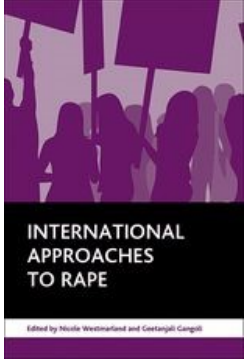

International approaches to rape

Nicole Westmarland (ed.), Geetanjali Gangoli (ed.)

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CHAPTER

Two Sexual assault law in Australia: contextual challenges and changes

Patricia Easteal

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Abstract

This chapter describes how, despite all of the campaigns and resources available for survivors in Australia, there does seem to be a resistance to changing attitudes about rape, which affects the criminal justice response. The gendered pay gap and public-private dichotomy perpetuate the devaluation of women and male dominance. It is within such a context that mythology flourishes about rape, male sexuality, and female sexuality.

Keywords: campaigns, resources, Australia, criminal justice response, pay gap, public-private dichotomy, male dominance campaigns, resources, Australia, criminal justice response, pay gap, public-private dichotomy, male dominance

Subject: Comparative and Historical Sociology

The national context in relation to rape

Australia has a strong feminist movement, which has advocated successfully over the past several decades for Commonwealth and state government funding, programmes and policy concerning prevention, victim support, community education and law changes in the area of rape. Since the mid-1980s, the Commonwealth government has had a policy unit – currently the Office for Women[1]. It is currently housed within the Department of Families, Housing, Community Services and Indigenous Affairs. Relevant rape prevention and community education policies normally originate and are implemented through this office and its state and territory counterparts.

In addition, generally packaged as part of Violence Against Women campaigns or strategies, there have been various task forces over the past 25 years spearheading national and local action plans. Most recently, the federal government's 11-member National Council to Reduce Violence Against Women and their Children began its work in 2008. One of the outcomes from this council was the government's Time for Action: The National Plan to Reduce Violence Against Women, launched in 2009. This plan included more money for prevention activities, perpetrator programmes and a national domestic violence and sexual assault telephone and online 24-hour-a-day, seven-day-aweek crisis service.

There have been some Commonwealth initiatives, though, that focus solely on rape. The Australian Centre for the Study of Sexual Assault (ACSSA) was set up a few years ago 'to improve access to current information on sexual assault in order to assist policymakers and others interested in this area to develop evidence-based strategies that respond to, and ultimately reduce, the incidence of sexual assault'[2].

p. 14 Each state or territory has the equivalent of the Office for Women; New South Wales (NSW), for instance (www.women.nsw.gov.au), has a Violence Prevention Coordination Unit and oversees state/territory initiatives for women. Each jurisdiction funds its own sexual assault victim services[3]. Further, within each state since 1976, a number of Reclaim the Night Marches are organised each October. This is just one of a number of community education, prevention and victim solidarity activities that take place in Australia.

Given all of these government and community programmes, one might imagine that in Australia there is a promising context for equitable rape laws and just trials for rapists in which victim witnesses would not be re-traumatised. However, as this chapter describes, despite all of the campaigns and resources available for survivors, there does seem to be a resistance to changing attitudes about rape, which affects the criminal justice response.

Australia remains a male-dominated society. Men have a relative lack of responsibility in relation to domestic work and childcare; they tend to identify with the breadwinner role and are more concerned with increasing their incomes and their upward mobility. This pay differential and differences in power between the sexes have a knock-on effect in terms of the gendered division of labour in the home and vertical and horizontal segmentation in paid employment (Easteal, 2010). As women leave paid work for months or years, this in turn perpetuates the salary differential between the sexes. The gendered pay gap and public–private dichotomy perpetuate the devaluation of women and male dominance '… like a steady torrent of patriarchal rain upon the values, roles and structures of the society that in turn impact on the law' (Easteal, 2001, p 12).

It is within such a context that mythology about rape, male sexuality and female sexuality flourish; a continuum emerges with 'authentic rape' or 'real rape' (stranger, injures, physical force, report immediately) at one end and 'not quite legitimate assault' (partner, non-physical coercion, delay in reporting, victim 'provocation') at the other end. Thus, in a survey examining community attitudes about violence against women, Taylor and Mouzos (2006) found that despite some positive changes over the previous decade, negative attitudes and stereotypes towards violence against women persist. In another study, 98 % of participants considered the victim's dress, behaviour, chastity, alcohol consumption and prior acquaintance with the perpetrator as relevant in determining the seriousness of any particular offence (Clark, 2007).

Accordingly, the evidence of victims of rape is assumed to be intrinsically unreliable, and it is a common
p. 15 (mis)perception that '… ↳ women are prone to fabricate allegations of sexual offences out of jealousy, spite, regret, or even "for no reason at all" and that such allegations are "very easy to fabricate but extremely difficult to refute"' (VLRC, 2001, p 155).

There is a gradation of credibility based on the attributes of the victim, with some victims seen as more unreliable than others. Those seen as extra incredible include victims who allege they were sexually assaulted as children (Taylor, 2004), partner rape victims (Easteal and Feerick, 2005; Lievore, 2005; Heenan and Murray, 2006), indigenous women (Department for Women, 1998; Easteal, 2001) and victims with a cognitive impairment (Jordan, 2004).

Judges, jurors and legal practitioners are influenced to varying degrees by these community attitudes (Neame and Heenan, 2003; Easteal and Gani, 2005; Taylor and Mouzos, 2006). For instance, in the context of partner rape, some judicial use of phrases like 'little short of rape' and 'special relationship' to describe a violent marriage significantly minimise the nature and effects of rape in an intimate relationship (Easteal, 1998). Such attitudes can translate into ambivalent implementation of rape legislation. For example, although the immunity of husbands from prosecution and a 'license to rape' have been abolished since 1981, partner rape has particularly low reporting, prosecution, and conviction rates (Lievore, 2003; 2005; Easteal and Feerick, 2005; Easteal and Gani, 2005; Heenan and Murray, 2006).

There are many more examples of the limited efficacy of decades of law reform, which was intended to redress injustices towards the victim/witness. Some of these are discussed in this chapter.

Prevalence

About one third (34 %) of Australian women report that they have experienced rape in their lifetime (Mouzos and Makkai, 2004). Nearly one in five women and 5.5 % of men have experienced sexual violence since the age of 15; 80% of women who have experienced rape know the perpetrator (ABS, 2006). A 2007 Australian study of rape and related offences confirmed this fact, and also found that most offences are perpetrated in residential settings (Borzycki, 2007).

Reporting

Only a small proportion of victims report being raped to the police, and where the perpetrator is a current or
p. 16 former partner, the rate of disclosure is even lower. Research suggests that between one in four ↳ (ABS, 2007) and one in six (VLRC, 2004) of those assaulted make a report to the police. Those who fall at the 'genuine rape' end of that covert but omnipresent rape typology are more likely to report; for instance in Queensland, only 5–10% go to the police when the rapist is a current partner compared with 35% of those assaulted by a stranger (Kift, 2003, p 294). Aboriginal (Atkinson, 2001) and non-English speaking (Easteal, 1999) women may also be particularly less likely to report.

Of the minority who do go to the police, some do not do so immediately. Delayed reporting can lead to the disappearance of evidence and, as described later in this chapter, can be used in trial to discredit the witness.

Most Australian jurisdictions do have specialist police units designed to investigate complaints and provide support for complainants. In the Australian Capital Territory (ACT), for example, the Sexual Assault and Child Abuse Team (SACAT) has medical examination rooms with a connecting bathroom, bedroom and interview room and the Adult Sexual Assault team is made up of eight specialist investigators who are required to complete the Sexual Offences Investigation Program conducted by the Australian Federal Police Training College. Officers are trained to treat complainants sensitively as well as being versed in the procedures designed to build a strong case for SACAT functions by referrals from varying agencies. However, they are not members of the initial response team and so those officers first at the call may not be trained in interviewing rape victims. In addition, as a result of confusion about guidelines, not all police officers refer rape complaints to the prosecution (Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, 2005).

Prosecution

Prosecutors review cases to determine if there are 'reasonable prospects of a conviction' in accordance with the Director of Public Prosecutions' prosecution policy. As cases reflecting the 'real' rape stereotype are most likely to result in a conviction, it is these cases that are most likely to proceed to trial at the prosecutor's discretion (Taylor, 2001a; Cripps and Taylor, 2009).

A lack of forensic evidence may be pivotal in the decision to discontinue. Criminal matters require a high standard of proof beyond reasonable doubt and in the absence of corroborating evidence such as forensics, there is little chance of conviction. A reluctance to prosecute results from a lack of such evidence and no
p. 17 physical injuries (Office ↳ of the Director of Public Prosecutions (ACT) and Australian Federal Police, 2005).

There is therefore significant attrition at this point: one study, looking at five jurisdictions, found that 38 % of the rape prosecutions overall were dropped; those more likely to proceed involved 'force *and* the victims actively expressed non-consent' (Lievore, 2005, p 5).

Conviction/acquittal

The conviction rate in rape trials is very low with even lower rates for those assaults not conceptualised as 'real' rape (as described earlier in the chapter) (Heath, 2005), which is further evidence of the attrition rate through the criminal justice system (see Fitzgerald, 2006 for NSW statistics). Acquittals occur more frequently than guilty findings and more often than in other serious offences (Taylor, 2007) – in about one quarter of sexual violence matters in higher and lower courts the defendants were acquitted (ABS, 2007). That proportion is misleadingly low:

> If the defendants who pleaded guilty in the ABS higher courts data are removed from the equation, this means that 58 percent of those who pleaded not guilty in the higher courts where a decision was finalised were acquitted in 2005–06, 57 percent in 2004–05 and 61 percent in 2003–04. (Taylor, 2007, p 2)

Low conviction rates no doubt are an indicator that most rape matters have little or no corroborating evidence with the offences occurring in the private domain. Factors such as the location of the assault, the level of physical injury sustained by the victim, admissions of guilt by the accused, the completion or absence of a medical examination and community attitudes towards sexual violence can influence jury decision making and sexual assault trial outcomes (Heenan, 1997). Offences that do culminate in conviction therefore 'reflect only a portion of offences committed' (Clark, 2007, p 20).

Sentencing

In those sexual offence matters decided in higher criminal courts across Australia, 69% of offenders received custodial sentences, 15% received fully suspended sentences and 15% received non-custodial
p. 18 orders (ABS, 2004, p 78). The mean aggregate sentence time for those charged with ↳ an aggravated sexual assault was 92.5 months (around seven-and-a-half years), with the expected time to serve being 59.9 months (around five years). The mean aggregate sentence time for all sexual assault and related offences was 59.2 months (just over four-and-a-half years), with the expected time to serve being 38 months (around three years) (ABS, 2004, p 82). These sentences are relatively low considering that the maximum sentence for rape in Victoria is 25 years' imprisonment (1958 Crimes Act, s 38) and that aggravated sexual assault in NSW carries a maximum penalty of 20 years' imprisonment, with a standard 'non-parole' period of ten years (1900 Crimes Act, s 61J).

In 2003, NSW amended s 21A of the 1999 Crimes (Sentencing Procedure) Act, intended as a restatement of common law sentencing principles (Debus, 2002). Judicial discretion is maintained though with no guidance about what impact actions such as violation of trust, prior consensual sex and negation of consent, the victim's wishes and the offender's problems should have on the eventual sentence. Increased awareness of aggravating factors (at least as expressed by judges in their sentencing remarks) arguably is *not* translating into increased sentences or even custodial sentences (Cripps and Taylor, 2009). In fact, looking at local, district and supreme courts, the most common sentence (52.6%) imposed on conviction of sexual assault not involving a child in NSW in 2004 was non-custodial (Fitzgerald, 2006). Thus, of the minority of sexual assaults that do result in a guilty plea or verdict, the sentencing process appears to be further tainted by rape mythology (Lievore, 2005).

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Legal framework: theory and practice

In Australia, the six states and two territories have enacted round after round of law reform over the past few decades; a few of the criminal law and evidence law changes are outlined in the section that follows.

The legal definition of rape has broadened with time to include oral, anal and vaginal penetration with any body part or with an object; the exact wording varies across jurisdictions. In fact, that sort of jurisdictional heterogeneity is one of the key issues in Australian rape law. Another is the huge gap between the black letter law of statutes (the theory) and how they are actually applied (the practice).

Consent

Consent is what distinguishes between consensual sex and sexual assault. It is therefore of paramount consideration in every sexual assault trial. The prosecution must prove two elements: the physical – that
p. 19 the ↳ woman did not consent (in relation to which a jury in Victoria should now be directed that the fact that a complainant did not say or do anything does not indicate consent); and the mental – that the accused was aware that the complainant was not consenting, or might not be consenting, did not care about consent or had no reasonable grounds to believe in consent, depending on the jurisdiction. Most defence lawyers rely on arguing that there was consent, as it is a dangerous strategy for defence to argue mistaken belief. Thus, the focus of the trial tends to be on the physical element of consent and judges' directions in consent may be verbose and very complex (Easteal and Feerick, 2005).

There is no longer the requirement in any Australian jurisdiction that there be physical resistance in order to demonstrate a lack of consent (Heath, 2005), with Victoria's provisions on the physical element of consent '... regarded as a best-practice approach' (Heath, 2005). However, it is debateable whether it has made prosecutions more effective.

With the 1991 Victoria reforms described by McSherry (1998), judges were required to direct the jury that 'the fact that a person did not say or do anything to indicate free agreement to a sexual act is *normally* enough to show that the act took place without that person's free agreement' (1958 Crimes Act (Vic) s 37(a)), and, under s 37(1)(b), if relevant to the specific facts of the matter, 'that a person is not to be regarded as having freely agreed to a sexual act just because she did not protest or physically resist or sustain physical injury' (these sections were substituted in 2007 by s 37AAA and 37AA as discussed later).

A study of the 1991 changes identified six trials out of 27 in which there was a failure to direct juries that 'saying and doing nothing' ought not to be construed as an indication of consent in circumstances where this direction may have been relevant (Heenan and McKelvie, 1998, p 298). More recent research found too that some judges were not advising jurors about the factors that could vitiate or negate consent and/or were adding commentary to their directions, which was sometimes not in synch with the aims of the sections (VLRC, 2004). An example would be a judge advocating blanket consent or implied consent by advising jurors that consent can be given at a time prior to the act.

The Victorian Law Reform Commission report (VLRC, 2004) not surprisingly recommended further amendments such as deleting the word 'normally' from s 37(1)(a). Accordingly, in 2007, the 1958 Crimes Act (VIC) was amended to further define consent. This round of changes resulted in additional jury directions
p. 20 under sections 37AAA and 37AA. Consequently, Victoria legislation does lead Australia on the ↳ physical element issue; however, it falls down in relation to having an objective mental element for rape. It has retained the Morgan (1976 AC 182) approach – requiring proof of a subjective fault element in all cases except where the accused has failed to turn their mind to the question of consent. Consistent with this, jurors are directed to take reasonableness into account to determine whether the accused was aware that the complainant was not consenting or might not have been consenting. NSW, on the other hand, has added an 'objective fault test'. If the prosecution proves there was no consent (physical element), all it has to prove under s 61HA(3)(c) of the 1900 Crimes Act is that the defendant had no reasonable grounds for a belief in consent.

In many of the other code states, rape is an offence of strict liability. All the prosecution has to prove is sexual intercourse without consent. It is then left to the defence to argue that the accused made an honest and reasonable mistake as to consent; reasonableness in this context would require that the accused had turned his mind to the issue, usually by taking steps to ascertain consent, and had some basis for his belief.

Corroboration and delay in reporting

Until about 30 years ago, judges in Australia had to warn juries not to convict on the uncorroborated evidence of complainants who were regarded as especially unreliable as a class of witness. Women (and children) testifying about sexual assault were, and still are, regarded by (some) judges as belonging to that category. One justification for judges needing to warn jurors about rape victims' credibility has been if there is delay in reporting.

A real mixed bag of laws across jurisdictions abolished any requirement to warn about the dangers of convicting an accused of a sexual offence on the uncorroborated testimony of the victim. Then two High Court cases diluted the effectiveness of these reforms. First, in *Longman v R* (1989) 168 CLR 79, the High Court unanimously reversed a conviction on the basis that the trial judge had failed to warn that it was unsafe to convict on the uncorroborated testimony of the complainant. A year earlier, legislation (1906 Evidence Act (WA) s 36BE(1), replaced by s 50 in 1988) had been enacted stating that the judge 'shall not give a warning unless *satisfied that such a warning is justified in all the circumstances*' [emphasis added]. Since Longman, judges generally give a 'Longman warning' in order to avoid appeals (Grey, 2007). Thus, Kathy Mack (1998, p 65) concludes that judges have continued to exercise their discretion to comment on the
p. 21 evidence because of 'social and judicial attitudes, which accept and endorse the ↳ myths which were used to justify the older practices of denigrating the credibility of those who testify about sexual assault'.

Second, the majority in the High Court case of *Crofts v R* (1996) 139 ALR 455 held too that the reforms were intended only to abolish the rules, which presumed that women *as a class of witness* were untrustworthy; that they were not intended to create a presumption of reliability for all women who allege rape. Trial judges in individual cases could continue to warn the jury that 'in fairness to the accused' complainants who do not report their sexual abuse at the first 'reasonable' opportunity lack credibility as witnesses, the effect of which is to impugn the credibility of alleged victims of rape (Bronitt, 1998). Indeed, this strategy of discrediting witnesses does continue to be used by defence lawyers despite some jurisdictions having mandatory directions that highlight to the jury that there may be 'good reasons' for delay in making a complaint of sexual assault; for instance in Western Australia under the 1906 Evidence Act, s 36BD.

Since 2006 with s 294(2)(c) of the 1986 Criminal Procedure Act, judges in NSW '(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'. Section 294(2)(c) states that judges must not warn the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a warning (Donnelly, 2009). 'Sufficient evidence', however, remains open to judicial interpretation.

Analysis of court proceedings in Victoria, showed that the impact of mandatory directions in s 61(1) of the 1958 Crimes Act could be neutralised too by general comments about the significance of prompt as opposed to delayed complaints (Heenan and McKelvie, 1997, pp 70–1). Note, too, that s 61(1)(b) was amended to delete the word 'necessarily' and includes that there may be good reasons why a victim of a sexual assault may delay or hesitate in making a complaint. However, in research of 24 cases taking place after that deletion, judges gave the former warning using the word 'necessarily' in 12 of 14 cases that involved a delay (VLRC, 2004, p 362).

Directions about delayed reporting can also be neutralised by contradicting each other:

> On the one hand, juries are told that there may be good reason for the delay and delay does not necessarily mean that the allegation is false. On the other hand, juries are also told ↳ that they can take the delay into account when determining whether to believe the complainant. The two directions together can be nonsensical. (Boniface, 2005, p 268)

p. 22

Sexual reputation and history

A 'rape shield' was placed on the admission of evidence relating to 'sexual reputation' in all jurisdictions except the Northern Territory [Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 4(1)] where the trial judge retains discretion to admit such evidence. Every jurisdiction in Australia limits the admissibility of evidence of sexual history or sexual experience, requiring court permission based on stated criteria.

However, this 'rape shield' has been pierced in various ways (Henning and Bronitt 1998: 93). For instance, traditionally in cross examination, the defence has not been limited to questioning the complainant on issues arising from evidence she provided in examination in chief. Instead, under the common law, the only principal limit on the evidence which the defence may adduce has been its relevance. This enabled extensive interrogation into many contentious issues including any previous consensual sex between the victim and the defendant, and between the victim and others. Such questioning is used to imply that there was actually consent or that, because there had been consensual sex in the past, the defendant had the mistaken belief that the woman was consenting.

Not unexpectedly then, evaluation in several Australian jurisdictions shows that such questions are still being admitted, often without reference to relevant legislation (Heath 2005: 13). This results in extensive opportunities for the defence to adduce sexual experience evidence, contrary to the aims of the legislation (Henning and Bronitt 1998: 76,84).

Protection against intrusive questioning has also been limited, since certain evidence about sexual history is admissible with the court's permission. In the ACT for example, the 1991 Evidence (Miscellaneous Provisions) Act allows evidence of sexual activities of the complainant deemed to have 'substantial relevance to the facts in issue' or 'be a proper matter for cross-examination about credit' (s 51, 53). 'Substantial relevance' can be interpreted through social myths about 'real' rape, female sexuality, male sexuality and intimate relationships.

A High Court case may act to further weaken the shield. In a 5–0 ruling, the court in *Bull v The Queen* (2000)
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Legal framework: theory and practice

In Australia, the six states and two territories have enacted round after round of law reform over the past few decades; a few of the criminal law and evidence law changes are outlined in the section that follows.

The legal definition of rape has broadened with time to include oral, anal and vaginal penetration with any body part or with an object; the exact wording varies across jurisdictions. In fact, that sort of jurisdictional heterogeneity is one of the key issues in Australian rape law. Another is the huge gap between the black letter law of statutes (the theory) and how they are actually applied (the practice).

Consent

Consent is what distinguishes between consensual sex and sexual assault. It is therefore of paramount consideration in every sexual assault trial. The prosecution must prove two elements: the physical – that
p. 19 the ↳ woman did not consent (in relation to which a jury in Victoria should now be directed that the fact that a complainant did not say or do anything does not indicate consent); and the mental – that the accused was aware that the complainant was not consenting, or might not be consenting, did not care about consent or had no reasonable grounds to believe in consent, depending on the jurisdiction. Most defence lawyers rely on arguing that there was consent, as it is a dangerous strategy for defence to argue mistaken belief. Thus, the focus of the trial tends to be on the physical element of consent and judges' directions in consent may be verbose and very complex (Easteal and Feerick, 2005).

There is no longer the requirement in any Australian jurisdiction that there be physical resistance in order to demonstrate a lack of consent (Heath, 2005), with Victoria's provisions on the physical element of consent '… regarded as a best-practice approach' (Heath, 2005). However, it is debateable whether it has made prosecutions more effective.

With the 1991 Victoria reforms described by McSherry (1998), judges were required to direct the jury that 'the fact that a person did not say or do anything to indicate free agreement to a sexual act is *normally* enough to show that the act took place without that person's free agreement' (1958 Crimes Act (Vic) s 37(a)), and, under s 37(1)(b), if relevant to the specific facts of the matter, 'that a person is not to be regarded as having freely agreed to a sexual act just because she did not protest or physically resist or sustain physical injury' (these sections were substituted in 2007 by s 37AAA and 37AA as discussed later).

A study of the 1991 changes identified six trials out of 27 in which there was a failure to direct juries that 'saying and doing nothing' ought not to be construed as an indication of consent in circumstances where this direction may have been relevant (Heenan and McKelvie, 1998, p 298). More recent research found too that some judges were not advising jurors about the factors that could vitiate or negate consent and/or were adding commentary to their directions, which was sometimes not in synch with the aims of the sections (VLRC, 2004). An example would be a judge advocating blanket consent or implied consent by advising jurors that consent can be given at a time prior to the act.

The Victorian Law Reform Commission report (VLRC, 2004) not surprisingly recommended further amendments such as deleting the word 'normally' from s 37(1)(a). Accordingly, in 2007, the 1958 Crimes Act (VIC) was amended to further define consent. This round of changes resulted in additional jury directions
p. 20 under sections 37AAA and 37AA. Consequently, Victoria legislation does lead Australia on the ↳ physical element issue; however, it falls down in relation to having an objective mental element for rape. It has retained the Morgan (1976 AC 182) approach – requiring proof of a subjective fault element in all cases except where the accused has failed to turn their mind to the question of consent. Consistent with this, jurors are directed to take reasonableness into account to determine whether the accused was aware that the complainant was not consenting or might not have been consenting. NSW, on the other hand, has added an 'objective fault test'. If the prosecution proves there was no consent (physical element), all it has to prove

under s 61HA(3)(c) of the 1900 Crimes Act is that the defendant had no reasonable grounds for a belief in consent.

In many of the other code states, rape is an offence of strict liability. All the prosecution has to prove is sexual intercourse without consent. It is then left to the defence to argue that the accused made an honest and reasonable mistake as to consent; reasonableness in this context would require that the accused had turned his mind to the issue, usually by taking steps to ascertain consent, and had some basis for his belief.

Corroboration and delay in reporting

Until about 30 years ago, judges in Australia had to warn juries not to convict on the uncorroborated evidence of complainants who were regarded as especially unreliable as a class of witness. Women (and children) testifying about sexual assault were, and still are, regarded by (some) judges as belonging to that category. One justification for judges needing to warn jurors about rape victims' credibility has been if there is delay in reporting.

A real mixed bag of laws across jurisdictions abolished any requirement to warn about the dangers of convicting an accused of a sexual offence on the uncorroborated testimony of the victim. Then two High Court cases diluted the effectiveness of these reforms. First, in *Longman v R* (1989) 168 CLR 79, the High Court unanimously reversed a conviction on the basis that the trial judge had failed to warn that it was unsafe to convict on the uncorroborated testimony of the complainant. A year earlier, legislation (1906 Evidence Act (WA) s 36BE(1), replaced by s 50 in 1988) had been enacted stating that the judge 'shall not give a warning unless *satisfied that such a warning is justified in all the circumstances*' [emphasis added]. Since Longman, judges generally give a 'Longman warning' in order to avoid appeals (Grey, 2007). Thus, Kathy Mack (1998, p 65) concludes that judges have continued to exercise their discretion to comment on the
p. 21 evidence because of 'social and judicial attitudes, which accept and endorse the ↳ myths which were used to justify the older practices of denigrating the credibility of those who testify about sexual assault'.

Second, the majority in the High Court case of *Crofts v R* (1996) 139 ALR 455 held too that the reforms were intended only to abolish the rules, which presumed that women *as a class of witness* were untrustworthy; that they were not intended to create a presumption of reliability for all women who allege rape. Trial judges in individual cases could continue to warn the jury that 'in fairness to the accused' complainants who do not report their sexual abuse at the first 'reasonable' opportunity lack credibility as witnesses, the effect of which is to impugn the credibility of alleged victims of rape (Bronitt, 1998). Indeed, this strategy of discrediting witnesses does continue to be used by defence lawyers despite some jurisdictions having mandatory directions that highlight to the jury that there may be 'good reasons' for delay in making a complaint of sexual assault; for instance in Western Australia under the 1906 Evidence Act, s 36BD.

Since 2006 with s 294(2)(c) of the 1986 Criminal Procedure Act, judges in NSW '(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'. Section 294(2)(c) states that judges must not warn the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a warning (Donnelly, 2009). 'Sufficient evidence', however, remains open to judicial interpretation.

Analysis of court proceedings in Victoria, showed that the impact of mandatory directions in s 61(1) of the 1958 Crimes Act could be neutralised too by general comments about the significance of prompt as opposed to delayed complaints (Heenan and McKelvie, 1997, pp 70–1). Note, too, that s 61(1)(b) was amended to delete the word 'necessarily' and includes that there may be good reasons why a victim of a sexual assault may delay or hesitate in making a complaint. However, in research of 24 cases taking place after that deletion, judges gave the former warning using the word 'necessarily' in 12 of 14 cases that involved a delay (VLRC, 2004, p 362).

Directions about delayed reporting can also be neutralised by contradicting each other:

> On the one hand, juries are told that there may be good reason for the delay and delay does not
> p. 22 necessarily mean that the allegation is false. On the other hand, juries are also told ↳ that they can take the delay into account when determining whether to believe the complainant. The two directions together can be nonsensical. (Boniface, 2005, p 268)

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Key issues

Policing problems

Poor police practice in rape cases can leave complainants feeling re-victimised. Most of the women interviewed by Easteal and McOrmond-Plummer (2006) who turned to the police did not feel wholly supported. Similarly, the VLRC report (2004) found through its focus group research with several Centres Against Sexual Assault and Victorian police members that there was still room to improve police attitudes and understanding about sexual assault.

Insensitivity may be evidenced by police minimising what has occurred through their choice of words in questions they ask. For example, in an interview with one woman whose ex-boyfriend was charged with ‘unlawfully confining a person’, ‘sexual intercourse without consent’ and ‘intentional threat to kill’, the officer asked, ‘How did he come to rape you?’. After she responded that he had forced her legs open, the officer asked, ‘How long did he lay on top of you in that position making love to you, fucking you, whatever words you want to use ... raping you?’ (Easteal and Feerick, 2005, p 190). Easteal and Feerick (2005) found that such treatment by the police could have an effect on victims' decision about whether to continue legal proceedings.

Another common complaint about police is their lack of relaying information and keeping the complainant informed of progress with the investigation. This includes the lack or inadequacy of explanations given for why charges are not laid (Easteal and McOrmond-Plummer, 2006; NSW Violence Against Women Specialist Unit, 2006).

Prosecution problems

As noted earlier, stereotypes and myths are also acted out in the prosecution process, specifically in decisions to discontinue. Moreover, if there are any differences between what the victim says to police in different interviews and/or at committal, the prosecutor may preempt the defence raising these discrepancies at trial by labelling the victim as unreliable and dropping the case. Indeed, prosecutors assess
p. 24 a complainant's credibility, paying attention to consistency and evaluating ↳ victims' conformity to 'typical' psychological and emotional reactions to rape (Office of the Director of Public Prosecutions (ACT) and Australian Federal Police).

The complainant may ask for the matter to be discontinued because the prosecution has dissuaded her (sometimes subtly and sometimes directly) that there is little hope of a guilty verdict or because her cross-examination at the committal hearing was prohibitively traumatic (Easteal and Feerick, 2005). Thus not surprisingly, there is some evidence that victims show more willingness to pursue prosecution in the presence of evidentiary factors that increase the prospects of conviction (Kerstetter, 1990) and that criminal justice officials sometimes manipulate victims' choices in line with their assessments of the prospects of conviction (Kerstetter and van Winkle, 1990).

Problems at trial

Those who use the criminal justice system continue to find it traumatising, humiliating and distressing (Taylor, 2004; VLRC, 2004). One of the key issues is that of time. In the Real Rape, Real Pain partner rape survivor sample, one woman waited 18 months for the trial; it was cancelled twice. She ended up feeling frustrated, weary and powerless (Easteal and McOrmond-Plummer, 2006).

A further problem is that the complainant does not have a lawyer or anyone advocating for her in the courtroom. Victim witnesses can become upset in court when facts that they consider to be relevant are not raised. For example, not all judges deem evidence of domestic violence as relevant in partner rape trials (see *R v An* (2000), for instance), and the victim can do nothing (Easteal and Feerick, 2005).

As mentioned earlier, the victim's credibility is often attacked through cross-examination and jury warnings (Lievore, 2003). Barristers may cross-examine certain types of victim (for example, incest survivors, victims of partner rape) in ways designed to destroy their credibility (Taylor, 2007). They may be asked questions to which they can only answer 'Yes' or 'No' but are impossible to answer in that way. The questions may be asked in a non-chronological way, the objective being to confuse and make the victim appear unreliable. Complainants are cross-examined about lying and making false reports and about their motives in reporting sexual assault. In the *Heroines of Fortitude* report (Department for Women (NSW), 1996, p 169), over half the victims (53.7%) were asked whether they had a motive for false reporting. A median of victims were asked five questions on this issue, while 84.3% were asked an average of seven questions
p. 25 focused on lying. The partner/ ↳ complainants in the Heenan (2004) study were likely to be asked about previous consensual sex.

Aside from cross-examination issues, as a consequence of law reform followed by pivotal case law such as Longman and Crofts, rape trials generally involve 'a multitude of directions' as enunciated by Wood CJ in the 2002 NSW case of *R v BWT* (2002) (Boniface, 2005, pp 263–4). These many directions may serve as the source of appeals; 55.5 % of conviction appeals were argued about alleged defects in a trial judge's warnings and directions in sexual assault trials (Boniface, 2005, p 263). As Justice McHugh pointed out in *KRM v The Queen* in 2001: '[T]he more directions and warnings juries are given the more likely it is that they will forget or misinterpret some directions or warnings'.

Indeed, a recent study found that the judge's summing-up of evidence was less helpful in sexual assault hearings than in other trials. Jurors in trials with adult/child sexual offences were 1.4 times more likely than jurors in trials dealing with non-sexual offences to report that this judicial discourse did not help them 'at all' in reaching a verdict or only helped 'a little bit' (Trimboli, 2008). In fact, 'a direction instructing jurors that a particular use of evidence is forbidden is likely to fail to the extent that it conflicts with the jury's common sense reasoning' (Boniface, 2005, p 267).

Problems with sentencing

As a consequence of issues canvassed in cross-examination, some judges are apt to take a negative view of the victim's supposed character or sexual history (Taylor, 2001a, 2001b). It is also possible that given myths about ‘real’ rape, the nature of the tie between victim and offender affects judicial weighting. Analysis of Victorian sexual assault cases (Kennedy et al, 2009) confirms previous studies suggesting that breach of trust is commonly viewed as an aggravating variable in sentencing offenders within parenting-type relationships but not when sentencing partner perpetrators (Warner, 1998; Heenan, 2004; Easteal and Gani, 2005; Krahé et al, 2006; Stewart and Frieberg, 2008). Sentences in those cases remained lower though than where the offender was unknown to the victim and where the rape included physical violence. Mitigating variables, although similar for all categories of defendants, may be given more weight where the defendant is related to the victim (Warner, 2005), which neutralises the consideration of breach of trust (Kennedy et al, 2009), and where the perpetrator and victim are indigenous (Taylor et al, 2009).

p. 26 Other normative variables form part of judicial heuristics. Easteal and Gani (2005) identify some partner rape cases with histories of domestic violence in which judges looked at offenders' emotional upset at a relationship break-up as a mitigating variable at sentencing. Warner (1998) also discusses other cases of sexual assault by a partner where the offender's emotional state was raised in mitigation. Further, some sentencing judges and appellate courts recognise abusive contexts in which pleas for leniency for a partner defendant by a victim need to be understood. Ironically, given that understanding, other judges seem to be particularly concerned about imprisonment jeopardising the family unit, despite antecedents of violence. Taylor's (2004) work revealed that some judges reject victim impact statements (in part or in whole) and question victim claims of harm, even when such claims are supported by therapeutic evidence.

Analysis of sexual offence cases involving indigenous children demonstrates how cultural stereotypes might influence legal reasoning and decision making too (Cripps and Taylor, 2009; Taylor et al, 2009). A Queensland case involving a 10-year-old Aboriginal child is an apposite example of a judge holding the victim culpable for her own rape (a mitigating factor in lessening the offence's seriousness). Similarly, in a Northern Territory trial, the judge declared that the indigenous child in question knew what was ‘expected’ of her, in terms of submission to an older man under contentious claims of traditional marriage.

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The case for more legislative, policy and cultural change

Australian rape laws are based on an ‘open-plan’ model. This indeterminacy needs to be removed as much as possible to limit judges and jurors from interpreting ‘grey’ areas through the filtering of false mythology. Accordingly, the VLRC (2004) proposed that judicial instructions be clear and concise, always address delay in prosecution appropriately and eliminate the harshest forms of the warning that state that it may be unsafe or dangerous to convict on uncorroborated evidence. These legal and practice changes would be more directive and allow for less judicial discretion. Further, there is a need in Australia for more consistency between jurisdictions.

The 2009 addition of Section 41 to the Evidence Act (Cth) (NSW) (ACT) (VIC) reduces judicial discretion through legislation, classifying sexual offence witnesses as vulnerable and mandating judges to intervene. Prior to the 2009 addition, courts merely had the discretion to disallow improper questions and the exercise
p. 27 of that discretion ↳ was found to be ‘patchy and inconsistent’ and ‘seldom invoked by judges’ (ALRC, 2005, 5.96–5.106). How mandatory is mandatory though? Under s 41, unless the judge or prosecutor perceives the question to be improper, the issue of mandated intervention is moot. Despite the legislation providing guidance as to the definition of an improper question – for example, forbidding questions that are ‘unduly humiliating’, ‘put in a manner or tone that is belittling, insulting’ or based on ‘stereotype’ alone (s 41(1)(b)(c) and (d)) – it is the perception of the judge, prosecutor and to a lesser extent the defence lawyer that will be determinative. Their perceptions are informed by a long history of training in adversarial trial dispute resolution and may remain steeped in rape mythology. In other words, their perceptions will often not be the same as those of the complainant who is facing cross-examination.

Even if law reform as described did tighten the loopholes effectively, which is debatable, it is not enough. Culture change has been identified as a necessary accompaniment to any legislative reform (VLRC, 2004). As Kift (2003, p 293) concludes:

> Research ... has shown that reform of substantive and procedural law has not necessarily translated into real change for victims and, in many instances, has been subverted by a legal culture that tends to discredit and disbelieve women and children who allege sexual abuse.

There are a number of ways in which this necessary change in culture can be effectuated, including as an offshoot of law reform. For instance, NSW s 275A, the forerunner to s 41, aimed to set a 'new standard for the cross-examination of witnesses in criminal proceedings' thus focusing on the courtroom conduct and culture of barristers and leading to culture change.

Indeed, court processes need to better meet the victims' need for protection from being re-traumatised. This can be legislated as illustrated by the following examples. Note the jurisdictional variation though, which means that if a person is a victim of sexual assault there are some states or territories where their witnessing experience may be relatively easier than in others.

The 2008 Sexual and Violent Offences Legislation Amendment Act (which commenced on 1 June 2009) in Australia's capital aims to achieve this goal in a number of ways. It was 'designed to extract the 'best' evidence possible from witnesses who may otherwise suffer a disadvantage' (Revised Explanatory Statement, 2008).

p. 28 The Act amended the committal hearing process by allowing a transcript or written statement of an audio or visual recording between police and a witness to be admissible as evidence for a sexual assault victim. It introduced a pre-trial hearing for children and intellectually impaired victims, as well as other sexual assault victims who are likely to 'suffer severe emotional trauma; or be intimidated or distressed'. This latter grey area – that is, deeming some complainants to be particularly vulnerable – may prove to be yet more fertile ground in which myths can flourish.

The Act also includes restrictions on the victim's view of the accused if giving evidence in the courtroom or when giving evidence via closed circuit television (CCTV). Screens or other arrangements are to be made available. Other jurisdictions, such as South Australia (1929 Evidence Act, s 13A) also offer special arrangements for taking evidence including CCTV or a screen, as does Victoria (1958 Evidence Act, s 37B, 37CAA) and the Northern Territory if deemed 'a vulnerable witness' (Evidence Act, s 21A).

In some jurisdictions such as the ACT, South Australia, Victoria, and Queensland, a self-represented accused is no longer permitted to personally cross-examine a witness in a sexual or violent offence proceeding if that witness is a complainant, a similar act witness, a child witness for the prosecution, or a witness for the prosecution who has a mental or physical disability that affects their ability to give evidence. In Western Australia (1906 Evidence Act, s 25A(1)(a)), the self-represented accused can cross-examine, but the judge can order this to be done with the accused in one room and the complainant in another.

Under the new legislation in the ACT, sexual assault complainants are entitled to have a person of their choice with them for emotional support while giving evidence. The 2001 Evidence (Children and Special Witnesses) Act (Tasmania) (s 4.4 (1)) enables children to have a support person when giving evidence. The Northern Territory Evidence Act names children as vulnerable (s 21D) but no support person is mentioned; however, in relation to other categories of vulnerable witnesses (s 21B – sexual abuse or serious violent offences) under s 21A(2)(c), a friend or relative can provide support to the vulnerable witness. This is also the case in South Australia if the witness is considered to be vulnerable.

Towards a better understanding of rape

In addition to tightening laws and amending courtroom process, judges and jurors do need to be better
p. 29 equipped to understand the reality ↳ of rape. This can be achieved in a number of ways, such as further training of court personnel. Targeted training may work the best. One way of such targeting could be via specialist court lists. The Criminal Justice Sexual Offences Taskforce (2006) reviewed the requirements of a specialist court for NSW and concluded that a case management system should be implemented that involved specialist judges and prosecutors. The Victoria Law Reform Commission (VLRC, 2004) similarly recommends a specialist list. Perhaps, with appropriate education, provisions like s 41 could make a difference, as this does give judges who wish to use it a mandate to control proceedings more closely, particularly in a specialist jurisdiction.

Aside from training for specialist judges, cultural attitudes need to be changed to minimise the chance of selecting jurors who adhere to false myths. A fairly recent study (VicHealth, 2006) found that 40% of Australians sampled believed rape resulted from men's inability to control their need for sex, while some continue 'to believe men are uncontrollable sexual beasts and women are liars and temptresses'. Smaller proportions in 2006 believed that 'women who are raped often ask for it' (6% compared with 15% in 1995) but 15% still believe 'women often say no to sex when they mean yes', about the same proportion as in 1995. So although there has been some improvement – no doubt due in part to government community education programmes – there remains a need for more outreach and education programming. This has been dramatically illustrated by the frequency of public iteration of myths concerning 2009 revelations about high-profile rugby players and non-consensual group sex.

In April 2009, the then Australian Prime Minister announced funding for another public information campaign targeted at men and boys to highlight the attitudes and behaviours that play a role in violence against women, stating that '... our national resolve must be zero tolerance. Zero tolerance when it comes to violence against women and violence against children' (Rudd, 2009).

The commitment is there. However, it is vital that any education campaign or further legal reform is underpinned with the victims' reality and not with a silencing of their voices or with misperception about certain issues, which only perpetuates rape mythology.

The case for more legislative, policy and cultural change

Australian rape laws are based on an 'open-plan' model. This indeterminacy needs to be removed as much as possible to limit judges and jurors from interpreting 'grey' areas through the filtering of false mythology. Accordingly, the VLRC (2004) proposed that judicial instructions be clear and concise, always address delay in prosecution appropriately and eliminate the harshest forms of the warning that state that it may be unsafe or dangerous to convict on uncorroborated evidence. These legal and practice changes would be more directive and allow for less judicial discretion. Further, there is a need in Australia for more consistency between jurisdictions.

The 2009 addition of Section 41 to the Evidence Act (Cth) (NSW) (ACT) (VIC) reduces judicial discretion through legislation, classifying sexual offence witnesses as vulnerable and mandating judges to intervene. Prior to the 2009 addition, courts merely had the discretion to disallow improper questions and the exercise
p. 27 of that discretion ↳ was found to be 'patchy and inconsistent' and 'seldom invoked by judges' (ALRC, 2005, 5.96–5.106). How mandatory is mandatory though? Under s 41, unless the judge or prosecutor perceives the question to be improper, the issue of mandated intervention is moot. Despite the legislation providing guidance as to the definition of an improper question – for example, forbidding questions that are 'unduly humiliating', 'put in a manner or tone that is belittling, insulting' or based on 'stereotype' alone (s 41(1)(b)(c) and (d)) – it is the perception of the judge, prosecutor and to a lesser extent the defence lawyer that will be determinative. Their perceptions are informed by a long history of training in adversarial trial dispute resolution and may remain steeped in rape mythology. In other words, their perceptions will often not be the same as those of the complainant who is facing cross-examination.

Even if law reform as described did tighten the loopholes effectively, which is debatable, it is not enough. Culture change has been identified as a necessary accompaniment to any legislative reform (VLRC, 2004). As Kift (2003, p 293) concludes:

> Research ... has shown that reform of substantive and procedural law has not necessarily translated into real change for victims and, in many instances, has been subverted by a legal culture that tends to discredit and disbelieve women and children who allege sexual abuse.

There are a number of ways in which this necessary change in culture can be effectuated, including as an offshoot of law reform. For instance, NSW s 275A, the forerunner to s 41, aimed to set a 'new standard for the cross-examination of witnesses in criminal proceedings' thus focusing on the courtroom conduct and culture of barristers and leading to culture change.

Indeed, court processes need to better meet the victims' need for protection from being re-traumatised. This can be legislated as illustrated by the following examples. Note the jurisdictional variation though,

which means that if a person is a victim of sexual assault there are some states or territories where their witnessing experience may be relatively easier than in others.

The 2008 Sexual and Violent Offences Legislation Amendment Act (which commenced on 1 June 2009) in Australia's capital aims to achieve this goal in a number of ways. It was 'designed to extract the 'best' evidence possible from witnesses who may otherwise suffer a disadvantage' (Revised Explanatory Statement, 2008).

p. 28 The Act amended the committal hearing process by allowing a transcript or written statement of an audio or visual recording between police and a witness to be admissible as evidence for a sexual assault victim. It introduced a pre-trial hearing for children and intellectually impaired victims, as well as other sexual assault victims who are likely to 'suffer severe emotional trauma; or be intimidated or distressed'. This latter grey area – that is, deeming some complainants to be particularly vulnerable – may prove to be yet more fertile ground in which myths can flourish.

The Act also includes restrictions on the victim's view of the accused if giving evidence in the courtroom or when giving evidence via closed circuit television (CCTV). Screens or other arrangements are to be made available. Other jurisdictions, such as South Australia (1929 Evidence Act, s 13A) also offer special arrangements for taking evidence including CCTV or a screen, as does Victoria (1958 Evidence Act, s 37B, 37CAA) and the Northern Territory if deemed 'a vulnerable witness' (Evidence Act, s 21A).

In some jurisdictions such as the ACT, South Australia, Victoria, and Queensland, a self-represented accused is no longer permitted to personally cross-examine a witness in a sexual or violent offence proceeding if that witness is a complainant, a similar act witness, a child witness for the prosecution, or a witness for the prosecution who has a mental or physical disability that affects their ability to give evidence. In Western Australia (1906 Evidence Act, s 25A(1)(a)), the self-represented accused can cross-examine, but the judge can order this to be done with the accused in one room and the complainant in another.

Under the new legislation in the ACT, sexual assault complainants are entitled to have a person of their choice with them for emotional support while giving evidence. The 2001 Evidence (Children and Special Witnesses) Act (Tasmania) (s 4.4 (1)) enables children to have a support person when giving evidence. The Northern Territory Evidence Act names children as vulnerable (s 21D) but no support person is mentioned; however, in relation to other categories of vulnerable witnesses (s 21B – sexual abuse or serious violent offences) under s 21A(2)(c), a friend or relative can provide support to the vulnerable witness. This is also the case in South Australia if the witness is considered to be vulnerable.

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