were provided in acknowledgement of the complainant's limited concentration span and physical strain of keeping his head up.

The NSWLRC recommended that the Judicial Commission, with the help of people with appropriate expertise, develop more materials dealing with intellectual disability, including at least:

- the identification of people with an intellectual disability;
- effective communication with people with an intellectual disability;
- awareness of disadvantages that may be suffered by people with an intellectual disability in the criminal justice system; and
- services available to help people with an intellectual disability and their carers.⁶⁰⁷

The Attorney General's Committee in its report released in May 2002, endorsed the NSWLRC's recommendation that there be further training and education for police, lawyers and judges. It was suggested that training for criminal justice agencies should prioritise the identification of intellectual disability and communicating with people with an intellectual disability.⁶⁰⁸

A number of Taskforce members, including Detective Superintendent Kim McKay, Victims Services, Dr Cossins, Associate Professor Stubbs, and Women's Legal Services support mandatory training of legal practitioners and judicial officers, while the DPP and Legal Aid do not. The DPP states that the only mandatory training provided to prosecutors is that required by the Law Society in relation

to EEO, Anti-Discrimination and OH&S. The DPP stated that his Office provides training to all staff relating to people with a cognitive impairment that is attended on a voluntary basis. In his opinion, there is no need for mandatory training as the Office deals with few matters in which a witness with a cognitive impairment is involved. While that may be true, issues relating to intellectual disability are frequently considered in the course of sentencing offenders and it can be argued that training in cognitive impairment will serve the dual purpose of providing prosecutors and judicial officers with the tools to better understand issues pertinent to the sentencing exercise, and by making the criminal justice system more responsive to both victims and offenders. The Legal Aid Commission supported the further training of all justice personnel, but not necessarily 'mandatory training', as it would be difficult to implement at a practical level.

A number of agencies with expertise in cognitive impairment supported judicial education.⁶⁰⁹ Honorary Professor Gething advised that her research conducted for the NSWLRC, illustrated that negative attitudes and myths held in the wider community regarding people with disabilities also characterises officers of the judicial system. Associate Professor Hayes supported this by stating that in her recent experience, some members of the judiciary have little knowledge about intellectual disability and other cognitive impairments, and appear to have few informal networks whereby they can improve their knowledge. IDRS argued that because intellectual disability is often confused with other cognitive impairment, false beliefs may have an impact on the trial if they remain unchallenged.

⁶⁰⁶ Blyth, J., *Myalla: Responding to People with Intellectual Disabilities who have been Sexually Assaulted*, August 2002, pp.70-71

⁶⁰⁷ NSWLRC Report 80, Recommendation 45

⁶⁰⁸ Attorney General's Department, Committee on Intellectual Disability and the Criminal Justice System, *Police Interviewing of People with Intellectual Disabilities*, [2.12], p.19.

⁶⁰⁹ The Public Guardian and IDRS supported education for judicial officers and legal practitioners generally.

TASKFORCE RECOMMENDATIONS:

- 53 The Attorney General should give consideration to amending the Criminal Procedure Act 1986 to introduce additional measures to assist witnesses in sexual offence proceedings in giving evidence by:
- Allowing the use of an intermediary by a witness who has difficulty communicating unaided,
 - Allowing a witness to use a communication device when giving evidence, if that witness usually employs the device to communicate.
- 54 The NSW Police Service should give consideration to introducing as Police Operating Procedure, video recording of a statement to police of a complainant with a cognitive impairment.
- 55 The Criminal Procedure Act 1986 should be amended to provide for the admission of a video recording of the statement of a complainant with a cognitive impairment (as exists for the recording of a child's statement)
- 56 The Attorney General should consider extending s 91(8) Criminal Procedure Act 1986, to prohibit the calling of a complainant with a cognitive impairment (adopting the same definition that is developed with respect to recommendation 60) in a sexual offence proceeding at committal proceedings.
- 57 The ALRC proposal – to create an exception to the credibility rule to allow expert evidence on the nature of the impairment of a person with a cognitive impairment – should be adopted.
- 58 Training programs should be developed for criminal justice personnel on issues relating to persons with cognitive impairment. This should take the form of experts in the field and/or experienced practitioners conducting continuing legal education seminars or electronic courses.

3. Sexual Offences Relating to Victims with Cognitive Impairment

In NSW, it is an offence to have sexual intercourse with a person with an intellectual disability in certain circumstances which are detailed in s 66F Crimes Act 1900:

- (1) In this section:
intellectual disability means an appreciably below average general intellectual function that results in the person requiring supervision or social habilitation in connection with daily life activities.
- (2) Any person who has sexual intercourse with another person who
- (a) has an intellectual disability, and
 - (b) is (whether generally or at the time of the sexual intercourse only) under the authority of the person in connection with any facility or programme providing services to persons who have intellectual disabilities, shall be liable to imprisonment for 10 years
- (3) Any person who has sexual intercourse with another person who has an intellectual disability, with the intention of taking advantage of the other person's vulnerability to sexual exploitation, shall be liable to imprisonment for 8 years.
- (4) Any person who attempts to commit an offence under this section upon another person who has an intellectual disability shall be liable to the penalty provided for the commission of the offence.
- (5) A person does not commit an offence under this section unless the person knows that the person concerned has an intellectual disability.
- (6) No prosecution for an offence against this section shall be commenced without the approval of the Attorney General.

A person with an intellectual disability has a permanent condition of significantly lower than average intellectual ability. The disability also results in "adaptive deficits", that is, the disability usually affects the person's level of communication, social skills, and ability to live independently. The policy behind the introduction of sexual offences against persons with an intellectual disability appears to be that such members of the community are especially vulnerable to sexual exploitation and assault. This policy, however, arguably also applies to other persons who by reason of cognitive impairment, such as dementia or brain injury, require assistance in their daily living. It is submitted that the provisions that presently apply to sexual offences against persons with an intellectual disability ought to also apply to other persons who by reason of impairment require care.

The current definition of “intellectual disability” in s 66F(1) Crimes Act 1900 is:

an appreciably below average general intellectual function that results in the person requiring supervision or social habilitation in connection with daily life activities.

The Model Criminal Code Officers Committee (“MCCOC”) in 1995 recommended that the term “mental impairment” be adopted, and that the definition be inclusive, not exclusive. It was argued that the tribunal of fact would thereby not be restricted from finding that other conditions may constitute mental impairment⁶¹⁰. The definition put forward was:

Mental impairment includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.

Tasmania adopted a varied form of the definition, choosing not to include severe personality disorders. The Queensland Criminal Code uses the term “intellectually impaired person” which is defined as:

A person is an “intellectually impaired person” if the person has a disability:

- (a) that is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and
- (b) that results in—
 - (i) a substantial reduction of the person’s capacity for communication, social interaction or learning; and
 - (ii) the person needing support.⁶¹¹

The Crimes (Sexual Offences) Bill 2005⁶¹² was introduced in the Victorian Parliament on 16 November 2005 which substitutes “*cognitive impairment*” for the term ‘*impaired mental functioning*’. This amendment arises from a VLRC recommendation that “cognitive impairment” was a more accurate description, and one that is widely used and accepted by service providers. “*Cognitive impairment*” includes impairment because of mental illness, intellectual disability, dementia or brain injury⁶¹³. The Northern Sydney Health Sexual Assault Service supports the adoption of the term “*cognitive impairment*” in the NSW legislation as it includes persons with dementia, intellectual disability and acquired brain injury.

Discussion

The Taskforce agreed⁶¹⁴ that the offences presently relating to persons with an intellectual disability should be extended to include other persons in care arrangements, including persons with a cognitive impairment as a result of acquired brain injury, neurological disorder, or developmental disorder, as well as dementia, and autism.

The definition proposed by the NSWLRC⁶¹⁵ requires that there be both a below average intellectual functioning, and limitations in two or more of the following skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work. Such a test appears to be fertile ground for differential expert opinion.

The NSWLRC said that the current definition was criticised for the reason that it is inconsistent with the term “intellectual disability” as understood by psychologists. This is a view in part shared by Associate Professor Hayes who states that the use of the phrase “serious intellectual disability” as an aggravating feature under s 61J(2)(g) Crimes Act 1900 is not a diagnostic term that is used by experts because the categories of intellectual disability are “mild”, “moderate”, “severe” and “profound”. She argues that any intellectual disability is serious because its diagnosis means that the individual falls into the lowest 2-3 percent of the population in terms of their cognitive reasoning skills and adaptive behaviour skills, and they have ongoing needs for support and services. In her opinion, the word “serious” should be omitted; a recommendation that is supported by many members of the Taskforce.⁶¹⁶

The Taskforce agreed in principle that the current definition is problematic, and supported consultation with specialists⁶¹⁷, with a view to formulating an appropriate definition to cover persons with an intellectual disability, and also other persons who are vulnerable because they require supervision or assistance in their daily activities.

⁶¹⁰ Model Criminal Code, op cit, p.179

⁶¹¹ s 229F Criminal Code 1899 (Qld)

⁶¹² The Bill was introduced in the Legislative Assembly on 16 November 2005 by the Attorney General, Mr Robert Hulls. The Bill has been adjourned for debate to 30 November 2005.

⁶¹³ s 50 Crimes Act 1958 (Vic)

⁶¹⁴ The Legal Aid Commission, Women’s Legal Services, Victims Services, Dr Cossins, Associate Professor Stubbs, and the DPP supported amendment to the definition of “intellectual disability” to include other cognitive impairments.

⁶¹⁵ “Intellectual disability” means a significantly below average intellectual functioning, existing concurrently with two or more deficits in adaptive behaviour”.

⁶¹⁶ Written submissions of Detective Superintendent Kim McKay, Women’s Legal Services, Dr Cossins, Associate Professor Stubbs, the DPP and Victims Services.

⁶¹⁷ Written submissions of Detective Superintendent Kim McKay, Women’s Legal Services, Dr Cossins, Associate Professor Stubbs, the DPP and Victims Services.

The Taskforce also said that the requirement of supervision or social habilitation appears to indicate a higher level of disability than that experienced by many people with an intellectual disability. Detective Superintendent Kim McKay agreed that the aspect of supervision needs to be re-visited as a determiner of a person's intellectual disability. The Legal Aid Commission expressed the view that the provision should be directed to persons with a "significant" impairment.

For policy reasons, only those people who by reason of their vulnerability require assistance in their daily living should be protected by a special category of offence. The requirement of supervision or social habilitation ought to be a threshold requirement in acknowledgement of the fact that some people with a cognitive impairment will not be inherently vulnerable by reason of their impairment, while others will be particularly vulnerable to sexual exploitation because of the nature of their impairment.

Experts and agencies were approached with the question "*what would be an appropriate definition?*" Honorary Professor Gething preferred a term such as "people with an intellectual disability and/or cognitive impairment" arguing that this would cover all conditions. Associate Professor Hayes, however, advised that an expression to cover all of the above impairments is difficult to develop. This is partly due to the difficulty in ascertaining the cognitive impairment that renders the individual vulnerable. While intellectual disability can be measured by tests of IQ and adaptive behaviour, assessment of other forms of cognitive impairment is not so straightforward. For example, there is no "cut-off score" for autism or Asperger's Disorder, or dementia, that defines the disorder.⁶¹⁸ Further consultation with psychologists who specialise in the diagnosis and treatment of persons with the above-mentioned impairments is therefore required in formulating a definition.

⁶¹⁸ Written submission of Associate Professor Susan Hayes.

TASKFORCE RECOMMENDATIONS:

- 59 The definition of "intellectual disability" for offences under s 66F (1) Crimes Act 1900 should be amended.
- 60 Specialists should be consulted with a view to formulating an appropriate definition that meets the objective of providing protection to, and criminal sanction of, sexual offences committed against vulnerable people who require supervision or assistance in their daily activities, including but not limited to persons with:
- an intellectual disability,
 - a cognitive impairment as a result of acquired brain injury,
 - a cognitive impairment arising from a neurological disorder,
 - a cognitive impairment arising from a developmental disorder (for example Asperger's Disorder),
 - dementia,
 - autism.
- 62 The words "an intellectual disability" in s 66F(2) and (3) should be replaced with the term identified as appropriate following consultation with specialists.
- 63 If the definition is amended, the circumstance of aggravation that the victim has a serious intellectual disability under s 61J(2)(g) Crimes Act 1900 (Aggravated Sexual Intercourse without Consent), should be amended in similar terms.

Extending the scope of the offences to other care arrangements

The NSWLRC recognised the difficulty in finding an appropriate balance between protecting sexual autonomy and preventing the sexual exploitation of persons with an intellectual disability. Such a dilemma is acknowledged by Associate Professors Carmody and Hayes who argue that the concern to protect people with an intellectual disability from exploitation needs to be balanced with the person's right to live a full and 'normal' life, including the right to sexual expression.

Section 66F(2) creates an offence by a person in authority to have sexual intercourse with a person with an intellectual disability. It may be assumed that the prosecution would not have much difficulty in proving that the accused had knowledge of the complainant's disability.

In order to provide greater protection to intellectually disabled people, the NSWLRC recommended that s 66F(2) be redrafted to cover all relevant carers, including volunteers and staff providing home-based care, but not prohibit sexual relations between consumers of the same service⁶¹⁹. Similarly, the VLRC determined that such an offence should be confined to specified situations in which people with impaired mental functioning are particularly dependent and therefore vulnerable, that is, the offence should be targeted at carers.

In considering sexual offences against persons with mental impairments, MCCOC were of the view that there had to be a distinction between truly exploitative sexual contact between mentally impaired persons and their carers, and sexual contact with a carer to which a person with some degree of mental impairment might nevertheless freely and voluntarily consent. They argued that otherwise, sexual offences would arbitrarily restrict the sexual autonomy of mentally impaired persons when it comes to their carers. MCCOC recommended a limited definition of consent which requires consideration of the consent of the impaired persons, but also whether such consent was unduly influenced by the fact that the accused was responsible for the care of the mentally impaired person.⁶²⁰

The view of the VLRC was that the Victorian provisions specified an appropriate standard of behaviour for those providing services to people with a cognitive impairment. To lend further support to the prohibition on sexual relations with persons in their care, the VLRC quoted statistics derived from OPP records which showed that only 17 prosecutions took place between 1996 and 2004

for offences under ss 51 and 52 Crimes Act 1958 (directed only to persons who provide services to a person with a cognitive impairment, or who work within a residential facility in the period). They argued that a definition that is based solely on capacity would make matters more difficult and lengthy to prosecute. The VLRC did not support adopting a definition that would make it more difficult to prosecute those who sexually exploit people with a cognitive impairment.⁶²¹

The arguments of the VLRC appear to be sound. Where a person is particularly vulnerable, the law can and should put in place measures to protect them, including criminal sanctions against persons who exploit them. While it is acknowledged that such a provision may restrict the sexual autonomy of a person with a cognitive impairment, that concern is overborne by the need to protect against the sexual abuse and exploitation of a person who is vulnerable by reason of their cognitive impairment.

Should s 66F(2) Crimes Act be amended to cover volunteers and staff providing home-based care?

The NSWLRC recommended that s 66F(2) be re-drafted to expressly include volunteers and staff providing home-based care. In order not to restrict the sexual autonomy of the person with a cognitive impairment any more than is necessary, the NSWLRC recommended that consumers of the same service should be expressly excluded from its operation. Both of these recommendations were supported by the Taskforce.⁶²²

Should s 66F Crimes Act be amended to include other acts of indecency with a cognitive impairment?

The NSWLRC could not identify any principled reason why an offence under s 66F(2) should be restricted to sexual intercourse, and recommended that the prohibited conduct under s 66F(2) should also include any act of indecency. The penalty for such an offence should be lower than for conduct involving sexual intercourse.

⁶¹⁹ In some facilities, some consumers of a service (who have a cognitive impairment) assume responsibility roles, and arguably could be considered to be persons in authority for the purposes of s 66F(2). It is to this group of persons of whom the Commission is concerned should be expressly excluded from being criminally responsible by operation of the section.

⁶²⁰ Model Criminal Code, section 5.2.32

⁶²¹ Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Final Report, 2004, [6.45-6.46]

⁶²² Written submissions of Detective Superintendent Kim McKay, Women's Legal Services, Victims Services, Dr Cossins, Associate Professor Stubbs, LAC and DPP.

At the time IDRS supported this recommendation on the basis that:

The trauma experienced by someone who has been sexually assaulted can be just as severe in cases where indecent assault rather than penetration occurred.⁶²³

Inappropriate sexual touching between a person in authority and a vulnerable person is just as exploitative as an act of sexual intercourse. The recommendation of the NSWLRC was supported by the Taskforce. Given the concerns expressed by a number of the agencies consulted regarding the nature of some aspects of the care arrangements, it should be expressly provided in the legislation that an act of indecency does not include an act done in the course of an appropriate and generally accepted medical, therapeutic or hygienic procedure, nor would the provision apply to a person who is married or in a defacto relationship with the person, and who is also their carer.⁶²⁴

TASKFORCE RECOMMENDATION:

63 The offence pursuant to s 66F(2) Crimes Act 1900 should be re-drafted to:

- cover all carers including volunteers and staff of home-based care providers, but exclude consumers of the same service;
- cover all sexual acts as prohibited conduct, but exclude acts done in the course of an appropriate and generally accepted medical, therapeutic or hygienic procedure;
- to provide a lesser penalty if the prohibited conduct is an act of indecency.

⁶²³IDRS Submission (1 March 1995) at p.11. The written submission of IDRS agreed that indecent assault should be covered by s66F, however, raised the question of whether an exception would be created for care workers' attendance to clients' personal needs.

⁶²⁴This is the definition of "indecent act" under s 50 Crimes Act 1958 (Vic). Sections 50-52 deal with offences against people with impaired mental functioning. The Northern Sydney Health Sexual Assault Service, IDRS and Spastic Centre agreed that indecent acts should be included in s66F Crimes Act 1900, provided there was a statutory defence for legitimate touching for therapeutic, hygiene or medical purposes.

Sexual exploitation of vulnerable people

Some commentators argue that any law reforms in the area of sexual assault as it relates to individuals with a cognitive impairment should be based on the principle that individual autonomy be respected to the greatest possible degree. Any interference with an individual's expression of his or her sexuality should only be justified where it is shown that the interference is necessary for the protection of the person concerned. During the course of preliminary consultation with agencies, the Spastic Centre were concerned that an extension of the provisions to cover people with cerebral palsy, who may not have an intellectual disability but who may have a profound communication problem, and no control over their movements, may be problematic and involved a philosophical dilemma between paternalism and the need to ensure their right to sexual freedom is protected⁶²⁵.

While it is accepted that the law should not operate to deny persons with a cognitive impairment the freedom to participate in consensual sexual relationships; the law must serve to protect vulnerable members of society from sexual exploitation.

The Taskforce considered whether an extension of s 66F(2) would serve to cover the conduct presently prosecuted under s 66F(3). To this end, files sanctioning the prosecution of offences under s 66F(3) Crimes Act 1900 were obtained from the Attorney General's Department with a view to ascertaining whether an extension of s 66F(2) would accommodate the factual circumstances of those matters.

It became clear that the proposed extension of s 66F(2) Crimes Act 1900 would not cover the exploitative conduct of the matters considered. In most cases, the accused person was a neighbour, or social acquaintance. These cases would not fall within the authority relationships required under s 66F(2). In other cases, the accused was the partner of the victim's mother. The prosecution may have difficulty in proving that an authority relationship existed in those circumstances. Perhaps one of the most concerning cases of exploitation was one in which the accused was a former carer at a group home; where the previous relationship would have provided the basis upon which the sexual exploitation later occurred.

In most cases victims had impairments that resulted in their cognitive ability being in the range of between 3 and 10 years. Consent would have been a live issue in any prosecution under s 61J(2)(g) Crimes Act 1900, as in most cases the victim submitted to the requests of the accused. The best example of the difficulties that the

prosecution would face in such cases was one in which the accused was a neighbour of a victim with Down Syndrome (who had a mental functioning of a 3 year old). The accused admitted to police that he had engaged in sexual activity with the victim after the victim had "come onto him". In all of the cases considered, it could be inferred from the circumstances that the accused person had sexually exploited a person who by reason of cognitive impairment could not refuse the sexual advances. In all of the cases, with the exception of one, there was a pre-existing relationship between the accused and victim from which it could be inferred that the accused was aware of the complainant's cognitive impairment.

These examples illustrate that an extension of s 66F(2) Crimes Act 1900 would not cover all instances of sexual exploitation of persons with a cognitive impairment. The facts of those matters also highlight the difficulties that the prosecution may face in proving lack of consent, or the accused's knowledge of lack of consent, for offences charged under s 61J(2)(g) Crimes Act 1900. It is in the public interest to criminally sanction the sexual exploitation of vulnerable members of the community; for this reason the Taskforce⁶²⁶ recommends that s 66F(3) Crimes Act 1900 be retained.

Given that prosecutions under s 66F Crimes Act 1900 require the sanction of the Attorney General (a function delegated to the Director of Public Prosecutions), and that prosecutions are in accordance with the Prosecution Guidelines of that Office, these are considered to be adequate safeguards against prosecutions of persons who engage in non-exploitative consensual sexual activity with a person who has a cognitive impairment.

⁶²⁵ Telephone submission of the Spastic Centre.

⁶²⁶ Written submissions of the Legal Aid Commission, Women's Legal Services, Dr Cossins, Associate Professor Stubbs, and DPP Victims Services agreed with recommendation, but were of the view that IDRS should be consulted regarding the wording.

TASKFORCE RECOMMENDATION:

64 Section 66F(3) Crimes Act 1900 should be retained in the current form, but the definition of the person protected be amended in the same form as recommended for s 66F(2).

4. Aged care issues

According to Julie Blythe and Lauren Kelly, counsellors at the Northern Sydney Health Sexual Assault Services; there has been an increase in the number of people in aged care and disability settings presenting to services having been the victim of sexual assault.⁶²⁷ Several barriers exist which prevent recourse to the criminal justice system to criminally sanction the perpetrator or perpetrators, and to ensure the future safety of the victim. Given the perceived inability of the criminal justice system to meet the needs of people with disabilities, the Sexual Assault in Disability and Ageing Project (SADA project) was established to respond to the complex issues relating to sexual assault of vulnerable persons in care.⁶²⁸

Australian and international research suggests:

- 50-90 percent of people with a disability are sexually assaulted in their lifetime;⁶²⁹
- people with a disability are three times more likely to be a victim of a violent crime;⁶³⁰
- high rates of sexual assault by service providers. for example, residential care workers, teachers, therapists, make up the largest group of perpetrators in many large studies;⁶³¹
- the assaults are more likely to be severe, that is, penetrative, and ongoing. Because people with disabilities may be not taken seriously, or are unable to disclose due to cognitive or communication difficulties, the abuse is likely to have gone on for a long while without being detected;⁶³²
- the assaults are less likely to be detected and acted on;⁶³³
- offenders gravitate to residential facilities. The rates of sexual assault in residential facilities is high, with perpetrators having greater access and opportunity to assault highly vulnerable people.⁶³⁴

Research on sexual assault, particularly in care settings, is limited. Another barrier to ascertaining the incidence of sexual abuse in residential care is that organisations fear litigation if the abuse is discovered. This is coupled with the problem of where an offence is disclosed to staff, a delayed report to police or inaction results in the loss of potentially vital forensic evidence,⁶³⁵ which may ultimately result in criminal proceedings not being commenced by reason of a lack of forensic evidence.

The clinical experience of Blythe and Kelly, and studies in the United States,⁶³⁶ suggests that the profile of sexual assault of aged persons is very similar to that of people with disabilities.⁶³⁷ Abuse of vulnerable members of the

community thrives in a context of secrecy and ignorance⁶³⁸. Indeed Groth found that “sexual offenders are attracted by vulnerability and availability, rather than by physical attributes of potential victims”⁶³⁹. According to Kelly, many investigators now fear that as it has become more difficult for child offenders to have access to children, they may be targeting vulnerable adults. The term ‘gerophile’ is now beginning to be reported in the literature.⁶⁴⁰

In order to prevent the sexual abuse of people with disabilities and elders, the SADA project advocate:

- 1 guidelines for agency responses when the police are unable to take action;
- 2 improving the criminal justice systems response to ensure equitable access to criminal action for all complainants;
- 3 training of specialist police to conduct investigations that are complex by reason that the complainant has communication difficulties; and
- 4 the extension of the current ‘Working with Children Check’ to ‘Working with Children and Vulnerable Adults’.⁶⁴¹

⁶²⁷ Kelly, L., Responding to Sexual Assault in Aged and Disability Care Settings: The SADA Project, at 1

⁶²⁸ Ibid

⁶²⁹ Crossmaker, M (1991) “Behind Locked Doors- Institutional Sexual Abuse”, *Sexuality and Disability* (3) 210-219; and Carmody, M (1990) “Sexual Abuse of People with and Intellectual Disability”, *NSW Women’s Coordination Unit*.

⁶³⁰ Wilson, N & Brewer, N (1992), “Incidence of Criminal Victimization of Individuals with an Intellectual Disability”, *Australian Feminist*, Vol.27 pp 714-72.

⁶³¹ Sobsey, D & Doe, T (1991), “Patterns of sexual Abuse & Assault”, *Sexuality and Disability* (3) 243-250.

⁶³² Nosek, MA (1997), “Abuse of Women with Disabilities: Policy Implications”, *Journal of Disability Policy Studies*, Vol. 8 pp157-176.

⁶³³ Connelly, G. & Keilty, J. (2000) ‘Making a Statement’ *An exploratory study of Barriers Facing Women with Intellectual Disabilities when making a Statement about Sexual Assault to the Police*, Intellectual Disability Rights Service, Sydney NSW

⁶³⁴ Blythe, J (2000), op cit.

⁶³⁵ Ibid

⁶³⁶ Burgess, A (2000), “Sexual Abuse of Nursing Home Residents”, *Journal of Psychosocial Nursing*, 38 (6) 10-18; and Ramsey-Klawnsnik, H (1996) “Assessing Physical and Sexual Abuse in Health Care Settings”, in Baumhorner, L. & Beall, S.C *Abuse, Neglect and Exploitation of Older Persons: Strategies for Assessment and Intervention*, Baltimore Press.

⁶³⁷ Kelly, op cit, at 2

⁶³⁸ Ibid, at 3

⁶³⁹ Groth, N. (1979) *Men who rape: the psychology of the offender*, Plenum Press NY.

⁶⁴⁰ Kelly, op cit, at 3

⁶⁴¹ Ibid, at 5

The greatest challenges for both service providers, and the community generally, is accepting that elder abuse, including sexual abuse does occur, and in tailoring responses to meet the special needs of people who may have difficulties communicating. As evidence of the particular vulnerability of persons in aged care, Burgess' study found that over half the victims died within a year of trauma related complications such as physical injury, and shock. Given current delays in prosecutions, it is unlikely that the offenders will ever be prosecuted.⁶⁴²

The special vulnerability of persons who require supervision and assistance in their daily activities, as highlighted by Blythe and Kelly, raises the question of whether criminal record checks should be conducted on volunteer and employed care-givers. All agencies and experts who made submissions were in favour of compulsory checks on staff who provide care in a residential setting,⁶⁴³ however IDRS also supported checks on those who provide services in settings other than residential care.⁶⁴⁴ The Public Guardian expressed the view that it may be appropriate to consider a system similar to the Working with Children Check,⁶⁴⁵ as some persons with a cognitive impairment are just as vulnerable as children.⁶⁴⁶ The rationale for providing criminal sanction of sexual exploitation of persons with an intellectual or other cognitive impairment, applies equally to introducing procedures to reduce the risk of such abuse occurring. Mandatory criminal checks of staff providing residential and therapeutic care is therefore recommended.

⁶⁴² Ibid, at 3

⁶⁴³ Oral submission of the Spastic Centre, and written submissions of Honorary Professor Gething, and the Public Guardian.

⁶⁴⁴ Written submission of IDRS

⁶⁴⁵ The Working With Children Check is a process for helping employers to decide whether employees and applicants are suitable for child related positions in NSW. It has two components:

a) the Prohibited Employment Declaration, which is the mechanism for ensuring that Prohibited Persons (convicted sex offenders and Registrable Persons) do not engage in child related employment; and b) the process of checking the backgrounds of preferred applicants for paid child-related positions. It includes: a check of relevant criminal records; a check of relevant Apprehended Violence Orders; a check of relevant employment proceedings; an assessment of risk where a relevant record is found; and a report to the employer.

All people working in, or seeking to work in, child-related employment must declare whether or not they are a Prohibited Person (i.e. a person who has been convicted of a serious sex offence or a Registrable Person). This requirement exists for all paid and unpaid workers in child-related employment.

Some people must also be subject to background checking: preferred applicants for paid child-related positions (as listed in the *Child Protection (Prohibited Employment Act 1998)*), foster carers and ministers of religion or other members of religious organisations seeking to work in child-related positions (see Section 3.1 of these Guidelines for list).

Employment includes: performance of work under a contract of employment; performance of work as a sub-contractor; performance of work as a volunteer for an organisation; performance of work as a minister of religion (whether or not ordained); undertaking practical training as part of an educational or vocational course; and includes people who are self employed.

⁶⁴⁶ Written submission of the Public Guardian.

TASKFORCE RECOMMENDATION:

- 65 There should be mandatory criminal record checks for employed and volunteer care givers, who provide services to aged or cognitively impaired clients, in a residential and therapeutic setting.

Chapter 9

Specialist Courts, Dedicated Courts and Case Listings

Introduction

There appears to be a great deal of confusion within NSW about what is meant by the term “specialist sexual assault court”, with no clear or common definition, model or understanding as to what a specialist court is or might be. This is partly because there is no defined blueprint of a “specialist sexual assault court”, and possibly because there is only one country where such courts have been developed. Confusion may also exist because specialisation in the NSW criminal justice system has, to date, primarily been focussed on alternative methods of dealing with offenders, based on the doctrines of therapeutic jurisprudence or restorative justice, for example, the establishment of the Drug Court and Aboriginal Circle Sentencing Courts respectively.⁶⁴⁷ It is therefore important to acknowledge from the outset that the concept of a ‘specialist court’ should not be confused with other types of courts based on therapeutic jurisprudence or restorative justice, as these do not necessarily go hand-in-hand.⁶⁴⁸

The Taskforce terms of reference is extremely broad and is set out as follows:

The Taskforce will look at alternative methods used in other jurisdictions to prosecute sexual assault offences to see if any of the methods employed would:

- be capable of being utilised in or adapted to the NSW legal system;
- improve the way sexual assault offences are prosecuted;
- minimise the secondary victimisation of complainants;
- not impact detrimentally upon the provision of a fair trial;
- reduce recidivism; and
- be financially feasible and time and resource-effective.

The Taskforce will research and evaluate jurisdictions which employ:

- specialist sexual assault courts;
- specialist sexual assault jurisdictions; and
- specialist listing/case management methods, for example, dedicated trial lists and compulsory pre-trial case management.

⁶⁴⁷ Freiberg: “Innovations in the Court System” (2004) *Australian Institute of Criminology, Conference* 30 November at 2

⁶⁴⁸ Julie Stewart makes this very important point in the context of domestic violence courts: “Specialist Domestic Violence/Family Violence Courts within the Australian Context” *Issues Paper 10*, (2005) Australian Domestic and Family Violence Clearinghouse

This chapter will examine what is meant by the term 'specialist court', the theory behind 'specialist courts' and evaluate those jurisdictions, such as South Africa, Manitoba Canada and the Australian Capital Territory, which have employed specialist courts. This chapter will also address 'alternative methods' used in sexual assault prosecutions in NSW and other jurisdictions, such as conferencing and pre-trial diversion, which tend to exist as an adjunct to the conventional criminal justice system and are designed to reduce recidivism and provide victims with a sense of justice.

What is a specialist court?

Within Australia there has been a growth in the number of alternative or 'problem-orientated' courts. Many of these courts have been based on the principles of therapeutic jurisprudence, and are aimed at rehabilitating the offender, for example, the NSW Drug Court. Proposals have been put forward for specialist courts in other contexts, such as domestic violence courts and now specialist sexual assault courts. Arie Freiberg observes that:

The majority of courts which have emerged in Australia has revealed that there is no single template or model upon which they have or can be built.⁶⁴⁹

Freiberg argues that it is important to distinguish between specialist and problem solving courts. Not every specialist court is a problem solving court. He defines a problem-solving court as one which is focussed on the individual and "*seeks to use the authority of the courts to address the underlying problems of individual litigants, the structural problems of the justice system and the social problems of communities*".⁶⁵⁰ A problem solving court may or may not include features such as a non-adversarial approach; direct engagement with offenders; ongoing judicial supervision; and the integration of service provision. Diversionary schemes have also been established as alternative means of dealing with the underlying problems of offending behaviour.

According to Freiberg restorative justice also needs to be distinguished from diversionary programs or problem solving courts. Restorative justice is based on the principle that justice requires a response, which balances the rights of victims, offenders and citizens. To date this has predominately been implemented in the form of a conference held between the offender, community members and the victim.⁶⁵¹ However, the appropriateness of such an approach within the context of sexual assault is considered highly problematic.⁶⁵²

According to Freiberg, a specialist court can be defined as follows:

A specialist court can be regarded as a court with limited or exclusive jurisdiction in a field of law presided over by a judicial officer with experience and expertise in that field. The advantage of specialisation includes improved judicial decision-making through the use of judicial expertise, more efficient court processes, because of judge's and counsel's familiarity with the subject matter and reduced back-logs in the generalist courts.⁶⁵³

Theory of court specialisation

Specialisation is considered desirable as it may lead to greater efficiency in the administration of justice, specialised knowledge, effective processing of cases, sharpening the skills of people concerned, consistency in decision making, specialists on the bench and in the legal profession. The question is, how do we go about it? Is there a difference between creating a 'specialist court' and 'specialised court within an existing jurisdiction'?

The establishment of a specialist court outside the normal court structure is a fairly radical concept. Such courts tend to be based in legislation, and operate with their own rules, for example, the Land and Environment Court NSW. Less controversial are specialised courts that have not been created by specific pieces of legislation and remain within the broad structure of the court system. The establishment of such courts, sometimes called 'dedicated courts' are designed to ensure the efficient disposition of matters and use a particular courtroom within a jurisdiction to exclusively hear a certain set of cases. Such courts tend to rely on organisational or managerial decisions to give effect to the court. Courts established by specific pieces of legislation and 'dedicated courts' usually share the same rationale and desire to address the complexities and sensitivities associated with particular legal matters.⁶⁵⁴

⁶⁴⁹ Freiberg: "Innovations in the Court System" *Australian Institute of Criminology, Conference* (2004) 30 November at 2.

⁶⁵⁰ *Ibid.*

⁶⁵¹ Most restorative justice practised in NSW occurs in the context of juvenile justice. However, a small number of Restorative Justice Conferences are have been organised by the Department of Corrective Services NSW, Restorative Justice Unit, who determine the willingness of victims and offenders to participate in a conference, after a sentence has been imposed. For further information see http://www.dcs.nsw.gov.au/res_just/main.htm

⁶⁵² See in particular Julie Stubbs: "Restorative Justice, Domestic Violence and Family Violence" (2004) *Issues Paper 9*, Australian Domestic and Family Violence Clearinghouse.

⁶⁵³ Freiberg Innovations in the Court System" *Australian Institute of Criminology, Conference* (2004) 30 November at 2.

⁶⁵⁴ Antony Altbecker: Chapter 3, "Court Specialisation in Theory" in *Justice through Specialisation? The case of the Specialised Crime Court*, 2003

Dedicated specialised courts offer an environment in which the skills of the personnel, the management systems and infrastructure available are better suited to cases than the more generalised court environment. However, at the same time these courts remain part of the standard court system. This has clear benefits for the system as a whole. In particular, there remains the opportunity of career mobility for staff, as skills are readily transferable. In addition, the same rules of evidence, common law and sentencing principles apply in the dedicated specialised court, ensuring that the administration of justice is predictable and consistent, and laws develop in a consistent fashion.⁶⁵⁵

On a theoretical level, there are a number of perceived risks associated with specialist courts. Although specialisation of personnel may contribute to the efficiency of decision-making, it also has been suggested that it has the potential to create a degree of over-familiarity and may lead to suggestions that court players have lost their objectivity, or that individual practitioners have become over-familiar with each other.⁶⁵⁶ If the same judges are employed in the specialist court, the judges may also become a source of discontent and difficulty for the parties and there may be an element of perceived bias. Due to the fact that dedicated courts have no legal mandate, there is also a concern that cases for which they are dedicated will also be heard in other courts. Victims and participants whose cases are not heard in the specialised court, may feel as though they are receiving a second rate service, simply by virtue that their case is not considered to be part of the specialised process.

What is a specialist “sexual assault” court?

Sexual Offences Courts, as they currently exist, are otherwise ordinary dedicated courts focusing on a specific set of offences in order to provide a more appropriate service to the victims of those crimes. Court staff are trained to ensure that the needs of victims are taken into account and responded to appropriately. Many of these courts also have the physical infrastructure required to assist victims to provide evidence without having to confront the accused in person. Sexual offences courts currently exist in a number of South African provinces.⁶⁵⁷

Other Jurisdictions

South Africa appears to be the only jurisdiction to have developed specialised and dedicated sexual assault courts. The Family Violence Court, Winnipeg Manitoba and the Family Violence Intervention Program, Australian Capital Territory, hear both domestic violence and sexual assault offences. Given the parallels between domestic violence and sexual assault, with respect to under-reporting, shame and the high withdrawal rate of victims, it is useful to understand what methods have been employed in these jurisdictions to prevent the secondary victimisation of complainants, reduce delays and provide access to justice within the framework of specialisation. The three programs have also been subject to a number of evaluations since their inception, which provide a useful insight into whether the core objects of the court are being met.

South Africa

Sexual Offences Court, Wynberg, South Africa

It is important to acknowledge the unique cultural background of South Africa when examining the establishment of the court and service initiatives in the area of sexual assault. South Africa faces one of the highest number of reported rapes⁶⁵⁸ and the highest acknowledged rate of HIV/AIDs in the world. Preventing the spread of the HIV/AIDs virus is linked to the prevention of sexual assault against women and children. Indeed, it is in the context of HIV/AIDs that further assaults have been perpetrated in South Africa. The development of the wide spread myth that having sexual intercourse with a virgin will cure a person of HIV/AIDs has led to a high incidence of child sexual assault and infant rape in that country.

The first specialised sexual offences court was established in Wynberg in March 1993, as an initiative of the then Attorney General of the Western Cape, and in response to increasing public criticism about the manner in which two particular sexual assault cases were dealt with by the Cape Town Magistrate’s Court.⁶⁵⁹

⁶⁵⁵ Ibid.

⁶⁵⁶ Ibid.

⁶⁵⁷ <http://www.iss.co.za/Pubs/Monographs/No76/Chap3.html>

⁶⁵⁸ In the year 1 April 2003 to 31 March 2004, 52 733 rape cases were reported, Jankielsohn: *SA het nog nie red om misdaadstatistieke te vier*, *Volksblad* 5 Oktober 2004 at 7 cited in H B Kruger: *Comparing the South African legal response to international standards: is there justice for women and children after sexual abuse?* (2005) <http://www.lawrights.asn.au/docs/kruger2005.pdf>

⁶⁵⁹ In the first case involving the alleged sexual assault of an eight year old, the accused was acquitted because the district surgeon had ignored his subpoena to give evidence. In the second matter a magistrate had remarked on sentence that the complainant was unlikely to have suffered any psychological damage as she was not a virgin: Sharon Stanton and Margot Lochrenberg: *Justice for Sexual Assault Survivors?: State Role-Player’s perceptions of the Success of the Wynberg Sexual Offences Court and Associated Services* (2001) at 3

The Attorney General recognised the lack of public confidence in the system and high levels of under-reporting of sexual assault. After permission was granted by the Minister of Justice to open the sexual assault court, the Attorney General then sought the co-operation of the major stakeholders.

The aims of the court are to prevent secondary victimisation, reduce delays and reduce the high withdrawal rates for sexual offence matters. The Court hears only sexual assault cases involving women and children. Other services were also introduced into the Wynberg district at the time, including a comfort room at the Local Hospital for the examination of sexual assault victims, and a Victim Support Services Co-ordinator to co-ordinate a counselling referral service.

What are the court's powers?

Sexual Offences Courts in South Africa are an administrative response to sexual offences and there is no legislative basis to the courts. Process and procedural problems are addressed through practical initiatives and the specialisation of the prosecutor who takes a lead role in the court. The specialist court at Wynberg is a Regional Magistrate's Court, and sits at a similar level in the court hierarchy to the District Court of NSW. A Magistrate's Court in South Africa is divided into Regional courts and District courts. More serious criminal matters are heard in the Regional courts, as the District Court cannot pass a sentence of more than three years imprisonment upon conviction of an accused. The most serious criminal matters are heard in the High Court.⁶⁶⁰

There are six Regional Courts at the Wynberg Magistrate's Court complex. The Sexual Offences Court is located in the same building, but on a different floor and only deals with specific offences. Magistrates work on a rotational system, presiding in the Sexual Offences Court for one week of every six weeks.⁶⁶¹ There are two full time prosecutors assigned to each Specialist Sexual Offences Court. Cases generally progress through the District Court, until the investigation is complete and it is determined how the matter will proceed. Once the investigation is complete, a Regional Court date may be set.⁶⁶² This process appears somewhat similar to that employed in NSW, where cases progress through the Local Court and may later be committed to the District Court for trial.

South Africa has an adversarial justice system, presided over by a Magistrate. The rules of evidence are the same in the Sexual Offences Court as in any other court, however, there is provision for matters to be heard in

camera, and for children to give evidence by CCTV. Once all the evidence has been presented, the Magistrate will make a judgment on whether to convict or not. If the Magistrate decides on a conviction, the accused will then be sentenced.

What offences does the court hear?

The Wynberg Sexual Offences Court generally deals with sexual offences against women and children, whereas the Cape Town Sexual Offences Court and others deal only with sexual offences against children.⁶⁶³ An evaluation of the effectiveness of the Wynberg court in meeting the needs of survivors of sexual offences was undertaken in 1997, 2000 and again in 2001.

One of the problems identified in the 1997 evaluation was that there were no criteria for which cases were referred to the specialised court. Whether cases were heard in the Sexual Offences Court or in another Regional Court was dependent on the recommendations of the sexual assault court prosecutors. One prosecutor was reported as saying that the cases usually channelled to other regional courts were strong cases likely to gain convictions and where the witnesses were likely to be consulted with.⁶⁶⁴ Often cases involving child complainants were prioritised. However, at the time of the 1997 evaluation not all rape cases were heard in the Sexual Offences Court because the court list was approximately three times that of other regional courts.⁶⁶⁵

⁶⁶⁰ For more information on the structure of South African Courts please see the following website: http://www.capegateway.gov.za/afr/pubs/public_info/C/32303/E#12

⁶⁶¹ Sharon Stanton and Margot Lochrenberg: *Justice for Sexual Assault Survivors?: State Role-Player's perceptions of the Success of the Wynberg Sexual Offences Court and Associated Services* (2001) at 54

⁶⁶² *Ibid.* at 47

⁶⁶³ In South Africa common law sexual offences against adult women include (i) rape (ii) incest (iii) indecent assault (iv) *crimen injuria* (v) abduction and (vi) public indecency. Statutory sexual offences for women over 18 include (a) intercourse with a female 'idiot or imbecile', that is a person with an IQ of less than 49 or intellectual age of less than 7 years, (b) indecent or improper acts with a female under 19 years, (c) statutory abduction and (d) statutory forms of public indecency. Rape is presently defined in common law as the unlawful, intentional sexual intercourse with a woman without her consent; and indecent assault is defined as the unlawful and intentional assault with the object of committing an indecency. Rape is gender, object and orifice specific: for rape to have occurred the woman's vagina must have been penetrated by the man's penis. The Sexual Offences Bill, which seeks to address these problems and broaden the definition of sexual assault, is yet to be passed.

⁶⁶⁴ Sharon Stanton and Margot Lochrenberg: *Justice for Sexual Assault Survivors?: State Role-Player's perceptions of the Success of the Wynberg Sexual Offences Court and Associated Services* (2001) at 48

⁶⁶⁵ Shahana Rasool: "Sexual Offences Courts: Do more courts mean better justice?" (2000) 4(2) *Nedbank ISS Crime Index*

A prosecutor also has the discretion to determine whether a sexual offence should be prosecuted in the High Court (formerly known as the Supreme Court).⁶⁶⁶ According to the 1997 evaluation, the Attorney General's guidelines (circular 15/94) set out the criteria for the offences that should be heard in the High Court, as:

- where a woman is raped in her own home where the accused illegally gained entry;
- where other serious crimes such as kidnapping and robbery also took place;
- when a woman is seriously injured;
- when it is a gang rape;
- when the victim is defenceless, for example a child or an elderly person; and
- if when taking into account the accused's previous convictions, the sentencing scope of the Regional Court would not be sufficient.⁶⁶⁷

Wynberg Evaluation 1997

In 1997, Stanton and Lochrenberg conducted an evaluation of the Wynberg court in terms of meeting the needs of victims. The evaluation centred around interviews with members of the South African Police Service, Attorney-General's Office, Wynberg Magistrate's Court Personnel, the Department of Justice College, Department of Welfare and Department of Hospital and Health Services. Unfortunately, due to time constraints, the evaluators only observed one complete adult trial in the Wynberg Specialist Court. In addition, there was inadequate data available on what types of sexual offence cases were coming before the court, whether the cases involved adults or children, and the relationship between the complainant and the accused person. The following data was available for the first two years of the operation of the court in 1993 and 1994:

The table below is reproduced from the Evaluation Report of Stanton and Lochrenberg.⁶⁶⁸

Date	Cases Completed	Scrapped	Warrant for arrest	Convicted	Acquitted	%	Withdraw	%
1993								
Apr	18	4	4	7	?	?	?	
May	30	0	1	20	1	95	8	28
June	38	1	1	20	9	69	7	19
July	34	0	0	24	6	80	4	12
Aug	27	2	1	11	2	85	11	46
Sept	29	0	4	9	7	56	9	36
Oct	21	0	2	8	3	73	8	42
Nov	29	1	3	10	4	71	11	44
Dec	20	0	1	5	6	45	8	42
1994								
Jan	13	0	0	5	3	63	5	38
Feb	33	0	1	11	4	73	17	53
Mar	50	0	2	21	6	78	21	44
Apr	25	0	1	9	7	56	8	33
May	39	0	3	10	9	53	16	46

The evaluation identified the following strengths of the Sexual Offences Court, and effect on stakeholders, including:

- centralisation of the way in which sexual offence cases are dealt with, allowed those concerned to become more experienced and specialised;
- strengthened relationships between police and the prosecution service;
- improved police attitudes towards sexual assault cases;
- prosecutors gained broader knowledge to assist the presentation of their cases;
- prosecutors were more capable at handling witnesses;
- prosecutors were more prepared than previously;
- the private waiting room reduced the possibility of intimidation.

However, the evaluation also identified the following problems:

- absence of a 24 hour support service for sexual assault survivors;
- attitudes of police continued to be a reason why some women withdrew the complaint;
- lack of separate waiting facilities at police stations for complainants;
- women often had to tell their story to more than one prosecutor;
- women were often not provided with pre-trial consultations;
- there were no procedural guidelines for officials, leading to a lack of consistency in the level of service delivery;

⁶⁶⁶ Sharon Stanton and Margot Lochrenberg: *Justice for Sexual Assault Survivors?: State Role-Player's perceptions of the Success of the Wynberg Sexual Offences Court and Associated Services* (2001) at 47

⁶⁶⁷ These criteria are not dissimilar to the matters that are taken into account when determining whether an aggravated sexual assault has been committed pursuant to s 61J *Crimes Act* (1900) NSW. Cases can be sent to the High Court for sentencing if the accused is convicted of the rape of a child/ person under eighteen years, and or indecent assault with injuries.

⁶⁶⁸ Sharon Stanton and Margot Lochrenberg: *Justice for Sexual Assault Survivors?: State Role-Player's perceptions of the Success of the Wynberg Sexual Offences Court and Associated Services* (2001) at 17

- some women were not advised of the private waiting room, and those who did use it, often found themselves sitting alone for hours with no explanation as to what was happening;
- increased number of matters being listed in the court;
- not all matters were prosecuted in the Sexual Offences Court, leading to a view that the 'specialist nature was lost' and community expectations were not met;
- lack of time to consult with every sexual assault complainant;
- higher administrative workload than other courts;
- stressful nature of the work not adequately supported;
- unclear and inconsistent criteria in determining which cases are prosecuted in the Sexual Offences Court;
- it was not suitable for adult and child sexual assault matters to be dealt with together;
- no singular or independent complaints mechanism.
- creation of specialised family violence, child abuse and sexual assault units in the police;
- creation of the Sexual Offences and Community Affairs Unit (SOCA) as part of the National Prosecuting Authority, established in 1999;
- establishment of "Thuthuzela centres" in various part of the country, commencing in 2000; and
- additional courts at Wynberg.

Sexual Offences and Community Affairs Unit, NPA

The objects of the SOCA unit are to improve conviction rates, reduce secondary victimisation within the criminal justice system by establishing multidisciplinary care centres, and develop the skills of all role players in the prosecution of sexual offences.⁶⁷¹ The Unit conducts multi-disciplinary training seminars in all provinces, providing training to police, prosecutors, magistrates and doctors. It has also established numerous other Sexual Offence Courts throughout South Africa. The Unit publishes a quarterly bulletin on sexual offences that is distributed to all prosecutors. The Unit is also instrumental in public awareness campaigns surrounding sexual assault.⁶⁷²

The evaluators were of the view that the success of the reforms from 1993 to 1997 were to a large extent due to the willingness and ability of particular individuals who were in contact with sexual assault victims and their commitment to implementing the reforms. They observed:

Procedural reforms do not automatically mean that there will be an immediate and corresponding progressive change in official's attitudes, beliefs and behaviours. The current role-players have received little specialised training around sexual assault. It is important that both new and current state officials who deal with sexual assault survivors participate in well planned training programmes...⁶⁶⁹

The evaluators viewed the Wynberg Court as partially successful and recommended that a blue print be drafted for Sexual Offence Courts based on the Wynberg model and for clear policy and guidelines to be formulated.⁶⁷⁰

Changes since the 1997 evaluation

Following the 1997 evaluation a number of initiatives were undertaken by the South African Government to complement the function and role of the Sexual Offences Court including the:

- National Sexual Offence Court Taskforce Team was established by the Department of Justice in 1998, to expand Sexual Offence Courts to all regional court districts and provision of training to justice personnel;

Thuthuzela Centres

The SOCA unit has been involved in establishing three rape-care centres. The first centre is housed within Jooste Hospital Manenberg, and is linked with three police stations and the specialised court in Wynberg. The centre streamlines a network of investigative, prosecutorial, medical and psychological services in the hospital, providing a 'one-stop-shop' for sexual assault victims. The centres were created to assist victim's access to services and assist the prosecution process. It became clear to those working in the area that the first few hours after the sexual assault were critical and an ideal stage for all role players to be involved.⁶⁷³

⁶⁶⁹ Sharon Stanton and Margot Lochrenberg: *Justice for Sexual Assault Survivors?: State Role-Player's perceptions of the Success of the Wynberg Sexual Offences Court and Associated Services* (2001) at 69

⁶⁷⁰ H B Kruger: *Comparing the South African legal response to international standards: is there justice for women and children after sexual abuse?* (2005) <http://www.lawrights.asn.au/docs/kruger2005.pdf>

⁶⁷¹ <http://www.npa.gov.za>

⁶⁷² Lindie Saunderson, Senior State Advocate, Sexual Offence and Community Affairs Unit, National Prosecuting Authority, Pretoria, South Africa, at a Forum held in Victoria by the Department of Justice on 29 June 2005.

⁶⁷³ Ibid.

Once a sexual assault complainant reports to any of the linked police stations, they will be transported to the Thuthuzela Centre. The victim is welcomed by a site co-ordinator, and provided with the opportunity to speak first to a social worker or to the police. There will be a short session with the social worker and during the session the victim will be asked to sign documents granting permission for different procedures. The victim will then have a forensic examination conducted by either a Doctor or a Nurse. An exit interview is conducted with a counsellor where the victim is provided with brochures about services and the prosecution.⁶⁷⁴

On 1 July 2004 a fifth Sexual Offences Court opened at the Wynberg Court complex. Three of the five courts are now equipped with CCTV. Cases dealing with adult victims are accommodated in the fourth and fifth courts known as the Thuthuzela court and linked to the Thuthuzela centre in Manenburg.

Evaluation of Wynberg and Cape Town Sexual Offences Courts 2001

In 2001 the Wynberg and Cape Town Sexual Offence Courts were evaluated again to understand whether they were meeting their objectives. The evaluation was primarily based on interviews with key participants. Very few children were interviewed and the evaluators noted it was extremely difficult to obtain quantitative data.⁶⁷⁵ The evaluators examined the court facilities and observed that there was no separate entrance to the building for complainants. They also examined support services for court staff and formed the view that there was a lack of de-briefing, especially for prosecutors.⁶⁷⁶ Although regular training was conducted for prosecutors,⁶⁷⁷ there was a high turnover of staff resulting in a loss of expertise.⁶⁷⁸

The available statistics for Wynberg between 1995 and 2000 show the average annual conviction rate was 68.5 percent. The highest conviction rate was 76 percent in 1996, followed by a conviction rate of 65 percent in 1997. According to the DPP the fall in the conviction rate was due to a reduction in the productivity of the court, however, in 1997 the Sexual Offences Court lost four experienced prosecutors, who were replaced with less experienced staff.⁶⁷⁹ The evaluation in 2001 commented that generally the Sexual Offence Courts ran well, with very committed staff, however, the major issues appeared to be the high case loads and backlog of cases.

An earlier 2000 evaluation of Wynberg was conducted by Moul, who spent approximately 5 months observing the court and spoke to prosecutors and victims. She was not as confident that the court had been meeting its

objectives. Moul was particularly concerned that the focus on conviction rates within the court had 'blinded' the players to some of the larger issues, particularly with respect to reducing secondary victimisation.⁶⁸⁰ She was concerned with the poor levels of communication between the prosecution, court and the complainant; the fact that complainants did not often meet the prosecutor until the day of the hearing; and lack of security and support for complainants within the court complex. In her view little had changed at the Sexual Offences Court to make it geared towards reducing or eliminating inappropriate and insensitive treatment of complainants.⁶⁸¹

Expansion of Specialist Courts Across South Africa

Since the establishment of the court at Wynberg a number of similar specialised sexual assault courts have been established across the country at Bloemfontein (1999), Durban, Mitchells Plain, Parow, Umtata, Grahamstown and Port Elizabeth. There are currently 56 Sexual Offences Courts in South Africa. Determining the location of the courts was based on the number of reported rapes to police.⁶⁸² Given that the courts are an administrative and practical response, it makes it difficult to find information on the framework of the courts.

⁶⁷⁴ <http://www.info.gov.za/speeches/2002/02042512461001.htm>

⁶⁷⁵ Sadan, Dikweni and Cassiem: *Pilot Assessment: The Sexual Offences Court in Wynberg and Cape Town and related services* (2001) idasa

⁶⁷⁶ Sadan, Dikweni and Cassiem: *Pilot Assessment: The Sexual Offences Court in Wynberg and Cape Town and related services* (2001) idasa at 18

⁶⁷⁷ Prosecutor training in the Western Cape has been donor funded and comprises a 3 day structured program with Day 1 focussing on medical evidence, questioning medical experts and leading DNA evidence, Day 2 focussing on child appropriate behaviour, profiles of sex offenders, how to deal with complainants with an intellectual disability and interviewing techniques and Day 3 focussed on rape trauma syndrome and dealing with child witnesses, Sadan, Dikweni and Cassiem: *Pilot Assessment: The Sexual Offences Court in Wynberg and Cape Town and related services* (2001) idasa at 48.

⁶⁷⁸ A comment was also made that due to the high caseload, staff were not always available to attend training.

⁶⁷⁹ Sadan, Dikweni and Cassiem: *Pilot Assessment: The Sexual Offences Court in Wynberg and Cape Town and related services* (2001) idasa at 37

⁶⁸⁰ Moul: *The Court doors may be open, but what lies behind those doors? An observation of the workings of the Wynberg Sexual Offences Court* (2000), University of Cape Town, Institute of Criminology, <http://web.uct.ac.za/depts/sjrp/publicat/kelleyt.pdf>

⁶⁸¹ Ibid at 2.

⁶⁸² Shanhana Rasool: "Sexual Offence Courts: Do more courts mean better justice", (2000) 4(2) *Nedbank ISS Crime Index*

However, generally, all specialist courts have the following features:

- a dedicated and permanently presiding judicial officer;
- two specialist prosecutors for every presiding judicial officer;
- equipment required for a sexual offences court, such as CCTV;
- no contact between the accused and the victim (if there is a possibility of a victim seeing an accused person in the passage ways or corridors, such a court will not be considered a Sexual Offence Court);
- intermediaries;
- the involvement of Legal Aid;
- an oversight management committee.

There is one regional court President at each of the provinces available to consult with and give advice. Saunderson suggests that the Magistrates have embraced the concept, as they find the prosecution is more prepared. The Sexual Offences and Community Affairs Unit has developed the official blueprint for Sexual Offence Courts which prescribes that each court must have two dedicated prosecutors with at least 5 years experience; prosecutors must be properly supported by administrative staff; there must be victim assistant services; and there must be case managers to reduce the turnaround time of cases. The case manager is appointed to manage court roles, secure the attendance of witnesses at court and fast track and monitor all cases tried in these courts. Each court must be equipped with CCTV, have dedicated social workers, and have an experienced, dedicated and sensitised magistrate. At least twenty-six of the sexual offence courts created in South Africa are based on the blue-print.⁶⁸³

Conviction rates

There has been a dramatic improvement in the conviction rates in sexual assault prosecutions in South Africa. As of October 2003, the overall national conviction rate for sexual assault has risen from 42 percent to 62 percent.⁶⁸⁴ In certain regions the conviction rates are incredibly high. For example, Ms Lindie Saunderson, Senior State Advocate, Sexual Offence and Community Affairs Unit, National Prosecuting Authority, Pretoria, South Africa states that in the North West Province the conviction rate is 69 percent; and in Port Elizabeth the conviction rate is 100 percent. Other courts had conviction rates of 63 percent, 75 percent, 67 percent and 79 percent.⁶⁸⁵

One may at first be sceptical of the conviction rates and question how many cases are heard and disposed of in

the courts. Ms Saunderson reported that on average 23 cases were finalised per month at Port Elizabeth and that it was rare for matters to be withdrawn. Generally, it takes between 6 to 9 months for a matter to be finalised. In examining these figures, it is important to bear in mind the difference between Australia and South Africa, including the much narrower definition of rape used in South Africa,⁶⁸⁶ the high incidence of rape and violence of children due to the virgin myth, and the fact that the Presiding Magistrate is the tribunal of fact.

Specialist prosecutors

The success of the specialist courts in South Africa has been largely dependent on the establishment of specialist prosecutors. Prior to specialisation, prosecutors were perceived as being de-sensitised and de-motivated. They had poor interviewing skills, and lacked specialised knowledge of sexual assault laws. There was a high turn over rate of staff, and a victim often saw a different prosecutor each time the matter went to court. There was only one prosecutor assigned to the court and there was no time to consult at all with the victim.

How do they recruit and specialise the prosecution service?

Not all prosecutors are invited to apply to be a specialist sexual assault prosecutor. Prosecutors need to be dedicated and are required to have 5 years experience. There is an entrance requirement and an applicant must demonstrate a certain level of skill before being accepted. Training covers issues such as medical evidence and DNA and is also provided in time management and stress management. In order to attract the best and brightest minds, specialist prosecutors are paid slightly more and bonuses are offered. The prosecution service also conducts exit interviews with victims, which provide specialist prosecutors with vital feedback on their performance.⁶⁸⁷

⁶⁸³ H B Kruger: *Comparing the South African legal response to international standards: is there justice for women and children after sexual abuse?* (2005) <http://www.lawrights.asn.au/docs/kruger2005.pdf> at 14

⁶⁸⁴http://www.doj.gov.za/2004dojsite/m_speeches/sp2005/2005_05_20_mabandla_bv2005.htm

⁶⁸⁵ Figures quoted by Ms Lindie Saunderson, Senior State Advocate, Sexual Offence and Community Affairs Unit, National Prosecuting Authority, Pretoria, South Africa, at a Forum held in Victoria by the Department of Justice on 29 June 2005.

⁶⁸⁶ A 1995 Human Rights Watch Report made the following recommendations regarding the definition of rape under South African law: 1. It should be recognized in law that this crime can be committed by men or women against men or women. 2. The definition of rape should be broadened to include anal and oral penetration as well as penetration by foreign objects such as sticks, bottles, or knives. 3. The definition should focus on coercion by the perpetrator rather than lack of consent by the victim.

⁶⁸⁷ Ms Lindie Saunderson, Senior State Advocate, Sexual Offence and Community Affairs Unit, National Prosecuting Authority, Pretoria, South Africa, Presentation Department of Justice Forum Victoria 29 June 2005

National Policy Guidelines for Prosecutors in Sexual Offence Cases⁶⁸⁸

In 1999 the National Director of Public Prosecutions issued Policy Directives in terms of the Constitution and the National Prosecuting Act.⁶⁸⁹ Prosecutors working in a specialist court are expected to exhibit the necessary interest and sympathetic attitude that sexual offence cases require. Continuity is an integral feature and it is expected that the prosecutor who first handled the case will follow it through the trial stage until its conclusion. The prosecutor must consult thoroughly with the victim⁶⁹⁰ before the trial commences and with the health care practitioner to ensure that he or she is familiar with the medical terminology as well as the implication of the findings of the district surgeon.⁶⁹¹

The prosecutor must consult with the police who investigate the case to ensure all necessary documents and exhibits are available to assist with the smooth running of the case.⁶⁹² The victims of sexual offences should not be exposed to the accused, his family or friends outside the courtroom. The victim should be informed of the role, scope and duration of the case as well as other relevant information.⁶⁹³

The prosecutor must inform the victim of section 153 of the Criminal Procedure Act 1977, regarding the choice of holding the trial in camera. When children testify, the prosecutor should generally apply to the court for permission to make use of the closed camera system to protect the child from direct confrontation pursuant to section 170(A) of the Criminal Procedure Act (No 51 of 1977) so that a child is not exposed to undue mental stress. A prosecutor may make an application to use the CCTV facilities and may lead evidence from a social worker about whether this would be in the best interests of the child. If the defence do not object, the magistrate is likely to grant the application. If the application to use the CCTV facility has been granted, an intermediary will sit with the complainant in the camera room and will relay all questions to the complainant in a sensitive manner.⁶⁹⁴ If the defence does object to the use of the camera room, the prosecutor has to lead further evidence or accept that the camera facilities will not be used.

Discussion

Despite the progress made in South Africa it is recognized that further improvements and refinements can still be made to the court system. Kruger suggests that a policy needs to be developed to provide for monitoring and evaluation of the Sexual Offence Courts, to facilitate assessment of the court and improve efficiency. There is also a continuing concern that no accredited specialist

training is required for court officials assigned to Sexual Offences Courts. Kruger suggests that there should be on-going training of all court personnel, including accreditation of social welfare agencies involved in the court process.⁶⁹⁵ Addressing the issue of Sexual Offences Courts in 2005, both Kruger and South African Prosecutor, Lindie Saunderson, appear to be positive about the progress of reform in South Africa and the process of specialisation, whilst acknowledging that further improvements can be made.

Manitoba Canada

The Family Violence Court

The Family Violence Court in Winnipeg, Manitoba commenced hearing cases in 1990. Over the last 15 years it has been evaluated consistently, providing an important source of data in the area of family violence prosecutions. Family Violence Courts now also operate in Alberta, Ontario, and the Yukon. In determining whether a specialist court could have increased benefits for NSW it is useful to examine the methods employed in the Family Violence Court, Winnipeg, its framework and support systems, as well as the focus on personnel within the court system.

The impetus for the court arose due to the prevalence of family violence matters in Manitoba. Dr Jane Ursel from the University of Manitoba became part of the Court Implementation Committee. She was of the view that such a profound crime needed a dedicated response and they needed to attract the best minds to the job. Prior to the Family Violence Court this was not the case. The courts were typically faced with weak cases and junior prosecutors. Prosecutor's passed files from one to another; there was no consistency in personnel; and the defence had to negotiate with two or three different prosecutors meaning that any understanding previously reached would not transfer from one prosecutor to the next. Public confidence in the justice system was low.⁶⁹⁶

⁶⁸⁸ For a copy of the Guidelines, see http://www.doj.gov.za/2004dojsite/policy/guide_sexoff/sex-guide04.html#1
⁶⁸⁹ National Prosecuting Act 32/1998, s 21(1)(b).

⁶⁹⁰ National Guidelines for Prosecutors in Sexual Offences Cases, Guideline 3

⁶⁹¹ National Guidelines for Prosecutors in Sexual Offences Cases, Guideline 4

⁶⁹² National Guidelines for Prosecutors in Sexual Offences Cases, Guideline 5

⁶⁹³ National Guidelines for Prosecutors in Sexual Offences Cases, Guideline 6

⁶⁹⁴ In terms of Section 170A of the *Criminal Procedure Act* (1993) witnesses under the age of 18 years could give evidence in a separate room from the court, which is linked to the court via CCTV with the assistance of an intermediary.

⁶⁹⁵ H B Kruger: *Comparing the South African legal response to international standards: is there justice for women and children after sexual abuse?* (2005) <http://www.lawrights.asn.au/docs/kruger2005.pdf> at 27-28

⁶⁹⁶ Ursel J speaking at the Department of Justice forum in Victoria on 29 June 2005.

The goals of the specialist court were to:

- reduce delays and process cases expeditiously, aiming for a 3 months disposition time;
- rigorously prosecute;
- create a sensitive and supportive environment for victim/witnesses;
- reduce attrition;
- provide more consistent and more appropriate sentencing;
- mandate treatment for offenders where suitable.

The Court Implementation Committee undertook the following responsibilities:

- to ensure the smooth operation of the specialised court;
- to ensure that the court is understood and accessible to the community at large and the specific community of service providers;
- to monitor the impact of the court on other system components;
- to facilitate the adoption or adaptation of the Family Violence Court model to communities outside Winnipeg and to other jurisdictions.⁶⁹⁷

What offences does the court hear?

All cases of violence in which the victim is in a relationship of trust, dependency and/or kinship with the accused are designated family violence cases. This includes cases of spousal, child and elder abuse. Cases classified as “spousal abuse” include those in which the victim is between the ages of 18 and 59 and who experienced abuse whilst an adult by a legal or common-law spouse, ex-spouse or current or former boyfriend/girlfriend. This category is not restricted to heterosexual relations, although the overwhelming majority of cases involve heterosexual couples.

Cases classified as “elder abuse” include those in which the victim is 60 years of age or over and is abused by a spouse, child, caretaker or third party. “Child abuse” matters include those where the victim is under the age of 18 at the time of the abuse. This includes adult witnesses who come forward with a complaint of historical abuse, as well as cases of multiple abuse where at least one victim is a child. For example, a case of violence against both a woman and her child would be counted within the category of child abuse. Children are considered to be in a position of trust and dependency with all adults; therefore, children abused by individuals, who are not family, are also processed through the Family Violence Court.

The offences encompassed in the court’s definition of abuse and most frequently dealt with by the court are:

- common assault
- assault causing bodily harm
- uttering threats
- possession of weapon
- assault with weapon
- sexual interference⁶⁹⁸

Other criminal charges encompassed by the term “family violence” are:

- sexual assault
- sexual assault causing bodily harm
- sexual assault with a weapon
- criminal harassment (‘stalking’)
- mischief
- intimidation
- attempted murder
- murder

What are the court’s powers?

The Family Violence Court exists only at the provincial court level; that is the equivalent of the Local Court in NSW. The Court is made up of a judge alone who deals with first appearances, remands, guilty pleas and summary hearings. Some cases are disposed of summarily and others committed for trial to the Queen’s Bench, following a preliminary hearing in the Family Violence Court. There is no specialised court at the Queen’s Bench level. Only a very small number of the overall matters dealt with in the Family Violence Court are committed to the Queen’s Bench, however, these tend to be child abuse cases. Most importantly the same prosecutor stays with the matter when it is committed for trial.

There are no legislative provisions relating specifically to the Family Violence Court and it has been established at an administrative level. The rules of evidence are the same in the Family Violence Court as any other court.⁶⁹⁹

⁶⁹⁷ Ursel J: “The Family Violence Court in Winnipeg” (1992) *Manitoba Law Journal* 101-102

⁶⁹⁸ Sexual interference is defined in s 151 of the *Canadian Criminal Code* as: Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of fourteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

⁶⁹⁹ See the *Manitoba Evidence Act*, C.C.S.M. c. E150 and the *Canada Evidence Act*, R.S. 1985, c. C-5

What particular specialised features does the court have?

At the time the Family Violence Court was established, a number of key support mechanisms were also introduced into the criminal justice process to support the work of the court. This included a child abuse investigation unit with Winnipeg Police Service; two victim support programs; a specialised unit in the prosecutor's office with designated Crown Attorneys who exclusively prosecute family violence matters from bail hearings to trial; specially designated courtrooms and dockets for intake; a screening court; and a child friendly courtroom that is used for child abuse prosecutions.⁷⁰⁰

The Family Violence Court also has two victim support programs. The Women's Advocacy Services is part of the Department of Community Services and provides support for women through the court process, as well as a lawyer to assist with other matters unrelated to the offence. The Child Abuse Victim Witness Program also provides support and advocacy for women and children.

Prior to the establishment of the court, a circular was sent to all Judges at the provincial court level inviting expressions of interest from judicial officers interested in working in the court. Initially fourteen judges expressed an interest and were designated to sit in the court. However, after the commencement of the court there was a rapid increase in the caseload of family violence matters and now all provincial judges rotate through the designated courts. Judges receive training on Gender Equality, dynamics of domestic violence, aboriginal and immigrant issues.⁷⁰¹

Personnel within the court also have further specialised duties. Crown Attorneys rotate on a monthly basis from screening matters and conducting lists, to appearing in the trial court. One judge is primarily responsible for court listings and there are three members of staff to assist with case screening to know where each case is within the system. Another staff member concentrates on monitoring cases and another concentrates on tracking and data entry. In addition, there is a specific support person to assist the Crown Attorneys to coordinate files and the flow of information.⁷⁰²

Evaluation of the Manitoba Court

Dr Jane Ursel suggests that one of the consequences of specialisation was to re-define the 'work culture' of the Family Violence Court prosecution unit.⁷⁰³ Policy guidelines were established to assist Crown Attorneys in the prosecution of domestic violence cases, which reflected the dual goals of rigorous prosecution and

sensitivity to the victim. Specialisation was seen to increase the quality of the Crown case and help Crown Attorneys establish appropriate rapport with children.

Court specialisation has impacted on outcomes, from bail decisions, through to sentencing outcomes, including an effect on conviction rates.

Cossins notes that some of the effects include:

- court staff are able to keep track of upcoming cases and make sure there are enough courtrooms for child sexual abuse trials;
- the same prosecutor stays with the case from bail until it is disposed;
- significantly higher conviction rates compared with the National Data for Canada;
- higher levels of reporting of domestic violence than before the Family Violence Court, suggesting increased public confidence in the system.⁷⁰⁴

Ursel reports that prior to the establishment of the Family Violence Court in 1989, the number of spousal assault cases where charges were laid in Winnipeg was 1137. After the establishment of the court, the number of cases increased exponentially to 1444 in 1990-1991, 2325 in 1991-1992, 3193 in 1992-1993, and 3602 in 1993-1994. The figures have remained high since the inception of the court, reaching a peak in 1998-1999 of 3842 cases. The figures suggest that with greater public confidence in the justice system, support and awareness, more complainants are prepared to report to the police and go through the system.

⁷⁰⁰ Cossins A: "Prosecuting Child Sexual Assault Cases: To Specialise or not, that is the question" (2005) as yet unpublished at 26.

⁷⁰¹ Ursel J: Presentation, Department of Justice Victoria, 29 June 2005.

⁷⁰² Ursel J: "The Family Violence Court in Winnipeg" (1992) *Manitoba Law Journal* 103

⁷⁰³ Ursel (2002) "His Sentence is My Freedom" Processing Domestic Violence Cases in the Winnipeg Family Violence Court in L. Tutty and C. Goard (eds) *Reclaiming Self: Issues and Resources for Women Abused by Intimate Partners*, Fernwood Publishing, Halifax, at 55

⁷⁰⁴ Cossins A: "Prosecuting Child Sexual Assault Cases: To Specialise or not, that is the question" (2005) as yet unpublished at 27.

Statistics Canada reported in 2003 that between 1992 and 1999, 85 percent of the spousal abuse cases before the Family Violence Court involved physical assault, ranging from common assault (63 percent) assault occasioning actual bodily harm (11 percent), assault with a weapon (12 percent), aggravated assault (1 percent) and 23 cases of murder. Sexual assault constituted only 2 percent of the overall caseload.⁷⁰⁵ Between 1992 and 1997 there were 604 child sexual abuse cases. Of these matters, 186 cases were stayed, whilst 416 proceeded to court. Of those that proceeded to court, 58 percent (242) resulted in a guilty plea and 42 percent (174) proceeded to trial.

Of those that went to trial:

- 3 percent of matters were discharged;
- 13 percent of cases were dismissed;
- 37 percent of accused were found not guilty;
- 49 percent of accused found guilty.⁷⁰⁶

The overall conviction rate for child sexual offences was 54 percent, compared with 46 percent as the national average. Dr Cossins argues that specialisation can achieve dramatic results in relation to conviction and sentencing.

By way of comparison the conviction rates at trial in the Manitoba FVC for the period September 1992 to September 1997 (49%) and September 1992 to September 2000 (50%) are significantly higher for the conviction rates at trial found in NSW for the same period....⁷⁰⁷

Whilst acknowledging that the Family Violence Court in Winnipeg appears to have been successful on the basis of conviction rates, it is important to remember that the number of child sexual assault cases dealt with in the Family Violence Court Winnipeg in a 5 year period are approximately the same number dealt with in NSW in one year. In addition, it is not clear whether the Family Violence Court has had an impact on the number of child sexual assault matters reported, or whether the increase in Family Violence prosecutions has only occurred within the context of domestic violence.

It is also important to look at other measures of success, as defined by the aims of the court, such as expedition of cases through the criminal justice system. In the initial years of the court processing time for child abuse cases frequently extended beyond 18 months in the FVC, however, this appears to have improved.⁷⁰⁸ Court processing time for such cases in the Winnipeg Family Violence Court from 1992 –1997 are set by Ursel below:

Court processing time	Guilty plea - 242	Trial - 174
6 months or less	56%	16%
7-12 months	29%	40%
13-18 months	9%	32%
19 months and over	6%	13%

If we compare this with the median number of days it took for child sexual assault matters from arrest to outcome in the District Court in NSW in 1999 and 2000, it would appear that the median length of time for matters to progress through the Courts in NSW is longer.

Year	Days from arrest to committal	Days from committal to outcome	Days from arrest to outcome
1999	113	357	509
2000	149	343	552

Specialisation also has an impact on the quality of the prosecution service and presentation of cases. This advantage is summarised by Ursel:

Specialisation of the criminal justice system in Winnipeg plays an important role in balancing the child's best interest with the interest of criminal court intervention. Specialisation ensures that the same prosecutor stays with the case until it is disposed. It also provides a core group of peers for prosecutor's who work in this field, who struggle with the same issues and provide an important reference group when hard decisions need to be made. Specialisation creates a new culture of prosecution, which encourages Crown Attorney's to be aware of, and attend to, the special needs of their vulnerable witnesses. While these benefits of specialisation are hard to quantify, their advantages for the child witness are readily apparent.⁷⁰⁹

⁷⁰⁵ Statistics Canada: Family Violence in Canada: A Statistical Profile, 2003, http://www.phac-aspc.gc.ca/nctv-cnivf/familyviolence/pdfs/2003famvioprofil_e.pdf

⁷⁰⁶ Ursel J and Gorkoff K (2001) "Court Processing of Child Sexual Abuse Cases: The Winnipeg Family Violence Court Experience" in D. Heibert-Murphy and L Burnside (eds) *Pieces of a Puzzle: Perspectives on Child Sexual Abuse*, Fernwood Publishing, Halifax at 87

⁷⁰⁷ Cossins A: "Prosecuting Child Sexual Assault Cases: To Specialise or not, that is the question" (2005) as yet unpublished.

⁷⁰⁸ Statistics Canada May 1994.

⁷⁰⁹ Ursel J and Gorkoff K (2001) "Court Processing of Child Sexual Abuse Cases: The Winnipeg Family Violence Court Experience" in D. Heibert-Murphy and L Burnside (eds) *Pieces of a Puzzle: Perspectives on Child Sexual Abuse*, Fernwood Publishing, Halifax at 92.

Australian Capital Territory

Family Violence Intervention Program (FVIP)

The Family Violence Intervention Program is not a court, but an integrated and co-ordinated criminal justice and community program focussed on improving the criminal justice response to victims of domestic violence in the ACT. The program formally commenced in 1998 and has brought about an administrative response to the high level of withdrawals in domestic violence prosecutions. Evaluation of the program suggests that cultural change has been brought about by: increased levels of police training and brief preparation; the creation of a specialist unit within the DPP; and a Family Violence Case Management process in the Magistrate's Court. A considerable amount of data has also been captured from the program, providing policy makers with a clear view as to how to proceed to enhance the administration of justice in such cases.

What type of offence is the program aimed at?

The term family violence is used in the ACT to encompass all forms of violence, including sexual assault, within relationships in families and includes relationships between spouses, ex-spouses, a child of a spouse, defacto spouse or ex-spouse, and relatives, such as parents, grandparents, step-parents, parents in law, brothers, sisters, uncles, aunts, nephews, nieces and cousins.⁷¹⁰ A family violence matter also extends to persons who normally reside in the same household, apart from boarders and tenants. A family violence offence was previously defined in Schedule 1 of the Crimes Act 1900, however, this has been amended and a definition of domestic violence created by s 9 of the Domestic Violence and Protection Orders Amendment Act 2005.⁷¹¹

What are the core elements of the program?

Like the Family Violence Court in Manitoba, the FVIP is based on a pro-arrest policy and the safety of victims remains one of the highest priorities. Data provided by the ACT DPP shows that from 1988/1999 to 2002/2003 there has been a 288 percent increase in the number of family violence matters rising from 168 to 651 in a four year period. There has also been a significant increase in the number of matters finalised by way of an early plea of guilty, rising from 24 percent in 1998/1999 to 76 percent in 2002/2003. Although the disposition time improved in the first few years of the Program, it appears that this could not be sustained for the year 2002/2003.⁷¹²

Best Practice Guidelines have been created by the DPP about how to deal with Family Violence Prosecutions. Funding was provided for a Family Violence Prosecutor and Specialised Prosecutors. The AFP identifies files as family violence matters, and these are checked by the prosecutor. The Family Violence Prosecutor will allocate the files, with the majority of matters being prosecuted by the dedicated family violence prosecutors, with separate case management.

In July 2000 the ACT Magistrate's Court issued Practice Direction No. 2 of 2000 titled: "Family Violence Case Management Hearings". The Practice Note set out the procedures to be followed for family violence criminal proceedings. It begins by reminding practitioners of the power of the court to award costs against parties in criminal matters and that costs orders will be used to ensure compliance with the Practice Direction.

The Practice Note sets out the procedures to be followed at first mention, where matters identified as family violence matters will be adjourned to the dedicated family violence mention list, when the brief is to be served and a plea entered. If a plea of not guilty is entered the matter may be set down for a Case Management Hearing and the specialised form of Case Management will apply. A very prescriptive timetable then applies with respect to the progress of the matter. At the Case Management Hearing appropriate and constructive negotiation may take place between the DPP with respect to the charges that will proceed to hearing; whether a plea will be entered; whether all the witnesses in the brief will be required to give oral evidence or whether their statements can be tendered by consent; and the issues in contest. The Magistrate will enquire of the parties about these matters at the Case Management hearing before a hearing date is set.

Other support mechanisms

The Program is facilitated by regular interagency meetings and by a dedicated co-ordinator and steering committee. There is proactive support provided to victims to inform them about the legal process and issues relating to their safety. A twenty-six week perpetrator program is also available as part of a sentence ordered by the Court.

⁷¹⁰ New s 10A Domestic Violence and Protection Orders Amendment Act 2005

⁷¹¹ It is understood from discussions with the ACT DPP that sexual offences that fall within the criteria are also prosecuted in this manner, 29 June 2005.

⁷¹² Materials provided by the FVIP Crime Co-ordinator, 29 June 2005. Halifax at 92

Evaluation of the Program

The program has achieved some impressive results to date, including an increase in the number of guilty pleas from 24 percent to 61 percent, and an increase in the number of people convicted by 68 percent (89-99) and 126 percent (00-01). It is also estimated that the Family Violence Case Management Hearing process saved 120 hours of court time and 271 witnesses from having to attend court in the year 2001.⁷¹³ Victim satisfaction evaluations have also been conducted which revealed that family violence victims expressed a 74 percent satisfaction rate with the response of the ACT police at the time of the incident, and of those who had contact with the DPP, more than half said that they were satisfied.⁷¹⁴

Victoria

Specialist listing and case management

Recently, the Victorian Law Reform Commission (VLRC) examined the possibility of developing a specialist court for trying summary and indictable sexual offences. The court would be distinguished by having a specialist judicial officer presiding with expertise in substantive law; rules of evidence applicable to sexual offence cases; better case management; and a better environment where such cases could be heard. The VLRC considered whether the Magistrate's and County Court could establish specialist lists under the supervision of a judicial officer with an interest in this area. In the Magistrate's Court a pilot was conducted to trial specialist listing in committals for child sexual assault.

Pilot

Ms Lisa Hannon from the Melbourne Magistrate's Court considered that there were strong reasons for specialisation. In her view specially trained judges and prosecutors would provide a more consistent approach to the conduct of court proceedings, cultural change would be easier to achieve, and may lead to increased efficiency in case management and cost savings. Ms Hannon adopted a specialist list approach for a period of one month in 2004. According to Ms Hannon this increased the number of cases settled by way of a plea of guilty, reduced delays and had a positive effect on the conduct of the case and conduct of cross-examination.⁷¹⁵

Proposals for the future

On 30 June 2005 the Attorney General of Victoria, Robert Hulls, announced that a specialist court dealing only with sexual offences will be created within Melbourne Magistrate's Court.⁷¹⁶ Mr Hulls said the specialist sexual

offences list would be modelled on examples from Canada and South Africa. He said that international experience showed that assigning judges to a specialist list and creating a specialist prosecutors unit had transformed court culture.

The Chief Magistrate of Victoria, Ian Gray said the sexual offences list would operate statewide through suburban and major regional courts, and be overseen by a co-ordinating magistrate and a senior, specially trained registrar.

We would aim to have this operating next year, if not the beginning of the year then certainly no later than halfway through next year," Mr Gray said. "There will be particular magistrates at particular courts assigned to hear the cases in this list."⁷¹⁷

Indeed, it appears from discussions with the Victorian Department of Justice, that contrary to the news headlines which suggests the establishment of a specialist court, the Department of Justice is contemplating a new court listing mechanism for sexual assault matters, at least in the Magistrate's Court. On 1 October 2005 the County Court (equivalent of the District Court) commenced a specialist listing Pilot in Melbourne.

⁷¹³ Holder and Munstermann: "What do women want? Prosecuting Family Violence in the ACT", *Expanding Our Horizons, Understanding the Complexities of Violence Against Women Conference*, 18-22 February 2002, University of Sydney at 13.

⁷¹⁴ Urbis Keys Young (2001b) *ACT Family Violence Intervention Program Phase II, PADV*, Commonwealth of Australia.

⁷¹⁵ Melanie Heenan: "Sexual Offences Law and Procedure" ACSSA Newsletter No.5 January 2005 at 13

⁷¹⁶ Munro: "Special court will handle sex crimes", *The Age*, 30 June 2005, <http://www.theage.com.au/news/national/special-court-will-handle-sex-crimes/2005/06/29/1119724690639.html>

⁷¹⁷ Munro: "Special court will handle sex crimes", *The Age*, 30 June 2005, <http://www.theage.com.au/news/national/special-court-will-handle-sex-crimes/2005/06/29/1119724690639.html>

What aspects of these models could be adopted in NSW?

Specialist courts in other jurisdictions have for the most part been considered effective when evaluated against the criteria they have set themselves. Most importantly, in the Family Violence Court Manitoba and Family Violence Intervention Program, ACT, the attitudinal changes of key participants appears to have been one of the greatest indicators of success, although measuring this and its impact on the reduction of secondary victimisation is difficult. Changing the culture of a court is not as easy as improving the physical and structural facilities, although these also have an important role to play in reducing secondary victimisation of complainants. From the programs established elsewhere it appears that cultural change is unlikely to be brought about unless there is increased training of all participants in the court process, a clear understanding of participants roles and the expectations and responsibilities attached to those roles, strong administrative support, as well as an accompanying commitment by all participants to the key goals and objectives of the court.

What are the problems that need to be addressed in NSW?

Before examining the utility of specialist courts or dedicated courts in NSW, it is important to briefly re-examine what the current problems are within the NSW criminal justice system, to determine whether 'specialisation' can potentially solve these problems. At the Adult Sexual Assault Interagency Committee Meeting on 25 August 2005, the Committee identified a number of issues of most concern to their agencies in the prosecution of sexual assault in NSW.⁷¹⁸

The area of most concern was delay. This included:

- delays in the provision of health care;
- delays in police taking statements and completing investigations;
- delays in the time taken for the Division of Analytical Laboratories (DAL) to complete DNA testing;
- late service of briefs of evidence on the accused person;
- delay in briefing the DPP;
- late briefing of Crown Prosecutors;
- adjournments at the time of trial due to over-listing in the courts, late allocation of legal aid, and lengthy legal arguments.

The Committee also expressed concern about the acceptance of such delays by legal professionals and the courts and the lack of accountability within the criminal justice system. Related to this was the lack of continuity by police and ODPP in the handling of sexual assault matters. Lack of judicial knowledge about aspects of sexual assault law and sensitivity surrounding sexual assault matters were also cited as areas that required redress. It was also suggested that there needed to be improvements to court design, technology, court staff, and case management.

The Criminal Justice Sexual Offences Taskforce online sexual assault survey of services and agencies conducted in August 2005 received 191 responses. In relation to the question "*what laws or procedures around sexual assault need to be changed*" there was a wide range of responses, including a number which supported: greater restrictions on cross-examination so that victims are not intimidated or asked offensive questions (22); greater use of CCTV for adult victims (4); use of pre-recorded video statements for adult victims as their evidence in chief (14); changes to jury directions (13); greater sensitivity to victims (30) (11 mentioned the judiciary, 7 the DPP and 5 mentioned police); further education of the judiciary and legal profession; reducing delays by prioritising sexual assault matters (15); and amending the definition of consent (4).

Responses received from sexual assault victims suggested they were disappointed with the quality and thoroughness of the police investigation; cases were not taken seriously by police, there was a lack of sensitivity on behalf of police, and police should have kept victims better informed. When asked "*what could have made the court process easier?*" victims responded there needed to be more information about the court process from the police and ODPP and said it would have been better to meet the Crown Prosecutor before the day of the trial. When asked "*what could have made it easier to give evidence at court?*" victims responded they were troubled by the manner in which they were asked questions by the defence and the adversarial nature of the proceedings, and one survey respondent felt as though she was treated with disdain by the judge.⁷¹⁹

⁷¹⁸ The following agencies were represented at this meeting: NSW Police Service (including JIRT and Detectives), NSW Health, ODPP, Corrective Services; Violence Against Women Specialist Unit (DOCs), Victims Services, Attorney General's Department and NSW Rape Crises Centre.

⁷¹⁹ This is a broad summary of the comments made as part of the survey.

What would a specialist court or dedicated specialised court look like in NSW?

When examining the specialist courts described in other jurisdictions, the common elements appear to be:

- a dedicated and separate case management list;
- specially trained prosecution teams;
- a dedicated co-ordinator to facilitate specialist listings;
- specialist witness support;
- specialised court staff;
- specialist police training.

Clearly the methods outlined above do not address all the problems surrounding the prosecution of sexual assault matters, such as rigorous cross-examination in the adversarial system, or of complainants having to physically confront the accused in court where CCTV facilities are either not available, not working⁷²⁰ or the complainant is not granted the use of such facilities. However, in light of the problems identified within the current criminal justice system, the merits of a specialist or dedicated specialised court appear to be worthy of consideration, particularly those elements directed to better case management, increased training for all criminal justice participants and continuity of prosecutors, so as to engender a culture of increased knowledge, sensitivity, expertise and professionalism. The question is how do we go about this? What would be the core objectives of such a court or program? How is this best implemented and communicated to the practitioners and participants who will work in this environment and be required to give effect to the court objectives?

Not all members of the Taskforce were of the view that a specialist or specialised dedicated court was necessary⁷²¹, however, all members endorsed better case management of sexual offence cases through the courts. Magistrate Quinn noted that three areas of response arising from the surveys are particularly relevant to courts and the Taskforce terms of reference, namely the practice and procedure of courts, delay experienced in preparation for court and delay experienced at court.

In examining the basis for a specialist court, Dr Cossins argues that consideration needs to be given to:

- the specific aims or objectives sought to be achieved,
- the perception that offences will be handled differently to other criminal matters;
- adequacy of resources;
- criteria for screening and assignment of cases to a specialist court; and
- appropriate method of evaluation and assessment of outcomes to determine the effectiveness of the court.⁷²²

What are the policy objectives of establishing a specialist court?

Before embarking on a specialist court, or dedicated specialised court within an existing structure, it is important to have clear and defined objectives. Stewart argues, in the context of domestic violence, that a specialist court may have as its key objectives: the expedition of cases, provision of information, support, advocacy and services for victims and safety at court.⁷²³ Dr Cossins suggests that if the sole object of a specialist court is to reduce the secondary trauma to victims and improve their experiences in court, this can be done within the same jurisdiction as other cases. However, writing in the context of child sexual assault she asks whether a specialist sexual assault court can be conceived which aims at preventing sexual assaults. She writes;

...prevention of child sexual abuse is, of course, just as important as making child victims' experiences less stressful in court. This raises the issue of whether that can be achieved in the same jurisdiction or whether it is necessary to consider specialisation through the establishment of a specialist court for the prosecution of child sex offences. In making out a case for a specialist court, it is necessary to focus on what the prosecution of sex offences can or should achieve.⁷²⁴

⁷²⁰ In a child sexual assault prosecution in the District Court in July 2005, the jury was dismissed after 3 days having not heard any evidence, as the court had tried unsuccessfully to work the CCTV equipment and play a recorded interview with the complainant (05/11/0363).

⁷²¹ This was the view of Magistrate Quinn, Public Defenders Office and the Legal Aid Commission.

⁷²² Cossins: "Prosecuting child sexual assault cases" to specialise or not, that is the question" (2005) as yet unpublished at 25.

⁷²³ Stewart: Specialist Domestic Violence/Family Violence Courts within the Australian Context" *Issues Paper* 10, (2005) Australian Domestic and Family Violence Clearinghouse.

⁷²⁴ Cossins: "Prosecuting Child Sexual Assault Cases: To Specialise or not, that is the question" (2005) as yet unpublished at 20.

Dr Cossins argues that the aims and objectives of a specialist court and the manner in which it measures success should include conviction rates and issues such as recidivism. She notes that if a preventative approach is taken, the focus of any reform options must deal with the prosecution process and prosecution outcomes not just the use of special measures that protect victims from cross-examination. Dr Cossins is of the view that a specialist court could have the following objectives:

- to minimise the incidence of sexual abuse in the community;
- to minimise the secondary victimisation of complainants;
- to increase reporting, prosecution and conviction rates of sexual offences;
- to develop a co-ordinated, integrated approach to the processing and management of sexual assault cases by all agencies involved in the criminal justice response;
- to rehabilitate those convicted of sexual assault offences and thereby reduce the risk of recidivism by offenders.

One may question how a court can directly or indirectly minimise the incidence of sexual abuse in the community, as this is a matter of education and cultural change, which a court may not be in a position to effect. On the other hand, if the presence of a specialist court, its judgments and sentences are seen by the community as a deterrent, and its profile serves a broader educative function, it may have the potential to affect community attitudes about sexual offences. Cossins states that it remains unresolved as to whether a specialist court would be successful in reducing the incidence of sexual abuse in the community, but if it were to do so, it would be necessary to recognise that prosecutorial, sentencing and rehabilitative processes of the court would need to be linked, with the inclusion of a sex offender treatment program.⁷²⁵ Magistrate Quinn submitted that the trend towards specialist courts, which hold the judiciary responsible for 'solving problems' may tend to blur the distinction between the role of the separate arms of government.

What aspects of other models could be adopted in NSW?

Although there is no clear blueprint on the way forward, it is suggested that the models employed in other jurisdictions contain elements, which may be suitably adapted to the NSW system. From the experiences elsewhere it does not appear that a separate stand-alone court needs to be created, nor is it necessary to implement legislation to give effect to a specialised and dedicated court. What is needed, is the goodwill of all the key participants in the criminal justice process. It is suggested that sexual assault matters should be taken out of the general list and be subject to a call-over on a separate day with separate and specialised case management hearings; and that dedicated courts, equipped with the appropriate technology, be set aside and reserved for hearing sexual assault matters.

The following elements are worthy of consideration:

- dedicated court space, equipped with appropriate technology and specialised personnel, including court officers and interpreters;
- access to CCTV rooms and the court via a separate entrance to accommodate and provide for victim safety;
- a process of court listing and case management to ensure that cases are brought promptly without undue delays;
- dedicated court registry staff to co-ordinate and support new listing arrangements and ensure parties have complied with court orders;
- utilising a set of specially trained and highly skilled judges;
- Employing specially trained prosecutors who continue with the matter from bail to trial;
- an ongoing training program for prosecutors, including support services to enable opportunities for debriefing to prevent burn-out and high staff turn overs;
- the creation of a case manager within the ODPP to exclusively ensure sexual assault cases are being prepared to a high standard, that conferences are held with complainants, and to keep abreast of the listing of all matters and to solve problems which are preventing the efficient disposition of matters;
- the establishment of a data collection method to allow for an evaluation of the jurisdiction's effectiveness and the assignment of a specific group to manage, monitor and evaluate the jurisdiction;
- referral of victims to appropriate specialist services.

⁷²⁵ Submission Dr Anne Cossins, 8 November 2004.

The points outlined above were generally endorsed by the Taskforce and in the written submissions of the DPP, Detective Superintendent Kim McKay, Women's Legal Services, Victims Services and Associate Professor Julie Stubbs as essential elements of a specialised response to the prosecution of sexual offence matters. With respect to the creation of a case manager within the DPP, Mr Cowdery QC AM advised that rather than adopting this approach, sexual assault matters could be categorised as a priority matter or special interest matter and they would therefore be tracked through the system, allowing Managing lawyers to monitor these cases. This may be a more desirable and efficient mechanism by which the DPP can achieve the same result.

Court resources – designated, identified and properly equipped courts.

Although the above suggestion does not create a separate court, it does create a separate sense of “place”, in that dedicated courts could be set aside or reserved for the prosecution of such matters. An evaluation has recently been undertaken of the courts in NSW to determine what courts currently have a remote room; an audio visual recorder to record the complainant's evidence; CCTV screens that can be switched on to show a complainant's recorded interview with police; a plasma screen for the jury; a monitor for the accused and the judge; a document reader, video player and DVD player.

This evaluation presents an important opportunity to examine the best way to utilise properly equipped courts for sexual offence proceedings and whether a special list for properly equipped vulnerable witness courts can be created, separate to the general list and listing priorities. In order to facilitate this additional listing arrangement a Registrar could be specifically appointed to ensure parties are complying with requirements to file and serve specified notices and that matters proceed in a timely manner. There could also be a specifically appointed technician allocated to the designated courts to ensure equipment is working and participants have the necessary skills to operate equipment.

This model may be effective in the Downing Centre and Sydney West Metropolitan Courts, with Campbelltown, Penrith and Parramatta forming a court cluster with designated courts at each complex. A designated Registrar could also be appointed for Sydney and Sydney West Courts to ensure matters are proceeding in a timely fashion and there are sufficient courts available. More creative solutions may be required to accommodate the regional courts, and hub courts could be nominated for each region dependent on the court with the highest

number of sexual assault prosecutions and where a DPP office is co-located, for example, Newcastle, Wollongong, Gosford, Dubbo, Wagga Wagga and Bathurst. The feasibility of setting up a remote room in other key country locations could also be considered so that complainants do not have to travel as far to give their evidence. However, the Legal Aid Commission observed that not all courts in the regions are equipped with the appropriate technology.

Magistrate Quinn also raised the difficulty in being able to accommodate remote locations where matters are in the Local Court stage and the difficulty in transporting victims and witnesses to court. Alternative listing practices would require additional court resources. Magistrate Quinn submitted that modification to existing arrangements in the Local Court may improve the way sexual assault offences are prosecuted and minimise any secondary victimisation of complainants, while not impacting detrimentally on the provision of a fair trial.

Active Case Management

Active case management during the court process may assist in reducing delays and ensuring the smooth running of a matter through the criminal justice system. Such case management should be continuous and commence in the Local Court and all the way to the District Court if the matter is committed for trial. Magistrate Quinn submitted that one way to improve the management of sexual assault cases involving children in the Local Court would be to introduce legislative time standards from arrest to court and arrest to committal. For example, a period of 6 months from arrest to committal could assist in reducing delay. Magistrate Quinn also supported giving priority status to all sexual offence cases to assist with listing arrangements. She was of the view that these measures would be sufficient to improve the criminal justice response without having to create a separate and dedicated court. She submitted that the emphasis should be on open and transparent guidelines regarding process.

The Legal Aid Commission also preferred alternative listing arrangements and active case management, rather than the establishment of a specialist court as a means to improve the criminal justice process for both complainants and defendants, however, the Commission was of the view that this will only be effective if agencies are able to dedicate specific staff to support this approach. The Commission submitted: *“It is important that case management achieves maximum efficiency by early resolution of pre-trial issues and that the cost of the matter is not inflated by requiring legal representatives to make additional court appearances.”*

Judge Ellis also advised the Taskforce that a hands-on approach to case management in the District Court may also have the effect of resolving issues between the parties earlier, ensuring that matters are ready to proceed on the trial date, with the flow on effect of reducing the number of matters listed on that day. In a recent paper given to the National Judicial College of Australia he states:

The desire to constantly seek new and better means to manage our Courts is a logical extension of the judicial goal of providing an efficient, ethical and effective system of criminal justice in which the community can have complete faith. The need for ongoing reform and improvement should not be justified by the desire to increase conviction rates or by beliefs that all complainants tell the truth or all accused are guilty. Rather it is justified by the need to ensure procedural fairness to all witnesses (including the accused and defence witnesses) within the context of a fair trial...⁷²⁶

He noted that some causes for delay are outside the control or influence of the Court, but that a number of cases of delay can be prevented by or minimised by better case management; and that this can generally be best achieved when trial counsel are involved well before the trial date.

The DPP submitted that the most important priority when creating a framework for a specialised response to sexual offences is rigorous case management employed by the judicial officer controlling the process. The DPP further submitted that a specialised approach should also include pre-trial hearings (with one judicial officer's decision binding on another) so that the parties can litigate any matters in advance that may delay the commencement of the hearing. The Government has recently introduced legislation, the aim of which is to provide for better case management of sexual assault trials. The provisions⁷²⁷ make pre-trial orders made by a Judge binding on the later trial judge. Previously, pre-trial orders made by one judge were not binding on a different judge, thereby discouraging the parties seeking early resolution of matters likely to impact on the commencement of the trial. The commencement of the legislation coincided with the issue of a Practice Note⁷²⁸ directed to case management of sexual offence trials.

The stated purpose of the Practice Note is to ensure the timely management and expeditious hearing of trials for prescribed sexual offences, by requiring orders relating to the hearing to be made prior to the trial date wherever possible. It requires that issues relating to the manner in which a child is to give evidence, and the editing of the recording of the child's statement are to be addressed before the day of trial. The prosecution is also to advise the court of any pre-trial orders sought and a pre-trial application will then be listed on a date prior to the trial date. This also applies to matters in which the complainant is an adult. It is expected that the combined effect of the legislation and Practice Note will be that a complainant will give their evidence on the day that the matter is fixed for trial.

⁷²⁶ Judge Ellis: *Judicial Activism in child sexual assault cases*, Paper presented at the National Judicial College of Australia Children and the Courts Conference Sydney 5 November 2005 at 2.

⁷²⁷ The Criminal Procedure Amendment (Sexual Offence Case Management) Act 2005 inserts section 130A into the *Criminal Procedure Act 1986*

⁷²⁸ District Court Practice Note: Management Of Prescribed Sexual Offence Proceedings.

Training key participants within the criminal justice system and co-ordination of service delivery – changing cultural practices

The Taskforce supported training of key justice personnel, however, it was the mandatory nature of any training that remained a point of controversy.

Judicial Officers

In other jurisdictions, judicial officers have generally been engaged with specialised programs through court-users forums, case management, and interagency meetings, as considered appropriate. The role of the judicial officer is vital and it is important that if a specialised and designated court structure is adopted, that judicial officers are involved in the development of policy and procedure. One of the most difficult questions is how judges should be assigned to a specialised and designated court and whether this should be exclusively, dedicated part-time, or on a rotational basis. There appears to be a higher likelihood of obtaining good results where people have elected to take on a specialised role and have an understanding of their purpose and role. As evidenced in Canada, a memorandum to judges about the Family Violence Court elicited a number of expressions of interest.

Within Victoria, there appears to be resistance to the idea of judicial specialisation,⁷²⁹ possibly because there is a concern that judges and magistrates will be pigeon holed, and also because it is considered undesirable to exclusively preside over sexual assault matters. This is understandable and it is important to recognise that judges can still be specialised and receive training, without having to exclusively preside over sexual assault cases. A rotational system appears to have been adopted in nearly all specialist courts. From a policy perspective this may be considered more effective as there would be a greater number of recognised and specially trained judicial officers to pool from; it may prevent burn-out; and it may also alleviate defence counsel concerns about any perceived bias.⁷³⁰

One may argue that specific judicial training in sexual assault is unnecessary as it is no different to presiding over any other criminal proceeding and a good judge will be able to draw upon his or her skills to make decisions and properly conduct proceedings. However, reports made to the Criminal Law Review Division throughout the course of the year have suggested there have been some instances where judicial knowledge about aspects of sexual assault law and legislation has been found wanting, such as to undermine confidence in the administration of justice. Such reports included, being unaware of the extended definition of sexual intercourse;

being unaware of the provisions of the Evidence (Children) Act 1997 which allows a child to give evidence in chief by way of pre-recorded video; and being unaware of the prohibition of calling a child complainant at committal.

Judicial education was considered by some members to be crucial.⁷³¹ The DPP also emphasised the importance of the judicial officer in the process in terms of instilling respect for complainants, regardless of their socio-economic, racial or cultural background, and ensuring their privacy and safety. The DPP also highlighted the importance of judicial knowledge of the laws of evidence, knowledge on the use of technology, and the acknowledgment that sexual assault is a different crime requiring a different response. It is suggested that only judicial officers with some criminal experience preside in sexual assault matters.⁷³² The question is how to go about selecting key personnel to be involved. Should this be by invitation or would it be preferable to seek expressions of interest? For those judicial officers involved, training seminars could be offered to canvass a wide range of matters, including laws governing sexual assault and the latest developments, cultural issues surrounding sexual assault, asking questions in an age appropriate manner and s 275A Criminal Procedure Act 1986, sentencing, forensic evidence, medical evidence and issues surrounding the dynamics of sexual assault.⁷³³

Police

It is suggested that further training could also be provided to police to improve investigations and ensure complainants are dealt with sensitively from the moment they first contact the police. Responses from the online surveys suggest that this first point of contact has an enormous impact on the complainant and their confidence in the system. It is understood that two hours of training is offered as part of the Detectives Education Program, covering legislation, myths, and health ramifications for complainants. A specialist seven-day program is also offered, but it is voluntary. It is run approximately 8 times per year and with about 25 participants. The program includes guest speakers on a variety of issues, including presentations from two complainants about their experiences with police.

⁷²⁹ Victorian Law Reform Commission: *Sexual Offences Law and Procedure* Final Report at 174

⁷³⁰ See also the evidence of Mr Cowdery QC AM, DPP and Patrick Parkinson at the NSW Legislative Council Standing Committee on Law and Justice: *Report on Child Sexual Assault Prosecutions* (2002) at 201

⁷³¹ Associate Professor Stubbs, Women's Legal Services, Dr Cossins, Victims Services.

⁷³² This was supported by the Public Defenders.

⁷³³ Although all judicial officers were sent materials compiled and prepared by the NSW Judicial Commission as part of the Child Sexual Assault Jurisdiction Pilot, written materials should be supplemented by seminars and workshops.

There is a sex crimes squad with approximately 30 investigators, however, this unit is generally involved in very complex matters with multiple victims or accused, or high profile matters. The majority of sexual assault cases would therefore not qualify as matters dealt with by the squad.⁷³⁴

Given the 7 day education program is voluntary, there is a concern that those who choose to participate may already have a degree of sensitivity and commitment to the investigation of sexual assault matters. The real question is whether such a program should be mandatory for officers of a certain level or at least an officer investigating a sexual assault offence, or whether a more condensed version of the course should be run and offered to junior police in Local Area Commands, who may have greater contact with complainants in the first instance.

Forensics

A number of Taskforce members cited delay in obtaining results with respect to DNA analysis by the Division of Analytical Laboratories (DAL) as a major cause for delay between arrest and committal and recommended that further resources be set aside for DNA testing.⁷³⁵ At the last Taskforce meeting it was determined that DAL should sit independently of the Department of NSW Health.

Prosecutors

Results from the victim survey suggest that late briefing of prosecutors, and a lack of communication with sexual assault complainants contributes to secondary victimisation and a feeling of powerlessness. In those jurisdictions where specialisation has been employed, the specialisation and continuity of prosecutors has been the lynch pin to the success of the program.

Introducing specialist prosecutors does not necessarily mean that a specialist unit needs to be created which will wholly and solely prosecute sexual offence matters. Accreditation and training on a wide range of issues could qualify a person to conduct sexual offence matters and improve the skills of the prosecution service generally. A person who has received specialist training need not, and it may be argued, preferably should not, prosecute solely in this area. Accreditation could take many forms, but should be rigorous, challenging and present lawyers with the opportunity to obtain new skills. It should be competitive so as to attract experienced and talented prosecutors.

A program could be established which runs over a number of days and includes workshops on interviewing children, conducting conferences with reluctant complainants, understanding forensic evidence,

interpreting medical reports in sexual assault matters, understanding the effect of drugs used in sexual assault, understanding the dynamics of child sexual assault, including coping mechanisms and counselling, understanding cultural issues surrounding sexual assault, particularly in Aboriginal communities, improving the quality of briefs, presenting sexual assault cases in court, sentencing and victim impact statements, practice management and maintaining victim contact, reviewing sexual assault legislation and case law, and understanding a prosecutor's responsibilities under the Victims Rights Act. This program could be available for both solicitors and Crown Prosecutors with higher levels of training directed towards Crown Prosecutors.

Continuity of solicitors should also be considered as a feature of specialisation. Currently within the ODPP, the structure of the office means that a case will generally be handled by one solicitor in the local court stage and passed to a second more junior solicitor when it is committed for trial.⁷³⁶ After a matter is committed for trial, knowledge of the brief and any rapport established with the complainant is generally lost. Within the DPP there is no policy that the solicitor who has carriage of the matter should appear on bail or other important applications and often these are given to the solicitor who is conducting the list at court on the day. This practice is utilised because it is considered more efficient, however, victims may often perceive it as a lack of interest or care, and may lead to confusion as to why such a sensitive matter is being handled by so many people.

Lack of continuity in the prosecutor also creates difficulties for the defendant's legal representative, as it is difficult to clarify issues in dispute and conduct realistic negotiations.⁷³⁷ Magistrate Quinn submitted that the introduction of continuity would be a matter for the ODPP, but from a practical point of view it would be a distinct advantage to have a prosecutor responsible for all aspects of the case from first mention to trial and familiarity with the case would enhance the smooth running of matters. Continuity of prosecutors was strongly supported by Detective Superintendent Kim McKay, Associate Professor Stubbs, Dr Cossins, Victims Services and Women's Legal Services. Mr Cowdery also supported having continuity of prosecutors from bail through to sentence, however, advised that in order to achieve this, there would need to be additional significant resources, suggesting somewhere in the vicinity of an increase of Crown Prosecutors and advocates of 50 percent.

⁷³⁴ Information provided by NSW Police Service, Programs

⁷³⁵ This problem was highlighted by the Public Defenders Office and the Legal Aid Commission.

⁷³⁶ This problem was identified by the ODPP (ACT) and Australian Federal Police: *Responding to sexual assault: the challenge of change* (2005) at 103 and the Western Australian DPP, which discussed the importance of vertical prosecutions, Keating: *Review of Services to Victims of Crime and Crown Witnesses Provided by the Office of Director of Public Prosecutions for Western Australia* (2001) at 29.

⁷³⁷ Submission of the Legal Aid Commission.

Complainants concerns are often compounded when they are not advised as to who the Crown Prosecutor will be until a few days or even the day before the trial is due to commence. This also compromises brief preparation as it is often left to a junior instructing solicitor to make judgment calls about items needed for the brief or witnesses required. Whilst appreciating that resources are a major issue, if there was a nominated and dedicated category of Crown Prosecutors to appear in such cases, this may assist in prioritising matters and ensuring that Crown Prosecutors are briefed early. The Legal Aid Commission is of the view that continuity of prosecutors and early briefing of Crown Prosecutors would be an advantage to the defendant and the complainant. A similar view was expressed by the Public Defenders. The Legal Aid Commission suggested that it would not be necessary for the Crown Prosecutor to appear on every occasion, but it is important that a person who has responsibility for making decisions about how the trial is run is involved in the matter from an early stage.

Court Staff

In order to ensure that complainants are treated with sensitivity, it is suggested that court staff also receive training. This may not be as imperative as training for other participants, however, it should be noted that interactions with court staff can have an enormous impact on the confidence of the complainant and whether they feel as though they are being treated with respect. Of particular importance is the ability of court staff to operate technological equipment in matters where CCTV is utilised.

Magistrate Quinn was of the view that training of court staff in relation to sensitivities of persons before the court may be of assistance and proposed that court officers and staff receive some specialist training. This was a view shared by Victims Services.

Defence Representatives

Generally it does not appear that defence representatives receive any specific training within other specialist jurisdictions, however, it is considered important that defendants be able to access legal aid and that representation is secured well in advance of proceedings. Early allocation of legal aid funding to obtain counsels' advice may assist in matters proceeding through the courts more quickly, and for issues to be resolved prior to the commencement of the proceedings.⁷³⁸

Associate Professor Stubbs noted that specialist training for defence representatives was raised by the *Heroin of Fortitude* report and that training could be focussed on

how to engage in effective cross-examination that is not aggressive, demeaning, harassing, and that is appropriate for children, vulnerable witnesses and sexual assault complainants generally. Victims Services were of the view that training of defence representatives would be an important measure to improve the experience of sexual assault complainants.

The Legal Aid Commission submitted that special listing arrangements will only be effective if agencies are able to dedicate specific staff to support the program, including defence representatives. The Legal Aid Commission is also structured in a similar manner to the ODPP, in that in-house counsel are employed at the committal stage, with a different Legal Aid solicitor taking over the brief for trial and instructing counsel. The Legal Aid Commission has suggested that further funding would be required to adequately resource a specialised court or listing arrangements.

Attorney General's Department

Critically, there needs to be a designated program co-ordinator to ensure the delivery of key training, and communicate the goals of the court to its participants. Additional administrative support may also be required within the courts and the DPP to drive reform. There also needs to be scope to incorporate evaluation and research. The experiences in other jurisdictions demonstrate that mistakes will be made and not all things implemented will work. Evaluation offers the opportunity to identify issues of system failure and to redress and refine these in the specialised court model. In order to achieve this, there needs to be an appropriate database designed to allow for gathering of key information about the prosecution of such matters so that we can learn what does and does not work within the model. The importance of a body to drive reforms and oversee the implementation of change was seen to be particularly important by the DPP, Women's Legal Services, Associate Professor Stubbs and Detective Superintendent Kim McKay.

Women's Legal Services and Associate Professor Stubbs submitted that NSW Attorney General's Department must take a clear leadership role in a specialist court project. It was recommended that there be a special court implementation unit established within the Department and that each key service, such as the DPP and Legal Aid also have corresponding staff member to oversee the implementation of reforms.

⁷³⁸ See comments made by Deputy Chief Magistrate Syme at the Legislative Standing Committee on Law and Justice: *Report on Child Sexual Assault Prosecutions* (2002) at 202.

Detective Superintendent Kim McKay recommended the inclusion of an accountability mechanism for interagency and departmental specialised response to victims of sexual assault. This was also raised by Mr Cowdery QC AM who commented:

...it is also important to monitor new approaches as they are implemented and to assess their impact. For that reason it would be appropriate to establish a cross-agency monitoring body to assess and evaluate a dedicated and specialised court with alternate listing arrangements and the performance of all contributors to the project. This body should provide all the necessary accountability – and should be set up in such a way as to provide leadership for the project.

Victim advocates/lawyers

Within NSW there has been a call for victim advocates to be employed in the criminal justice process.⁷³⁹ Currently, the Witness Assistance Service (WAS), within the ODPP provides support for witnesses in court and refers victims to counselling and a wide range of other support services. It is understood that the call for victim advocates relates to legal representation for victims, as opposed to an advocate with a social welfare or a psychology background.⁷⁴⁰ Dr Cossins has written about this in the context of child sexual assault and questions whether the use of separate legal representation for victims as employed in some European civil jurisdictions could be adopted within NSW.⁷⁴¹ Justice Wood has also raised the merit of such an approach with respect to children⁷⁴², and both the DPP in Western Australia and the ACT have considered this option.⁷⁴³

One of the main reasons Dr Cossins proposes separate legal representation is to protect complainants during cross-examination. She suggests that this is not without precedent in the adversarial mode, and cites the use of separate legal representation in Ireland for victims of very serious sexual offences, where a defendant makes an application to adduce evidence or cross-examine a complainant about his or her sexual history.⁷⁴⁴ Criticisms have been made of this approach, including that it may result in coaching complainants; lead to conflicts between the prosecution and the complainant's lawyer, complicate the trial and alienate the jury. However, there is also a fundamental difficulty with reconciling the role of a separate legal representative more generally within the adversarial system. The Victorian Law Reform Commission has expressed concerns about such a role and formed the view that separate legal representation could confuse juries, undermine prosecution cases, cause longer trials, create unfairness for defendants and give rise to high costs of legal representation.⁷⁴⁵

Dr Cossins observes that the role of a child legal representative has been successfully employed within the Family Court, where a separate representative may be appointed to act in the best interests of the child.⁷⁴⁶ Whilst this may work within the context of the Family Court, it must be borne in mind that the role of the separate legal practitioner in this jurisdiction and the nature of the enquiry, that is: 'what is in the best interests of the child', neatly coincide. This is not the same in the criminal adversarial environment where the rights of the accused and prosecution need to be balanced and the nature of the enquiry is whether the accused is guilty or not guilty of the offence alleged, with the potential for penal sanctions, if guilt is proved.⁷⁴⁷ The Legal Aid Commission agrees that the role of the separate legal representative does not fit within the existing framework of criminal prosecutions.

Dr Cossins not only envisages scope for victim legal representative to object to unduly hostile cross-examination of the complainant, but also to provide information about the investigation and trial process; make submissions at bail hearings; inform police if bail conditions are not being complied with by the accused; put all relevant information before the court; and make submissions as to rulings on the admissibility of evidence of previous sexual experience, sexual assault communications privilege and sentence.⁷⁴⁸ Similar roles were also outlined in the VLRC Discussion Paper, including a right to cross-examine. Arguably, many of these functions are already carried out by either the DPP solicitors and/or WAS.

⁷³⁹ Ibid. Evidence given by Women's Legal Resource Centre.

⁷⁴⁰ Discussion at the NSW Adult Sexual Assault Interagency Committee August 2005.

⁷⁴¹ Cossins: "Is there a case for the legal representation of children in sexual assault trials" (2004) 16(2) Current Issues in Criminal Justice. Cossins states that there are 13 member states of the European Union where rape victims have some form of legal representation.

⁷⁴² Wood CJ at CL: "Sexual Assault and the Admission of Evidence" (2003) *Practice and Prevention: Contemporary Issues in Adult Sexual Assault* available at 9

⁷⁴³ See Keating: *Review of Services to Victims of Crime and Crown Witnesses Provided by the Office of Director of Public Prosecutions for Western Australia* (2001) at 24-25 and Office of the Director of Public Prosecutions (ACT) and Australian Federal Police: *Responding to sexual assault: the challenge of change* (2005) at 245-248 – no recommendation was made to adopt this course.

⁷⁴⁴ *Criminal Law (Rape) Act 1981 (Ire)* s 41A, inserted by the *Sex Offenders Act 2000 (Ire)*

⁷⁴⁵ Victorian Law Reform Commission: *Sexual Offences: Law and Procedure Discussion Paper* (2001) at para: 9.4 - 9.19.

⁷⁴⁶ The role of the child's legal representative is set out in the Guidelines for The Child's Representative and in *Re K* (1994) FLC 920461.

⁷⁴⁷ This point was also raised by Magistrate Quinn

⁷⁴⁸ Ibid at 18.

Whilst acknowledging that many complainants are initially confused by the fact that the DPP solicitor or Crown is not ‘their’ solicitor, but is representing the State, it is suggested that if this is conveyed properly and the role of the DPP understood, it can avoid unrealistic expectations on behalf of the complainant, who will then better understand his or her own role in the proceedings. In addition, there is now a positive duty on judges to disallow questions which are misleading, confusing, unduly annoying, harassing, intimidating, oppressive, humiliating or repetitive, or put in a manner or tone that is belittling, insulting or otherwise inappropriate, or has no basis other than a sexist, racial, cultural or ethnic stereotype.⁷⁴⁹

It is unclear what effect separate legal representation may have where a complainant is reluctant or hostile to the Crown, but is compelled to give evidence. This may happen where there is an allegation of sexual assault within a domestic relationship and the complainant resiles from her earlier statement, but is nonetheless compelled to give evidence due to the public interest in the matter proceeding. Secondly, it is also unclear who would be qualified to carry out this highly specialised criminal advocacy role; what the costs would be of employing a solicitor of this standard; and who would bear these costs.⁷⁵⁰ The Legal Aid Commission does not support separate legal representation for complainants. The Commission currently provides non-means tested legal representation for children in care and protection matters before the Children’s Court NSW and Family Court of Australia. The Commission advises that the introduction of separate legal representatives for children would require significant additional funding and in their view would effectively double the cost of sexual assault trials. They are also of the view that from a practical level, it would slow the process of the trial, with proceedings becoming slower and more cumbersome.

Whilst there may be some merit to utilising independent legal representation in matters arising under the sexual assault communications privilege, as this is a privilege that belongs to the complainant, the proposal, as it currently stands, appears to create more problems than it may solve. It does not appear from the written representations of Taskforce members that this proposal has much support.⁷⁵¹

Discussion

Specialised or specialist courts are not a magic panacea. One criticism of the models that exist elsewhere, is that there is a potential for special courts to emulate the same problems of existing courts, if training is incomplete or inadequate, common goals are not implemented in practice and responses are not adequately resourced. For example, lack of funding for the prosecution service, courts, technology and administrative support. “*It appears that a specialist court could have the potential to simply become ‘repackaging or relabelling’*.”⁷⁵² Such problems have clearly arisen in the context of the Child Sexual Assault Jurisdiction Pilot.⁷⁵³ In addition, if the goals and expectations of the specialised court are not explained to victims, they may feel as though their matter is not being treated seriously or they are receiving lesser justice.

A specialised approach also creates the potential for a high rate of burnout of professionals and subsequent high levels of staff turnover, leaving a lag in the provision of highly specialised service delivery and loss of human capital. To counter this, there is a need for an inbuilt system of debriefing and supervision for practitioners, as well as an inbuilt system of rotation, preferably in a staggered way, so that some residual expertise assists incoming rotational staff. Clearly, high level funding is required to achieve this. Consideration also needs to be given as to where to best direct resources and how to ensure a specialist approach continues from the Local Court stage to the District Court.

⁷⁴⁹ Section 275A *Criminal Procedure Act* 1986 – See also the Chapter on the Evidence of Children.

⁷⁵⁰ It is understood that where an order is made for a separate child legal representative in the Family Court, the Legal Aid Commission will fund this arrangement. Similarly, the Legal Aid Commission will provide for legal representation for children in Care Proceedings in the Children’s Court.

⁷⁵¹ The proposal for separate legal representative is not supported by the Public Defenders, Law Society, the DPP, Magistrate Quinn, and seen as an uncertain strategy by Associate Professor Stubbs. Detective Superintendent Kim McKay does not see this as necessary if the process and response to victims is improved by specialisation. In the absence of a well funded specialist court WLS would support separate legal representatives for victims.

⁷⁵² Stewart; “Specialist Domestic Violence/Family Violence Courts within the Australian Context” (2005) *Issues Paper 10*, Australian Domestic and Family Violence Clearinghouse

⁷⁵³ This report has not commented upon the Child Sexual Assault Jurisdiction Pilot. The Evaluation Report is available at:

[http://infolink/lawlink/bocsar/ll_bocsar.nsf/vwFiles/r57.pdf/\\$file/r57.pdf](http://infolink/lawlink/bocsar/ll_bocsar.nsf/vwFiles/r57.pdf/$file/r57.pdf) This report should be read in conjunction with the evaluation and in particular the issues of training, specialisation, clearly defined roles, expectations and co-ordination.

There is no clear blueprint for a specialised, specialist or dedicated court, however, it is submitted that the elements outlined above and raised by the Taskforce members are worth considering as part of a package of reforms. Funding and resources are clearly key issues for each agency. In order to support the approach outlined above increased funding and support of personnel in the key agencies is required.

Although Taskforce Members considered other reforms or models, none were considered more suitable to achieve the efficient administration of justice within NSW, reduce secondary victimisation and increase confidence in the system. A number of alternatives to the conventional system are outlined below. These were canvassed by the Taskforce but were not necessarily endorsed as options that should be pursued at this time, with the exception of the expansion of New Street for Young People and possible expansion of some rehabilitation programs for offenders who have pleaded guilty and accepted responsibility for their crimes.

Alternative approaches to prosecution and sentencing

1. A less adversarial approach to the prosecution process

Previously Dr Cossins was asked by the National Child Sexual Assault Reform Committee to investigate alternative methods for prosecuting child sexual offences. One of the approaches she examined was whether consideration should be given to establishing a court with a less adversarial approach so as to reduce secondary trauma to complainants.⁷⁵⁴ The less adversarial model she wrote about appears to have more in common with the inquisitorial or civil courts in Europe, where judges dictate proceedings and determine whether a person is guilty of the offence. Cossins appreciates that others may argue that a less adversarial approach would infringe an accused's right to a fair trial. However, she asks what does a fair trial mean? She suggests that it includes the following: the right for an accused to have adequate time and facilities to prepare; freedom from excessive questioning or inappropriate comment; free assistance of an interpreter if required; competent legal representation; for the trial to be conducted according to law; the right to procedural fairness; exclusion of admissible and relevant evidence where its probative value is outweighed by its prejudicial effect; and specific judicial warnings about the unreliability of certain evidence including accomplice evidence and prison informant evidence.⁷⁵⁵

In writing about these issues Dr Cossins suggests that these fundamental rights can be maintained within a system where decisions about evidence and the calling of witnesses are made by the trial judge in consultation with parties. In addition, changes could be made to the style of cross-examination, rather than the content of cross-examination. She is of the view that there is no constitutional impediment to the establishment of a specialist court based on a 'less adversarial model'.⁷⁵⁶ She states that the principles of a fair trial would not be undermined:

⁷⁵⁴ This view was also expressed in the Legislative Standing Committee on Law and Justice: Report on Child *Sexual Assault Prosecutions* (2002).

⁷⁵⁵ Cossins: "Prosecuting Child Sexual Assault Cases: To Specialise or not, that is the question" (2005) as yet unpublished, at 38

⁷⁵⁶ Whilst there is no constitutional right to a trial by jury for State offences, the Legal Aid Commission has stated that trial by jury is a fundamental of the criminal justice system Legislative Standing Committee on Law and Justice: Report on Child *Sexual Assault Prosecutions* (2002) at 203.

by conferring on a trial judge discretionary judicial powers that would enable him/her to exercise greater control over the trial process so that the focus of the trial becomes an inquiry into the guilt or innocence of the accused, rather than a battle between two adversarial parties.⁷⁵⁷

The real questions that arise are:

- what evidence is there that this approach would increase the rate of convictions; and
- what evidence is there that this approach would necessarily minimise the harm or re-victimisation of complainants, particularly adults?

Associate Professor Stubbs submitted that evidence from Europe does not provide confidence that a shift to a less adversarial approach will necessarily assist in the difficulties associated with child sexual assault.⁷⁵⁸ It appears that Dr Cossins does not personally advocate for a less adversarial approach either.

Further research is required to understand the benefits and disadvantages of such a system, as well as how it would work within the NSW context, before any recommendation can be made as to whether to adopt this course. However, it is important to note that the Legislative Standing Committee on Law and Justice considered the attractions of the inquisitorial process, but determined that the *'practical and philosophical difficulties in applying such a model to a single category of offence are insurmountable'*.⁷⁵⁹

2. Alternative approaches to sentencing and punishment

Within NSW and other jurisdictions there are a few alternative schemes that have been established to deal with sexual offenders. However, all of these schemes operate as an adjunct to the conventional criminal justice system and rely upon a plea of guilty or admission of guilt before they come into effect. Indeed, there has been no truly alternate scheme devised to determine whether there is sufficient evidence to make a finding of guilt or otherwise within the context of sexual assault. The current alternative approaches are set out below. The important question is whether any of these programs can be extended or adapted when considering the concept of a specialist sexual assault court.

Pre-trial diversion for child sexual assault: Cedar Cottage

There is currently an alternate sentencing regime for child sexual assault offenders who have pleaded guilty to a sexual offence with respect to their own child, step-child or their defacto partner's child. The program is quite small and can handle a maximum of 18 offenders. The program, known as Cedar Cottage, has been in operation since 1989 and is governed by the Pre-trial Diversion of Offenders Act 1985. The program is an intensive therapeutic non-residential program, however, strict conditions govern where the participants can live and participants must sign a "treatment agreement". The program is run from Westmead hospital. Offenders are required to attend individual, small group or large group therapy at least once a week for the duration of the program. Therapy can last 2 years, however, the court has the discretion to extend this period for 12 months if the Director of the program so requires.

The primary aims of the program are the protection of children, the prevention of re-offending, and the increase of responsible thinking and behaviour by offenders. The program also aims to address the harm caused to individuals and relationships, for example, child, mother, siblings and extended family. A wider aim of the program is to ensure community safety. Family reunification is not a goal of the Program, however, reunification at the end of the treatment program is not prohibited.⁷⁶⁰

In 2002, Mr Tolliday, the Program Director indicated that since 1998, of the 193 offenders referred to the program; 83 were assessed as suitable, with 40 offenders completing the program. Of the 40 who had completed the program, 2 participants had re-offended.⁷⁶¹ Current funding and resource arrangements mean that the current program is quite limited in the number of offenders it can deal with. The question is whether this program should be expanded to other Area Health Services and if the types of offences and or relationships should also be expanded to include grandparents, siblings or other persons who are otherwise in a position of familial trust and generally reside with the victim.⁷⁶²

⁷⁵⁷ Ibid.

⁷⁵⁸ Linda Regan and Liz Kelly (2003) *Rape: Still a forgotten issue: Briefing document for strengthening linkages – Consolidating the European Network Project*, London Metropolitan University,

⁷⁵⁹ Legislative Standing Committee on Law and Justice: *Report on Child Sexual Assault Prosecutions* (2002) at 212

⁷⁶⁰ Evidence of Mr Tolliday Program Co-ordinator; Legislative Standing Committee on Law and Justice: *Report on Child Sexual Assault Prosecutions* (2002) at 222

⁷⁶¹ Mr Tolliday gave evidence to the Legislative Standing Committee that there was to be an evaluation conducted of the program. This was to be funded by NSW Health. However, it is understood that this evaluation has not yet commenced, and is unlikely to commence before the end of the year.

⁷⁶² See also recommendations made by the DPP, Legislative Standing Committee on Law and Justice: *Report on Child Sexual Assault Prosecutions* (2002) at 225.

Diversion program for juveniles: New Street

There is also a juvenile diversion program in operation in NSW, known as New Street. The program was established by NSW Health and is an interagency initiative between NSW Health, NSW Police, Department of Education, Department of Community Services and the Department of Juvenile Justice. The program is designed to provide treatment to children aged between 10 and 17 years who have displayed sexually abusive behaviour. This is a non-residential program and it is essential that the parent or carer of the child also participates in the program. The Program is independent of the judicial process and only children who have not been charged with a criminal offence are eligible to be referred to the program. Children who are convicted of sexual assaults are primarily dealt with by the Department of Juvenile Justice, which has its own Sexual Offenders Program.⁷⁶³

The New Street program has not been able to accommodate all persons referred to it. From 1998 to 2002, there were 261 referrals to the service, however, 104 young persons were not able to gain a place in the program and were not able to find treatment elsewhere.⁷⁶⁴ In the financial year 2003 to 2004 a total of 70 young persons were referred to the program, however, only 18 progressed to assessment and only 7 progressed to the intensive program.⁷⁶⁵

Restorative Justice Approach

Restorative justice is seen as a way of providing the community with the opportunity to condemn the accused's offending behaviour and for the community and victim to receive an explanation or apology for the offence. Restorative justice is perceived as being highly controversial in the context of sexual assault, as it may be seen as a 'soft' option of dealing with a very serious and violent crime and places victims in an untenable position⁷⁶⁶. Allison Morris understands that some members of the community may see restorative justice approaches as trivialising violence against women and children, however, she takes the view that this does not need to be the case:

the criminal law remains a signifier and denouncer but it is my belief that the abuser's family and friends are by far the most potent agents to achieve this objective or denunciation.....restorative justice also has the potential to challenge community norms and values about men's violence against their partners.⁷⁶⁷

If a restorative justice approach was to be included within the criminal justice response, its role and purpose needs to be made very clear. For example, whether it is a diversionary mechanism or a sentencing option. Both

types of approaches currently exist. Restorative justice approaches or conferencing has been utilised for sexual offence matters in the Youth Court in South Australia and in a number of communities within New Zealand, however, the commencement of the scheme is again dependent upon an admission of guilt.⁷⁶⁸

In South Australia sexual abuse by young offenders may be referred to conferencing at the discretion of the prosecutor, rather than proceeding through the traditional mechanisms of the court.⁷⁶⁹ In 2003 Daly, Curtis-Fawley and Boutours examined sexual assault case files for matters dealt with by way of caution, family conference or Youth Court. They found that almost a third of cases were referred to conference and of those cases that were referred, approximately 40 percent of cases involved intra-familial victims. These cases generally involved less serious offences; or the young person had little criminal history. It is a requirement of the conference that the young person has made an admission of guilt. What constitutes a sexual offence can vary substantially, however, it was surprising that matters dealt with by way of conference covered a broad range of the spectrum from low-level indecent assaults to sexual intercourse offences with very young siblings.⁷⁷⁰ Associate Professor Stubbs reports that those who were referred to conferences were expected to do more than those convicted at court. Of those who were dealt with at court, none gave a verbal apology, whilst 77 percent of conference participants did so. Similarly, only 1 percent of court participants provided a written apology compared to 32 percent of conference participants. Of those dealt with at court 33 percent received sexual assault counselling; whereas this was higher for the conference group at 55 percent.

⁷⁶³ It is understood that this program is currently being evaluated with preliminary data being assessed.

⁷⁶⁴ Legislative Standing Committee on Law and Justice: *Report on Child Sexual Assault Prosecutions* (2002) at 231

⁷⁶⁵ New Street Adolescent Service 2002/2003 Annual Report at 11

⁷⁶⁶ Daly: "Sexual assault and restorative justice" in Heather Strang and John Braithwaite (eds.) *Restorative Justice and Family Violence* (2002) at 67; http://www.griffith.edu.au/school/cj/kdaly_docs/kdpaper11.pdf

⁷⁶⁷ Morris: "Children and Family Violence: Restorative Messages from New Zealand" in Heather Strang and John Braithwaite (eds.) *Restorative Justice and Family Violence* (2002), pp.89-107, Cambridge: Cambridge University Press at 104.

⁷⁶⁸ For more information on Youth justice care and protection family group conferences see Morris: "Children and Family Violence: Restorative Messages from New Zealand" in Heather Strang and John Braithwaite (eds.) *Restorative Justice and Family Violence* (2002), pp.89-107, Cambridge: Cambridge University Press

⁷⁶⁹ s 17(2) *Youth Offenders Act* 1993, South Australia

It was found that re-offending rates were similar for those who had been dealt with by way of conference, and those who had been dealt with by the court. However, in both groups those young people who had attended a specific adolescent sexual abuse program had lower re-offending rates. Of those who attended a sexual abuse program and conference 42 percent had re-offended, whilst of the court group 50 percent had re-offended. Of those who were not referred to a sexual abuse program, 61 percent of the conference group had re-offended and 65 percent of the court group had re-offended.⁷⁷¹

Restorative Justice conferences

Restorative Justice Conferences are currently co-ordinated through the Department of Corrective Services after an offender has been convicted and sentenced. A victim-offender family group conference is a meeting of the community of people affected by behaviour that has caused serious harm. The conference provides a forum in which offenders, victims and their respective supporters can seek ways to repair the damage caused by the incident and to minimise further harm. A conference gives offenders an opportunity to understand the impact of their behaviour on other people, on themselves and on the wider community.

A conference gives victims the opportunity to explain how they have been affected and contribute to negotiations about how best to repair the damage. All participants are given an opportunity to recount what happened at the time, and what has happened since. It is important that everyone present should have a clear understanding of the full impact of the behaviour. They then decide what needs to be done to repair the damage and minimise further harm. When an agreement has been reached, it is recorded in writing, and signed by key participants, who are then given a copy of the agreement.

Circle Sentencing and Aboriginal Communities

Conferencing and Circle Sentencing have been utilised in a number of different courts throughout Australia for offences other than sexual assault. A successful example of restorative justice in NSW has been the Circle Sentencing model adapted for the needs of Aboriginal people in NSW and first piloted in Nowra. The process of the sentencing scheme is outlined in Schedule 4 of the Criminal Procedure Regulations. Following a plea of guilty, the court makes a decision about a person's suitability for circle sentencing. Strictly indictable offences, and all sexual offences are excluded from circle sentencing. The circle sentencing may, but need not, involve the victim.

The objectives of the program are as follows: to include members of Aboriginal communities in the sentencing process; to increase the confidence of Aboriginal communities in the sentencing process, to reduce barriers between Aboriginal communities and the courts, to provide more appropriate sentencing options for Aboriginal offenders; to provide effective support to victims of offences by Aboriginal offenders; to provide for the greater participation of Aboriginal offenders and their victims in the sentencing process; to increase the awareness of Aboriginal offenders of the consequences of their offences on their victims and the Aboriginal communities to which they belong; and to reduce recidivism in Aboriginal communities.⁷⁷²

There is a real question as to whether circle sentencing or something similar to this should be extended to sexual assault prosecutions in Aboriginal communities and it remains a highly controversial area. It must also be borne in mind that within the current model of circle sentencing a victim may attend the sentencing process.

Discussion

The alternative approaches to sentencing outlined above have generally been grafted on to the conventional criminal justice system. A more liberal approach appears to have been adopted in South Australia with respect to sentencing juveniles, however, generally the principle of rehabilitation should be given more weight when sentencing young persons. It is unclear whether the same approach would be suitable to adopt for adult offenders and whether additional purposes of sentencing such as punishment; protection of the community; accountability; denunciation of the conduct and recognition of harm can be achieved through conferencing alone, or whether it would need to be considered as part of an overall sentence. Although these models provide a useful framework for sentencing, it is unclear how they could be adapted to fit within the prosecution process.

⁷⁷⁰ A number of useful case studies are set out by Daly her article: "Sexual assault and restorative justice" in Heather Strang and John Braithwaite (eds.) *Restorative Justice and Family Violence* (2002) at 67; http://www.griffith.edu.au/school/ccj/kdaly_docs/kdpaper11.pdf, at 81-83.

⁷⁷¹ Stubbs: "Restorative Justice, Domestic Violence and Family Violence", (2004) *Issues Paper 9*, Australian Domestic Family Violence Clearinghouse at 10.

⁷⁷² One of the findings of a review and evaluation of Circle Sentencing in NSW was that while overall participants were satisfied with the composition of the circle members, there is a need, based on responses from circle participants, to consider the gender make-up of circles, particularly where women are either the victim or the offender. This highlights the need not only to strive for equal gender representation but to ensure that participants are particularly sensitive to the feelings of victims and offenders, and that they have an adequate awareness of the dynamics of domestic violence. See: Rowena Lawrie, Brendan Thomas, Ivan Potas, Jane Smart, and Georgia Brignell, (2003) *Circle Sentencing in New South Wales: A Review and Evaluation*, at [http://www.lawlink.nsw.gov.au/ajac.nsf/51bf77d7793e43184a2565e800280584/5456562c82f0e90aca256d190012c3ed/\\$FILE/circle%20sentencing%20report.pdf](http://www.lawlink.nsw.gov.au/ajac.nsf/51bf77d7793e43184a2565e800280584/5456562c82f0e90aca256d190012c3ed/$FILE/circle%20sentencing%20report.pdf)

Restorative Justice was not seen by members of the Taskforce as an alternative method to be incorporated in a specialised approach to sexual assault offences.⁷⁷³ Associate Professor Stubbs advised that it was premature to consider this question as trials of restorative justice in the context of sexual assault mainly involve intra-familial cases involving siblings. Associate Professor Stubbs also advised that a restorative justice program is underway in Arizona for 'date rape' for university students where the offender accepts responsibility for the assault and is a first offender. A re-education and rehabilitation program of a number of years is imposed, however, the program is still in its infancy and no data is available on its success.

TASKFORCE RECOMMENDATIONS:

- 66 Sexual assault matters should be subject to a call-over and specialised case management hearings; and that courts, equipped with the appropriate technology, be set aside and available for hearing sexual assault matters. Case management should be supported by:
- court space, equipped with appropriate technology and specialised personnel, including court officers and interpreters;
 - access to CCTV rooms and the court via a separate entrance to accommodate and provide for victim safety;
 - a process of court listing and pro-active case management to ensure that cases are brought promptly without undue delays;
 - utilisation of pre-trial binding directions to ensure the commencement of the trial is not delayed.
 - court registry staff to co-ordinate and support listing arrangements and attempt to ensure parties have complied with court orders;
 - referral of victims to appropriate specialist services.
 - utilising a set of specially trained and highly skilled judges;
 - employing specially trained prosecutors who continue with the matter from bail to trial;
 - an ongoing training program for prosecutors, including support services to enable opportunities for debriefing to prevent burn-out;
 - the creation of case management system internal to the ODPP to ensure sexual assault cases are being prepared to a high standard, that conferences are held with complainants, and to keep abreast of the listing of all matters and to solve problems which are preventing the efficient disposition of matters;
 - the establishment of a data collection method (possibly through BOCSAR) to allow for an evaluation of the court's effectiveness and the assignment of a specific group to manage, monitor and evaluate the court;
 - the employment of a specific person or persons within the Attorney-General's Department to drive the reforms and co-ordinate implementation.
 - the creation of a cross-agency monitoring body to assess and evaluate a dedicated and specialised court with alternate listing arrangements and the performance of all contributors to the project. This body should provide all the necessary accountability, and should be set up in such a way as to provide leadership for the project.

⁷⁷³ Restorative Justice options were not supported by the DPP, Public Defenders Office, Women's Legal Services, Associate Professor Stubbs or Dr Cossins.

67 Further and tied funding should be made available to:

- courts and the Legal Aid Commission to allow for special listing practices in sexual offence matters;
- the ODPP to allow for special and alternative listing practices, continuity of prosecutors, early briefing of Crown Prosecutors, and training and debriefing of prosecutors in sexual offence matters.

68 There should be further funding for the Division of Analytical Laboratories (DAL) to assist with facilitating timely analysis of forensic material. DAL should be independent from the Department of Health and established as an independent body with separate funding and regulation.

69 Training programs should be developed regarding legislation specific to sexual assault cases, how to deal with vulnerable witnesses and the dynamics of sexual assault for all criminal justice personnel. The programs should be run through existing education bodies with responsibility for training. Such programs should be made available to:

- judges;
- prosecutors;
- police;
- court staff;
- defence representatives;
- social workers; and
- health workers.

Appendix 1

Statutory definitions of consent

Queensland Criminal Code

s. 348 Meaning of “consent”

- (1) In this chapter, “consent” means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.
- (2) Without limiting subsection (1), a person’s consent to an act is not freely and voluntarily given if it is obtained—
 - (a) by force; or
 - (b) by threat or intimidation; or
 - (c) by fear of bodily harm; or
 - (d) by exercise of authority; or
 - (e) by false and fraudulent representations about the nature or purpose of the act; or
 - (f) by a mistaken belief induced by the accused person that the accused person was the person’s sexual partner.

Western Australia Criminal Code

s. 319

- (2) For the purposes of this chapter
 - (a) “consent” means a consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means;
 - (b) where an act would be an offence if done

- without the consent of a person, a failure by that person to offer physical resistance does not of itself constitute consent to the act;
- (c) a child under the age of 13 years is incapable of consenting to an act which constitutes an offence against the child.

ACT Crimes Act 1900

s. 67 Consent

- (1) For sections 54, 55 (3) (b), 60 and 61 (3) (b) and without limiting the grounds on which it may be established that consent is negated, the consent of a person to sexual intercourse with another person, or to the committing of an act of indecency by or with another person, is negated if that consent is caused—
 - (a) by the infliction of violence or force on the person, or on a third person who is present or nearby; or
 - (b) by a threat to inflict violence or force on the person, or on a third person who is present or nearby; or
 - (c) by a threat to inflict violence or force on, or to use extortion against, the person or another person; or
 - (d) by a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person; or
 - (e) by the effect of intoxicating liquor, a drug or an anaesthetic; or

- (f) by a mistaken belief as to the identity of that other person; or
 - (g) by a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person; or
 - (h) by the abuse by the other person of his or her position of authority over, or professional or other trust in relation to, the person; or
 - (i) by the person's physical helplessness or mental incapacity to understand the nature of the act in relation to which the consent is given; or
 - (j) by the unlawful detention of the person.
- (2) A person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse.
- (3) If it is established that a person who knows the consent of another person to sexual intercourse or the committing of an act of indecency has been caused by any of the means set out in subsection (1) (a) to (j), the person shall be deemed to know that the other person does not consent to the sexual intercourse or the act of indecency, as the case may be.

United Kingdom Sexual Offences Act

s.74: "Consent" For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.

s. 75- Evidential presumption about consent

- (1) If in proceedings for an offence to which this section applies it is proved-
- (a) that the defendant did the relevant act,
 - (b) that any of the circumstances specified in subsection (2) existed, and
 - (c) that the defendant knew that those circumstances existed the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.
- (2) The circumstances are that-
- (a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;
 - (b) any person was, at the time of the relevant act or immediately before it began, causing the

complainant to fear that violence was being used, or that immediate violence would be used, against another person;

- (c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;
 - (d) the complainant was asleep or otherwise unconscious at the time of the relevant act;
 - (e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;
 - (f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.
- (3) In subsection (2)(a) and (b), the reference to the time immediately before the relevant act began is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began

s. 76 Conclusive presumptions about consent

- (1) If in proceedings for an offence to which this section applies it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection existed, it is to be conclusively presumed-
- (a) that the complainant did not consent to the relevant act, and
 - (b) that the defendant did not believe that the complainant consented to the relevant
- (2) The circumstances are that-
- (a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act.
 - (b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant

Canadian Criminal Code

s. 273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question

- (3) No consent is obtained, for the purposes of this section, if:
- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
 - (b) the complainant is incapable of consenting to the activity;
 - (c) the accused counsels or incites the complainant to engage in the activity by abusing a position of trust, power or authority;
 - (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
 - (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
- (4) Nothing in subsection (3) shall be construed as limiting the circumstances in which no consent is obtained.
- (5) It is not a defence to a charge under this section that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge if:
- (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.
- (6) If an accused alleges that he or she believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

Appendix 2

Criminal Responsibility – Sexual assault without consent

Queensland Criminal Code

s. 349 Rape

- (2) A person rapes another person if—
- (a) the person has carnal knowledge with or of the other person without the other person's consent; or
 - (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or
 - (c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent
- (4) For this section, a child under the age of 12 years is incapable of giving consent.

s. 23 Intention—motive

- (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—
- (a) an act or omission that occurs independently of the exercise of the person's will; or
 - (b) an event that occurs by accident.

(1A) However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality even though the offender does not intend or foresee or cannot reasonably foresee the

death or grievous bodily harm.

(2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

s. 24 Mistake of fact

(1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.

(2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

Western Australia Criminal Code

s. 325. Sexual penetration without consent

A person who sexually penetrates another person without the consent of that person is guilty of a crime and is liable to imprisonment for 14 years.

- s. 24. A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist. The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

United Kingdom Sexual Offences Act

s. 1 Rape

- (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.

(3) Sections 75 and 76 apply to an offence under this section.

(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

Canadian Criminal Code

s. 265.

- (1) A person commits an assault when:

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
- (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

- (a) the application of force to the complainant or to a person other than the complainant;
- (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.

(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

This must be read in conjunction with s 273.

Appendix 3

Presumption for counts to be heard together

Crimes Act 1958 (Victoria)

Section 372. Orders for amendment of presentment, separate trial etc.

(1) Where before trial or at any stage of a trial it appears to the court that the presentment is defective the court shall make such order for the amendment of the presentment as the court thinks necessary to meet the circumstances of the case unless having regard to the merits of the case the required amendments cannot be made without injustice.

(2) Where a presentment is so amended a note of the order for amendment shall be indorsed on the presentment and the presentment shall be treated for the purposes of the trial and for the purposes of all proceedings in connexion therewith as having been made in the amended form.

(3) Where before trial or at any stage of a trial the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same presentment or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in a presentment the court may order a separate trial of any count or counts of such presentment.

(3AA) Despite sub-section (3) and any rule of law to the contrary, if, in accordance with this Act, 2 or more counts charging sexual offences are joined in the same presentment, it is presumed that those counts are triable together.

(3AB) The presumption created by sub-section (3AA) is not rebutted merely because evidence on one count is inadmissible on another count.

(3AC) In sub-section (3AA) “sexual offence” means—
(a) an offence under Subdivision (8A), (8B), (8C), (8D) or (8E) of Division 1 of Part I or under any corresponding previous enactment or an attempt to commit any such offence or an assault with intent to commit any such offence; or (b) an offence to which clause 1 of Schedule 1 to the Sentencing Act 1991 applies.

(3A) Where a presentment contains a count of conspiracy to commit an offence and another count alleging the commission of that offence, the court shall, unless it is of the opinion that to try those counts together would be in the interests of justice, order that the count of conspiracy shall be tried separately from the other count, and the prosecution may elect which count shall be tried first.

(4) Where before trial or at any stage of a trial the court is of opinion that the postponement of the trial of a person accused is expedient as a consequence of the exercise of any power of the court under this Act to amend a presentment or to order a separate trial of a count, the court shall make such order as to the postponement of the trial as appears necessary.

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