Issues
NO 4 JUNE 2005
AUSTRALIAN CENTRE FOR THE STUDY OF SEXUAL ASSAULT

The law and sexual offences against adults in Australia

MARY HEATH

This paper outlines those laws of evidence that have had significant impacts upon procedures in sexual offence trials and on victim-complainants' experiences in court. It provides an accessible introduction to the current status of the laws governing penetrative sexual offences in each Australian state and territory jurisdiction to allow sexual assault workers, counsellors and victim-complainants to understand more readily the relevant criminal law in their particular state.

Sexual assault impacts on the lives of many Australians. However, the vast majority of people who are sexually assaulted avoid engagement with the criminal justice system, perceiving it as inappropriate to their needs or fearing the additional trauma of the legal process (Cook et al. 2001; Lievore 2003). According to the Victorian Law Reform Commission, rape has the lowest reporting rate of any crime (VLRC 2004). At least 85 per cent of sexual assaults never reach the criminal justice system at all (Stubbs 2004).

"Current deficiencies in the system contribute to substantial under-reporting of sexual offences and discourage people who allege they have been assaulted from giving evidence" (VLRC 2004: 81).

The relationship between reporting and convictions has become a self-perpetuating cycle, one that maintains both at unacceptably low levels. Of the cases that do enter the criminal justice system, very few reach trial, which means that a tiny fraction of all reported sexual offences result in convictions (Lievore 2003). On the other hand, low conviction rates, traumatic experiences in court, and high rates of withdrawal from criminal justice processes contribute to low rates of guilty pleas and low reporting (VLRC 2004). Part of the task for those engaged in trying to change this picture is to break the cycle.

The criminal justice system should be accessible to everyone who is subjected to a serious crime. People who are sexually assaulted deserve to be treated with dignity and respect, no less than victims of other crimes. Their contribution to the public interest in reporting crime and ensuring that it is prosecuted should be recognised. Instead, "current deficiencies in the system contribute to substantial under-reporting of sexual offences and discourage people who allege they have been assaulted from giving evidence" (VLRC 2004: 81).

Australian Government
Australian Institute of Family Studies
Australian Centre for the Study of Sexual Assault

The Australian Centre for the Study of Sexual Assault aims to improve access to current information on sexual assault in order to assist policy makers, service providers, and others interested in this area to develop evidence-based strategies to prevent, respond to, and ultimately reduce the incidence of sexual assault.

The Australian Centre for the Study of Sexual Assault is funded by the Office for Women, Australian Government Department of Family and Community Services, through the Women's Safety Agenda. The Centre is hosted by the Australian Institute of Family Studies.

Contents

The author

Dr Mary Heath lectures in law at Flinders University in South Australia. She is also the Chair of the Management Committee of Yarrow Place Rape and Sexual Assault Service, and a member of "Stop Rape Now" who are currently lobbying for law reform.

Acknowledgements

The author is grateful to Margaret Foreman, Angela Egan and Kate Battersby for their research and proofreading expertise. She is also grateful to Professor Bernadette McSherry, Associate Dean (Research) of the Faculty of Law, Monash University, for her thorough review of this paper; her comments were extremely constructive in helping to polish the finer details.

ACSSA Coordinator: Melanie Heenan

Australian Institute of Family Studies
300 Queen Street, Melbourne 3000 Australia
Phone: (03) 9214 7888 Fax: (03) 9214 7839

Internet: www.aifs.gov.au/acssa

ISBN 0 642 39530 6

Designed by Double Jay Graphic Design
Printed by Impact Printing

Aims and structure of the paper

This issues paper aims to provide a plain-language account of the current status of the law relating to key penetrative sexual offences against adults in Australia. It also aims to outline some parts of the law of evidence that have significant impacts upon procedures in sexual offence trials and on the experiences in court of victim-complainants. It seeks to provide an accessible introduction to the current status of the laws governing sexual offences to allow sexual assault workers, counsellors and victim-complainants to understand more readily the relevant criminal law. In doing so, the paper aims to supplement existing guides which provide support and information about going to court as a complainant witness in a sexual offence trial (Cumberland, Heenan and Gwynne 1998; Taylor 2005).

This paper begins with some brief historical context about Australian laws against sexual offences and information about reporting and conviction rates. Although the overall focus is on the current state of the law, it would be misleading to suggest that the criminal law currently addresses sexual violence in a completely effective way. The vast majority of sexual offences never reach the legal system because they are never reported to the police. The majority of sexual offences that are reported to the police do not reach court.

As a result of these well-documented limits on the effectiveness of the criminal justice response to sexual offending, some anti-rape activists are considering whether alternatives to the criminal justice system offer better models for responding to sexual violence. The paper briefly summarises some of the key arguments for and against alternative approaches.

It then moves on to offer a description of the law about the admissibility of evidence about the victim-complainant's past sexual experiences, the admissibility of sexual assault counselling information (such as counselling files and counsellors' notes), and corroboration in sexual offence trials.

Having described the applicable law in each of these areas, the paper presents a summary of key evaluations that were designed to assess how the

law works in practice. It then describes the laws of each state and territory dealing with major sexual offences involving sexual penetration of an adult; provides contextual information about the relationship of these offences to the law dealing with intrafamilial sexual assault (incest); and summarises the findings of key evaluations of each area of the law, where they have been undertaken.

Historical context

The law of sexual offences applied in Australian courts today has its foundations in the English common law tradition. However, in the last 30 years, there have been major changes to the law concerning sexual offences in every state and territory. Every jurisdiction has created distinct legislation on sexual offences. As a result, Australia offers significant opportunities to consider which laws work most effectively and why. Most Australian jurisdictions have also undertaken evaluation of this legislation (discussed in more detail in the body of this paper). Evaluation is critical because the evidence so far suggests that, while major improvements have taken place, more work is needed (Heenan and McKelvie 1997; Stubbs 2003; VLRC 2004).

The law relating to adult sexual offences has moved a long way from its history in a legal tradition that saw women as the property of their husbands or fathers, and treated rape as a violation of male property rights. The modern law of rape focuses much more strongly on sexual autonomy. However, the past exercises an intense pull on the law in a range of ways. Judge-made law draws on the decisions of judges in order to decide the legal principles of today. The historical shape of the law of rape limits the imaginations of those who lobby for, enact, enforce and interpret laws. Individuals who work within the police, the legal profession and the courts are part of the same culture that produces victim-complainants, perpetrators and juries. Myths about sexual assault remain prevalent within Australian culture (Easteal 1993; Friedman and Golding 1997; Xenos and Smith 2001).

Every jurisdiction has created distinct legislation on sexual offences. As a result, Australia offers significant opportunities to consider which laws work most effectively and why.

Sexual assault is a complex problem that cannot be addressed solely by legislative change. However, the importance of the criminal justice system and its significant symbolic role should not prevent a clear recognition that the vast majority of sexual assaults are not addressed by the criminal justice system (Stubbs 2004: 2891).

Reporting and conviction rates

Australian research suggests that one in five Australian women and one in twenty Australian men over the age of 18 have been "forced or frightened into unwanted sexual activity" across their lifetimes, many of them having experienced coercion when aged under 16 years (de Visser, Smith, Rissel, Richters and Grulich 2003: 200).[1] However, very few of these experiences reach the criminal justice system. National and international research suggests that 15 per cent or less of these offences are reported to the police (McLennan 1996; Cook, David and Grant 2001; de Visser et al. 2003; Lievore 2003).

A high proportion of sexual assaults against women are perpetrated by male intimate partners (Heenan 2004a; VLRC 2003). Indeed research undertaken on behalf of the Victorian Health Promotion Foundation (2004) has found that domestic

violence is among the top five risk factors for ill health and premature death among Australian women (see also Access Economics on behalf of the Office of the Status of Women 2004). However, women are more likely to report sexual assaults by strangers than by people they know, in particular, current sexual partners (Cook et al. 2001).

Many women who are sexually assaulted by their partners view the assault as a private issue and see police involvement as inappropriate (Lievore 2003). The criminal justice system responds least effectively to sexual offences committed against women by their male partners (Radford and Stanko 1996; Cook 1999; Heenan 2004a). Recent Victorian research shows that while specialist police dealing with sexual assaults are less likely to accept myths about rape, a substantial proportion of non-specialist police officers believe that a high proportion of rape allegations are false, and that victim-complainants often withdraw complaints of rape against intimate partners because they are false (VLRC 2004).

Some writers have suggested that the reasons people give for not reporting sexual assaults are based in societal myths about sexual assault, but these same myths also seem to be at work within the criminal justice system itself (Doyle and Barbato 1999; Cook et al. 2001; Stubbs 2004). Although feminists have spent decades debunking the myth of the "real rape" as one involving a violent attack by a stranger and the myth of the lying, vindictive sexual offence complainant, the ongoing influence of these inaccurate stereotypes is reflected both in decisions about whether to report sexual offences and in statistics relating to court outcomes (Stubbs 2004).

In the wake of rape law reforms, while police responsiveness and sensitivity is widely believed to have improved, charge and conviction rates in some English-speaking jurisdictions have actually decreased over the last ten to twenty years.

While few sexual assaults involve weapons or physical injuries in addition to sexual penetration itself, assaults involving additional physical injuries or weapons are more likely to be reported; they are also more likely to result in convictions (Cook et al. 2001). Indeed, the use of physical force has been found to improve substantially the chance of conviction (Edwards and Heenan 1994; Brereton 1994; Naffine 1994; Brereton 1997b; Heenan and McKelvie 1997; Cook et al. 2001: 37; VLRC 2003: 320-321). Sexual offences have very high rates of "not guilty" pleas. If the accused makes admissions of guilt to the police, a conviction is more likely (Heenan and McKelvie 1997; Cook et al. 2001; Briody 2002).

Levels of reporting vary dramatically across socio-demographic groups within the Australian population (Lievore 2003). Parts of the population who experience disproportionately high rates of sexual assaults, such as Indigenous women, people with cognitive impairments, and prisoners, often also experience multiple barriers to reporting offences against them (Cossins 2003; Lievore 2003; VLRC 2004).

Although the law purports to apply equally to everyone, in practice, cases involving victim-complainants who have used alcohol are less likely to result in convictions, even where the victim-complainant is not drunk (Edwards and Heenan 1994; Heenan and McKelvie 1997; Briody 2002). Studies suggest that juries pay more attention to evidence of character and conduct than they do to substantive evidence of rape (Edwards and Heenan 1994; Konradi 1996; Cook et al. 2001; Taylor 2004). In short, "common features of sexual assault are often associated with negative case outcomes" (Stubbs 2004).

In the wake of rape law reforms, while police responsiveness and sensitivity is widely believed to have improved, charge and conviction rates in some English-

speaking jurisdictions have actually decreased over the last ten to twenty years (Lees 1996; Spohn and Horney 1996; Schissel 1996; Cook 1999; Stop Rape Now 2004; VLRC 2004).

In 1996-1997, the number of findings of guilty for "sexual assaults" in New South Wales was 10 per cent of the number of offences reported (Cook et al. 2001: 44). In Victoria, the number of convictions of rape in 1997-1999 was only 4.2 per cent of the number of reports (VLRC 2003: 81). My calculations based on South Australian data (Office of Crime Statistics and Research 2003) suggest that convictions as charged for rape and attempted rape were only 1.8 per cent of the number of those offences reported to South Australian Police in 2002, and that convictions have not risen above 3.1 per cent of reports in any year in the last decade (Stop Rape Now 2004). These figures are all the more disturbing when we remember that at least 85 per cent of sexual offences are never reported to the police.

The process of attrition is so "overwhelming" (Gans 1997: 28) that one writer has described it as "progressively decriminalis[ing]" sexual offences (Lees 1996: 99). Others describe police practices in relation to sexual offences as diverting sexual offenders away from the criminal justice system rather than policing sexual violence (Carrington and Watson 1996). Despite 30 years of rape law reform, legal changes have been routinely "subverted by a legal culture that tends to discredit and disbelieve women and children who allege sexual abuse" (Kift 2003: 293). In effect, the criminal justice system barely addresses sexual assaults. The overwhelming majority of sexual offences are subject to "resolution without trial" (Carrington and Watson 1996: 260; Mack and Roach Anleu 2000: 127; Stubbs 2004). It has been suggested that this systemic failure of access to justice is so extreme that "the criminal justice system is not merely failing to protect [victim-complainants] . . . the processes involved [work to] legitimise [sexual] violence" (Lees 1996: 111).

Where a matter does proceed to trial, evaluations of trial transcripts consistently show that many complainants are: accused of lying or making false reports; asked questions about behaving in a sexually provocative way; asked about alcohol intake on the day of the offence and asked about the way they were dressed at the time of the offence (NSW Department for Women 1996; Young 1998). Recent research has suggested that similar questions are asked of children alleging intra-familial sexual abuse (Taylor 2004). A Victorian study that asked barristers, judges and magistrates for their opinions found that almost all of them believed that "rape complainants have a significantly different experience as witnesses than victims of other forms of personal violence" (Heenan and McKelvie 1997: 244).

Research in which sexual assault trials are compared with trials of major, non-sexual assault shows some of these questions are common to all assault trials (Brereton 1997a). However, there are significant differences in the "way in which stereotypes of "deserving" and "undeserving" victims were constructed and employed, and in how defence counsel sought to define normal, or typical, victim behaviour" (Brereton 1997a: 243). In particular, the nature of the questions put to sexual offence victim-complainants are humiliating in a way not shared by the questions put in other assault trials (Brereton 1997a). Further, the average length of questioning endured by victim-complainants in sexual offence trials is double that for victim-complainants in trials involving other assaults (Brereton 1997a). The situation facing Indigenous victim-complainants is significantly worse, with more questions, longer periods of cross-examination, and racist imputations being made in court (Cossins 2003).

While the structure and adversarial nature of criminal trials are common to all offences, the impact of those processes is quite different for sexual offence victim-complainants. Thus, critical attention on the trial process itself, as well as a focus on elements specific to sexual offence trials, is needed (Brereton 1997a). The Victorian Law Reform Commission (VLRC) (2004: 85) has suggested that the responsibility on defence counsel to "vigorously test the prosecution case" and on the prosecution to "show fairness to the accused" combine to hamper sensitivity toward complainant witnesses.[2]

Victim-complainants recognise the constraints operating upon them within sexual offence trials. A United States study has shown that survivors of sexual assault are far from passive in their witness roles. Rather, witnesses work on their appearance, prepare their role as witnesses and emotionally prepare "to achieve courtroom demeanour . . . consistent with idealised images of witnesses or victims" (Konradi 1996: 415). They often built teams of supportive people around them, increasing their understanding of the court process as well as their confidence and capacity to assist in the prosecution. Many provided documents, evidence and strategic ideas to the prosecution. Their active participation went well beyond the expectations of prosecutors, and at times they resisted it (Konradi 1996). However, almost all of the survivors interviewed found that portraying themselves as "legitimate victims" required presenting themselves in ways that responded to, rather than challenging, cultural stereotypes about rape and rape victims (Konradi 1996: 425).

Alternatives models for justice

Given current low reporting and conviction rates, there are obvious limits on the capacity of "law and legal reform to address effectively certain kinds of interpersonal crime, especially sexual assault" (Daly, Curtis-Fawley, Bouhours, Weber and Scholl 2003). As a result, some people working for change have begun to explore alternative models for justice and healing outside the criminal justice system.

In particular, "restorative justice" approaches are being examined for their applicability to sexual assault and domestic violence. These approaches bring together people who have been affected by criminal activity and aim to achieve a reintegration of the offender into the broader community. Restorative justice processes take a large number of forms with widely varying relationships to usual criminal justice processes (Stubbs 2004). Evaluation of family conferencing of sexual offences committed by young people in South Australia has shown that while a substantial proportion of offenders whose cases go to court are never held responsible for their conduct, family conferencing may produce better outcomes for victim-complainants. In order to enter the family conferencing program, offenders must admit the offence, although at least half of the cases going to trial result in all charges being withdrawn or dismissed. Family conferences produced outcomes far more quickly. They resulted in more apologies to victim-complainants as well as more undertakings to do community service and more undertakings to participate in therapeutic counselling from offenders than court processes. By contrast, the few custodial sentences imposed in court were almost all suspended. (Daly et al. 2003; Daly 2004).

However, some authors and community members have real concerns about the appropriateness of restorative approaches in dealing with sexual offences, and

with domestic and family violence (and with experiences of both which is often the case when the perpetrator is a partner or family member) (Stubbs 2004). In particular, critics question whether restorative justice approaches are able to adequately address power imbalances, deal with crimes in which there may not be community consensus condemning the offender's behaviour, provide safety for victim-complainants and address the complexities of domestic violence (Stubbs 2004). Although the shortcomings of formal legal processes are documented, much less evidence is available about the capacity of restorative justice strategies to achieve safety, justice and future non-offending (Stubbs 2004). While appropriate restorative justice processes may provide a valuable alternative choice within the context of the criminal justice system, the current failures of the criminal law still need to be effectively addressed.

While appropriate restorative justice processes may provide a valuable alternative choice within the context of the criminal justice system, the current failures of the criminal law still need to be effectively addressed.

In Australia, most criminal offences, including sexual offences, are dealt with under state and territory law. This means that the law relating to sexual offences is different in each state and territory, although some jurisdictions have similar legislation. Consequently, each section of the paper deals with the similarities and differences between the states and territories. Information on evaluations of the law is provided where it has been undertaken in each jurisdiction. There is also a detailed Table at the end of this paper (pp. 32-41) outlining the specific laws and provisions that operate in each state and territory.

Evidence about past sexual experiences

A focus on the character of the victim-complainant has been a persistent feature of rape trials, and one which has reflected social attitudes suggesting that women's sexual reputation and chastity are indicators of women's truthfulness and reliability as witnesses (Henning and Bronitt 1998).

In the 1970s and 1980s, all Australian jurisdictions reformed the law applying to this aspect of evidence. It was widely recognised that the unjustified use of sexual history evidence could be humiliating and distressing for victim-complainants, jeopardising a fair trial of the real issues and producing unjust acquittals. Attacks on women's credibility based on past sexual activity also seemed to imply that some victim-complainants were unworthy of legal protection or partially responsible for sexual assaults committed against them (Edwards and Heenan 1994; Henning and Bronitt 1998). Reform sought a better balance between the rights of the accused to a fair trial and the rights of the victim-complainant to access to justice.

The legislation

Evidence about the victim-complainant's sexual reputation[3] is not permitted in any Australian jurisdiction except the Northern Territory (NT), where it is permitted only with the permission of the court. However, despite the blanket rule that evidence of sexual reputation is inadmissible, studies show it is still being admitted (Henning 1996; NSW Department for Women 1996; Taylor 2004). It appears that part of the reason is that legislation and case law offer little guidance on distinguishing between "sexual reputation" (which is generally not admissible) and "sexual experience/history" (which is admissible in some circumstances) (Henning and Bronitt 1998; Law Reform Commission of NSW 1998).

Evidence about the victim-complainant's sexual experiences prior to the offence charged is restricted in every Australian jurisdiction. However, the nature and extent of the protection that the law offers differs considerably. Each jurisdiction establishes a process in which any party seeking the admission of sexual history evidence must first apply for and obtain the permission of the court.

In every jurisdiction apart from New South Wales (NSW), legislation establishes one or more criteria that must be satisfied before the court may give its permission for sexual history evidence to be admitted. In contrast, NSW states a general rule that sexual history evidence is not admissible and then lists exceptions to that general rule. The court can only allow the evidence to be heard if it falls within one of these exceptions.

The key reasons for reform to this area of the law included the distress and humiliation that cross-examination about sexual history can cause.

In the Australian Capital Territory (ACT) and NT, prior sexual experience with the accused is exempt from the application of the protections that apply to all other sexual history evidence. In Queensland (QLD) and South Australia (SA), *recent* sexual activities with the accused are exempt from the requirement for permission from the presiding judge. In NSW, prior sexual experience with the accused may fall within the exception for evidence about an "ongoing or recent" relationship between the accused and complainant, effectively providing a partial exemption from protections provided by the Act (Henning and Bronitt 1998).

Criteria for the admissibility of sexual history evidence

In the ACT, NT, QLD, SA, Tasmania (TAS), Victoria (VIC) and Western Australia (WA), a court must not allow sexual history evidence to be introduced unless it has substantial relevance to facts that are disputed in the case.

Most jurisdictions provide some limited guidance as to the meaning of "substantial relevance". In the ACT, NT, QLD, SA and VIC, evidence about sexual activities is not "substantially relevant" simply because it raises an implication about the victim-complainant's "general disposition" or "general character". In the NT and QLD, evidence has "substantial relevance" if it took place at virtually the same time as the offence charged or it was part of a sequence of events "that explain the circumstances in which the alleged offence was committed".[4]

In the ACT, NT, QLD, SA and VIC,[5] evidence about sexual activities is not permitted as part of cross-examination about the victim-complainant's credibility unless there are special circumstances that mean it "would be likely to substantially impair confidence" in the reliability of the complainant's evidence if it were admitted. In TAS and WA,[6] sexual history evidence is not admissible solely for the purposes of cross-examination about credibility. QLD law explicitly states that victim-complainants are not to be regarded as less credible witnesses merely because they have engaged in sexual activity.

The key reasons for reform to this area of the law included the distress and humiliation that cross-examination about sexual history can cause. As a result, several jurisdictions have required the risk of distress and humiliation to the victim-complainant to be considered when decisions about sexual history evidence are being made.

In SA, in making a decision about whether to grant permission for questions concerning, or other evidence about, sexual history, the judge is required "to give effect to the principle that alleged victims of sexual offences should not be

subjected to unnecessary distress, humiliation or embarrassment through the asking of questions or admission of evidence" about sexual history.[7] To grant permission, the judge must also be convinced that allowing questions or evidence about sexual experience to be heard is necessary in the interests of justice (VIC has a similar requirement).

In TAS and WA, a magistrate or judge must not give permission for evidence of sexual experiences to be heard in court unless the capacity of the evidence to assist in proving a disputed fact "outweighs any distress, humiliation or embarrassment" which the victim-complainant might suffer as a result of the evidence being disclosed in court.[8] In TAS, the legislation offers the further guidance that, in forming a decision on this issue, the magistrate or judge must take into account the victim-complainant's age and the "number and nature of the questions" that may be asked.

In contrast to the legislation in every other state and territory, NSW law states a general rule that evidence about sexual experience cannot be used. It can only be allowed into court where the court has given its permission, *and* the evidence: closely relates to the time when the alleged sexual offence took place; or is part of a connected set of events as a part of which the sexual offence is alleged to have been committed; or concerns a relationship between the accused and the victim-complainant that was ongoing or recent at the time the offence was committed; or could explain "the presence of semen, pregnancy, disease or injury" where the accused denies that intercourse took place; or could show that, at the time of the alleged sexual offence, either the victim-complainant or the accused person had a disease that the other person did not have; or could show that the victim-complainant first alleged that the sexual offence had been committed after sexual intercourse had taken place and when the victim-complainant realised or discovered pregnancy or disease.

Where the prosecution's case has referred to the sexual experience of the victim-complainant and accused might be unfairly prejudiced if they could not ask questions about these matters, the court can allow the victim-complainant to be questioned about them. However, the defence may question the victim-complainant only about the specific things raised by the prosecution's case. The court can only allow those questions to be asked if the value of the evidence outweighs any potential "distress, humiliation or embarrassment" to the victim-complainant resulting from the evidence being allowed into court.

No other Australian jurisdiction has explicitly limited the kinds of evidence that the defence can bring into court if the prosecution raises the complainant's sexual history. However, numerous studies have shown that defence cross-examination designed to rebut prosecution evidence dealing with sexual experience often allows wide-ranging access to evidence about sexual history. The questioning and other evidence that follow can be humiliating for the complainant and difficult for the court to confine (Henning 1996; Heenan and McKelvie 1997; Henning and Bronitt 1998).

Written applications and written reasons

In the ACT and VIC, an application for the admission of sexual history evidence must be made in writing. In VIC, the application must be made at least 14 days before the date of the criminal proceeding. It must set out the questions the applicant wants to ask, state the scope of the questioning that is likely to follow on from these questions, and explain the substantial relevance of the questions to disputed facts or the reliability of the victim-complainant as a witness. The

requirement for the application to be made in writing can only be waived by the court in exceptional circumstances.

Every jurisdiction requires that discussion of an application for admission of sexual history evidence must take place in the absence of the jury, if there is a jury. In the ACT, NT and VIC, the victim-complainant can also be excluded from the court while the application is considered if the accused requests this.

If the court agrees to allow evidence about sexual activities to be admitted into court, it must give written reasons for its decision in the ACT, NSW, TAS and VIC. In TAS, the written reasons must explain how the requirements of the legislation have been met. NSW law requires a written record of the nature and scope of the evidence that is allowed and the reasons for the court's decision before the evidence is heard.

How does it work in practice?

Despite evidentiary reforms limiting the use of sexual history evidence, studies in several Australian jurisdictions demonstrate this evidence is still being widely used and that its use may be increasing (Mack and Roach Anleu 2000; Heenan 2002-2003). Studies across VIC, NSW and TAS show sexual history evidence being admitted in 52-76 per cent of cases studied (NSW Department for Women 1996; Heenan 2002-2003). Further, studies have found that sexual history evidence was admitted in court *without the use of procedures required by law* in 38 per cent of cases reviewed in TAS (Henning 1996: 24-28); 30 per cent of cases reviewed in VIC (Heenan and McKelvie 1997: 153); a "relatively high proportion" of those reviewed by the Victorian Law Reform Commission (2004: 203) and 35 per cent of cases reviewed in NSW (NSW Department for Women 1996: 230).

Where applications for the admission of sexual history evidence are made, compliance with legislative requirements is often "purely formal and technical", rather than providing "genuine scrutiny of evidence in the prescribed terms" (Henning and Bronitt 1998: 90). As a result, the intention of the legislation to exclude evidence suggesting that consent to sexual intercourse on one occasion means consent on every occasion is being routinely defeated (Henning and Bronitt 1998).

Requirements that applications for the admission of sexual history evidence must be made in writing and (in VIC) in advance are designed to ensure more thorough application of the provisions and prevent admission of evidence without the application of criteria established by law. The Victorian provisions were introduced after evaluation (Heenan and McKelvie 1997) found the previous provisions had not been sufficiently effective. However, recent evaluation of the Victorian legislation has found that cross-examination on sexual history is still taking place without a written application in about half of all cases and that sexual history evidence is admitted without permission "in a relatively high proportion of cases" (VLRC 2004: 203).

In jurisdictions that permit sexual history evidence with "substantial relevance" to facts in issue, the lack of guidance as to the meaning of "substantial relevance" has been criticised as unclear (Heenan 2002-2003). In the absence of legislative guidance, judges have wide discretion in making decisions about which evidence should be allowed, leaving room for the re-emergence of discriminatory interpretations of the law which were applied before law reform, along with the myths which sustained them (Henning and Bronitt 1998).

The clear implication of decided cases in many jurisdictions is that "the only material question is whether the exclusion of sexual history evidence would be unfair to the defendant, not whether it might be unfortunate for the complainant" (Lees 1996: 107). Only three Australian jurisdictions have attempted to address this lack of attention to the victim-complainant's rights through mandating court consideration of potential harm to the victim-complainant. Only TAS provides legislative guidance about how that task should be approached by the court.

The law of NSW seems to take a more promising approach by establishing a primary rule that sexual history evidence is not admissible, with stated exceptions. It was intended to remove judicial discretion as the "only means of ensuring that irrelevant evidence would be excluded" (Law Reform Commission of NSW 1998). However, in practice, "this bold legislative attempt to eliminate judicial discretion has been largely neutralised" by broad judicial interpretation of the exceptions and the absence of a "substantial relevance" requirement (Henning and Bronitt 1998: 84). The lack of a requirement that sexual history evidence must be substantially relevant means that evidence of limited relevance can be admitted if it falls within one of the statutory exceptions. While the NSW legislation provides the strongest protection for complainant witnesses, it has also been subjected to criticism on the basis that it places the accused's right to a fair trial at risk by excluding some evidence critical to the defence (Law Reform Commission of NSW 1998; MCCOC 1999; VLRC 2004).

Such persistent resistance to reform by courts and legal practitioners has prompted commentators to argue that the primary project facing reform in this area is to "challenge the deeply entrenched historical legal understanding of the pertinence of sexual history evidence which fuels the continued acceptance of its admission in rape trials today".

Various studies have demonstrated the reluctance of courts to refuse to admit evidence of prior sexual history involving the accused, even in jurisdictions where a requirement for the permission of the court is applicable (Heenan 2002-2003). Given the prevalence of sexual violence by male partners (VLRC 2003; Heenan 2004a) and the evidence from self-report studies suggesting most sexual offences are committed by people known to the victim, this is of particular concern. Many sexual offences are committed by partners, and these cases have particularly poor rates of reporting and conviction. Yet the cases in which sexual history evidence is most likely to be admitted are those in which the victim-complainant's partner or former partner is charged with a sexual offence. The pervasive admissibility of sexual history in such cases maintains the myth that consent to sexual intercourse on previous occasions implies consent on all occasions. Some commentators argue that this results in a return to the law of rape prior to modern reforms, which did not recognise that women could be raped by their husbands because marriage was thought to grant a permanent form of consent (Henning and Bronitt 1998).

The evidence suggests that many judges have failed to apply legislative criteria in a rigorous way (NSW Department for Women 1996; Henning and Bronitt 1998; Sheehy 2002; Temkin 2002). Others have actively resisted the limits placed on their discretion by laws which limit questioning about sexual experience (Mack 1993). In addition, reforms to the law of evidence have been actively resisted by defence barristers (Heenan 2002-2003), while prosecution barristers struggle effectively to counter defence arguments relying on rape myths (Lees 1996: 109; Henning and Bronitt 1998; Taylor 2004). Such persistent resistance to reform by courts and legal practitioners has prompted commentators to argue that the

primary project facing reform in this area is to "challenge the deeply entrenched historical legal understanding of the pertinence of sexual history evidence which fuels the continued acceptance of its admission in rape trials today" (Heenan 2002-2003: 8). Despite case evaluation evidence to the contrary, defence barristers and judges told the Law Reform Commission of NSW (1998) that the procedural requirements of the legislation were always complied with unless prosecution and defence agreed the evidence in question was admissible.

If the accused has prior convictions, they are generally not admissible as evidence: this is because the law accepts that the accused should be tried for the specific acts alleged to have been committed in relation to the offence before the court, and not acts which took place at a different time. In contrast, "rape culture consistently denies female sexuality the ability to change over time" (Marcus 1992: 400), maintaining the myth that past consent makes present consent more likely.

Most jurisdictions state that sexual history evidence may be admissible if it might "materially impair" confidence in the reliability of the victim-complainant's evidence. In ordinary circumstances, it is difficult to see how evidence of sexual history could be relevant to the reliability of the victim-complainant's evidence without beginning from the premise that sexual promiscuity might make a woman less likely to tell the truth (Henning and Bronitt 1998). Ironically, however, despite these provisions being enacted to limit irrelevant use of sexual history evidence their very language seems to suggest that sexual experience has the capacity to be devastating to credibility.

Defence counsel have begun to argue that evidence or allegations of prior sexual assault imply that the victim-complainant's evidence may be unreliable because of emotional and psychological damage resulting from abuse or confusion between a number of prior assaults.

In some relatively recent cases, a new argument about how sexual experience might "materially impair" credibility has begun to emerge. Defence counsel have begun to argue that evidence or allegations of prior sexual assault imply that the victim-complainant's evidence may be unreliable because of emotional and psychological damage resulting from abuse or confusion between a number of prior assaults (Sheehy 2002; Heenan 2002-2003).[9] The lack of clarity of provisions restricting admissibility of sexual history means that in some jurisdictions it is unclear whether evidence of *non-consensual* prior sexual activity falls within the scope of these provisions, and different judges – even within jurisdictions – are making different decisions about their applicability (Heenan 2002-2003). Cross-examination on prior sexual abuse can be particularly "humiliating and painful" and impacts most heavily on complainant witnesses from groups which experience high rates of victimization, such as Indigenous women and people with cognitive impairments (VLRC 2004: 202).

In the case of child victim-complainants, the admission of evidence of prior sexual abuse may be sought in order to argue that their detailed awareness of sexual matters can be explained by prior abuse and not by the assaults that form the basis of the charges currently before the court (Sheehy 2002; Taylor 2004). Taylor's (2004) research suggests that defence accounts of children's understanding of sexual matters form a critical issue for the credibility of child witnesses, making this an especially effective undermining of the spirit of sexual history laws.

Despite the incomplete success of these laws, evaluations of the effectiveness of legislation in VIC, NSW and TAS all point to strong judicial statements indicating the irrelevance of sexual history evidence, and convictions being achieved in the face of its admission (Henning 1996; NSW Department for Women 1996; Heenan and McKelvie 1997; Heenan 2002-2003; Taylor 2004). Although sexual

history evidence is still being allowed into courts, there is considerable evidence to suggest that the legislation has reduced the amount and focus of the evidence being admitted (Henning 1996; Law Reform Commission of NSW 1998).

Ongoing evidence that judges, prosecutors and defence counsel are sometimes ignorant of relevant evidentiary doctrines, do not understand why such protections are needed, or are prepared to undermine them (Doyle and Barbato 1999) continues to fuel arguments for specialisation in court lists and for the creation of specialist sexual offences courts (Heenan 2004b). In addition, proposals for innovative strategies to ensure compliance with legislative requirements continue to emerge. The Victorian Office of Public Prosecutions has recently begun to support effective application of the law by advising defence counsel of the applicable law in writing, ensuring that inexperienced counsel are aware of their obligations (VLRC 2004).

Corroboration

There is no legal requirement for evidence that independently confirms the evidence of a single witness (corroborating evidence) in any Australian jurisdictions. An accused charged with any crime can be convicted of the offence on the evidence of a single witness, provided the jury accepts that his or her evidence proves the offence beyond reasonable doubt (Mack 1998). However, in the past, Australian jurisdictions required that juries should be warned about the dangers of convicting people accused of sexual offences on uncorroborated evidence (Sheehy 2002). A judge's failure to warn the jury about relying on uncorroborated evidence could result in a conviction being overturned on appeal, resulting in a retrial or an acquittal.

Victim-complainant witnesses in sexual offence trials have been, and to some extent continue to be, treated as potentially unreliable witnesses. The reasons judges have historically given for treating victim-complainants as potentially unreliable witnesses have included the ease of making unfounded allegations of sexual assault, the difficulty of refuting an accusation of sexual assault, jury sympathy for victim-complainants, and women's tendency to lie (and lie convincingly), especially where sex is concerned (Mack 1998). These "reasons" have long been discredited by extensive evidence that sexual offences have extremely low reporting rates, that there are extensive barriers to reporting, that cases are progressively and intensively filtered out prior to trial as they pass through the criminal justice system and that, consequently, the rate of convictions in sexual offences is very low (Naffine 1992; Mack 1998; Stubbs 2004).

Feminists have argued that warnings to the jury about the dangers of convicting an accused on uncorroborated evidence or requiring very careful scrutiny of uncorroborated evidence primarily function as barriers to reporting and prosecuting sexual offences, producing unwarranted acquittals and additional humiliation for victim-complainant witnesses.

Statutory reforms mean that there is now no *requirement* that a jury be warned that it is dangerous to convict on the uncorroborated evidence of the victim-complainant of a sexual offence (Mack 1998). The law of NSW, QLD, SA, TAS and WA states that there is no *requirement* for a judge to warn a jury that it is dangerous to convict an accused on uncorroborated evidence. NSW further states that, in cases where there is no corroborating evidence, judges are not required to direct the jury about the absence of corroboration.

However, during the process of reforming the corroboration rules relating to sexual offence trials in Australia, the High Court Australia handed down a critical decision.[10] It simultaneously ruled that victim-complainants of sexual offences should no longer be regarded as a group of unreliable witnesses, *and* profoundly limited the effectiveness of legislative reforms abolishing the requirement for corroboration warnings in sexual offences. The court decided that, even in the face of legislative changes eliminating the requirement for a corroboration warning, judges retain a discretion to give a corroboration warning where it is called for (Sheehy 2002).[11] In practice, this decision emphasised the necessity for trial judges either to warn, or to risk having their decisions overturned, sometimes even in cases where the defence had not requested a corroboration warning at trial (Heenan and McKelvie 1997; Mack 1998). More recently, the High Court has emphasised that a judge may be obliged to give a warning even if there is substantial corroborating evidence and the defence has not requested a warning. The High Court has also made it clear that a warning that the complainant's evidence should be carefully scrutinised may not be enough to discharge the judge's duty to warn.[12]

In the ACT, NT and VIC, the law states that the judge *must not* warn the jury or suggest to them in any way that the law views victim-complainants in sexual offences as unreliable witnesses. However, courts retain the capacity to comment on evidence as appropriate to the circumstances in the interests of justice.

In practice, these provisions have allowed warnings that fall short of suggesting that victim-complainants of sexual offences in general constitute a class of unreliable witnesses. For example, corroboration warnings may direct the jury to scrutinise the victim-complainant's evidence with great care.

How does it work in practice?

Reforms to the corroboration warning have not been universally effective. Even after reforms abolishing any legal requirement for a corroboration warning, studies found continued references to a legal requirement to warn (Mack 1998). After the High Court stated definitively that sexual assault complainants were not to be seen as especially untrustworthy, judicial statements casting doubt on the reliability of victim-complainant witnesses continued (Mack 1998).

When the corroboration warning remained discretionary in VIC, case analysis showed that such warnings were given in circumstances where they were unnecessary, or where reasons given by the defence for requesting a corroboration warning were poor and unsupported by the evidence (Edwards and Heenan 1994). Evaluation of the application of corroboration warnings in NSW under a discretionary regime found that a warning that it was unsafe or dangerous to convict without corroborating evidence was given in 40 per cent of cases, despite the High Court having overruled warnings suggesting that sexual offence complainants should be regarded as a suspect class of witnesses.[13] A less harsh warning suggesting that uncorroborated evidence should be evaluated or "scrutinised with great care" was given in 59 per cent of cases. Some cases received both types of corroboration warning. No corroboration warning was given in only 15 per cent of cases (NSW Department for Women 1996: 188-189). High rates of corroboration warnings were also found in SA and, to a lesser extent, WA, after reform (Senate Standing Committee on Legal and Constitutional Affairs 1994). As with sexual history reforms, "continued emphasis on judicial discretion has undermined the

positive impact of the legislation" intended to eliminate unwarranted corroboration warnings in sexual offence cases (Mack 1998: 73).

Despite their demonstrated limitations, few jurisdictions have chosen to undertake further reform of corroboration rules. Proposals for further reform suggest legislative guidance about when corroboration warnings will be required, and propose mandatory instructions to the jury (Mack 1998). Mandatory jury instructions may be particularly desirable in view of the Victorian Law Reform Commission's finding that emphasis and degree of repetition make a significant difference to the way that directions on corroboration come across to the jury. The Victorian Law Reform Commission has proposed changes to the law to ensure that instructions are clear and concise, always address delay in prosecution appropriately and eliminate the harshest forms of the warning which state that it may be unsafe or dangerous to convict on uncorroborated evidence (VLRC 2004).

Protection of sexual assault counselling communications

In the process of preparing for a criminal trial, the defence can seek access to relevant documents, no matter whom they belong to. By serving a subpoena on someone who has relevant documents in his or her possession, the defence can compel that person to disclose the documents even if she or he does not want to. Until recently, this process could be applied to records made in the course of a confidential relationship between a victim-complainant and a counsellor with few restrictions, allowing these documents to go to the defence in any sexual offence trial. A subpoena requiring the documents to be produced could be issued provided that the documents were requested "for a *bona fide* purpose connected with the litigation" (Freckleton 1998: 156). In spite of this requirement, research demonstrates that subpoenas have been served on counselling services when no record of contact with the complainant exists or records of contact are extremely limited (Olle 1999).

In the process of preparing for a criminal trial, the defence can seek access to relevant documents, no matter whom they belong to.

Access to these documents has been considerably restricted in most states and territories, with attempts to limit access beginning in 1997, when NSW first amended the applicable law (Freckleton 1998). It followed earlier Canadian reforms designed to limit access to sexual assault counselling notes (Sheehy 1996; Bronitt and McSherry 1997). Every state and territory *except QLD* now has specific legislation protecting counselling communications.

The starting points

Each jurisdiction establishes a primary threshold, which an application for disclosure of sexual assault counselling communications must meet for disclosure to be permitted.

In TAS, sexual assault counselling communications cannot be disclosed without the counselled person's consent, and courts do not have the power to order disclosure without that consent. In all other jurisdictions, a court can decide to order disclosure even if the complainant does not agree to it. However, WA has significantly different provisions dealing with disclosure to those of the other jurisdictions. WA law establishes higher thresholds the applicant must meet before a court can order disclosure. It also states that a person cannot be

required to produce evidence of counselling communications without the court's permission. A subpoena which is issued without the court's permission is therefore of no legal effect.

In NSW, NT, VIC and WA, sexual assault counselling communications can be disclosed either by court order or with the consent of the complainant. In the NT and VIC, a guardian or appropriate person can consent to disclosure in the place of the victim-complainant if she or he is less than 14 years of age.

In the ACT and SA, sexual assault counselling communications cannot be disclosed in court unless the court orders it. The protection provided by the legislation cannot be waived, even if the complainant and the counsellor agree to the disclosure. Only a court can order the disclosure of a sexual assault counselling communication (though the court must consider the attitude of the counselled person). In NSW and SA sexual assault counselling communications cannot be admitted in pre-trial proceedings in any circumstances.

The criteria a court must consider before making an order for disclosure vary from one jurisdiction to the next. For a court to order disclosure in NSW, NT and VIC, the evidence must have substantial value in proving disputed issues. In the ACT, SA and WA, the party applying for disclosure must demonstrate that they have a legitimate court-related purpose. ACT and SA applicants must show that disclosure would significantly assist their case. In NSW, NT, VIC and WA, the court must not order disclosure if other evidence of similar or greater value in proving disputed facts is available.

Additional issues the court must consider in deciding whether to order disclosure

In TAS, sexual assault counselling communications can only be disclosed with the consent of the complainant. In every other jurisdiction, a court which is considering whether to order disclosure of such information must consider the public interest. The precise nature of the public interest which the court is required to consider varies. For example, in the ACT, SA and WA the court must weigh the public interest in the right to a fair trial against the public interest in confidentiality and potential harm to the confider.

The legislation applies to a wide range of verbal and written communications about or during sexual assault counselling.

Many jurisdictions require consideration of the nature, extent and the likelihood of harm to the complainant if the evidence is disclosed. Some jurisdictions provide additional guidance. For example, in the ACT, SA and WA the court must consider the impact of disclosure on the public interest in ensuring complainants have access to counselling, recognising that effective counselling might depend on confidentiality. WA law also requires the court to consider the public interest in adequate counselling records being kept, recognising the possibility that sexual assault counsellors may limit the notes they keep if those notes may later be disclosed in court (MCCOC 1999). The laws of the ACT and SA also require the court to consider whether the application to have the sexual assault counselling communication disclosed is being made on the basis of discriminatory beliefs or bias.

What information is protected?

The legislation applies to a wide range of verbal and written communications about or during sexual assault counselling. It can apply to things said during counselling as well as to documents such as letters, notes, forms and electronic documents.

The ACT, SA and TAS provide protection for counselling communications that are made in a context giving rise to a duty of confidentiality or reasonable expectation of confidentiality. In these states, the communications must directly relate to assessment of trauma or treatment relating to harm suffered as a result of the sexual offences alleged.[14]

In the ACT, NSW, NT, VIC and WA, protection can extend to communications made prior to the alleged sexual assault, and is not necessarily limited to communications made specifically in connection with the alleged sexual offence.

Some jurisdictions specify that some documents are exempt from the protection of the legislation. These are usually documents that might conceivably fall within some of the broadly worded definitions of communications protected by law, but which would have been created as potential evidence. The most common examples are records created during a physical examination of the victim-complainant by a medical practitioner or documents created for the purposes of legal proceedings.

In TAS, sexual assault counselling files can only be disclosed with the consent of the complainant, and there are no identified circumstances in which protection can be lost. In every other jurisdiction, the protection from disclosure offered by this legislation can be lost in some circumstances. In most states, where counselling communications provide evidence of serious misconduct (such as fraud, perjury, a civil wrong or a criminal offence), protection from disclosure will be lost.

Court inspection of documents

In most jurisdictions, the legislation specifies that the court can inspect sexual assault counselling communications in order to reach a decision about whether or not to order the disclosure.

In SA, VIC and WA, the court has the discretion to inspect the documents in order to make a decision about whether to order the disclosure. However, in the ACT, SA and WA, the court can only exercise this discretion once it is satisfied that there is a legitimate purpose for the application and (in ACT and SA) an arguable case that disclosure will assist the applicant's case.[15] In the ACT and NSW, a court which is ruling on an objection concerning the disclosure of sexual assault counselling communications *must* inspect the relevant documents once threshold tests have been met.

In the ACT and SA, the law offers guidance as to how the preliminary examination of counselling communications should be carried out. It must take place in the absence of the public, the jury (if there is one), and the parties to the proceeding and their lawyers (unless the court decides otherwise). Information provided as part of examining the evidence must not be communicated to the parties or their lawyers, unless the court decides otherwise. A record of the examination is taken, but it is not made available to the public.

NSW, VIC and WA all provide for notice of an application for disclosure of sexual assault counselling records to be given to the other parties involved in legal proceedings and to the counselled person. The nature of the notice and the people who must be notified vary from state to state.

Ancillary orders

If a court decides to order disclosure of a sexual assault counselling communication, it can make additional orders designed to limit the potential harm to the counselled person. The court's discretion to make orders is wide. For example, a

court can order that the court be closed to the public while the evidence is disclosed, that conditions be imposed on the inspection or copying of documents, that the documents be edited or only part of them be disclosed, that publication be suppressed or that information about the identity or contact details of the complainant or other people mentioned in the documents be removed before disclosure.

How does it work in practice?

Cossins argues that the legislation is aimed at preventing sexual assault trials "continuing to be a forum in which the complainant is baited by the defence with untested assertions and innuendo in order to prove her moral unworthiness" (Cossins 1998: 106). As the previous section showed, legislation limiting cross-examination on sexual history has not been as successful as might have been hoped. Although it is believed to have reduced the amount of sexual history evidence being heard in court, much of that evidence is still being permitted. Ironically, however, some writers suggest that the declining capacity of defence counsel to use sexual history evidence following legislative reform may have increased reliance on sexual assault counselling records as "an alternative source of information for undermining the complainant's credibility" (Cossins 1998: 101; Olle 1999).

Advocates of protection for sexual assault counselling records argue that allowing the defence to force disclosure of these documents and use them in court has a number of damaging effects.

First and foremost, they argue that counselling is not designed to investigate allegations of crime. Counselling is not designed to produce evidence and is not relevant to a sexual offence trial.

Second, if counsellors are compelled to provide their records as evidence, people who have been sexually assaulted will be discouraged from reporting sexual offences and seeking counselling after sexual assault. Disclosure of sexual assault counselling records adds an additional fear of revictimisation to the already substantial barriers to reporting, prosecution and conviction of sexual offences (Cossins 1998). The impacts on victim-complainants' decisions about seeking or continuing with counselling have led to this being seen as "a public health issue" (MCCOC 1999). Disclosure can also expose personal information about the victim-complainant to the person who is alleged to have assaulted him or her, placing the victim-complainant in potential physical danger. (Cossins 1998).

Existing legislation such as that in VIC has been criticised because it leaves room for multiple interpretations of when counselling records have "substantial relevance" to facts in issue in a trial (Olle 1999). Sexual assault services have argued for strict, clear criteria explaining what could make a counselling file relevant. Sexual assault services have also criticised the absence of legal rights for counsellors to give evidence where their files are disclosed in court (something few jurisdictions allow), and for complainants to challenge the contents of their counselling files if they are produced in court (Olle 1999).

Analysis of Victorian cases has borne out some of these concerns. In particular, even before the legislation was enacted, some judges insisted that the defence make a case for the relevance of the evidence prior to the judge inspecting files themselves. However, some judges have interpreted the legislation as requiring them to examine the file in order to decide whether the evidence is admissible. The result is that the counselling service is effectively required to make a case as to why

the documents are *not* relevant to the proceedings (Olle 1999). Even where counselling files are not disclosed to the defence, inspection by officers of the court in itself violates the confidentiality of the counselling relationship (Olle 1999).

The Victorian Law Reform Commission has found that the legislation has not prevented subpoenas being issued. Rather, Centres against Sexual Assault have been compelled to pay lawyers to oppose subpoenas requesting their files at considerable expense (VLRC 2004). This is a burden which private counsellors may simply not be able to meet. Indeed, concerns have also been raised about the level of awareness of the legislation among private counsellors who may be unaware of the provisions and the protection they provide (VLRC 2004).

However, despite its limitations, one study found that "with rigorous adherence to the existing provisions, constant testing of meanings and unstinting elaboration of the stated legislative intent the [Victorian] Act has the capacity to protect files from defence" (Olle 1999: 84).

The only jurisdiction to bring in legislative changes which would prevent the burden of responding to a subpoena is WA, where a person can only be required to produce a document with the court's agreement. If a subpoena is issued without court agreement in WA, it is of no legal effect.

In the last 30 years, every Australian jurisdiction has extended the kinds of "sexual intercourse" or "sexual penetration" which can amount to rape or sexual assault.

Outline of the offences

The key adult sexual offences for every state and territory have three main elements. Each of these elements must be proved beyond reasonable doubt by the prosecution in order to result in a conviction. Each of the offences requires: physical acts, which meet the definition of "sexual intercourse" or "sexual penetration" in that jurisdiction; the non-consent of the complainant; and a specific mental state on the part of the accused.

Within this framework, however, there is considerable variation between the jurisdictions. This paper deals with each of these three broad elements in turn. The text of each section is accompanied by a table setting out the detail of the legislation for every state and territory. The Table on pp. 32-41 provides more detail and allows for comparison across the jurisdictions.

The law of sexual offences is complex and sometimes technical. This issues paper does not claim to cover all of the features of this legislation or every possible interpretation of the offences. However, it does aim to provide a plain English account of their key components, including those which have received most attention from law reformers aiming to make the law more responsive to the needs of people who have been sexually assaulted.

Sexual intercourse

Prior to modern law reform, the law of rape dealt only with heterosexual, vaginal intercourse without consent. In the last 30 years, every Australian jurisdiction has extended the kinds of "sexual intercourse" or "sexual penetration" which can amount to rape or sexual assault. These changes responded to arguments that sexual acts other than the penetration of a vagina by a penis could be "humiliating and traumatic" and "serious invasions of a person's physical and emotional

integrity" when they took place without consent (MCCOC 1999: 11). It was also necessary for non-consensual sexual acts against men and boys to be legally recognised as "rape".

Definitions of "sexual intercourse" and "sexual penetration"

The current definitions of "sexual intercourse" and "sexual penetration" vary considerably across the country. All jurisdictions recognise penetration of the vagina or, (depending on the jurisdiction), the external female genitalia by a penis as "sexual intercourse". Similarly, all jurisdictions recognise penetration of the anus by a penis as "sexual intercourse".

Every jurisdiction except TAS also defines sexual intercourse as including penetration to any extent of the vagina (ACT), external female genitalia (NSW, NT, QLD, SA, VIC and WA) or anus of one person by another person, using any part of their body or any object.[16] In addition to these Acts, WA law includes penetration of the urethra of one person by another person using any part of their body or any object within the definition of "sexual intercourse". TAS law has the narrowest definition of "sexual intercourse". It treats penetration of the vagina, genitalia or anus with any object or part of the body other than the penis as a separate offence, rather than as "rape".

All Australian jurisdictions recognise the insertion of any part of the penis of one person into the mouth of another person as amounting to "sexual penetration". NT, SA and WA also include oral contact with male genitals ("fellatio"), providing explicit recognition of "fellatio performed by the accused on the complainant" as falling within these offences (MCCOC 1999: 9). In ACT, NSW, NT, SA and WA law, oral contact with female genitals ("cunnilingus") falls within the legal definition of "sexual intercourse".[17]

Continuation of sexual intercourse is explicitly included in the statutory definition of "sexual intercourse" in every state and territory apart from QLD and under case law in SA.

In Victoria, rape can also be committed by compelling a male to sexually penetrate another person with his penis or preventing a male from withdrawing his penis from another person. The WA definition also extends to manipulation of any part of the body of the victim-complainant in order to cause penetration of the vagina, labia majora, anus or urethra of the accused. NSW and NT have additional offences of "sexual assault by self-manipulation". This offence is committed by anyone who coerces another person into inserting an object into their own vagina or anus using threats, or in circumstances where the victim-complainant could not reasonably be expected to resist.

The NSW, NT, TAS and VIC definitions of "female genitals" or "vagina" include surgically constructed genitalia. TAS law also includes a surgically constructed penis within the meaning of "penis".[18]

Continuation of sexual intercourse

Continuation of sexual intercourse is explicitly included in the statutory definition of "sexual intercourse" in every state and territory apart from QLD and under case law in SA.[19] This means that where the complainant initially agrees to sex and later withdraws consent or an accused becomes aware that the complainant is not consenting after sexual intercourse has commenced, the accused is committing a criminal act if he or she continues sexual intercourse.

Acts carried out for medical, hygienic or other lawful purposes

ACT law specifically excludes penetration which is done for a "proper medical purpose" or authorised by law in another way from the definitions of "sexual penetration". NSW, NT and WA exclude penetration done for a "proper medical purpose". QLD excludes penetration carried out for "a proper medical, hygienic or law enforcement purpose". VIC law excludes penetration with objects or a part of the body other than the penis unless it is done "in the course of a procedure carried out in good faith for medical or hygienic purposes." SA law deals with this issue a little differently, stating that agreement to an act on the basis that it is necessary for a medical or hygienic purpose is not agreement for any other purpose.

Aggravated assaults not requiring proof of sexual intercourse

The ACT has an offence of "sexual intercourse without consent", which is similar to the key offences of the other jurisdictions. In addition, it has a series of aggravated sexual assaults with higher penalties than "sexual intercourse without consent". Sexual assaults in the first, second and third degree do *not* require proof of sexual intercourse. Rather, they require that the accused injured, assaulted or threatened the victim-complainant with the *intention* of engaging in sexual intercourse.

NSW has a similar offence of "assault with intent to have sexual intercourse" and QLD and VIC have an offence called "assault with intent to commit rape", none of which require proof of sexual intercourse.

How does it work in practice?

Prior to the wave of Australian reform from 1975 onward, rape could only be committed by a man against a woman, because "sexual intercourse" was defined as penetration of the vagina by a penis. Other forms of sexual conduct would be dealt with as other offences, such as "sodomy" or "indecent assault". There has been broad agreement that the range of physical acts which the law recognized could amount to rape was too narrow. However, there has not been complete agreement about more extensive modern definitions.

The potential for other forms of non-consensual sexual contact to violate sexual autonomy and physical integrity; humiliate and physically injure has been one of the main arguments for broadened definitions of "sexual intercourse" (MCCOC 1999). However, arguments against change maintain that the old definition is still the one many members of the public understand (MCCOC 1999). Some commentators have suggested that extending the most serious adult sexual offences such as "rape" to non-consensual penetration by fingers or objects trivialises those offences (ACT Law Reform Commission 2001).

The broadened definitions have not been uniformly embraced by the judiciary. Some believe that extending "sexual intercourse" beyond the traditional definition, to include acts which do not involve penetration, is illogical or inappropriate (NT Law Reform Committee 1999).

Non-consent of the victim-complainant

The criminal laws of every state and territory contain sexual offences, which can be committed whether the victim-complainant consents, or not. There are some circumstances in which the law simply will not recognise any apparent consent.

The best-known examples are sexual offences involving children, where the law states that children under a certain age are not capable of giving legally recognisable consent.

However, non-consent is a crucial element of most Australian offences involving adult victim-complainants. This focus on the victim-complainant's state of mind at the time of the offence can be problematic because it can lead to an inappropriate focus on the complainant during trial.

The prosecution bears the burden of proving beyond reasonable doubt that the victim-complainant was *not* consenting to sexual intercourse. In practice, this means that the legal starting point assumes that the victim-complainant was consenting, which the prosecution needs to disprove in order to achieve a conviction (MCCOC 1999; Corbett et al. 1993). This has resulted in "unwarranted reliance on stereotyped views of what might amount to consensual sexual behaviour" which has tended to position real rape victims as those who fight back, who vigorously defend themselves, who are virginal or who are assaulted by strangers (MCCOC 1999: 21).

The ACT has addressed this issue by creating a series of "aggravated sexual assaults". If the accused injured, assaulted or threatened the victim-complainant with the intent of engaging in sexual intercourse, the offences have been committed. The prosecution does not need to prove that the victim-complainant did not consent. The legislation presumes that a person who has been injured, assaulted or threatened with injury would not consent to sexual intercourse with their assailant or anyone who assisted in the assault. NSW, QLD and VIC also have offences of "assault with intent to commit rape", none of which require proof of non-consent.

However, the ACT offence of "sexual intercourse without consent", and the key penetrative sexual offences in every other jurisdiction all require proof of the complainant's non-consent. Lack of consent is understood as the critical thing that distinguishes wanted sexual intercourse from unwanted and criminal sexual assaults.

The meaning of "consent"

In attempts to improve the protection of adult sexual autonomy and to remove the victim-complainant's mental state from the spotlight in sexual offence trials, almost every jurisdiction has reformed the law dealing with consent. Victoria's approach to consent is regarded as a best-practice approach by some commentators (Home Office 2000; ACT Law Reform Commission 2001). It defines consent as "free agreement" and states that juries must be told 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 their free agreement." Similarly, in Tasmanian law "a person does not freely agree to an act if the person does not say or do anything to communicate consent". These consent standards make it clear that a person who does not positively communicate free agreement to sex through their words or actions is not consenting. They provide the strongest protections of sexual autonomy of any Australian jurisdiction in relation to consent.

NT, TAS and VIC all state that sexual intercourse without "free agreement" is an offence. QLD and WA define "consent" as "free and voluntary consent", while judge-made law in SA defines consent as "free and willing consent".[20]

The ACT requires juries to be instructed that the victim-complainant has not consented just because she or he did not say or do anything to indicate non-consent. These provisions fall short of the TAS and VIC standards requiring positive indications of consent, but go further than the laws of NT, SA, VIC and WA, which merely make it clear that the absence of physical resistance by the victim-complainant or the absence of injury does not demonstrate consent. These legislative statements are designed to respond both to the historical requirements of physical resistance to demonstrate non-consent and the discredited myth that people who do not consent will always be able physically to resist.

Circumstances in which any apparent consent is legally invalid

Every Australian jurisdiction recognises that there are some circumstances in which any apparent consent to sex has not been given in a free or willing way. However, the range of circumstances in which the law recognises that consent has not been given varies dramatically from one jurisdiction to another.

Violence or force

Every Australian jurisdiction recognises that the use of force against the victim-complainant is inconsistent with consent. However, it is less clear whether violence against anyone else will be legally recognised as inconsistent with real consent. Only the ACT[21], NT, TAS and VIC specifically recognise the use of force against someone other than the victim-complainant as invalidating consent.

TAS law states that where the victim-complainant "suffers grievous bodily harm as a result of, or in connection with" a sexual offence, the injury itself is evidence of the victim-complainant's lack of consent unless there is proof to the contrary.

Unlawful detention

Where the complainant is unlawfully detained, any consent to sexual intercourse given by the complainant will be invalidated in the ACT, NT, TAS and VIC. In TAS, where the victim-complainant consents to sexual intercourse because of the unlawful detention of someone else, that consent will also be invalidated.

Threats, fear and intimidation

All Australian jurisdictions recognise that some threats can make people so intimidated or fearful that they submit to sexual intercourse. The law recognises that this kind of submission is not real consent. Each jurisdiction describes the kind of threats that the law recognises as invalidating consent.

All Australian jurisdictions recognise that some threats can make people so intimidated or fearful that they submit to sexual intercourse. The law recognises that this kind of submission is not real consent.

SA law offers very limited protection. Case law establishes that threats of force invalidate consent, but does not offer guidance on whether threats of any other kind against someone other than the victim-complainant will invalidate consent.[22] Other jurisdictions go further. For example, TAS law invalidates consent due to "threats of any kind" against the victim-complainant or another person. QLD and WA law invalidate consent due to "threats" or "intimidation". The ACT specifies a wide range of threats as invalidating consent to sexual intercourse, including threats "to inflict violence or force" on the complainant or someone else "present or nearby"; threats of extortion; and threats "to publicly humiliate or disgrace . . . physically or mentally harass" the complainant or someone else.

Some jurisdictions focus instead (or as well) on the *effect* of threatening behaviour, referring to the victim-complainant's fear, intimidation or terror. For example, NSW law says that where consent is given because the victim-complainant or someone else was terrified or subjected to threats, that consent is invalid. In the NT and VIC, if the victim-complainant consents to sexual intercourse because of fear that harm of any type will be done to herself, himself or another person, that consent will be invalid.

NSW has an additional offence of "sexual intercourse procured by intimidation, coercion and other non-violent threats". It is committed where a person has sexual intercourse with someone else, knowing that the other person submitted to sexual intercourse because of intimidation or threats which did not involve threats of physical force. This offence carries a lower penalty than "sexual assault".

Intoxication, unconsciousness, sleep

Where the victim-complainant is asleep, unconscious or so affected by alcohol or other drugs that they are not able to freely agree to sexual intercourse, NT, SA,[23]TAS and VIC law recognise that the victim-complainant is incapable of consenting. Under QLD and WA law, consent means free and voluntary consent, which suggests that a sleeping, unconscious or severely intoxicated victim-complainant would be viewed as incapable of consenting.[24] However, in all states and territories, a person who agrees to sexual intercourse when they are under the influence of alcohol or other drugs and who would not have agreed were it not for that influence will be treated as having consented. It is only when they are unable to make a decision about whether or not to consent that the law will invalidate any apparent consent. ACT law adds that consent caused by the complainant's "physical helplessness" will not be recognised by the law.

Fraud, deception and mistaken belief

All jurisdictions recognise that some kinds of fraud, deception or mistaken belief should invalidate consent. However, they differ in the types of fraud that can invalidate consent. They also take different perspectives on addressing fraud and mistaken belief. Some jurisdictions focus on the fraud or deception practised by the accused, while others focus on the mistaken belief formed by the victim-complainant (which may or may not be due to fraud on the part of the accused).

The ACT, TAS and WA recognise consent due to any kind of fraud or deceit as invalidating apparent consent. The jurisdictions with narrower laws about the types of fraud that may impact on consent focus on deception or mistakes about the *nature* or *purpose* of the act, about whether the act was needed for medical purposes, or about the *identity* of the person proposing sexual intercourse.

All jurisdictions recognise that some kinds of fraud, deception or mistaken belief should invalidate consent.

Fraud about the *nature* of the act involves the accused deceiving the victim-complainant into believing that what will happen is a non-sexual act of some kind, when what the accused actually does is sexual intercourse. Fraud about the *purpose* of the act addresses situations where the victim-complainant and the accused have the same understanding of the type of act that is proposed. However, the accused has deceived the victim-complainant into believing that the act is needed for one purpose, when the accused is carrying it out for a completely different reason. Fraud about medical or hygienic purposes is a specific example. Laws invalidating consent given as a result of fraud as to medical purposes were passed in many parts of

Australia after a case in which an accused led several women to believe he needed to conduct a vaginal ultrasound examination for medical purposes when, in reality, there was no medical purpose for his actions.

Fraud about the identity of the person proposing intercourse recognises that when a person consents to sexual intercourse believing they are having sexual intercourse with a particular person, but they have been deceived into having sex with a completely different person, they have not given genuine consent.[25] In some jurisdictions, the law recognises a more specific form of fraud about identity where a person is deceived into believing that they are having sexual intercourse with their sexual partner or mistakenly believes they are married to the accused.

Many jurisdictions recognise mistaken beliefs held by the victim-complainant as invalidating consent to sexual intercourse. Some recognise mistaken belief instead of recognising fraud, while others recognise both fraud and mistaken belief as invalidating consent. For example, TAS, NT and VIC recognise the complainant being mistaken (in TAS, "reasonably mistaken") about the nature of the act (in TAS, the "nature or purpose of the act") as invalidating consent.

Inability to understand the nature of the act

Where a complainant is unable to understand the sexual nature of the act (for example, due to cognitive impairment or young age), the law recognises that they are not genuinely consenting to sexual intercourse. All jurisdictions have specific offences dealing with complainants who are children or cognitively impaired (which are not dealt with in this paper). In addition, the ACT, NT, QLD, SA, TAS and VIC specifically recognise inability to understand the sexual nature of the act as invalidating consent to sexual intercourse (see Goodfellow and Camilleri 2003 and VLRC 2004 for the laws and legal issues relating specifically to people with a cognitive impairment).

How does it work in practice?

ACT model

The ACT approach to consent was intended to reduce the focus on the victim-complainant's non-consent at trial. However, a range of studies of similar approaches have found that in practice, the law's preoccupation with consent has continued (MCCOC 1999). "Sexual intercourse without consent" is often charged in addition to an aggravated assault, so that consent must be proved (MCCOC 1999). The ACT Law Reform Commission found that few charges were laid under the aggravated sexual offence provisions. "In most cases the charge is in fact one of sexual intercourse without consent" (2001). The ACT Law Reform Commission recommended the current approach be replaced with a rape offence and a series of aggravated rape offences (ACT Law Reform Commission 2001: 30). NSW repealed a similar scheme in 1989 for similar reasons (MCCOC 1996).

Free agreement

Models of consent that use the language of "free agreement" have been seen as defining "consent" more tightly than the previous approaches because they suggest a positive state of mind, where the focus is on what the victim-complainant actually said or did to indicate to the accused that they were consenting. This has been seen as providing better legal recognition of the "sexual autonomy and freedom of choice of adults" (MCCOC 1999:41). Only three jurisdictions (NT, TAS and VIC) have moved to the language of agreement rather than consent.

The ACT consent provisions (which are very similar to those of NSW) do not define consent, but set out circumstances in which consent is *not* present. Review of these provisions has found that they are unhelpful and insufficiently clear and suggested that they be replaced with a clear definition of consent as "free and voluntary" (ACT Law Reform Commission 2001).

Jury directions

Some jurisdictions, such as NT and VIC have implemented jury directions about consent which the judge is required to provide to the jury. These directions were designed to "formalise good practice" and ensure juries are provided with consistent, appropriate information about the legal standard of consent (MCCOC 1999: 265; Home Office 2004). Recent Victorian evaluation of jury instructions designed to make sure that juries understand that inactivity or silence indicate lack of consent under Victorian law has shown that the directions are almost always given (VLRC 2004).

Although the Victorian legislation does not require a direction on these factors, the evaluation has found that the factors, which are recognised as negating any apparent consent (such as force, threats and fraud), are only referred to by judges in about half of all cases when the jury is being instructed. However, prosecutors do not appear to be objecting to the absence of direction or the failure of judges to draw attention to circumstances in which consent is legally invalid (VLRC 2004).

Review of Tasmanian jury instructions also showed that in the absence of required jury instructions, juries were seldom told that submission in the face of violence and threats did not equate to consent. Terese Henning's submission to the Tasmanian review concluded that "in the absence of such instructions the result has not been neutrality but preservation of stereotypes which enable coercion to be perceived as legitimate sexual conquest and seduction" (Task Force on Sexual Assault and Rape in Tasmania 1998: 30).

What the accused thought

Prior to the reforms, rape could only be committed where the accused intended to have sexual intercourse with the knowledge that the victim-complainant was not consenting, or might not be consenting. The accused's belief about consent was therefore a crucial element of the offence. The prosecution had to prove beyond reasonable doubt that the accused knew that the victim-complainant was not consenting (the *mens rea* requirement).

The Australian states and territories have taken very different approaches to the law concerning the mental state of the accused person. In the following description, jurisdictions are grouped together where they share relatively similar approaches on this issue.

Australian Capital Territory

In the ACT an accused can be convicted of sexual assault in the first, second or third degree without the prosecution needing to prove that the accused knew (or realised it was possible) that the victim-complainant was not consenting. The legislation presumes that a person who has injured, assaulted or threatened someone else with the intention that they, or someone assisting them in the assault, will have sexual intercourse realises that the person they injured, assaulted or threatened was not consenting to sexual intercourse.

The offence of "sexual intercourse without consent" requires proof that the accused either knew that the victim-complainant was not consenting to sexual intercourse, or thought about consent and decided to persist with sexual intercourse whether the victim-complainant was consenting or not.[26]

Where the accused knows that the victim-complainant consented to sexual intercourse because of force, threats, drugs, fraud or abuse of authority, the law treats the accused as knowing that the victim-complainant was not consenting.

If an accused argues that he or she mistakenly believed that the victim-complainant consented to a sexual act, the judge must direct the jury that they may consider whether the belief was reasonable in the context.

New South Wales

In order to be found guilty of "sexual assault" in NSW, it must be proved beyond reasonable doubt that the accused knew that the other person was not consenting to sexual intercourse or was aware of the possibility that the other person was not consenting to sexual intercourse and proceeded with sexual intercourse with that awareness. An accused who did not think about whether or not the other person was consenting to sexual intercourse at all will also be guilty of sexual assault (provided the risk of non-consent would have been obvious to someone with the accused's mental capacity).[27]

If the accused knew the other person consented to sexual intercourse only because they were mistaken about the accused person's identity, they mistakenly believed they were married to the accused, the accused had deceived them into believing that the act was required for a medical or hygienic purpose, or they held a mistaken belief about the nature of the act that was brought about by the accused's fraud, then the law treats the accused as knowing the victim-complainant was not consenting.

In the NT, SA and VIC, a conviction for "sexual intercourse without consent" or "rape" requires the prosecution to prove that the accused intended to have sexual intercourse with the victim-complainant knowing that they did not consent or realising that it was possible they were not consenting.

Northern Territory, South Australia and Victoria

In the NT, SA and VIC, a conviction for "sexual intercourse without consent" or "rape" requires the prosecution to prove that the accused intended to have sexual intercourse with the victim-complainant knowing that they did not consent or realising that it was possible they were not consenting.[28] As a result, if there is reasonable doubt about whether the accused believed that the victim-complainant was consenting, the accused should be found "not guilty". The accused's belief in consent does not need to be reasonable in order to form a complete defence; it only needs to be honestly held.[29]

In the NT, where an accused has become voluntarily intoxicated through alcohol or other drugs, it is presumed that they foresaw "the natural and probable" consequences of their actions.

In SA, if the accused was intoxicated by alcohol or other drugs at the time of the alleged offence, the jury must take that intoxication into account in deciding what his or her level of awareness of consent was.[30] If the accused realised the victim-complainant was not or might not be consenting, in spite of being intoxicated, they should be convicted. However, if the intoxicated accused honestly

believed the victim-complainant was consenting (even though a sober person would have realised they were not), they should be acquitted.

In VIC, where the accused has given evidence that she or he believed that the victim-complainant was consenting, a judge must direct the jury to consider whether that alleged "belief was reasonable in all the relevant circumstances".[31] The judge must help the jury understand this instruction by drawing connections between this statement and the specific case they are considering.

Queensland, Tasmania and Western Australia

In QLD, TAS and WA, the prosecution must prove that the accused intentionally penetrated the victim-complainant. However, there is no additional requirement for the prosecution to prove that the accused knew the victim-complainant was not consenting. If the accused argues that they believed the victim-complainant was consenting, that belief is only a defence if it was an honest *and reasonable* belief.

A conviction for "incest" requires proof of a smaller number of elements than a conviction for "sexual assault" or "rape", where consent is a complete defence. The requirement of proving beyond reasonable doubt that the complainant did not consent can result in lengthy cross-examination of the victim-complainant in trials for rape and sexual assault offences.

However, in TAS, a mistaken belief in consent will not be accepted as a defence if the accused was intoxicated by self-administered alcohol or other drugs and would not have made this mistake if they had been sober, or the accused was reckless about whether the victim-complainant was consenting or not; or the accused did not take reasonable steps to find out whether or not the victim-complainant was consenting.

These provisions were brought in after review of Tasmanian law showed that the mistaken belief defence had continued to allow evidence of irrelevant matters based in victim-blaming myths that would not have been allowed in relation to other crimes. Expert advice to the review found that "a just and balanced position requires that the accused must have taken actual and reasonable steps to ascertain that the complainant was consenting" in order to have a defence (Task Force on Sexual Assault and Rape in Tasmania 1998: 31).

Attempted rape, aggravated sexual assaults

ACT, NSW and WA have specific offences of "aggravated sexual assault" which carry heavier penalties than non-consensual sexual intercourse, which does not involve aggravating factors such as additional violence, injury, or multiple perpetrators. Every jurisdiction has an offence of "attempt" which allows a charge of "attempted rape" or "attempted sexual assault". Every jurisdiction has the capacity to charge assaults or injuries in addition to non-consensual sexual intercourse as separate offences.

How does it work in practice?

Northern Territory

The Northern Territory parliament has indicated its intention to review the law which establishes the mental state of the accused in NT law (Gray 2005). This decision appears to have been taken after a decision of the High Court[32] which placed this aspect of the law beyond doubt, finding that the prosecution must prove that the accused knew the victim-complainant was not, or might not have been consenting.

Victoria

Victorian law requires the judge to instruct the jury that when deciding whether the accused believed that the victim-complainant was consenting, "it must take into account whether that belief was reasonable in all the relevant circumstances".[33] Recent evaluation has shown that this direction is given in 75 per cent of cases (VLRC 2004). However, the same evaluation found that in some cases, jury instructions imply that the victim-complainant's prior sexual activity is relevant to the accused's belief in consent, a suggestion that is inconsistent with the communicative model of the consent established by the legislation.

The Victorian Law Reform Commission has recommended changes to the mental element which would bring it closer to the Canadian model. If these changes were implemented, the prosecution would need to prove the accused intended to sexually penetrate the victim-complainant. A defence of honest belief in consent would be available. This model would be closer to the current law of QLD, TAS and WA. However, the Victorian proposals go further still. In order to use the defence, the accused would need to provide some evidence, rather than a mere assertion of honest belief in consent. A judge would not be able to place the defence of honest belief in consent before the jury unless there was sufficient evidence of a mistaken belief for it to go to the jury. No defence would be available where the accused had not taken reasonable steps to assess consent, the accused did not turn their mind to the question of consent at all, or circumstances which invalidate consent (such as force, threats or fraud) were present, and the accused was aware of them. Any intoxication of the accused would not be taken into account (VLRC 2004).

Incest provisions

Every state and territory has legislation which criminalises sexual intercourse between close relatives. Penetrative sexual assaults committed by one family member against another family member are sometimes charged and prosecuted as "incest" rather than as "rape" or a similar offence. Usually this is done because, in contrast to "sexual assault" or "rape", the offence of "incest" does not require the prosecution to prove the victim-complainant's non-consent nor the accused's awareness of non-consent. Most incest offences make all sexual intercourse between close relatives criminal, whether it is consensual or not. As a result, a conviction for "incest" requires proof of a smaller number of elements than a conviction for "sexual assault" or "rape", where consent is a complete defence. In practice, the requirement of proving beyond reasonable doubt that the complainant did not consent can result in lengthy cross-examination of the victim-complainant in trials for rape and sexual assault offences. Unfortunately, as Taylor's (2004) research shows, incest trials often also involve lengthy cross-examination of the victim-complainant.

The fact that the crime of "incest" applies both to consensual *and* non-consensual sexual acts can make it particularly inappropriate. Some people who have been raped or sexually assaulted by close relatives feel that a crime which fails to distinguish between consensual and non-consensual sexual contact is inappropriate and offensive. Some have suggested that an offence called "intrafamilial rape" or "intrafamilial sexual assault" would better recognise the non-consensual nature of their experiences (Taylor 2004: 298).

Caroline Taylor's (2004) research suggests that "rape" has clear associations with "force and violation", while "incest" is seen as a less serious offence and associated with intense social stigma, including a sense that the victim-complainant is in some way culpable. She documents this association not only among victim-complainants, but also among defence counsel and judge.[34] In some incest trials, defence counsel insist on a clear distinction between incest and rape, with the clear implication that incest is *not* rape, a perception that fails to recognise the non-consensual nature of sexual abuse within families (Taylor 2004; VLRC 2004). Western Australian law now refers to "sexual offences by relatives" while every other jurisdiction still has an offence called "incest". The Victorian Law Reform Commission has recommended that the name of this offence should be changed to reflect the changing focus away from prohibiting sexual intercourse between close relatives and toward "protecting children and young people from exploitation and abuse within the family" (VLRC 2004: 442).

The very systems that Australia has implemented to respond to criminal conduct are still judged inappropriate or unusable by many people who are sexually assaulted yet never report their experiences to the police.

The range of family relationships which fall within incest offences varies widely across the country. South Australian law addresses the narrowest range of relationships. It deals only with blood relations, and criminalises sexual intercourse between parent and child and between siblings. Other jurisdictions, QLD and VIC in particular, take a broader view, recognising family relationships rather than blood relationships as central to the behaviour which should be considered incest. As a result, *de facto* relationships, half-relationships, step-relationships and relationships through adoption and fostering are included in incest offences. QLD also extends the reach of incest legislation further into blood relationships, criminalising sexual intercourse between people related as aunt, uncle, niece or nephew.

Some jurisdictions treat crimes against people under the age of consent as a single group of offences. Under this kind of system, the law treats relatives who sexually abuse children and young people within their families in the same way as it treats strangers who perpetrate sexual abuse. Sexual intercourse between close relatives is only treated as a separate offence where the victim-complainant is over the age of consent.

In some jurisdictions, "incest" provisions can apply both to the person who perpetrates the abuse and to the person who is abused. Although some jurisdictions explicitly provide a defence to incest where a person is coerced into sexual intercourse with a close relative, others do not. This raises the possibility that a person who has been sexually assaulted by a relative could be charged with incest themselves: a threat some perpetrators use to silence victim-complainants (Taylor 2004). Even where it is available, a defence of coercion can only be used once the coerced person has been charged with the offence.

The Victorian Law Reform Commission believes that: "Although it is not common for the person who reports the abuse to be charged as a co-offender . . . the possibility of charge may act as a disincentive for an adult victim to report the offence" (VLRC 2004: 443). Further, the Commission suggests that a defence of "coercion" may be poorly adapted to addressing "the exploitative power dynamics that can exist in families" (VLRC 2004: 443).

For more detailed information about the law of incest in each jurisdiction, please refer to the Table on pp. 32-41.

Conclusion

After thirty years of reform, the evaluations discussed in this issues paper suggest success has been partial at best (Heenan and McKelvie 1997; Stubbs 2003; VLRC 2004).

The cost to people who experience sexual assault is clear. The very systems that Australia has implemented to respond to criminal conduct are still judged inappropriate or unusable by many people who are sexually assaulted yet never report their experiences to the police (Cook 2001; Lievore 2003). Those who do use the criminal justice system continue to find it traumatising, humiliating and distressing (VLRC 2004; Taylor 2004). The process does not adequately recognise and respect the community service that complainant witnesses provide in reporting offences and participating in trials (VLRC 2004). Compliance with evidence laws designed to provide safeguards for complainant witnesses have achieved limited compliance. Conviction rates remain low. Yet the cost to the broader society is also substantial.

"Criminal procedures that discourage reporting or which stigmatise and traumatise witnesses in sexual assault cases may result in some offenders escaping apprehension, which may put more members of the community at risk" (VLRC 2004: 81). While only a fraction of the total number of sexual offences being committed enter the criminal justice system and even that tiny fraction are responded to inadequately, strong messages are communicated to Australian society. Clearly these messages cannot be left unchallenged.

Legal change is not the only way of addressing sexual assault, and it may not be the most important strategy (Stubbs 2003). However, so long as the criminal justice system remains a critical response to serious crime, access to justice through that system for people who are sexually assaulted is essential.

The lack of success of rape law reforms in Australia and internationally has been attributed to a range of sources, including failure to implement adequately funded, systematic and thoroughgoing reform (Kift 2003). Some commentators argue that rape law reforms have so far fallen short of producing the "revolution in thinking that the research data so clearly calls for" (Cook 1999: 1871).

However, in assessing the legacy of thirty years of rape law reform in Australia, it is important not to forget how far legal change has come nor to ignore how much more change is needed. The last thirty years have seen dramatic, innovative changes to law and legal practice in relation to sexual offences, including major modifications to every element of the offences and to relevant aspects of the law of evidence. There is also evidence of significant cultural change through this period (Crime and Misconduct Commission 2003).

Nevertheless, so long as the legal system continues to be a source of re-traumatisation rather than redress, efforts to change the shape and implementation of the law will be necessary. The existing range of legislation of the Australian states and territories forms a rich resource in working toward creating the revolution in legal thinking that may still be required.

SEXUAL OFFENCE LAWS AND PROCEDURES IN AUSTRALIA

Sexual history provisions by jurisdiction

	ACT	NSW	NT	QLD
Legislative provisions	**Evidence (Miscellaneous Provisions Act) 1991 ss 50-53**	**Criminal Procedure Act 1986 s 293**	**Sexual Offences (Evidence and Procedure) Act 1983 s 4 (1-4)**	**Criminal Law (Sexual Offences) Act 1978 Part 2 s 4**
Application	Applies to all court processes including bail, interlocutories, committals and sentencing	Applying to all offences and in whatever court dealt with	Evidence Act applies to all court processes including examination of witnesses and trials	Includes examination of witnesses and trials
Evidence that is not admissible under any circumstances	Sexual reputation of complainant	Sexual reputation of complainant		General reputation of complainant "with respect to chastity"
Evidence that is only admissible with the court's permission	Evidence of sexual activities of complainant with *any person other than the accused*	Evidence that discloses or implies complainant has or may have had sexual experience or lack of sexual experience, or has or may have taken part in any sexual activity *with any person,* is inadmissible *unless* it falls within one of the exceptions listed below	Reputation as to chastity and sexual activities with *any person other than the accused*	Sexual activities *with any person*
Primary criteria for admissibility of evidence	Evidence must have substantial relevance to facts in issue OR Be a proper matter for cross-examination about credit	Evidence that discloses or implies complainant has or may have had sexual experience or lack of sexual experience, or has or may have taken part in any sexual activity *with any person,* is inadmissible *unless* it falls within one of the exceptions listed below	Substantial relevance to facts in issue	Evidence must have substantial relevance to facts in issue OR Be a proper matter for cross-examination about credit
Additional guidance on admissibility	Evidence does not have substantial relevance because it raises an implication about the complainant's general disposition Evidence is not a proper matter for cross-examination unless likely to materially impair confidence in reliability of complainant's evidence	Evidence must have relevance to facts in issue and: Concern events close in time to, or part of a connected set of events including alleged offence OR Concern ongoing/recent relationship of complainant and accused OR Could explain presence of semen/regnancy/disease/injury OR Could show complainant or accused had a disease that the other did not have OR Could show allegation made upon discovery of pregnancy or disease OR Unfair prejudice to the accused would occur if complainant could not be questioned about matters raised in the prosecution case and probative value of evidence in rebuttal outweighs potential distress, humiliation, or embarrassment to the complainant	Evidence has substantial relevance if it took place at the same time as the offence or was part of a sequence of events "that explain the circumstances in which the alleged offence was committed" Evidence does not have "substantial relevance" if it merely raises an implication about complainant's general disposition Evidence is not a proper matter for cross examination unless likely to materially impair confidence in reliability of complainant's evidence	Evidence has substantial relevance if it took place at the same time as the offence or was part of a sequence of events that may explain the circumstances in which the alleged offence may have been committed Evidence does not have "substantial relevance" if it merely raises an implication about the complainant's general disposition Evidence is not a proper matter for cross examination unless likely to materially impair confidence in reliability of complainant's evidence
Process for seeking admission of evidence	Application in writing Application must be determined in the absence of any jury Complainant may be excluded from hearing at accused's request	Application must be determined in the absence of any jury prior to any questions being put to the witness	Application must be determined in the absence of any jury Complainant may be excluded from hearing at accused's request	
Requirements for written reasons	If granting permission the court must give written reasons	If granting permission, the Court must give written reasons and describe the nature and scope of the admissible evidence in writing		

SA	TAS	VIC	WA
Evidence Act 1929 (SA) s 34i	**Evidence Act 2001 s194 M**	**Crimes Act 1958 s 37A**	**Evidence Act 1906 ss 36B-36BC**
Every proceeding before any court whatever	Any proceeding before a magistrate or court including sentencing proceedings	Any proceeding that relates to a charge for a sexual offence including a committal	Every legal proceeding
Sexual reputation of complainant	Sexual reputation of complainant	General reputation of complainant "as to chastity"	Sexual reputation or disposition of complainant
Recent sexual activities *with the accused* The complainant's sexual activities before or after the events of and surrounding the alleged offence	Sexual experiences of the complainant other than those which were part of the events or circumstances out of which the charge arose	Cross-examination or evidence of sexual activities *with accused or any other person*	Sexual experiences of the complainant with any person other than those immediately connected with the alleged offence
Evidence must be of substantial probative value OR Likely materially to impair confidence in the reliability of the evidence of the alleged victim AND Admission must be required in the interests of justice	Direct and substantial relevance to a fact or matter in issue	Evidence must have substantial relevance to facts in issue OR Be a proper matter for cross-examination as to credibility OR Be of substantial relevance to appropriate sentence (in some circumstances) AND Court must believe admission is in the interests of justice	Substantial relevance to facts in issue
Court must give effect to the principle that "alleged victims of sexual offences should not be subjected to unnecessary distress, humiliation or embarrassment" Evidence about sexual history is not permitted if its only purpose is to raise inferences about the complainant's general disposition complainant	Evidence should only be admitted if its probative value outweighs potential distress, humiliation, or embarrassment to the complainant Evidence does not have direct or substantial relevance to a fact or matter in issue if it is relevant only to the credibility of the person against whom the offence is alleged to have been committed Court must consider age of complainant and number and nature of questions likely to be put to them in assessing likely distress and humiliation	Evidence does not have "substantial relevance" because it raises an implication about the complainant's general disposition Evidence is not a proper matter for cross examination unless there are special circumstances which mean it is likely materially to impair confidence in reliability of complainant's evidence	Evidence should only be admitted if its probative value outweighs potential distress, humiliation, or embarrassment to the complainant
Application must be determined in the absence of any jury	Application must be determined in the absence of any jury	Application to the court in writing, and notice to Police or DPP, at least 14 days before hearing and set out the questions sought to be asked, expected scope of questioning and relevance of evidence Application must be determined in the absence of any jury Complainant may be excluded from hearing at accused's request	Application must be determined in the absence of any jury
	If granting permission, the Court must give reasons addressing each of the requirements for admissibility	If granting permission, the court must give written reasons and cause them to be entered into the court records	

Defining "sexual intercourse" or "sexual penetration" by jurisdiction

	ACT	NSW	NT	QLD
Name of offence(s)	**Sexual intercourse without consent**	**Sexual assault**	**Sexual intercourse without consent**	**Rape**
Legislation which establishes the offence/s	s54 Crimes Act 1900	Ss 61I Crimes Act 1900	S 192 Criminal Code Act 1983	S 349 Criminal Code Act 1899
Genital sexual contact	Penetration to any extent of the vagina or anus of one person by another person with any body part or object Unless done for a proper medical purpose or otherwise authorised by law	Penetration of the female genitals or anus by any part the body or any object controlled by another person Unless done for a proper medical purpose	Insertion to any extent of any body part into the internal or external female genitals or anus of another person Unless done for medical purposes	Penetration of vagina or anus with a penis to any extent; Penetration of vulva, vagina or anus to any extent with an object or part of the body other than a penis Unless done for proper medical, hygienic or law enforcement purposes
Oral sexual contact	Insertion of any part of the penis of one person into the mouth of another; Cunnilingus	Introduction of any part of the penis of one person into the mouth of another; Cunnilingus	Insertion of any part of one person's penis into the mouth of another; Cunnilingus; Fellatio	Penetration to any extent by the penis of one person into the mouth of another
Continuation	Continuation of sexual intercourse	Continuation of sexual intercourse	Continuation of sexual intercourse	
Surgically constructed genitalia		"Female genitalia" includes a surgically constructed vagina	"Vagina" includes a surgically constructed vagina	
Additional information	Sexual assaults in the first to third degree require aggravating circumstances and *do not require proof of sexual intercourse*	Additional offence of "sexual assault by forced self-manipulation"; Additional offences of aggravated assault; Additional offence of "assault with intent to have sexual intercourse" requires proof of aggravating circumstances but *does not require proof of sexual intercourse*	Additional offence of "coerced self-manipulation"	Additional offence of "assault with intent to commit rape" *does not require proof of sexual penetration*

What the accused thought by jurisdiction

	ACT	NSW	NT	QLD
Name of offence(s)	**Sexual intercourse without consent**	**Sexual assault**	**Sexual intercourse without consent**	**Rape**
What mental state (if any) is required for a conviction?	Knowledge of non-consent OR Awareness of possibility of non-consent	Knowledge of non-consent OR Awareness of the possibility of non-consent OR Failure to give any thought to the question of consent OR Knowledge consent has been given due to fraud or mistake	Knowledge of non-consent OR Awareness of the possibility of non-consent	Neither intention nor recklessness need to be proved Defence of honest and reasonable but mistaken belief in consent is available

SA	TAS	VIC	WA
Rape	**Rape**	**Rape**	**Sexual penetration without consent**
S 48 Criminal Law Consolidation Act 1935	S 185 Criminal Code Act 1924 Criminal Code Amendment (Consent) Bill 102/2003 before Upper House (Feb 2005).	S 38 Crimes Act 1958	S 319 Criminal Code Act 1913
Penetration to any extent of the external lips of the vagina ("labia majora") or anus with any part of the body or any object	Penetration to any degree of "the vagina, genitalia, anus, or mouth by the penis"	Penetration of the vagina, external genitalia or anus of another person with an object or any part of the body	Penetration of the vagina, labia majora, anus or urethra of one person with any part of the body of another or any object controlled by another person
Agreement to an act on the basis that it is being done for medical or hygienic purposes is not agreement for any other purpose		Unless done in good faith for medical or hygienic purposes	Unless done for proper medical purposes
Cunnilingus; Fellatio		Penetration to any extent by the penis of one person into the mouth of another	Introduction to any extent of one person's penis into the mouth of another; Cunnilingus; Fellatio
Continuation of sexual penetration	Continuation of sexual intercourse	Continuation is included in definition of "rape"	Continuation of sexual penetration
	"Vagina" and "penis" include surgically constructed genitalia	"Vagina" includes a surgically constructed vagina	
	Additional offence of aggravated sexual assault addresses penetration of the vagina, genitalia or anus by any part of the body other than a penis or by an inanimate object	"Sexual penetration" includes compelling a male to sexually penetrate another person with his penis; and Compelling a male "not to withdraw his penis" from another person Additional offence of "assault with intent to commit rape" *does not require proof of sexual penetration*	"Sexual penetration" includes manipulation of any part of the complainant's body in order to cause sexual penetration of the accused; Additional offences of aggravated sexual penetration without consent

SA	TAS	VIC	WA
Rape	**Rape**	**Rape**	**Sexual penetration without consent**
Knowledge of non-consent OR Awareness of the possibility of non-consent	Intention to sexually penetrate Neither intention nor recklessness need to be proved Defence of honest and reasonable but mistaken belief in consent available UNLESS Mistaken belief is caused by *self-inflicted intoxication, *recklessness about consent or *failure to take reasonable steps to check consent	Awareness of non-consent OR Awareness of possibility of non-consent	Neither intention nor recklessness need to be proved Defence of honest and reasonable but mistaken belief in consent is available

Non-consent

	ACT	NSW	NT	QLD
Name of offence(s)	**Sexual intercourse without consent**	**Sexual assault**	**Sexual intercourse without consent**	**Rape**
Consent standard	Legislation states circumstances in which consent is negated	Legislation states circumstances in which consent is negated	Free agreement	Free and voluntary consent by a person with cognitive capacity to consent
Directions which must be given to the jury	A person has not consented only because: They did not say or do anything to indicate non-consent; They did not protest, physically resist or sustain physical injury; They consented to sexual acts with the accused or someone else on this, or a previous occasion		A person has not consented only because: They did not protest, physically resist or sustain physical injury; They consented to sexual acts with the accused on this, or a previous occasion	
Circumstances which invalidate consent: the law does not recognise consent if it is brought about by				
Force	Infliction of violence or force on the complainant or someone present or nearby	Aggravated sexual assaults provisions apply	Force used against complainant or someone else	Force
Threats	Threats of violence or force against complainant or someone present or nearby; Threats to inflict violence or force or use extortion against another person; Threats of public humiliation; disgrace, physical or mental harassment against the complainant or someone else	Threats against the complainant or someone else	See fear of force, below	Threats
Fear Intimidation		The complainant, or someone else being terrified	Fear of force, or fear of harm of any type to complainant or someone else	Intimidation Fear of bodily harm
Circumstances affecting consciousness: Alcohol Drugs Intoxication Unconsciousness Sleep Helplessness	The effects of alcohol, drugs or anaesthetic; The complainant's physical helplessness		Complainant is asleep, unconscious or so affected by alcohol or another drug that they are not capable of free agreement	Complainant unable to form a decision about consent because asleep or intoxicated
Fraud and deceit (generally)	A fraudulent misrepresentation of any fact			
Fraud or mistake about the nature or purpose of the act	See fraud provisions above	Mistaken belief about the nature of the act brought about by fraud	A false representation about the nature or purpose of the act	False and fraudulent misrepresentation about the nature or purpose of the act
Fraud or mistake about medical or hygienic purposes	See fraud provisions above	Fraud about medical or hygienic purposes for the act	Mistaken belief the act is for medical or hygienic purposes	
Fraud or mistake about the identity of the person proposing intercourse	A mistaken belief about the identity of the person proposing intercourse	A mistaken belief they were married to the other person; A mistaken belief about the identity of the other person	Mistake about the identity of the other person	The accused bringing about a mistaken belief by the complainant that the accused was the complainant's sexual partner
Inability to understand the nature of the act	Inability to understand the nature of the sexual act		Inability to understand the sexual nature of the act	Consent means free and voluntary consent given by a person who has the cognitive capacity to give consent
Unlawful detention	Unlawful detention of the complainant		Unlawful detention of the complainant	
Abuse of authority or trust	Abuse of a position of authority or trust in relation to the complainant			Exercise of authority
Significance of physical resistance or physical injury (see also jury instructions, above)	A person has not consented just because they did not physically resist	A person has not consented just because they did not physically resist	See jury directions above	

SA	TAS	VIC	WA
Rape	**Rape**	**Rape**	**Sexual penetration without consent**
Free and willing consent	Free agreement: A person does not freely agree if they do not say or do anything to communicate consent	Free agreement (see jury direction below)	Freely and voluntarily given consent
		If a person does not say or do anything to indicate free agreement that is normally enough to show they do not freely agree; A person has not freely agreed only because they did not protest, physically resist or sustain physical injury or because they consented to sexual acts with the accused or someone else on this, or a previous occasion	
Force	Force used against complainant or someone else	Force used against complainant or someone else	Force
Threats of force	Threats of any kind used against complainant or someone else	See fear of force, below	Threats
	Reasonable fear of force	Fear of force or harm of any type to complainant or someone else	Intimidation
Complainant unable to form a decision about consent because asleep or intoxicated	Complainant is asleep, unconscious or unable to form a rational opinion about consent due to effects of alcohol or drugs	Complainant is asleep, unconscious, or so affected by alcohol or another drug they are unable to freely agree	
	Fraud on the part of the accused		Deceit, or any fraudulent means
Fraud about the nature of the act	Complainant being reasonably mistaken about the nature or purpose of the act	Complainant being mistaken about the sexual nature of the act	See fraud provisions above
Agreement on the basis the act is needed for medical or hygienic purposes is not consent for any other purpose		Mistaken belief the act is necessary for medical or hygienic purposes	See fraud provisions above
Fraud about the identity of the person proposing intercourse	Complainant being reasonably mistaken about the identity of the accused	Complainant being mistaken about the identity of the person proposing intercourse	See fraud provisions above
Inability to understand the nature of the act due to young age or cognitive impairment	Inability to understand nature of the act	Inability to understand the sexual nature of the act	
	Unlawful detention of complainant or someone else	Unlawful detention	
	Complainant being overborne by the nature or position of another person		
An accused can be found guilty of rape whether or not the complainant physically resisted	If complainant suffers serious physical harm due to, or in connection with a sexual offence the injury is evidence of non-consent unless there is proof to the contrary	See jury directions above	A person has not consented just because they did not physically resist

Protection of sexual assault counselling records

	ACT	NSW	NT
Legislative provisions	**Evidence (Misc Provisions) Act 1991 s 54**	**Criminal Procedure Act 1986 ss 296-306**	**Evidence Act 1939 s 56**
What is protected?	Counselling communications made by, to or about a person against whom a sexual offence was or is alleged to have been committed Communications made in a context giving rise to a reasonable expectation or a duty of confidentiality	Counselling communications made by, to or about a victim or alleged victim of a sexual offence OR Made to or about the complainant by the counsellor or a support person in the course of counselling; OR Made between counsellors about the complainant	Communications made in confidence by a complainant to a counsellor in the course of the counselling relationship; OR About the complainant by a parent, carer or other supportive person to the counsellor or by a counsellor to the supportive person
What is specifically not protected?	Information obtained by a doctor because of a physical examination of a complainant; Any communication made in the course, or because, of such an examination; Communications for criminal investigations or criminal proceedings arising from sexual offences	Addressed by definition of counselling communication	Communications made about a physical examination of the complainant by a medical practitioner or registered nurse
Are communications prior to charged sexual assault covered?	Yes	Yes	Yes
Primary rules protecting sexual assault counselling communications	Counselling communications are never admissible in preliminary proceedings Evidence disclosing the content of sexual assault counselling is not admissible in other proceedings without permission of the court	Counselling communications are never admissible in preliminary proceedings Evidence disclosing the content of sexual assault counselling is not admissible in other proceedings without permission of the court	Evidence disclosing the content of sexual assault counselling is not admissible without permission of the court
Standards which must be met for disclosure to be ordered	There must be a legitimate forensic purpose for disclosure Disclosure must be of significant assistance to applicant's case	The evidence must have substantial probative value There must be no other evidence which could prove the disputed facts	The evidence must have substantial probative value There must be no other evidence which could prove the disputed facts
Factors court must consider in deciding whether to order disclosure	Whether public interest in ensuring fair trial outweighs public interest in maintaining confidentiality; Whether disclosure is necessary for full defence; Public interest in ensuring complainants receive counselling; Whether disclosure will allow proof of a disputed fact; Whether disputed facts could be proved in another way; Probability disclosure will change outcome; Whether request for disclosure was made on the basis of a "discriminatory belief or bias"; Whether complainant or counsellor object to disclosure; Whether confidentiality of information has decreased with time or changed circumstances	Whether public interest in disclosure substantially outweighs public interest in protection of confidential communications and the confider; The "likelihood, nature, and extent" of potential harm to the complainant	Whether public interest in disclosure outweighs potential harm to the complainant; Likelihood, nature, and extent of potential harm to the complainant

Note that Queensland currently has no legislation protecting sexual assault counselling records and does not appear on this table.

SA	TAS	VIC	WA
Evidence Act 1929 ss 67D-67F	**Evidence Act 2001 s 127B**	**Evidence Act 1958 Division 2A ss 32B-32G**	**Evidence Act 1906 ss 19A-19L**
Communications made to enable a counsellor to assess trauma or provide therapy to complainant Must be made in a therapeutic context in circumstances giving rise to a duty or reasonable expectation of confidentiality	Communications made in a context giving rise to a reasonable expectation or a duty of confidentiality Communication must have been made by the complainant to a counsellor in the course of counselling or treatment relating to harm suffered in connection with the offence OR To, or in relation to the victim for the purposes of counselling or treatment	Communications made in confidence by the complainant to a registered medical practitioner or counsellor in the course of the relationship between medical practitioner and patient	Counselling communications made by, to or about a complainant in a sexual offence Counselling communications made in confidence by the complainant to a counsellor about harm the complainant may have suffered; OR Made to or about the complainant by the counsellor or a support person in the course of counselling; OR Made between counsellors about the complainant
Communications about a physical examination of the complainant by a medical practitioner or registered nurse Communications made for the purposes of legal proceedings arising from the sexual offence	Addressed by definition of counselling communication	Information about a physical examination by a medical practitioner Communications made for the purposes of legal proceedings arising from the sexual offence	Addressed by definition of counselling communication
Not addressed (Wilson v Magistrates Court of South Australia and ANOR [2004] SASC 297 found that the provisions could apply to records of counselling prior to a disclosure of sexual assault, but found it unnecessary to decide wether counselling prior to the commission of an alleged offence would be protected)	No	Yes	Yes
Counselling communications are never admissible in preliminary proceedings and are not liable to pre-trial disclosure Evidence disclosing the content of sexual assault counselling is not admissible in other proceedings unless court grants permission and limits established by the court are complied with	Disclosure is permitted only if complainant has given consent There is no obligation on anyone to produce counselling related documents unless complainant has consented	Evidence disclosing the content of sexual assault counselling is not admissible without permission of the court	Evidence disclosing the content of sexual assault counselling is not admissible without permission of the court Production of counselling communications can be required only with the court's permission-subpoenas issued without court permission are of no effect
There must be a legitimate forensic purpose for disclosure Disclosure must be of significant assistance to applicant's case	Not applicable	The evidence must have substantial probative value There must be no other evidence which could prove the disputed facts	There must be a legitimate forensic purpose for disclosure proved by the applicant There must be no other evidence which could prove the disputed facts Disclosure can be ordered if and only if disclosure is in the public interest
Probative value of the evidence and whether exclusion may lead to a miscarriage of justice; Whether public interest in maintaining confidentiality between complainant and therapist outweighs risk of miscarriage of justice from non-disclosure; Complainant's attitude to disclosure; Whether application for disclosure is being made on basis of discriminatory beliefs or bias; Need to encourage complainants to seek counselling the effectiveness of which may depend on confidentiality; Extent of infringement of reasonable expectation of privacy to anyone who would otherwise be protected by public interest immunity	Not applicable	Whether public interest in disclosure substantially outweighs interest in preservation of confidentiality and possible harm to the complainant Likelihood, nature, and extent of potential harm to the complainant	Whether information will provide substantial evidence; Extent to which disclosure is necessary for a full defence; Likelihood outcome will be affected; Public interest in access to effective counselling; Public interest in adequate counselling records; Likelihood, nature and extent of potential harm to complainant; Any other relevant matter ➤

Protection of sexual assault counselling records continued

	ACT	NSW	NT
Legislative provisions	**Evidence (Misc Provisions) Act 1991 s 54**	**Criminal Procedure Act 1986 ss 296-306**	**Evidence Act 1939 s 56**
Is court inspection of documents required or discretionary?	Preliminary examination *must* be made if court is satisfied the applicant has a legitimate forensic purpose and evidence would significantly assist the applicant's case	If the court needs to rule on an objection concerning a confidential document, the document *must* be produced for inspection by the court	
Is notice required?		Applicant must give reasonable notice in writing to each other party and the protected confider if they are not a party	
Significance of complainant's consent to disclosure	These provisions apply whether or not the confider has consented or has not objected to disclosure	Disclosure permitted with express consent of an adult complainant in writing	Disclosure permitted with consent of the confider, or of an appropriate person where complainant is under 14
Circumstances in which protection can be lost	Communications in the commission of a criminal offence, fraud or civil wrong	Communications in the commission of fraud, or an act giving rise to a civil penalty	Where there is evidence of criminal fraud or perjury
Additional orders the court can make if disclosure is ordered	Orders designed to limit harm to complainant including: Orders closing the court to the public while the protected evidence is disclosed; Orders that the document be edited or a copy be disclosed instead of the original; Orders suppressing of publication; Orders about disclosure of information about the identity of the protected confider	Orders designed to limit harm to complainant including: Orders closing the court to the public while the protected evidence is disclosed; Orders for production, inspection and copying which may be necessary for safety and welfare; Orders suppressing publication; Orders restricting access to identities of people mentioned in documents	Orders designed to limit harm to complainant including: Orders closing the court to the public while the protected evidence is disclosed; Orders for production and inspection which may be necessary for safety and welfare; counsellor or any other party; Orders suppressing publication; Orders restricting access to identities of people mentioned in documents

Sexual offences against close relatives

	ACT	NSW	NT	QLD
Legislative provisions	**s62 Crimes Act 1900**	**s 78 Crimes Act**	**S 134 Criminal Code Act 1983**	**s 222 Criminal Code Act**
Name of offence	Incest	Incest	Incest	Incest
Sexual conduct addressed	Sexual intercourse	Sexual intercourse	Sexual intercourse	Carnal knowledge
Relationships addressed	Lineal descendants Siblings half siblings stepchildren	Close family member aged 16 or older who has been a family member since birth. Parent Child Sibling Half Sibling Grandparent Grandchild	Close family member who has been a family member since birth Parent Grandparent Lineal descendant Sibling Half sibling	Lineal descendant Half-, adoptive or step-lineal descendant Sibling Half-, adoptive or step-sibling Parent Grandparent Uncle/Aunt Nephew/Niece
Mental state	Knowledge of the family relationship	None stated	None stated	Knowledge of the family relationship, or a relationship of that type
Defences	Coercion	Not realising that the other person was related	Coercion	Coercion Lawful marriage Entitlement to be lawfully married
Other		A person on trial for sexual assault or aggravated sexual assault may be found not guilty of the sexual assault but guilty of incest Sexual offences against people under 16 covered by separate offences		Includes step-relationships arising from de facto relationships, fostering and other legal arrangements Excludes step relationship beginning after those involved became adults

SA	TAS	VIC	WA
Evidence Act 1929 ss 67D-67F	**Evidence Act 2001 s 127B**	**Evidence Act 1958 Division 2A ss 32B-32G**	**Evidence Act 1906 ss 19A-19L**
Preliminary examination *may* be made only if court is satisfied the applicant has a legitimate forensic purpose and there is an arguable case the evidence would significantly assist the applicant's case		For the purpose of determining an application for leave the court *may* inspect the document	Preliminary examination *may* be made only if court is satisfied the applicant has proved a legitimate forensic purpose
	Consent of complainant is required	The applicant must give 14 days written notice other parties, the informant and the medical practitioner or counsellor if not a party	Court must notify the applicant and each other party when the application is going to be heard in court
Permission for disclosure cannot be granted by the counsellor, the complainant or their guardian	The confidential communication cannot be admitted as evidence unless the alleged victim consents to disclosure	Disclosure permitted with consent of the confider, or of an appropriate person where complainant is under 14	Disclosure permitted with express consent of an adult complainant in writing Consent by or on behalf of a child witness not permitted
Communications providing evidence of a criminal fraud, perjury or other offence	Not addressed	Communications in the commission of a fraud, perjury or an act giving rise to a civil penalty	Communications as part of a fraud, offence or an act giving rise to a civil penalty
Orders to prevent publication or dissemination of the evidence; or for any other purpose the court considers appropriate	Not addressed	Orders designed to limit harm to complainant closing the court to the public while the protected evidence is disclosed; Orders suppressing publication; Orders about disclosure of the identity of the confider or practitioner	Orders designed to limit the harm caused by disclosure including: Orders closing the court to the public while protected evidence is disclosed; Orders for production, inspection and copying which may be necessary for safety and welfare; Orders suppressing publication; Orders restricting access to identities of people mentioned in documents

SA	TAS	VIC	WA
s 72 Criminal Law Consolidation Act	**s 133 Criminal Code Act**	**s 44 Crimes Act 1958**	**s 329 Criminal Code Act 1913**
Incest	Incest	Incest	Sexual offences by relatives
Sexual intercourse	Sexual intercourse	Sexual penetration	Sexual penetration of a person over 18 Consent to sexual penetration by a person 18 or over
Parent Child Sibling	Lineal ancestor Lineal descendant Siblings Half-siblings	Lineal descendant Step-child Lineal descendant or step child under 18 of de facto spouse Sibling Half sibling Lineal ancestor or step parent (in the case of a person over 18 years)	Lineal ancestor Lineal descendant Sibling Half-siblings
None stated	Knowledge of the family relationship	Knowledge of the family relationship	Knowledge of the family relationship
None stated	None stated	Coercion	None stated
	Explicitly includes ancestors and descendants related by blood rather than marriage		Explicitly includes half-relationships, blood relationships and relationships established by written law Sexual offences against people under 16 covered by separate offences

Endnotes

1 Compare McLennan (1996), who found 18 per cent of adult Australian women have experienced sexual violence since the age of 15.

2 The research evidence that sexual offence trials are re-traumatising is ambiguous, although the evidence that sexual assaults are particularly likely to produce post-traumatic effects is strong (Rosenman 2002; Orth & Maercker 2004). Further traumatisation is particularly undesirable in this context, yet it is a common experience for the proportion of sexually assaulted people who enter the criminal justice system and one which is only likely to be mitigated by "moral satisfaction" and "relief at court outcome" which are most likely to result from conviction (Orth & Maercker 2004: 223).

3 In some jurisdictions, "reputation as to chastity".

4 s 4 (3) Sexual Offences (Evidence and Procedure) Act 1983 (NT); s 4 (4) Criminal Law (Sexual Offences) Act 1978 (Qld).

5 In Victoria, permission can also be granted if the evidence is of substantial relevance to the question of an appropriate sentence for an accused who has given written notice of their intention to plead guilty, has pleaded guilty, or has been convicted of all the sexual offences charged.

6 However, a Western Australian decision has found that cross-examination on previous allegations of sexual abuse, which have been withdrawn or discredited, is permissible provided questions are directed towards establishing that *no* sexual activity took place, rather than towards demonstrating a lack of credibility. The court found that this was not evidence of sexual activity, and consequently such questioning could proceed without the court's permission (*R v Stergiou* [2004] WASC 172). The court also found that cross-examination on the basis that the alleged sexual activity took place consensually *would* fall within the statutory restriction on sexual history evidence.

7 s 34i (1)-(3) Evidence Act 1929 (SA).

8 s 194M Evidence Act 2001 (Tas).

9 Arguments of this type are evident in jurisdictions beyond Heenan's study – for example, *Hill v R* WASCA 177; *R v Stergiou* [2004] WASC 172.

10 *R v Longman* (1989) 168 CLR 79.

11 *R v Longman* (1989) 168 CLR 79.

12 *Doggett v R* [2001] HCA 46.

13 *R v Longman* (1989) 168 CLR 79.

14 Although they may predate disclosure of a sexual offence to the practitioner: *Wilson v Magistrates Court of South Australia and Anor* [2004] SASC 297, [49]-[50].

15 Existing decisions have found that this threshold requires the accused to identify evidence that is material and relevant to the defence prior to the court's agreeing to inspect the documents "as opposed to conducting an investigation into matters which might be of assistance to him" *R v Liddy (No. 3)* [2001} SASC 151. In applying this principle, one judge stated that "trawling" was not a legitimate forensic purpose, and that the legislation posed "an impenetrable barrier against any fishing expedition. There are clearly good policy reasons for doing so." *R v P* [2003] SADC 160, [25], [28].

16 However, in QLD law, penetration of the external female genitalia ("vulva") by a penis, without penetration of the vagina, does not amount to sexual intercourse.

17 QLD and VIC have definitions of sexual intercourse, which would include any form of cunnilingus, which penetrated the external female genitalia.

18 SA courts have stated that the definition of sexual intercourse is "inclusive . . . it is not exhaustive and exclusive", but have not ruled on whether surgically constructed genitalia would fall within the legislation. *R v Remynse* (1987) 135 LSJS 180, 181.

19 *Murphy* (1988) 52 SASR 186.

20 *Question Of Law Reserved On Acquittal Pursuant To Section 350 (1a) Criminal Law Consolidation Act (No. 1 Of 1993)* (1993) 59 SASR 214; (1993) 66 A Crim R 259.

21 In the ACT, the other person must be "present or nearby".

22 *Question Of Law Reserved On Acquittal Pursuant To Section 350(1a) Criminal Law Consolidation Act (No. 1 Of 1993) (1993) 59 SASR 214; (1993) 66 A Crim R 259*, 265.

23 *Lang* (1975) 62 Cr App R 50; *R v Blayney and Blayney* [2003] SASC 405; *R v Green* [2001] SASC 25.

24 *R v Francis* [1993] 2 Qd R 300.

25 *R v Hauth and Fiora* [1994] SASC 4500.

26 These are the terms of a direction the court found to be unobjectionable in *Turrise v R* [2003] ACTCA 23.

27 *R v Kitchener* (1993) 29 NSWLR 696; *R v Tolmie* (1995) 37 NSWLR 660.

28 *Director of Public Prosecutions (NT) v WJI* [2004] HCA 47; *McMaster v R* [1994] NTSC 33; *R v Brown* (1975) 10 SASR 139; *Wozniak and Pendry* (1977) 16 SASR 67, 175: reckless indifference involves "a determination to proceed with advertence to the possibility of non-consent".

29 Although a defence of honest but mistaken belief in consent is available in the NT, it will now be of little relevance to this offence. s 32 Criminal Code Act 1983 (NT).

30 *Evans* (1987) 30 A Crim R 262. s 269 Criminal Law Consolidation Act 1935 (SA) establishes specific rules concerning directions on intoxication where the defendant has not specifically requested jury directions on this issue.

31 S 37 (1) (c) Crimes Act 1958 (Vic).

32 *Director of Public Prosecutions (NT) v WJI* [2004] HCA 47. See also *McMaster v R* [1994] NTSC 33.

33 S 37 (1) (c) Crimes Act 1958 (Vic).

34 See also Duncan (1994) and Mitra (1987).

References

Access Economics on behalf of the Office of the Status of Women (2004), *The cost of domestic violence to the Australian economy: Part 1*, Partnerships Against Domestic Violence, Canberra.

ACT Law Reform Commission (2001), *Report on the laws relating to sexual assault*, Australian Capital Territory Law Reform Commission, Canberra.

Brereton, D. (1994), "'Real rape', Law reform and the role of research: The evolution of the Victorian *Crimes (Rape) Act 1991*", *Australia and New Zealand Journal of Criminology*, vol. 27, no. 1, pp. 74.

Brereton, D. (1997a), "How different are rape trials? A comparison of cross-examination of complainants in rape and assault trials", *British Journal of Criminology*, vol. 37, no. 2, pp. 242.

Brereton, D. (1997b), "A response to Jeremy Gans", *Australia and New Zealand Journal of Criminology*, vol. 30, pp. 36.

Briody, M. (2002), "The effects of DNA evidence on sexual offence cases in court", *Current Issues in Criminal Justice*, vol. 14, no. 2, pp. 159.

Bronnitt, S. & McSherry, B. (1997), "The use and abuse of counseling records in sexual assault trials: Reconstructing the rape shield?", *Criminal Law Forum*, vol. 8, no. 2, pp. 259.

Carrington, K. & Watson, P. (1996), "Policing sexual violence: Feminism, criminal justice and governmentality", *International Journal of the Sociology of Law*, vol. 24, pp. 253.

Cook, B., David, F. & Grant, A. (2001), *Sexual violence in Australia*, Australian Institute of Criminology, Canberra.

Cook, K. (1999), "When is rape a real crime?", *New Law Journal*, pp. 1856.

Corbett, L., Larcombe, W. & Real Rape Law Coalition (1993), "Lunar landscapes: The dark side of sexual assault and the law", in P. W. Easteal & S. McKillop (eds), *Women and the law: Proceedings of a conference held 24-26 September 1991*, Australian Institute of Criminology, Canberra.

Cossins, A. (1998), "Tipping the scales in her favour: The need to protect counselling records in sexual assault trials", in P. Easteal (ed.), *Balancing the scales: Rape, law reform and Australian culture*, Federation Press, Sydney.

Cossins, A. (2003), "Saints, sluts and sexual assault: Rethinking the relationship between sex, race and gender", *Social and Legal Studies*, vol. 12, no. 1, pp. 77.

Crime and Misconduct Commission (2003), *Seeking justice: An inquiry into the handling of sexual offences by the criminal justice system*, Crime and Misconduct Commission, Brisbane.

Cumberland, R., Hennan, M. & Gwynne, M. (1998), *Who's on trial?; A legal education and training kit for CASA workers advocating for victim/survivors of sexual assault,* CASA House, Melbourne.

Daly, K. (2004), "A tale of Two studies: Restorative justice from a victim's perspective", in E. Elliot & R. Gordon (eds), *Restorative justice: Emerging issues in practice and evaluation*, Willan Publishing, Cullompton, UK.

Daly, K., Curtis-Fawley, S., Bouhours, B., Weber, L. & Scholl, R. (2003), *Sexual offence cases finalised in court, by conference, and by formal caution in South Australia for young offenders, 1995-2001*, School of Criminology and Criminal Justice, Griffith University, Brisbane.

de Visser, R., Smith, A., Rissel, C., Richters, J. & Grulich, A. (2003), "Experiences of sexual coercion among a representative sample of adults", *Australian and New Zealand Journal of Public Health*, vol. 27, no. 2, pp. 198.

Doyle, S. & Barbato, C. (1999), "Justice delayed is justice denied: The experiences of women in court as victims of sexual assault", in J. Breckenridge & L. Laing (eds), *Challenging silence: Innovative responses to sexual and domestic violence*, Allen & Unwin, St Leonards, NSW.

Duncan, S. (1994), "Disrupting the surface order and innocence: Toward a theory of sexuality and the law", *Feminist Legal Studies*, vol. 2, no. 1, pp. 3.

Easteal, P.W. (1993), "Beliefs about rape: A national survey", in P. W. Easteal (ed.), *without consent: Confronting adult sexual violence: Conference proceedings No 12*, Australian Institute of Criminology, Canberra.

Edwards, A. & Heenan, M. (1994), "Rape trials in Victoria: Gender, socio-cultural factors and justice", *Australian and New Zealand Journal of Criminology*, vol. 27, no. 3, pp. 213.

Freckleton, I. (1998), "Sexual offence prosecutions: A barrister's prospective", in P. Easteal (ed.), *Balancing the scales: Rape, law reform and Australian culture*, Federation Press, Sydney.

Friedman, B. & Golding, S. (1997), *Guys talk too: Report of the young men and acquaintance rape survey*, Family Planning South Australia, Adelaide.

Gans, J. (1997), "Rape trial studies: Handle with care", *Australia and New Zealand Journal of Criminology*, vol. 30, pp. 26.

Goodfellow, J. & Camilleri, M. (2003), *Beyond belief, beyond justice: The difficulties for victim/survivor with disabilities when reporting sexual assault and seeking justice,* Final report of Stage One of the Sexual Offences Project, Disability Discrimination Legal Service, Melbourne.

Gray, S. (2005), "The state of things in the Territory: Literalism, principal and policy in Northern Territory criminal law", *Criminal Law Journal*, vol. 29, pp. 37.

Heenan, M. (2002-2003), "Reconstituting the 'relevance' of women's sexual histories in rape trials", *Women Against Violence*, vol. 13, pp. 4.

Heenan, M. (2004a), "Just 'keeping the peace': A reluctance to respond to male partner sexual violence", *Issues: Australian Centre for the Study of Sexual Assault*, vol. 1, pp. 1.

Heenan, M. (2004b), "Sexual offences law and procedure", *Aware: Australian Centre for the Study of Sexual Assault Newsletter*, vol. 5, pp. 8.

Heenan, M. & McKelvie, H. (1997), *The Crimes (Rape) Act 1991: An Evaluation Report*, Attorney-General's Legislation and Policy Branch, Department of Justice, Melbourne.

Henning, T. (1996), *Sexual reputation and sexual experience evidence in Tasmanian proceedings relating to sexual offences*, University of Tasmanian Law Press, Hobart.

Henning, T. & Bronitt, S. (1998), "Rape victims on trial: Regulating the use and abuse of sexual history evidence", in P. Easteal (ed.), *Balancing the scales: Rape, law reform and Australian culture*, Federation Press, Sydney.

Home Office (2000), *Setting the boundaries*, Home Office, London.

Kelly, L. & Radford, J. (1996), "'Nothing really happened': The invalidation of women's experiences of sexual violence", in M. Hester, L. Kelly & J. Radford (eds), *Violence against women and children: The contradictions of crime control under patriarchy*, Open University Press, Buckingham.

Kift, S. (2003), "A legal process or a justice system? Sex offences in Queensland: Still seeking justice", *Alternative Law Journal*, vol. 28, no. 6, pp. 292.

Konradi, A. (1996), "Preparing to testify: Rape survivors negotiating the criminal justice process", *Gender and Society*, vol. 10, no. 4, pp. 404.

Law Reform Commission of New South Wales (1998), *Review of Section 409B of the Crimes Act 1900 (NSW): Report 87*, Law Reform Commission of New South Wales, Sydney.

Lees, S. (1996), "Unreasonable doubt: The outcomes of rape trials", in M. Hester, L. Kelly & J. Radford (eds), *Women, violence and male power: Feminist activism, research and practice*, Open University Press, Buckingham.

Lievore, D. (2003), *Non-reporting and hidden recording of sexual assault: An international literature review*, Commonwealth Office of the Status of Women, Canberra.

Mack, K. (1993), "Continuing barriers to women's credibility", *Criminal Law Forum*, vol. 4, pp. 327.

Mack, K. (1998), "'You should scrutinise her evidence with great care': Corroboration of women's testimony about sexual assault", in P. Easteal (ed.), *Balancing the scales: Rape, law reform and Australian culture*, Federation Press, Sydney.

Mack, K. & Roach Anleu, S. (2000), "Resolution without trial, evidence law and the construction of the sexual assault victim", in M. Childs & L. Ellison (eds), *Feminist perspectives on evidence*, Cavendish Publishing Ltd, London.

Marcus, S. (1992), "Fighting bodies, fighting words: A theory and politics of rape prevention", in J. Butler & J. W. Scott (eds), *Feminists theorise the political*, Routledge, London.

McLennan, W. (1996), *Women's safety Australia*, Australian Bureau of Statistics, Canberra.

Mitra, C. (1987), "Judicial discourse in father–daughter incest appeal cases", *Journal of the Sociology of Law*, vol. 15, pp. 121.

Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (1996), *Draft Model Criminal Code Chapter 5: Sexual Offences Against the Person Discussion Paper*, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Canberra.

Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (1999), *Model Criminal Code Chapter 5: Sexual Offences Against the Person*, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Canberra.

Naffine, N. (1992), "Windows on the legal mind: The evocation of rape in legal writings", *Melbourne University Law Review*, vol. 18, no. 4, pp. 741.

Naffine, N. (1994), "A struggle over meaning: A feminist commentary on rape law reform", *Australia and New Zealand Journal of Criminology*, vol. 27, no. 1, pp. 100.

NSW Department for Women (1996), *Heroines of fortitude: The experiences of women in court as victims of sexual assault*, NSW Department of Women, Woolloomooloo.

Northern Territory Law Reform Committee (1999), *Report on the Laws Relating to the Investigation and Prosecution of Sexual Assault in the Northern Territory*, Northern Territory Law Reform Committee, Darwin.

Office of Crime Statistics and Research (2003), *Crime and justice in South Australia 2002*, Attorney-General's Department, Adelaide.

Olle, L. (1999), "Protecting confidential counselling files of sexual assault complaints from disclosure in legal proceedings: A Victorian act", *Women against Violence: An Australian Feminist Journal*, vol. 6, pp. 78.

Orth, U. & Maercker, A. (2004), "Do trials of perpetrators retraumatise crime victims?", *Journal of Interpersonal Violence*, vol. 19, no. 2, pp. 212.

Radford, J. & Stanko, E. (1996), "Violence against women and children: The contradictions of crime control under patriarchy", in M. Hester, L. Kelly & J. Radford (eds), *Women, violence and male power: Feminist activism, research and practice*, Open University Press, Buckingham.

Rosenman, S. (2002), "Trauma and post-traumatic stress disorder in Australia: Findings in the population sample of the Australian national survey of mental health and wellbeing", *Australian and New Zealand Journal of Psychiatry*, vol. 36, pp. 515.

Rozee, P. & Koss, M. (2001), "Rape: A Century of resistance", *Psychology of Women Quarterly*, vol. 25, pp. 295.

Schissel, B. (1996), "Law reform and social change: A time-series analysis of sexual assault in Canada", *Journal of Criminal Justice*, vol. 24, no. 2, pp. 123.

Senate Standing Committee on Legal and Constitutional Affairs (1994), *Gender bias and the judiciary*, Senate Standing Committee on Legal and Constitutional Affairs, Canberra.

Sheehy, E. (1996), "Legalising justice for all women: Canadian women's struggles for democratic rape reforms", *Australian Feminist Law Journal*, vol. 6, pp. 87.

Sheehy, E. (2002), "Evidence law and 'credibility testing' of women: A comment on the E case", *QUT Law and Justice Journal*, pp. 10.

Spohn, C. & Horney, J. (1996), "The impact of rape law reform on the processing of simple and aggravated rape cases", *The Journal of Criminal Law and Criminology*, vol. 86, no. 3, pp. 861.

Stop Rape Now (2004), *Submission to the Legislative Review Committee Inquiry into Sexual Assault Conviction Rates in South Australia*, Stop Rape Now, Adelaide.

Stubbs, J. (2003), "Sexual assault, criminal justice and law and order", *Women Against Violence: An Australian Feminist Journal*, vol. 14, pp. 14.

Stubbs, J. (2004), "Restorative justice, domestic violence and family violence", *Australian Domestic and Family Violence Clearinghouse Issues Paper*, vol. 9, pp. 1.

Task Force on Sexual Assault and Rape in Tasmania (1998), *Report of the Task Force on Sexual Assault and Rape in Tasmania*, Hobart.

Taylor, C. (2005), *Surviving the legal system: A handbook for adult and child sexual assault survivors and their supporters*, Coulomb Communications, Melbourne.

Taylor, C. (2004), *Court licensed abuse: Patriarchal lore and the legal response to intrafamilial sexual abuse of children*, Peter Lang Publishing Inc, New York.

Temkin, J. (2002), *Rape and the legal process*, (2nd edn), Oxford University Press, Oxford.

Vichealth (2004), *The health costs of violence: Measuring the burden of disease caused by intimate partner violence: A summary of findings*, Victorian Health Promotion Foundation, Melbourne.

Victorian Law Reform Commission (2003), *Sexual offences: Interim report*, Victorian Law Reform Commission, Melbourne.

Victorian Law Reform Commission (2004), *Sexual offences: Law and procedure: Final report*, Victorian Law Reform Commission, Melbourne.

Xenos, S. & Smith, D. (2001), "Perceptions of rape and sexual assault among Australian adolescents and young adults", *Journal of Interpersonal Violence*, vol. 16, no. 11, pp. 1103.

Young, A. (1998), "The waste land of the law, the wordless song of the rape victim", *Melbourne University Law Review*, vol. 22, no. 2, pp. 442-465.

Australian Government
Australian Institute of Family Studies
Australian Centre for the Study of Sexual Assault

Australian Institute of Family Studies, 300 Queen Street, Melbourne 3000 Australia
Phone: (03) 9214 7888 Fax: (03) 9214 7839 Internet: www.aifs.gov.au/acssa/