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..... [redacted] .....

Sec. Research Graduate School Committee

ADDENDUM

p 247 Add the following references at the end of para 1: (Smart, 1989, 1995; Heath & Naffine, 1994).

P 295 footnote 2: the reference here should be to Appendix 3.

Please excuse blank page between page 353 and page 354.

p 357 last paragraph, first line, substitute 'was' with 'were'.

p 380 para 3: Insert the following discussion:

The current study therefore points to the importance of future reformist agendas taking account of a range of feminist explanations and interpretations of the legal and social processes and practices that mark the nature of rape trials today. Consistent with a theoretically pluralist approach this thesis strongly supports feminists continued interventions into rape law and policy, but interventions that are done carefully, and critically, and that are informed by the findings of studies such as this one. Specifically, intervention strategies should go beyond the more straightforward, conventionally liberal "solutions" for drafting legislative change and take account of the complexities and contradictions revealed through radical and post-structuralist feminist analyses. For example, this would be particularly important in the context of future legislative development of the 'communicative model of consent'. On the basis of a fuller understanding of the gendered nature of the cultural and psychological underpinnings of the notion of consent, feminists have argued for legislatively reinforcing a model of consent where the principal focus rests on a woman's proactive or positive communication within the sexual performance (rather than on a man's assumed mental state). This would undoubtedly minimise the extent to which an accused is able to argue a defence of consent in the context of an immobilised, sleeping or heavily intoxicated woman complainant. It would also alleviate some of the concerns raised by radical feminists through legislatively endorsing women's capacity to say 'no' (Olsen, 1989: 1157).

However, as the trials in this study continue to show, changing the words of statutes, in isolation, is unlikely to effect any significant change to the position of women complainants in similar cases in the future. They will inevitably continue to be the objects (or subjects) of traditional characterisations by barristers that position them as having displayed risky, daring or provocative behaviour; or will have their reality and credibility demolished within the structures of trial 'talk' (Matoesian, 1983; Young, 1998) where a woman complainant's

capacity for interrupting the conventional 'rape supportive' stories is grammatically contained.

The insights offered by feminist post-structuralists in many ways offer the most theoretically challenging, and perhaps encouraging, dimensions to considering what Smart has termed the 'uneven development of law' and its reform (1995: 154). The greatest potential lies in those writers and theorists who contemplate the rape trial as a site where social meanings may be contested and negotiated, where space is sometimes discursively created for alternatives to the more conventional rape scripts to appear. Here, the work of Cuklanz (1996) is particularly promising. Cuklanz's predominant interest in the 'struggle over meanings about rape' and the notion of consent, direct our attention to the more subtle points or moments through which alternative stories relevant to constructions of gender, rape, and, more specifically, consent, can figure within rape trial discourse. Her work (1996), and that of Young (1998) and Puren (1998), help to explain the situation in some of the trials observed where, through prosecutors' arguments, women's responses, or jurors' evaluations and interpretations of the evidence, narratives that sit outside the conventional frame can compete, and even dominate in terms of trial outcome (e.g. Trials 1 & 9).

p 382 para 1: Change to: Relying on a range of feminist perspectives and theoretical approaches underpinned the approach adopted by Canadian reformists in 1992, the results of which included modifying the *mens rea* requirement.

p 404 line 15, para 4: insert 'In two further cases, the relationship with the accused and two other women....'.

p 405 Add at the end of para 1:

Closer or more familiar relationships existed in other cases where the accused was a former boyfriend (n=2), friend/acquaintance or 'friend of a friend' (coded as second order acquaintanceships) of the woman-complainant (n=6).

p 428 line 20: insert 'Ann' for reference to 'Brogden'.

p 433 line 10: insert 'Janet' for reference to 'Finch'.

p 450 line 24: the reference should read Dorothy 'E' Smith.

p 450 insert line between reference to Smith, Dorothy E.(1988) and reference to Smith, Lynne (1989).

Trial and Error:*

Rape, Law Reform and Feminism

Thesis submitted for the Degree of Doctor of Philosophy (Sociology)

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Bachelor of Arts (Sociology Honours) First Class

Thesis Submitted: March 30, 2001
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** Thanks to Heather Fraser for her contribution to the title of this thesis.*

Many hours had passed. Eventually, a grey sombre man in a suit called out my name. I followed him inside the room. It was grey and sombre. Unlike any room that I had ever seen before. Impressive dimensions. Stark proportions. I took a minute. But there was no time to waste. He urged me forward. He showed me where to sit. He showed me *my place* – a place from which I dared not venture.

I sat on a wooden seat. In a wooden pen. With my feet touching the wooden floor. From my position I could see most of the people in the room. I recognised some of them. I wondered who the others were. The men in grey at the table to the right. The men in grey at the table to the left. The men in uniform. The man with the beard typing. The man elevated above all others was barely discernible from where I was seated. His head bobbed up and down on top of his podium in the sky. He looked old. I knew he was the most important person in the room. I think he did too.

Julie Grix, 1999: 85

When I was a little girl, I was in danger at home - from my brother; and when I went to school, I with every other girl, learned how much the boys really despised us, and when I got older and went to work I heard then, what men thought of us. They just thought women were shit. Good fucks, maybe - and good for cleaning up their houses - but as for respecting us as human beings, well, they didn't. The worst part about it was that it seemed to come so natural to them. And I never could figure out what we had done to them. We didn't rape them and use their bodies...
[Ann's story; raped by her brother from aged nine to fifteen years]

Elizabeth Ward, 1984: 38

To dream of a world without rape is to dream of indeed a radically different world...[but] when one dreams of a new world, this world immediately becomes possible…

[If we see] rape [as] an invention.
Rape can be unimaginable.

Susan Griffin, 1979: 25, 47

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Abstract

This thesis looks at law reform in the area of sexual assault and examines the impact of what has been a mostly feminist inspired agenda for legal and social change. There are two main focuses of the study conducted. One concerns an indepth analysis of the effects of an especially progressive law reform package introduced in Victoria, Australia, during 1991. A first hand observation of rape trials allows for an exploration of how the practice of law has responded to the reforms and thus extends the analysis beyond a quantitative assessment of their success.

A second focus concerns how feminists might understand the issues surrounding rape and rape law. Different feminisms have each provided valuable theoretical insights into whether law reform has been and can be a useful endeavour for women in terms of effecting genuine change to their (our) social conditions. Feminist sociologists and legal theorists also offer explanations for the kinds of practices I observed in the trials.

The study suggests that the "stories" told about rape in the courtroom, and the often subversive practices of the courts, the judiciary, and barristers continue to reflect traditional sexist assumptions and explanations about men, women and sexuality with the effect that the full potential of the reforms is not realised. And yet amongst the cases observed, there existed moments within these trials where alternative, mostly feminist-oriented understandings of rape, from a woman's perspective, discursively appeared. The key issue is whether their assimilation, co-option or appropriation within rape trial discourse means there is a real prospect of rape law reforms giving women justice, or whether they have merely caused some moderation to the practices that have typically led to the silencing and/or blaming of women who experience rape.

Declaration

This thesis contains no material which has been accepted for the award of any other degree of diploma in any university or other institution. I also affirm that to the best of my knowledge, the thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Signed [redacted] Date 30.3.01

Acknowledgements

I am enormously indebted to my two supervisors, Professor Anne Edwards and Dr Jan van Bommel, for the valuable feedback and encouragement they offered on each stage of drafting this thesis. Anne, your support of my intellectual journey in this area has now spanned a decade. I am very grateful for the continued energy and focus you have given my work and ideas, not to mention opening up your home and personal time to myself and Debbie in bridging state lines.

I also wish to express my gratitude to Dr Inez Dussuyer, Manager of the Criminal Justice and Research Unit of the Department of Justice, for allowing me virtually unconstrained access to research files and data bases that were used as comparative tools for this study. Gary Ching, Manager of the Sexual Offences Section at the Office of Public Prosecutions was once again extremely generous in allowing me to become 'part of the furniture' on Level 8, while wading through the case files. Adrian Benderler, OPP "librarian extraordinaire", also generously gave of time, information, and photocopier on several occasions (even after some of the material was "lost").

So many extraordinary women have contributed to this work, not just in terms of informing the thesis itself, but in continually challenging the legal and social space through which women's experiences of violence has so often been marginalised. In this context I mention my contact and respect for the "old gals" – you know who you are - these women have undoubtedly been key in forging service models in the sexual assault field that demand, for women, the right to be believed and respected, and importantly the right to access and receive justice.

To merely express my "thanks" to the many people who have wandered alongside me at different stages of this work seems absolutely absurd. Nevertheless it is important for me to write of their unwarranted kindness, support and humour that so often served to keep me afloat. I want to name Jodie and my family for standing out in this crowd. Also special thanks to Tez for having such a careful read during the final stages, and to my sister Linda for her efforts in making Appendix 3 user-friendly.

I also want to acknowledge my sister PhD'er and friend, Debbie Kirkwood, for the hours we shared urging ourselves on through what was often an isolating and demoralising journey. Thanks Deb, for your infinite support, sound-boarding, hashing and re-hashing of ideas, all amidst an incredible warmth and quiet humour, and (not forgetting) generosity in letting me have "the Cream Room" more times than you (I worked it out)! And finally, your efforts in providing a final eye over this thesis in its last days were fantastic.

A friendship based on many wonderful walks, chats, meals, philosophical respect, and love of red wine and curly haired dogs grew throughout the time of this thesis also. My thanks to you Dr Rhonda Cumberland!

And finally, for the endless laughter, support and encouragement, Quarr, and for waiting on me to take the next exciting walks through life – thank you.

INTRODUCTION

"My thesis is on rape trials". That was the simple response I gave to those who wondered about the subject matter of my PhD research. In turn, their reactions provided a glimpse of how the subject of rape law might be viewed and interpreted within pockets of contemporary Australian society. For some (women), the notion of "rape trials" provoked immediate outrage as they recalled the reporting of particularly sexist remarks made by judges in cases highlighted by the media.[1] For others, the subject was an unsettling experience that often led to complete silence or an uncomfortable pause in the conversation, where someone might fill the space by commenting on how distressing it must have been for *me* to observe what went on in the courtrooms of rape trials. Where a dialogue continued, however, most were optimistic about "things" having "changed" for women where rape was concerned. The laws had improved, women were more empowered, men surely did not rape women as much as they used to.

And they were right. At least partially. Things have changed in terms of the legal response to rape. Men can no longer rape their wives or partners with statutory immunity[2] and nor can they rape their dates, their daughters, members of their congregations, or their employees without danger of prosecution. Women who report rape should now expect a more compassionate response according to the protocols of police and prosecutors, and feel confident that their counselling and medical needs will be given equal priority along with the investigation.[3] Where the matter proceeds to trial, women may also anticipate spending less time in the witness box (Heenan & McKelvie, 1997: 207) and, while there, be spared the humiliation and distress of having personal details about their sexual pasts paraded before the

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[1] In particular, mention was made of the South Australian Judge, Justice Bollen, who in August 1992 suggested that it was entirely reasonable for a husband 'when faced with his wife's initial refusal to engage in intercourse, in attempting, in an acceptable way, to persuade her to change her mind, and that may involve a measure of rougher than usual handling' (*R. v Johns*, Unreported 26 August 1992, Bollen J, pp. 12-13). Others spoke of the sentencing comments expressed by a Victorian judge who suggested that sex workers suffered less psychological harm than other victims of rape (*R v Hakopian*, Unreported, County Court of Victoria, 8 August, 1991).

[2] In Victoria, men could not be charged with raping their wives until 1985 when the spousal immunity was lifted.

[3] See discussion in Appendix 1 that outlines the current process for reporting and prosecuting rape offences under the Victorian criminal justice system

court. Changes to sentencing laws and practices have also increased the capacity for serious sexual offenders to be given heavier sentences as well as providing victims with an opportunity to influence the sentencing process through detailing the emotional effects of rape on their lives.

Feminists were a significant force in achieving this transformation of sexual assault laws and procedures. International momentum throughout the 1960s and 1970s grew after the a second wave of feminism created the public space where women could speak out about their common experience of sexual assault and about the failure of courts and governments to adequately respond to these experiences (Largen, 1976; Scutt, 1980a; Temkin, 1986). Legislatures both in Australia and overseas were subsequently persuaded to introduce changes that would address concerns about the definition and physical circumstances of rape as well as the evidentiary and procedural rules that compounded the distress women felt in giving evidence in court against the men who raped them.

In the wake of three decades of reform, however, feminists concede there is only modest cause for optimism. It still remains difficult for women who have been through the trial process to feel at ease about advising others to do the same. Motives such as civic duty or the need to make offenders accountable are often not strong enough when measured against the degree to which women feel emotionally re-traumatised in being forced to re-live the rape publicly in court (Real Rape Law Coalition, 1991; Heenan & McKelvie, 1997). Others have been firm in their advice that other women simply 'don't bother...they'd get over it a lot quicker and a lot easier....solve it some other way' (Heenan & McKelvie, 1997: 361). Six of the twelve adolescent young women interviewed by Eastwood et al. indicated they would never encourage other victims to report. For one young woman, it simply 'was not worth it' (1998: 2). Two others, who had been sexually assaulted *since* the proceedings, had decided against making a further police report given what occurred during their previous appearance in court (Eastwood et al., 1998: 2).

Studies monitoring responses of the criminal justice system to rape, in terms of changes to police and prosecutorial practices as well as those intended to improve the courtroom experience for women, had similarly reported on the limited impact of

reforms on the conduct of rape trials (Adler, 1987; Bonney, 1987; Temkin, 1987, 1993; Scutt, 1993). The kinds of discriminatory practices and processes still used by police and the courts in dealing with rape were repeatedly likened to a secondary victimisation: here the assault took the form of persistent attacks on the woman's character and moral culpability which drew on dominant stereotypes of women as liars, money-seekers and trouble-makers, and/or as sexually compliant, if not actively promiscuous. The effect of nominal change to the legal notion and treatment of consent served to further enshrine the court's reliance on force and resistance as key indicators for determining whether a woman was "really" raped. And courts continued to caution juries about the diminished evidentiary weight they could afford to give to women's testimonies in situations where their words could not be further substantiated.

Empirical studies highlighted the substantial levels of non-reporting. A Women's Safety Survey[4] conducted in Australia during 1996 to provide national estimates of the levels of both sexual and physical violence found that 1.4% of women[5] had experienced some form of sexual assault within the preceding year (ABS Women's Safety Survey, 1996: 14). Only a tenth of the women surveyed reported the incident to police (ABS Women's Safety Survey, 1996: 29). The main reason given by over half of these women for not reporting was that they felt they had 'dealt with the incident themselves' (1996: 32).[6] This strongly suggested that women continued to see sexual assault as their own personal problem and not something about which the community or the legal system could adequately deal with from their perspective.

When the *Crimes (Rape) Act* was introduced in 1991 in Victoria, Australia, feminist hopes of justice for women rape victims/survivors were nevertheless revived. For

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[4] This survey produced a more accurate estimate of sexual victimisation due to the personal approach of conducting face-to-face or telephone interviews with those women who responded to the survey rather than adopting the usual practice of mailbox questionnaires (Russell, 1984; Currie & MacLean, 1997). Furthermore the interviewers were given 'sensitivity and awareness training to increase their understanding and ability to deal with issues related to violence against women' (ABS Women's Safety Survey, 1996: 72).

[5] The survey was restricted to women aged 18 years and over who were living in a private residence at the time the survey was conducted (ABS Women's Safety Survey, 1996: 71).

[6] The experiences of indigenous women, non-English speaking background women and women with disabilities are clearly unrepresented in these surveys. Atkinson (1990a, 1990b) and Bolger (1991) have each detailed the high incidence of sexual violence perpetrated against Aboriginal women and

the first time in Victoria's legal history, the legislature had responded to demands that rape laws should be attuned to protect women's fundamental legal right to sexual integrity and autonomy.[7] To the extent that many of the provisions reflected a genuine attempt to incorporate feminist views with respect to the legal treatment of rape, the reforms were interpreted as a landmark 'legislative victory' (Mason, 1995: 50).[8]

The question as to whether seemingly progressive feminist-inspired reformist achievements, such as the 1991 Victorian Act, have succeeded in altering the legal understanding and adjudication of rape lies at the heart of this thesis. It draws on an empirical study of thirty-four rape trials held during 1996 to 1998 with the objective of investigating the intersections of rape law reform, trial practice and rape trial discourse. The primary focus of attention is on how the reformist ideals and objectives might be interpreted and incorporated within the practice of rape trials so that the rulings and decisions made by judges and juries, and the arguments and submissions made by barristers, may reflect a new understanding of rape. In particular, the study explores the discursive dimensions of rape trial discourse to explore whether there has been a shift in focus for presenting and adjudicating rape accounts away from the women-complainant's behaviour and onto the men accused.

Certain important questions need to be asked about the effects of these reforms. Has legislation allowed the apparatus of law to recognise a wider range of circumstances under which women experience rape? Has it meant a change in what have become the standard trial tactics for prosecuting and defending allegations of rape in the courtroom? How have key elements of the legislation translated into the arguments and stories constructed by barristers to persuade juries of the accused's culpability or innocence?

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girls and the role of non-Aboriginal people in historically silencing and distorting their experiences (See also Scutt, 1990).

[7] See Section 1(b) of the *Crimes (Rape) Act 1991 (Vic.)* where it states that the purpose of the Act includes reforming the law in order to 'reaffirm the fundamental right of a person not to engage in sexual activity'.

[8] Some of the barristers interviewed during the Heenan & McKelvie study also judged the reforms as a feminist triumph though not one they viewed favourably. They variously criticised the changes for responding to what they perceived was 'woosy political soundness' (Heenan & McKelvie, 1997: 303) or 'a gift to *people* that don't like the nature of rape trials' (1997: 313), where only the 'the views of a *minority group*' had been adequately represented (1997: 318) [emphases added].

Through the consideration of first-hand observations of rape trials, this study examines three principal areas that have historically been of concern to feminists agitating for reform. The use of corroboration warnings, the admission of sexual history evidence and the definition and treatment of consent have repeatedly been identified by feminists as enshrining the most prejudicial aspects of rape law with respect to women and, for this reason, they occupy a central focus of the study. The rape trial process can be seen as a discursive space, or site of struggle, through which the meanings and interpretations afforded to rape situations and women's experiences are being re-conceptualised, negotiated and to some extent compromised (Bumiller, 1990; Smart, 1995).

Feminist sociologists and lawyers have developed various theoretical approaches, with related political strategies, to the analysis of rape law and its application. Some feminists have remained committed to lobbying, often quite successfully, for law reform initiatives aimed at improving the situation for victims subjected to the rigours of the criminal justice process (Adler, 1987; Lees, 1996). Others remain sceptical about the efficacy of law reform strategies in the context of a system of law that remains male and masculinist in terms of its history, interpretation and operation (Brownmiller, 1975; Edwards, 1981; Vandervort, 1987/88; MacKinnon, 1983, 1987). A third approach, exemplified by the writings of women such as Smart (1989, 1995) and Naffine (1994; Heath & Naffine, 1994), takes a more complicated, and perhaps more sophisticated, position. They locate the continued resistance of law to arguments that it should give due recognition to the subjective experiences of women rape victims within the sociological context of a structure of gendered power relations.

A fourth contribution has come from the areas of cultural studies and socio-linguistics (Matoesian, 1993; Puren, 1998, 1999; Young, 1998). Here the focus is on trial discourse or the structures and sequencing of talk in rape trials and how the practice of the courtroom exchange works to contain the extent to which traditional legal "stories" about rape can effectively be disrupted or subverted through reformist or feminist understandings about rape. Scheppele's (1989, 1992) analyses also show the power of legal discourse to draw on the prevailing cultural conditions in constructing narratives that effectively neutralise any threat to the (legal and)

gendered status quo. This thesis draws on theory and research from all four of these schools of thought.

Chapter 1 reviews the feminist literature in this field starting with a brief overview of the historical legal treatment of rape. It views the early successes of the women's movement in the light of rape prevalence studies that provided a political platform for feminists to mobilise community support in favour of widespread changes to the criminal justice system's treatment of rape. As a result, key features of rape trial adjudication were modified. Limits were placed on the admission of women's prior sexual history, the mandatory corroboration warning regarding the evidential value of women's claims was made discretionary, and the traditional legal framework for determining consent was altered in some jurisdictions.

Chapter Two traces the passage of these reformist achievements within Western legal jurisdictions, both internationally and across different states in Australia. This covers the changes made to sexual assault laws and procedures in response to a series of effective feminist campaigns aimed at specifically addressing those features of the system that further compounded the trauma women experienced during a rape prosecution. Although there were differences in terms of the more substantive changes made to rape laws in Australia, by the close of the 1980s, most state and territory jurisdictions had legislated to procedurally reform or modify those rules of evidence that had historically worked in favour of the men accused of rape and at the cost of women victims/survivors.

The chapter then turns to the particular package of reforms introduced by the *Crimes (Rape) Act 1991* in Victoria that was said to hold considerable promise for changing the conventional legal understanding and adjudication of rape offences. The most progressive feature of the reforms concerned the new legal definition of consent. For the first time in Victoria, consent was statutorily defined to mean "free agreement" and the Act listed a number of vitiating or negating circumstances under which *non*-consent would be presumed. Juries would also be given a series of judicial

directions at the end of the trial that would fundamentally challenge the criteria against which rape allegations had traditionally been assessed.[9]

Some insight into the implementation and application of these changes can be gained from a major evaluation study that commenced soon after the reforms had been introduced (Heenan & McKelvie, 1997). This study included an examination of rape trials to assess how well the changes to consent had been interpreted by barristers and judges in the courtroom and the extent to which the new framework may have minimised the more distressing aspects of women's experience of giving evidence. Overall, however, the findings from the Victorian Evaluation Study were disappointing. Few women were spared the rigours of traditional defence techniques for discrediting their accounts, including the use of prior sexual history being admitted in a significant proportion of cases (Heenan & McKelvie, 1997: 127-136).

The Victorian Evaluation Study helped to set the parameters for the current research.[10] The study certainly provided quantitative evidence that the reforms did little to alter the status quo, but it was not designed to theoretically interpret or explain its findings. Further empirical and theoretical attention was therefore directed in the current study to consider the kinds of mechanisms relied upon by defence barristers for attempting to persuade judges of the merits of sexual history applications; to consider how corroboration warnings still figured as a legitimate consideration for juries deliberating in rape cases; and to explore in what ways the new definition and meaning of consent was being negotiated by barristers and judges mandated to consider consent in the light of a more communicative model. A sociological approach was required to consider the complexities of these issues.

Chapter 3 considers some of the epistemological (and ethical) issues involved in conducting research that is intended to be feminist in method and focus. It describes

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[9] See Sections 36 & 37 of the *Crimes (Rape) Act 1991 (Vic.)*. The content of these provisions are discussed in detail in Chapter 2.

[10] The Victorian Evaluation Study (Heenan & McKelvie, 1997) was also used to compare whether the trials observed for this thesis were broadly representative of cases being prosecuted in Victoria during the 1990s. Appendix 2 provides a detailed overview of the 34 trials observed, including information on the demographics of the women-complainants and the accused that appeared in each case. This material is then compared with 98 trials from the Victorian Evaluation Study that were re-examined for the purposes of the current research.

the research process and the range of data sources drawn upon for the current study in considering the 34 rape trials, including: court observations, the examination of prosecution case files and an analysis of appeal court decisions. It further outlines a critical shift in the early stages of the study that resulted in particular attention being directed to the "stories of rape trials" as they were (re)constituted by barristers and judges in summarising their respective cases for the jury. Examination of barrister's closing addresses, as well as the legal argument that transpired throughout the trial, was especially important for considering how feminist or reformist ideals about women and rape might now compete with discourses that have remained dominant to the cultural and legal understanding.

Chapters 4, 5 and 6 provide a detailed analysis of the empirical data that was collected in relation to three key areas of corroboration warnings, sexual history evidence and consent.[11] Quantitative comparisons between the current study and previous research are briefly considered although most of each chapter is devoted to a qualitative exploration of the issues. Specifically, the focus for Chapter 4 is on corroboration warnings and whether law reform has succeeded in altering the legal practice of cautioning juries about the unreliability of women rape-complainants. The role played by appeal courts in interpreting the legislative status of corroboration is highlighted by examining several High Court decisions that have since been widely interpreted by judges who preside in rape trials. Chapters 5 looks at the admission of sexual history evidence in the light of legislative restrictions that now provide for its general prohibition. It also considers whether or how women's sexual histories continue to feature in the construction of legal stories about consent or rape in the courtroom. The legal management of consent is the subject of Chapter 6. The focus is on those trials that most challenged the new statutory framework for determining consent. In particular, Chapter 6 details the approaches taken to cases involving women who were asleep or so affected by alcohol or other drugs that their capacity to consent, according to the new statutory regime, should have been statutorily vitiated.

[11] The Table in Appendix 3 provides an overview of the individual trials with respect to these three key features and includes the outcome of each case.

The question of whether feminists should continue to engage with rape law reform efforts is again brought to life in the afterglow of studies like this one (Smart, 1989; Heath & Naffine, 1994; Mason, 1995). Should feminists uncritically participate in law reform campaigns when the law has proved so resilient to changes that sexually and socially empower women within the broader social structure? Is it just a matter of drafting the right legislative combinations or is law institutionalised to work against feminist gains in order to serve the interests of a patriarchal social order? And finally, have feminist agendas for reform ever really represented the subjective experiences of women beyond those who are white and middle-class? Chapter 7 looks at how liberal, radical and poststructuralist feminist approaches might understand or interpret the material from the thirty-four trials, and suggests that a range of different theoretical positions can lead to a wider appreciation of how feminisms might usefully intersect for approaching future law reform agendas.

The findings from this study are interpreted in the light of these analyses which help us to understand the complexities of discourse, language and culture operating in a legal and social context where power relationships are fundamentally gendered. More straightforward accounts as to why rape law reforms have fallen short of their legislative mark appear oversimplified in this context. It is clearly not just a matter of statutorily patting legislative or procedural changes into place or abolishing those aspects of rape law that have appeared most emblematic of law's mistrust and hostility towards women. Trials operate as a site where both legal and non-legal stories about women and rape may be re-produced or negotiated (Pringle, 1993; Naffine, 1994; Puren, 1998). Some fall well within the conventional rape narrative or draw more directly on law's stash of 'stock stories' (Scheppele, 1992: 128) about women[12], while others fall outside the rape scene itself but figure well within culturally prescribed non-legal discourses surrounding gender, sexuality and consent.

[12] These 'stock stories' are often the embodiment of a pervasive set of myths that serve to trivialise rape or place the blame for rape on women-victims. Some of the most recognisable rape myths include: that when women say "no" they really mean "yes"; that women "ask" to be raped by their behaviour and appearance; that women "cry rape" for financial benefit, to get revenge, or to explain a pregnancy; and that women secretly want to be raped to satisfy their desire for sexual domination. Writers throughout the 1980s documented the prevalence of the mythology surrounding rape, revealing the extent to which these cultural assumptions informed the legal and social response to rape and rape victims (see Schur, 1983; Morris, 1987; Shapcott, 1988, Morrison, 1991). In particular, rape myths were shown to provide the foundation for many of the legal rules that had been developed specifically for rape prosecutions (Morrison, 1991).

Narratives that prescribe women blame, culpability and responsibility or that question their reliability, emotional stability and credibility remain common themes in the courtroom.

However, there is also a capacity within law for feminist inspired reformist principles to feature within rape trial discourses. It is here that the conventional understanding and treatment of rape may be forced to compete with alternative frameworks that better incorporate the range of social and sexual situations, cultural contexts and power relationships in which women have always claimed rape occurs (Cuklanz, 1996). It is this potential that feminists are keen to explore in their agendas for future reform not only in terms of the benefits for women rape complainants but also for the space this might afford women to more fully explore their social and sexual subjectivities beyond the structures, discourses and histories of a legal social order that has traditionally reflected a male perspective.

CHAPTER 1

A review of rape and its legal treatment: Confronting feminist critiques

1.1 INTRODUCTION

For most of Western history, while rape was something women may have feared 'like fire and lightning' (Griffin, 1979: 3), it was a phenomenon rarely discussed, not publicly at least, and rarely understood to affect more than a handful of victims. As Carol Smart suggests, it was *de rigueur* for feminists writing on the subject to point to the nominal consideration given to rape by (mostly male) academics, researchers and society more generally, as exemplifying the differential power relation that existed between men and women (1990: 70).[1] If rape was considered "a women's issue" it followed, according to feminists, that little seriousness at a political, legal, educational or cultural level would be afforded to it.

More recently, writers have referred to the 'explosive development of research' (Matoesian, 1993: 3) or the 'publication explosion' (Cuklanz, 1996: 17) when considering such subjects as the etiology of rape, the criminal justice processing and prosecution of rape, and the extent to which women's experiences of rape are considered within the normative social and (hetero)sexual relationships they have with men.[2] Mostly these writings reflect the development of feminist challenges to traditional conceptualisations of rape, with current interpretations seeing rape as inextricably tied to the kinds of dominant social definitions and meanings attached to the constructs of sexuality, gender and power relations.

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[1] Liz Kelly and Jill Radford (1987: 240) spoke of the 'deafening silence' that pervaded political responses to sexual violence against women in the early 1970s. The extent to which silence has continued to be a central theme of feminist theorising about women's experiences of violence is further discussed by Hilary Astor (1995: 181-184). Consider also the way the political slogan – 'breaking the silence' – is used by sexual assault services around the world (See CASA House Training Manual (Scott et. al., 1990).

[2] Importantly, Hilary Astor (1995) reminds us that some women's voices have been privileged in defying the silence, while the experiences of other women, such as indigenous women, non-English speaking background women, gay and lesbian women, and women with disabilities remain invisible. Astor is keen to point out that 'the roar on the other side of silence is composed of many voices' (1995: 192).

This chapter begins by tracing some of the early feminist contributions to a critical analysis of the historical legal response to rape, where the kinds of discriminatory legal practices and processes used to define the crime were an immediate target. This section predominantly draws on empirical research intended to reveal "the realities" of rape (meaning the realities for women). In particular, the high levels of under-reporting, combined with inadequate and insensitive responses by the police and the courts throughout the 1970s, provided substantial political leverage to feminists agitating for reform.

I then consider how feminist critiques of rape law and the efficacy of reformist ideals developed as more complex theoretical and epistemological considerations increasingly entered the debate throughout the 1980s. Feminist legal theorists in particular were sceptical of law ever "solving" the injustices faced by women in court especially when, despite significant changes to both the evidentiary and substantive laws governing rape, the situation for women victims/survivors appeared to have only marginally improved (MacKinnon, 1987; Smart, 1989). The principal difficulty, according to these writers, lay in the notion of consent, the scope and meaning of which had remained narrowly defined in order to privilege male interests and prerogatives.

Although there is, to some extent, a chronological dimension to the development of feminist theory in this area, my intention is not to seek to establish a particular evolutionary sequence of ideas, but rather to distinguish the dominant feminist types of jurisprudential thinking on reforming sexual assault laws. At the same time, feminist approaches to these issues need to be understood within the broader changing political, cultural and intellectual context of contemporary theory and research (Davies, 1994).

1.2 Historically Situating The Legal Response to Rape

Although more than two decades have since past Susan Brownmiller's landmark publication, *Against Our Will: Men, Women and Rape* (1975), it continues to stand as one of the most comprehensive works describing the historical and cross-cultural dimensions of the phenomenon of rape and rape laws. The book systematically

traces the social, cultural, economic and political[3] use made of rape throughout history in preserving the rights of all men to maintain their exclusivity over the bodies of women. Particularly ground-breaking was Brownmiller's theory of rape where the dominant explanations that saw rape as the inevitable expression of men's pre-determined and biologically driven sexual energy were replaced with a controversial theory about power – men's power over women – where rape was seen as 'nothing more or less than a conscious process of intimidation by which *all men* keep *all women* in a state of fear' (1975: 15). Far from rape being relegated to the anomalous behaviour of a few mentally disturbed men, it was, according to Brownmiller, regularly perpetrated in the name of war, religion and race, and more surreptitiously, in the name of marriage, the family or intimate relationships.

Brownmiller's overview consistently revealed the extent to which, regardless of race, culture or class, rape was historically regarded as a crime against men. Rape, she suggests, 'entered through the back door as it were', being unashamedly geared to protecting male property interests and bloodline (Brownmiller, 1975: 18). The "offence" of rape clearly lay in the damage caused to the investments held by future husbands and fathers who materially and socially benefited from the virginity of unwed daughters. Monetary compensation to the patriarch was therefore common amongst early Western sanctions for rapists who stole the value of 'unruptured hymen[s]' (Brownmiller, 1975: 20; Clark and Lewis, 1977; Morris, 1987; Clark, 1987; Burgess-Jackson, 1996). Alternatively, rapists sometimes became eligible to marry their victims if a lucrative arrangement could be agreed between the male parties.[4]

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[3] Edward Shorter (1977) questions the accuracy of Brownmiller's analysis and the extent to which rape in historical times can be considered a political crime. According to Shorter, the sexually prohibitive culture operating during the centuries prior to the French Revolution would more accurately account for rape being about 'sexual frustration' rather than a political act (1977: 473). He further suggests that rape would have been relatively incidental to maintaining the existing patriarchal culture given that women of all classes could not have been more subjugated during these historical epochs. However, Anna Clark's (1987) discussion of the treatment of rape during the late eighteenth century demonstrates the extent to which rape, while trivialised and minimised by men of all classes, was a much recognised and discussed experience of (particularly working) women's lives.

[4] Punishment for rapists varied depending on the marital and social status of the woman. In ancient Babylonian times, Brownmiller (1975) detailed how married women would share in the responsibility for their own violation and be killed alongside the perpetrator for failing to protect their husband's right of sexual exclusivity. Daughters of Israel who were raped within city walls also shared the blame for a rapist's assault for failing to scream loud enough to secure assistance and rescue (Brownmiller, 1975: 18-19). Otherwise, where rapists were to suffer the punishment of death,

By the close of the thirteenth century in England the Crown, as the representative of the state, had assumed the right to prosecute crimes of rape. This represented a shift in the legal treatment of rape away from the objective of safeguarding the interests of individual propertied men to an issue of community protection and concern. In this context, the offence of rape against every woman was considered, at least in theory, a crime. Official sanctions for an offender convicted of rape remained severe and included castration or mutilation, but these punishments, according to Brownmiller's research (1975), were rarely meted out.

Ruth Kittel's (1982) empirical study of rape cases heard by itinerant judges throughout England during the twelfth and thirteenth centuries gives life to this historical social narrative. Kittel examined the plea rolls maintained by judges as a way of comparing legal scripture or what had been written as law and the practice of the courts. She found that, in as many as 56% of the cases examined, the woman victim withdrew from pursuing a state prosecution (Kittel, 1982: 107). The outcome in other cases varied with some women marrying the offender, while others received a monetary settlement as compensation for the offence. A small number of offenders successfully avoided trial by fleeing the district before the case went ahead (Kittel, 1982: 109). In her study of the 23 accused men who actually stood trial, acquittals were recorded in 20 of these cases (Kittel, 1982: 109). Moreover, the three perpetrators who were convicted did not receive orders for castration or mutilation (two were clergymen), despite these being the requisite punishments of the day.

Kittel (1982) concludes that, although thirteenth century laws included strong sanctions against rapists, in practice offenders rarely stood trial and, even when tried and convicted, were often spared the existing sanctions (see also Geis, 1978: 26-27). Three centuries later, Bashar's study of court archives revealed 274 rape cases heard throughout five English counties between 1558 and 1700, with just 45 of the men prosecuted for rape actually found guilty (1983: 34-35). These studies confirmed the extent to which law's historical treatment of rape appeared, in the words of Brownmiller, to 'read better in parchment than it worked in real life' especially for

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dismemberment or castration, women were encouraged to "save" them through marriage if a

women who were of lower socio- economic, and therefore moral, standing (1975: 30).[5]

The extent to which class biased the legal responses to rape complaints during the late eighteenth and early nineteenth centuries in England has been extensively documented by Susan Edwards (1981) and Anna Clark (1987). Their accounts detailed the unscrupulous and often corrupt methods used by legal officials for dismissing women's claims of rape, often well before any legal proceedings took place. A combination of threats, bribes and a reminder of the 'public degradation ceremony' (Giacopassi & Wilkinson, 1985: 368) they were likely to face in court, was undoubtedly effective, according to Clark, in keeping many working class women from seeking legal redress for rapes committed against them (1987: 55-57; see also Bashar, 1983: 42).

Edwards (1981) also locates the historical development of sexual offence law throughout the nineteenth century within a model of female sexual passivity, where the legal and social definitions of rape systematically reflected an image of sexuality that culturally constructed and highly regulated women as sexually inert or compliant. The implication of this model for working class women, who were more likely to be in sexually active relationships with men outside of marriage, was that allegations of rape would rarely succeed beyond attacking the moral character and (in)credibility of women who were perceived as wantonly behaving outside the social bounds of acceptable "female" conduct (Edwards, 1981: 52 – 58).

By the middle of the twentieth century, Judith Allen's (1990) study of trials involving men's sexual victimisation of women, both during and post the wartime period in Australia, graphically illustrated the law's continued scepticism and minimisation of rape disclosures. Allen documents a series of cases where judges and juries remained unconvinced by rape complaints during these times. Women were often perceived as being raped (or consenting to sex) as a result of their increasing access to, or occupation of, 'public space' (Allen, 1990: 219). Women

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satisfactory pecuniary arrangement could be reached (Dean and deBruyn-Kops, 1982: 20).

entering the paid workforce, using public transport, or socialising at dances, picnics or gatherings while partners or husbands were away were constructed as behaving in an especially risky and provocative manner. Representations of men's sexualities in these contexts clearly reflected the social and moral standards of the day that simultaneously excused men and resulted in women being blamed. It was women who had activated men's sexual insatiability, or been available or accessible to them, or failed to have successfully controlled or resisted their "advances".

1.3 THE LEGAL LEGACY OF THE LYING, LASCIVIOUS WOMAN: THE TALES OF THE COMMON LAW[6]

For the few women who did appear in courts to testify about the rapes perpetrated against them special legal rules had been established by the seventeenth century to further safeguard the interests of men against the potential for wrongful conviction (Nordby, 1980; Warner, 1981; Hunter & Mack, 1997). The rules of recent complaint, corroboration and the use of sexual history evidence were each developed to assist juries with the task of determining whether the accused was guilty of rape. Each of them was designed to expose what was claimed to be the ever-increasing numbers of false or unworthy complainers (Warner, 1981). According to Edwards, although the crime of rape may have been established to safeguard the bodies of women, the associated procedural rules had clearly 'evolved with the protection of the (male) defendant in mind' (1981: 49).

In considering the application of these rules, reference is invariably made to the contribution of one of the fathers of common law, Matthew Hale, the Chief Justice in

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[5] Bashar (1983) and Clark (1987) contrast the treatment of rape cases with the severity of legal responses to those convicted of crimes against property when, during the late 1800s, pickpockets and thieves were often condemned to death.

[6] The common law or judge-made law embodies the collective and precedential decision making of judges in past cases. As Davies (1994) has pointed out, however, in classical common law tradition judges locate themselves as merely agents for declaring pre-existing law as opposed to creating it. In this sense, the common law has symbolised the 'immemorial wisdom' of judges in capturing the essence of reason, based on impartial, apolitical understandings of custom for the common good of all people (Davies, 1994: 42). This tradition of mainly seventeenth century juridical thinking is still propagated on occasion today. For example, in Victoria, when a County Court judge proclaimed that sex workers would suffer less psychological harm than other victims of rape, he extolled the virtue of his decision as being consistent with the legal principle previously applied by the Court of Criminal Appeal (*R v Hakopian*, Unreported, County Court of Victoria, 8 August, 1991). In other words, he was properly applying the decision-making of previous judges (Sharpley, 1993). For a detailed consideration of the implications of the decision in *Hakopian*, see the commentary in the final report published by the Law Reform Commission of Victoria (1992: 2-8).

England during the seventeenth century, who instilled into the law extreme scepticism towards women rape victims.[7] Indeed, rape laws were to be governed by the legal principles developed and authoritatively expressed by judicial lords following Hale over the next three centuries (Largen, 1988; Davies, 1994)[8].

1.3.1 Corroboration

The words of women who claim to have been raped have historically been regarded in the criminal law as especially unreliable (Temkin, 1987).[9] This deep suspicion emerged out of the dominant cultural thinking of the time when women were generally viewed as emotionally unstable and unpredictable and often devious, particularly in the context of their sexual lives (Edwards, 1981; Mawson, 1999). In order to protect men against the likelihood of false accusations, a rule of practice developed throughout the seventeenth and eighteenth centuries[10] that required judges to caution juries about the dangers of convicting men on the uncorroborated or unsupported evidence of rape complainants[11] (Scutt, 1980a; Warner, 1981; LRCV, 1987b; Estrich, 1987; Graycar & Morgan, 1990; Mack, 1993, 1998).

One of Chief Justice Hale's most infamous statements emerged during these times and ultimately became the most frequently cited legal dictums to be heard in future rape trials across the Western world[12]:

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[7] Brownmiller includes Hale amongst those to whom she refers to as 'the giants of English jurisprudence' (1975: 30).

[8] Geis (1978) compares Hale's strictures on rape with his handling of witchcraft accusations during the seventeenth century. He details the events of the Lowestoft trials where two widowed women were accused of witchery and ultimately sent to their deaths by Hale despite evidence that seriously impeached the credibility of these claims. Geis suggests that Hale's preparedness to accept indefensible allegations of witchcraft reflected the 'pious misogyny' he wreaked upon women throughout his judicial career (Geis, 1978: 27). Mawson (1999) also positions Hale as principal in constructing hegemonic legal stories about women that continue to dominate in contemporary rape trial discourse. (See also Scutt, 1992.)

[9] Children's evidence has also been legally treated as inherently unreliable, as has the evidence of accomplices against co-offending parties (Young, 1983; Wells, 1990).

[10] Edwards (1981) locates the emergence of corroboration as a legal requirement as far back as the twelfth century although she attributes its continued vigour in contemporary times to the utterances of Lord Hale in the seventeenth century.

[11] With the exception of rape complainants and very young children, the common law has generally allowed convictions to stand where the jury had been satisfied on the basis of the evidence given by a single witness (Model Criminal Code Officer's Committee Report, 1996; Mack, 1998).

[12] See Naffine (1992) on the continued resilience of common law legal rules being authoritatively reiterated and endorsed in leading textbooks for law students.

> it must be remembered at all times that it [rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho` never so innocent (Hale, 1736: 635).

The strong attachment to the sentiment in this statement in contemporary rape trial discourse[13] disturbingly perpetuates the law's misogynist bent with respect to the treatment of rape victims. Not only did the common law construct women as especially prone to lie about sexual acts and therefore about sexual assault, it "revealed" how adept they were at masking their talents for fabrication (Mack, 1993; 1998, Bargen and Fishwick, 1995). Ultimately, this has meant that women complainants, as a class of witnesses, were indiscriminately viewed with suspicion and distrust.[14]

What constituted corroborative evidence was often subject to a technical legal determination where the presence of physical injuries, witnesses' accounts of the events, or torn clothing and other physical evidence were needed to confirm a "material particular" of the issues in dispute. Injuries that were, for example, also consistent with an accused's claim of vigorous sex may not be judged as capable of providing corroborative evidence. Similarly, the testimony of a witness, who had seen an accused alight from a car only partially dressed, would not independently confirm that a rape had occurred if the accused's contrary claim was of consensual sex.

The law also unambiguously defined what was *not* to be regarded as corroborative of rape accounts, such as evidence of a woman-complainant's[15] distress.[16] Here the law

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[13] Consider the words of Brent Fisse in the fifth edition of Howard's Criminal Law (1990) regarding the difficulty that sexual assault cases pose for the law: 'Rape is at once one of the most difficult offences to administer reasonably and one of the most difficult to define in a manner which facilitates reasonable administration. This is because it combines in high degree the qualities of ease of accusation and difficulty of denial' (Fisse, 1990: 169).

[14] Clark described the longevity of the corroboration warning as a 'spectre' that has 'haunted' legal reformers since the eighteenth century (1987: 67).

[15] The term woman-complainant is predominantly used throughout this thesis to symbolise the formal legal positioning of women as "principal witness to a rape prosecution" and the adversarial contest of determining whether she really is "a victim" of rape. In other parts of the thesis I use the term victim/survivor which is my philosophical preference. The term victim/survivor both acknowledges the courage and strength it took to survive the assault(s) and challenges the representation of women as inherently disempowered and victimised (Scott et al., 1990: 5).

[16] Young (1983: 138) outlines the very limited circumstances under which jurors are able to use evidence of distress as corroboration.

objected to forms of evidence that were considered self-serving or where the evidence was said to emerge from the same source as the allegation itself. Even where there was ample evidence that the victim was in an emotionally distressed state following the alleged assault, judges were at pains to reduce the significance of this evidence by suggesting to juries that distress can be feigned or, even more mysteriously, by remarking that "some *people* cry more easily than others" (emphasis added).[17]

Corroboration warnings became mandatory in rape trials to the extent that a failure by the trial judge to give the prescribed warning would usually serve as grounds for a retrial (LRCV, 1988; Mack, 1993). Juries were therefore instructed to look for corroboration before they could find the accused guilty[18], despite the majority of rapes being perpetrated in situations unlikely to produce physical injuries and where witnesses could rarely attest to what happened (Finley, 1989), so that, as Estrich notes, rape was distinctively 'a crime in which corroboration may be uniquely absent' (1987: 21).[19]

1.3.2 Evidence of Sexual Morality/Reputation of Rape Complainants

From the beginning of the nineteenth century onwards, English common law regarded a complainant's prior sexual history and reputation as highly relevant to deciding the issues in a rape trial (Adler, 1982; Temkin, 1984, 1987; Bargen & Fishwick, 1995; Ward, 1995).[20] The dual assumptions underlying this conception were: firstly, that the words of sexually active women, or simply non-virginal women, were (by virtue of this experience alone) considered highly suspect; and

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[17] That this gendered interpretation became a frequently cited addendum for judges commenting on the weight that ought to be given to evidence of distress is significant and often overlooked in the literature. Crying has been (and still is) an emotional response to trauma that is far more culturally expected (and accepted) from women than it is from men. That some "people" cry more easily than others clearly referred to women who were seemingly capable of feigning emotional distress.

[18] Juries were not prevented from finding an accused guilty in the absence of corroboration. However, they were warned with the full weight of judicial authority that it would be unwise, if not dangerous, to do so.

[19] Moreover, as Clark's study (1987) makes clear, in the nineteenth century no amount of corroboration was likely to render the rape of working class women a crime. Despite eyewitness accounts and the injuries sustained by some women who were raped, working class women were almost infinitely rapeable.

secondly, sexually active women were seen as inherently more likely to consent to sexual intercourse with other men.

The availability of evidence of sexual history or sexual reputation was said to legitimately impact on the complainant's credit as a witness, and/or on the issue of consent, in that women who engaged in premarital sex or who had acquired a "bad" reputation, typified the kind of woman more likely to consent to sexual intercourse, or at least more likely to lie about it (O'Grady and Powell, 1980; Scutt, 1980a; Edwards, 1981; Adler, 1982).[21] Put more simply, Clark suggests the common law allowed for 'a woman's chastity [to] define...her worth as a person' (1987: 47). Regardless of whether the prosecution could "prove" that a rape had occurred, the very existence of any evidence that related to a woman's prior sexual history immediately appeared discordant with the image of a genuine rape victim and would significantly reduce the chances of sustaining a conviction.

Temkin (1984) has identified the most common circumstances under which evidence of sexual history or sexual reputation would be routinely admitted during a rape trial. These included: evidence of prior intercourse with the accused or other men; evidence that the complainant was a sex worker; and, evidence that the complainant had acquired a reputation for 'want of chastity' (Temkin, 1984: 942-945).

Rape trials in this respect varied considerably from the corresponding legal principles governing the trials for non-sexual offences (Scutt, 1980a; Temkin, 1984). In particular, there were strict evidentiary rules preventing the general admission of character evidence or evidence which did no more than establish a person's propensity to engage in particular sorts of conduct (LRCV, 1976; Temkin, 1984; Freckelton, 1998a).[22] Paradoxically, a man's previous convictions for sexual

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[20] Particular common law examples include *R v Barker* (1829) 3 Car & P 589 at 590; 172 ER 558 at 559 per Park J; *Thomas v David* (1836) 7 Car & P 350; 173 ER 156; *Cargill* (1913) 8 Cr App R 224; *R v Richardson* [1969] 1 QB 299.

[21] The prejudice attached to sexually active or non-virginal women was also another illustration of the law's inordinate preoccupation with women as false complainers. Brownmiller describes it as the law's 'abiding fear' of 'what can happen to a fine, upstanding fellow if a vengeful female lies and cries that she has been assaulted' (1975: 22). She relates the story of Potiphar's wife contained in Genesis who vindictively accused her husband's favourite slave of raping her as the kind of folklore used to legally justify careful scrutiny of women's past sexual lives.

[22] This common law rule was translated into Section 14 of the *Crimes Act 1958 (Vic.)*.

offences were considered highly prejudicial and irrelevant for the purposes of assessing the likelihood of him offending in the future whereas, for women complaining of rape, it was precisely their willingness to engage in sexual intercourse in the past that rendered their present claims spurious (Ward, 1995).[23] Moreover, examining evidence of past sexual history was not considered relevant to assessing the credit or 'trustworthiness' of people alleging, or being accused of, any other criminal offence (Temkin, 1984: 946). [24]

For LeGrand (1973) the existence of the common law rules regarding the admission of sexual history evidence merely captured the extent to which rape laws had been framed and interpreted from a male perspective. Their existence allowed for a disproportionately high number of women rape victims to be 'put on trial' themselves and be exposed to cross-examinations that focused almost entirely on the minutiae of their past sexual lives and experiences (Berger, 1977). Adler more colourfully describes the defence as having historically been given 'a virtually unconstrained licence to sling sexual mud' (1982: 666) as part of their armoury of legitimate tactics for defending men accused of rape. This not only ensured a steady number of unwarranted acquittals (Kalven & Zeisal, 1966; LaFree et.al, 1985; Temkin, 1993; and Bargen & Fishwick, 1995) but further reduced the likelihood of women ever coming forward and subjecting themselves to the kind of "justice" offered by the legal system.

1.3.3 The Rule of Recent Complaint

The archetypical rape victim under common law was not only a chaste woman who could corroborate her victimisation with injuries and eyewitness accounts, but she was also one who immediately disclosed her rape at the "first reasonable

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[23] In 1976, when the Law Reform Commission of Victoria was considering the need to introduce legislative restrictions on the admission of sexual history evidence, the Commissioners were at pains to suggest that the law has never allowed for a woman's past sexual behaviour to be used as evidence of a general propensity to consent to sexual intercourse with other men. According to the Commissioners, additional grounds for admission would have needed to be established, such as evidence that would have substantially influenced assessments of her credit. This is contrary to several studies which show the wide interpretation afforded by the courts to the notion of relevance in rape proceedings (O'Grady & Powell, 1980; Temkin, 1993).

[24] Bargen and Fishwick (1995) note that, even without specific legislative restrictions, judges had always held broad discretionary power to exclude any evidence that was not considered relevant to the issues in the trial, although this was rarely if ever exercised with respect to the admission of sexual history evidence.

opportunity". Although evidence of "complaint" was generally considered hearsay[25], and therefore inadmissible before the court, the law made an exception in the case of rape allegations as a further test of a complainant's credibility and consistency, because it was considered only 'natural' that women who were truly forced to engage in sexual conduct would promptly raise the "hue and cry" (Morrison, 1991: 1042). Chief Justice Hale put it this way during his seventeenth century judicial reign:

> ...if the witness be of good fame, if she presently discovered the offence, made pursuit after the offender, showed circumstances and signs of injury...these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself. But on the other side, if she concealed the injury for a considerable time after she had opportunity to complain,...and she made no outcry when the fact was supposed to be done, when and where it is probable that she might be heard by others; these and the like circumstances carry a strong presumption, that her testimony is false or feigned (1678: 663, cited in LRCV, 1987a: 23).

According to Hunter and Mack, the rule of recent complaint arises out of the masculinist assumption 'that truth lies in immediate protest' and disclosure (Hunter & Mack, 1997: 180).[26] In this sense, delayed complaints of rape were immediately the subject of considerable caution, especially in circumstances where other physical indicators of the offence were absent (Bessmer, 1984; Scheppele, 1992; Hunter & Mack, 1997).[27] Conversely, however, the common law did not allow the fact of a recent complaint to be used as evidence of proof that the rape actually occurred. The evidence could only be used to demonstrate a consistency of conduct on behalf of

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[25] Witnesses are normally prevented from giving evidence of what someone "says" to them, especially if the accused person is not present when the words are exchanged. Note that Young (1983: 145) argues that recent complaint evidence is not hearsay evidence but evidence of a prior consistent statement which is also legally inadmissible.

[26] In the context of sexual offences, there was a strong presumption that women's natural reaction following a rape (like that of a man who was criminally assaulted) would be to report so that the offender could be swiftly apprehended (Bessmer, 1984).

[27] MacCrimmon develops this point further in considering the degree to which evidentiary laws were presumed to correspond with 'a model of individual will' (1991: 39). The "truth" of one's actions was seemingly revealed by inspecting the individual's responses and motives in given situations, as if law functioned outside of the historical and social dimensions that discursively shaped and indeed cultivated gender, cultural and racial difference.

the complainant who behaved in accordance with how the law imagined a genuine victim would respond (Bronitt, 1998).

The historical implications of this rule not only severely curtailed the chances of success for rape prosecutions in that delayed complaints received strong criticism from the courts but it also directly obscured the social barriers that historically worked against women being able to promptly report and recount their experiences of rape (Morrison, 1991).

1.4 Feminist Approaches to Law Reform

The imputations contained within these three legal rules provided the cultural framework that shaped the contemporary legal response to women rape victims from police, courts and the wider community. They provided obvious targets for feminist reformers struggling to expose the mechanisms through which the criminal justice system had systematically discounted all but a small number of cases that accorded with traditional stranger-rape constructs.

This section explores a range of feminist approaches to the issue of rape law reform that have emerged over the past three decades. Taken separately, each of these approaches reflect quite different philosophical and theoretical views about the issue of sexual violence and, more fundamentally, divergent approaches to critiquing the operation of law and criminal justice processes for women. And yet distinctions between these approaches are not easy to draw (McFadden, 1984). According to Davies (1994), the lines that are said to distinguish feminist theories are themselves constructs that sometimes conceal the fluidity between them. For the remainder of this section, however, I have simply made use of a generally accepted categorisation of feminist theories which are relevant for conceptualising the efficacy of reforms with regard to the legal treatment of rape.

Exploring what I consider to be the main theoretical differences underlying the ontological and epistemological thinking amongst feminisms and feminist approaches to law reform in this area is what conceptually drives this chapter,

although I also acknowledge the space through which they often "intersect"[28]. The extent to which law reform agendas have been built on a combination of feminist discourses concerned with understanding or making sense of law's role in maintaining a gendered power relation is also illustrated by exploring the ideals and objectives that have often shaped feminist reformist activities and the direction and efficacy of their successes.

1.4.1 A Liberal Feminist Story of Law Reform

The examination of feminist influences on rape law reform often starts by recounting a 'liberal story' of feminist activism that describes partial success in producing legislative and procedural change across rape laws and procedures (Mason, 1995: 50; Heath & Naffine, 1994: 31). Law reform based on feminist liberal ideals, as Martha Chamallas suggests (1988), has tended to draw on rights focussed objectives where the struggle is seen to lie in finding a more appropriate balance between a woman's individual right to remain free from, while also remaining appropriately protected by, law's regulation.[29] Social change in this context is principally a matter of confronting the institution of the law and its discriminatory practices with demands that women be afforded the same opportunities, rights and responsibilities as men (Sachs & Wilson, 1978; Simpson & Charlesworth, 1995).

According to this traditional liberal feminist account of reform, law's apparatus is capable of change that will notionally produce more equitable conditions for women with respect to their economic, social and working lives (Sachs & Wilson, 1978; Caringella-MacDonald, 1988; Smart, 1989; 1995). The theory assumes that a largely benevolent state will be receptive to women's demands for change and eagerly amend what runs counter to its primary goal of preserving the democratic freedoms and rights of all individuals (Franzway et al., 1989; Heath & Naffine, 1994). In the context of sexual assault, the expectation amongst liberal feminists has been that state intervention will follow where sustained political pressure has

[28] Gerry Simpson and Hilary Charlesworth, for example, use the concept of 'intersections' when discussing feminist understandings of the law (1995: 111).
[29] Chamallas (1988) draws a distinction between the principles of conventional liberalism and an egalitarian model of sexual conduct where feminists have adapted liberalist principles so as to better represent the rights and interests of women.

revealed the need to humanise the social, medical and legal responses to victims of sexual assault.

Mason describes the efforts of feminists committed to rape law reform, particularly during the 1970s and 1980s, as mainly driven by 'a blend of liberalism and standpoint politics' (1995: 50). It was women's experiences of rape and the legal system that provided the key impetus for agendas directed at exposing law's inadequate treatment and adjudication of rape offences.[30] The principal concern of campaigners during this time was to uncover some of the more pervasive misconceptions that had traditionally framed the legal response to rape. In particular, feminists pointed to how both the legal definition and evidentiary requirements could directly explain why so few cases ever appeared before the courts. In effect, liberal reformists set out to substitute law's truth about rape with a feminist one (Smart, 1989) where women's experiences were positioned as the authentic voice on the realities of rape and the legal system (Mason, 1995).

1.4.1(a) The "Hidden Figure"[31] and the Problem of Police

Studies that repeatedly highlighted the extent to which rape remained amongst the most highly under-reported crimes in Western countries provided compelling empirical support for liberal feminist claims (Katz & Mazur, 1979; Largen, 1988). Phone-ins conducted by grass roots activists and rape crisis centres[32], combined with more methodologically rigorous studies on policing and victimisation surveys (Young, 1983; Chambers & Millar, 1983; and more recently, Walker, Dagger and Collins, 1991; Grace et al., 1992; Lees & Gregory, 1993; ABS Women's Safety Survey, 1996), effectively shattered the dominant construction of rape as a relatively rare event perpetrated against a small number of women of whom a high proportion

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[30] Standpoint feminism, as described by Harding (1986) and Smart (1995), presumes the production of knowledge based on women's experiences will lead to a progressive change in the social conditions of women. The point at which epistemological and political ends meet is illustrated when the state or other institutionalised forces are made to recognise how "women" are systematically oppressed or discriminated against in the context of their social, sexual and working lives. Here the potential exists for marshalling resources to work towards bettering the situation for all women.

[31] Koss (1985: 193, 206) refers to 'hidden rape victims' as those who are least likely to report to police or to disclose their victimisation beyond their immediate network of friends or family. However, Easteal's survey of survivors of sexual assault in Australia revealed that over a third of victims had never told anyone about what happened to them (1993: 80).

[32] See for example the Report of the Women's Safety Survey conducted by the Women Against Rape in London during the early 1980s (Hall, 1985).

immediately reported the incident to police.[33] Furthermore, these studies revealed how a previous lack of reliable information about the prevalence of rape reflected the wider social forces and complexities underlying women's experience of sexual assault.

Diana Russell's (1984[34]) influential study surveying the rates of rape and sexual harassment amongst 930 women living in San Francisco during the late 1970s was published around this time. As many as 223 women (24%) reported a completed rape[35] and an additional 291 (31%) were the subjects of a rape attempt (Russell, 1984: 35).[36] The rate of reporting[37], however, was a disturbing 9.5% (Russell, 1984: 36)[38] with very few women reporting incidents of rape by dates and acquaintances or by current or former boyfriends/lovers (Russell, 1984: 96).[39] This contrasted significantly with the proportion of women (32%) who had nevertheless disclosed

[33] It should be noted that data generated by phone-ins and self-select survey questionnaires are often criticised for being unreliable estimates of the sample population given how respondents are obtained. Women from non-English speaking backgrounds, women who have disabilities, or women who are institutionalised are amongst those who are particularly under-represented by these methods of data-collection.

[34] According to Matthews, Russell's work helped to 'legitimise' feminist analyses of rape by using a sociological approach that remained focussed on the victim's perspective (Matthews, 1994: 174).

[35] The study relied on the legal definition of rape operating in San Francisco during 1978. It was limited to acts of penile-vaginal penetration without consent and included instances where the woman was drugged, unconscious, and asleep. Rapes and attempted rapes involving other types of penetration such as oral and anal rape were excluded.

[36] Russell attributed the high rate of disclosure in her study to the research design which took account of how women might be reluctant to conceptualise or interpret their experiences as rape situations. The questions were framed to identify women who had been 'forced to have sex' rather than those who had 'ever been raped' (Russell, 1984: 37). The impact of the study design on rates of disclosure is partially supported by the comparison Russell draws between her data and the 1974 National Crime Victim Survey (NCVS) of which San Francisco was one of the cities studied. There were 33 women who identified in the Russell survey as having experienced rape or attempted rape in the previous 12 months. This translated into a rate of 3.5% per 100,000 females (1984: 46). The incidence rate for the NCVS, however, was only 0.5% per 100,000 females, seven times lower than the figure reported in the Russell study (1984: 46).

[37] It should be noted that these figures represented incidents of sexual assault that may have occurred at any time throughout the lives of the women interviewed rather the incidence rate for a specific year. Russell (1984) later reported that 25 of the 930 women living in San Francisco city at the time of her survey (she excluded the 8 cases that occurred outside the city bounds for statistical compatibility with the Uniform Crime Reports) had disclosed a rape or attempted rape having occurred in the past 12 months. Only 4 of these 25 incidents had been reported to the police.

[38] This figure is based on cases of non-marital rape given the spousal immunity was operating in California at the time. Husbands could therefore not be charged with raping their wives.

[39] Menachim Amir's study (1971) of rape reports in Philadelphia during 1958 and 1960 destabilised the conventional view of rape as typically committed by perpetrators unknown to their victims. His statistical profiling of 646 reported cases found that just under half of the offenders (47.5%) were acquaintances, close friends, neighbours, relatives or the current/former partner of the victim (Amir, 1971: 235). Contrary to the "stranger-rape" conception, Amir also concluded that the 'most dangerous place' for women was indoors, with 56% of rapes occurring in the victim's or the offender's homes (1971: 144).

being raped by men with whom they had dated or with whom they had been in previous relationships (Russell, 1984: 97). A second study on the incidence of rape amongst American college students conducted by psychologist Mary Koss in collaboration with *Ms Magazine* (Warshaw, 1988) also produced alarming results. One in four women indicated they had been the victims of one or more rapes. A clear majority of these offences had been perpetrated by men they knew (84%) with 57% occurring in the context of dating situations (Warshaw, 1988: 11).[40] The reporting rate amongst these women, however, was a meagre 5% (Warshaw, 1988: 50). This fuelled feminist claims that reported rapes only reflected the tip of the iceberg in terms of the true incidence of rape experienced by women.

Studies on police practices provided an immediate target when seeking an explanation for why so few women were prepared to report. In one of the first detailed studies examining police responses to rape Lorenne Clark and Debra Lewis systematically revealed the institutionalised bias that allowed police to operate as a 'highly selective filter' in processing rape reports (1977: 59). They found that of the 116 reports of rape made to the Toronto police during 1970 a very high number (74 or 63.8%) had been classified as 'unfounded' or 'false' (Clark & Lewis, 1977: 57). Upon reviewing these cases, the authors believed that a rape had in fact occurred in at least 104 of the 116 incidents reported (Clark & Lewis, 1977: 57).[41] Although it was estimated that at least two thirds of the cases classified as unfounded might well have been decided on 'pragmatic considerations' principally concerned with the likelihood of cases resulting in convictions, the judgements made in the remaining cases were less easily understood (Clark & Lewis, 1977: 58). Clark and Lewis (1977) suggest, however, that police perceptions of what constituted acceptable standards of behaviour for women appeared to heavily influence whether the report would be classified as legitimate.

A similar study of police practices in Scotland conducted by Gerry Chambers and Ann Millar during the early 1980s found that 22% of reported rapes, attempted rapes

[40] Interestingly, this research has been criticised for being methodologically flawed and partially responsible for generating a disproportionate fear of rape amongst women college students. Warshaw refers to this phenomenon in her foreword as the 'rape denial attack' (1988: xx) of which Katie Roiphe's book *The Morning After* (1993) would be a case in point.

and assaults with intent to "ravish" were designated as 'no-crime' committed, with a further 24% classified as 'unsolved' (1983: 10). Although 'no-crimed' cases were further described as either unfounded or 'complaint withdrawn', in practice the grounds upon which this distinction was based seemed highly spurious. The authors detailed several instances of police misusing the term 'complaint withdrawn' to screen cases where the victim was accused of making false allegations or for situations where 'the cases would have been marked groundless or unsubstantiated anyway' (Chambers & Millar, 1983: 43; see also pp. 78-87).

In Australia, criminologist Paul Wilson (1978) strongly criticised police classification methods and recording practices with respect to rape complaints. He identified a proportion of complaints that appeared to get "lost" in the system and no crime report existed.[42] Chambers and Millar also made reference to the 'cuffing' of crime reports by police as a way of reducing paper work and improving clearance rates (1983: 30; see also Gregory & Lees, 1996).[43]

Comparisons between these studies and the testimonies of women who were increasingly speaking out about their reasons for not reporting showed a high correlation between the likelihood of police disbelieving rape allegations and women's reluctance to report for fear of being disbelieved. In a recent Victorian study (Heenan & Ross, 1994), counsellors at sexual assault centres indicated a number of disincentives cited by women who were reluctant to proceed with a police report. These included a distinct lack of confidence in the criminal justice system and a fear of being disbelieved by police (Heenan & Ross, 1994: 67). Corresponding surveys with police officers revealed the extent to which women's fears accurately reflected this situation with as many as 44.4% of police presuming that the rape allegations were false prior to conducting any extensive investigation

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[41] The researchers considered that only 12 of the 74 reports screened out were 'genuinely unfounded' (Clark & Lewis, 1977: 58).

[42] An interesting case in point is provided by one of the trials observed for the current study where the woman-complainant had reported to police ten years after the rape occurred. After making her initial statement, the police made no further contact with her and she was never asked to appear in court. A decade later, however, she decided to approach the police again only to find that they had no record of her original report [Trial 10].

[43] An inspection of records maintained by the Community Policing Squads in Victoria during the mid 1990s revealed that not all sexual assaults reported to the police were recorded amongst the official crime statistics (Drug and Crime Prevention Committee, 1996: 39, 109).

(Heenan & Ross, 1994: 71). The associated commentary provided by some members of the police force during this study, candidly portraying rape as a crime that is often easily and capriciously claimed[44], revealed the extent to which police culture and classification methods tenaciously cling to a belief system where the image of the "lying lascivious woman" remained prevalent.[45]

Feminists and victims' rights activists continued to report on the high attrition rates for rape complaints with varying degrees of success throughout the 1980s and 1990s. These were used to substantiate their periodic calls for further reforms to the operational criteria guiding police and prosecutorial decision-making with respect to rape cases in both Australia (Real Rape Law Coalition, 1991; Heenan & Ross, 1994; Easteal, 1994; Standing Committee on Social Issues, 1996) and overseas (Stone et al., 1983; Gregory & Lees, 1996; Grace et al., 1992; Temkin, 1997).

Rises were observed in official crime statistics over this time with the number of rapes reported in Victoria, particularly during the early 1990s, having steadily increased (Ross and Brereton, 1997). This trend was parallelled in other Australian states and territories where there were similar increases in reported rapes and other forms of sexual assault (See Bargen & Fishwick, 1995: 24-25). Research conducted by Easteal (1993) and Ross and Brereton (1997) suggests the change in reporting practices might at least partially reflect an increased willingness on behalf of women to report sexual assault to the police, especially considering the higher proportion of incidents involving past sexual assault or where the accused is well known to the victim.[46]

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[44] For example, one detective felt it pertinent to add a 'passing comment' in 'guess[ing] that two thirds of the alleged rapes which I have attended have been false reports' (Heenan & Ross, 1994: 101).

[45] The training notes that were current for Victorian detectives up until 1993 unashamedly endorsed these perceptions. The words of Chief Justice Hale were used to advise the investigator to be on the look out for "false complainers". According to the notes, 'The investigator MUST first satisfy himself that a crime has been committed and secondly, that it was apparently committed by the accused. He must remember at all times that complaints in sexual assault cases are easily made. False allegations resulting from sexual neuroses, fantasy, jealousy, spite or simply a girl's refusal to admit that she consented to an act of which she is now ashamed, often place the person accused in the position where he has great difficulty in establishing any defence' (their emphasis). (Detective Training School notes, Victoria Police, 1993: 3).

Although an increased willingness to report sexual assault may reflect wider considerations, such as the increased availability of support services which provide victims with access to counselling support and information, it may also signal a genuine shift in the police management of sexual assault reports. For example, during 1991 representatives from the Victoria police agreed to combine with workers from sexual assault services and forensic doctors to develop a Code of Practice that would allow for a co-ordinated approach in responding to victims who reported a recent sexual assault (LRCV, 1991a). The Code was unique in Australia because it explicitly prioritised the medical and emotional needs of the victim over the investigatory requirements for taking statements and locating suspects or crime scenes. Several prescriptive statements in the Code were designed to directly confront some of the traditional misconceptions guiding the assessment of rape complaints.[47]

Although the evaluation of the effects of the Victoria Police Code of Practice on the attitudes and practices of police (a project I undertook with Stuart Ross in 1994) were disappointing overall, there were a significant number of instances where compliance with the Code led to a professional, supportive and effective response to victims making reports of recent sexual assault.[48] For instance, as many as 42% of victims/survivors surveyed spoke positively about their treatment by police, particularly CPS members (Heenan & Ross, 1994: 77).

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[46] Temkin is not convinced that this is the case. Of the 23 women she interviewed for a review of Sussex police responses to rape victims, 30% were far from confident that police would respond to their reports with care and sensitivity (Temkin, 1997: 523).

[47] For example, the guidelines direct police to '[r]emember that people react differently to traumatic events. A victim may appear very composed and be able to calmly discuss the incident. You should not infer from this that the victim is unaffected by the assault or is lying...' (Code of Practice For The Investigation of Sexual Assault, 1999, Guideline 66). They are also instructed to 'allow the victim to describe the assault in their own words' and to 'remind the victim that it is the offender who has committed the crime' (Guideline 59).

[48] Although the Code of Practice was reissued in 1998, the Chief Commissioner of Victoria Police at that time, Neil Comrie, stated that the Code is merely a guide for members to follow and that there may be good reason for police to deviate from the procedures in particular circumstances. This statement, which appears at the beginning of the Code, significantly weakens its original status as Police Standing Orders. Nonetheless, while at the time of the Evaluation Study a number of police expressed dissatisfaction with the aims and objectives of the Code, sexual assault services generally observed a high degree of compliance with the guidelines that required police members to ensure victims of recent sexual assault receive crisis support within two hours of reporting an incident of rape (Guideline 43). (This information was obtained from my experience of working with a team of

Improvements in the police response to sexual assault have also been documented elsewhere. Three quarters of the women interviewed for the British study by Gregory and Lees during the period from 1988 to 1990 reported being satisfied with police treatment (1996: 182). A Victorian study conducted by Gilmore and Pittman also suggested that Community Policing Squad (CPS) members were largely perceived as both 'co-operative and responsive' to victims' needs during the reporting stage (1993: 44).

Although police decisions about whether to charge an offender are still likely to be influenced by how closely victims meet the image of "real rape" victims, the likelihood that these factors would immediately render a woman "not believable" has diminished. Women who are employed as sex workers, women with a psychiatric disability, women who are drunk or perceived to have engaged in what has typically been perceived as "provocative" or "risky" behaviour (all of whom were formerly deemed to be the unrapeable) have a greater chance of being believed than they had in the past. Nonetheless, as Temkin[49] (1997) points out, they continue to make up the greater proportion of women who are less likely to be believed by the system overall.[50]

1.4.1(b) The Diminishing Pyramid - From Reporting to Trial Outcome

The extent to which the number of reported rapes diminished as they moved through the criminal justice process further supported the claims made by women's groups that the law's treatment of rape victims stood as a 'monument to injustice' (Clark & Lewis, 1977: 57). Studies commissioned throughout the 1970s and 1980s provided considerable scope for feminist reformists to demand wholesale change to the practices, procedures, and attitudes that had allowed a majority of rape offenders to

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counsellors on the Victorian After Hours Telephone Crisis Line, attached to the Centres Against Sexual Assault, from March 2000 to March 2001.)

[49] Temkin further warns of any complacency around monitoring police responses to rape, especially in the light of continued practices and belief systems that leave a 'sizeable minority' of women feeling disbelieved and unsupported very soon after they have officially disclosed the trauma of having been sexually assaulted (1997: 527).

[50] The Heenan and Ross Evaluation research found that victims with a psychiatric history and victims with a criminal record were amongst the least likely to be believed when reporting a rape (1994: 75). Other studies continue to show the extent to which the relationship between the victim and offender predominantly influences the police in their charging decisions (Victorian Community Council Against Violence, 1991: 31; Gregory and Lees, 1996: 185).

escape a criminal justice response (Holstrom & Burgess, 1975; Robin, 1977; Royal Commission into Human Relationships, 1977; Chambers & Millar, 1983; 1986).

Clark and Lewis cited incontrovertible figures documenting low levels of reporting, charging and conviction rates for rape throughout Canada and the United States during the 1960s and 1970s, and concluded that Western societies were in effect 'tacitly condon[ing] rape' (1977: 56). Their own study showed how few rapes were likely to result in conviction, even on the highest estimates of report, arrest and prosecution rates (Clark & Lewis, 1977: 57). Richard Wright's study (1984) of rapes and attempted rapes recorded in six English counties between 1972 and 1976 confirmed this picture. He found that almost 25% of reported rapes by single offenders were 'no-crimed' by police (Wright, 1984: 399). A further 39 of the 204 men who were apprehended for rape did not face prosecution. Of the remaining 165 who were charged and prosecuted, only 22 were found guilty of rape, with a further 13 convicted of attempted rape (17% of total 204 men charged). Sixty-three of the men arrested for rape were acquitted, 23 were convicted of a non-sexual offence, and 42 pleaded guilty to a "lesser" sexual offence (Wright, 1984: 400).

More recently, a study published by the London Home Office (Grace et al., 1992) looked at the attrition rate for a sample of rape cases processed in England and Wales during 1985. Of the 327 alleged offenders in the study, only 25% were convicted of a rape offence[51], while almost half the cases did not proceed to court (Grace et al., 1992: 25). The researchers identified three key points of attrition where significant numbers of cases were filtered out (Grace et al., 1992: 8). These were where:

1. the police decided to 'no-crime' an incident;
2. the police chose not to continue with a prosecution against the alleged offender;
3. juries decided to acquit the accused.

[51] The study by Chambers and Millar of attrition rates in Scottish rape cases also reported a conviction rate of just 25% (1983: 60).

Factors that appeared to have a significant influence on filtering during the various stages of the reporting and prosecution process were: the age of the complainant, the relationship between the complainant and the alleged offender[52], the place of initial contact, the degree of injuries sustained or violence perpetrated and whether there had been any prior consensual social or sexual contact between them before the alleged offence took place (Grace at al, 1992: 18-22). Some of these factors were also directly related to trial outcome.[53]

Similar findings were reported by Gregory and Lees (1996) as the basis of their survey of all cases of sexual assault reported within the London borough of Islington during 1988 and 1989. Of the original 301 reports, only 88 were handed over to the Crown Prosecution Service (Gregory & Lees, 1996: 7). Of these cases, 71 prosecutions were initiated, with 41 resulting in conviction, although the authors were careful to point out that convictions were often for lesser offences (Gregory & Lees, 1996: 9).

The recently published Victorian Evaluation Study (Heenan and McKelvie, 1997: 48) produced similar results. There were 255 accused persons[54] in the 18- month study over 1992-1993 with an estimated number of 1235 reports recorded by police[55] during that same period. Of the 255 handed up to the Office of Public Prosecutions, the following outcomes were obtained:

- rape prosecutions were discontinued in 28 cases (10.9%);
- 80 accused (31.4%) either pleaded guilty or were found guilty of offences *other than* rape;
- 54 accused (21.2%) pleaded guilty to rape;

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[52] Gregory and Lees (1996: 12) also found that 'the greater the degree of former intimacy, the more difficult it was for a case to make progress' at every point of the prosecution. Also see Chambers and Millar (1983: 88).

[53] The significant factors here were whether the accused was an acquaintance of the alleged victim, the age and marital status of the complainant, whether there had been previous consensual contact, the place of initial contact on the day/night of the incident and whether the alleged victim had sustained physical injuries (Grace et al., 1992: 17-21).

[54] There was one woman charged with rape in terms of aiding and abetting her husband to commit sexual offences against her two daughters.

[55] This figure was calculated using the Victoria Police Crime Statistics for 1992/1993 and 1993/1994 where the number of reports for 1992/1993 was 786 (1992/3: 72) and the number of reports for 1993/1994 was halved at 449 (1993/4: 24).

- 35 accused (13.7%) were found guilty of rape;
- 54 (21.2%) accused were acquitted of rape[56]

(Heenan & McKelvie, 1997: 48).

In other words, an estimated 7.2% of recorded rapes resulted in convictions.[57]

Although police and prosecutorial practices were justifiably the prime targets of criticism by feminists and other reformists as the causes of the high rates of attrition, there was some acknowledgement that other factors also influenced the final tally.[58] Studies in Victoria have revealed that, at each point of the process, up to a third of women had withdrawn their initial complaint or indicated an unwillingness to proceed after making their initial report (Victorian Community Council Against Violence, 1991: 41; Gilmore and Pittman, 1993: 42).

Researchers have noted a range of factors likely to have influenced these decisions. For example, Gregory and Lees (1996: 5) found that victims were more likely to withdraw their statements if they knew the offender in some way, especially if there had been some prior intimacy between them. Gilmore and Pittman (1993) have also pointed to the range of fears that work to actively discourage women from continuing, such as: their fear of or lack of faith in the legal system, the negative reactions of family and friends or fear of the offender himself. The Victorian Evaluation Study also reported instances of women who were threatened with further assaults and violence from the perpetrator unless they withdrew their complaints

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[56] There were two accused who absconded before proceedings went ahead and a further two accused who were deemed unfit to plead either guilty or not guilty to the offences given the severity of their psychiatric disability.

[57] This figure was calculated by dividing the total number of convictions (n=89) into the 1235 rapes reported during the 18 month period.

[58] Galvin and Polk (1983) suggest that their research leads to serious questions about the extent to which the attrition rate for rape cases is in any way unique when compared with other serious offences. Drawing on various data sets available for the state of California, they compared the handling of rape cases alongside the attrition rates for homicide, burglary, assault and robbery. A similar pattern of attrition emerged across all offences leading the authors to conclude that 'attrition is common throughout the justice system' and that 'rape has no unique pattern of attrition, clearly distinguished from that experienced in other serious felony cases (Galvin & Polk, 1983: 151-152). This was also surprisingly the case when comparing rates of non-reporting across the five offence types (1983: 135). Diana Russell has been critical of this work, however, for 'ignor[ing] the unfounding process unique to cases of rape' (1984: 30), as well as the proportion of rapes that are never recorded by police. Similarly Gregory and Lees suggest that, although the attrition rates for all cases may be high, the attrition rate for rape is particularly unsatisfactory, given that most alleged perpetrators are known to their victims and can more readily be located and charged (1996: 11).

(Heenan & McKelvie, 1997: 161, 168). Other studies have highlighted the extent to which police advise women not to continue with their official complaints (Chambers and Millar, 1983; Temkin, 1987; Gilmore and Pittman, 1993; Lees, 1996; Drugs and Crime Prevention Committee in Victoria, 1996).[59]

1.4.1(c) Women Rape Victims "On Trial"

If statistically the figures on reporting were seen to measure the lack of seriousness with which rapes were typically treated, the conduct of rape trials graphically portrayed the injustices women faced in the courtroom. The trial process and particularly the gratuitous character attacks launched in cross-examination were variously described as a secondary victimisation or a secondary assault against women (Borgida & White, 1978; Largen, 1988). A core feature of liberal reformist campaigns has, therefore, often been to give status to the stories of women who consistently describe having their credibility and morality systematically demolished or "put on trial" in defending their accounts of rape in court.

Early studies by Griffin (1971), LeGrand (1973) and Berger (1977) focused attention on the historical legal precedents that were peculiar to rape, where corroboration warnings, the admission of sexual history evidence, and the rule of recent complaint unfairly operated to reduce the weight a jury might afford to women's claims. Lobbying to legislatively remove or significantly tighten these evidentiary and procedural obstacles was consequently considered key to redressing the balance between the rights of the accused and those of the victim. It was believed that this would directly alleviate the extent to which women would be forced to defend highly prejudicial and distressing personal attacks made against them during cross-examination.

Clark and Lewis also located other contributors to 'the art of victim blaming' (1977: 147) such as the deleterious influence of victimology which further perpetuated the belief that women were somehow culpable, or at least partially responsible, for being raped. When rape could no longer be explained as the result of individual pathology

[59] Gregory and Lees (1996: 7) have also commented on the political and organisational pressures on police to continually improve 'clear up' rates, and the extent to which this runs counter to the drive

and/or uncontrolled sexual aggression in a social minority of disturbed men, the focus turned to the victims - the women. The rationale was that if rapists were just normal men then what was it that women were doing to make men rape them? In line with more empirically-based and "scientific" approaches to studying social phenomenon, Menachim Amir developed his brand of victimology by coining the term 'victim precipitation' in the context of his study on *Patterns in Forcible Rape* (1971: 346). Amir advanced an interactional explanation for one fifth of the 646 cases reported to police in 1958 and 1960 in his Philadelphia study that occurred after women had voluntarily agreed to a certain amount of social or sexual contact with the accused (1971: 266). Victims "precipitated" rape in these circumstances by placing themselves in 'situations charged with sexuality' or by behaving in ways that could be interpreted *by the offender* as sexually 'inviting' or simply by failing to resist the offender's advances 'strongly enough' (Amir, 1971: 346).[60]

Critics of Amir quickly attributed the currency of his theory to its reliance on the principal tenets of a dominant rape mythology that had become deeply enshrined within traditional trial discourse (Weis and Borges, 1973; Clark and Lewis, 1977; Jeffreys and Radford, 1984). Far from victimology constructing a new way of conceptualising rape situations, in this instance it further legitimated the courts' focus in constructing measures of blameworthiness derived from preconceived and highly gendered standards of appropriate behaviour for women[61] (Feild, 1978; Burt, 1980; Giacopassi & Wilkinson, 1985).

The findings from an impressive array of empirical research conducted here and overseas throughout the 1980s continued to draw attention to the problems with rape

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for police to pay more serious attention to victims of sexual assault who are increasingly encouraged to come forward and make official reports.

[60] Lois Pineau (1989: 227) discussed this notion in the context of the mythology surrounding male sexuality as impossible to contain once activated. It remains the responsibility of women to take care not to arouse these unstoppable sexual urges or suffer the consequences. Although, as Pineau rather cynically surmises, even in such circumstances, no harm will be seen to have occurred anyway since rape 'give[s] [women] the sexual enjoyment they *really* want' (1989: 228). Vandervort also notes the cultural acceptability of men's risk-taking in initiating sexual situations where 'admir[ing] successful "recklessness"' (1987/8: 281) acts to socially endorse the image of aggressive male seduction.

[61] Ironically, Amir believed the trial process for rape trials did not allow for a proper consideration of the victim's contribution to the incident that led to unfairness for the accused (1971: 265). And yet the notion of victim precipitation (even if this term was not explicitly used in the courts) was readily accommodated within the traditional processes used to assist with the legal determination of rape. A

trials where any change resulting from procedural and evidentiary reforms appeared marginal (Naffine, 1984; La Free et. al., 1985; Bonney, 1987; Adler, 1987; Temkin, 1987). The conventional methods for diminishing women's credibility through detailed examinations of their past sexual histories (see e.g. Adler, 1987: 82), coupled with the routine giving of corroboration warnings to guard against the pervasive threat of wrongful conviction (Scutt, 1980a), were continually repositioned as key obstacles in securing convictions.

Increasingly, more attention was directed at reformulating the definition of consent. Studies highlighted the extent to which men successfully argued against convictions by freely admitting to having had sex with the complainant but claiming there was consent. Given the prosecutorial burden was to prove non-consent, the focus of the rape trial invariably turned to the behaviour and character of the woman and whether her actions and behaviour on the day in question, as well as her lifestyle and moral choices in the past, adequately matched the stereotypical picture of a woman who had really been raped.

Mostly, feminist reformers in the liberal tradition continued to work for change within the existing legal framework, and further reforms were sought to resolve the structural barriers that had so far proved relatively resilient to any legislative modification (Carmody, 1992; Mason, 1995).[62] Along with re-shaping rape laws, the cultural attitudes of those who administered and adjudicated in rape matters was seen as the final challenge in narrowing the gap between substantive change and the practices of the courts. Promoting the development of gender awareness in the legal profession, police force, and across the broader community (future jurors) often figured amongst the "wish lists" of campaigners and commentators who were sceptical that legislative change on its own would be enough to substantially improve the position of women (LaFree et. al., 1985; Adler, 1987; Scully, 1990).

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focus on her behaviour, her actions and her level of culpability were routinely positioned as key indicators of moral worthiness and believability in rape trials.

[62] In this sense the actions of grass roots activists and rape crisis centre workers in continuing to advocate for reforms may be less reflective of political positioning against what is conceived as the classic liberal-radical feminist divide, and more a reactionary stance provoked by the appalling treatment they hear from women service-users who have been through the legal system.

1.4.2 A Radical Feminist Story: Questioning Law Reform

Feminists applying a more radical analysis to the operation of rape laws turned their theoretical and activist attentions to the need to change the kinds of dominant meanings that shaped the historic cultural construction of the offence of rape itself. For them, the legal treatment of rape revealed certain fundamental truths about the law, the state, and gender inequality where the likelihood of reforms ever serving the interests of women was seriously questioned. A central concern lay in exposing the deeply entrenched male bias that systematically operated to produce and perpetuate a gendered power relation resulting in women being socially controlled and structurally oppressed throughout their economic, social and sexual lives (Griffin, 1971; Brownmiller, 1975; Rich, 1979; Kelly & Radford, 1987). Under the prevailing system of male power, according to radical feminists, reforming rape laws would be unlikely to effect any meaningful change for women rape victims as long as the phenomenon of rape continued to be defined and understood from the male perspective (Thornton, 1991).

Perhaps the most celebrated and controversial[63] radical feminist voice to emerge during the 1980s is that of American legal scholar Catherine MacKinnon (1983, 1987, 1989). In her most acclaimed article, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence* (1983), MacKinnon outlined her own brand of 'unmodified feminism' (1983: 639), a theory of gender oppression that claimed to speak the truth of women's experiences while exposing the malecentric biases of law and its practice.

MacKinnon's theory saw the tools of women's oppression as deeply embedded in the processes, policies and institutions that dispensed power with a distinctively male hand in what was claimed to be the first uniquely radical feminist theory of the state. According to MacKinnon (1983), the law could only operate from the male standpoint, not just in terms of the way it reflected the maleness of the social world, but by applying its power in a male way through a dominant culture, language, and practice. In her analysis the construction of (hetero)sexuality was positioned as key to understanding inequality for women and the operation of gender oppression. She

used the example of rape to more fully explore her theory of sexuality where a dichotomous relationship of dominance and submission was said to epitomise the male-female relation (MacKinnon, 1983).

Women's domination by men was, according to MacKinnon, primarily sexual in the sense that sex has culturally been constructed according to masculinist images of coercion and seduction where 'forced sex is paradigmatic' (1983: 646). MacKinnon thus questioned the line that had conventionally stood to separate the actions of "good" men from rapists and, more controversially, the event of sex as opposed to the event of rape where she argued that the notion of consent within heterosexual relationships was in fact highly problematic (Finley, 1988).[64] The law continually placed rape outside the range of "normal" male behaviours that were seen as culturally consistent with the performance of heterosexual sex, while women were conditioned to see their sexuality as reflected in an image of male sexual desire where being coerced or acquiescing to sex was not perceived as rape. This, for MacKinnon, represented a system of male dominance that was 'metaphysically nearly perfect' (1983: 638).

> Under conditions of male power, consent becomes whatever it is defined as from the dominant (male) position, unless injuries or other physical signs of force cause it to fall outside that which has been regarded by men as culturally acceptable. Even then, legal and judicial interpretations may try to reconcile such force with a man's over-enthusiastic, but perfectly understandable, attempts at seduction.[65] Far from rape being criminalized, argues MacKinnon (1983), it has systematically been regulated so that men cannot be seen to have raped their wives, their dates, or their girlfriends, and women cannot *be* raped unless they can express, or conceive of, their sexual desires outside the male frame.

Liz Kelly provided empirical support for MacKinnon's theory when her interviews with women revealed that a 'continuum of sexual violence' (1988: 97) more

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[63] See Olsen's review of MacKinnon (1989) that considers a range of theoretical critiques of her work prior to the release of *Feminism Unmodified* (1987).

[64] According to Olsen (1989) and Davies (1994), this is a principal point of contention for MacKinnon's critics who have variously interpreted her as denying women their sexual subjectivities or more conservatively as "anti-men".

[65] See for example footnote 1 in the Introduction of this thesis that details the 'rougher than usual handling' comment made by the South Australian Judge, Justice Bollen in 1992.

adequately accounted for the complex range of experiences that occurred in most women's sexual lives. Women identified a series of practices and contexts that variously marked their sexual relationships with men. This often included coercion and pressure, compliance and acquiescence while only on some occasions could they more readily distinguish experiences of rape or of feeling forced (Kelly, 1988: 137). It was evident from Kelly's interviews 'how unclear in retrospect the boundary between rape and not rape was for many women' (1988: 112) and perhaps the 'shifting boundaries between these categories as [women's] own understandings and definitions change over time' (1988: 116).

1.4.2(a) Critiquing the Legal Construction of Consent

Throughout the 1980s feminist discourses surrounding rape were increasingly focused on the legal construction of consent. For an accused to be convicted of rape under criminal law, the prosecution was required to prove that penetration had occurred without the consent of the woman-complainant and in circumstances where the accused knew that the woman was not consenting or might not be consenting. Much had been revealed by feminists of the historically-based gendered approach that informed the procedural treatment and socio-cultural interpretations typically applied to rape accounts. Some reforms aimed at addressing these issues had subsequently been successfully introduced. However, the feminist interest shifted to the social construction of the offence itself when juries repeatedly failed to be convinced beyond reasonable doubt that women's claims of non-consent could be sustained in the face of men's seemingly reasonable claims to the contrary.

The goal for liberal feminists who saw the problem lying in the traditional view of rape as the natural outcome of men's uncontrollable sexual urges (Barry, 1985) was to re-conceptualise rape as a crime of violence. According to this view, removing the "sex" from rape and focusing on the violence of the assault would minimise the focus on consent in most rape trials and therefore the issue of the credibility of the complainant. The prosecution would in this context merely be obliged to prove that

an assault had in fact taken place (Brownmiller, 1975; Clark and Lewis, 1977; Temkin, 1987).[66]

Law reforms in Michigan in 1974, and in Canada and New South Wales in 1981, exemplified the level of political significance that was being attached to the language of rape, and the importance of redefining rape within a discourse of power (Young, 1983; Naffine, 1984; Heald, 1985; Temkin, 1986; Woodhull, 1988, Allen, 1990). The Michigan reform was heralded as one of the most radically progressive statutes of its time with a legislative focus on establishing whether the sexual contact occurred in 'coercive circumstances' and using degrees of physical violence to distinguish levels of sexual assault (Heald, 1985; Temkin, 1987; LRCVb, 1991). Similarly, in Canada and in New South Wales a system of graduated offences was introduced with categories of sexual assault classified according to the degree of violence perpetrated (Wallace, 1981; Bonney, 1987; Morgan & Graycar, 1990; Bargen & Fishwick, 1995).

For radical feminists, however, "desexualising" rape essentially missed the fundamental point that 'gender has been sexualised' across social institutions including law and its practice (MacKinnon, 1983: 635). To adopt this liberal solution was, for MacKinnon, masking how fundamental to the workings of patriarchy women's oppression 'through sex' had always been (1987: 87). As opposed to Brownmiller's analysis of rape (1975) being firmly grounded in the biologically determined power relations between men and women, with the sexual element being incidental, the political importance of rape as described by MacKinnon (1989) was that it illustrated the social process through which the state, men and patriarchal forces had been able to maintain a clear distinction between heterosexual sex, as mutually desired and similarly enjoyed, and rape in the face of women's experiences of both. In MacKinnon's own words:

> What we [radical feminists] are saying is that sexuality in exactly these normal forms often does violate us. So long as we say that those things are abuses of violence, not sex, we fail to criticise what has been made of *sex*,

[66] The following slogan cleverly captures the message intended to flow from these reforms: "Rape is about violence not sex. If a person hits you with a spade you wouldn't call it gardening" (comment attributed by Victorian Centres Against Sexual Assault to South Australian Family Planning project officer, Brook Friedman, in 1994).

> what has been done to us *through* sex, because we leave the line between rape and intercourse, sexual harassment and sex roles, pornography and eroticism, right where it is (1987: 86-87; her emphasis).

Furthermore trials that measured the violence of rape did nothing to shift the historical legal reliance on measures of force and resistance that were classically used for determining whether a woman's non-consent had adequately been conveyed[67] (Plaza, 1980; Naffine, 1984; Reekie & Wilson, 1993). In the majority of rapes, particularly those involving offenders well known to their victims, physical violence would rarely figure precisely because of the gendered sexual dimension that allowed men to perform a sequence of "seduction" in the absence of unambiguous resistance from women and then claim there was consent (Pineau, 1989).

Other feminist legal commentators emphasised the nature of adversarial proceedings as working against the kinds of legislative changes intended to shift the focus from women's behaviour to that of the male accused (McBarnet, 1981; Vandervort, 1987/8; Smart, 1989). Broadly, a criminal trial requires the prosecution and the defence to depict the "evidence" in ways that are favourable to their side in the hope of either persuading the jury of the accused's guilt or raising enough doubt to convince them that the charges cannot be sustained. In this way, according to McBarnet, the trial process can be seen as 'a joust between two competing versions' (1976: 173) where 'one side [will be] taking the grey areas of "reality" and turning them into "black" the other turning them to "white"' (1981: 24), with juries being forced to make 'clear unambiguous decisions' (McBarnet, 1976: 173) in situations where the complex interactions, histories and contexts represented in the subjective realities of everyday lives are systematically obscured. Matoesian puts it this way:

> ...the legal system is not about doing justice or discovering what happened from some mythical and privileged Archimedean vantage point but is about winning and losing. Adversarial trials are battles of

[67] However, even here there is recognition amongst some feminists taking the "rape as power" line that the boundaries between rape and consensual heterosexual sex are always obscured. The title of Lorenne Clark's and Debra Lewis's book *The Price of Coercive Sexuality* (1977) is a case in point. Although these authors lobbied for a legal response that would prioritise the violence aspect of rape over the sexual, they repeatedly posed the question of how meaningful any analysis of rape can be in a context where conceptions of normal and abnormal sexual behaviour are tied to a 'framework of coercive sexuality' (Clark & Lewis, 1977: 145).

> assaultive conduct was not wrongful. That is "rule by myth and custom" not "rule by law"
> (Vandervort, 1987/88: 265).

Reformulating a framework of consent that is genuinely directed at recognising and protecting women's sexual agency would radically reduce the defence scope for arguing against men's culpability for the honest mistakes they make in "unintentionally" committing rape. Within such a framework, the notion of sexual voluntariness 'will be interpreted as an absolute issue, such that a failure to find that it was present is taken to demonstrate that it was absent' (Vandervort, 1987/8: 277).[76]

Determined to resolve the legal impasse of the majority of women's claims, particularly those of "date rape", being treated as virtually unsustainable by the courts, Pineau (1989) further argued the merits of rape law incorporating a more communicative model of sexuality, where the new criterion for establishing consent would be grounded in notions of *reasonableness* and taken from the woman's perspective:

> Since what we want to know is when a woman has consented, and since standards for consent are based on the presumed choices of reasonable agents, it is what is reasonable from a woman's point of view that must provide the principal delineation of a criterion of consent that is capable of representing a woman's willing behaviour (Pineau, 1989: 221).

Pineau's framework would not only carry important implications for the future adjudication of rape trials[77], it could arguably transform the traditional discourses and practices governing sexuality where women's (often silent) submission has been synonymous with men's 'masterful seduction' (Pineau, 1989: 222; Puren, 1998). Pineau 'reasons' (1989: 222) that the point at which rape is distinguished from seduction has proved so difficult for the courts, and for women, precisely because

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[76] The articles written by legal commentators, Toni Pickard (1980) and Celia Wells (1982), previously contemplated this option for revising the legal framework governing the mental element, although both tended to favour substituting the subjective standard of reasonableness used for assessing an accused's honest belief in consent with objective standards of "reasonableness".

[77] Unlike Vandervort's model where the accused's (reasonable) state of mind would still constitute an element of the offence, Pineau argues for a strict liability test, where, if the court finds the woman did not freely agree to sex, under the communicative ideal, the accused is guilty of rape. Under this framework, the reasonableness or otherwise of the accused's belief in consent does not figure given

cultural interpretations and standards of reasonableness have continued to favour male constructs of sexual conquest, where proceeding in spite of signs of sexual unwillingness from the woman can easily be reconciled as performing well within the prevailing model of (hetero)sexuality based on (male) aggression and female acquiescence.

In reality, Pineau argues, there is ample evidence to suggest that mutually pleasurable and desirous sex is not achieved through 'overriding' or discounting the emotional or physical readiness of either partner (1989: 231). In other words, the fact that for women rape is associated with non-communicative sex is perfectly logical. Pineau therefore seeks to re-conceptualise sex on the basis of a model of communication so that any sexual exchange would occur 'as if it were a proper conversation rather than an offer from the Mafia' (1989: 235). In this context, the conditions of sexual intimacy would be negotiated through the 'dialectics of desire' (Pineau, 1989: 237), where sexual pleasure (like conversation) is likely to be heightened by the attention given to the emotional and/or physical responsiveness and participation of both parties.

According to Pineau (1989), and those mentioned earlier, reformulating rape laws to incorporate a more communicative approach to the treatment of consent would significantly broaden the traditionally narrow legal frame for defining a rape situation, particularly those involving date or spousal rape. The focus on what the accused man did to establish the ongoing enjoyment and participation of the woman would not only render irrelevant traditional cross-examination techniques that disproportionately focus on women's pre- and post-rape behaviour, but would establish a normative model of sexuality far removed from that which has celebrated and romanticised sexual relations based on indifference, aggression and dominance.

While Pineau's highly influential contribution to radical change with respect to the notion of consent appeared to offer a new potential for law to more meaningfully incorporate the experience of rape from "women's point of view", legal commentators

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that the communicative model, if observed, would ensure the voluntariness of the parties throughout the activity.

and philosophers[78] expressed some theoretical and practical concerns about applying a paradigm of sexuality based on a communicative ideal. The most challenging of these raised epistemological issues associated with applying a single model for defining a healthy sexual exchange, where communication about sex provided the only basis upon which genuine consent or voluntariness could be determined (Adams, 1996; Wells, 1996). Wells in particular argued the plausibility of a communicative model that paid little regard to the multiplicitous contexts and meanings through which gender and power are discursively negotiated, where for women the practice of articulating or demonstrating their needs or desires may be entirely contrary to, or meaningless within, their historical or cultural lives.[79] Indeed Wells directly criticises Pineau for essentialising "women's experience" beyond considering the impact of 'other societal hierarchies such as race, class, and sexual preference' (1996: 47) on their social identities.

To this extent, some of Wells' arguments are representative of the broader theoretical and political issues debated across feminisms. The influences of poststructuralism and postmodernism have raised serious epistemological questions about what it means to "know" within the social world and whose experiences or perspectives count as "truth". Taken-for-granted meanings and interpretations relevant to how we derive our understandings of gender, power and "women's experience" have been problematised within poststructuralist analyses, as has the broader question of whether and how feminist engagement with law reform should proceed.

1.4.3 Poststructuralist Influences: Challenging Rape and Rape Law Reform

The rejection of 'universal givens' and 'the possibility of knowledge, including knowledge about categories of people such as women' (Bartlett, 1990: 877-888) characterises most poststructuralist critiques. For poststructuralists and

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[78] See the compilation of articles edited by Leslie Francis (1996) where Pineau's 1989 article provides the focus for debating the theoretical implications of introducing a communicative model of sexuality into the legal treatment of rape and as a defining point of the gendered sexual relation.

[79] MacKinnon (1983; 1989), for very different reasons, would likely have agreed with Wells (1996) that, in assuming women's desires and sexualities would readily surface under a communicative model, Pineau (1989) overlooks the power of the patriarchal lens through which women's sexual pleasures and needs have remained male defined.

postmodernists[80], understanding the social through theories that claim to have uncovered the nature (or gender) of social structures and processes is highly problematic in that it fails to account for how knowledge is socially produced or constructed (Weedon, 1987; Tong, 1989; Butler, 1990, 1992; Smart, 1995). In abandoning or destabilising conventional "knowledge-based" frames, poststructuralists embrace language and discourse as constituitive of meaning, where space is discursively created to allow for multiplicitous interpretations that can simultaneously co-exist, compete, traverse and contradict (Weedon, 1987). According to poststructuralist theorists, individual and social experiences and realities can only reflect 'situated' (Haraway, 1988) or 'partial' (Greenberg, 1992: xx) knowledges that are inclusive of multiple truths, perspectives and identities (Hutcheon, 1988; Tong, 1989).

Feminists interested in applying poststructuralist critiques in the context of rape law reform have tended to focus on deconstructing the categories of "women" in legal and feminist discourses, and exploring the complex and shifting interpretations and meanings relevant to how we have historically understood or conceptualised the social dimensions of gender, power and knowledge.

1.4.3(a) Women and Difference

Theoretically, poststructuralism gave voice to what some feminists had already been accusing liberal and radical feminists of doing all along, that is, claiming to know or to represent the "truth" of women's experience of rape without acknowledging that this category of "woman" had been restricted to the experiences and identities of those who were mostly white and middle-class (Kline, 1989; Nightingale, 1991; Butler, 1992; Mukherjee, 1992). The insistence on an image of "women united" ("we will not be divided") may have been deemed to be politically strategic during the 1970s but the implications of assuming a commonality of purpose and

[80] My interest as a sociologist is with poststructuralism as an influence on feminist analyses of rape as distinct from postmodernism. Smart (1995: 6-10) has usefully described the points at which she sees the two sets of theoretical ideas diverge. While she acknowledges the 'philosophical continuum' between poststructuralism and postmodernism, Smart also considers the latter to be more attuned to 'the construction of local knowledge' using analyses that consider the deployment of power through 'discourse, relationships, subjects, documents, representations, bodies and so on' (1995: 8) as opposed to infinite subject positions, meanings and identities. It is principally poststructuralism that

experience for all women meant that 'particular attention was rarely paid to the racial and class prejudices embodied in the mythology surrounding rape' (Mason, 1995: 52; see also Matthews, 1994). These analyses therefore obscured the cultural relationships, histories and practices that had systematically reduced the levels of accountability and seriousness with which rapes of particular groups of women were held (Harris, 1990; Razack, 1995).

The preoccupation with commonality rather than difference between women denied the diversity of women's experiences, particularly for Aboriginal women, immigrant women, lesbian women and for women with disabilities, especially when considering how law served to cultivate the kinds of prejudices and discrimination that marked their social and historical lives. Disproportionately high levels of under-reporting amongst these women[81] continue to pay testament to how modifying the legal definitions and procedures governing rape has done little to address the complexities of power and the ongoing impact of deep-seated racial, social and legal oppression on their capacities and willingness to disclose sexual violence.

Atkinson (1990a) and Greer and Breckenridge (1992) have graphically illustrated this point by tracing the impact of colonisation on Aboriginal women in Australia where rape was frequently used as a means of social control over Aboriginal populations. They argue that responses to the widespread practice of abducting and raping Aboriginal girls and women by white colonists resulted in further segregation and regulation of Aboriginal communities with Aboriginal women blamed for the decline of European morals and standards. Greer and Breckenridge draw a direct parallel between the legacy caused by a history of European invasion and the breakdown of 'traditional gender relationships' (1992: 190) amongst Aboriginal men and women. They cite the devastatingly high incidence of largely unreported sexual

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influenced Smart's (1995) reconsideration of law as inherently powered through patriarchy, where the interests of the dominant group (men) were unilaterally reinforced and maintained.

[81] Bligh (1983), Bell & Napurrla Nelson (1989), Bolger (1991) and Thomas (1993) have discussed the levels of under-reporting amongst Aboriginal women; Pittaway (1991), Aldunate (1993, 1995), Gonzalez (1994) and Ana-Gatbonton (1999) discuss these issues for non-English speaking background and immigrant women, and Rosser (1990), Razack (1995), Phillips (1995) and Howe (1999) for women with disabilities.

and physical violence that has been found to exist within Aboriginal communities[82] in support of this contention (Greer & Breckenridge, 1990, see also Atkinson, 1990a, 1990b; Bolger, 1991).

Law lecturer and Aboriginal activist, Marie Andrews, has also noted how contemporary calls for improved police responses to sexual assault have rarely considered the significant historical role police have played in 'dispossessing, oppressing and dispersing Aboriginal people' on behalf of the state (1995: 9). Carol Thomas (1993) has distinguished several reasons why Aboriginal women are unlikely to formally report sexual assault to the police. These include: the overtly racist and sexist attitudes held by police towards Aboriginal women; a failure to respond to reports that were made; lack of police women available to take statements from victims reporting sexual assault; and the dominant perception of the police that follows the historical treatment and continued violence they have perpetrated toward Aboriginal people (Thomas, 1993: 141; see also Bolger, 1991).[83]

With respect to intra-racial rapes (where Aboriginal men are the perpetrators) there may be an even greater reluctance on behalf of Aboriginal women to report sexual assault and other violence perpetrated against them for fear of the potential flow-on effect of other negative consequences such as: fear that disclosure may add to the racially motivated perception that all indigenous men are violent (Bell, 1989); fear that reporting the perpetrator will result in further deaths of Aboriginal men in custody (Department For Women, 1996: 96; Hunter & Mack, 1997); a deep cultural mistrust of a legal system that has perpetually minimised the violence perpetrated

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[82] The figures generated by the Western Australia Crime Research Centre's study of victimisation rates for Aboriginal people found that Aboriginal women were almost 11 times more likely than non-Aboriginal women to be the victim of a violent crime (1995: 22).

[83] Consider the award winning first volume of Roberta Sykes' auto-biographical account in *Snake Cradle* (1997). Her teenage years included a number of negative contacts with police including episodes of being sexually assaulted by a detective, being accused of stealing and the repeated occasions of being harassed by police about being 'off the reserve' or questioned about whether she was 'under the Act' (Sykes, 1997: 204, 218). Against this backdrop, it was impossible for her to ever conceive of approaching the police after being pack raped at 15 years old by 'a sea of white male faces' (1997: 231). For some women, reporting rape may lead to further victimisation or further sexual assaults by the very agents charged with the responsibility of enforcing laws. As the book by Afiya Shehrbano Zia makes clear, Islamic women who report rape in a context where police themselves are notoriously involved in raping Islamic women, coupled with the very real possibility that women themselves are likely to be the ones judged as contravening the laws of Zina (unlawful sexual intercourse between a man and a woman), means that all but a few rapes go unreported (Zia, 1994: 37).

> impression management relying on overt displays of partisanship (1993: 64).

Central to these analyses is the legal fiction that, through the application of processes governed by the principles of fairness and impartiality, the law functions as the mechanism by which "truth" will be revealed and justice will be dispensed accordingly. The interests of the state and its laws, according to these theorists, lie not in improving the social condition for individuals but in preserving the power of dominant social groups.

Sheilah Martin (1993) and Regina Graycar (1995) consider these issues in the context of how judges construct their "knowledge" of the world. Graycar, in particular, considers how the authority bestowed on judges allows their pronouncements in a public context to operate as powerful and 'quintessentially authoritative' statements of reality (1995: 269; see also MacCrimmon, 1991). And yet, according to Martin:

> Rarely is a legal method expressly revealed as a methodology and unravelled as a political endorsement of certain values and modes of thought. Two basic features of legal craft are the ability to abstract real situations into a context between hierarchically ordered interests and to select what is "legally relevant" from the layered complexities of an actual occurrence. This often means that the social context in which women live will be factored out, considered to be irrelevant or treated as a lower order interest (1993: 30-31).

Mary Jane Mossman suggests that the construction of legal "knowledges" applied to women's lives and experiences are often made by judges who profess their decisions are informed by 'neutral principles of interpretation' instead of abstract legal concepts (1986: 39). For if conventional legal reasoning assumes that truth and fact can be objectively determined through the neutral application of legal method, then judicial decision-making becomes nothing more than the operationalisation of pre-existing, legally derived principles. This anchoring of decisions in basic legal principles of neutrality and objectivity is what Mossman says enables judges to deny responsibility for any outcome that occurs on the grounds that it is the legal principle

that may be faulty, not the individual judge who applies the relevant precedent to their decision.[68]

It is in this way that the judiciary are in effect able to 'create women's lives' by claiming to "know" about women (Mossman, 1986: 39) and more particularly to know about women rape victims (Hunter & Mack, 1997). The extent to which law and legal language can 'socially construc[t] and socially constitut[e]' meaning demonstrates a 'particularly potent ability to shape popular and authoritative understandings of situations' (Finley, 1989: 887-888). As the rules of evidence governing rape trials reverberate through the authority of judicial discourse judges are able to make statements about what constitute genuine claims of rape and leave intact the significance of factors such as the timing of the report and the presence of corroboration in the legal determination of the case.[69]

The problems caused by law's claim to discover "truth" through a distinctively legal method in the context of rape trials have also been more widely examined by Carol Smart in a perceptive analysis of what she terms the 'binary system of logic' (1989: 33). According to Smart (1989), law's most powerful feature lies in its capacity to confine the complexities of social interaction and the articulation of experience within the narrow legal frame of oppositional truths: the accused must be found either guilty or innocent; witnesses are either lying or telling the truth; the woman-complainant is either consenting or not consenting. In a rape trial, the exercise for the jury then becomes artificially reduced to one of determining whether the woman-complainant was consenting or not consenting, whether sex did or did not occur, whether she unequivocally resisted, and whether he genuinely or unintentionally committed the act of rape (*mens rea* or guilty mind). This occurs in circumstances that often require them to make complex assessments and evaluations about the motivations and expectations of the parties involved. In the absence of more obvious indicators of the rape having occurred, and in the context of pre-existing social (and sometimes sexual) relationships,

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[68] The examples provided by Judge Jones in *R v Hakopian* and Judge Bland in *R v Johns* (See report by Senate Standing Committee on Legal and Constitutional Affairs, 1994) reflect this point. Both judges suggested they had correctly applied pre-existing case-law (Also see Scutt, 1997, pp. 39-44 for a discussion of the decision in *Hakopian*).

[69] That legal textbook writers also contribute to the preservation of this "knowledge" is amply demonstrated in Ngaire Naffine's article, 'Windows on the Legal Mind: The Evocation of Rape in Legal Writings' (1992). The latest version of Howard's Criminal Law put together by Brent Fisse (1990) is a disturbing case in point.

the courts legitimise a focus on the behaviour and disposition of the woman-complainant. The jury are then encouraged to draw on their own "common sense" assumptions that tend to reflect the dominant social conceptions of power relations that typically feature under patriarchal cultural conditions for distinguishing "the truth" of what occurred (La Free et al., 1985; Taylor, 1987; Scheppele, 1992).

It is this 'tyranny of the binary', according to Edwards (1996: 188), that imposes a formidable hurdle for women victims whose voluntary agreement to be in the company, car, or lives of the men who then have allegedly raped them confuses the issue in relation to their positions on these various dichotomous dimensions and significantly increases the likelihood that juries will find themselves unable or unwilling to convict.

For these theorists, the processes and practices through which the law continues to privilege masculine interpretations of sexual encounters over women's subjective experiences of rape and sexual assault, while claiming to exercise objectivity and impartiality, are what most reveals its maleness. Therefore, to engage with law or attempt to right the wrongs done to women through the use of the existing structures of law and legal method would be to further extend and legitimise male power.[70]

1.4.2(b) Reformulating the Meaning of Consent – The Radical Feminist Influence

Unless there is a significant shift in the highly gendered meanings and interpretations typically applied to the common law adjudication and determination of consent, feminists applying a radical perspective anticipate little change in the established repertoire of techniques used by defence barristers for reconstructing women's accounts of rape as falling well within the traditional expectations of the situations in which men and women are likely to (consensually) sexually interact. Nonetheless, the insights offered by feminist analyses have encouraged legal commentators like Lucinda Vandervort (1987/1988) and Vicki Waye (1992) and philosophers like Lois Pineau (1989) to suggest reconceptualising consent or more importantly the notion

[70] MacKinnon nevertheless has also sought to employ the law, even in its unmodified form, when demanding that the institutions of state and law consider previously 'unrecognised harms of particular concern to women' (Simpson & Charlesworth, 1995: 116), particularly in her campaign to change the laws governing pornography and sexual harassment.

of *non*-consent in order to widen the theoretical scope through which women's experiences of rape can be recognised.

The theoretical starting point for each of these three writers was to shift the presumption of consent in rape law, where male standards of force and resistance, or what women said or did to unequivocally resist the offender, had typically provided the legal measure of non-consent. As the law and society customarily viewed the female body as passive and sexually compliant (Vandervort, 1987/88), the objective was to develop a different notion of non-consent that afforded women sexual agency or the right to sexually self-determine.

For Vandervort (1987/8) and Waye (1992)[71] the transformation of the legal and social conception of consent could effectively be achieved through the introduction of the notions of voluntariness and free agreement so that men would be required to indicate how women's "positive assent" was evident. Drawing on women's past sexual or social lives to provide checks on their credibility and character would arguably feature less under such a model with jurors being directed to consider what was actually said or done *at the time* of penetration to communicate their agreement. Moreover, the dominant model of sexuality that allows for women's inactivity and silent submission to count as consent (or at least not convincingly signalling their non-consent) would be fundamentally challenged.[72]

Drawing on some of the same arguments advanced by MacKinnon (1983), Vandervort (1987/8) also highlighted the extent to which women's sexual agency had been routinely compromised by a framework that allowed men to defend allegations of rape

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[71] Waye and others (Scutt, 1977/78; Balos & Fellows, 1991; Howe, 1997) propose repositioning rape within alternative legal discourses, such as those represented in commercial contracts, where notions of reciprocity, informed consent, duty of care and standards of duress are the principal elements of civil legal doctrine.

[72] Waye (1992) suggests the notion of unconscionability could be used for assessing whether consent had been vitiated so that 'free agreement' to sexual intercourse within a context of relationships based on power or inequity would be considered outside the conventional tests for determining consent against evidence of force/resistance or violence and threats. According to Waye the likelihood of women being assessed by juries as having freely and voluntarily agreed to engage in sexual intercourse that 'arise[s] out of fraud, emotional abuse or economic blackmail' would be greatly minimised if the unconscionability of the social relationship between the accused and the victim was considered legally relevant (1992: 102).

by claiming an honest but mistaken belief in the woman's consent.[73] According to Vandervort, the treatment of *mens rea* in the context of rape cases was 'universally misapplied' (1987/88: 240) and resulted in large numbers of men remaining unaccountable for assaults they could reasonably have interpreted as non-consensual situations where the women had been decidedly unwilling, ambivalent or immobilised during the period of sexual interaction.[74]

Appealing to the traditional legal distinction drawn between 'mistakes of law' and 'mistakes of fact' (1987/88: 247), Vandervort constructs a compelling argument that, in most "fact" situations where men claim to have been unaware or oblivious of women's non-consent, the culpability issue still remains since ignorance of the law generally affords no excuse (1987/88: 251). However, according to Vandervort (1987/88), the problem for rape cases however lies not with the individual judgements and arguments lodged in defence of men's actions, but in the wider cultural definitions and power relations deeply entrenched within the practice and processes of the courts, where distinguishing the law from fact has inevitably reflected the male perspective.[75] In short:

> If excuses that are ultimately based on lack of awareness that a sexual transaction is assaultive in law are not barred, social definitions of sexual assault (community norms based on myth rather than legal norms of conduct) will continue to be relied on as the basis for an honest and often purportedly reasonable belief that the alleged

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[73] See p. 71 for a discussion of the English case of *Morgan* where precedential authority was given to subjectively determining whether an accused holds the requisite guilty intention to commit the crime of rape. According to the judges in this case, an accused man should be acquitted of rape where he is found to have held an honest even if unreasonable belief in the complainant's consent. This followed the common law tradition of excusing criminal wrongdoing where the individual had not consciously intended to commit the crime for which they had been charged.

[74] Vandervort perceptively notes the extent to which the "belief" element may influence the decisions made by police and/or prosecutors not to proceed with cases where there are sufficient grounds for the defence to raise a reasonable doubt about mistaken belief in consent. This might at least partially explain why so few 'belief' cases actually proceed to trial (Vandervort, 1987/88: 244). See the trial research reported in LRCVb (1991) followed by Gans critique (1997) where he suggests the "belief" aspect may figure more prominently in rape trials than was recorded during the LRCV's 1991 study.

[75] Suzanne Callinan's published experience (1984) as a juror on a rape trial in South Australia during 1983 provides experiential support for Vandervort's point. She described how many jurors became preoccupied with the issue of the accused's guilty mind despite neither the defence nor prosecution giving it any more than cursory consideration. She saw this element significantly impact on the jury's overall reluctance to convict, despite the case involving a man who had broken into the home of the woman-victim who lay frozen with fear while he raped her.

against them (Thomas, 1992); and fear that the disclosure may arouse a series of welfare-based concerns[84] that can include the removal of children or other family members (Astor, 1995; Laster & Raman, 1997).

The level of unrecognised sexual assault of Aboriginal women and children by white Australia becomes tragically apparent when one considers the testimonials provided in *Bringing Them Home*, the report on the national inquiry into the stolen generations of Aboriginal children who have been removed from their homes, their families and their people (Human Rights & Equal Opportunity Commission, 1997.[85] Experiences of violence and sexual assault are recurring themes amongst the accounts provided especially by those children taken to boarding schools and orphanages run by the church (Bird, 1998[86]). The following extract from one of the testimonials illustrates the institutionalised abuse and subsequent silencing of hundreds of Aboriginal and Torres Strait Islander children:

> The saddest times were the abuse. Not only physical abuse, the sexual abuse by the priests over there. They were the saddest because if you were to tell anyone, well, the priests threatened that they would actually come and get you...He [a priest] not only did it to girls, he did it to boys as well...There were four priests and two nuns involved. We were in their care. That fella's still walking around. He's now got charge of other kids (Bird, 1998: 39-40).

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[84] In recent times, the police have been primarily responsible for implementing local policies aimed at "assisting" Aboriginal communities to deal with problems such as alcohol and substance abuse. However, Chris Cunneen has described how such policies have translated into instances where police in the Katherine region of the Northern Territory have placed Aboriginal women in police cells in accordance with 'protective custody' regulations governing intoxication laws, despite women reporting that they had been sexually assaulted (1996: 3).

[85] Some of the testimonials describe generations of children in the same family being systematically removed from their families. See Confidential evidence number 557 and account number 10 in Carmel Bird (ed) *The Stolen Generation: Their Stories* (1998: 37-41).

[86] See Bird, 1998, confidential submission numbers 436 & 437, 557, 640. The *Bringing Them Home* report states that the 'stories of sexual exploitation and abuse were common in evidence to the inquiry. Nationally at least one in every six (17.5%) of witnesses to the inquiry reported such victimisation' (Human Rights & Equal Opportunity Commission, 1997: 194). Jan Breckenridge (1999: 10) also makes reference to the sexual abuse that often accompanied the removal of Aboriginal girls and young women into white servitude or foster care where records of teenage pregnancies further attest to the violating consequences of white colonisation.

Accessing justice through a judicial system that carries the '"knapsack" of "white privilege"' (MacIntosh, 1989, cited in Fraser, 1995: 13[87]) has also had particular implications for Aboriginal women (Nightingale, 1991). Lloyd and Rogers (1993) have noted the virtual absence of cultural responsiveness in respecting how Aboriginal women might present to give their evidence, for example, maintaining eye-contact or verbalising the minutiae of a sexual assault in open (white) court is likely to be culturally problematic. Where courts have been influenced by customary laws and traditions, they have typically favoured interpretations that legitimate violence within Aboriginal communities. Courts have often accepted defence arguments in mitigation of sexual assault and physical violence that Aboriginal men were exercising their traditional "rights" in the acts they perpetrate in certain contexts[88] (Bolger, 1991; Lloyd & Rogers, 1993; Australian Law Reform Commission, 1994: 121; Andrews, 1995).

1.4.3(b) The Dangers of Grand Theorising

In this light, feminist agendas for rape law reform that claim to advocate for the rights of *all women* can be seen as having further concealed or marginalised the subjective experiences of women (and men) whose lives and identities can no more be separated from their cultural origins, traditions and histories, or their experiences of subjugation and oppression, as they can from the broader social dimensions of race, gender, class, sexuality or disability (Valverde, 1992; Heath & Naffine, 1994; Smart, 1995; Mason, 1995; Razack, 1995).

Universalising women's experiences or claiming to have uncovered the ultimate source of women's oppression has also been identified as the major weakness in MacKinnon's work and she has been criticised for her "grand theorising" of sexuality and gender in this context (Bartlett, 1987; Finley, 1988; Smart, 1989, 1995;

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[87] MacIntosh writes of 'white privilege' as being 'like an invisible, weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools and blank cheques...' that allow 'invisible systems' such as those governing housing, education, health care, as well as those impacting on more interpersonal social relationships, to 'confer dominance' through the lives of one racial group (1989, cited in Fraser, 1995: 14).

[88] After analysing a number of cases where the actions of Aboriginal men were mitigated in the face of a "cultural defence", Bolger writes that the 'transcripts relating to cases of rape, murder and assaults on women [are] like reading the minutes of a male club. Judges, lawyers and witnesses act to confirm each other's prejudices – that men may be provoked into violence by women's actions, that women are inferior and that rape is not a serious offence in Aboriginal society, and so on' (1991: 81).

Harris, 1990; Mason, 1995).[89] According to these critics, in developing an all-encompassing theory of male supremacy that powerfully dictates the dimensions of women's public and private subordination, MacKinnon essentialises the nature of the social with respect to gender by suggesting that women are 'inevitably defined by their membership in the powerless, gendered social group female, their experiences constructed by this identity' (Finley, 1988: 363).

To propound a theory that sees women as 'fully expressed in their oppression' (Olsen, 1989: 1175) is to ignore the differences amongst women. Some may define their experiences outside a frame of universal male domination or are located in situations where patriarchy might only partially account for their experiences of subjugation. The testimonials of women who claim a range of experiences, some contradictorily, occur within their sexual relationships with men where sexual fulfilment and r iutuality may form at least part of the sexual exchange (Kelly, 1988; Gavey, 1990), cannot simply be dismissed by MacKinnon as examples of "false consciousness" or another insidious feature of patriarchy personified.

A particular concern of her critics is how the social construction of "woman" for MacKinnon is forever bound to notions of victimisation by a sex/gender relation defined and expressed through patriarchy (Bartlett, 1987; Finley, 1988). Smart (1995) expresses similar concerns, when she anticipates how the conception of "Woman as forever victimised" is likely to translate within the discourses of law. She warns us that introducing ideas of women's agency, resistance or proactivity in rape situations is likely only to result in the story turning into one of seduction or consent. Smart concludes that theorists like MacKinnon who subscribe to an essentialist position on women as rape victims (or whose views seem to imply such a position) may be 'unwittingly colluding' (1995: 87) with the law's belief in its capacity to discover "Truth" and hence play a role in 'silencing all but one account of rape' (1995: 84).

The work of Sharon Marcus may also be interpreted as contributing to this analysis. In her highly influential article, 'Fighting Bodies, Fighting Words' (Marcus, 1992),

[89] Conversely, see Frances Olsen (1989: 1172) for her comments on the value of 'grand theorising' in

she stresses the importance given to the construction of discourses by feminists working for rape law reform. However, she argues, that in the process of making space for women to speak about their experiences of rape and violence, feminists have themselves created or at least perpetuated discourses that disempower and victimise women. In particular, Marcus takes issue with feminists such as Brownmiller (1975) and Hawkesworth (1989) whose analyses leave no room for women to be seen as anything other than the target objects of actual or potential rape (1992: 386).

Marcus urges feminists to explore how language might be used to write alternative cultural scripts so it is possible to cast rape and rape situations in a different light. In particular, she suggests we consider discourses that centralise rape prevention as a method of making rape "unimaginable". Her proposal is that we understand rape as a:

> scripted interaction which takes place in language and can be understood in terms of conventional masculinity and femininity as well as other gender inequalities inscribed before an individual instance of rape (Marcus, 1992: 390).

Whilst the language of rape has traditionally constructed women as the objects and often the passive recipients of male violence, Marcus conceives of alternative rape scripts where women's agency becomes the focal point of rape narratives. Resistance strategies such as negotiating for weapons to be dropped, refusals to perform certain acts or yelling abuse are all examples of how women's agency can be used to disrupt what Marcus has termed a 'gendered grammar of violence' (1992: 392). Women need to fight back or resist rape scripts that continue to situate them as paralysed, victimised and forever vulnerable as the objects of male sexual violence (Marcus, 1992: 392). Ultimately she suggests that if rape is only discoverable through language, and language is constituted by as well as constitutive of social meaning, then rape could conceptually, if not culturally, be obliterated.

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the context of advancing feminist theory and mobilising political action.

While her strategy may be less relevant in situations where sleeping, drunk or drugged women are raped or sexually assaulted[90], her enthusiastic calling for women to become agents of resistance rather than objects of violence does much to challenge the more conventional and even some feminist constructions and understandings of women's sexuality.

Applying some of these theoretical arguments to rape laws, Smart (1995) and Naffine (1994) argue that feminists need to adequately explore the specificity of women's subjective sexualities and identities so they don't find themselves trapped within the same constructions of sex as a natural/biological/primal phenomenon which is found in the traditional discourses that have framed the social and legal conceptions of rape. If the radical feminist analysis of women being forever victimised, degraded, harmed and humiliated becomes the dominant centrepiece of law's revised understanding of rape, what of those women who present in court as emotionally contained and who give a rational account of their experience of rape; or who detail a relationship where the experience of rape occurred amidst a range of sexual practices that were often marked by coercion and manipulation but were on other occasions described as mutually pleasurable or gratifying; or whose experiences of sex varies across several relationships which inform their account of a particular situation where rape occurred?

These issues are further explored by Nicola Gavey (1990) whose indepth discussions with women provided revealing accounts of how meaning was discursively attached to narratives surrounding their sexual and social lives with men. For these women the dominant culture surrounding heterosexuality variously influenced how they conceived a range of sexual experiences throughout their life. For example, the following reflection of a woman's sexual relationship with a former partner demonstrates just how meaningless notions of consent or non-consent were in a

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[90] Threadgold (1997: 87) is also concerned with Marcus's disregard for 'the very real social and legal dangers in which this becoming-agent may place women'. This has most recently been demonstrated through the law's response to women killing violent partners. So far, women's agency in carefully planning or proactively creating situations under which they can kill men who have systematically abused them and periodically threatened their lives has often been interpreted by the courts as the actions of malicious women with premeditated intentions to murder (Stubbs & Tolmie, 1994; Scutt, 1995, Kirkwood, 2000). In the context of rape trials, Puren (1998: 133) might further argue that the law already constructs women as agents within the rape context in so far as their socialising, drinking behaviour, or choice of clothing is said to act upon the man in a way that causes him to rape.

situation where her perceptions were that sex was expected, and she performed her role as girlfriend to maintain the relationship:

> What he really did was to take away my sense that I had the power to say no. So it isn't very useful to talk about me consenting or not consenting. I had very little sense of having the power not to consent. For me the qualitative difference in our various sexual encounters is between the times I wanted sex and the times I didn't, or was ambivalent; not between times I consented or didn't... sexual coercion was the norm anyway, so it did not seem shocking or unusual. It was an extension of what had been going on anyway (Gavey, 1990: 192).

Naffine (1994) suggests that feminist discourses and law reform agendas have yet to disturb the dominant cultural constructions of heterosexuality embedded in the law whereby sexual relations continue to be defined according to images of women forever possessed (and oppressed) while men forever remain the possessors. Despite legislative attempts to focus the law of sexual offences on protecting the sexual autonomy and integrity of all persons, Naffine says there has been no meaningful attempt to challenge or explore women's sexual subjectivities (1994: 25). In other words, the law subscribes to a dominant cultural construction of sexual relations that is intrinsically coercive - where women are pursued, persuaded and ultimately taken.

Gavey (1990) in particular questions the capacity of law to ever accommodate women's experiences of rape in the context of heterosexual relationships given the complexities and ambiguities of sexual and social interactions over the course of (especially long-term) relationships. The tendency to normalise experiences in such relationships reduces the scope and capacity to consider single episodes as rape (Wood & Rennie, 1994). Gavey's interviews disturbingly portrayed how irrelevant the objectives of law reformers have proved to be for women when the harm or violation of rape may be reconciled or reformulated when seen within the sexual status quo:

> ...if I had responded to a survey immediately after the rape I probably would have said I hadn't been raped, because I wouldn't have wanted to admit it to anyone else. Although this would have depended on my mood that day or week. If presented with a more behaviourally specific description of rape I may have

> been more likely to say yes I had been raped, but may not have. It would have depended on the state of relations between Craig and I at the time, and how I felt about that. This varied from hour to hour, day to day, week to week (Gavey, 1990: 197).

Accordingly, like MacKinnon (but for different reasons), these feminists have 'a profound unease about the use of law for feminist ends' (Heath & Naffine, 1994: 33). Regardless of how progressive or "women-centred" the reforms may seem, it appears they cannot be sustained against a cultural frame that allows male interpretations of women's sexual desire and performance to regulate the (hetero)sexual relation. For Smart, the power of law will most effectively be undermined where feminists 'decentre' its significance within their agendas for changing women's social conditions (1989: 5) and focus on other alternatives for shifting power relations. This applies particularly in the context of rape trials where reforms have done little to sever the patriarchal ties that inevitably attribute women's sexualities to the sexual performance of men.[91]

In many ways, Smart's contention is consistent with Gavey's study. Women who stand outside the law[92] created their own spaces - their own discourses - through which to disrupt or resist the heterosexist paradigm by articulating their experiences of sex as unwanted, undesired, coercive and at times traumatic. This led Gavey to conclude that 'these women's positionings as subjugated heterosexual subjects was not complete and uncontested' (1990: 172) in their capacities to actually name and (re)interpret their experiences as violations even if these spaces fall outside the formal process of law and criminal sanction.[93]

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[91] Interestingly, it is on this point that Smart's analysis has been most heavily critiqued. Her rejection of the feminist drive to change law through reformist strategies has been said to promote political immobilisation and underestimates the possibilities for real change through feminist inspired efforts to challenge law and its method (e.g. Henderson, 1991).

[92] The notion of standing 'inside' or 'outside' the law is borrowed from Mari Matsuda (1989: 7-8). Her proposition is that feminists can theoretically stand at the door of the courtroom and engage with debates that both work within law's method and framework, while acknowledging how its rules and procedures are fundamentally tipped in favour of those with the power to define.

[93] Others interested in how women negotiate standing inside the courtroom as victims of rape have similarly recognised the kinds of resistance strategies used by women for contesting the cycle of

1.4.3(c) Conceptualising the Legal Stories of Rape

Some feminist theorists have usefully incorporated the insights offered by poststructuralism in exploring the role of narrative to their analyses of legal discourse and processes in the courtroom. Analysing 'legal story-telling', according to Kim Lane Scheppele (1989, 1992), reveals how dominant meanings are often re-created or re-constituted to reflect the interests of the powerful while reducing or invalidating the stories that represent the experiences of the oppressed. Conventional stories contained in legal narratives have typically come to represent "law's truth" where established meanings and interpretations become 'the only ways of seeing the world' (Scheppele, 1989: 2075) and inevitably reduce the narrative scope through which alternative stories can be told or legitimated.

Scheppele's discussion of stories as symbolising the views and perspectives of "insiders" and "outsiders" can readily be translated to the structures and processes of legal story-telling in rape trials. "Insider stories" are the authorised accounts or legitimated versions of those with the power to define social perception and re-present it as fact while "outsider stories" are those that generate immediate suspicion, cannot be verified, and are therefore unreliable, open to challenge and likely to be disregarded (Scheppele, 1989: 2079). While "insider" stories about rape have clearly been perpetuated through the carriage of legal doctrine and precedent and reflected in the contemporary rulings, practices, and stories produced by legal practitioners and judges in rape cases, Scheppele's approach also considers the point at which dominant narratives will have shaped the 'perceptual fault lines' likely to influence the role of adjudicating conflicting accounts of events (1989: 2082). Here Scheppele (1989) points to the subjective positioning of jurors where individual life experiences, backgrounds and cultural identities will impact on their interpretations and reactions to the stories told to them by the parties in dispute.

The impact of these perceptual differences, as pointed out by Edwards and Heenan (1994), may be particularly marked in rape trials where the parties have some previous social or sexual involvement. While the believability of "insider stories" might well reflect the prevailing power relations based on gendered, racialised or

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questioning that attempts to rework their stories of rape into stories of consent, sexual fantasy or neurosis

classed lines, the notion of accepting "outsider stories" is likely to pose too big a step for those jurors who wish to maintain a 'sense of an ordered, predictable and relatively safe world for themselves' (Edwards & Heenan, 1994: 233). To accept that women could be raped in the familiar contexts of dates, relationships or families seriously compromises the social and legal boundaries through which rape has typically been conceptualised or acknowledged by the wider community (including jurors).

Bumiller (1990), Scheppele (1992), and Kaspiew (1995) have each demonstrated how the 'construction of reality' (Scheppele, 1992:124) reflected in the story telling of rape cases continues to reflect the male perspective, with lawyers and judges relying on, and juries being readily convinced by, the telling of "insider stories" that serve to invalidate or mask the experiences of women who are raped. This is particularly the case for women whose subjective experiences and stories fundamentally challenge the cultural frame through which the prevailing mythology surrounding rape reflects the "insider story". While police statements will have already 'decontextualised' and 'mediated' (Kaspiew, 1995: 358) women's versions of events to fit within the frame of legal relevancies, in court women's accounts become the indiscriminate target of a range of alternative stories or narratives as the contest ensues between defence and prosecution to produce the most convincing portrayal. During this process, as Smart points out (1989: 41), a woman's story is rhetorically patted into place to fit the wider categories of "Woman" which function as the basis for determining the credibility of rape victims. Julia Grix recalled being likened to this "Woman" in her own trial over the two days she was cross-examined:

> Vivid descriptions. Liar. Voracious. Imaginative. Sick. Lascivious. He bandied these labels around the room...They had currency. I had heard of such women. I had read about them. I had seen them in the movies. The scorned Woman. The Woman who wanted attention. The Woman who changed her mind afterwards. The Woman who imagined the whole thing. The Woman who deserved it. The Woman who liked it that way. Who were these women? I had never met one of them. Perhaps they had never really existed. Except perhaps, in here (1999: 90).

(Konradi, 1996a, 1996b; Young, 1998).

These theorists are mostly pessimistic about hopes for reforming the law in ways that could redress the narrative impasse through which women's accounts of rape are suppressed and obscured. While law's perspective continues to ground the legal structures and definitions governing rape cases, as well as constrict the narrative space through which women's stories can be told, to modify the existing evidentiary rules and procedures will, according to Scheppele only succeed in 'dismantling' the 'worst of [law's] overt sexism' (1992: 124). Of greater significance to women in the long run, at least according to Kaspiew (1995), may be the increasing evidence of social change "outside" the law. Here the influences of feminism are clearly discernible within contemporary media accounts, or the development of judicial education programs, where primacy is given to women's experiences and these become the dominant influence in changing attitudes and practices.[94]

Nonetheless, an analysis of narrative discourse gives space for story-telling and inevitably implies the possibility for alternatives to be constructed. In this sense, the narrative structures and processes that ritualise the questions and the question sequencing in rape trials can be seen as a site of contestation where law's limited imagination can repeatedly be confronted or challenged using a diversity of stories or "truths" which represent a multiplicity of experiences (Matoesian, 1993). Whether feminist inspired discourses that reflect a wider range of subjectivities may have discursively entered the legal or cultural space as a result of law reform or though popular avenues of representation remains an important but so far relatively unexplored area of investigation.

Cuklanz (1996) in her thought-provoking work on the representation of law reform itself within mass media discourses provides an exception. She urges law reformers to pay attention to lessons that can be learned from the partial successes of the social movement for rape law reform, particularly in terms of how reforms are negotiated

[94] A local example was the Judicial Education Conference conducted in Ballarat in Victoria during 1995. A majority of magistrates and County and Supreme Court judges attended the conference where the panels of speakers were mainly comprised of feminist academics (including Canadian Professor Kathleen Mahoney) and workers from sexual assault and domestic violence services. Apart from being exposed to more formal presentations covering a range of issues relevant to women's treatment by the law, judges were asked to participate in workshops where issues of institutionalised discrimination in legal practice were debated in the context of gender, sexuality, race, class and disability.

and constituted through mainstream discourses on the issues and the influence this can have on 'public consciousness' (Cuklanz, 1996: 6) and the 'processes of social change' (1996: 121).

Cuklanz suggests that periods of national coverage of what she terms 'issue oriented trials' (1996: 39) provide an opportunity to examine the processes through which dominant cultures will respond to the issues. They reveal how differing interpretations and representations may be reflexively considered in the context of resisting or appropriating alternative (and potentially feminist-oriented) meanings about contested stories of rape. She argues that the success of feminist law reform efforts could therefore be attributed to the degree to which feminist principles and understandings of rape are being expounded, relied on, or at least discussed through mainstream discourses or representations of these issues in media, film and literature. While she recognises, as do others (Smart, 1989; Bumiller, 1990), the extent to which feminist ideas and arguments are frequently the subject of co-option and subversion by lawyers and judges, she is nevertheless encouraged by analyses that reveal instances where alternative meanings and understandings may upset the prevailing interpretations.

Cuklanz (1996) urges further exploration of these multiplicitious sites through which the efficacy of feminist engagement with the apparatuses of law may be discursively negotiated both inside and outside the courtroom walls.

1.5 Concluding Comments

Whether feminist inspired reforms have resulted in anything more than marginal improvement for women rape victims has increasingly been questioned by feminists committed to exposing the gradual dilution of progressive legislative gains (Adler, 1987; Largen 1988). While there is much to sustain the arguments of feminist theorists who question the ethics of advocating a better system for women in the face of repeated examples of entrenched male bias in the practice and execution of the law, there remains a staunch commitment to holding ground in the legal-political arena on anything that promises women a better deal within the system (Heath & Naffine, 1994). Accordingly, in most Western jurisdictions, feminist analyses on the

subject of rape have undeniably played a crucial role in driving platforms for reform that have resulted in substantial changes to the definitions and meanings which underpin current legislative frameworks (Temkin, 1986; Berger et al., 1988).

This chapter offered a (selective) review of feminist theory and research on the efficacy of law reform with respect to rape to provide a critical framework as a basis for assessing the current operation of rape trials. One conclusion is that, regardless of where feminists position themselves politically, or the colour of their theoretical stripes, they all argue for more progressive change with respect to law's treatment and conception of "women". They still engage in one way or another with the challenge of what happens in the courtroom and how to alter this to benefit women who bring complaints of rape.

For example, feminist lobby groups often return to "victim's rights" discourses at times when the state is at its most threatening in terms of abolishing previously won gains for women victims (Smart, 1989). However, what might be interpreted as a typically liberal reformist strategy may simultaneously create the space through which political and theoretical dialogues will be regenerated and the positioning of women's subjectivities and experiences can be further recognised and contested. Indeed Smart (1995) believes that much of the current lobbying for change shows an enormous commitment to the kinds of philosophically based ideas associated with poststructuralism around women's difference.[95] In Victoria, the incorporation of (at least some) feminist ideals into the package of reforms introduced in the form of the *Crimes (Rape) Act 1991* was particularly evident and will be the subject of detailed discussion in the next chapter. Never before had the criminal law governing rape confronted language in the legislation that would provide women with an affirmative right 'not to engage in sexual activity'.[96] Moreover, the articulation of a new "meaning of consent", coupled with a tightening of evidentiary mechanisms previously used to cast suspicion on rape allegations, in this legislation directly contested the conventional paradigms through which rape had typically been determined.

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[95] MacKinnon (1992: 188) has also recognised the important pragmatism displayed by earlier (usually liberal) feminists determined to have sexual violence against women placed on the political agenda.
[96] See page 1 of the *Crimes (Rape) Act 1991 (Vic)*.

Monitoring and evaluating the impact and operation of this most recent reform package had at the time of the current study[97] been restricted to a distinctively positivist research approach. Compliance with the provisions was mostly quantitatively assessed by counting the number of incidences where changes to the legislation were not being adequately observed (Heenan & McKelvie, 1997). The objective of this government-funded research was to report on the success of the reforms at a policy level in lieu of recommendations flagging the need for further substantive or procedural amendments. Not surprisingly, little attention was given to the sociological or historical implications underpinning the law or the reform process, nor was there any exploration of the theoretical complexities and nuances of trial discourse, where the social dimensions of gender, power and sexuality inevitably figures.

The intention of this thesis is therefore to draw on the diversity of feminist approaches to consider how the interpretations and meanings of Victoria's most progressive rape laws have so far translated into the processes, structures and discourses of rape trials conducted since the early 1990s. This involves not only exploring how the language of rape law is now framed but it also considers the mechanisms through which feminist inspired principles about rape may be negotiated, co-opted, reshaped or consolidated through the legal "stories" told by barristers, and in the rulings, judgments and verdicts delivered by the court. What kinds of stories feature in rape trials through the structures of cross-examination and through the operation and application of evidentiary and procedural rules when reforms introduce a new interpretative framework? How do defence barristers or judges continue to argue the relevance or legitimacy of corroboration warnings and sexual history evidence against the enactment of legislation designed to reduce the reliance on traditional stories that promote suspicion or ascribe blame to women rape victims?

It is this focus on "legal story-telling" in rape trials that I argue makes aspects of the current study especially unique. While feminists of all persuasions have considered the processes within rape trials that provide for a reification of gendered power

[97] Young's work is an exception but it was published well after the current study had commenced

relations, feminist legal scholars, policy-makers and activists have been less attuned to the unstructured and largely unregulated features of the rape trial where "stories" about rape (or non-rape) are re-constituted before the jury. The uninterrupted closing addresses delivered by barristers at the end of a rape trial provide a critical point of story-telling not only in terms of the law and how it might be interpreted and applied in the context of the evidence presented but also in recasting a narrative that neatly fits within or falls outside the cultural parameters that shape the social perceptions and expectations of the situations in which rape is alleged.

These dimensions of rape trials therefore provide a previously unexplored space through which meanings about women, rape and the law are likely to be hotly contested. They are considered alongside the evidence that was admitted in each of the 34 trials I observed in the context of three key areas of analysis – corroboration warnings, sexual history evidence, and the meaning of consent.

Before describing the particular research approach and methods used in the current study, the next chapter provides a detailed overview of the goals and achievements of feminist reformist agendas in Western jurisdictions and sets out the current statutory and evidentiary framework that governs the legal treatment of rape in Victoria, Australia.

(1998).

CHAPTER 2

Tracing the journeys of reform for Western rape laws/lores

2.1 INTRODUCTION

Mapping the development of contemporary Western rape laws reveals a mainly conservative legislature in the face of consistent and resilient feminist voices calling for more radical and meaningful change. This chapter traces the passage of sexual assault law reform in Australia as mainly the result of a series of episodic liberal feminist campaign successes, at a time when government and law reform officialdom were gradually being awakened to the inadequacies of the legal treatment of rape, at the same time as becoming more politically responsive to women's interests and rights more generally throughout the 1970s and 1980s.

The focus then moves to examine more closely the existing structures governing rape laws and procedures and chronicles the recent findings from a major evaluative study undertaken in Victoria during the mid 1990s. Current proposals for a national model criminal code for sexual assault laws and procedures will be discussed in the light of these findings. The chapter ends with a brief discussion of the most recent reforms introduced in Victoria, against a backdrop of current trends likely to impact on the prosecutorial processing of rape cases, and on the efficacy of law reform achievements more generally, in order to provide the context of the current study.

2.2 RAPE IN THE COMMON LAW

Prior to any reform of rape law in Australia, the crime had historically been defined by traditional common law principles or through the rules and decisions developed and instituted by judges in previous cases. A rape offence was said to have been committed when a man (of at least 14 years) had sexual intercourse with a woman (not his wife[1]) forcibly and against her will (LRCV, 1986; Streets, 1991; Bronitt, 1992; Waller & Williams, 1997). The three substantive elements that had to be proved by the prosecution under the common law of rape were:

[1] The presumption under common law was that a man could not be prosecuted for raping his wife when under the contract of marriage a woman was legally positioned as being in a 'perpetual state of consent' (Scutt, 1977: 37; see also Hale, Pleas of the Crown, 1736, Vol. 1: 636).

1. that the man's penis had penetrated the woman's vagina;
2. that it occurred against the woman's will; and
3. that he had been aware at the time of penetration that the act was against her will (Warner, 1983; Bronitt, 1992).

For an accused man to be convicted of rape, the jury had to therefore be satisfied beyond reasonable doubt that there had been some degree of penetration, that this had taken place without the consent of the woman, and in circumstances where the man realised that the woman was not consenting or might not be consenting and went ahead regardless of whether she was consenting or not.[2]

The second and third elements have been at the core of what causes the historical and contemporary difficulties with the legal processing of rape cases.[3] This is precisely because the adjudication and assessment of rape complaints that are contested have required an investigation and determination of two states of mind: that of the woman who claims to have been raped and that of the man who denies it. The jury's task has therefore primarily been reduced to a consideration of arbitrarily deciding whether the woman-complainant was consenting to the sexual activity in question and, where there is an absence of consent, whether the man realised that she was not consenting (Temkin, 1987).

Alongside this traditional legal paradigm lies the critical gender component in the construction of rape laws/lores. As Smart (1989), Naffine (1994), Rush (1997) and others before them (Adler, 1987; Rafter & Stanko, 1982) have suggested, a consideration of the laws of rape must immediately be located within the context of a prevailing patriarchal culture that both perpetuates and reproduces a gendered power relation. What are most relevant here, in the context of rape offences, are the mechanisms through which law has constructed and reinforced the existing gender

[2] These elements have remained steadfast to the law of rape where in most Western jurisdictions the prosecution is still required to prove beyond reasonable doubt that there was penetration, that the victim did not consent and that the accused was aware that she was not or might not be consenting.
[3] In more recent times, there has been an increase in the number of trials where accused men will dispute the first of these three elements and deny having had sexual contact with the complainant at all, or at least dispute there having been sexual penetration. This largely reflects the greater number of prosecutions involving family members, where charges have been laid against step-fathers, fathers, or uncles (Ross & Brereton, 1997; Heenan & McKelvie, 1997: 36).

order to reflect the wider socio-cultural context of male/female relations, and the associated social interpretations and cultural meanings prescribed under patriarchal conditions so that in the context of rape offences, as Rush so eloquently describes, we see how 'the image of the sexual relation [has been] given the seal and imprimatur of law' (1997:181).[4]

Apart from confining rape to penile/vaginal penetrative conduct[5], the common law requirements of force and resistance predominantly characterised the traditional treatment of rape offences (Clark & Lewis, 1977; Scutt, 1977; Weiner, 1983; Estrich, 1987; Vandervort, 1987/88; Reekie & Wilson, 1993). The consent standard depended on signs of 'resistance as the outward manifestation of consent' (Largen, 1988: 272). Unless physical evidence of resistance, or of a substantial degree of force being exerted was apparent through the likes of torn clothing or physical injury, the law claimed an absence of sufficient proof to establish that the act had occurred with force or "against the will" of the woman (Mills, 1982; Temkin, 1987).[6]

As previously outlined, evidentiary rules for how a rape trial ought to be conducted were also determined by the common law through the requirements of "first complaint", corroboration and the admissibility of sexual history evidence. In court this meant that: firstly, women were expected to promptly report being raped to the first person with whom they had contact following the event; secondly, their account ought to be supported by physical evidence or eye-witness testimony so that accused men were not in danger of wrongful conviction on the sole evidence of a woman's

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[4] Traces of this more philosophically challenging and theoretically sophisticated sociological understanding and analysis of rape laws have also been appreciated, at least to some extent, in the context of debates and discussions informing reformist agendas within mainstream law reform bodies. For example the Law Reform Commission of Victoria in its 1986 discussion paper on the substantive law into rape and allied offences, were demonstratively more aware of the role of law in reinforcing existing standards of sexual and social practices between men and women. They suggested that: 'In declaring certain types of sexual behaviour to be criminal, the law plays a crucial part in the development, maintenance, and perhaps even establishment, of community attitudes and expectations. This symbolic function may be particularly relevant in the sexual context because the law can influence community attitudes about relationships, particularly between women and men' (LRCV, 1986: 5).

[5] This resonates with the historical beginnings of rape being a property offence where its seriousness was gauged by its potential to confound bloodlines of inheritance or in committing a culturally forbidden act against another man's property (Clark, 1987).

[6] Although common law judgments gradually altered the phrase "against the will" to the more contemporary "lack of consent", notions of force and resistance have remained central features of both prosecution and defence cases and are likely to remain key factors upon which trial outcomes will continue to turn (LRCVb, 1991: 95).

complaint of rape: and thirdly, women's accounts were to be appropriately measured against their propensity to have consented to sexual activity in the past, where non-virginal or unchaste women were considered less likely to withhold consent in the future (Berger, 1977; Temkin, 1987).

2.3 Contemporary Shaping of Western Rape Law

The law remained relatively unchanged throughout the nineteenth and twentieth centuries in Australia and overseas. It was not until the momentum of the women's movement regained significant public pace in the 1970s that demands for contemporary reform to rape laws could no longer be ignored (Largen, 1976; Giacopassi & Wilkinson, 1985; Matthews, 1994).[7]

Much of the impetus for reform can be traced to the House of Lords decision in the case of *DPP v Morgan*[8] that provoked international public censure during the mid 1970s. Morgan had arrived home from a hotel with three of his colleagues, each of whom he had invited to have sex with his wife. The three men were told to ignore any protest or resistance his wife might display as Morgan assured them this was really a sign of her sexual enjoyment. The men were convicted of rape but appealed against the outcome arguing that the third element of the offence, their guilty intention or awareness of committing the crime, could not be proved because they had each claimed to have held an honest belief in the woman's consent.

Although the appeal judges upheld their convictions, the legal point under consideration was reaffirmed. The House of Lords maintained that as long as an accused man held an honest belief in consent, even if an unreasonable one, he could not be held criminally liable for his behaviour (Adler, 1987; Faulkner, 1991). Feminists branded this akin to creating a 'rapist's charter' (Naffine, 1984: 13; Adler, 1987: 1) where men's interpretations of consent would be legally favoured over

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[7] Scutt (1997) reminds us that the efforts of women to actively and vocally challenge laws that have historically excluded, ignored and pathologised women have been the subject of feminist attention for hundreds of years (see also Sachs and Wilson, 1978). In particular, as discussed in Orr (1997), the Women Against Rape Collective (WAR) and the Women's Electoral Lobby Group (WEL) in Melbourne throughout the 1970s were instrumental in galvanising support for the development of sexual assault services amidst more general calls for the state to provide improved medical, legal and social responses to rape victims.

[8] [1976] AC 182.

women's, even where a reasonable person would or should have realised there was no consent (Duncan, 1996).

The aftermath of *Morgan* generated a flurry of international and local reform activity where committees, law reform bodies and Attorneys-General from around the world busily began contemplating alternative proposals for changes to rape laws and procedures.[9]

The precise content and structure of these changes, however, varied considerably across jurisdictions. Some states took the opportunity to consider wholesale reframing of the substantive laws of rape, including discussions around: the terminology of rape versus sexual assault; definitions of sexual offences; the merits of adopting a system of grading the seriousness of sexual crimes; whether to alter the age of consent and the age of criminal culpability; and whether to legislate against immunity for rape in marriage. Other legislatures addressed the mechanics of the trial process and focused on amending rules of evidence and procedure that were seen to unfairly compound victims' treatment in court. Overall, the solutions were thought to reside in the tightening of sexual history provisions, reducing the number of court appearances women would be required to make, and regulating the period of time by which a prosecution would be finalised (Bargen & Fishwick, 1995).

It is of note that amendments introduced in South Australia during 1976 were unparalleled in other state jurisdictions at the time, with the government opting to remove the spousal immunity for rape[10] and expand the substantive definition of the act to include other forms of penetrative conduct[11] (Scutt, 1977; Naffine, 1984; Bargen & Fishwick, 1995).

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[9] For a comprehensive and detailed outline of the reforms introduced across each state during the 1970s, see Scutt, 'The Australian Aftermath of the *DPP v Morgan*', *Chitty's Law Journal*, 1977, Vol. 25, No. 9, pp. 289 - 305. See also Adler, 1987 pp. 26-29 for an account of the political and legal response to the House of Lord's decision in *Morgan* that took place in England.

[10] Although the offence was restricted to circumstances where additional physical violence, threats, or humiliation served to aggravate the commission of the act. Interestingly, South Australia was the last of the nation's states to statutorily criminalise spousal rape in 1992 without any additional requirements (Heath & Naffine, 1994).

[11] These amendments are found in the *Criminal Law Consolidation Act 1976*.

Internationally, reforms in New Zealand (Young, 1983; Barrington, 1984, 1986), Canada (Hinch, 1985; Snider, 1985; Bryant, 1989), the United States (Tong, 1984; Temkin, 1986; 1987), Denmark, and the United Kingdom (Adler, 1987) were also introduced.

Undoubtedly, the single most radical transformation of rape and sexual offence law occurred in Michigan where a new gradation scheme was formulated that distinguished different types of rape as assaults, according to whether penetration had occurred and the degree of injury inflicted during the commission of the offence.[12] Moreover, the Act carefully outlined the circumstances under which a legal presumption of non-consent would operate, most notably where a degree of force or the threat of force had been used to affect the offence (Heald, 1985; Temkin, 1987; LRCVb, 1991). This meant that in situations where the victim was raped and suffered additional injury, or threat of injury, the law would not require the prosecution to also prove that the victim was not consenting to the act.[13] Additionally, the requirements of resistance and corroboration were legislatively abolished, and evidence of the complainant's sexual history with people *other* than the accused was effectively barred except in very limited circumstances.[14] In all, the model suggested a 'drastic philosophical shift' of legal focus for considering the actions of rape victims and offenders (Naffine, 1984: 3) that moved outside the traditional consent/non-consent legal paradigm.

The law reform exercise in Victoria was comparatively disappointing. Indeed, the report produced by the Law Reform Commission into rape procedures and evidence appeared preoccupied by concerns about the 'many opportunities' women have to make 'plausible but unfounded allegations' of rape (LRCV, 1976: 12). Drawing on a 'long line of legal writers and experienced observers' (LRCV, 1976: 16) and citing the likes of Chief Justice Matthew Hale, and the more contemporary English law

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[12] The *Michigan Criminal Sexual Conduct Act 1974* introduced categories of offences each carrying different maximum penalties.
[13] An accused could still raise a defence of consent in which case the prosecution would then be required to prove consent was absent (Marsh et al., 1982).
[14] The exceptions included where the evidence could provide an alternative source for pregnancy, sperm or sexually transmitted disease, or where there had been prior sexual contact with the accused.

professor Glanville Williams[15], the Commissioner's report wanted to ensure that law reform efforts were not likely to exacerbate what was thought to be the very serious threat of wrongful conviction. Notwithstanding this caution, the Commissioner was still minded to recommend procedural change to some areas of the court process. These included: provision for a new hand-up brief procedure[16] that would reduce the number of times women had to appear in court; a prohibition on the publication of the complainant's and the accused's identities; and most notably the introduction of Victoria's first set of restrictions on the admissibility of evidence relating to a complainant's prior sexual history.

The Commissioner's recommendations were given legislative authority by the summer of 1976. Although the changes were received by women's groups and feminist activists with mixed degrees of enthusiasm, there was broad support for the long-awaited introduction of restrictions relating to sexual history evidence. Some feminists and members of reformist groups, however, remained sceptical of rules that went only so far to protect women from questions related to their prior sexual history with people *other* than the accused, and where judicial discretion would continue to override the provisions should the court view the evidence as having "substantial relevance" to the disputed issues in the case.[17]

Despite the level of legislative change enacted throughout the country during the 1970s, and in the face of more progressive models introduced in overseas jurisdictions, the Australian attempts could fairly be described as cosmetic or piecemeal, intended to modify the existing legal frameworks rather than to opt for radical new ways of conceptualising the legal understanding of rape (Scutt, 1977, 1980b; Young, 1983; Naffine, 1984; Bargen & Fishwick, 1995; Rush, 1997). In other words, no Australian legislature at that time was prepared to contemplate

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[15] Naffine discusses the contribution made by the criminal law texts of Glanville Williams as further 'developing the theme of women's mendacity' (1992: 748). His writings fully subscribe to law providing men with 'special protection from women who cry rape' (Naffine, 1992: 749).

[16] A hand-up brief includes the statements of each prosecution witness including the complainant's statement and the accused's record-of-interview with police.

[17] This scepticism was entirely reasonable when one considers the kinds of examples listed within the Commissioner's report to illustrate the circumstances under which the sexual history provisions would not apply. These included where a young woman was gang-raped after the first offender claimed that his friends were criminals and would beat her up if she didn't agree to have sex with all

altering the substantive features of rape law. This left key elements of the offence such as consent and the accused's belief in consent firmly under the traditional common law regime.

Somewhat remarkably, this conventional framing of rape law remained intact in Australia until the beginning of the next decade when rape laws and procedures were the subject of further review. Once again, this followed a period of sustained political agitation by women throughout the late 1970s who demanded recognition of the inadequacies of the legal system's response to women's experiences of rape (Mason, 1995).

In 1976, the Women Against Rape Collective (WAR) in Victoria called for a Public Inquiry into existing laws and procedures following a well attended public forum highlighting the continued injustices faced by women giving evidence in court (Orr, 1997). Also of particular significance was the publication in 1977 of the Sydney Women's Electoral Lobby (WEL) draft Bill on Sexual Offences which received national support from women's groups and feminist academics. While the Bill was never legislatively implemented, it represented a radical departure from the traditional common law approach in proposing the introduction of a system of grading sexual offences according to the degree of violence that accompanied the commission of the act.[18] The draft Bill also included a list of circumstances that would legally constitute a lack of consent, providing juries with clearer guidance on its scope and meaning. Other provisions included tightening the regulations surrounding sexual history evidence, the abolition of committal proceedings, and calls for comprehensive training packages to be developed for police responding to rape complaints.[19]

In that same year, the Royal Commission on Human Relationships featured rape and other sexual offences in its final report that included extensive recommendations about the procedures governing the police and court response to sexual offences. While also calling for rape to be redefined according to graded categories of sexual

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of them, and a second scenario where a woman 'cried rape' after having discovered that she was pregnant and was determined to find someone to marry her.

[18] This was similar to the model that had been introduced in Michigan.

assault, where it was hoped the focus on consent as the principal issue in a rape trial would be substantially reduced, the Commission also focused on the quality of medical and counselling care provided to victims following the assault.

Three years later, in May 1980, one of the most influential conferences was held in Hobart, Tasmania, appropriately titled "Rape Law Reform". The event was well attended, successfully drawing key state and international representatives to debate the various directions that future law reform should take. Professor Virginia Nordby, one of the principal drafters of the Michigan legislation, provided the keynote address outlining some of the preliminary findings in relation to the implementation and operation of the Michigan model. Nordby declared success for the new model given there had been a marked increase in the conviction rate for forcible rape as well as higher rates of reports and arrests since its introduction; women were also said to experience less trauma when giving evidence in court; and there was further evidence of the new regime having improved community perceptions regarding rape. Nordby was of the view that 'the prohibition of past sexual history evidence [was] undoubtedly one of the major contributors to each of these improvements' (1980: 28).

The situation described by local participants at the conference stood in sharp contrast to the success story told by Nordby. Results from evaluative studies and projects monitoring the application of existing laws and procedures consistently showed how the reforms had systematically been subverted or undermined by state and territorial jurisdictions (Scutt, 1980a, 1980b).

Nonetheless, Scutt (1980b) contends that the Tasmanian conference coupled with the WEL Bill, substantially impacted on the content and shape of Australia's rape laws. Soon after there was nation-wide resurgence of political support for calls to improve the plight of rape victims in court which led to more comprehensive and progressive reform packages being introduced. Once again the reform process and corresponding amendments varied from state to state.

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[19] The WEL draft Bill 1977 is reprinted in Appendix II of J. Scutt (1980a).

In Victoria it took the form of the passing of the *Crimes (Sexual Offences) Act* in 1980. In brief, the effect of this legislation was to:

a) neutralise the gender of "people" who could be the victims and offenders of rape, so that women could be charged with perpetrating rape and men could claim to be the victims of it;[20]

b) expand the physical circumstances of the offence of rape to include anal and oral penetration, and rape by the manipulation of an object into the vagina or anus of a person;[21]

c) introduce the separate offences of rape and indecent assault with 'aggravating circumstances', where the threat or use of additional physical violence or other humiliating acts would carry a more severe maximum penalty; and

d) remove the mandatory requirement of corroboration leaving judges with a discretionary power to continue to warn jurors of the dangers of conviction on the unsupported evidence of the victim.

Again feminist calls for legislative attention on the issue of consent and the accused's belief in consent were met with parliamentary silence.

Not so in other states of Australia where the Australian Capital Territory (ACT), Western Australia, Tasmania and New South Wales (NSW) each adopted frameworks that provided for a statutory definition of consent. Although the definitions were in line with the common law treatment of consent,[22] it was

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[20] Some feminists were staunchly opposed to making rape laws gender neutral, arguing such change would further mask the gendered nature of the crime of rape as well as avert attention away from the inherent gender bias and sexist practices that continued to shape the legal judgements and outcomes in rape cases (See Giacopassi & Wilkinson, 1985; Graycar and Morgan, 1990; Naffine, 1994).

[21] Despite an extension of the types of penetrative conduct that can now constitute a rape offence, Rush suggests there is still a 'privileg[ing]' of the penis that remains a legacy of the common law tradition' (1997: 185-186). This is consistent with the views of some Victorian judges who expressed their objection to the inclusion of digital penetration as a rape offence. According to one judge 'it's just balmy [sic], it's just so different, it's just an indecent assault' (Heenan & McKelvie, 1997: 311).

[22] The ACT was a notable exception. Their Criminal Code included a definition of consent more closely aligned with the Women's Electoral Lobby's draft Bill which allowed for a significantly broader interpretation of consent than the common law allowed. The definition relied on a list of

anticipated that greater clarity in the meaning of consent would result in a greater consistency of approach in terms of judges' interpretations and juries' considerations of consent in trials where it remained the central issue.[23]

The Michigan system of graduating degrees of sexual assault was also first introduced locally by NSW in 1981.[24] The intention was to promote a desexualisation of offences to more adequately reflect the violence in rape situations, while simultaneously redirecting the trial focus away from the issue of consent (Wallace, 1981; Heald, 1985).

The NSW approach to procedural reform was also more influential than the attempts of other Australian states and territories, and more closely aligned with the US forerunner. Of particular note were the provisions regulating the admission of sexual history evidence[25], where no evidence of a woman's sexual past, present or future would be tolerated save for a small number of particularised circumstances.[26] Even where the grounds for an exception to the prohibition may have been defensible, the court was also to have regard to the level of distress, humiliation or embarrassment that the complainant was likely to endure should the questions be allowed.

Increasingly throughout the 1980s, police operations and practices also came under the feminist spotlight when continual low levels of reporting were matched against the disturbing anecdotes regularly voiced by women victims about their contact with police (Coxsedge, 1980; Henry, 1980; Freckelton, 1988; Nixon, 1992). High levels of disbelief, insensitive questioning and failure to ensure victims received appropriate medical care and counselling support gave rise to immediate calls for specialised training and education for police members (Orr, 1997). In Victoria, for example, a Sexual Offences Squad was established in 1982 which consisted of

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'negating circumstances' that could preclude consent where there was a threat of public humiliation, a threat of physical or emotional harassment, or where there was abused by a person in authority (See section 96(1) of the *Crimes Act 1900.*)

[23] The mental element in these states' codes also shifted so that no intention or guilty mind needed to be proved unless a defence of mistake was raised by the accused himself, in which case the onus lay with the prosecution to satisfy the jury that the accused did not hold an honest belief in consent.

[24] Western Australia followed suit in 1986 by introducing a similar system of grading sexual assault.

[25] See section 409B (2) of the New South Wales' *Crimes Act 1900.*

women police officers that were primarily responsible for taking rape victims' statements and supporting them through the medical and legal processes. The Sexual Offences Squad was developed specifically to increase the confidence victim/ survivors might have in seeking a criminal justice response by ensuring that police officers responded as 'sensitively and professionally as possible' (Freckelton, 1988: 6).[27]

Campaigning for counselling and support services for victims of sexual assault also gained considerable public support (Carmody, 1992). The first government-funded sexual assault service was established in Victoria in 1977 at the Queen Victoria Medical Centre (Farrant, 1979). Although the Centre remained the sole metropolitan service-provider in the field for some eight years[28], by the mid 1980s the state government was beginning to listen more closely to alternative models for providing both medical care and support to victim/survivors of sexual assault (McCarthy, 1990; Orr, 1997).[29] In 1987, the Centre Against Sexual Assault or CASA House was established and structurally attached to (although remained geographically separate from) the Royal Women's Hospital. This relationship was significant given that the philosophy guiding the service was openly radical feminist. CASA House were particularly concerned to locate the responsibility for responding to the needs of victim/survivors of sexual assault firmly within the state's broader agenda of women's primary health care, although it was removed from traditional medical models that tended to individualise and pathologise women's experiences of rape (Orr, 1997: 77). By the end of the 1980s, government funding had been allocated for 14 sexual assault services across the state.[30]

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[26] These included any existing or recent relationship with the accused, or where sexual activity with others might prove relevant to an issue of pregnancy, disease, or any medical condition said to have been suffered by the complainant as a result of the assault.

[27] The Sexual Offences Squad was disbanded in 1988 after Ian Freckelton's review recommended that regional Community Policing Squads take over the duties and responsibilities for responding more appropriately to reports of sexual assault (Freckelton, 1988).

[28] Other rape crisis services were established in the intervening years, however, these were self-funded rather than government-funded initiatives.

[29] See Orr (1997) for a local overview of the development of sexual assault services amidst shifting feminist discourses surrounding state/legal/medical responses to rape, alongside the competing pressures of interacting with the state's increasing interest in women's issues.

[30] These achievements were representative of a broader changing social environment where women's rights were beginning to carry greater political kudos. Bargen and Fishwick (1995) describe the extent to which the issue of sexual assault and the treatment of women victims by the legal system began to enter party platforms and political speeches throughout the late 1980's.

2.4 THE VICTORIAN EXPERIENCE OF REFORM – 1980 AND BEYOND

Despite the many and varied approaches to bringing about change in the management of sexual assault reports and prosecutions and the concomitant improvement anticipated in the experiences of women going though the legal system, by and large women continued to describe the same processes of 'secondary victimisation' (Spencer, 1987: 54) as they negotiated the various avenues of the criminal justice process.

By the mid 1980s, the Attorney-General of Victoria was prompted to direct the Law Reform Commission to mount an enquiry into the operation and impact of the *Crimes (Sexual Offences) Act 1980* with a view to making recommendations for future law reform.[31]

Surprisingly, the Commission did not attempt to conduct a detailed empirically-based evaluation of the current legal situation, but chose instead to rely on the submissions and feedback provided by the legal profession, victim support agencies, women's groups and the police in exploring their recommendations for change. Whilst this approach was unique in the LRCV's history of considering law reform in the area, and could be commended for ensuring that "expertise" was seen to lie beyond the bounds of the legal profession alone, a systematic and comprehensive assessment of the application and interpretation of the existing laws and procedures might have laid the foundations for a far more radical reform package.

As it was, the discussion generated throughout the enquiry[32] represented a significant contrast to the rhetoric of a decade earlier. No longer did the Commission see itself as having to fiercely protect the rights of rape defendants against the unscrupulous lies of false complainers. The Commission was now keen to address those legal rules that 'may impose unnecessary but significant distress upon complainants...' (1988: 3). Indeed, it took the opportunity to applaud the efforts of women's groups in driving sexual assault law reform movements around the world and directly

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[31] The only other legislative change to have been instituted following the enactment of the 1980 changes was the statutory removal of the spousal immunity for rape in 1985 through the *Crimes (Amendment) Act 1985 (Vic.)*.

[32] There was a series of two discussion papers and two reports generated by the enquiry looking at both the substantive and procedural rules governing rape and other sexual offences.

attributed any gains to their tenacity and perseverance in demonstrating the need for further change.

In spite of this shift, the Commission's final recommendations were on the whole disappointing, particularly in relation to the treatment of consent. While the Commission's Discussion Paper flagged the possibility of consent being statutorily defined, the final report gave this only cursory consideration. It was finally resolved to leave consent to reflect its 'ordinary and natural meaning' (LRCVb, 1987: 2), despite feminist claims that the traditional framework and meaning were inherently biased against women.[33] Accompanying calls for the mental element to be altered to ensure men were accountable for rape where they held an honest but *un*reasonable belief in consent were also rejected. The Commissioners were of the general view that interfering with the common law of consent would do 'more harm than good' (1987b: 38).[34]

Moreover, although the merits and shortfalls of more restrictive legislation in relation to sexual history evidence were considered, such as that in Canada and NSW, the Commission felt that the solution to the continued admission of sexual history evidence lay in magistrates and judges applying a more careful consideration of applications, and a greater vigilance for intervening when the provisions were breached (LRCV, 1988: 52-53). Accordingly, 'a proper balance' between the complainant's and the accused's interests was said to be found in keeping the existing sexual history rules intact (LRCV, 1988: 50).[35] It was, however,

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[33] The Discussion Paper implied that the Western Australian approach of providing a statutory definition of consent to mean 'a consent freely and voluntarily given' would be adopted (LRCV, 1986: 50). The Final Report, however, was silent on the issue other than to suggest rape laws be extended to all situations where consent is absent, rather than be confined to those where there was evidence of force or threats.

[34] Interestingly, the Commission's Final Report on the substantive aspects of rape law included a section outlining the views of those who dissented with the final recommendations (1987b: 39-40). Dr Linda Hancock and Ms Susan McCulloch, both members of the division established by the Commission to conduct work on the enquiry, stated their opposition to the Commission's failure to address the inadequacies in the law as they related to consent and belief in consent. They each supported the introduction of a statutory definition of consent coupled with legislative examples of situations where consent could be vitiated. They also endorsed changing the mental element to require an objective standard of reasonableness for accused who claimed to have held an honest belief in consent.

[35] The Commission's reluctance to provide for any change to these provisions may in part be explained by their reliance on anecdotal information that suggested sexual history evidence was admitted in as few as 5% of cases (LRCV, 1987a: 27).

recommended that judges be required to record their written reasons for allowing evidence of prior sexual history to be admitted during the trial.[36]

My own research conducted in 1990 was the first to specifically focus on monitoring the impact and operation of the *Crimes (Sexual Offences) Act 1980* through first-hand observation of seven rape trials heard and finalised in the Melbourne County Court (Heenan, 1990). Although small scale and exploratory in nature[37], the study allowed for a close examination of rape trial processes in cases that typified the kinds of prosecutions that were heard during the early 1990s. It further provided a preliminary snap-shot of the operation and application of existing rape laws and procedures.

With one exception, the trials involved cases where the complainant and the accused had some kind of pre-existing social or sexual contact, however slight, prior to the alleged rape. There was little to distinguish the versions of events immediately leading up to the alleged incident which meant that the issue in dispute was most commonly whether the complainant consented to the activity in question, or, as in two cases, whether any sexual activity had occurred at all.[38]

As well as offering confirmation of the kinds of arguments being waged by feminists in relation to the persistent use of traditional corroboration warnings (Heenan, 1990: 98-100) and the ease with which sexual history evidence continued to be admitted (Heenan, 1990: 100-108), the study's findings also provided further insight into how the conventional framing of consent remained a dominant feature in the prosecution of contemporary rape trials.

In court, complainants were regularly constructed according to how closely they met the social expectations and moral standards more generally inscribed for women under patriarchal social and cultural conditions. Juries were encouraged to view women-complainants according to the conventional measures where double

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[36] This provision was not acted on in Victoria until 1991 with the introduction of the *Crimes (Sexual Offences) Act*.
[37] The research was conducted in fulfilment of my Honours thesis during 1990.
[38] In these two trials, the defence claimed that the allegations were simply false and that there had been no contact with the complainant apart from a social one.

standards were applied with respect to alcohol consumption, dress and sexual experience, as well as to their more general character and lifestyle (Griffin, 1971). Notions of force and resistance also continued to carry significant sway for barristers prosecuting or defending rape allegations. The only conviction came from a trial where explicit photographs depicting the woman with substantial facial injuries were shown to the jury (Heenan, 1990).

2.5 The Political Pathway to Victoria's Current Legislation

The most fundamental reform to laws in Victoria did not emerge until the beginning of the 1990s after women's groups vehemently rejected the content of a draft Bill that had been circulated for final comment during 1990 (Guest, 1991; Egger, 1994).[39] The focus of the new *Crimes (Sexual Offences) Bill* was confined to addressing procedural concerns related to legal proceedings involving children and "people" with an intellectual disability and made no attempt to deal with feminist discourses surrounding the meaning and operation of consent.

This gave rise to the formation of a remarkably effective lobby group, self-titled the Real Rape Law Coalition (RRLC). While driven by grass-roots activists and workers from Centres Against Sexual Assault, Community Legal Centres and other women-focussed community groups, the Coalition also included prominent women lawyers and feminist academics. After successfully mobilising political and community support over the failure of the government to offer more meaningful changes to rape laws[40], the Attorney-General appeased the RRLC by allocating further resources to the Law Reform Commission to focus exclusively on the processing of rape prosecutions and, in particular, the issue of consent. It was also expected to examine any further measures that could minimise the trauma rape victims experienced as part of the investigation and prosecution processes.[41]

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[39] The Bill largely accorded with the recommendations made by the LRCV in their 1987 report on the substantive aspects of "Rape and Allied Offences" (Report No. 7). See the article by Loff & Carter, 1987.

[40] Egger (1994: 95) provides a brief synopsis of the political strategies used throughout the campaign and commends the 'sophistication' of the RRLC's approach that ultimately forced the Attorney-General to reconsider the proposed Bill.

[41] As was highlighted in the separate commentaries provided by Naffine (1994) and Egger (1994) on the advent of the Victorian reforms, the political significance of this process deserves particular note. In previous decades parliaments and law reform committees had mostly relied on the expertise of

Although the subsequent reference was overseen by the Law Reform Commission, representatives from key agencies, including RRLC members, participated on working groups to debate the various recommendations for change.[42] David Brereton, who was the principal consultant to the reference, traced the more significant events following the establishment of the various working groups in his 1994 article '"Real Rape" Law Reform and the Role of Research: The Evolution of the Victorian *Crimes (Rape) Act 1991*'. Although the object of Brereton's paper is to highlight the role played by social science research in the formation of the draft legislation, his quasi-diarised account of the evolution of the *Crimes (Rape) Act*[43] provides a unique and fascinating chronology of the processes through which the reformist agenda was set.[44]

Brereton describes several months of political grappling by working party members, where competing philosophical positions and agendas needed to be negotiated, even compromised, in order that agreement be reached. Although the process was at times 'relatively unstructured' (1994: 84) and 'attenuated' according to Brereton, it was also one that facilitated outcomes that were 'broadly acceptable' (1994: 81), even in the face of dramatically different objectives being set by the principal stakeholders involved. The success of this process could therefore be measured as much by the final legislative product as it could by the manner in which the LRCV's reference 'allow[ed] consultative mechanisms to operate' and created space for a 'constructive dialogue' to be ensue between the main parties to the review (Brereton, 1994: 85).

Much of this dialogue was informed, and sometimes tempered, by the research conducted by the LRCV as part of the rape reference. Although the methodology combined three important components, the detailed analysis undertaken of some 150

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lawyers and the judiciary to call for review of existing laws and procedures. By the 1990s, however, governments were obliged to consider the growing community acceptance of feminist analyses of rape that continued to draw attention to women's treatment by the courts.

[42] The issues considered by the Commission and working group representatives during the rape reference are documented in a series of three reports, the last of which culminated in the presentation of the draft Crimes (Rape) Bill (LRCV, 1991a, 1991b and 1991c).

[43] See the Appendix in Brereton, 1994, at pages 87 to 93. See also the comments made by Krysti Guest, one of the LRCV researchers, in her brief article in *Arena* (1991: 54-59).

[44] Although as Brereton himself acknowledges, his account provides but one perspective on what at times became a very tense exchange between the key parties involved.

rape prosecutions was by far the most influential aspect in that it comprehensively grounded feminist analyses of rape law. Firstly, and most importantly, it positioned consent as a key feature of most trials (LRCVb, 1991: 87). Further, it revealed the unique stresses experienced by victims being cross-examined (LRCVb, 1991: 99-104); it exposed the rape-specific themes relied upon by defence barristers in attempting to undermine the victim's evidence (LRCVb, 1991: 104-108); and it distilled the statistical evidence that suggested convictions were more likely to result in situations where women's behaviour correlated with the dominant conceptions of how and where rape occurs. This was typically in cases where physical injuries could substantiate the elements of force and resistance (LRCVb, 1991: 95), where the accused was a stranger to his victim (LRCVb, 1991: 97), and where accused men themselves made admissions that tended to support what the woman had said happened (LRCVb, 1991: 96-97).

During the initial phase of the reference, Commission researchers gave careful attention to the more radical reformist approaches, particularly the viability of the Michigan option, with a view to assessing whether non-consent should be retained as an element of the offence. However, several legal commentators had more recently debated the efficacy of the Michigan framework, each concluding that rather than diminishing the role of consent in rape trials, the model had merely shifted the point at which consent would become a live issue in the trial, especially in cases that involved no additional physical violence or threat (Marsh et al., 1982; Naffine, 1984). The model's greatest effect was seen to operate in precisely those cases that posed the least difficulty for prosecutors to prove (Naffine, 1984). Hence, the model designed to reframe the law's conceptualisation of consent, so that it would more adequately address the injustices faced by women in court, was found to be incapable of diverting the trial away from its traditional preoccupations.

Greater scope was seen to lie in creating a statutory definition of consent that worked on a notion of "free agreement" with clearer legislative direction being provided around what would *not* constitute consent. The definition, according to the Commission's reformists, would enshrine the existing principles underlying the common law approach while also allowing a wider frame through which to determine non-consent, particularly in situations where there was no additional

physical violence. In other words, alongside the traditional indicators of force or resistance, the Bill included reference to a 'fear of harm of *any* type' as sufficient grounds to vitiate consent, where economic harm or sexual blackmail would arguably be covered by the provisions. A lack of free agreement would also be presumed in situations where a person was asleep at the time of penetration, unlawfully detained, or so affected by alcohol or other drugs as to be incapable of freely agreeing to the act.[45]

Unique to the proposed legislation was a set of directions that judges would also be required to give to juries on consent. This would not only ensure that a more 'consistent approach' was taken by judges directing on the issue (LRCV, 1991b: 8), but would provide guidance to juries on how to assess *non*-consent or a lack of free agreement through an alternative frame of reference that overtly challenged or reversed the kinds of assumptions that had served to support the traditional mythology surrounding rape.

In addition, and by far the most radical reform proposed by the Commission, was a requirement that judges inform juries that where a person says or does nothing to indicate their free agreement, it is 'normally enough' to show that the act took place without that person's free agreement. This change reflected the more recent feminist reformist preference for a shift away from laws that claimed to protect a person *from* sexual misconduct towards a legal framework that recognised an individual's *right to* sexual freedom and autonomy. So in circumstances where a woman did nothing to positively communicate her consent, greater onus would be placed on the man accused to explain why he had inferred consent.

More fundamentally, the proposal directly countered the legal presumption of consent in rape law where, if men were presumed to be innocent, women were inevitably consigned the legal and cultural status of the ever-consenting sexual subject, unless or until the prosecution was capable of proving otherwise (Scutt, 1977; Temkin, 1987; Guest, 1991; Rush & Young, 1997). As Loff and Carter

[45] As a consequence, the focus on consent as an element of the offence may further be minimised during the trial if prosecutors can reasonably argue that the complainant's experience fits within one of the circumstances said to vitiate free agreement.

(1987) explain, if non-consent to sex could only be evidenced by women who expressly indicated their unwillingness to proceed, then women who were saying and doing nothing were, according to the (law's) masculinist view of women's sexuality, in a permanent state of readiness for (or at least not objecting to) sex.

Apart from the potential impact on trial outcome, it was further anticipated that the new legislative definition and accompanying judicial directions on consent would provide a far stronger educational and symbolic statement on what constituted the legal bounds of acceptable standards of sexual conduct (LRCVa, 1991). It also showed a commitment by the Commission to take seriously the RRLC proposal to ensure the new legislation would 'place sexual offences in a social context' (LRCVb, 1991: 180) that could more effectively shift the cultural perceptions that had traditionally been used to mitigate rape allegations, especially in cases where there were no physical signs of struggle or injuries suffered, or where the woman had been sexually active with the accused or others in the past.[46]

The Commission was however less convinced by representatives and sympathisers of the RRLC to recommend change in assessing an accused's intention to commit the crime of rape. It had been proposed that the existing subjective test for determining whether an accused honestly, although mistakenly, believed a woman was consenting should be replaced with an objective one (the *mens rea* requirement). The latter would require the prosecution to prove that a reasonable person *should* have realised that the other person was not consenting, even if the accused claimed to have been genuinely unaware. Far from being persuaded to alter the standard test[47], the Commission opted for a statutory provision that combined both subjective and objective elements, so that in assessing an accused's claim to have held an honest belief in consent, juries would also be required to consider whether 'that

[46] The RRLC recommended the inclusion of a preamble to the new Act that would outline some of the social realities of rape. See their submission to the Law Reform Commission (LRCVb, 1991: 180-182).

[47] In brief, the Commission was not prepared to endorse an amendment that would alter one of the most 'established principles of the criminal law', i.e. to hold legally accountable only those persons who intend to commit the crimes for which they are prosecuted (LRCV, 1991c: 10). The findings in the rape prosecution study that only 6% of the accused actually relied on a defence of honest belief in consent as their main line of defence in the trials examined was considered a further reason not to alter the existing *mens rea* requirement (LRCV, 1991b: 87).

belief was *reasonable* in all the relevant circumstances' (LRCVc, 1991: 18; my emphasis).

Changes to court procedures and practices were also the subject of several consultations and debates held between key agencies and organisations throughout the life of the reference. Consideration was given to issues such as: whether victims should be provided with their own legal representation rather than be the primary witness in a state prosecution; the value of pre-court meetings between victims and prosecution representatives; the need for further restrictions to be placed on the admission of sexual history evidence; notions of fair treatment within cross-examination; the viability of introducing alternative arrangements for adult complainants to give their evidence using closed circuit television or screens; and the merits or otherwise of closing trials to the public.

Within weeks of the Commission reporting on their final recommendations, the *Crimes (Rape) Act 1991* was passed by both houses of the Parliament. To summarise, the main changes were as follows:[48]

Substantive changes

- the physical circumstances of the offence of rape were extended to include penetration of the vagina or anus by other parts of the body, namely, cunnilingus and digital rape;

- rape was further defined to include continuation of penetration after consent has been revoked;

- the element of consent was defined to mean free agreement, and included a list of vitiating circumstances under which a person could not be seen to freely agree;

- judges were required to provide juries with a set of directions in relation to consent that a person cannot be regarded as having freely agreed to an act of

sexual penetration just because s/he did not protest or physically resist, or sustain any physical injury and nor can free agreement be inferred because of any prior sexual activity with the accused or another person. Juries would also be told that saying or doing nothing to indicate free agreement 'is normally enough to show that the act took place without the person's free agreement';

- the subjective standard of the *mens rea* requirement was retained, although juries would be directed to take into account whether the accused's honest belief in consent could be considered reasonable in all the relevant circumstances;

- judges were prohibited from suggesting to juries that rape complainants are an unreliable class of witness;

- where the defence raised the issue of any delay in complaint, judges were required to tell juries that such a delay does not necessarily mean that the complaint is false, and there may be good reasons why a complainant might hesitate in making a complaint;

- the maximum penalty for rape was increased to 25 years.

Procedural changes

- the use of alternative arrangements for giving evidence was introduced for complainants who were under 18 years of age, or who had an intellectual disability, where the proceedings related to sexual offences or other serious assaults against the person. These included closed circuit television, the use of screens to block the complainant's line of sight to the accused, closing trial proceedings to the public, support people standing or sitting beside the

[48] The changes were introduced by the *Crimes (Sexual Offences)Act* which came into effect on August 5, 1991 and the *Crimes (Rape) Act*, effective from January 1, 1992.

complainant while s/he gives evidence, and requiring barristers to be seated or to remove their wigs and gowns when questioning the complainant;[49]

- further restrictions were placed on the admission of sexual history evidence to include prior sexual activities with the accused so that in effect a general prohibition stood with respect to seeking to adduce evidence of the complainant's sexual proclivities;

- judges were required to provide written reasons for admitting or refusing to allow questions relating to the complainant's prior sexual history.

The reform package was generally well received by local feminists and law reformists alike. In particular, the changes to the meaning and legal adjudication of consent were applauded by women's groups and feminist legal commentators who variously described the provisions as 'impressive' (Naffine, 1994:100), 'a credit [to our] women's movement' (Sheehy, 1995: 12) and an effort to 'disturb the aggressive/passive model and recognise women's sexual autonomy by reversing the presumptions about consent' (Bargen & Fishwick, 1995: 65). Others, who were less hopeful that the new laws would radically alter the legal treatment of rape, nevertheless recognised the wider symbolic and educative function that the legislation could play in reducing the cultural strength of outdated assumptions about rape and women victims.[50]

2.6 THE VICTORIAN EVALUATION STUDY

A subsequent commitment by the existing Labour government was made to resource a detailed evaluation to monitor the impact and operation of the new *Crimes (Rape) Act*.[51] This followed recognition by parliament that legislation on its own was

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[49] The use of the arrangements was not an automatic right. The court's permission was required before any of the arrangements could be used. Prior to 1997, adult victims could only use alternative arrangements where the court was satisfied that the complainant would suffer severe emotional trauma or be significantly disadvantaged as a witness.

[50] For example, Peter Rush referred to the Victorian rape legislation as providing a 'pedagogic tool addressed to the general community and particularly to men' (1997: 168).

[51] Funding was also provided for a community based legal education project. Most believed this was somewhat of an ancillary "prize" after the Commission rejected the RRLC's strong recommendation that victim/survivors be provided with their own legal advocate to assist them throughout the prosecution process (LRCV, 1991a: 34-35). The Project For Legal Action Against Sexual Assault,

unlikely to effect change. As a corollary, there would need to be a commitment by those charged with the responsibility of interpreting and applying the new provisions to give life and meaning to them in the courtroom.

The Rape Law Reform Evaluation Project[52] was born of these principles. The project was funded for a period of three years[53] and its aims were to report on:

1. the implementation and workability of a new Police Code of Practice aimed at improving victim/survivors' experiences of the reporting process;[54]

2. the impact and operation of changes to substantive and procedural laws introduced by the *Crimes (Rape) Act 1991*, including whether the reforms had improved the legal treatment of rape complainants in court.

I was employed as the principal researcher and later the Co-ordinator of the Evaluation Project which published a series of two reports. The second report detailed the results of a comprehensive appraisal of the impact of the new provisions on prosecutorial and courtroom practice.[55]

The project developed four main research components.[56] These included:

1. face-to-face semi-structured interviews conducted with:

   - 47 prosecution and defence barristers who had appeared in rape proceedings following the introduction of the new legislation;

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established in 1992, developed training and legal education packages for sexual assault services, solicitors at the Office of Public Prosecutions, tertiary students, and victim support groups.

[52] Hereafter referred to as the Victorian Evaluation Study (Heenan & McKelvie, 1997).

[53] A Liberal Government maintained the commitment to fund the project from 1992.

[54] See Heenan & Ross, *The Police Code of Practice For Sexual Assault Cases, An Evaluation Report*, Rape Law Reform Evaluation Project, Report No 1, Department of Justice, Melbourne, Victoria, 1994.

[55] Heenan & McKelvie, *The Crimes (Rape) Act 1991: An Evaluation Report*, Rape Law Reform Evaluation Project, Report No. 2, Department of Justice, Melbourne, Victoria, 1997.

[56] See Heenan & McKelvie (1997), Chapter 2, pp. 15-26 for an overview of the sampling methods and procedures used for each component of the research.

- 8 solicitors from the Office of Public Prosecutions, 6 of whom were part of the specialist Sexual Offences Section responsible for preparing cases against accused charged with rape offences;
- 18 County Court judges, including all three women judges who at that time occupied the bench;
- 13 Magistrates, including 2 women.

2. interviews with 37 victim/survivors who had been involved in a rape prosecution after the legislation had been introduced, 18 of whom gave evidence at a trial;

3. an examination of 27 transcripts of judges' directions to juries in rape trials where the principal issue of dispute was consent or the accused's belief in consent;

4. a detailed quantitative and qualitative analysis of some 242 case files from rape prosecutions initiated after the legislative changes, in both city and country regions.

Given the report represents the most recently published research on the operation of existing rape laws and procedures in Victoria, and given my central role within the Evaluation, which is directly linked to the subject of this thesis, the main substantive findings from the study will be considered here at length.

In broad terms, the Victorian Evaluation Study showed some significant and progressive shifts in terms of how the new laws impacted on rape prosecutions and in particular on women's experiences of the trial process. However, there were also several examples of the provisions being ignored, undermined and sometimes deliberately flouted by members of the legal profession which often left women exposed to the rigours of more traditional rape trial practices. The following provides a brief overview of some of the findings generated by the evaluation with respect to five main areas: the use of alternative arrangements for giving evidence; the operation of the extended restrictions on the admissibility of sexual history evidence; the application of the new directions in relation to consent and

corroboration warnings; and the impact of the legislative changes on cross-examination practices generally.

2.6.1 Using Alternative Arrangements To Give Evidence

Some considered the introduction of alternative arrangements for giving evidence a fundamental shift in the traditional principles established to ritualise how criminal justice under English common law would "be seen to be done". According to the advice regularly given to jurors by defence counsel, the physical design of the courtroom is "no accident". The presiding judge sits elevated to the highest position in the courtroom to accord with his (and now sometimes her) principal role as arbiter or overseer of the proceedings. The witness box is similarly raised in line with the jury box so that jurors can see and assess the physical demeanour of witnesses alongside the oral evidence that is given. The accused sits in the dock which is deliberately positioned in line with the height of the witness box to encourage "the accuser to face the accused" with the allegations.

Hardly surprising, then, was the initial resistance mounted by barristers and members of the judiciary to the proposed change to these arrangements. The results from the Victorian Evaluation Study showed very few applications made by prosecutors requesting the use of any of the alternative arrangements. Less than a third of complainants during the committal and just on a quarter of complainants at trial had access to the range of alternative possibilities for giving their evidence (Heenan & McKelvie, 1997: 57 & 61). Courts were more likely to grant leave for the alternative arrangements to be used for child complainants or where an adult woman-complainant had an intellectual disability.[57]

The perceptions of the operation and impact of the new provisions that very quickly swept across the legal profession were that devices like closed circuit television (CCTV) or blocking screens were potentially detrimental to jurors' assessments of

[57] Requests made on behalf of these complainants were far from straightforward. One case file included an example of a child being asked to enter the witness box and explain why she would prefer to use closed circuit television. When faced with the judge asking her whether she could cope with being in court, the 13 year old complainant simply nodded in the affirmative and the application was refused (Heenan & McKelvie, 1997: 63).

women-complainants or unfairly prejudicial to an accused person facing trial.[58] Some barristers were also opposed to other features of the provisions that could force them to remain seated while questioning the complainant, or that would involve them appearing in court without the formal regalia of wigs and robes. This, they felt, would unfairly obstruct the theatre and authority available to cross-examiners. Others objected to the provisions that interfered with the principle of "open justice" in allowing judges to close the court to the public.[59] In some instances, the arrangements were even described as 'dangerous' (1997: 73) and 'fundamentally unfair' (1997: 74), despite some barristers having never appeared themselves in a case where the provisions were used.

Few of the interviewees seemed to appreciate that the rationale for introducing the provisions was a way of reducing the level of trauma and distress women had consistently identified when facing the accused in court, or the more general anxiety and dread experienced by women in sexual assault cases when having to give their evidence in the public and highly formalised setting of a courtroom (LRCV, 1991b: 129-130). The focus remained on what were perceived to be the probabilities of the arrangements interfering with juries' assessments of the principal parties.[60]

While there did appear to be some shift in the assumptions and theories advanced about the merits of using alternative arrangements during the life of the evaluation[61], and as experience of using these alternatives increased[62], there remained a general

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[58] This was in spite of the legislation providing for a mandatory warning to be given to jurors in such cases that they must not draw any inference adverse to the accused, nor should they give the complainant's evidence any greater or lesser weight because of the alternative arrangements used (See Section 37C(4) of the *Evidence Act 1958, Vic).*

[59] This principle of "open justice" symbolises the right of any member of the public to observe the operation of the courts under a democratic system of individual rights and freedoms (Department For Women, 1996: 113).

[60] There is no empirical evidence to support these various contentions. Research conducted by the Western Australian Ministry for Justice (1996) indicated that the use of closed-circuit television did not influence juries' final decisions in cases involving child victims giving evidence in sexual offence proceedings.

[61] Subsequent theories have also been advanced by barristers since the Victorian Evaluation Study. See for example Freckelton (1998a: 150-151) who believes the process for complainants giving evidence via closed circuit television would be 'even more stressful' because the defence can take advantage of how 'disorienting and alienating' the experience of speaking into a camera is likely to be for complainants. He concludes that alternative arrangements provide 'limited succour to genuine victims' (1998a: 151) for ameliorating the rigours of cross-examination.

[62] Magistrates are reportedly now using CCTV routinely in sexual offence cases involving child witnesses (Heenan & McKelvie, 1997: 114).

opposition to the arrangements as appropriate for adult complainants. In line with an additional eligibility requirement that adult complainants were obliged to meet in order to use the arrangements, barristers nominated very few circumstances under which they would be prepared to make an application requesting the use of such alternative arrangements for adult women (Heenan & McKelvie, 1997: 82). Even in situations where applications were made for those arrangements were considered least controversial, such as closing the trial to the public, adult complainants were sometimes subjected to demands from judges to explain why they would prefer to give their evidence *in camera* (1997: 67).

2.6.2 Sexual History Evidence

The extension of the "rape shield" restrictions to provide a general prohibition on the admission of sexual history evidence was also carefully evaluated. Where before, any prior sexual activity or relationship between the complainant and the accused would automatically be the subject of rigorous questioning during a rape trial, regardless of when the alleged activity occurred, the *Crimes (Rape) Act 1991*[63] now requires barristers to establish how the intended evidence would provide material of 'substantial relevance' to the issues in dispute.

For many of the prosecutions examined, the introduction of this amendment appeared to have minimal bearing on the manner in which defence and prosecuting barristers ran their cases both during committal and trial proceedings. All but two of the 37 applications to question the complainant about her sexual past with the accused were allowed by magistrates and judges (Heenan & McKelvie, 1997: 123, 132), with very few constraints placed on the scope or content of the questioning.

On a further 23 occasions at committal (1997: 126) and 11 at trial (1997: 135), the amendment failed to be observed by legal counsel altogether. In other words, whether this reflected a deliberate flouting of the new provision or a distinct lack of awareness regarding the requirements of the new section [64], evidence of alleged prior

[63] See section 4 of the *Crimes (Rape) Act 1991*.

[64] A lack of knowledge as to the specifics of the legislative changes introduced by the *Crimes (Rape) Act* was a factor in each of the areas reviewed by the Victorian Evaluation Study. See sections of the report that indicate where barristers claimed to be unaware of the provisions relevant to the operation

sexual relationships or activities between the accused and the woman-complainant was introduced in direct breach of the requirements of the new section.[65] It was certainly not anticipated that the new legislation would prevent jurors from becoming aware of *any* prior consensual sexual relationship between the complainant and the accused, especially if it was proximate to the time of the alleged assault. However, prompted by the disturbing findings generated by their own study of prosecution files (1991b: 101-102), the LRCV were more concerned to limit the extent to which courts would, as a matter of course, allow evidence of prior sexual activity between the complainant and the accused to be heard, especially in situations where the activity (if it had in fact occurred) had ended some time prior to the assaults that were the subject of the trial (LRCVb, 1991: 104; LRCVa, 1991: 41).

The subsequent interviews with legal personnel conducted as part of the evaluation study cast some interesting light on the potential efficacy of tightening the restrictions governing the admission of sexual history evidence. Whereas a substantial proportion of the interviewees supported an evidentiary bar being placed on the admission of sexual history evidence relating to people *other than the accused*, they were uncertain or unhappy about the section being extended to prior sexual activities *with the accused*. Some barristers in particular felt that expanding the restrictions was merely tokenistic and unnecessary, given the reality that any prior sexual history between a complainant and an accused is likely to be constructed by counsel as relevant, especially where the principal issue in dispute is consent or the accused's belief in consent. One barrister put it this way:

> Here is someone who has been busily screwing the accused for months, years or weeks, and all of a sudden is crying rape. Of course it's relevant to all questions of his belief and whether she consented (Heenan & McKelvie, 1997: 141).

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of the alternative arrangements (Heenan & McKelvie, 1997: 114) and of the extension of evidentiary restrictions on admitting prior sexual activities with the accused (1997: 135-136).

[65] On a small number of occasions prosecutors immediately and successfully objected where the provisions were clearly being breached by defence barristers who were attempting to question complainants at length about alleged prior sexual activity with the accused without first obtaining the court's permission.

Some prosecutors (and one solicitor) also mentioned the value of a prior relationship between the complainant and the accused to the prosecution case especially in situations where there is corresponding evidence of previous physical or sexual violence.

Although a clear majority of judges were in favour of the extension, they were also wary of refusing applications in the face of powerful arguments being made by defence counsel that suggested evidence of a prior relationship between the complainant and the accused was critical to his/her client's defence. As one judge rather crudely summarised it:

> What [the provisions] have excluded is the "town bike" approach, the attack upon the sexuality and the morality of the complainant. What it has been less successful in excluding is the specific sexual experience of the complainant in relation to the accused person, because so often that really does throw light on the question of consent or non-consent (1997:138).

Whilst solicitors generally supported the introduction of the provision, they too had witnessed the ease with which barristers were able to convince magistrates and judges of the relevance of any prior relationship. They were therefore sceptical of it having achieved any real change to courtroom tactics.

A more interesting theme to emerge from some of the interviewees, regardless of their particular role or function, was the perception by some members of the profession that the legislature had become over-regulatory in the area of sexual assault law. Here, good practice from astute lawyers and judges apparently made any tightening of the existing provisions not only unnecessary but was likely to obstruct the fair adjudication of criminal justice.[66]

One final observation highlighted by the interviews was the apparent lack of insight shown by the legal profession as a whole with respect to the distressing and

[66] A worthy contrast to note is the significant proportion of interviewees who acknowledged an inconsistency of approach in terms of the way magistrates and judges exercised their discretion in considering sexual history applications – this was reported by about 50% of barristers and solicitors (Heenan & McKelvie, 1997: 148-149).

humiliating impact that sexual history questions are likely to have on women-complainants giving evidence at a rape trial. Their comments tended to be directed at concerns around the impact that sexual history evidence might have on trial outcome, or with the gaps through which barristers were still able to weave successful applications to admit sexual history evidence, rather than addressing the rationale underlying the spirit of the restrictions.[67] In this context, it seems unsurprising that the law remains largely ineffectual in terms of failing to reduce the extent to which women will be obliged to defend their sexual lives and proclivities as relevant considerations for deciding the issues in rape trials.

2.6.3 Consent Definition and Judicial Directions

In addition to the procedural changes, a significant component of the Victorian Evaluation Study was to examine the interpretation and application of the substantive amendments introduced by the legislation, particularly the operation of the new consent provisions. An analysis of judges' directions in rape trials provided some indication of how well the issue of consent had translated into the more routine commentaries provided to juries. Whilst some judges delivered the new provisions in the same rote-type fashion that marked their more general style of directing with respect to the law, others tended to breathe considerable life into them. All judges appeared aware of the existence of the new laws and most had taken steps to incorporate the changes into their standard directions.[68]

However, once again the interviews conducted with barristers and solicitors revealed a far more complicated and discursive journey being trodden by the new provisions. Broadly, about half of those interviewed from the legal profession were explicitly in favour of the new consent definition and the accompanying judicial directions being introduced.[69] A contrasting view was, however, provided by some barristers who

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[67] For example, a small number of magistrates considered it less of a concern if sexual history evidence found its way into questioning at the committal hearing, given the absence of the jury and the likelihood of the issue being the subject of further scrutiny by the trial judge, without seemingly any regard for the distressing impact on the woman-complainant (Heenan & McKelvie, 1997: 152).

[68] There were a small number of trials where judges failed to direct juries about the new provisions relating to consent (Heenan & McKelvie, 1997: 300). One other judge made his position clear by disapprovingly suggesting to the jury that the directions on consent were merely being given because 'Parliament requires me to do so' (Heenan & McKelvie, 1997: 300).

[69] Barristers' views tended more readily to be distinguished according to which end of the bar table they generally occupied - the prosecution or the defence end (Heenan & McKelvie, 1997: 312).

spoke of the dangers of the legislature bowing to what was perceived as (clearly ill-informed) feminist pressure. Their comments revealed a more general philosophical position with respect to what they saw as:[70]

> ...woosy political soundness, yeah, quote it, it's nonsense. I can assure you also I'm no misogynist. (1997: 303)

More considered views on the introduction of the new consent provisions were offered by other interviewees who regarded the changes as being of some symbolic value, although unlikely to effect any real change with respect to the manner in which defence barristers would construct their cases (Heenan & McKelvie, 1991: 308), and more importantly to juries' determinations of consent (1991: 309). Greater enthusiasm was voiced by those who believed the new legislation could potentially alter the kinds of cases being prosecuted (1991: 308, 309), or would at least provide for a more uniform approach being taken by judges directing juries on the issue of consent (1991: 303). Others felt that the changes were a welcome reflection of the law's increasing capacity to recognise a wider set of circumstances under which women were subjected to rape and other sexual offences (1991: 305, 308).

While the interviewees' perceptions regarding the intention and content of many of the new provisions varied considerably, there did appear to be a broad (and for some a resigned) acceptance of the fact that the changes now formed part of the legislative framework under which they would be required to work.

In stark contrast to this, however, some interviewees were vehemently opposed to features of the new judicial directions on consent, particularly the legislative statement that placed some onus on accused men to be certain that a woman who is 'saying and doing nothing' is genuinely freely agreeing to sex.[71] While 42% of (mainly) prosecuting barristers spoke favourably of the direction, particularly in terms of dispelling the antediluvian view that silence can be equated with consent (1997: 316), 49% of (mostly) defence barristers strongly objected to its introduction.

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[70] One of the judges similarly described the consent definition as 'a reaction to strident feminism' (Heenan & McKelvie, 1997: 306).
[71] Section 37(a) of the *Crimes Act 1958 (Vic.)*.

Some interviewees appeared genuinely incensed by it and variously described the provisions as 'ludicrous', 'a travesty' and 'fundamentally absurd' (1997: 317).

The opposition tended to be located in fears that accused men were being denied a fair trial and that juries' decision-making powers would somehow be fettered if they were obliged to presume a lack of free agreement in such circumstances. Of particular interest to us as (feminist) researchers was the extent to which interviewees claimed that the direction failed to accord with 'normal human experience' (1997: 318) or ordinary 'human nature' (1997: 317, 319), or with how 'most married people' conducted their sexual lives (1997: 317).[72] They seemed genuinely troubled by a direction that could effectively outlaw what they perceived formed part of common practice for most sexually active couples. The implication was that there would be nothing unusual about sex occurring in circumstances where "one of the parties" said and did nothing throughout the event. The extent to which these images remained highly gendered was clearly manifested in this barrister's comment:

> I have a personal as well as a lawyer's concern about this, having three teenage sons. They ought to go along with their written consent forms as well as their protection devices. I feel sorry for young people these days.... (1997: 317).

Another disapproving judge noted:

> That [direction] virtually says you've got to say "I consent" as you're hopping into bed...that one does offend me a bit...it doesn't really accord with human nature. (1997: 319).

In contrast, feminist reformers and academics variously described this provision as the 'most clearly responsive to women's concerns' (Bargen & Fishwick 1995: 57), or as representing 'a courageous effort to fight hegemonic stories of female sexuality' (Puren, 1997: 139).

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[72] These views were expressed by barristers, solicitors and judges.

2.6.4 Corroboration and Delayed Complaints

The extent to which judges were complying with the new provisions relating to corroboration warnings and the issue of making a delayed complaint was also examined. In brief, the transcripts revealed few instances of judges giving traditional warnings about the dangers of convicting on the uncorroborated testimony of a complainant[73], and even fewer instances of judges failing to direct juries that a delay was not necessarily evidence of a false or less credible complaint (Heenan & McKelvie, 1997: 299).

While some judges were still making comments to juries about the importance of carefully assessing the complainant's evidence, or of the need to look for evidence to support the allegations, the traditional warnings about the "dangers of convicting" on the uncorroborated word of the rape complainant alone were noticeably absent.

Although on the surface these findings showed a good proportion of trial judges giving effect to the reforms in the courtroom, appeal decisions in higher courts were beginning to reshape the more general practices and perceptions relevant to the statutory abolition of corroboration warnings in rape trials. Over a third of judges interviewed for the Evaluation Study made mention of the High Court decision in the case of *R v Longman*[74] which was interpreted by many judges as going 'a long way towards restoring the corroboration warning' (1997: 330). Whilst the significance of the decision in *Longman* continues to be debated, it is in practice often used by defence counsel as grounds for an application to the trial judge for a traditional corroboration warning to be given.[75]

Similarly, even if the word "corroboration" was distinctly avoided, very little persuasion was required to convince some judges that the jury ought to be alerted to

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[73] There were a small number of judges who managed to create a hybrid version of a corroboration warning where juries were told to scrutinise the woman's evidence with great care, or to look for independent evidence of the allegations. These comments tended to fall short, however, of warning juries to not convict unless such confirmatory evidence was presented.

[74] (1989) 168 CLR 79. This case will be discussed in detail in Chapter 4.

[75] These issues were picked up as an important focus of the current study. Chapter 6 discusses the impact of the High Court case of *Longman* in greater detail before presenting further analysis of the current operation of corroboration warnings in the rape trials observed.

look for evidence independent of the complainant's account, before they could consider convicting the accused (1997: 330).

For the most part, judges appeared to comply with the new direction that cautioned juries about drawing negative inferences against women-complainants who delayed making their complaint, although some of the judges nevertheless appeared troubled by its introduction when interviewed. Comments ranged from the direction being seen as patronising to juries who they perceived would be well aware of the difficulties women faced in reporting sexual crimes to the view that it was an inappropriate and unnecessary encroachment on the way (particularly defence) cases were run (1997: 331).

2.6.5 Cross-examination practices

There was little to distinguish the predominant themes of cross-examination or patterns of questioning during the trials examined for the Victorian Evaluation Study when compared with the LRCV's original research (LRCVb, 1991). This represented perhaps the most disappointing indication that the purpose of the legislative reforms had failed to be achieved. Despite the fact that the stated intention of the *Crimes (Rape) Act* was to 'give greater protection to complainants in court proceedings'[76], the changes seemed incapable of protecting complainants from becoming traumatised by questioning that was principally directed at establishing them as (at least partially) morally blameworthy or as shameful liars. Roughly the same proportions of women continued to face questions about drinking on the day of the offence (51.4%), about what was perceived to be their 'sexually provocative' behaviour (45.7%), and about their motives for allegedly lying about the assault (60%) (Heenan & McKelvie, 1997: 193-195; LRCVb, 1991: 104-105).

Most of the women interviewed about their trial experiences during the Evaluation Study described feeling extremely distressed while under cross-examination, where the questioning was 'far more akin to the treatment they thought would be meted out to the accused' than they had imagined they themselves would be subjected to (Heenan & McKelvie, 1997: 201). The memory of cross-examination as depicted by

[76] This appears section 1 of the *Crimes (Rape) Act 1991* which identifies the 'Purpose' of the Act.

this woman revealed how deeply personalised and humiliating the process felt for her, particularly when she believed her character was being unfairly portrayed and questioned:

> Jesus. How do you describe something like that. The questions he asked and the manner that he asked them he was just downright...there was just no need...In all honesty I wanted to get down and slap his face so hard for the questions that he asked me had nothing...look, if he was asking me stuff that had to do with the case, fine, I'll answer it. I'll do what I have to do. But to ask me questions that had nothing to do with the case and to make me look like I was a loose woman and that I more or less stripped in front of this guy, for God's sake ...I wanted to get out (1997: 202).

The great majority of interviewees from the legal profession were also of the opinion that rape complainants were subjected to a significantly different experience in the witness box compared with victim/witnesses in cases involving non-sexual violence (1997: 197). They recognised the dehumanising process of cross-examination where women were called liars, where they were made to recount the minutiae of being sexually violated, and where they were forced to defend themselves against constant accusation. It was this insight that appeared to contribute to a small number of barristers (n=7) and solicitors (n=3) suggesting that they would probably advise their friends or family against entering the criminal justice system should they be faced with deciding whether to report a rape to the police and/or go through a rape prosecution (1997: 356 & 358).[77]

To some extent these findings may suggest that the likely effects of the new legislation had been considerably overestimated, particularly in relation to changing trial practice. However, prior to its introduction, Brereton (1994) acknowledged the limited extent to which the *Crimes (Rape) Act* was likely to significantly alter most women's experience of a rape trial. Without diminishing the significance of some

[77] These personal sentiments were expressed by two of the barristers (Heenan & McKelvie, 1997: 356): 'Keep away from lawyers. It's a horrible experience. I don't really believe there is justice in this world', and '[j]ust don't [report it]. I wouldn't want to be cross-examined by some of the people I know'. Heath and Naffine (1994: 31-32) noted a similar experience when law students indicated they would be unlikely to report sexual assault themselves, or advise a friend to report, despite their knowledge of reforms aimed at significantly improving the legal treatment of rape victims.

key features of the new Act, Brereton (1994) was mindful of there having been no specific legislative measures introduced to modify the tactics or approaches used by defence barristers in preparing and running their cases in court.

In a Supplementary Report to the original Rape Reference that placed cross-examination techniques under direct scrutiny, the LRCV decided against recommending further legislative change (1992: 32). The Law Reform Commission was of the view that there already existed provisions that offered protection to witnesses against offensive or irrelevant questioning, though they were consistently under-utilised.[78] They therefore suggested a greater vigilance on behalf of prosecutors and judges to object or intervene during cross-examination as a way of regulating inappropriate cross-examination techniques and of more successfully disrupting the culture of aggressive trial tactics.[79] This position was somewhat surprising given that the LRCV's own rape prosecution study showed how reluctant prosecutors and trial judges were to intervene during cross-examination. Furthermore the regulatory sections of the legislation offer little legislative guidance in terms of what constitutes questions that are 'intended to insult or annoy' or that are 'needlessly offensive in form', leaving the interpretation to the idiosyncratic assessments of individual judges presiding in particular trials.[80]

2.6.6 Outside the narrow legal frame

It is difficult to gauge the extent to which the broader law reform agenda, including the various well-publicised campaigns and activities driven largely by the Real Rape Law Coalition and others, influenced wider community perceptions and understandings of sexual violence and its legal treatment.[81] Initially, it may have

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[78] See sections 39 & 40 of the *Evidence Act 1958 (Vic.)*.

[79] Subsidiary recommendations were also made for the issue to be addressed through judicial education programs and through the establishment of ethical standards throughout the legal profession with respect to courtroom behaviour (LRCV, 1992: 32).

[80] Consider the enormous diversity of responses given by barristers and judges when interviewed for the Victorian Evaluation Study about concepts such as "fairness" in cross-examination and the appropriate points at which to object or intervene during a complainant's evidence (1997: 219-224). Victim/Survivors also recounted a range of experiences regarding their perceptions of how interventionist the presiding judge or magistrate was during the giving of their evidence (1997: 225-228).

[81] Krysti Guest (1991) talks about the symbolic importance of law in this area as having a role in reshaping the social relation between the sexes, although she believes this potential is often lost on members of the legal profession.

meant a greater willingness on behalf of victims to report sexual assault to the police, perhaps encouraged by the shows of outrage and support demonstrated by a community mobilised into demanding a better deal for rape victims (Ross & Brereton, 1997). There also appeared to be a shift in terms of prosecutorial practices, with a higher proportion of cases going ahead than previously in situations involving familial rapes, or rapes by intimates, and in situations where there had been a delay in the initial complaint - all features traditionally likely to dissuade the OPP from proceeding to trial (Heenan & McKelvie, 1997: 49).

And yet, there appeared to be no equivalent impact at the level of trial outcome. In fact there was an increase of almost 9% in trial acquittals as compared with the original LRCV study (Heenan & McKelvie, 1997: 47).[82] Given that accused men were more likely to be found not guilty in precisely the kinds of cases described above (1997: 49, 236), it may be that juries, in the confines of the courtroom and when faced with the responsibility of adjudicating between two seemingly credible accounts, fall back onto the conventional framework for assessing rape complaints, where the woman's behaviour, lifestyle choices and post-rape conduct become the focus and, when viewed through a gendered lens, produce the predictable outcome.

2.7 Nationalising Sexual Assault Laws

Exploring ways of achieving uniform rape laws across the country has largely been an initiative of the 1990s. The report produced by Jenny Bargen and Elaine Fishwick, *Sexual Assault Law Reform: A National Perspective* (1995), has been the most significant force in Australia for driving a consideration of options around national rape law reform.[83] While the report meticulously chronicles the operation of historical and contemporary territorial and state laws and procedures with respect to the legal processing of rape and sexual offences, its clear objective was to strengthen calls for national reform to address the inadequacies still pervading the legal response to women rape victims.

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[82] A similar decline in trial convictions for rape was reported by Heath and Naffine in reviewing the South Australian statistics (1994: 48).

[83] The report was an initiative of the National Committee on Violence Against Women, who in 1992 developed a national strategy for guiding policy and reform in relation to violence against women.

Following the release of the report, several key events were held in an attempt to maintain the momentum for focusing on nationalising a best practice model for uniform sexual assault laws and procedures. Commonwealth funding contributed to the convening of two national conferences on Sexual Assault Law Reform, the first held in Melbourne in 1995 and the second in Perth the following year.[84]

Running parallel to this was a far broader project being instituted by the Standing Committee of Attorneys-General. In 1991, they had established the Model Criminal Code Officers Committee (MCCOC) which was to develop jurisdictional uniformity through the development of a national model criminal code for all offences that could be adopted by individual states and territories (Latham, 1995).

Their Discussion Paper on *Sexual Offences Against the Person* was first circulated in November 1996 and included preliminary proposals for a best practice model for sexual assault laws and procedures (MCCOC, 1996). Acknowledging the vast differences in state and territory approaches to reform over the last 20 or so years, which left most jurisdictions governed by a curious combination of both statutory and common law provisions, the MCCOC considered building on the most effective of these reformulations to produce a national prototype (MCCOC, 1996: 3).

For the most part, however, the recommendations made throughout the Discussion Paper were remarkably conservative. Although their support for definitions of rape and other associated terminology was in line with more contemporary legislative approaches (MCCOC, 1996: 21, 29) that included a recommendation for consent to be statutorily defined (1996, 57-59), other substantive and particularly contentious features of rape laws were left noticeably intact.[85]

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[84] The papers from each conference were published in two sets of proceedings: *Legalising Justice For All Women* (Project For Legal Action Against Sexual Assault, Melbourne, 1995) and *Balancing the Scales* (Sexual Assault Referral Centre, Western Australia, 1996).

[85] For a critique of the proposals see Peter Rush and Alison Young (1997) 'A Crime of Consequence and a Failure of Legal Imagination: The Sexual Offences of the Model Criminal Code' *Australian Feminist Law Journal*, Vol. 9, pp. 100-133.

Although the Committee endorsed the adoption of the vitiating circumstances clause of Victoria's consent provisions[86], they deliberately excluded the direction that was thought to create a more positive communication standard for the legal consideration of consent (MCCOC, 1996: 191; Brereton, 1994).[87] They also supported the retention of a subjective fault standard for determining criminal culpability which served to maintain the common law position in South Australia, the ACT, Victoria, and NSW for an accused to be acquitted should he be found to have held an honest, even if unreasonable, belief in consent (MCCOC, 1996: 75).

Procedurally, the MCCOC's recommendations also tended to favour what would be considered the less progressive models. In relation to the admission of sexual history, for example, they preferred the Victorian model where judges retained a discretionary power to admit evidence of "substantial relevance", rather than support the more restrictive NSW regime[88] (MCCOC, 1996: 175).

Despite hundreds of submissions received by the MCCOC following the release of the Discussion Paper, many expressing disappointment at the Committee's lack of foresight in providing national status to the more progressive provisions governing consent, the recommendations contained in the Final Report remained virtually unchanged (MCCOC, 1999: 245, 263).[89] In between times, the ACT and Tasmania had been in the midst of debating substantial law reform packages in their respective states, conscious of MCCOC's preliminary recommendations. This placed considerable pressure on women's groups, who were forced to direct their attentions to promoting the kinds of legislative and procedural models that had already been

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[86] This was despite acknowledging that the ACT legislation incorporated 'the most comprehensive list' (MCCOC, 1996: 53).

[87] Section 37(a) of the *Crimes Act 1958 (Vic)*. The Committee preferred to include the circumstance of a person 'saying and doing nothing' as a negating element of consent (MCCOC, 1996: 245). They were 'concern[ed]' that s.37(a) 'appear[ed] to establish an automatic prima facie lack of consent where a person did not do or say anything to indicate consent' (MCCOC, 1996: 191), although they remained silent on what the source of their apprehension might be. This model would substantially weaken the legislative weight that is attached to a *direction* that argues against the legal presumption of consent when a woman is silent or otherwise inactive during sex. (See Rush and Young (1997: 131) who also make this point.) The MCCOC alternative would reduce the provision to a definitional category that *might* be outlined for juries to assist them in assessing the complainant's state of mind regarding consent.

[88] Section 409B *Crimes Act 1900 (NSW)*.

[89] The Final Report did include reference to consent not being evidenced by a person who 'did not do or say anything to indicate that she or he did not consent', although the design of the provision is intended to (and does) fall far short of the Victorian equivalent (MCCOC, 1999: 265).

instituted in other states (even though aware of the difficulties documented in both the Victorian and the NSW evaluation reports) for fear of the legislature adopting the far more limited approaches that had been circulated by their respective Law Reform Committees who claimed to be following the MCCOC's proposals.[90]

2.8 Recent Reforms to Victorian Sexual Assault Laws & Procedures

Immediately upon release of the Rape Law Reform Evaluation Report, Victoria's Attorney-General publicly committed the Liberal government of the day to carefully consider the recommendations endorsed by the Evaluation Study's Advisory Committee. Towards the end of 1997, parliament was debating the final content of a new *Crimes (Amendment) Act*, part of which contained further procedural amendments to evidentiary rules governing sexual offence proceedings.

The most significant change was the introduction of a new administrative process and accountability mechanism through which to monitor the admission of sexual history evidence. Defence barristers (although not prosecutors) are now required to make pre-hearing written applications requesting the court's permission to cross-examine a complainant in relation to her prior sexual history.[91] The application must detail the specific questions the barrister intends to ask as well as justify how the evidence is said to meet the threshold test of "substantial relevance" or could be considered a proper matter for cross-examination as to credit.

The Act also relaxed the additional criteria under which adult complainants laboured[92] before being eligible to use any of the alternative arrangements for giving their evidence. It was hoped this would encourage the courts to more readily utilise the range of options available under the legislation as a way of lessening the distress associated with giving evidence in the traditional way, whether the complainant was a child or an adult.

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[90] See Law Reform Commission of the Australia Capital Territory (1998) 'Sexual Assault: Proposals for Legislative Reform', Discussion Paper, Canberra.
[91] See Section 9 of the *Crimes (Amendment) Act 1997 (Vic.)*.
[92] See footnote 49.

Slight changes were made to the directions governing corroboration warnings[93] and for trials where the defence raised the issue of the complainant having delayed reporting[94]. Neither of these changes, however, altered the discretionary power available to judges for continuing to use a lack of corroboration or a delay in complaint as grounds for cautioning juries about the "dangers of convicting" on the complainant's evidence alone.

The most significant and controversial part of the *Crimes (Amendment) Act 1997* was the section dealing with prosecutions involving multiple victims.[95] A long established rule of law had been for judges to break up the charges on a presentment where the case involved more than one complainant and hold separate and discrete trials (Freckelton, 1998a). This was meant to avoid juries convicting an accused on the sole basis of him appearing to have a propensity for committing sexual offences, such as might be the case where more than one complainant is making allegations of a similar nature against the same accused man (Gibson, 1998).

For the prosecution, it often meant that cases involving intra-familial sexual assault, or where the same perpetrator was charged with a series of offences committed over time, would have been tried separately. For example, if three sisters had each made allegations against their father, they would generally be made to give their evidence in three separate trials and be forced to remain silent about their knowledge of their siblings having also suffered abuse.

The new section established a presumption in law that multiple charges of sexual offences on a presentment will now be heard together in a single trial.[96] The Attorney-General clearly positioned the amendment as a direct response to the unfairness and injustice of an accused being serially acquitted in cases involving multiple victims or offences.[97]

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[93] Section 61, ss(3) of the *Crimes Act 1958*.
[94] Section 61(b) of the *Crimes Act 1958*.
[95] Sub-sections (3AA), (3AB), and (3AC) of Section 372 of the *Crimes Act 1958 (Vic)*.
[96] See Freckelton (1998a) for an opposing view on the risks associated with multiple charges being heard together.
[97] Second Reading Speech, October 9, 1997, *Daily Hansard*, Legislative Assembly, Parliament of Victoria, p.431.

Finally, mention should also be made of the *Evidence (Confidential Communications) Act 1998* which became operational in September 1998. The Act marked the first legislative response in Victoria[98] to the increasing trend of defence barristers subpoenaing victims' counselling files for use during cross-examination in court.[99]

The Victorian legislation offers protection to the 'confidential communications' shared between a victim/survivor and her counsellor as a *prima facie* position. Discretionary authority, however, still rests with the court to remove the protection should it be persuaded that the evidence has 'substantial probative value' to the facts in the case.[100] Alternatively, the Act provides the victim/survivor with a waiver to remove the confidential status afforded to her counselling file for use of the court.[101]

There has yet to be any systematic monitoring of how the legislation has been implemented in practice.[102] The National Association of Sexual Assault Services in Australia are currently considering the establishment of state clearing houses in a bid to monitor the effects of new state and territory laws.

2.9 Concluding Comments

This review has been conducted with the intention of outlaying what have been the principal areas of concern for feminist law reformers. As the problem of rape became more widely articulated throughout the 1970s and 1980s, the focus of law

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[98] Victoria's Act largely mirrored legislation that had already been passed in New South Wales earlier in 1998.

[99] This practice had gained both interstate (Gardiner & Roberson, 1995; Cossins & Pilkinton, 1996; Cossins, 1998) and international momentum (Sheehy, 1995) amongst legal practitioners. In Australia, it was the subject of significant feminist and community censure following the brief incarceration in Canberra of a sexual assault counsellor after she refused to hand-over a victim/survivor's file to the court.

[100] After some considerable delay, and with very little consultation, the Attorney-General rushed the legislation through the Victorian Parliament in the face of considerable opposition from sexual assault services. Their concerns related to the level of judicial discretion that would continue to operate under the legislation which would effectively do 'no more than attach an administrative process to what had become routine practice in admitting counsellors' files' (Victorian Centres Against Sexual Assault Forum, 1998: 72).

[101] The Victorian Centres Against Sexual Assault are fundamentally opposed to a waiver being provided to women in a context where, under the rules of evidence in a criminal trial, the contents will generally be used to discredit her. The CASAs rightly point out that, even where the file may provide evidence that is consistent with the complainant's account, this would be inadmissible as a 'prior *consistent* statement'. The law only admits evidence of 'prior *inconsistent* statements' as evidence to be considered by the jury (Victorian Centres Against Sexual Assault Forum, 1998: 70).

reform agendas broadened. Apart from the more immediate targets of modifying or abolishing the procedural and evidentiary obstacles to the successful prosecution of rape offences, the difficulties associated with the legal language, definition and meaning of rape were increasingly being debated. Not only were law reformists committed to ensuring women could speak the reality of rape in courts without fear of having their sexual pasts admitted, or of being labelled as especially prone to lie, but law would need to concede its role in perpetuating a paradigm of sexuality that was inherently gendered, particularly in terms of its treatment of consent.

How to re-conceptualise rape from women's point of view is what preoccupies the theoretical, political and policy debates amongst feminists who remain determined to push the 'legal imagination' (Rush & Young, 1997: 100) to its limits in providing women rape complainants with a genuine avenue through which to access criminal justice. A national opportunity to explore these limits has tended towards a conservative approach (MCCOC, 1999). Interesting in the context of the current research was the reluctance by the national committee to mandate judges' directions in rape trials that would dramatically alter (at least statutorily) the legal presumption of consent. Encouraging law to promote a more communicative model of sexuality, where women's free agreement to sex would be viewed within a framework of positive assent, or mutuality, was what many feminists hoped would transform the rape trial experience for women.

The laws introduced in Victoria, Australia, during 1991 were said to come close to providing women with an affirmative right *not* to engage in sexual activity (Naffine, 1994; McSherry, 1998). There is now greater onus on men to explain how "free agreement" can be inferred from a woman who remains inactive and silent throughout sexual activity. This new definition and meaning of consent, alongside the procedural tightening of evidentiary laws governing the admission of irrelevant and prejudicial material and the statutory abolition of corroboration warnings, gives reason to assume the rape trial experience for women will have significantly improved.

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[102] The empirical work carried out for this thesis was completed by the close of 1998.

The findings from the trial component of the Victorian Evaluation Study, however, suggest the potential for the reforms has yet to be realised. Not unlike most evaluative studies (Marsh et al., 1982; Bonney, 1987; Spohn & Horney, 1992), the impact of reforms was often stymied, not only by judges and barristers who in some cases deliberately subverted, or who were simply unaware of, the changes to the relevant provisions, but by the structures and processes of conventional rape trial practice that clearly remained impervious to reform. Even where the legislation may have prompted a change in prosecutorial practices in bringing less traditional rape cases to trial, such as those involving intra-familial or spousal rape, juries were less likely to convict in these cases.

The current study builds on this research to further explore the issue of rape law reform in Victoria outside of the traditional evaluative and mostly quantitative framework. It draws on an empirical study of rape trials to qualitatively consider, from a sociological perspective, the kinds of mechanisms that simultaneously work against or help to promote the practical effect of legislative change that were seriously aimed at redressing feminist concerns with rape trials.

The next chapter takes as its theoretical starting point the issue of feminist research in the context of rape trials and argues that the use of first-hand observation is a unique and valuable tool to explore the complexities of rape trial discourse and practice and the experience of women victim/survivors who are subjected to (cross-) examination.

CHAPTER 3

Multiple methods for "doing" feminist research

3.1 INTRODUCTION

Historically, much of the research into the processing of rape cases through the criminal justice system has been confined to developing quantitative analyses of some of the key factors influencing the reporting, charging and prosecution of rape offences which are then correlated with trial outcome. A key finding of these studies was that cultural rather than legal factors seem to be responsible for the ways in which rape is handled through the criminal justice system (Clark & Lewis, 1977; Chambers & Millar, 1983; Adler, 1987; Brown et al., 1992; Spohn & Horney, 1992; Lees, 1993; Gregory & Lees, 1996). Although these studies have made a profound contribution to our understanding of both the social realities of sexual assault, and of the sexist assumptions informing the construction and interpretation of rape law, they have been less effective at exploring the impact of socio-cultural processes on the interpretation and application of laws in the courtroom.

More recently, feminist academics and researchers from a variety of disciplines have asked quite different questions about the complex nature of rape trials and developed more sophisticated philosophical and sociological analyses for understanding the processing and adjudication of criminal justice responses to sexual violence (Smart, 1989, 1995; Naffine, 1990; Scheppele, 1992; Heath & Naffine, 1994). Of particular note are the substantial contributions made by cultural theorists in exploring how complex narrative structures and processes of talk in rape trials further the harm experienced by women in distorting and minimising their accounts in the courtroom (Matoesian, 1993; Threadgold, 1993; Kaspiew, 1995; Young, 1998; Puren, 1998).

The study reported in this thesis draws heavily on these recent feminist contributions to examine the relationship between rape law reform, trial practice and contemporary rape trial discourses in the actual proceedings of rape cases. As a sociologist, my purpose was to explore the kinds of attitudes, beliefs and cultural meanings which informed the legal management of rape trials and the impact these had on the realisation of law reform efforts and on women rape survivors' experiences of giving

evidence in the courtroom. In this sense, the study posed research questions that required both quantitative and qualitative approaches.

The primary focus of attention was on *how* rape reformist ideals and objectives were culturally translated within the sphere of courtroom practice and, in effect, to consider the processes through which legal change was being conceptualised, negotiated, and reconstituted by those who remain critical to its application, namely, judges, barristers and juries. A key consideration was to observe how some of the most significant changes to Victoria's rape laws were being interpreted and applied in the rulings and decisions made by judges and juries, and in the arguments and submissions used by barristers to persuade juries of the accused's culpability or innocence.

Given that many of the reforms appeared to incorporate some of the principal concerns raised by feminists in the context of rape trials, the study was particularly interested to explore whether feminist understandings of rape had begun to figure within rape trial discourses. Close attention was therefore directed at examining the interpretation and application of provisions that most challenged the traditional conceptualisations and constructions of rape offences such as: the abolition of corroboration warnings; the prohibition on the admission of sexual history evidence; and the new legal definition and meaning of consent.

The study relied on first-hand observations and the typed transcripts of 34 rape trials that proceeded through the County Court in Victoria between 1996 and 1998. The majority of these trials took place in Melbourne (n=24) while a further ten were distributed across three reasonably well-populated regional areas of Victoria.

This chapter provides an overview of the particular methodologies used to ground the study, including the more structured processes of selecting trials, documenting field notes and analysing case files. Consideration is also given to the experience of attending rape trials, which provided the opportunity to observe the non-verbal aspects of courtroom interaction, along with the many occasions where more spontaneous out-of-court interactions with legal professionals and women victim/survivors.

The first section discusses the theoretical approaches undertaken and clearly positions the research as intended to contribute to the range of feminist analyses concerned with women's experiences of sexual violence and the legal and judicial systems' responses to those experiences. It also outlines the broader considerations and questions relevant to engaging with feminist theories of knowledge and the epistemological and theoretical shifts in inscribing meanings to women's social experiences.

3.2 Feminist Ways of Knowing

Feminists have remained committed to philosophical debates that continue to problematise how "knowledge" is constructed in the socio-political world and the processes through which we claim to "know" (Roberts, 1981; Harding, 1987; Sprague & Zimmerman, 1989; Reinharz, 1992). While this section includes commentary on some aspects of this debate, it does not attempt to fully encompass the disparate epistemological issues conceptualised through and across feminist discourses. The purpose is rather to explore how "doing feminist research" cuts across a range of theoretical and methodological considerations for situating what we (can ever hope to) know and how we know it.

That the feminist project must engage with the realities of women's lives was as much a political statement of the 1970s as it was an attempt to define an authentic and distinctive feminist epistemology. For too long, the social world had been quantified, observed and explained from the male standpoint, leaving the ("private") lives of women undocumented, undervalued and unspoken (Mies, 1983; Hawkesworth, 1989; Harding, 1996). Social issues relevant to women's lives, histories, labours and bodies remained unimaginable in the positivist minds of malestream, white, middle-class academia, where men's lives were positioned as wholly representative of the human condition (Jayaratne, 1983; Reinharz, 1992).

Feminists simultaneously exposed the profound (and largely unacknowledged) androcentrism that informed the epistemological claims of the social scientistic world and proposed alternative approaches that would give women a voice. This took the form of more humanistic and "subjectivist" research methods that were

consequently considered un-scientific within the dominant positivist paradigms (Harding, 1987; Jayaratne & Stewart, 1991; Acker et al., 1991; Reinharz, 1992).

Standpoint feminism - often associated with the consciousness-raising of women vocalising, sharing and politicising their subjective experiences - was heralded as the preferred feminist method for discovering the nature of the social world from women's point of view (Smith, 1988; Hawkesworth, 1989). Put simply by Susan Griffin, '...theory had ceased to impress us as much as it had. Experience had become more important' (1979: 26). Qualitative research, particularly through interviewing women or providing opportunities for women to speak about the "realities" of their experiences (e.g. Dahl, 1987), became the only "safe" feminist method, according to standpoint feminists, for capturing the integrity of women's lives (MacKinnon, 1982; Jayaratne & Stewart, 1991; Smart, 1995).

While the standard types of quantitative analysis were largely rejected in favour of more "subjectivist" experiential methods, some feminists nevertheless saw value in utilising statistics for certain purposes. Finding ways to quantify aspects of women's social, economic, educational and working lives, using appropriate research techniques, was for these feminist researchers and theorists (e.g. Jayaratne, 1983) a way of contributing to a fuller knowledge about women's social condition.[1] Producing "evidence" of women's social experiences through methodologically rigorous and reliable research frameworks, informed by feminist values and objectives, could further our consideration of how the operation of social structures and processes remained institutionally and distinctively gendered. Moreover, as Sprague and Zimmerman point out:

> We do not have to reject quantitative methods to approve of qualitative methods. Posing one against the other is presenting a false choice, especially from the perspective of feminist and other sociologies of knowledge which recognise that each way of doing research is a construction and has biases (1989: 82).

[1] Feminist empiricism also "corrects" the male bias in social scientistic research. When research data about the situation of women is added to (male) knowledge about the situation of men then we have

Our knowledge about women and sexual violence has clearly benefited from both qualitative and quantitative feminist research (Stanley & Wise, 1993). Interviewing women victims about their experiences of rape, encouraging "speak outs" where women publicly disclosed their victimisation, participating in protest marches calling for women's right to be safe in public places, in the workplace, in institutions like schools, hospitals and universities, and in the home, have all been utilised by victim/survivors and feminist activists and researchers who are committed to exposing the extent, seriousness and emotional consequences of sexual violence against women (Kelly 1988; Matthews, 1994). Nonetheless, the quantitative data of sexual violence has also usefully been represented through large scale victimisation surveys where attention to empirical details such as victims' and offenders' ages, relationships and the contexts in which rape occurs has clearly helped to dispel the myth of rape as a stranger-perpetrated phenomenon (Russell, 1984; Koss, 1985).

While the revelation of women's testimonies and experiences of rape had done much to counter the conventional understanding of sexual violence, as well as fuel support for the women's movement more broadly, the "truth" of women's lives often portrayed through these accounts implied a universality of social conditions for women. There was limited space through which the diverse meanings, complexities and contradictions of women's social lives could be explored. A particular criticism was that (like the traditional androcentric social analysis) feminist theories homogenised or essentialised (the meaning of) the experiences of women out of the cultural, racial or class-based contexts that discursively shaped their socio-cultural identities, and which also grounded how they might conceptualise their experiences of rape and other forms of violence (hooks, 1981, 1984; Matsuda, 1988; Spelman, 1988; Alcoff, 1988; Kline, 1989; Harris, 1990; Matthews, 1994).

It is here that feminist postmodernism has made a valuable contribution in problematising earlier feminists' claims to know. In the wake of calls by radical, marxist-socialist and liberal feminists for social change based on a revolution or a modification of (gendered) social structures, postmodernism paused to consider whose voice(s) claimed the "knowledge" that spoke on behalf of all women

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an un-biased and "true" understanding of the "human" condition. Needless to say, there are problems

(Spelman, 1988; Bartlett, 1990). Angela Harris, for example, refers to the 'gender essentialism' (1990: 585) that has plagued the works of feminists such as Robyn West (1987, 1988) and Catherine MacKinnon (1983, 1987), where the voices of black women were sacrificed in order to position gender as paramount in the 'hierarchy of oppressions' (1990: 589), or consolidate a political strategy that would advance the rights of women.[2]

Harris, in critiquing MacKinnon's dominance theory, writes of the experience of rape for black women 'as deeply rooted in colour as in gender' (1990: 598). Where for MacKinnon, systemic male power can explain the role of the state, the law and of men in the rape of women, the historical experience of rape for black women, legitimised through the social and legal conditions of slavery, made for substantively different experiences of sexual violence (see also Kline, 1989).

Accordingly, postmodernists and poststructuralists maintain there is no single account of "Women's Truth" waiting to be unearthed, but an infinite spectrum of 'situated knowledges' where truths are the production of partial discoveries shaped by the historical, cultural, racial and social situatedness of the observer (Haraway, 1988: 575). In this sense, postmodernists in particular embrace the notion of partiality to locate our own subjectivity and positionality in the production of social meanings (Weedon, 1987; Hawkesworth, 1989; Kline, 1989; Jones, 1990b). Social research, according to Haraway, must therefore ensure:

> that the object of knowledge be pictured as an actor and agent, not as a screen or a ground or a resource, never finally as slave to the master that closes off the dialectic in his unique agency and his authorship of "objective" knowledge (1988: 592).

Lather has referred to postmodernist and poststructuralist influences as 'a fundamental turning point in social thought, an epochal shift marked by thinking differently about what it means to know' (Lather, 1988: 570). In particular,

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with this perspective (See Harding, 1986; Hawkesworth, 1989: Reinharz, 1992)

[2] Alison Jones has also referred to the criticism, particularly from indigenous and non-Anglo women, of the 'constructedness of (usually white middle class) feminist accounts' (1990a: 7) where feminists

poststructuralist feminist theorists pay attention to exploring the discursive meaning of talk or of language within feminist methods, where women's positionality through the processes of speech - talking, listening and being heard 'as women' – becomes central to the research question itself (Devault, 1990: 97). Social research in this context concentrates on how language is a site for reproducing social power in the context of gender, class and culture (Weedon, 1987). Difference, situatedness and fluidity within and across women's lives, and the shifting complexities, ambiguities and contradictions associated with attaching meaning to women's experiences are embraced under postmodernism rather than forging a false universality of women.

Important for "doing feminist research" in the light of these theoretical positions is therefore to maintain a critical stance of our 'conscious partiality' which forever shapes, constructs, influences and contradicts how we analyse and understand our lives as women. At the same time we must recognise, as Bartlett points out, that seeing 'women's gender [as] only one of many sources of identity' does not preclude gender as 'a category that can help to analyze and improve our world' (1990: 835). Or in the perceptive words of Mary Hawkesworth:

> Although it is often extraordinarily difficult to explicate the standards of evidence, the criteria of relevance, paradigms of explanation, and norms of truth that inform such distinctions, the fact that informed judgements can be made provides sufficient ground to avoid premature plunges into relativism, to insist instead there are some things that can be known (1989: 555).

3.3 THE CURRENT STUDY AND "DOING" FEMINIST RESEARCH

Having considered some of the key questions that often theoretically shape the parameters of feminist research, this section now turns to the "nuts and bolts" of the current study, and highlights how many of these issues were critical for the development of the particular methodological approach. The study draws largely on courtroom observation and the examination of prosecution case file materials to explore the complex legal structures and cultural processes through which the

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have imposed the same kind of universality on women through silencing the differences in the lives of black women, working class women, lesbian and young women, and women with disabilities.

operation of law and law reform efforts in the context of rape cases[3] are negotiated and reconstituted by barristers, judges, juries and women-complainants who appear in rape trials.

While it provides an opportunity to add to the quantitative analyses of the implementation and application of various reforms, this study was particularly concerned with *how* law reforms are interpreted and translated through conventional trial practice and, in particular, whether they feature in the representations of rape events that are produced by barristers in defending and prosecuting rape cases. Close attention is therefore paid to the opportunities manufactured through trials for legal stories about rape to be told and the extent to which reformist discourses might usefully be drawn upon to reconstruct and reconceptualise narratives which contest the authenticity of rape accounts.

The study takes as its focus three areas of reform that were intended to alter the legal management of rape trials. These are: the abolition of corroboration warnings; the prohibitions on admitting sexual history evidence; and the definition and directions on consent. It is these three areas that are regarded as the principal historical mechanisms for the expression and perpetuation of highly pervasive and sexist judicial-legal stories about women and rape.

How these reforms are discursively negotiated through trial structures that facilitate the production of narratives or stories that favour one or other party in the case then becomes the focus of the thesis. The cross-examination of the woman-complainant, the legal argument that transpires between barristers and the trial judge, and the closing addresses provided by barristers to juries at the end of the trial provide particularly valuable sites for exploring trial discourses relevant to the operation of contemporary rape law reforms.

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[3] The study was restricted to rape cases for two main reasons. While the legislative reforms cover a range of sexual offence categories, the Office of Public Prosecutions administers the prosecution of sexual offences differently. Most rape prosecutions are prepared by a separate Sexual Offences Section whereas non-rape offences are variously distributed across a general criminal prosecution section. At a practical level, it was therefore methodologically and logistically simpler to focus on rape prosecutions only. More importantly, however, rape trials were more likely to trigger discussions or debate in the context of the more challenging features of the Victorian reforms, particularly in terms of testing the meaning and application of the new consent and sexual history provisions.

The influences of a conservative political climate on the efficacy of rape reform were also of interest. Two terms of a (conservative) Coalition government in Victoria (1992-1998) preoccupied with fiscal restraint significantly reduced the funding for health and community services, police and the courts throughout the 1990s. Inevitably, this had serious implications for how sexual assault was to be managed in the light of diminishing resources available to support the processes of reporting, investigating and prosecuting of sexual assault.

Theoretically, the current study was designed to be feminist in approach. Although such a claim entails positioning oneself within or across feminisms, it certainly does not prescribe a definitive feminist method. The search for an authentic feminist methodology has clearly proved futile (Stanley and Wise, 1983: 192; Smart, 1984). Reinharz concludes from her extensive survey of feminist studies across a range of disciplines that it is not the research method itself that is quintessentially feminist, but the theoretical positioning of the researcher:

> Feminism supplies the perspective and the disciplines supply the method. The feminist researcher exists at their intersection - feeling like she has a second shift or double burden, or feeling her research will benefit from the tension. Her feminist perspective is continuously elaborated in the light of a changing world and accumulating feminist scholarship. Feminist research, thus, is grounded in two worlds - the world of the discipline, academy, or funder, and the world of feminist scholarship...(1992: 243).

In other words, feminist method is discursively constructed as 'the *doing* of feminism' (Stanley and Wise, 1983: 192; their emphasis) in the interests of women, or indeed '"for" women' (Klein, 1983: 90). In the discerning words of Reinharz again, it is not the method in and of itself that principally locates a study as feminist, but method 'in the hands of feminists that renders it feminist' (1992: 48; see also Harding, 1987). As Smart notes, 'there are as many types of feminist research as there are feminisms' (1984: 159).

Reflecting on my earlier experience of working alongside three other women researchers during the life of the Victorian Evaluation Study (Heenan & McKelvie, 1997) is valuable to consider in this context. We were four women, each of whom

identified as feminist, participating in an area often thought to exemplify the ultimate feminist subject - the legal system's response to sexual violence against women (Edwards, 1987; Smart, 1989). And yet the methodology reflected a preoccupation with positivist methods of data collection, where quantitative techniques and standardised measures were relied upon to substantiate the findings and ground any subsequent recommendations.

The process of research was, however, undeniably feminist in approach and disposition. Women researchers spent several months in a room reading transcripts and listening to rape trials committed to rigorously recording the details of women's experiences in the witness box. We gave ourselves space to engage in frequent debriefing because of the anguish, distress and injustices we heard other women experience during the trials. We acknowledged our own positionality as objects of deeply entrenched cultural systems that sanctioned violence against us as women (Alcoff, 1988: 433-434; Puren, 1999). We were ethically and methodologically driven to ensure the "findings" from the study were likely to prompt a political response. In this sense, we each felt that during this time we were unambiguously engaged in feminist research that had the potential to effect further legal (and social) change for women who were facing trials in the future.

While traditionally in sociology it has been customary for the researcher to remain removed from his (usually his) research object, feminist research methodologies have long since acknowledged the ways through which our own subject positions as women, as feminists, as political activists, and as scholars, integrally shape how we approach and give meaning to what we study (Stanley & Wise, 1993). Both standpoint and postmodern feminists have particularly highlighted the importance of locating oneself within the process of research (Bell and Newby, 1977; Jayaratne, 1983; Stanley and Wise, 1983, 1993; Smart, 1984; Jones, 1990b; Devault, 1990; Puren, 1999) and of using our own experiential knowledge as the 'starting point and guiding principle...' for how and why we undertake a feminist study (Mies, 1983: 122).

What struck me most in reflecting on my own process of research for the current study was the extent to which the experience of "doing a feminist study" on rape

trials meant recasting the bounds of methodologically sound yet ethically driven feminist research. In trials where women-complainants had very few supports during the time they were required at court, I was often the only other person with whom they could communicate while they waited to give their evidence. Perhaps on these occasions I may have appeared more approachable, or more available to them than the prosecutors and solicitors who were continually rushing past during adjournments. However, the fact that I was a woman, unrelated to the accused and apparently interested in the trial created the conditions under which some of the women-complainants would initiate conversation. On these occasions, women might ask questions about my research, about my knowledge of the court process or about my impressions of how the trial was going.

Although removed from an interview context, the question of whether such interaction might somehow impact on the collection of empirically "reliable" data reminded me of Oakley's (1979) experience of interviewing pregnant women. Oakley engaged with women during a profoundly unique period of their lives on the subject of their feelings about pregnancy, their fears and their images of motherhood both prior to and after giving birth (Oakley, 1979). Unsurprisingly, given Oakley's sensitive approach to the interviews, she was positioned as far 'more than an instrument of data-collection' (Oakley, 1981: 48). Rather than revert to conventional "objectivist" sociological approaches and refuse to interact with the women she interviewed, Oakley (1979) embraced the sense of comfort they felt with her, empathised with the transitions they faced following childbirth and answered their questions based on her own experience of having given birth herself.

Like Oakley (1979, 1981) and Finch (1984), I did not distance myself from these women outside the court by refusing to smile or speak with them during adjournments, or by pretending they would be unaffected by their experience of giving evidence. I made a conscious decision neither to treat these women as simply objects of study, nor to behave as though I could remain impartial and indifferent when in their company.

In one regional trial, I was the only out-of-court contact available for a woman who remained alone during the entire trial while the two offenders were intermittently

visited by a local court support service. This woman had minimal understanding of the court process and was unsure about who would be prosecuting the case. She tentatively asked me whether I knew why there was a delay, who the OPP solicitor was and how soon she might be called to give her testimony.

The young woman-complainant in another trial had been ostracised by her family who were actively supporting the accused in court. While they assembled themselves each day in front of the dock occupied by the accused, the complainant's sole support lay with the police informant whose availability was sometimes limited. Once the informant learned of my presence, she asked me to sit with the young woman during adjournments to thwart the family's repeated attempts to harass and upset her. During these times, the young woman would candidly talk about her current life situation, her love for her dogs, football and how grateful she was for the support of the police informant. Her mother and sister occasionally walked past silently.

This out-of-court interaction sometimes extended to legal practitioners, particularly defence barristers who were curious about my presence in court. One defence barrister, who appeared in more than one of the trials observed, approached me several times to talk about the nature of the proceedings and, more importantly, my impressions of his practice with respect to cross-examining woman-complainants. While I was aware my comments were likely to reflect a particular perspective, I felt obliged to take up the opportunities he variously presented and voiced my concerns about his repeated attempts to introduce sexual history evidence during one of the trials and highlighted other examples of his sometimes offensive and harassing style of questioning women-complainants.

On one other occasion, however, my involvement as feminist researcher meant deciding whether to cross into the study focus itself. While engaged in the more conventional recording of field notes during a legal discussion surrounding the necessity for a corroboration warning, I became so alarmed by the prosecutor's meagre attempts to argue against the warning that I found myself spontaneously writing a note to the prosecutor to remind him of evidence that was clearly capable of legally corroborating the woman-complainant's account.

Although unlikely to have influenced the trial judge to reconsider his initial view[4], the mere possibility of this occurring further problematised the gap between established modes of scientific research and the concerns of feminists to promote social change, particularly those capable of making a difference through actively challenging conventional trial practice. As Klein so frankly concedes, there is a tension between:

> ...research which admits to working for change (and thus to be 'political'), which demands conscious subjectivity and which acknowledges (women's) feelings, emotions and intuition [and] not [being] taken seriously in academic circles and....her research being labelled 'journalistic' and 'popular' rather than 'scholarly' (1983: 96).

Nonetheless, I reflected on these issues with a contemplative eye which helped me to appreciate the dimensions of the research. This involved balancing the methodological considerations of what and how particular research was conducted with justifying why certain approaches were undertaken. It meant looking at how my own positionality and perspectives will have shaped what "data" was collected and how the meanings underlying my analyses have similarly been constructed and chosen over others.

3.4 Using Multiple Methods

3.4.1 Observing trials in the courtroom

Relatively little empirical research has been conducted using the courtroom as a site for first-hand observation. Sociologists and criminologists who have ventured into the courts have generally concentrated on the legal processing of offenders through the Magistrates' Courts (Brogden, 1982; Eaton, 1983) and looked at the relationships between case features and case outcomes.

Furthermore their rationale for choosing observation as a method does not appear to be based on any theoretical considerations. Rather, observation appears to have been chosen more for its practical benefits in providing access to potential interviewees

[4] Indeed, a strong corroboration warning was subsequently given [Trial 17].

(Brogden, 1982) or because of the lack of consistent and reliable written records maintained by the courts' administration (Eaton, 1983).

There are, however, some studies where observation is chosen as the preferred method. Kenneth Liberman's sociological research (1981) relied on courtroom observation and court transcripts from proceedings conducted in Western Australia and the Northern Territory between 1976-1978. He examined 40 trials that involved Aboriginal men and women, either as witnesses or defendants, in order to explore how they experienced courtroom performance, procedure and discourse in the witness box. His methodology relied on observing both the verbal and non-verbal interaction between Aboriginal witnesses, courtroom officials (including barristers and magistrates) and Aboriginal translators. His chosen method was crucial for more rigorously representing the difficulties faced by indigenous peoples in a situation of negotiation with, and subjugation by, what has traditionally been a culturally exclusive legal process.

Blanck (1987) is also an exception. He explored the role of judges' verbal and non-verbal behaviour in the processing of criminal trials for minor offences, including an assessment of whether and how judges expressed their attitudes or beliefs regarding the case to juries (Blanck, 1987). Studying '*actual* trials' was critical to the research approach and allowed for a careful consideration of the merits of conducting 'live' courtroom studies in order to more reliably assess the effects of judicial behaviour (Blanck, 1987: 337-338, his emphasis).

In the area of criminal justice and rape, one of the first notable examples of conducting first-hand observation of the trial process was the work of Adler (1987). Her study focussed on examining how law reform initiatives governing the legal management of sexual offences had translated into courtroom practice following their introduction in 1976, with particular emphasis on establishing whether the experience of rape victims giving evidence had improved. After exploring various options for collecting her data, she concluded that:

> Empirical research based on observation of court procedure is in fact the only reliable and valid way of obtaining

> answers to some of the questions that have arisen in recent years about the treatment of rape and its victims by the court (Adler, 1987: 40).

Interestingly, however, it appears her choice of observation as the principal technique was born more out of the limited use to which the available official statistics could be put than a particular philosophical or theoretical approach to studying this particular phenomenon.

More recently, Sue Lees' research (1996) included observations of Old Bailey rape trials after her earlier experiences of sitting in rape proceedings left a marked impression on her understanding of the trial process (Lees, 1993). Coupled with her examination of police records, and further supplemented by questionnaires she obtained from women survivors (1996: xxii, 265-266), Lees' multi-faceted approach to examining the workings of the British criminal justice system allowed her to comprehensively document the processes through which the police and the courts systematically discounted, marginalised and silenced women's accounts of rape.

Apart from lamenting the barriers to gaining access to courtroom research, however, Lees offered no explicit reason for choosing courtroom observation as part of her research approach. While she was clearly affected by her earlier experiences of observing rape trials, Lees only goes so far as to describe the data produced through courtroom observations as 'unique' (1996: xxiv). She does not comment on any perceived differences between her experience of courtroom observation and her analysis of typed court transcripts.[5]

Other studies undertaken by Matoesian (1993) and Young (1998) have adopted , poststructuralist approaches to examine the kinds of dominant narrative structures and question sequences that make up the "talk" of rape trials. Matoesian (1993) relied on court transcripts and the audio tapes from cross-examination sequences in a small number of rape trials to explore how dominant and gendered cultural meanings surrounding rape were symbolically represented through the processes of courtroom talk, with the result that the victim's story was reconstituted as one of consensual

sexual relations. While providing a persuasive account of the textual manoeuvring of verbal exchange sequences in rape trials, he specifically notes as a limitation of his study the absence of considering non-verbal features of courtroom discourses. He acknowledges that the demeanour and appearance of witnesses and the courtroom theatrics and performances of barristers are likely to bear heavily on legitimising or discrediting rape accounts.

Young (1998) opted to sit through a number of rape cases in order to observe how the processes of legal story telling were strategically used by barristers in rape trials to form a virtually uninterrupted narrative of consent. While no specific mention is made of her decision to rely on both courtroom observation and trial transcripts, Young's textual interpretations undoubtedly benefit from her experience of having "seen" and "heard" first-hand how these strategies translated into courtroom practice.

My own use of observation in the current study was the outcome of several key considerations. Firstly, I was aware from having observed rape trials for my Honours thesis (Heenan, 1990) of the sociological importance of having access to the influences of non-verbal interaction, alongside evidentiary and procedural considerations. In court the researcher is exposed to the physicality of the interaction in the courtroom, including where barristers are conventionally positioned[6] in relation to the witness box, the closeness of the accused, the gaze of the jury and (often) the distress of the woman-complainant. Moreover, the tone of questioning, the often aggressive stance of cross-examination and the frequent indifference displayed by trial judges and prosecutors, also allowed a greater appreciation of the range of discourses underlying the experience of rape trials which extend beyond the content of questioning and the type of evidence admitted.

I was also philosophically committed to a research design that was grounded in a more experiential approach to data collection. As a woman, and as a sociologist drawing primarily on feminist analyses of rape and its legal treatment, I was

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[5] Lees relied on both official court transcripts and courtroom observation for her study (Lees, 1996, Appendix 2: 265-266).

[6] The prosecutor is always positioned at the end of the bar table closest to the jury box.

predisposed towards research methods that might lessen the distance between conventional social scientistic and ethnographical approaches to empirical research to increase the opportunity for me to gain access to a wider spectrum of influences on rape trial practice. I wanted to record the gendered composition of courtroom participants. I wanted to create empirical space for out-of-court observations (and as it happened interaction) to be included as part of the trial experience. I wanted to be able to observe and represent how women appeared to manage their status as witnesses for the prosecution.

Empirically, the reliability of the research would have suffered had I relied entirely on accessing official court transcripts. During the period of the research, changes to court budgets meant transcripts of trial proceedings were no longer provided to the court as a matter of course.[7] Unless specifically ordered by the trial judge, transcripts were often limited to the complainant's evidence and if necessary the sworn evidence of the accused.[8] This meant the evidence of key witnesses, as well as any legal discussion relevant to the admission of sexual history evidence and decisions regarding corroboration warnings, did not appear within the official court transcript of the trial.[9]

Additionally, the closing addresses provided by both prosecution and defence barristers to juries at the end of the trial, as well as judges' directions, have never been routinely transcribed.[10] These were critical aspects of the current study's focus and so it was necessary to observe these parts of the proceedings.

Finally, observation is a method rarely employed by social researchers due to the amount of time and resources required (Kellehear, 1993). In the context of observing trials, the researcher must be present in court for extended periods of time

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[7] Along with almost every institution and organisation in Victoria, the cost cutting policies of the Kennett Government, which commenced with vigour during 1993, had particular implications for the administration of courts and tribunals. This included a reduction in the extent to which County Court trials proceedings would be transcribed.

[8] In Victoria, the accused maintains the right to remain silent and can choose not to give evidence during the trial.

[9] This will inevitably limit the kind of research (and level of accountability) that can be conducted on cases that proceed through the criminal justice system.

and is subject to the many delays that often plague the smooth running of criminal proceedings. There were a few occasions during the current study when the trial was adjourned mid-way through the evidence due to witnesses being unavailable, or as a result of a jury member falling ill, or to allow counsel to peruse new evidence relevant to the case. In this situation, my status as a PhD student was an advantage in managing sudden changes to trial listings and being able to find an alternative trial to attend.

These same factors, however, also acted as a necessary limitation on the number of trials that could be included in the study. Most of the trials ranged between five and eight working days. This limited the number of trials that I partially or wholly observed to thirty-four over a period of approximately 18 months during 1996 and 1998.

The trial observations

In taking field notes, I used a small sized note pad to record observations of the proceedings. My notes were subsequently typed into a word processor at the end of each court day.

The key issues and the level of detail to be recorded in the field notes were determined in advance. Close attention was paid to the legal arguments that arose in relation to the admissibility of evidence, the content and manner of questioning by both prosecution and defence barristers, and the types of evidence admitted. In particular, the notes I recorded of barristers' closing addresses and judges' directions, which represented an important opportunity to document the legal "stories" constructed in support of prosecution and defence cases, and the judges' commentaries on the relevant laws governing the adjudication of rape offences, were critical.

After a day of sitting through the first trial, I also decided to record my perceptions of the courtroom atmosphere, jurors' expressions during various parts of the trial and

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[10] The judge's directions may subsequently be transcribed if an application for appeal is lodged with the Court of Criminal Appeal and if the point of appeal relates to the directions that were given to the jury.

my interactions with barristers, women-complainants and other court personnel during adjournments in the proceedings.[11]

In trials where I was unable to observe the preliminary legal argument that took place prior to the jury being empanelled, I approached a solicitor from the Office of Public Prosecutions (OPP), the prosecutor, or the defence barrister to ascertain if any specific applications had been made regarding the admissibility of evidence. The OPP solicitors' hand written notes of the proceedings also provided a useful back-up for checking the content of the pre-trial legal argument.

Prosecution Case File Analysis

Once a trial was finalised, the case file became available for examination. This was important to the study for three main reasons: firstly, information that had been unavailable at the trial, such as the demographic details relevant to women-complainants and accused, was accessible through the case file materials; secondly, I could have recourse to the typed transcripts of cases where I had been unable to attend the entire proceedings; and thirdly, I was able to confirm the accuracy of the verbatim notes I took during my observations of the trials.

The case files generally contained a wealth of information including: the police depositions[12], the transcripts from both committal proceedings and the trial and any notice of appeal that the accused may have lodged against his conviction and/or sentence.

These files also included a "progress folder" which contained copies of all of the correspondence generated and received by the OPP solicitor while the case was prepared. This included information such as telephone contacts with witnesses, negotiations that may have taken place between the defence and the prosecution and

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[11] My notebook also gave me a means of expressing my own frustration, outrage and sadness at sitting, silently, and witnessing another women be annihilated at the hands of an unrelenting and unrestrained defence barrister. For a remarkably candid and thoughtful consideration of the personal (and professional) impact of researching sexual violence, see Stanko's article (1997), perceptively titled "I Second That Emotion': Reflections on Feminism, Emotionality, and Research on Sexual Violence'.

[12] The depositions consist of relevant witnesses' statements, including a typed transcript of the accused's taped record-of-interview with police.

any orders for extensions of time that were requested to delay the commencement of the proceedings.

I devised a coding schedule or booklet to ensure consistent information was collected from each case file. The variables included: demographic details related to the accused and the women-complainants; offence characteristics (such as where the rape occurred and when the report was made to police); and information relevant to the trial proceedings, such as the details of sexual history applications, principal lines of defence, jury composition and trial outcome. Where the trial resulted in a conviction, I also noted the grounds of any appeal that had been lodged in relation to the accused's conviction or length of sentence.[13]

The coding booklet was almost identical to the one we used to gather data for the Victorian Evaluation Study. This allowed me to draw some useful comparisons between trials examined for the present study and the kinds of cases brought before the courts during the early 1990s.

3.4.2 A Study of Rape Trials

Access to the criminal courts

I was under no obligation to obtain permission to observe the trials for the current study.[14] Nonetheless I felt an ethical obligation to explain my presence in the courtroom to women-complainants. Since it was not always possible or appropriate for me to approach them directly, I sought the agreement of the OPP solicitor to inform these women of the study and to let me know of any objections they may have had to my presence in court.

As previously discussed, judges now have a discretion to order that sexual offence trials be closed to the public.[15] In the current study, prosecutors made successful

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[13] This might be a useful point at which to consider Appendix 2 and Appendix 3 where details of the women-complainants, the accused men, the offences, and the trials are presented.

[14] An important principle underlying the Western democratic legal system is that court proceedings remain "open" to public scrutiny. According to rhetoric, not only must justice be done in the courts but it must be "seen to be done" in order to protect the rights and freedoms of every individual. For this reason, the courts generally remain open for public viewing.

[15] Section 37C of the *Evidence Act 1958* (Vic.) and Section 81(1) of the *County Court Act 1858 (Vic.)* each allow a judge to exclude members of the public from trial proceedings. However, these

applications for the proceedings to be closed during the women-complainants' evidence in eight trials.[16] In three cases, I confirmed that typed transcripts had been ordered by the trial judge and would later be available by examining the case file. In two other trials, the parties agreed to my seeking an exception to the court order to allow me to remain during the complainant's evidence. In the sixth trial, the woman-complainant preferred that I not be present during her evidence, although I later heard the audio-taped versions after the jury requested that they be replayed to assist them with their deliberations. In the two remaining trials I obtained permission[17] to view videotapes of the women-complainants' evidence.[18]

Access to trials in regional/rural Victoria

There are 13 regional locations throughout Victoria where County Court circuit-sittings take place. The frequency of these sittings depends on the size of the region and the numbers of cases pending. Overall County Courts in regional areas hold as many as 115 to 120 trials a year which represents around 28% of the total number of trials conducted for the state (Director of Public Prosecutions, 1998/9: 75).

No systematic study of regional or county cases has ever been conducted in Victoria. This is undoubtedly the result of the logistical difficulties in accessing reliable information relating to country cases in sufficient numbers to draw any conclusions.[19]

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provisions are rarely used as findings from the Victorian Evaluation Study showed (Heenan & McKelvie, 1997: 65-67).

[16] In two trials, judges refused to accede to prosecution requests for the proceedings to be closed. One judge made reference to the importance of 'open justice', while the other was persuaded by a defence objection that similarly suggested 'one of the cornerstones of our democratic system [is] that the general public are entitled to hear the allegations that are being made by the state'.

[17] Approval was given by the individual trial judges in these cases.

[18] Video recordings of proceedings occur randomly in trials that are listed in courts with video facilities.

[19] Figures reported by the Department of Justice in relation to the disposition and sentencing of criminal court matters document offence-based information for the entire state. They distinguish between metropolitan and regional cases. No distinction is made for court outcomes across different country regions. Any analysis of these statistics is therefore limited to comparing state figures with an overall rate calculated to represent the country region as a whole. This prevents any meaningful examination of any particular differences in the disposition of offences heard in particular country courts.

Figures provided to the Victorian Evaluation Study[20] suggested there were marked differences in trial outcomes for rape cases held in certain country regions (Heenan and McKelvie, 1997). In particular, the acquittal rates for trials held during 1983 to 1993 in Bendigo (92%), Wangaratta (87.5%), and Geelong (69.2%) were well above the rate for the entire State of Victoria (54.7%) (Heenan & McKelvie, 1997: 237).

The potential for exploring this phenomenon fell outside the terms of reference of the Victorian Evaluation Study. This was, however, an important impetus for including regional trials in the current research. Methodologically, there are several disincentives to looking at country trials. Not only does distance operate against the capacity for reliable first-hand observation of trials[21] but country cases are administratively dealt with differently from those held in Melbourne. Transcripts of the proceedings are only made in cases where the Court of Criminal Appeal specifically requests that one be provided following an application for appeal.[22] Solicitors were therefore expected to make detailed notes of the evidence during the trial itself or, if necessary, the court would have recourse to the audiotapes of the proceedings. Mostly this resulted in trial studies excluding country matters altogether or, as was the case with the original DPP Study (LRCVb, 1991), including only a small sample of circuit cases.[23]

The current study, although hampered by similar considerations, is the first to include circuit trials as part of an observational study of rape trials to explore any variations when metropolitan are compared with country cases. A total of ten regional or circuit cases were investigated, including three trials each for Morwell and Geelong (n=6) and two trials each in both Ballarat and Bendigo (n=4).

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[20] These figures were produced by the Case-Flow Analysis Section of the Department of Justice for exclusive use by the Victorian Evaluation Study.

[21] On three occasions I had attended country courts expecting the first day of a trial to commence only to learn there had been a last minute adjournment due to the accused changing his plea or a witness being unavailable.

[22] During 1998, this practice was modified so that transcripts were provided in rape trials heard at Geelong, Ballarat and Morwell.

[23] The Victorian Evaluation Study was also forced to rely on audiotapes of the proceedings. Given the inordinate time required to listen to any one trial, only a sample of circuit trials held during the study period was included (Heenan & McKelvie, 1997: 18).

Fortunately, in three of the regional trials where I had been unable to attend parts of the proceedings, the Court Reporting Service[24] made the audio-recordings available.

Access to prosecution case files

The Director of the Office of Public Prosecutions (OPP) approved my access to the case files after the trial had been finalised. The files can not be removed from the OPP premises and so I was required to examine them on site. This often allowed me to re-acquaint myself with the OPP solicitor who had been responsible for preparing and instructing in the trial and provided an opportunity to further discuss the way the prosecution was handled. Solicitors would frequently reveal their personal thoughts about the case during these conversations and direct my attention to features of the trial which they believed had "won" or "lost" it for them.

Access to barrister's closing addresses and judge's directions

At the end of the trial, both the prosecutor and the defence barrister present their closing addresses to the jury. During the address, they each rely on the evidence that was given during the case to fashion a narrative that favours their respective versions of events. This is the first and last occasion the court will hear an uninterrupted version of what each side claims to have occurred. It is reasonable to assume that jurors may be drawing on these "story-like" summaries during their deliberations.

Although the impact of the closing addresses summaries could not be directly examined by talking to jury members (see section 3.4.4 below), the kinds of narratives constructed by counsel based on their interpretations of the evidence are an interesting and previously unexplored focus of research and therefore were included in this study.

The closing addresses do not formally constitute part of the evidence so they are not usually transcribed. The only record of the addresses is therefore the audio-recordings made during the trial itself. This explains the absence of any reference to this material in the literature and the difficulties which researchers face in accessing this part of the trial process.

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[24] The Court Reporting Service is a private organisation responsible for audio-taping trial proceedings

The Victorian Government Reporting Service (VGRS) is the agency responsible for taping the proceedings held in Melbourne County Courts. Whilst I had originally planned to observe a number of the closing addresses first-hand, I assumed I would be able to listen to the audiotapes of others so that a larger number could be included in the study.

Approval was sought from the VGRS to access the audiotapes of a sample of closing addresses from trials held during the study period. The VGRS was, however, unwilling to grant access without the permission of the Chief Judge of the County Court. The Chief Judge subsequently refused to permit my systematic use of audiotapes as a legitimate record of this part of the proceedings (even though this part of the trial is routinely open to the public).[25] I was therefore obliged to rely on personal observation of the closing addresses of each trial. This limited the number of trials I had originally intended would form part of the study.[26] While observing this part of the proceedings did not significantly extend the time spent on trials held in Melbourne, I had to travel considerable distances to country trials to ensure that the closing addresses from trials in regional areas were also covered.[27]

A total of sixty-nine[28] closing addresses and thirty-three judges' directions were included in the study across 33 trials. In the remaining trial, the case was finalised prior to the closing addresses [Trial 7].[29]

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conducted in regional Victoria.

[25] The Chief Judge stated that '...the only acceptable record of court proceedings is a typed transcript which has been revised by the trial Judge' (correspondence dated May 16, 1996).

[26] The Chief Judge had not objected when the Victorian Evaluation Study requested access to the audiotapes of the proceedings when examining circuit cases. It appeared my status as a PhD student, as opposed to a worker in a government funded position, influenced the extent to which the judiciary would assist with my research.

[27] In view of the Chief Judge's objection, none of the quoted material relied on throughout the thesis is derived from the audiotapes of the proceedings from the three country trials where the Court Reporting Service had provided access.

[28] There were three trials where two offenders were involved. Each defence barrister representing the interests of the individual accused men are required to provide a closing address to the jury.

[29] The jury in this trial was invited to consider their verdict after the prosecution had presented its case. A judge is able to facilitate this process where he/she believes the prosecution case has fallen far short of proving its case beyond reasonable doubt. The jury is then expected to return a verdict of acquittal should they too be convinced that, even without hearing from the defence, the case against the accused has not been proved.

In the two trials where I had been unable to attend the closing addresses and the judges' directions due to proceedings running concurrently, I was given retrospective permission by the Chief Judge to listen to the audiotapes, provided I did not quote from the audio-recordings without the expressed permission of the presiding trial judge.

Access to the Victorian Evaluation Study's Data-Base

The data-base developed for the Victorian Evaluation Study was maintained by the Department of Justice. Despite my involvement with the study as project co-ordinator, I was required to obtain approval from the Ethics Committee of the Department of Justice before re-gaining access to the information. Permission was eventually forthcoming although I was confined to using the data-base on the Department of Justice premises.

Statistical comparisons between the trials examined for Victorian Evaluation Study and those observed for the current research are presented in Appendix 2. The findings from the current study with respect to the three key areas of reform are presented in a table in Appendix 3.

3.4.3 Appeal Court Decisions

For legal practitioners, law students and researchers, the decisions of appeal courts provide a valuable source for establishing the prevailing interpretations and applications of substantive and evidentiary laws that will in turn guide the practices of judges in the lower courts. Appeal court decisions therefore seriously impact on how law reform will translate into trial practice, particularly where the introduction of new statutory provisions alters or modifies the conventional common law understanding or approach to the adjudication and determination of offences.

Earlier studies conducted by feminist researchers (Adler, 1987; Estrich, 1987; Mitra, 1987) have stressed the importance of considering appeal court decisions with respect to sexual assault cases. Adler, in particular, suggests that appeal decisions 'can drastically alter the outcome of trials: sentences may be varied, and convictions

quashed' (1987: 39).[30] Therefore, a subsidiary aim of this project, but nevertheless an important one, was to explore the judicial discourse with respect to appeal court decisions and the creation of precedent governing the interpretation and operation of those features of rape laws that were the subject of particularly radical change.

Specific consideration was given to the decisions made by appeal courts in Australia since the Victorian law reform package was introduced in 1991. Appeal decisions were also examined for cases in the current study where the accused had been found guilty but had subsequently lodged a notice of appeal against his conviction and/or sentence. In total, appeals were heard in nine cases. This resulted in convictions being quashed in three trials[31] while sentences were reduced in two other trials.

3.4.4 The Original Focus - Jury Decision-Making in Rape Trials

In this, as in many other PhD studies, the final shape and scope of the research design were constrained by factors relating to the accessibility and availability of various data sources. This next section discusses the shift in focus that my research project underwent during the initial stages which ultimately led to a re-shaping of the original research questions.

The limits of studies on jury decision-making

Empirical studies on rape trials to date have focused almost exclusively on examining rape trial features, such as case characteristics, techniques of cross-examination, the victim's experience of giving evidence and trial outcomes. The findings from these studies have contributed to an evaluation of the implementation and operation of earlier legislative and procedural changes in support of calls for, further law reform efforts in the area (Naffine, 1984; Bonney, 1987; Adler, 1987; LRCVc, 1991; Department For Women, 1996; Heenan and McKelvie, 1997). As a result, recent law reform has largely been directed at firstly, improving the

[30] There is also a devastating impact on women who are required to give their evidence again if an accused successfully appeals against his conviction and a retrial is ordered. For a tremendously moving and courageous story of one woman's struggle to withstand two retrials after her father was found guilty of long-term sexual and physical abuse, see Taylor (1998) 'The Process of Appeal: A diary of a victim/survivor's experience'.

[31] Two retrials were subsequently held [Trials 19 & 22]. The third retrial resulted in the Court of Criminal Appeal ordering a verdict of acquittal given the offender had almost served his entire non-parole period in prison by the time the appeal was heard [Trial 30].

experience of rape victims going through the criminal justice system; and secondly, changing the legal framework governing consent. The traditional legal indicators of consent, such as evidence of force and resistance or the requirement of prompt reports, have been statutorily minimised.

Despite efforts in using law reform to educate jurors and the broader community about what legally constitutes rape and the meaning of consent, and about what ought to be considered legally relevant to their deliberations, there has yet to be any evaluation or review in Australia of whether these recent reformist initiatives have influenced the way in which jurors reach their verdicts in rape cases. My view at the start of this research was that this is perhaps the most critical aspect that should now be investigated to better understand the effects of legislative reforms, as well as to consider the processes of jury decision-making in rape trials more broadly. Previous research on the nature of rape trials leaves open to conjecture the influences operating on juries' decisions to acquit or convict an accused in the absence of studies that focus more specifically on their deliberations (Edwards & Heenan, 1994; Brereton, 1997).

This is not to reject the valuable insights that have been gained by studies which attempt to infer from the analyses of trials and their outcomes the kinds of factors that may influence jury decision-making. These studies have increased our understanding of the area and have had important implications for law reform and policy work. Indeed, as Brereton (1997) states, some of the findings have enabled the forming of some reasonable assessments about what influences jury decision-making in rape trials (LRCV, 1991: 95-96). However, this hardly constitutes a reliable empirical examination of the ways in which jurors come to understand, interpret and analyse what they see and hear in the courtroom.

The findings from the Victorian Evaluation Study consistently pointed to the need for an empirically reliable study of jury decision-making in rape trials (Heenan & McKelvie, 1997). Much of the research conducted for the evaluation highlighted the extent to which researchers and those working within the criminal justice system were forced to speculate about the way in which jurors understand the evidence that is admitted at trial. This was particularly evident during the interviews conducted

with legal practitioners and members of the bench, many of whom spoke authoritatively about the types of factors they presumed influenced jury decision-making (Heenan & McKelvie, 1997).

Gans (1997) suggests that in the absence of reliable data many of the inferential findings documented in previous empirical studies remain dubious. He argues that future law reform efforts should directly focus on jury decision-making, recognising 'the likelihood...[that] there is no way to obtain meaningful information about juror decision-making without asking the jurors themselves' (Gans, 1997: 33). While Gans might be overstating his point, there is clearly a gap in our understanding of how law reform operates at the level of decision-making by juries in rape trials and the extent to which legislative change may have altered wider community perceptions and understandings of the situations in which rape is alleged.

The revered jury system

Most research on jury decision-making has been conducted overseas using experimental situations where "mock" jurors are asked to arrive at a verdict after considering video or transcribed "evidence" from simulated trials (Kerr et al., 1976; Kerr & Turner Kurtz, 1977; Feild & Bienen, 1980; Reed, 1980; Hastie et al., 1983).[32] While the limitations of this kind of research may be obvious[33], legislation in Australia restricts the extent to which more reliable research could be undertaken by exploring the views of actual jurors involved in court proceedings. In Victoria, laws prohibit the publishing or handing over of information relating to the identity of jurors.[34] While this legislation was intended to preserve one of the fundamental principles of the Westminster legal system, ie, to keep juries' deliberations beyond public reproach (Brereton, 1997), it has equally served to ensure that the jury system remains beyond empirical investigation.

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[32] American research conducted by Gary La Free, Barbara Reskin and Cathy Visher (1985), which involved interviewing jurors about the process of their deliberations after the proceedings had been finalised, is the most notable exception to this. More recently, and for the first time in Australia, research was undertaken with actual jurors from child sexual assault cases (Ministry of Justice, 1995) who were surveyed about the process of their deliberations (discussed below).

[33] See Hastie et al., (1983) for discussion about the problems of generalising from "mock jury" experiments.

[34] See Section 69A of the *Juries Act 1967 (Vic.)*.

The jury system (in the context of the criminal law) has been revered in all countries which follow the English model as the fairest and most democratic process of impartially judging those charged with committing offences. That people who commit crimes will be judged by a representative panel of their peers who function as the "judges of the facts" has been upheld as the cornerstone of the English system of justice since the *Magna Carta*. The following quotation epitomises the philosophical and legal rationale for engaging juries in the task of delivering criminal justice, a version of which often prefaced the directions of judges' to juries in the trials observed:

> ...the presence and function of a jury in a criminal trial and the well-known tendency of jurors to identify and side with a fellow-citizen who is, in their view, being denied a "fair go" tends to ensure observance of the consideration and respect to which ordinary notions of fair play entitle an accused or a witness. Few lawyers with practical experience in criminal matters would deny the importance of the institution of the jury to the maintenance of the appearance, as well as the substance, of impartial justice in criminal cases.[35]

There has long been a tradition in the English and Australian adversarial systems of law that the content of juries' decision-making remains confidential, as should the identity of individual jurors in trial proceedings (LRCV, 1985). In the past, media reporting of particular trials has undoubtedly confirmed opinions that public disclosure of information by jurors in relation to their decision-making is problematic, particularly for those committed to defending the jury system and the secrecy that shrouds their deliberations.[36]

However, some legal commentators suggest the privacy surrounding jury decision-making imposes enormous constraints on the law reform process, leaving unexplored the terms on which jurors understand and apply their role during a trial and the kinds of factors that influence their decision-making. Kerr suggests that current moves towards silencing jurors by introducing legislation that would make it an offence for

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[35] Deane J., *Kingswell v. The Queen* (1985) 159 C.L.R. 300-301

[36] The public furore that emerged after the trials against Justice Murphy and Judge Foord is discussed in Kerr (1987). Jurors from these trials made contact with different media personalities in response to the criticism they had received regarding the verdicts. The media reports implied that some jurors were not confident with the verdict they had reached.

jurors to speak about their experience is in effect 'suppressing the voices of those who could provide the most vital evidence on the effectiveness or otherwise of the jury system' (1987: 16).[37]

Given the sanctity with which the jury system has been upheld, recent research conducted in Western Australia represents a considerable breakthrough in terms of demonstrating the inherent value of conducting this type of research. More importantly, it offers reassurance that jury research can be reliably undertaken without revealing the identity of individual jurors or exposing individual trials to scrutiny (Ministry of Justice, Western Australia, 1995).

Access to jurors

A careful reading of the legislation operating in Victoria reveals that, although the relevant section is restrictive, it does not prohibit more direct research being undertaken with jurors as long as the privacy and anonymity of individual jurors and the relevant trial proceedings are properly maintained. Sub-section (4) of the *Juries Act 1967* states that:

> Nothing in this section prevents the publication or disclosure by any persons of any information about the deliberations of a jury if that publication or disclosure *does not identify* a jury or the relevant proceedings. (emphasis added)

Despite a similar potential existing in the legislation of other Australian jurisdictions[38], no research had been conducted in this area prior to 1994. The sole exception to this, as mentioned above, was the release of a Western Australian report which documented a study of jurors who had served on cases involving child sexual assault (Ministry of Justice, 1995).

The Western Australian study examined the impact and operation of recent legislative amendments that allowed children (under the age of sixteen) and other

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[37] The dearth of research surrounding jury decision-making is also periodically the subject of media attention. See Janet Fife-Yeoman's article, 'Juries On Trial', *The Weekend Australian* Newspaper, "The Weekend Review", September 14-15, 1996, pp. 1-2.

"vulnerable" witnesses in cases involving sexual or physical assaults to give their evidence using closed circuit television or removable screens that blocked the line of vision between the complainant and the accused in the courtroom. In what is believed to be the first of its kind in Australia, the Western Australian Ministry of Justice received permission to survey actual jurors about their perceptions of the new procedures. The findings from this study are revealing, not only in terms of challenging the perception that procedural changes (such as closed circuit television) impact negatively on jurors' assessments of child-complainants, but for the broader implications for the importance of conducting jury research.

With the permission of the Chief Judge of the District Court and the Chief Justice of the Western Australian Supreme Court, and the co-operation of the Sheriff's Office (the agency responsible for administrating jury service), the researchers sent out surveys to jurors who had recently been involved in proceedings that involved child complainants giving evidence in sexual assault matters. At no time did the researchers have access to information that would identify the jurors and so the anonymity and confidentiality of jurors was secured.

Interestingly, the researchers received a high response rate from jurors (around 70%). This willingness to participate was viewed as an indication of the seriousness with which jurors take their role and the extent to which they 'may in fact welcome the opportunity to comment on their experience' (Ministry of Justice, Executive Summary,1995: ii).

A Proposal to Study Victorian Jurors

Given the absence of research focusing on jury decision-making in the area of rape and sexual assault, I had intended to include juries' deliberations in my study of rape trials. My particular interest lay in exploring the socio-cultural processes through which jurors interpret and give meaning to the evidence they hear and the definitions of law they are instructed to apply and, in particular, to gain a better understanding of how the legal elements of consent and belief in consent are dealt with by juries

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[38] See for examples Section 42C, subsection (6) of the *Juries Act 1967 (ACT)*; Section 68A, subsection (3) of the *Jury Act 1977 (NSW)*; *Juries Act 1996 (NT)*; Section 70, Subsection (9) of the *Jury Act 1995 (Qld)*.

during their final deliberations. I therefore proposed the first study in Victoria that would explore jury decision-making in actual rape trials.

The Western Australian research was a welcome impetus for requesting similar access to jurors who had served on recent rape trials in Victoria. I made a written approach to the Chief Judge of the County Court in Victoria to discuss my proposal to conduct a survey of jurors from recent rape trials held in the Melbourne County Court. The request was taken to the Executive Committee of Judges who replied:

> Section 69A of the *Juries Act* establishes, as a general rule, the confidentiality of juries' deliberations. It is the strongly held view of the Judges of the County Court that the preservation of such confidentiality is basic to the reliable functioning of the system.[39]

Despite my assurances that both the anonymity and confidentiality of jurors could be assured, as was the case with the Western Australian study (Ministry of Justice, 1995), the Committee remained unconvinced. They did add that they might be less opposed to a review of the jury system should it carry the weight of being commissioned by the Government, rather than conducted 'by a private individual'. Without the permission or the co-operation of the County Court, it was impossible for me to conduct an empirically reliable study of jurors from recent rape trials.[40]

Nonetheless, there were occasions during my observations of the trials when some anecdotal information in relation to jurors became available. Mostly this took the form of feedback provided through court personnel, or the police informant, who may have spoken informally with a juror after the verdict had been delivered and s/he had been discharged from service. On one occasion, I spoke with a woman who had been a member of a jury on one of the trials observed [Trial 31]. This jury had been discharged mid-way through the trial after it became known that one of the

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[39] Letter from Chief Judge Glenn Waldron, County Court, Melbourne, dated 12 April 1996.

[40] While there were clearly other ways I might have obtained access to jurors through methods that relied on self-selection, this was unlikely to generate a representative sample. Moreover, jurors are repeatedly warned by judges during the proceedings not to discuss the case with anyone. They clearly take this warning seriously, often appearing ill at ease whenever some out-of-court contact occurred with me, such as happens in the toilet block, or nearby shops, or the court lifts. One woman, who recognised my having been present throughout the trial, was visibly shaken when I said hello to her after we had happened to sit near each other on the same train!

jurors had recognised a witness. Nonetheless, this woman was keen to observe the "retrial" of the proceedings having seen and heard the evidence of the woman-complainant. She sat with me during the trial and spoke candidly about her impressions. This anecdotal material from jurors appears intermittently throughout the next three chapters.

3.5 Concluding Comments

Studies, which focus on the phenomenon of rape trials and law reform, have consistently highlighted the gap between the introduction of progressive statutory change and rape trial practice (Scutt, 1980a; Temkin, 1984; Adler, 1987; Spohn & Horney, 1992; Lees, 1993, 1996, 1997). Mostly, the problems are seen to lie with the attitudes and belief systems of barristers and judges who subvert the operation and meaning of any reforms introduced. Less attention, however, has been paid to exploring the cultural mechanisms through which reformist ideals and intentions have been negotiated in the courtrooms of contemporary rape trials. How the apparatuses of law, i.e., the practices of barristers and judges, as well as the conduct of juries, women rape complainants and witnesses, variously conceptualise the meaning of reforms in the context of actual rape trials is the principal sociological focus of this largely unexplored area of study.

The research undertaken for this thesis was conducted, as is all research, within certain practical constraints. In this sense, it can perhaps best be described as a study 'limited to producing partial discoveries of ongoing events' (Reinharz, 1983: 168 in Table 11.1). The strengths of this research are that it offers some valuable insights into the workings of contemporary rape trials, with a particular focus on how reformist ideals have been discursively translated into courtroom practice. Moreover, it considers the complex processes through which rape law reforms and reformist discourses are constructed, negotiated, and given meaning by those responsible for administering the law and those who are the subject of it, mindful in particular of the 'newer insights of conversation and discourse analysis' (Devault, 1990: 109).

The next three chapters analyse the data from the thirty-four rape trials in the context of three principal areas. They are:

- the use of corroboration warnings;
- the admission of sexual history evidence; and,
- the operation of consent.

Each chapter presents some statistical information relevant to the operation of these reforms. For the most part, however, the focus is on a qualitative analysis of the cultural and legal interpretations and applications of these areas of rape law in the context of trial practice and discourse and on the efficacy of (largely feminist inspired) reformist ideals and objectives. The extent to which feminist understandings of rape may have moved beyond the statutory definitions and meanings of these three features of rape law into the arguments, rulings and practices governing the treatment of rape offences and women-complainants in the courtroom is also considered.

In particular, the study explores how the conventional stories surrounding rape that have traditionally placed women's credibility and moral worthiness "on trial" may be influenced by a range of alternative discourses that seek not only to widen the legal and judicial scope for assessing rape accounts, but also challenge the cultural frame through which rape law perpetuates the prevailing social conditions relevant to how gender, sexuality and power are socially (re-)produced.

CHAPTER 4

Corroboration warnings: From a class of unreliable women to the unreliable "woman" of the rape trial

4.1 INTRODUCTION

Few would argue the acceptability of laws today that arbitrarily place women rape complainants in a special category of unreliable witnesses. The greater willingness of victim/survivors to disclose rape and to speak publicly about their experiences has allowed for a wider community understanding of sexual assault to develop, one that increasingly challenges the hegemonic image of rape being confined to one-off occasions of terror perpetrated by unknown offenders. Frequent media reporting of sexual assaults perpetrated within church communities, doctor's surgeries, school grounds and families have also helped to enlighten those who believed sexual assault was a crime likely to generate prompt reports and that could readily be proved by the testimonies of witnesses or other physical evidence.

Strong objections to the persistent use of corroboration warnings continue to be made by academics and feminists alike who often highlight the existing mechanisms within the system that already operate as formidable safeguards against the potential of wrongful convictions (Adler, 1987; Wells, 1990: Scutt, 1993; Mack, 1993; 1999). The high standard of proof required by the criminal law, the use of cross-examination, and the accused's right of appeal against a guilty verdict all work to substantially reduce the chances of innocent people being wrongly convicted. In the context of a rape trial, with the added likelihood of a complainant being subjected to attacks against her credibility and character alongside the very real possibility (indeed probability) that she will have her prior sexual history publicly canvassed before the jury, corroboration warnings could be said to border on overkill.

Despite two decades of legislative reform throughout Australian and overseas jurisdictions intended to limit or abolish the use of corroboration warnings, the practice of judges cautioning juries about the "dangers" of convicting on the basis of uncorroborated rape complaints persists. The pervasive belief that allegations of

rape and sexual assault deserve to be viewed with suspicion when no other signs of injury or medical evidence exists to confirm the woman-complainant's account remains deeply enshrined within law's apparatus.

In Victoria, the legislative status of corroboration warnings shifted from discretionary in 1980 to being broadly prohibited following changes to Section 61 of the *Crimes Act* in 1991. Not unlike its sister states[1], however, the Victorian legislature maintained an exclusory clause that would preserve the right of judges to comment on the unreliability of a complainant's evidence should the particular circumstances of a case warrant a corroboration warning 'in the interests of justice'.[2]

This caveat or "safety catch" readily opened itself to judicial (re-)interpretation in Victoria after barristers seized upon the Western Australian case of *Longman*. This case resulted in the High Court pronouncing on the circumstances under which corroboration warnings ought to still be given in order to safeguard against the potential for a miscarriage of justice in sexual assault cases. While few judges in Victoria during the early 1990s were prepared to completely override the new statute abolishing the use of traditional corroboration warnings, by the end of the decade, as the current study confirms, ground was shifting back towards the warning being more systematically reinstated.

This chapter begins by taking a closer look at some of the key decisions reached by the High Court in relation to corroboration. It then moves on to explore how the authority of these judgements has been widely interpreted in favour of reintroducing corroboration warnings as a legitimate means of testing rape accounts. That cases such as *Longman* can rapidly revive conventional 'stock stories'[3] about rape is also

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[1] Sub-section 164-165 *Evidence Act 1995* (Cth) (Australian Capital Territory); Section 4(5)(6) *Sexual Offences (Evidence and Procedures) Act 1983* (Northern Territory); Sub-section 164-165 *Evidence Act 1995* (Cth) (New South Wales); Section 50 *Evidence Act 1906* (Western Australia); Section 632 *Criminal Code Act 1996* (Queensland); Section 34i(5) *Evidence Act 1929* (South Australia); Section 136 *Criminal Code 1910* (Tasmania).

[2] Section 61, sub-section 2.

[3] Delgado (1989: 2412) uses the term 'stock stories' in much the same way as Schepple writes of 'insider' and 'outsider' stories (1989: 2079). 'Stock stories' are those that preserve the interests of the dominant group where social meaning is consistently interpreted as if representative of some predetermined truth or reality. The 'stories or narratives told by the ingroup remind it of its identity in relation to outgroups' so that alternative views or experiences are immediately revealed as less credible or trustworthy (1989: 2412). One of the most pervasive stock stories governing the

considered in the context of the trials observed where barristers in a small number of cases successfully argued the merits of corroboration warnings being given in circumstances far removed from those considered in the original High Court decision.

Conversely, in a small number of cases, judges appeared to resist the authority in *Longman*. This was done silently in some cases, where judges made no comment regarding corroboration despite a defence request that a warning be given. While in others, judges appeared to draw on women's subjective experiences of rape in problematising the law's expectation of rape complainants to provide immediate disclosures or have physical evidence of their assault readily available.

4.2 THE CASE OF *R. V. LONGMAN*

There is little doubt that most attribute the revival of the legal requirement of corroboration to the now infamous High Court case of *R v John Henry Longman*.[4] Longman was charged with two counts of indecent dealings with his stepdaughter who was aged six and ten at the time of the separate offences.[5] Apart from these occasions, the complainant, aged 32 at the time of the trial, described other instances of sexual abuse by the offender that extended over some years. She feared the consequences of disclosure[6] and remained silent for 25 years at which time a police investigation resulted in charges being laid.[7]

At the conclusion of the trial, counsel for the defence unsuccessfully applied to have the judge warn the jury of the dangers of convicting the accused in the absence of any independent evidence to support the allegations and given what was thought to be an inordinate delay in making the complaint. The judge's refusal to provide such a warning provided the principal grounds of appeal to the Western Australian appeal

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traditional legal adjudication of rape is that genuine victims should be able to corroborate their accounts of rape with medical or other physical evidence.

[4] (1989) 168 CLR 79.

[5] Longman also faced charges relating to sexual offences involving two other girl siblings in the family, but the trials were heard separately.

[6] The complainant had given evidence at the trial of being frightened of her step-father and of the implications that her disclosure would have on her relationships with her mother and the family (*R. v. Longman*, 1989, 168 CLR at 99).

court where the justices unanimously agreed that the trial judge was not in error in refusing to give a corroboration warning. Longman then applied to the High Court for special leave to appeal against his convictions, resulting in the jury's verdicts being overturned and a new trial ordered.

Unpacking the High Court judgement in *Longman* provides an interesting exercise in studying judicial discourse on the subject of rape, especially given the implications it immediately had in terms of resurrecting the kind of corroboration warning that the legislature had seen fit to abolish. The judges firstly engaged in a highly sophisticated, intellectualised philosophising of the historical entrenchment of the corroboration warning and they openly criticised the social and judicial processes through which judges in earlier times relied on the 'wisdom of [their] experience' to justify referring to raped women as an inherently unreliable class of witness (Brennan J., Dawson J., Toohey, J. at 86; Deane J. at 91[8]).

All too quickly, however, the discussion rapidly turned to one of legal technicalities and semantics, where the meaning and intention of the relevant legislation became lost in a convoluted appraisal of the scope of the relevant section. Whilst the justices regarded as 'unjust' any rule of practice that would indiscriminately position rape complainants as especially untrustworthy (at 86), they carefully distinguished the acceptability of a corroboration warning should the circumstances of a *particular* case and the uncorroborated evidence of a *particular* complainant warrant judicial comment. Were this not the case, according to the majority judgement, complainants would be placed:

> in a category of especially trustworthy witnesses whose evidence need never be the subject of a warning however necessary a warning might be to avoid a perceptible risk of miscarriage of justice in the circumstances of the case (Brennan J., Dawson J., Toohey, J. at 86).[9]

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[7] The complainant was also allowed to give evidence of other assaults that Longman allegedly committed against her, although she was unable to sufficiently particularise the circumstances to enable other charges to be laid.

[8] The referencing for *Longman* adopts the legal convention for citing cases where quotes appear "at" the appropriate page number of the law report in question.

[9] They were also describing the situation for a majority of other witnesses whose evidence had never systematically been the subject of judicial caution outside the normal requirements of considering

In effect, the High Court gave judicial voice to the discretionary clause in the Western Australian legislation that still afforded judges the authority to give a corroboration warning "in the interests of justice", as is also the position in Victoria. Prior to the decision in *Longman*, however, there was every indication that this discretion was being narrowly interpreted and applied, with very few juries being warned of the inherent "dangers of convicting" on the uncorroborated testimony of a rape complainant.

In delivering their judgement, the High Court seized on the opportunity to advise future courts of the general suitability of corroboration warnings should the circumstances reflect some of the difficulties that arose during Longman's case. In particular:

> ...the delay in prosecution. the nature of the allegations, the age of the complainant at the time of the events alleged in the two counts in the indictment. the alleged awakening of a sleeping child by indecent acts and the absence of a complaint either to the applicant or to the complainant's mother (Brennan J., Dawson J., Toohey, J. at 90).

The High Court was also concerned about the impact that such a lengthy delay of some twenty or more years would have had on Longman's capacity to adequately defend the allegations (at 91). This more than any other single circumstance, according to the High Court, warranted the jury being cautioned against the dangers of convicting on the sole basis of the complainant's testimony unless, after careful scrutiny and consideration of the warning, they were satisfied she was telling the truth.

In spite of the fact that these features were precisely those that often beset the reporting and prosecution of a large proportion of sexual offences[10], Justices

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whether the prosecution had satisfactorily proven its case against an accused beyond reasonable doubt.

[10] Child victim/survivors of sexual assault who are abused by a member of their immediate or extended family are amongst the least likely to report or disclose their victimisation (Ward, 1984; Herman, 1985; Easteal, 1994). A recent phone-in conducted by CASA House reported 51% of callers had been sexually assaulted by a family member (D'Arcy, 1999: 33). A majority of these victims felt unable to disclose what was happening until some time after the abuse had ended. They feared that

Brennan, Dawson and Toohey, who were responsible for the majority judgement, assured us that the complainant's status as an alleged victim specifically of sexual assault in the case of *Longman* was purely incidental. The judge ought to have given a warning:

> not by reason of her being an alleged victim of a sexual offence, but by reason of the whole of the circumstances of the case (Brennan J., Dawson J., Toohey, J. at 90).

Undoubtedly, Justice Deane saw the potential escalation effect that the majority judgement might generate on rape trials in the future. In a separate judgement, he openly criticised his colleagues for fettering the narrow discretion afforded by the legislation to limit the use of corroboration-like warnings and accused them of:

> ...creating new categories of case, such as where there has been a very long delay before the complainant has made any complaint to the authorities, in which a trial judge must be "satisfied" that the relevant warning or caution is "justified" (at 97).

Further, Justice Deane went on to explicitly discount the set of features that had been identified in the majority judgement as generally rendering trial convictions for certain sexual offences unsafe (at 100). On the contrary, he highlighted the emotional and practical difficulties that often prevent child victims from ever reporting systematic abuse perpetrated by family members (at 93). And yet, in spite of Justice Deane appearing to draw on alternative discourses with respect to understanding the plight of sexual assault victims, he concluded that some of the unique circumstances of the case (i.e., the child's age at the time coupled with the alleged offences occurring while she was sleeping or pretending to be asleep) justifiably required the jury being strongly cautioned by the trial judge. So, on the one hand, he denied that there was anything intrinsically unfair for accused men to

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they would not be believed, that they would be blamed for breaking up the family, or they were afraid of the offender himself (D'Arcy, 1999: 44-46). Research also confirms that for adult women, some of the issues that impact on their decisions to delay reporting sexual assault are complicated when the perpetrator is someone they know. Renner & Wackett (1987) found that 59% of women raped by men they knew ('social rape') waited at least a week, and they noted that 'for the majority of these cases the interval between the rape and contacting [a sexual assault service] was longer than a year' (1987: 52). They were also half as likely to seek medical attention or to report the rape to police (Renner & Wackett, 1987: 53-54).

be convicted on the uncorroborated word of complainants but at the same time he was unwilling to uphold convictions in cases where jurors were not adequately cautioned about accepting such evidence on its own.[11] Thus, a consensus was reached among the five High Court justices and Longman's convictions were quashed and an order that he be retried for the offences was issued.

Defence barristers in subsequent trials involving sexual offences quickly consolidated the overriding authority vested in the decision of the High Court. Where judges refused to give corroboration warnings, convictions were often then appealed on the grounds that the trial judge failed to adhere to the binding decision in *Longman*.[12]

In 1995, the Court of Criminal Appeal in Victoria added its own flavour to the *Longman* warning in the case of *R v Omarjee*.[13] This significantly widened the scope for judges to give a corroboration warning. Omarjee was convicted after a jury found him guilty of having drugged and raped a woman client who lay physically paralysed from the effects of a drug he administered at his medical centre. The conviction was successfully set aside after the Court of Criminal Appeal was persuaded that the trial judge was in error for not having directly instructed the jury to treat the evidence of the complainant with particular care. Aside from highlighting a three year delay in her report to police, the appeal court pronounced that the jury should have been cautioned given that 'Mrs X's evidence was uncorroborated' and there were incumbent 'dangers of convicting upon her evidence

[11] In her critique of another Victorian case that further solidified the hold of *Longman* in Victorian courts, Luan Danaan described how 'one is left feeling schizophrenic' after considering the chain of reasoning used to inform judicial discourse with the inherent collisions and contradictions that mark the meanings and interpretations offered in their appeal court judgements (1995: 146). Similar to Justice Deane, Danaan recounted the use made by one judge of feminist inspired theory to canvass the issues relevant to childhood sexual assault while remaining resolute in his belief that convictions on such bases alone, in the absence of juries being warned of the dangers of convicting, carried the potential for enormous injustice (see *R. v. Thorne* Unreported judgement of the Court of Criminal Appeal, Victoria, June 1995).

[12] Judith Osborne (1985) recounts the treading of a similar appeal court path where the simple removal of the corroboration warning in Canada did not of itself prevent its resurrection. Several higher court decisions endorsing the exercise of judicial discretion in deciding on the appropriate circumstances under which a corroboration-type warning could be given ensured that trial practices remained unchanged (Osborne, 1985: 53-54). It was not until 1982 that parliament adopted the more proactive role of altogether removing a judge's discretionary power to suggest to a jury how unsafe it would be to convict the accused in the absence of independent corroborative evidence (Osborne, 1985).

[13] *R v Omarjee* (1995) 79 A Crim R 355.

alone' (at 30). This was arguably a far broader interpretation of *Longman*. It set a threshold test that would merely require defence barristers establish that a determination of the allegations would rest solely on the complainant's testimony to satisfy any request for the judge to deliver a corroboration warning.

The judges in this case further held that the tone of corroboration warnings should carry 'the force of the judge's authority and [should] be more than a general comment about the need to scrutinise the evidence of the witness in question' (at 28). If there was any doubt, the case of *Omarjee* made clear the intention of the appeal courts. The net effect obliged trial court judges to seriously consider giving a traditional corroboration warning in all cases where the complainant's word alone was relied upon to convict an accused or face the very real prospect of a successful appeal.

In a subsequent but no less important case, the High Court was given the opportunity in 1996 to lend its judicial voice against the traditional (but recently revived) legal proposition that delayed complaints were, in and of themselves, spurious in nature. Instead they provided the final frosting to the corroboration cake by holding that a jury ought to be appropriately directed that a delay can be used for assessing a complainant's credibility and indeed for drawing an inference that the allegation is in fact false.[14] Juries should therefore be told that not only was delay another danger signal against convicting, but:

> may be so long, so inexplicable, or so unexplained, that the jury could properly take it into account in concluding that, in the particular case, the allegation was false.[15]

Once again, the spirit of the 1991 legislation was seriously undermined in the name of protecting the specific case rather than acknowledging the likely implications for the general category. The effect of the High Court ruling ensured that women who

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[14] *R v Crofts* (1996) 88 A Crim R 232 at 12

[15] Interestingly, in 1997 the Victorian legislature abolished the phrase contained in s. 61 of the *Crimes Act 1958* that a delay in complaint 'does not necessarily' indicate that a complaint is false precisely because of its negative implication, and yet this was the very phrase highlighted by the High Court as 'critical to the operation of s 61 (1)(b)(i)' (at 12).

delayed making sexual assault complaints would remain a source of distrust within contemporary rape trial discourse (Mack, 1999), despite the High Court condemning any warning that would reinforce the stereotypes of old or that might 'undermine the purpose of the amending Act'.[16] 'The only difference...', according to Simon Bronitt, 'is that judicial concerns about delay and complainant credibility must be expressed in terms of the "individual" facts of the case, rather than in broad discriminatory generalisations or stereotypes' (1998: 56).

4.3 The Early 1990s

Studies throughout the early 1990s highlighted the increasing confidence with which a considerable proportion of the judiciary was prepared to ensure the sanctity of the traditional cautionary warning. In New South Wales conventional trial practice coupled with the authority of *Longman* produced hybrid versions of old and new methods of issuing corroboration warnings. Researchers from the Department For Women distinguished three combinations: one based on the 'old-style' corroboration warning where juries were warned of the dangers of convicting; a *Longman* version where judges would direct juries to evaluate the complainant's evidence in the light of common human experience[17]; and a third version premised on a local case[18] where the jury was urged to scrutinise the complainant's evidence with great care (1996: 187-188).

In just on 40% (n=37) of the trials considered by the researchers, judges gave traditional 'old-style' corroboration warnings about the dangers of convicting an accused in the absence of independent, corroborative evidence (Department For Women, 1996: 188). In 19 of these trials (20.7%), additional directions were fashioned on the principles of *Longman* and the local case where juries were warned about scrutinising the complainant's evidence with great care or assessing it 'in the light of common human experience' (1996: 189). Only 14 trials (15.2%) escaped any style of warning (1996: 189).

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[16] *R v Crofts* (1996) 88 A Crim R 232 at 14

[17] This reading of *Longman* assumes less harm was caused by the High Court decision than I am suggesting here. According to the NSW researchers, *Longman* fell short of reissuing a judge's authority to give common law corroboration warnings in individual cases (Department For Women, 1996: 186-187).

[18] *R v Murray* (1987) 39 A Crim R 315.

In South Australia, judges were particularly conscientious about retaining customary corroboration warnings as part of their directions to the jury. An inquiry into gender awareness across the judiciary, conducted by a Senate Standing Committee on Legal and Constitutional Affairs, revealed that in 45% of cases (n=22) judges gave corroboration warnings (1994: 47). More disturbing was the Committee's finding that these directions were often accompanied by remarks that women were especially prone to lie about sex and falsely accuse men of raping them. The Committee quoted the following example from a case presided over by Justice Bollen in 1992[19]:

> I close today's remarks, in the course of my summing up, by offering you something that we in the courts have noticed in our experience for many years. There have been cases where women have made up false allegations of rape or sexual attack against men. Sometimes they have done it out of anger for the man; sometimes they have done it out of hatred that they have developed for the man. Sometimes they have done it, mainly young people, when they are late home and frightened of father, so they say, instead of saying "I stayed out and enjoyed intercourse with my friend" they said they were raped. Sometimes they do it for no reason at all. Be on the watch for that (cited in Standing Committee Report, 1994: 52).

Whilst the findings from the Victorian Evaluation Study reflected similar influences on trial practice, fewer judges appeared to blatantly revert to the 'old-style' direction promulgated by common law. Bearing in mind the smaller sample size, very few of the 27 judges' directions examined included 'old style' corroboration warnings. In less than half of the cases (n=11), judges relied on alternative phrases to suggest the jury 'scrutinise [her evidence] with great care' or 'look to the presence or absence of any evidence which might support her' (Heenan & McKelvie, 1997: 299). They steered clear of the use of the term corroboration.

Soon after the 1991 reforms had been introduced, and prior to a more general awareness of any binding appellate authority, barristers and judges appeared to apply a literal interpretation to section 61 and few requests for traditional corroboration

[19] *R v Willsdon* (unreported), Bollen J, 10 December 1992 pp. 17-18 (South Australia), cited in Senate Standing Committee on Legal and Constitutional Affairs, 1994: 52.

warnings were made or acceded to. Some of the judges even described the abolition of the corroboration warning as 'a great advance', saying that it had been 'out of date', even 'offensive' to them (Heenan & McKelvie, 1997: 329). In its place, they acknowledged adopting 'compromise' warnings (1997: 330) where the term "corroboration" was deliberately substituted with more innocuous references made about the importance of juries subjecting the complainant's evidence to careful scrutiny.

However, the interviews with judges and barristers conducted as part of the Victorian Evaluation Study suggested simply that the impact of *Longman* and *Omarjee* had not gained momentum during the time the transcripts were examined. Most judges and barristers identified the influence that these appeal court judgements had subsequently had on their application of section 61 and the perceived obligation they felt to deliver more standard corroboration warnings.

Not that the High Court decision sat easily with all sections of the judiciary, with one judge anxiously predicting that the long term consequences of *Longman* would mean a 'restor[ation of] the corroboration warning' (Heenan and McKelvie, 1997: 330). During the final stages of the evaluation, another County Court judge informally contacted the project workers and recommended urgent legislative change to counter the authority of the High Court decision.

However, with the advent of the decision in *Crofts* handed down by the High Court soon after, both arms of the Victorian reforms relevant to how juries ought to treat delayed or uncorroborated accounts of rape had effectively been stymied (Bronitt, 1998). Despite recommendations from the Victorian Evaluation Study to further amend Section 61 (Heenan & McKelvie, 1997: 373), parliament instead opted to introduce a legislative statement that effectively did nothing to alter the binding authority of the High Court decisions.[20] Cases involving delays in complaint or uncorroborated accounts therefore had little to no chance of escaping corroboration

[20] A faint attempt was made by parliament in 1997 to curb the influence of *Longman* by introducing an amendment to Section 61 so that judges are now legislated not to 'make any comment on the reliability of evidence given by the complainant, if there is no reason to do so in the particular proceeding in order to ensure a fair trial'. Given that the notion of fairness has historically been

warnings and this significantly reduced their chances of being successfully prosecuted.

These decisions not only represent the courts' unfailing scepticism when presented with women's uncorroborated testimonies of rape, but are also symptomatic of a judicial distrust of juries to make the "right" decisions in these cases (Young, 1995). Corroboration warnings have rarely been considered in this light[21], but there is little doubt that the strength of the caution is highly suggestive of the manner in which juries should exercise their function when considering the evidence of a sexual assault complainant.

Undoubtedly, appeal courts have been vested with a powerful authority to influence the kinds of cases coming before the courts (Bessmer, 1984; Coates et al., 1994; Mitra, 1997). While they generally exercise their power to overturn or quash convictions with a degree of caution, the cases discussed here provide troubling examples of the High Court fundamentally reversing juries' decisions in sexual assault cases for fear there had been a "miscarriage of justice". Similar to *Longman*, these cases relied on the testimonies of adult survivors of childhood sexual assault where there was no corroboration and a substantial delay in disclosing the events.[22] The implications of these decisions carry serious consequences for the success or otherwise of like cases being prosecuted in the future.

4.4 The Corroboration Warning Restored - The Findings

The study reported here reviews how the decision in *Longman* has translated into contemporary Victorian rape trials. A key question was whether the principles of *Longman* had been confined to cases involving delayed reports and "oath against oath" trials, or whether, with the passing of time, greater judicial latitude had developed for extending the scope of circumstances under which corroboration warnings were being delivered.

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legally weighted in favour of the accused, it seems most unlikely there will be any change to current practice.

[21] Bronitt (1991) and Young (1995) are exceptions.

[22] See for example *R v M* (1994) 76 A Crim R 213.

Table 1 provides an overview of the frequency with which corroboration warnings were given in trials I observed for the current study.[23] Unlike previous research, however, this study included a close examination of the kinds of cases subjected to strong corroboration warnings as opposed to less traditional versions. It also evaluates the features of those trials that escaped any kind of corroboration warning altogether.

Table 1
TYPE OF CORROBORATION WARNING GIVEN

Use of corroboration warnings issued by the trial judge	**Number of Trials**	**Percentage**
No corroboration warning/caution given	16	48.5%
Diluted version; jury directed to look for supportive evidence	8	24.2%
Strong corroboration warning given	9	27.3%
TOTAL	33	100%

Missing Case=1[24]

It is not insignificant that in just under half of the trials (16 of the 33), judges did not raise the issue of corroboration in their directions. Juries in these trials heard of no reason why they could not convict the accused if they were satisfied that the evidence supported a finding of guilt beyond reasonable doubt. The location of the proceedings did not appear to significantly influence whether a corroboration warning was given, although judges in country trials were proportionally more likely to remain silent on the issue. In 7 out of the 10 country trials observed, no mention was made of corroboration.

[23] See the table in Appendix 3 for the status of corroboration warnings in each trial.
[24] The "missing case" relates to a Trial 7 where the jury were asked to consider their verdict immediately after the close of the prosecution case.

In 8 further trials, whilst juries were unlikely to hear the word corroboration, they were nevertheless encouraged to look for 'supportive' or 'evidence independent of the complainant before being prepared to convict the accused. This was similar to the compromise warning spoken of by judges during the interviews in the latter stages of the Victorian Evaluation Study (Heenan & McKelvie, 1997: 330).

The perceived need for a warning may have been reduced in the 16 trials where there was no mention of corroboration, given that these cases tended to fit more squarely with the conventional construction of 'real rape' victims (Estrich, 1987).[25] In 11 of the 16 trials, complainants had disclosed to someone within 24 hours of the events having occurred, with 8 of the 11 reporting to the police within a day or two. Eight out of the 16 complainants also sustained physical injuries that required some form of medical treatment[26] with 5 of these 8 women also reporting promptly to police. Moreover, in at least 9 of the 16 cases a witness of the "recent complaint"[27] was called to confirm that the woman had promptly disclosed the rape, conduct that is seen as consistent with genuine claims of rape.[28]

Only 3 of the 16 cases involved women who had had some prior sexual contact with the accused, while two other women disputed claims of prior consensual sexual activity. Also, none of these 16 cases involved allegations of ongoing or long term sexual assaults being perpetrated over an extended period of time.

Generally, these kinds of case circumstances have historically proved the least contentious for juries responsible for adjudicating rape accounts. Visible injuries,

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[25] Mack (1998: 67-68) agrees that in those cases where judges' decisions not to give corroboration warnings have survived appeal there is often already 'substantial evidence actually supporting [the complainant's] testimony'.

[26] Three of these eight complainants required hospitalisation.

[27] In cases involving sexual offences, evidence that the complainant told someone about what happened soon after it occurred is admissible provided the complaint is made at the "first reasonable opportunity". Historically, a failure to raise the "hue and cry" was used as a defence to rape allegations, the law harbouring greater suspicion toward women who did not immediately disclose the details of assaults perpetrated against them. Evidence of "first complaint" was therefore admitted in rape trials to suggest a consistency of conduct on behalf of the complainant, as opposed to being capable of proving that the offence had in fact occurred (Law Reform Commission of Victoria, 1987a: 23; Bronitt, 1998: 45).

[28] I was unable to verify the appearance of a "first complaint" witness for one other complainant as the transcript was confined solely to the complainant's and the accused's evidence. The court had also been closed to the public during the complainant's evidence, confining my observations to counsels' closing addresses and the judge's direction.

speedy disclosures, and other witnesses to the surrounding circumstances have always offered the greatest chance of conviction in sexual offence proceedings, precisely because they provide the additional corroborative or supportive evidence likely to strengthen the complainant's account in the eyes of the jury (LaFree et al., 1985; LRCVb, 1991). As it was, 8 of these 16 trials resulted in convictions for rape, while in 2 others the accused were found guilty of non-sexual assault charges arising out of the incidents.

A similar picture emerged with the 8 trials where judges fell short of using the traditional corroboration warning and opted instead to use a more diluted version (generally careful to avoid using the "c-word"). Juries were encouraged to assess or 'scrutinise' the complainant's testimony with 'great care' and look for independent evidence that supports or tends to confirm the complainant's story. With one exception, these cases involved quick disclosures to "first complaint" witnesses, followed by reports to police. Medical examinations were undertaken with 7 of the 8 complainants, forcing the accused in four trials to provide an account that could somehow explain the injuries sustained by the complainant.

Again, only one of these cases involved multiple assaults over a period of time and in two cases there was some indication of prior consensual sexual activity having occurred between the complainant and the accused. Convictions for rape offences were delivered in four of these eight trials, with one other accused being acquitted of rape but found guilty of causing injury to the complainant.

Of particular interest to the current study, however, were those trials where there was no independent evidence to support the complainant and yet a corroboration warning was not given. Judges in these six trials decided against warning the jury of the perceived dangers of convicting on the uncorroborated word of the rape complainant, often in the face of considerable defence pressure to do otherwise. This level of judicial resistance to the practice of giving a full *Longman* warning was significant,

especially where a failure to do so might have resulted in any conviction being successfully overturned on appeal.[29]

One judge who presided over two of these six trials stated his position spontaneously after checking with counsel whether they were satisfied with the directions he proposed to give the jury. Even despite the fact that neither barrister made a specific request for a corroboration warning to be given[30], His Honour simply added that he did not think a *Longman* warning was necessary and did not intend to give them one [Trials 11 & 24].

Immediately after suggesting to the jury that evaluating the complainant's evidence was very important, a judge in another trial made it clear to the jury that in highlighting her evidence he was in no way suggesting that people who make allegations of sexual assault were an unreliable class of witness. This, he said, constituted 'a direction of law', effectively reversing the conventional approach by reassuring the jury that guilty verdicts can be reached in the absence of corroboration as long as they were satisfied that the complainant was telling the truth [Trial 34].

A fourth judge arbitrarily dismissed a defence request for a *Longman* warning on the basis of a four year delay in the complaint, saying the case represented 'a baby' in terms of the delayed disclosures involved in trials in which he had presided over in recent times and that he would 'need a lot more persuasion [from defence counsel] to give a *Longman* direction in this case' [Trial 32].

The two remaining trials perhaps posed the greatest challenge to the practice of reintroducing corroboration warnings in rape cases. Here, the judges effectively set

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[29] An appeal against the direction given by one of the judges in these cases was dismissed on the grounds of a failure to give a *Longman* warning. In significant contrast to the decision in *Omarjee*, the Court of Appeal held that to suggest 'a warning is necessary solely because the complainant's evidence is uncorroborated would seem to fly in the face of s.61(1) of the Crimes Act' and then somewhat circuitously added, 'The obligation to give a *Longman* warning only arises when the trial judge concludes that the circumstances of the particular case would make it unsafe to convict the accused on the uncorroborated evidence of the particular alleged victim...This requires something more than that proof of the offence rests on the uncorroborated evidence of the alleged victim' (*R v Costin*, Unreported judgement of the Court of Criminal Appeal, Victoria, August 7, 1997, p. 8).

[30] The defence barrister had already commented to the jury in his closing address that they should not be prepared to convict the accused on the uncorroborated word of the complainant, even though the complainant was photographed with significant injuries.

themselves apart from the more conservative reading and interpretation of *Longman* [Trials 6 & 28]. Both cases involved a significant lapse of time in terms of the complainant's disclosures and in both instances the offender was a member of the victim's family. No weapons were used, no injuries were sustained and neither of the two young women was able to physically resist the assaults. Other people were described as being relatively close by when the offences were committed, with one of the complainants alleging she was raped in a caravan where the accused's wife and children were sleeping only a few feet away.

Like most victim/survivors assaulted in the context of a familial setting, both young women felt either 'too ashamed' or frightened to tell anyone straight away. The police were subsequently not involved until some six months after the events occurred in one of the cases, and not until four years later in the second.

One of the young women had also suffered ongoing sexual assaults by her two brothers prior to the events involving the accused [Trial 6].[31] When questioned about why she had waited so long to tell anyone about the rape by her cousin, she responded that this had been the worst of all the things she had endured and that she had had to 'build up' to tell someone about it. The accused admitted also to having some prior consensual sexual contact with the then thirteen year old complainant and then claimed this as the context for the alleged activities. Far from a rape situation, according to the accused, this had been a passionate sexual encounter that took place in the back seat of his car while parked on the side of the road.[32]

Given the wide interpretation afforded by a number of judges to *Longman*, the circumstances of this trial appeared ripe for a corroboration warning. Accordingly, and in line with the decision in *Crofts*, the judge suggested to the jury that the four

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[31] According to the complainant, the accused had initially offered his sympathy and support regarding his knowledge of these assaults. Although later, the complainant felt that he considered inconsequential any harm he may have caused, given what she had already endured at the hands of her brothers.

[32] As an aside, over the years I have been involved in researching rape prosecutions, I have often been struck by the level of sexual proactiveness that is frequently attributed to women by accused men who claim the events are consensual. Women are frequently described by them as being "on top", or as the ones who "guide penises in", or as the initiators of oral sex, regardless of how old they are or how sexually naive they may have been, or how vehemently the complainant denies sex having ever occurred (willingly) between them.

year 'delay may be used to suggest inconsistency of conduct' in the complainant, as well as having hampered a thorough police investigation of the offences. Reference was also made to the deleterious effect that considerable delays might have on the memories of both parties involved and on the evidence of other surrounding witnesses. However, it was only after the judge had concluded his direction to the jury that the specific issue of a corroboration warning was first mooted.
The defence appeared confident that this matter had simply been overlooked and merely commented that a *Longman* warning would be 'most appropriate' in the circumstances. However, while agreeing to redirect on some peripheral matters, the trial judge remained silent on the defence request and said nothing to the jury about the status of the complainant's uncorroborated testimony.[33]

Leaving nothing to chance, the defence barrister in the second of these two trials made a particularly strong application for a *Longman* warning to be given to the jury prior to the judge commencing his direction. This followed a closing address where the defence had already seen fit to provide the jury with some traditional common law insight into uncorroborated rape allegations:

> Verbal allegations such as in this case of rape are in a sense easy to make. Where there is no corroboration of those allegations it makes it much more difficult to accept. In other words it is very dangerous to convict where there is nothing to back it up, and that is particularly so here because there is no recent complaint...[Trial 28].

Against the prosecutor's objection, the defence urged that the judge give judicial authority to these same sentiments by repeating them in his charge to the jury, especially given what the defence suggested was

> the bizarreness of the allegations...Here's a girl who has all these witnesses and prefers to be raped, apparently, rather than stop it in any way...and by not doing anything where you would have expected her to do such a thing where had she done so there would have been a

[33] The subsequent conviction of the accused in this case was appealed principally on the grounds of a failure of the trial judge to deliver the *Longman* warning. However, the appeal was abandoned prior to the matter being heard.

> ton of corroboration via recent complaint and what have you...[Trial 28].

In perhaps one of the more considered rulings[34] heard during the research project, the judge's response in this trial demonstrated a particular sensitivity and understanding of the complexities surrounding intra-familial sexual assault by refusing to accede to the defence request:

> In all the circumstances, I do not believe that the delay in making the complaint or the failure by her to arouse [witnesses] at the time, are such as to require me to give the jury any special warning about her evidence, or make any comment to that effect....The fact is, incestuous sexual type offences such as this, often take place in close proximity to other family members. One reason is that the perpetrator often feels he is above suspicion and the young victim is often afraid of the schism that can result in the family if she complains....A young victim, even one of 17 will often think long and hard before making a complaint, and a delay of some [few] months, in my view, is not of great significance [Trial 28].

The accused was acquitted in this case. Despite the OPP's preparedness to go ahead with a second prosecution for other offences allegedly committed by the accused against the complainant some ten years prior to the alleged rape, she felt unable to go through another court experience and the charges were dropped.[35]

In direct contrast to these trials, judges in nine other cases (27.3%) felt it necessary to issue strong warnings to juries regarding the inherent "dangers" of convicting an accused in the absence of corroborative evidence. Not only does the conduct of the judges in these trials carry serious implications for the future efficacy of section 61, and the applicability of the *Longman* warning more generally, but they highlight the process through which significant changes in the traditional management of rape cases can effectively be subverted and eventually nullified through the practices of

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[34] The judge opted to consider the matter overnight before delivering his ruling the following morning.

[35] The accused had previously been convicted of digitally raping a ten year old child who lived near the accused. She had felt able to disclose the assault after learning that the complainant had reported similar offences.

barristers and the judiciary drawing on a variety of mechanisms to effectively reinstate the more traditional methods for assessing women's claims.

While any comparisons across the 33 cases should be treated with caution, there are few factors that separate these 9 trials from the remaining 24. The most significant differences lie solely in the greater number of delayed reports and the kinds of prior relationships that existed between complainants and the accused men - features that were generally more likely to prompt greater judicial consideration of a corroboration warning being given.

Specifically, in six of the nine trials there were delays in reporting the assault to police. In four of these cases, a number of months or years had elapsed before a formal report was made. For five cases, there was also some dispute as to the nature or existence of a prior sexual relationship between the complainant and the accused.

Judges in most of these nine trials dutifully followed the guidance proffered by the High Court in *Longman*. Where a lengthy delay was involved, the corroboration warning was sometimes prefaced with strong criticism from the trial judge pointing to the 'unfortunate consequences' of the complainant waiting so long to report to police [Trial 2]. Not only was delay said to heighten the 'potential for error' [Trial 13] and 'deprive[] the authorities and the accused from making contemporaneous inquiries' [Trial 2], but some judges also felt they should suggest to the jury that a delay was in fact capable of being used to infer the allegation was false [Trial 27].[36]

The warning itself was remarkably consistent across these cases.[37] The following quotation is representative of the flavour of the warnings given:

> ...it is my duty to inform you that it would be dangerous to convict the accused of any of the offences charged on the evidence of the complainant alone, unless after having scrutinised her evidence closely, and with great

[36] In line with the decision in *R. v. Crofts* (1996) 88 A Crim R 232.

[37] Trial judges often have access to a standard set of directions compiled by their senior colleagues which 'model' how to address on particular areas of law (Bronitt, 1998: 47). In Victoria, I became aware that Judge Kelly had compiled a guide for County Court judges to use when directing in sexual offence proceedings, although I was unable to establish whether the corroboration warning as appears in this paragraph formed part of the guide.

> care and paying heed to the strong warning it is my duty to give to you, you are satisfied beyond reasonable doubt of its truth and accuracy. [Trial 31]

In two such trials, the case circumstances appeared to sit more squarely with the principles espoused in *Longman* [Trials 10 & 27]. Here judges might reasonably have felt obliged to give the more traditional corroboration warning or face the real prospect of being appealed, particularly given that both cases involved substantial delays in reporting offences that were alleged to have occurred when the complainants were young teenagers.[38]

The trial judges in both these cases gave strong corroboration warnings that emphasised the dangers of convicting the accused men in the absence of independent supportive evidence and highlighted the degree to which the antiquity of the offences precluded a more thorough investigation. What separated these trials, however, was each judge's approach to exercising his discretion to give the jury a full *Longman* warning.

In the older of the two cases, the judge foreshadowed with counsel his intention to give a traditional corroboration warning well before the complainant had finished giving her evidence. He also distinguished this from his usual practice of merely telling the jury that they ought to 'scrutinise [an uncorroborated complainant's] evidence with special care and attention'.[39] Forewarned, the prosecutor was able to put a Crown spin on the warning that would follow and highlighted for the jury those features of the evidence that could be used to support the allegations.

In direct contrast, the judge in the second matter openly revealed his position by questioning the merits of prosecuting delayed reports of rape, perhaps exposing his

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[38] One woman had waited twenty years before a police investigation resulted in charges being laid against the offender. She had first reported to the police ten years after the rape occurred but had never heard from them again. A police constable who gave evidence at the trial in 1997 said, 'off the record' that the police sergeant at that time had been renowned for simply throwing rape victims' statements in the bin, believing them nearly always to be false. The complainant in the second of these trials had gone to the police nine years after the assaults were alleged to have occurred after seeing one of the accused at a wedding. She said he had gloatingly smiled at her throughout the evening.

[39] The judge also mentioned as an aside how his much milder version of the old corroboration warning had so far survived the scrutiny of the appellate court.

views on rape cases more broadly, when he opted to caution the jury with one of the strongest corroboration warnings heard throughout the research period. Firstly, he prefaced his directions by alerting the jury to a 'current trend' in the community to readily assume the truth of rape allegations:

> whenever a person, particularly a girl, says that she's been raped then she must be telling the truth and the person that she names must be guilty just because she says so. That's grossly unfair to the accused person....if it has not been committed then there can't be a victim of that offence. Indeed if there has been no crime but a person for some reason says that there has been a crime committed then if anyone is a victim it's the person wrongfully named. And it is unfortunately not something unheard of in these courts for a person to wrongfully accuse another and to effect thereby an injustice [Trial 27].

The jury later heard from him that to convict the accused men[40] might not only be 'dangerous' but could amount to a 'miscarriage of justice' given the length of time that had passed and the lost opportunities for the accused men to mount proper defences. As to what motive the complainant would have to falsify allegations against the two accused, the judge suggested that, 'we will never know why Mrs [X] *wasn't telling the truth...*' [emphasis added].

It was hardly surprising that the jury delivered verdicts of acquittal some forty minutes after they retired.[41] In another trial, where the form of the warning was particularly powerful, the jury responded even more swiftly and returned within twenty minutes to acquit the accused of all charges [Trial 2].

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[40] Two men were charged with raping the complainant, one as an accomplice to assaults perpetrated by the principal offender.

[41] This trial depicted some of the worst examples of legitimised system abuse that I have encountered in recent years. Not only was the complainant subjected to extensive questioning around her sexual history, she was also asked to confirm details contained in her counselling file which had successfully been subpoenaed by the defence. She was further harassed by one of the defence barristers, who snickered and taunted her throughout her evidence without a trace of judicial intervention. Court support had not been provided for her (although support had been made available for the accused men) and she had never met the prosecutor prior to the trial going ahead. She sat on her own outside the courtroom while the accused men occupied the next bench. This trial was held in 1998.

While juries listening to cases involving delayed disclosures of sexual assault appear to be the most likely recipients of *Longman* warnings, other judges appeared faithfully to observe the principles of the High Court decision even in cases where there was no delay in complaint and where other evidence was in fact available to support the allegations.

In three such trials, there had been immediate disclosures. One woman had endured several hours of being held captive by the offender during which time she sustained cuts and abrasions to her face and other parts of her body [Trial 9]. She reported to police after seeking comfort and support from her boyfriend. The second trial related to offences that had effectively been interrupted by a person knocking on the door after hearing the complainant screaming. Blood matching the complainant's type was found on the carpet, and the accused conceded that he had become angry and frustrated at her refusal to engage in sexual intercourse [Trial 17].

In a third trial, the jury viewed photos of the complainant's bruised face and eyes and learned of a police report having been made within days of the offences [Trial 31]. The complainant's daughter gave evidence at the trial because she witnessed some of what had occurred. A neighbour also recounted how the complainant, when disclosing the rapes and assaults to her, was nursing two black eyes.

Nonetheless, judges in all three of these trials declared themselves 'duty bound' to warn the jury against convicting the accused on the unsubstantiated word of the complainant. The only implication was that, despite the additional corroborative evidence, the jury could not discount the accused's version in so far as the defence offered an adequate explanation for the existence of injuries or the testimony of other witnesses.[42]

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[42] The accused each respectively claimed that the injuries were a result of rigorous sex, the result of an existing medical condition and, in the third trial, that the bruising had been self-inflicted. The judges in these trials may have been adhering to the legal distinction established by English Lords during the early 1900s between evidence that was merely said to be *supportive* of the allegations and evidence capable of *corroborating the specific issues being contested* in the case. According to Bronitt (1991), for the evidence to be corroborative under this interpretation, it must do more than be suggestive of, or consistent with, the complainant's account; it must independently confirm that the rape actually occurred. In this context, as Mack points out (1998: 60), physical injuries would fall short of offering corroboration, especially if the accused claimed the injuries were also consistent with his account of vigorous consensual sex.

The preparedness of the trial judge to give a traditional corroboration warning in the second of these three trials revealed a particularly strong judicial bent towards a conservative interpretation of the decision in *Longman*. According to this long serving member of the County Court bench, the case certainly warranted a strong corroboration warning given the consumption of alcohol and the fact that the accused and the complainant 'were alone together' when the offences occurred - the judge here referring to features common to a majority of rape cases prosecuted [Trial 17].

With minimal opposition from the prosecutor, the judge went on to express these same sentiments to the jury. He prefaced the warning by reminding them that:

> [the complainant's] own evidence indicates that she had consumed eight glasses of wine...that [C] has given two different accounts of the events that terminated the evening...that there was no evidence of disturbance of the furniture...she did not suffer any injury ...or damage to her clothing [Trial 17].

Seemingly concerned that the jury might form the erroneous impression that corroboration warnings were given solely in sexual assault cases, the judge assured them it was the circumstances that required it, not the nature of the case. Although, upon exception by the defence, the trial judge agreed to further emphasise how this warning was a requirement of law and not just a matter of judicial comment, consistent with the additional onus created by the decision in *Omarjee*.[43]

Having perhaps already experienced the latitude allowed for by *Longman*, some barristers also became adept at convincing trial judges of the appropriateness of a warning, in the light of *Longman*, even despite the judge having first formed an impression that no such caution was necessary. Consider the following case.

The trial was one of five listed to proceed against a masseur who was said to have been sexually assaulting his clients over several years during their massage treatment [Trial 26]. The complainant was the first to give evidence in a trial where the accused was charged with digital rape and indecent assault. The accused denied

[43] See p. 153 of this chapter.

committing the offences, claiming that he merely offered support to the complainant for the emotional difficulties she was suffering. The only physical contact between them had been 'a little camaraderie kiss and hug' allegedly initiated by the complainant at the end of a session. Although six years had passed before a police investigation was prompted, the complainant had disclosed to her psychologist within a month of the assaults having occurred.

At the end of the trial, the judge pre-empted her charge to the jury by declaring that she was not proposing to give a *Longman* warning as the case was not 'of great antiquity' and involved an adult complainant who made a reasonably proximate complaint to her psychologist. Rather, Her Honour planned to simply draw the jury's attention to the 'oath against oath' nature of the trial where any conviction would require them to positively reject the account offered by the accused, while being satisfied of the truth and reliability of the complainant's account.

The defence immediately objected, strongly suggesting that the complainant's psychological state at the time, coupled with a lack of corroborative evidence, adequately qualified the case for a *Longman* warning. The prosecutor, on the other hand, supported the judge's initial assessment, using a narrower interpretation of *Longman* to argue that a warning need only be given to avoid a perceptible risk of a miscarriage of justice in circumstances similar to those outlined in the Longman case.

With little further discussion, the judge shifted from her initial position and claimed it was 'a borderline case...and that being so, I propose to give it [the warning]'. The jury subsequently heard that it would be 'dangerous [for them] to convict' in the absence of corroboration unless they were thoroughly convinced of the complainant's evidence, and that this cautionary direction was being given to them with 'the full weight of [her] judicial authority'. The jury were then reminded by the judge that the complainant had been seeing a psychologist around the time of the offences to work through issues related to the impact of childhood sexual assault.

Similarly, in another trial, while falling short of using the term "corroboration", the trial judge spent considerable time particularising those factors said by the defence to

impugn the complainant's credibility and, in this light, suggested the jury 'scrutinise carefully the evidence of the complainant before act[ing] upon it'. In attempting to offer a balance of the two differing accounts, the judge went on to identify evidence that could be said to provide independent support of the complainant's claims.
At the conclusion of his address, the defence barrister fiercely objected to the last of the judge's comments and suggested they were grounds for the jury to be discharged. Rather reluctantly, the trial judge agreed to prepare a long re-direction whereupon the jury heard the following extended version:

> ...so I have warned you of the potential unreliability of the evidence of the complainant, and I have drawn to your attention the dangers inherent in such evidence...I told you that I was giving those directions because I'm required by law to do so, and it may well have been that I sounded grudging in that statement which I made...Now [I am] required to give judicial emphasis to the instruction in relation to the dangers inherent in the evidence of the complainant, I'm required by law to give judicial emphasis to those instructions. I simply say to you that those instructions must carry with them the authority which is invested in me as a judge of the court. So I have to give judicial emphasis and I do give judicial emphasis to those instructions. [Trial 20]

The jury's verdict of not guilty followed after just over three hours of deliberations.

While these nine cases may represent the most direct examples of an effective reintroduction of the traditional corroboration requirement, they are by no means the only mechanisms through which the continued significance of corroboration figures in contemporary rape trial discourse.

For some judges, the abolition of corroboration warnings has been given a literal interpretation so that the issue is reduced to an exercise in semantics. For example, in one of the trials observed, when asked by the defence to redirect on an aspect of evidence he had wrongly suggested corroborated the victim's evidence, the judge commented that 'we don't talk about corroboration any more, we talk about supportive evidence' [Trial 5]. A judge interviewed for the Victorian Evaluation Study referred to the 'half way house' that allowed him to 'do the fair thing by

everybody by highlighting to the jury the need to carefully consider the complainant's evidence' without explicitly talking about corroboration (Heenan & McKelvie, 1997: 330).

However, on the retrial of an accused represented in the current study, there was little to distinguish this kind of hybrid warning from the more blatant "dangerous to convict" versions reported earlier, except for the deliberate omission of the word "corroboration". Before providing the jury with a summary of the evidence, the judge in this case alluded to 'a very important warning' he would give them regarding how to assess the complainant's evidence. He later advised the jury of the:

> ...need to carefully scrutinise her evidence...[to] scrutinise her evidence with special care...all the more so in this case because there is no real independent evidence of what took place. [Trial 14]

Although tempered by the judge's acknowledgment of how unusual it would be for there to be evidence of corroboration given the circumstances, the jury's confidence in relying solely on the complainant's word alone in convicting the accused is likely to have been substantially reduced.

Other judges used similar approaches in cautioning the jury to 'scrutinise' the complainant's evidence 'with great care', although rarely did they leave this aspect of their charge without adding that the complainant's evidence could be relied upon to convict the accused as long as the jury were properly satisfied of its truth and reliability.[44] One other judge prefaced his "compromise warning" by making plain that his comment on the complainant's evidence was not meant to imply that sexual assault complainants are second-class or suspect witnesses. However, he went on to say (somewhat mysteriously) that he made these comments 'in the interests of justice'.

[44] Young's earlier research in New Zealand suggested this kind of confusing warning was 'almost a contradiction in terms' where the jury are told on the one hand to look for corroboration before convicting while at the same time being told they can deliver a guilty verdict if they are satisfied of the truth of the complainant's evidence (1983: 141).

Regardless of the position that judges themselves may have adopted, barristers also employed a variety of measures for suggesting corroboration was important for juries in determining the believability of rape accounts. For defence barristers, this was often couched in language that encouraged the jury to revisit the archetypal image of the rape victim as the battered and bruised, hysterically distressed woman. Such an image would then immediately be contrasted with the appearance and behaviour of the complainant and the lack of any medical or physical evidence to support her complaint: 'you just have words here to deal with'[Trial 30] ; 'not a singie piece of furniture was disturbed' [Trial 17]; there was no evidence 'of the condition of her panties'[Trial 6]; 'there was not a single sign of injury to her which is consistent with her account only' [Trial 9]. While acknowledging that the law no longer required corroboration, some defence barristers would nevertheless submit how "helpful" it would have been for the jury to be able to match the complainant's testimony against other evidence from an independent source.

Conversely, where there was evidence of corroboration, prosecutors never failed to capitalise on it in a bid to strengthen the Crown case. The presence of physical injuries, the findings of medical examinations and the levels of distress witnessed by other people around the time of the offences would repeatedly be highlighted for juries as proof that the complainant was telling the truth.[45] Osborne has also referred to the readiness of prosecutors to concentrate on evidence that could be seen as independent of the complainant, tacitly reinforcing the view that rape allegations, on their own, should be viewed by juries with 'a jaundiced eye' (1985: 50).

In one case, the jury were even urged by the prosecutor to disregard the complainant's testimony altogether and to concentrate on the injuries she sustained [Trial 5]. 'It doesn't matter if you don't think much of her as a witness', the prosecutor said dismissively:

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[45] Similar to the legal status afforded to evidence of complaint (see Chapter 1, section 1.3.3) juries are instructed to treat any evidence of the complainant's distress as merely consistent with how one would expect a person to behave following a sexual assault. It is not evidence capable of corroborating the fact that a sexual assault occurred. The jury are further reminded that 'some *people* cry more easily than others' when evaluating the significance of any distress displayed by the complainant at or around the time the assaults were alleged to have occurred (see *R. v. Redpath* (1962) 46 Cr App Rep 319 and *R. v. Flannery* 1969 V.R. 586; emphasis added).

> [just focus on] her injuries, [and] the bruises that were photographed...that's why her credit isn't important...because of her injuries...once you keep that in mind [the doctor's evidence]...that's your starting point [Trial 5].

The doctor's evidence was constructed as a far more tangible, far more reliable basis for convicting an accused man of rape than the word of a non-English speaking background woman whose reliance on an interpreter, coupled with her cultural identity, was used to suggest she was unreliable, inconsistent and prone to exaggeration.

After stressing how 'prudent and wise [it would be] to look for independent evidence', the judge in this trial, much to the discomfort of the defence barrister, reverted to the traditional approach of itemising for the jury the evidence that was 'capable of supporting her story', including the medical evidence.[46]

One prosecuting barrister chose a different tack by applauding the shift in the legal situation that had removed the requirement of corroboration to quell any preoccupation the jury may have had with an absence of physical and other material evidence to support the complainant's account:

> We're close to going into the third millennium...no longer does a woman have to exhibit her wounds of resistance as her badges of non-consent....[or] to produce damaged clothing....She just has to say 'no', and she did.

Even here, however, the defence response was intended to deliberately mislead the jury by suggesting that they disregard the legal status of corroboration and asserting that 'generally in rape cases there is some violence' which should produce independent material evidence. While careful to avoid using the word,

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[46] A judge interviewed for the Victorian Evaluation Study described how advantageous the corroboration requirement had been for the prosecution if corroborative evidence had in fact been available. In these circumstances, the trial judge could opt to methodically list those features that were legally capable of corroborating the complainant's account (See Heenan & McKelvie, 1997: 329).

"corroboration", the judge later endorsed this position by further remarking on the absence of torn clothing and physical violence as part of the assault.

In an unusual turn of events, a prosecutor in another trial actually applied to the trial judge for a *Longman* warning to be given [Trial 12]. He was apparently concerned about the likely implications of a guilty verdict being overturned on appeal should the defence suggest that in the context of delayed complaints of rape a more traditional corroboration warning ought to have been given.

Other prosecutors, experienced in the application of *Longman*, similarly favoured "getting in first" by telling the jury they were likely to hear a very serious warning from the trial judge about the importance of looking for corroboration. By directly addressing the issue of physical injuries and witness accounts rarely figuring in rape complaints, these prosecutors attempted to counteract the impact a corroboration warning was likely to have on a jury's deliberations.

In this context, a prosecutor who had been warned by the trial judge of his intention to give a 'full *Longman* warning' carefully assembled all of the evidence that could be used to support the complainant's story. He suggested to the jury that they ought to believe the complainant was raped by the accused '(a) because she said so and (b) because the alternative version provided by [the accused] is unbelievable'. He then went on to particularise those features of the evidence that were consistent with her account of what happened [Trial 10].

This discursive approach to the notion of corroboration within any one trial is likely to have proved difficult for juries to reconcile. On the one hand they were faced with mandatory directions that directed them against using the existence of physical injuries and any perceived failure on behalf of the complainant to protest or physically resist as evidence that she was freely agreeing to the sexual activity in dispute[47], while on the other, they were discouraged by defence barristers (implicitly by some prosecutors) from convicting the accused in the face of rape complainants' unsupported testimonies.

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[47] Section 37(b) of the *Crimes (Rape) Act 1991*, Vic.

4.5 Concluding Comments

The legal requirement of corroboration formalises the most pervasive, deeply entrenched perception that there has ever been about rape - that women, for whatever reason[48], are prone to lie about it (Henderson, 1992). The currency of this (mis)conception has remained steadfast through the various echelons of the legal and judicial professions[49], and amongst legal writers who continue to extol the virtues of customary warnings in rape cases regarding corroboration (Naffine, 1992). Indeed Waller and Williams, authors of one of the most significant legal texts of today, suggest in their 1997 publication that the statement that rape allegations are easily made and hard to defend 'remains as true now as when it was written' (Waller and Williams, 1997: 90).

Although legislation made discretionary that which was mandatorily heard by jurors for centuries, the practice of warning juries about convicting solely on the uncorroborated word of a rape complainant remained unchanged. It was not until 1991 that the Victorian legislature abolished the corroboration requirement and removed the obligation on judges to advise juries that women who claimed to have been sexually assaulted were in and of themselves an unreliable class of witness.[50]

There is evidence that at least initially the legislation was effective in changing the practices of the courts. However within a relatively short period of time, the authority of the High Court decision in *Longman* had filtered through the legal chambers of most counsel and trial court judges, with the effect that the use of corroboration warnings was reappearing in a significant proportion of rape trials.

There are at least two major problems that have affected the practical implementation of reforms in this area. Firstly, too much stock was placed on the

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[48] And 'sometimes for no reason at all' according to Lord Justice Salmond whose infamous epitaph on the dangers of uncorroborated rape allegations has often been recited by judges in contemporary rape trials. See *R. v. Manning; R. v. Henry* (1968) 53 Cr App Rep 150 at 153.

[49] A recent example is provided by the legal response to proposals in Hong Kong to abolish the corroboration warning. The Hong Kong Bar Association strongly objected to the removal of such 'common sense safeguards' for the sake of 'political expediency', especially 'when the experiences of those closely involved in their application suggest they are both practical and necessary and in the overriding interest of justice' (Letter sent by the Chairman of the Special Committee on Criminal Law and Procedure of the Bar Association to the Legal Policy Division of the Department of Justice, dated June 3, 1999.)

amendments themselves to drive out what has been thoroughly enshrined within law's apparatus for hundreds of years. Legislatively prohibiting any reference to women as an unreliable *class of witness*, whilst celebrated by law reformers, also blinded them to the potential within law's practice to modify these same sentiments to account for the particularised or individualised rape complainant being seen as unreliable, as was the situation in *Longman*.[51] Secondly, the safeguard clause contained in Section 61 sub-section 2, that judges retained a discretion to make any comment on the evidence 'that is appropriate to make in the interests of justice' should have signalled how conditional the amendment would be on the discretionary power vested in individual judges presiding in rape trials. As Scutt insightfully foreshadowed:

> As all judges have been trained in a legal system which solidly subscribes to the notion of woman-as-incredible in sexual offences, for a judge not to continue to apply the corroboration rule in the same way...would be extraordinary (1993: 10).

The ease with which cases such as *Longman* and *Crofts* were accepted as authoritative in trials that followed undoubtedly showed the fragility of the changes that could so easily be subverted, reinterpreted and rewritten to restore the status quo. As the cases in the current study reveal, the legislation attempting to curb corroboration warnings was effectively made symbolic by the High Court decisions so much so that barristers can now be heard to explicitly call for a "*Longman* warning" when applying for the traditional caution to be given.

While the legal sanctioning of corroboration warnings can largely be attributed to *Longman*, this does not entirely explain the ease or the vigour with which they were reinstated within trials by large segments of the legal profession and the County Court bench. The types of circumstances deemed appropriate for the issuing of corroboration warnings were widely interpreted by trial judges in the present study. While cases involving significant delays in complaint were likely to result in strong

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[50] Section 61 of the *Crimes Act 1958 (Vic.)*.

[51] The High Court made this abundantly clear in criticising any legislation that would carte blanche abolish a judge's discretion to give juries a warning when the evidence relies on the uncorroborated

corroboration warnings, the circumstances under which some judges were persuaded to give "full *Longman* warnings" covered a much wider spectrum of case circumstances, so that the criteria for evoking a corroboration warning appeared less like the features named in *Longman* and more like those of most rape trials. So that in circumstances where the jury were left to distinguish "oath against oath", or where the defence suggested that the complainant was said to have some motive for making false accusations, or in situations where there was no independent evidence to support the allegations, judges obligingly cautioned juries against conviction (Tannin, 1996; Mack, 1999).

Cases in the current study also revealed the inconsistency of approach which some judges took in acceding to or refusing applications to give corroboration warnings. In some trials, judges seemed to have predetermined their position with respect to providing a *Longman* direction and would pronounce their intention to give the warning without inviting any debate from the bar table. In others, judges responded to defence applications which almost routinely resulted in versions of the corroboration warning being given, even where the judge had initially formed the impression that a corroboration warning would not be necessary.

Moreover, a judge's preparedness to give a traditional corroboration warning did not always accord with other aspects of how a trial had generally been conducted. In some of the trials I observed, judges who appeared sensitive to the distress of the complainant, strongly interventionist during cross-examination and careful to observe the content of the new directions around consent, were in fact the authors of some of the strongest corroboration warnings. This occurred even in cases where there were proximate complaints and physical evidence available to support the allegations.

By contrast, the unique examples offered by two of the trials I observed, where judges refused to give corroboration warnings in the face of strong applications by defence barristers and in circumstances that were akin to those represented in *Longman*, indicate that the re-establishment of corroboration warnings in rape trials

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word of the complainant. This, they stated fairly dramatically, would be to 'sterilize the trial judge's

may be the subject of some judicial dissidence. Judges in Victorian and other state jurisdictions have also publicly stated their concern about the overly broad interpretations applied to *Longman*.[52]

Overall, however, the implications of the study's findings are considerable. The effect of current trial practices with respect to corroboration is likely to have spread to other aspects of the legal management of sexual assault cases, including the reporting, charging and prosecution of rape offences. Trials involving adult victim/survivors of childhood sexual assault had only recently appeared before the courts with any frequency. Research conducted by the Criminal Justice Statistics and Research Unit (Ross & Brereton, 1997) showed that the greatest change to trends in reporting sexual assault was in relation to victims of childhood sexual assault and victims of familial sexual abuse, traditionally amongst the least likely to report their victimisation to police (Scott et al., 1990). Corresponding changes to police and prosecutorial practices have likely contributed to a greater number of cases of past sexual assault, including those involving intra-familial rape, coming before the courts (Heenan and McKelvie, 1997: 36)

By the mid 1990s, the situation revealed how changeable the social and legal climate in Victoria remained for women reporting experiences of long-term childhood sexual assault. An extended period of a Liberal government in Victoria, which championed the cause of economic rationalism and deregulation, brought considerable pressure to bear on the budget of the Office of Public Prosecutions, large funding cuts to Legal Aid and a substantial decrease to the numbers of police.

Organisations attuned to greater accountability and productivity requirements, in the context of the criminal jurisdiction, inevitably became preoccupied with cases that had a better than reasonable chance of success. At a recent Legal Education and Training course, Community Policing Squad members spoke candidly of an informal directive that was circulated to members informing them that for any sexual assault

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ability to secure a fair trial' (*R v. Longman*, (1989) 168 CLR 79 at 86).

[52] During a Judicial Seminar where I co-presented a session in South Australia on "Sexual Assault and the Law", the Chief Justice of the Supreme Court commented to his colleagues that *Longman* warnings were inappropriately being given in situations that would readily survive appeal if applications were lodged against conviction on the basis of a trial judge refusing to provide one.

matters to be authorised for prosecution there must be additional corroboration to substantiate the allegations made (June 25, 1999).[53] In New South Wales, the Director of Public Prosecutions formalised this process by cautioning lawyers against going ahead with cases where there was no immediate complaint and where 'different versions of the events [had] been given' (Herald and Weekly Times, 17 September, 1998).

If only the "strongest" allegations result in defendants being charged, those cases appearing before the courts are likely to more closely resemble the atypical rape scenario where physical injuries and other independent evidence is available to support the complainant's account. That complainants may also face being cross-examined by offenders who have been unable to obtain Legal Aid further reduces the likelihood that the reporting and prosecution of sexual assault, particularly for cases involving delayed complaints or intra-familial abuse, will continue to improve.[54] Indeed recently, the (former) Chief Commissioner of Victoria Police proudly announced that reports of rape had dropped by as much as 22%.[55]

Given the experience of other jurisdictions, perhaps no one ought to be surprised that the potential of the legislation has fallen far short of its mark in limiting the extent to which corroboration warnings are given. While the findings revealed some predictability regarding the kinds of cases more likely to activate the full *Longman* warning, on other occasions the discretionary scope afforded to judges provided the legal space through which competing meanings about the behaviour of rape complainants and the circumstances surrounding offences were apparent. What therefore emerges as particularly significant from the present study are the discursive mechanisms used across courtrooms, jurisdictions and dominant sections of the legal

[53] A fear of being sued for "malicious prosecution" had also begun to surface. A small number of defendants charged with sexual assault had successfully sued Victoria Police in this context with courts ordering that costs be deducted straight from the police budget.
[54] On two separate occasions during 1998 Victoria Legal Aid refused to fund legal representation for defendants in sexual assault matters, resulting in complainants having to face the ordeal of being questioned by the alleged offenders themselves (see for example *The Age* newspaper, December 16, 1998, p. 24). This followed several reported instances of defendants in English courts using the opportunity to further 'dominate, intimidate or humiliate the complainant' ('Sit Down Girlie', 1998: 190). Guidelines now exist in English Courts for judges to question complainants in situations where the accused is representing himself.
[55] Reported in *The Age* newspaper, August 8, 2000, p. 4.

profession which resulted in an effective reintroduction of the sanctity of corroboration warnings in the adjudication of rape accounts.
It is not simply a case of arguing the limitations of the amendments, or of criticising the practices of a conservative judiciary, or of accusing the High Court of widely interpreting the scope of the legislation, or even to contemplate the impact of a changing socio-political climate. Far more complicated, it seems, are how these processes interact to produce the circumstances under which most courts will revert to a conservative understanding of rape events. Other competing considerations are revealed by the small number of judges who refused to deliver traditional cautionary directions to juries despite the rulings of the High Court and the more direct pressures being applied by defence barristers in court.

The next chapter will explore these processes further in the context of the provisions intended to substantially reduce the legal relevance attributed to women's past sexual histories, particularly in trials where consent was the principal issue in dispute. The extent to which rape complainants' sexual pasts continue to mark trial discourse also provides a fitting backdrop to the underlying stories of consent that are examined in Chapter 6. There, alongside what is considered a more communicative legislative model, contests over the meanings and interpretations that should shape the final determination of juries' verdicts are discursively constructed across a range of paradigms informed by both traditional and alternative legal and cultural understandings of rape.

CHAPTER 5

Carving the eternal legal space for the 'substantial relevance' of sexual history evidence in rape trials

5.1 INTRODUCTION

The extent to which women's sexual history has remained an important part of the cross-examiner's repertoire during a rape trial has occupied an important locus of feminist agitation and review. During the 1970s and 80s, legislatures across the Western world were moved to introduce laws that would denote an "in principle" objection to the practice of challenging women's accounts of rape through the detailing of their sexual reputations and histories.[1]

Largely this was based on a recognition that the law could no longer justify the prejudicial and gendered grounds upon which women's veracity and credibility were traditionally measured against varying degrees of chastity. Not only was women's treatment in rape cases seen to reflect sexist practices and applications of the law, but it was identified as one of the most distressing aspects for women giving evidence in a rape trial (Real Rape Law Coalition, 1991; Temkin, 1993).

While the introduction of restrictions on the admission of sexual history evidence represented the first major step towards mobilising political and broader community support for improving the conditions faced by rape complainants, their application continued to remain a permanent target of feminist law reform agendas throughout the next decade. As research repeatedly highlighted the extent to which courts continued to sanction the exposure of rape complainants to character attacks based on their past sexual experiences, the provisions were criticised as nothing short of legislative tokenism (Scutt, 1979; Newby, 1980; Marsh, et. al, 1982; Adler, 1982, 1985, 1987; Brown et. al, 1992; Temkin, 1984, 1993)

[1] Examples are the English *Sexual Offences (Amendment) Act 1976*, Canada's *Criminal Code Amendment Act 1975*, and New Zealand's *Evidence Amendment Act 1977*.

In Australia, the admission of sexual history evidence continues to attract critical scrutiny. More recently, in Victoria (Heenan & McKelvie, 1997), New South Wales (Department For Women, 1996) and Tasmania (Henning, 1996) studies have documented the frequency with which sexual history evidence still pervades the rape trial. While the states vary with respect to the precise mechanisms through which they restrict or regulate the admission of sexual history evidence, there is no legislature that has introduced a blanket prohibition on its use. Most have adopted a framework that still allows for some judicial discretion for determining the relevance or probative value of sexual history evidence based on the specific circumstances presented in each case.[2]

Victoria's provisions as they exist today are statutorily stronger than those of the ACT, but not as restrictive as those governing New South Wales.[3] They could perhaps fairly be described as the middle of the range model where evidence of a complainant's general reputation 'as to chastity' is completely prohibited[4] and evidence of prior sexual history/ proclivities/activities (including with the accused[5]) may be admitted only where the requisite threshold tests are adequately met.

The first avenue of discretion allowed for under the Victorian provisions requires that the court first be satisfied of the 'substantial relevance' of any sexual history evidence to the disputed issues in the case. The second discretionary arm permits the introduction of evidence if cross-examination of an issue related to sexual history or past sexual conduct would significantly place the complainant's credit in question.

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[2] Section 1290 of Queensland's *Evidence Act 1977*; Section 43 of South Australia's *Evidence Act 1929*; Section 76G of the ACT's *Evidence Act 1971*; Sub-Section 36B-BA of Western Australia's *Evidence Act 1906*; Section 4 of the Northern Territory's *Sexual Offences (Evidence and Procedure) Act 1983*; Section 102A of Tasmania's *Evidence Act 1910*.

[3] The legislation in New South Wales is distinctive for its general prohibition on sexual history evidence apart from five limited exceptions. This more restrictive model was specifically intended to curtail the wide judicial discretion that had proved largely ineffectual in preventing the introduction of sexual history evidence in other states.

[4] All Australian jurisdictions have legislatively prohibited the admission of evidence that relates to the complainant's sexual "reputation".

[5] In the ACT, NSW, South Australia and Queensland the provisions do not extend to cover activities with the accused.

The sole legislative guides available to inform the interpretation and application of Section 37A are located in the *Evidence Act 1958* (sub-section 4) where it states that:

> Evidence that relates to or tends to establish the fact that the complainant was accustomed to engage in sexual activities shall not be regarded-
>
> (a) as having substantial relevance to the facts in issue by virtue of any inferences it may raise as to general disposition; or
>
> (b) as being a proper matter for cross-examination as to credit in the absence of special circumstances by reason of which it would be likely materially to impair confidence in the reliability of the evidence of the complainant.

Case law relevant to interpreting the scope of judicial discretion in this area is similarly lacking in clarity. In terms of assessing issues of credit, for example, the leading guide on interpreting the *Evidence Act* in Victoria provides the following advice which is fundamentally tautological:

> Cross-examination purporting to go to credit is impermissible unless an acceptance of the truth of the matter suggested would in truth affect credibility (Cross on Evidence, Butterworths, Vol. 1 (at 53) 17185).[6]

Any impact that the admission of sexual history evidence is likely to have on complainants giving evidence in sexual offence hearings is an area upon which the Victorian legislation remains silent.[7] Notionally, the adjudication of applications

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[6] Although the authors concede that, 'this is necessarily not a topic on which citation of decided cases affords much general guidance' (Cross on Evidence, Butterworths, Vol. 1 (at 53) 17185).

[7] Other state legislatures have seen fit to impose some statutory addendum to the legislation that the court must consider the potential of the evidence to cause embarrassment, distress or humiliation to the complainant. See s102A of the *Evidence Act 1910 (Tasmania)*; s34i of the *Evidence Act 1929 (SA)*; s36BC of the *Evidence Act 1902 (WA)*; s409B of the *Crimes Act 1900 (NSW)*.

therefore rests with a consideration of the technical legal merits of admitting the evidence in light of how the prosecution and defence put their case.

This chapter begins by considering the number of occasions where women-complainants' sexual histories were introduced as part of the evidence heard by juries in the trials observed. These include instances where applications were made and ruled upon as well as occasions where the evidence was admitted illicitly or without the court's permission. The findings are then compared with those generated from other recent Australian studies, particularly those of the Victorian Evaluation Study which focussed on trials that proceeded during the first half of the 1990s.[8]

While quantitatively monitoring the frequency with which sexual history evidence is heard by juries in rape trials remains important, the research approach and questions guiding this thesis are more specifically aimed at obtaining a greater insight into *how*, after twenty years of feminist activity and law reform, sexual history evidence can still readily be introduced as a relevant consideration for the legal determination of rape allegations. This chapter therefore focuses on the kinds of mechanisms used by barristers and judges in assessing women's sexual histories as being relevant for determining the disputed facts of the case or as legitimate grounds for discrediting the reliability of rape complainants.

5.2 How Frequently was Sexual History Evidence Admitted

The findings from this study point to an increase in the proportion of trials where prior sexual history featured in the evidence. Twenty-six out of the 34 trials or 76.5% included evidence of the complainant's sexual history, proclivities or sexual reputation.[9] In comparison with other recent studies of rape trials, even taking into

[8] Most of the cases reported in the Victorian Evaluation Study were prosecuted during 1992 and 1993 allowing the current study, which included trials that proceeded during 1996 to 1998, to provide some comparative insights into the ongoing use of sexual history evidence in rape trials.
[9] See the table in Appendix 3 with respect to the admission of sexual history evidence for individual trials.

account their methodological differences in collecting and analysing the data[10], the current study contained an unexpectedly high number of instances where sexual history was admitted.

Table 2
COMPARATIVE STUDIES OF SEXUAL HISTORY EVIDENCE IN SEXUAL OFFENCE PROCEEDINGS

Comparative Studies of Sexual History Evidence Admitted	Number of Cases	Percentage %
Current Study	26	76.5%
Victorian Evaluation Study[11]	48	52.2%
New South Wales Study[12]	70	63.0%
Tasmanian Study[13]	46	60.0%

There also appears to be, at least in Victoria, a progressive increase in the proportion of trials where sexual history evidence is admitted. The first comprehensive study conducted by the Victorian Law Reform Commission which was on trials processed during 1989, revealed just under a quarter of complainants (23%) were the subject of successful sexual history applications, with a further 6% being asked questions without the trial judge's permission (1991b: 101). This compares with 40% of complainants in the Victorian Evaluation Study being questioned following successful applications and

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[10] For instance, in the Tasmanian Study, Henning cites the number of 'cases' in which sexual conduct evidence was introduced and relies on transcripts from both committal and trial proceedings relating to offences of rape, aggravated sexual assault, incest, indecent assault and unlawful sexual intercourse with a minor (1996: 6-7). The Department For Women researchers in New South Wales relied on 'trials' for 'sexual assault' offences where evidence of sexual experience was raised, but thereafter analysed the number of 'instances' to accommodate trials where there were multiple occasions in which the evidence was admitted (Department For Women, 1996: 28, 231). The Victorian Study reported on the number of 'rape complainants' who were asked sexual history questions, not the number of individual trials represented by these figures (Heenan & McKelvie, 1997: 127 & 132).

[11] For the purposes of this table, I went back to the raw data from the Victorian Evaluation Study to isolate the number of *trials* where sexual history evidence was admitted.

[12] Department For Women (1996: 231). The study also reported on 13 trials where evidence of sexual reputation had been raised (1996: 230). The extent to which these cases may also have been represented amongst the 70 where evidence of sexual experience was introduced was unclear.

[13] Henning (1996: 88).

30% of complainants being subjected to questioning without prior approval being obtained (Heenan & McKelvie, 1997: 127 & 134).[14]

More generally though, the findings from these studies also highlight the importance of considering the number of *occasions* on which sexual history evidence is admitted during a rape trial. This measure recognises the probability that a single complainant might well be the subject of several areas of cross-examination in relation to her sexual past. For example, in any one trial a complainant might be asked, with the permission of the trial judge, to recount the first occasion upon which she had had sexual relations with the accused (successful application). She might then be asked, without any permission being sought, to detail the nature of a previous allegation of rape she made to the police (which would constitute a breach of the provisions). During the same trial, another witness altogether might be allowed to comment on his/her knowledge of some aspect of the complainant's sexual experience (a second successful application).[15]

Table 3 shows that of the 26 trials identified in the current study evidence of prior sexual history or activities was introduced on 36 separate occasions.

Table 3
OCCASIONS WHEN SEXUAL HISTORY EVIDENCE WAS ADMITTED

Occasions Sexual History Evidence Admitted During Trials Examined	Trials	Total Number of Occasions
Single topic area/occasion	18	18
Two areas/occasions	6	12
Three areas/occasions	2	6
TOTAL	26	36

[14] These percentages should not be combined given that a proportion of the complainants asked sexual history questions with the court's approval may also be represented amongst the 30% of complainants who were questioned without prior permission.

[15] Section 37A (1)(2b) states that '*no evidence* shall be admitted as to the sexual activities of the complainant'. This means that the restrictions on questioning apply notably to the complainant but also to other witnesses [emphasis added].

In 18 of the 26 trials, sexual history evidence was introduced on a single occasion during the trial; in six trials, two areas of sexual history questioning were covered; and in the remaining two trials, three occasions or areas of questioning relating to the complainant's sexual life were canvassed before the jury.

Table 4 further distinguishes whether these occasions related to sexual activity with the accused or with people other than the accused and whether it was admitted with or without the trial judge's permission.

Table 4
AREA OF SEXUAL HISTORY COVERED

Area of sexual history	Successful Applic.	Breaches	Unclear whether applic. made	Total Occasions
With Accused	11	1	2	14
With person/ other than accused	14	8	0	22
TOTAL	25	9	2	36

In 14 of the 36 occasions (38.9%) identified, the evidence related to the complainant's past sexual relationship or contact with the accused[16] mostly with the trial judge's permission.[17] Somewhat surprisingly, however, the majority of instances where sexual

[16] All of the recent studies evaluating the operation of sexual history provisions have documented the ease with which applications are granted to admit sexual history evidence in relation to the complainant and the accused. Henning noted the court's treatment of such evidence as 'unquestionably relevant' (1996: 9) with little attention being given to how the evidence met the requisite tests of substantial relevance. Heenan and McKelvie refer to applications being routinely granted without 'any genuine scrutiny of the arguments or discussion of the relevance of the material' (1997: 157). In New South Wales, the defence were 'most successful' in admitting evidence of a complainant's sexual experience where there had been prior consenting sex between the two parties (Department For Women, 1996: 233). In 8 of the 14 cases in the current study, the complainant did not dispute instances of prior consensual sexual activity with the accused. However, although the remaining 6 complainants denied prior sexual contact with the accused they were nevertheless questioned about the details of these contacts in circumstances where there was no evidence to substantiate the accused's claims.

[17] In the two instances where it remained unclear as to whether any permission had been sought or given to question the complainant about her prior sexual relationship with the accused, it is likely an application had in fact been made. Both prosecution and defence counsel asked several questions of the complainants in these trials about the status and details of their sexual contact with the accused with no intervention from the trial judge.

history evidence became the subject of trial scrutiny was in relation to the complainant's past sexual activities/ proclivities with people *other* than the accused. On 14 occasions (38.9%) this was as a result of successful applications, while on 8 other occasions (22.2%) questions were asked without permission first being sought from the trial judge.

While these figures undoubtedly portray a continued failure on behalf of the Victorian legal profession, judiciary and legislature to adequately guard against women having their sexual pasts exposed before the courts, they cannot tell us *how* barristers manage to preserve access to precisely those areas of sexual history evidence that the provisions were designed to prohibit.

Recent Australian studies have comprehensively documented the use and abuse of their respective sexual history provisions across jurisdictions, relying on excerpts from trial transcripts to illustrate the kinds of cases where sexual history evidence was more likely to be admitted (Dept. For Women, 1996; Henning, 1996). The aims of these studies were often evaluative and therefore directed at detailing the workability of the relevant sections through considering the number of successful applications, levels of non-compliance and the kinds of reasons fashioned by judges in their rulings to admit sexual history questions. Their focus was on describing the kinds of arguments being used to ground the applications and on the evidence that was subsequently admitted, rather than conducting a sociological analysis and interpretation of the content of the arguments and the construction of legal reasoning.

The current study also endeavoured to explore whether the more traditional legal narratives used for tailoring the relevance of sexual history evidence had shifted. In other words, was it that barristers were still gaining access to women's sexual lives by persuading courts that sexually active women are less trustworthy, or more likely to consent to subsequent activity (arguments one would think should carry less currency in courtrooms today) or were there new and more sophisticated approaches employed

for arguing the relevance of a complainant's prior sexual history in the adjudication of contested rape accounts?

5.3 A PROBLEM OF INTERPRETATION

Much of the criticism waged against the failure of the provisions over the years has centred on judicial practice. Case law has repeatedly pointed to judges using their discretionary powers to conservatively interpret and apply the regulations in court. The effect has been to further legitimise the use of sexual history evidence for evaluating the credit and veracity of women rape complainants. Feminist researchers and law reformers have often suggested that in improving this situation legislatures should turn their attentions to the content of the provisions themselves. As they see it, at least part of the problem lies with the absence of any statutory guides within the legislation for ensuring uniformity or consistency of approach in assessing the validity of sexual history applications (Lees, 1996).

Adler (1985) and others have suggested that sexual history provisions have largely been designed as if the contents will unproblematically and objectively be applied consistently across all cases. Bonney (1987: 13), when she muses over the many interpretative nuances that may present themselves in the face of legislative terms which remain undefined and left to individual judges' choice methods of interpretation, makes it clear that this is not such a simple matter:

> ....How many people have to think that Mary is a slut before that becomes her sexual reputation? What if Mary believes that other people regard her as a slut, but in fact they don't (or in any case the court isn't told whether they do or not). Would Mary, in stating her belief about her reputation, be introducing prohibited material? These questions are not raised as an interesting game of semantics. They are situations which arose and posed difficulties in the classification of the data.

In Victoria, the wording of section 37A remains sufficiently vague, leaving the provisions open to wide judicial interpretation. The meaning and scope of key terms

such as 'general reputation' and 'general disposition' remain ambiguous. The meaning of 'substantial relevance' and the kinds of 'special circumstances' that would warrant cross-examination of the complainant's credibility using her sexual history are also unclear. Even the boundaries of the very notion of 'sexual history' are widely disputed.

The Victorian Evaluation Study (Heenan & McKelvie, 1997) revealed the discursive approaches to interpreting section 37A. Several case examples documented within the report demonstrated the extent to which an application acceded to by one judge would in almost identical circumstances be thwarted by another. Henning's report (1996) is also particularly revealing on this point. Henning focussed on Tasmanian judges' methods for hearing, assessing, and ruling on the admissibility of sexual history applications, and found little to indicate any uniformity in evaluating barristers' requests, nor any consistency in interpreting the specifics of the provisions in light of the evidence the defence sought to introduce. Similar to Victoria, an absence of interpretative guidelines for key definitional terms such 'substantial relevance' led to wide judicial interpretation so that 'establishing mere relevance' would often 'justify the admission of the evidence' (Henning, 1996: 81).

The difficulties arising from a lack of clarity regarding the interpretation of section 37A were also evident in the current study. Trials where defence barristers were attempting to question complainants about prior allegations or experiences of sexual assault were particularly problematic. The ambiguity lay in whether the scope of prior sexual history included instances of *non*-consensual sexual activity.

In seven of the trials examined, an issue arose with respect to previous disclosures or complaints of sexual assault. In the absence of any specific guidelines within Section 37A, and without reference to associated case law that might direct the interpretation of whether non-consensual activities fall under the restrictions, the admissibility of the evidence in these trials was determined by the particular barristers and judges in each case.

In one of these trials [Trial 2], the defence launched immediately into asking the complainant whether her first husband had both 'physically and sexually abused [her]'. After prosecution intervention, the defence reluctantly made an application although he did not believe he was contravening the section because the subject related to *non*-consensual sexual activity. Similar questions were asked of complainants in two other trials about whether they had made previous complaints of sexual assault to the police, without exception being taken by the prosecutor or the trial judge [Trials 3 &18]].

Conversely, a detailed application was made by the defence in another trial to question the complainant about a previous report of rape she had made involving multiple offenders [Trial 20]. The complainant had previously denied having ever made such a report. However, the defence had been able to obtain a copy of the complainant's police statement documenting a horrific account of multiple rapes perpetrated against her by a group of men she had met at a hotel. The defence were therefore keen to introduce this evidence, not (they claimed) in terms of detailing any prior sexual history, but in a bid to place the complainant's credit in doubt. They also wanted to suggest that the previous assaults may have been extrapolated by the complainant onto the recent incident involving the accused and two other men.

The judge however was relatively confident that his interpretation of section 37A would make the application unnecessary given the evidence concerned allegations of prior sexual assaults, not prior sexual history:

> ...I do not think that you would be in breach of section 37A if you did it because I do not think that it is the sort of conduct which is contemplated by section 37A [Trial 20].

Contrast this approach with the three remaining trials where considerable court time was spent debating the merits of adducing evidence of previous sexual assaults alleged by the complainant [Trials 6, 12 & 26]. The judges in these cases required defence counsel to make formal applications under section 37A to question the complainant in relation to past assaults and to clearly articulate how the evidence could legitimately be

said to meet the threshold test of substantial relevance. Rulings were made in favour of the applications in each trial after defence counsel persuaded the trial judges that an exploration of the nature and timing of the previous assaults may have an important bearing on the complainant's credibility.

While the assumptions informing the applications in these trials are worthy of deeper analysis[18], the variability of approach is what is most exposed here. A careful reading of section 37A would immediately place the admissibility of such evidence well within its protected confines. The section does not distinguish between consensual and non-consensual sexual experiences in its regulatory aims precisely because it is the relevance of "sexual activity" that is routinely questionable, not the states of mind of the parties involved.[19] However, in the absence of even this most basic guideline being articulated within the legislation, the findings indicate that complainants are likely to be subjected to questioning about previous assaults with or without an application being made, with or without the relevance of the questions being debated and with or without a specific ruling from the trial judge.

5.4 When Judicial Controls Are At Work

While the quantitative findings reveal the extent to which sexual history evidence remains a staple of the contemporary rape trial, there was a small but significant number of instances where tighter judicial control or more rigorous prosecution intervention obstructed defence attempts to introduce evidence that was clearly intended to be shielded by the provisions.

In three trials [2, 10, 24], the judge spent considerable time scrutinising the basis for the defence applications and measuring them against the requirements of section 37A before indicating a preparedness to provide some limited leave for certain questions to be asked. On each of these occasions, the judges were persuaded by defence

[18] These trials are discussed in more detail later in this chapter. See section 5.5.2, "Using Legal Gymnastics".

arguments that the evidence may potentially impact on the complainant's credit but were unconvinced by attempts to link the evidence with the probability of consent.[20]

There were four other trials [6, 13, 19, 24] where the judge refused to accede to defence applications altogether. Each of these applications related to evidence of alleged past sexual conduct between the woman-complainant and people other than the accused where the defence claimed the information could substantially impact on the jury's consideration of the issue of consent.

In Trial 24, the defence barrister was visibly astounded by the judge's immediate response to disallow his application to admit evidence of a video that featured the complainant in group sexual activity, as well as other evidence of her alleged sex work. Indeed, he was so surprised by the judge's blanket opposition to his request that he desperately attempted to reconstruct the application in the vain hope that the response had been based on a miscomprehension of the arguments and was not the judge's final ruling on the matter. The judge was however unpersuaded and merely responded that he was of the:

> firm view that all the evidence of the complainant's prior sexual history has no substantial relevance to the facts in issue or are proper matters for cross-examination as to credit [Trial 24].

The judge in Trial 13 also referred to the specific wording of section 37A when he refused to grant leave for defence counsel to cross-examine the complainant about alleged sexual activities she'd engaged in with another male on the same afternoon as

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[19] Recent case law resolves any debate that the section's use of the term "sexual activities" includes evidence of any *non*-consensual sexual activity. See Cross on Evidence, Butterworths, Vol. 1, (at 57) 19040.

[20] It is also of note that the prosecutor in one of these trials [Trial 10] vigorously opposed the admission of evidence that related to the thirteen-year-old complainant's knowledge of sexual matters being relevant to the issue of consent. The prosecutor had a comprehensive knowledge of the legislation and argued that the high threshold test of 'substantial relevance' was sufficient to guard against attempts by the defence counsel to link the complainant's childhood sexual awareness with the issue of consent. This may well have had a significant bearing on the trial judge's consideration and adjudication of the defence application.

the alleged offences, despite the accused being on the premises at the time. While the defence barrister intermittently restated his application throughout the duration of the trial, the judge maintained that 'it's [the section] there for a purpose' and evidence that went to peripheral issues only did not adequately reflect the standard intended by the provisions.

Having already successfully applied to question the complainant about allegations of sexual abuse by her two brothers, the defence barrister in another trial [Trial 6] requested leave to ask the complainant about a subsequent rape complaint she had made to the police.[21] The defence submitted that the reported rape, and the complainant's reluctance to proceed with it, was evidence of a 'victim mentality' which would lead the jury seriously to question her overall reliability. The prosecutor strongly objected to the application and the logic used to inform it. The judge was of the same opinion when he suggested the request was nothing more than 'a fishing expedition in the hope of raising matters that are peripheral' to the issues in the trial [Trial 6].

In a similar vein, defence counsel in another trial [Trial 19] applied for leave to cross-examine the complainant about an instance of subsequent sexual activity that occurred several weeks after the offences. The defence claimed that the complainant had occupied a bed and had intercourse with a male friend while the accused was also sleeping in the same room. The defence suggested that this evidence would render her allegation against the accused man less credible because it would be unlikely that a woman who had been raped would be prepared to sleep in close proximity to the man who had allegedly raped her. However, after giving considerable thought to the defence request and the requirements of the relevant section, the trial judge refused to allow the evidence saying that:

> In a simplistic sense there is merit in this application. If the rape alleged against the accused occurred in circumstances where force was used to achieve penetration, then I could well

[21] This allegation related to offences allegedly perpetrated by a different male.

> understand how the subsequent behaviour of the applicant would be probative of the defence case. However, the agreed facts are that sexual intercourse between the complainant and the accused occurred in circumstances where there was consent, as it were, to the act, but where intercourse occurred with the wrong man[22] [Trial 19].

The careful assessment of the defence application apparent in this ruling was particularly unusual. Rather than immediately be influenced by what some might consider bizarre or risky behaviour on behalf of the complainant - to sleep in a room while her alleged rapist occupied a bed close by - the judge first turned his attention to how the defence had put their case.

The accused claimed to have held an honest belief in the complainant's consent. The prosecution case was that the complainant, who was asleep at the time of penetration, did not consent to having sex with the accused. The main issues in dispute therefore related to the accused's and complainant's states of mind at the relevant time of penetration: in particular whether the complainant was asleep or whether she thought she was consenting to the male with whom she had gone to bed with, versus the accused's defence of her knowingly consenting to him, or being under the mistaken belief that she was. After clarifying this position, the judge was far from satisfied that any subsequent activity with a third party could be substantially relevant to the issues being considered in the current trial. Nor could the defence succeed with such an application as a means of testing the complainant's credit because she vehemently denied the subsequent incident had taken place. This prevented the defence from exploring the issue any further.[23]

The jury in this trial convicted the accused. However, a successful appeal resulted in the matter being retried before a different judge and jury less than a year later, when

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[22] The accused had allegedly entered the bedroom where the complainant had been sleeping with another man, climbed in between them and proceeded to penetrate her while she was asleep.

[23] See Cross on Evidence, Butterworths, Vol. 1, (at 53) 19038) which states that the credit of the complainant cannot be attacked through another witness in an attempt to rebut evidence given by her during cross-examination.

questions about this subsequent incident were permitted.[24] The trial judge attempted to confine the questioning by ruling that there be no suggestion of any sexual intercourse having taken place in the room between the complainant and the other male. The prosecutor however strongly objected suggesting rather cynically to the trial judge:

> Your Honour, a nod is as good as a wink to a blind horse and this is precisely what I anticipated it was, it is a back door way of doing what it was the application was designed to do at the last trial [Trial 19].

Putting to one side this last example, an overview of these trials may on the face of it suggest that the existing provisions, when appropriately interpreted, are adequately shielding both the complainant and the jury from exposure to irrelevant sexual history evidence. However, the scarcity of these examples may further highlight how susceptible most judges, prosecutors and the courts more generally remain to being persuaded by arguments that link women's sexual histories to their general veracity and moral worthiness in the context of adjudicating the believability of rape accounts.

5.5 Putting Sexual History Evidence On Trial

Most researchers in the field of law and sexual assault would agree that tightening the scope of judicial discretion in respect of assessing relevant sexual history evidence would do little in terms of altering the situation for most rape victims in court.[25] As Temkin suggests:

> Since it was the judges who had contributed to the situation in which sexual history was freely used in rape trials, it scarcely made sense to leave it to them to decide whether and when to exclude it (1993:4).

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[24] The Court of Criminal Appeal by implication sanctioned its admission at the retrial when they deliberately opted not to comment in their judgement on whether the evidence in issue had fairly been excluded by the original trial judge. See *R v D'orta-Ekenaike*, Unreported, CCA, Vic, 24 July, 1997 at 15.

[25] Even where significantly more restrictive regimes have been implemented, such as in NSW and Canada, courts are still in practice successfully persuaded of the relevance or virtue of cross-examining women in relation to their sexual histories.

The much larger struggle has always been 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. The trials observed for the present study revealed a variety of methods that continue to be utilised by barristers seeking to legitimise the use of sexual history evidence in court. Undoubtedly, the most obvious examples were those trials where sexual history constituted the very essence of the defence case.[26]

5.5.1 Sexual History As Core Defence

In five of the trials observed, the foundation of the accused's defence appeared to rest squarely on what were claimed to be the complainant's sexual proclivities or sexual past [Trials 9, 12, 17, 27, 31]. As Table 3 (p. 188) showed, there were two trials where three separate topic areas relating to sexual history evidence were canvassed with the woman-complainant. In a further three trials, although fewer topic areas were recorded, the woman's alleged sexual behaviour was constructed as central to the accused man's claims that the activities had in fact been consensual.

Firstly, the relationships between the complainants and the accused in these five trials warrants some attention. In two of the trials [Trials 9 & 31], the existence of some prior consensual sexual contact was agreed between the two parties.[27] In another trial [Trial 12], the assaults were alleged to have been committed by the complainant's step-father throughout her childhood and teenage years. The remaining two cases included one joint trial [Trial 27] where both of the accused men claimed to have had some prior consensual sex with the complainant which she in turn denied. In a final case [Trial 17], the accused, who was a neighbour of the complainant, alleged that his sexual

[26] Personally, these trials were also the most disturbing to observe first-hand. These women often became visibly distressed by the repeated and often humiliating questioning they were subjected to by the defence, where long sequences of cross-examination would be devoted to describing the minutiae of aspects of their past sexual experiences.

[27] In one of these trials, while the complainant admitted to some prior sexual contact, she fervently denied having ever engaged in sexual *intercourse* with the accused. He, on the other hand, alleged an ongoing sexual relationship that regularly included sado-masochistic activity and intercourse.

advance had been prompted by learning that the complainant had been sexually active with other neighbours/friends.

The manner in which the sexual history evidence was located as a core defence varied across these five trials and will be the subject of the remainder of this section. In brief, in two trials the sexual reputation of the complainant was ultimately positioned as central to the accused's defence [Trials 12, 31]. In a third trial the accused argued that the complainant had consented and that her sexual conduct with other men corroborated his claim [Trial 17]. In the fourth trial the accused provided detailed accounts of his alleged sexual relationship with the complainant that routinely included sado-masochistic activities [Trial 9]. In the final trial the complainant's reputation and prior sexual contact with the two accused men, as well as her previous sexual relationships with others, were "open slather" areas of questioning by the defence throughout the trial [Trial 27].

Successful applications were made early in each of the five trials to legitimise the questioning that each complainant would face. In three trials [Trials 17, 27, 31], defence barristers alone sought the judge's permission to ask the complainant questions regulated by section 37A, while in two trials both the prosecutor and the defence barrister were effectively given leave to solicit sexual history evidence [Trials 9 & 12]. These applications will be considered first.

5.5.1(a) In Anticipation of the Defence - Prosecution Applications

The grounds for the prosecution applications were particularised during pre-trial argument and related to issues that were very much in dispute throughout the two trials in question. The impetus appeared to lie almost entirely in warding off anticipated defence attacks.

The complainant in the first of these trials [Trial 9] alleged that the accused man had raped her after becoming aware that she had been having intercourse with her current boyfriend when she had remained resolute in her refusal to have intercourse throughout

her relationship with him. The prosecutor was aware that the accused's main defence would rely on challenging this scenario by maintaining there had been an ongoing sexual relationship between the accused and the complainant that included intercourse. The prosecutor succeeded in obtaining the court's permission to ask the complainant about the sexual status of her relationship with the accused during her evidence-in-chief, rather than have the defence first canvass these issues during cross-examination.

The distressing impact of this exchange on the woman giving evidence was nonetheless revealed when she became visibly upset by the questions. This was despite the fact that the issue was confined to merely establishing the existence of a sexual relationship between herself and the accused and despite the fact that it was the prosecuting barrister, or the barrister representing her interests, who was asking all the questions. She seemed, nonetheless, alert to the existence of regulations that should prevent her being subjected to this kind of questioning:

PB Was your relationship with [M] a sexual relationship?

C ...do I have to answer...I don't know if that's relevant?

J Well I think because the court is cleared[28], you can answer it.

C Oh, okay. Yes.

A similar question was subsequently asked of her relationship with the accused:

PB All I want to ask you is this: when you were in the relationship with [the accused], did you ever have vaginal sexual intercourse with him?

C No.

In the second trial [Trial 12], the prosecutor was keen to rule out the possibility that any other man aside from the accused could be responsible for three separate

pregnancies endured by his step-daughter. With the court's permission, the prosecutor therefore asked the complainant:

> PB Had you had any other sexual contact with any other male prior to that?

An even more interesting and legally complicated question relating to sexual history evidence was also activated by the prosecutor in this trial. During preliminary discussions, a lengthy legal debate ensued after the prosecutor indicated his intention to lead from the complainant "relationship evidence" of the ongoing sexual contact that she was subjected to by her step-father.

Traditionally, this kind of evidence would have immediately been considered inadmissible because it demonstrated a propensity or disposition on behalf of an accused for committing sexual offences. However, the appellate courts had more recently given judges a degree of discretionary power to admit evidence of "uncharged acts" or evidence of an accused's "guilty passion" for a complainant in certain circumstances.[29]

The young woman in this case had experienced weekly assaults by her step-father that could not be distinguished in terms of particular dates or incidences, as the criminal law requires. The prosecutor therefore sought leave to place the offences 'within a realistic contextual setting' to allow the complainant to describe the ongoing assaults as 'just such a regular, normal thing to do'.[30] The judge was persuaded by the

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[28] The prosecution had successfully applied to have the court closed to the public throughout the duration of the complainant's evidence under section 37C of the *Evidence Act 1958 (Vic).*

[29] The leading authority in Victoria on this issue is *R v Vonarx* [1999] 3 VR 618. It allows for the admission of uncharged acts 'for the limited purpose of determining whether a sexual relationship existed between the complainant and the accused, thereby enabling the evidence relied upon by the Crown in proof of the offences charged to be assessed and evaluated within a realistic contextual setting' (*R v Vonarx* [1999] 3 VR 618at 625. As an aside, the use of the term 'sexual relationship' in this context appears highly problematic although the judges in *Vonarx* were clearly referring to a *non*-consensual 'sexual relationship'.) Although not in force at the time of this trial, section 14 of the *Crimes (Amendment) Act 1997* now statutorily allows for the wider admission of propensity evidence in sexual offence cases 'despite any prejudicial effect it may have on the person charged with the offence'.

[30] These were the words of the complainant when she was asked how often the assaults occurred.

prosecution's arguments and agreed to allow the complainant to speak more broadly about her experience of sexual abuse.

5.5.1(b) "It's my turn now"

In stark contrast to the prosecution's approaches in these trials were the means by which various defence counsel were able to successfully position the complainant's alleged sexual behaviour as compulsory to the accused's defence. The applications were themselves framed in relatively loose terms with what could fairly be described as broad brush approaches to persuade judges to exercise their discretion in favour of admitting evidence of prior sexual history.

Statutory prohibitions on evidence concerning the complainant's sexual reputation were introduced, at least in part, in order to prevent accused men from arguing that a complainant's consent could be inferred from her willingness to engage in sexual activity with others. The conventional notion of a woman who says 'yes to one, says yes to all', described by Clark and Lewis as 'open territory victims' (1977: 124), had historically been used in rape trials to absolve an offender of the responsibility for raping a woman who exercised a degree of social and sexual agency and autonomy in her relationships with men.

As previously outlined, each of Australia's states has legislatively barred the admission of evidence of general sexual reputation.[31] While studies continue to show how sexual reputation evidence can still be scattered throughout the pages of rape trial transcripts, overall research suggests broad success in eradicating the more obvious instances of successfully defending rape allegations through debasing a woman's sexual reputation (Henning, 1996).

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[31] Bargen and Fishwick (1995: 77), however, note how the lack of legislative clarity surrounding the meaning of the provisions where terms such as 'sexual reputation' (Tasmania, South Australia, New South Wales, Queensland and the ACT), 'disposition in sexual matters' (in Western Australia), and reputation with respect to 'chastity' (Victoria & Northern Territory) remain undefined. The implications of this are more fully developed in my discussion on *R V Bull*, in Chapter 7, pp.318.

When it does appear, the accused is more likely to rely on at least a partial defence of mistaken belief in consent. That is, regardless of the situation in relation to the complainant's actual consent, the accused claims to have honestly believed at the time of the incident that the complainant was consenting. To substantiate the honesty of the accused's belief, the admission of sexual history evidence becomes the subject of a defence application - not in terms of any prior sexual relationship or contact with the accused but in relation to the complainant's sexual conduct with *other men* of which the accused allegedly becomes aware.

Evidentiary guides continue to support this interpretation by suggesting that a complainant's 'reputation for chastity may become relevant' where an accused claims that he 'believed the complainant to be consenting' (Cross on Evidence, Butterworths. Vol. 1 (at 53) 19038). It is precisely within this context that a trial from the current study became preoccupied with assessing the culpability of an accused because his principal defence relied on the jury accepting that his sexual approach towards the complainant had only been made after learning of her previous sexual contact with two other men [Trial 17].

The complainant lived on the same housing estate as the accused and his extended family, and had attended social functions and activities organised by other residents. The offences were alleged to have occurred after the accused came to the complainant's house late at night under the pretext of checking on his son who was having a "sleep-over" with the complainant's son. The complainant claims that the accused succeeded in digitally penetrating her and was attempting to vaginally rape her when a knock at the door startled him. She ran to the door.

The accused claimed that the entire incident had been consensual. She had willingly performed oral sex on him. It was only when intercourse was suggested that the complainant became unwilling to participate further. This account of the accused's anger and sexual frustration was said to explain the yelling and screaming heard by the man who had come to the door to intervene.

The complicating features of this trial were that the accused alleged his initial approach to the complainant had been prompted by stories he heard about her sexual activities with other men on the housing estate. Each of these men, with whom the accused was related[32], boasted of having had separate sexual encounters with the complainant in the preceding few months. Moreover, the accused claimed that he had only entered the complainant's home after she had called out to him with an invitation to come inside, mistakenly believing him to be one of the other men with whom she had previously been intimate. The complainant, on the other hand, flatly denied that any sexual activity had ever occurred with these other men, although she did suggest that they had made sexual overtures towards her which she had immediately rejected.

During the trial, the defence based their application to question the complainant about these previous occasions on two main grounds. Firstly, the alleged activities were said to be relevant to the likelihood that the complainant would have consented to the activities with the accused because she wanted to 'try out' the remaining 'Latin lover'. Secondly, the defence alleged that the accused's "knowledge" of these previous activities with the other two men would have reasonably contributed to him forming a genuine belief that the complainant would likely consent to any activity he might propose.

In the absence of any objection by the prosecutor[33], and without any detailed legal discussion about how the evidence of previous incidents with the other men even if they had occurred could be used to draw an inference that the complainant was more likely to have consented to the accused on this night, the trial judge allowed the application. He suggested in his ruling that it would be 'totally artificial' to conduct the trial without such questioning going ahead given the accused's account of events. And yet the accused's defence was almost entirely dependent on constructing the

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[32] These men were the accused's uncle and cousin respectively. All these men were approximately the same age.

[33] Discussions with the prosecuting solicitor later revealed that the prosecution team had been more than aware that this alleged "sex triangle" was going to be the main foundation of the defence case. They presumed the jury would consider the accused's story so outlandish that it would more than likely benefit the prosecution case.

complainant's sexual reputation as the impetus for his visit on the night of the alleged rape. This is precisely the kind of evidence that was routinely intended to be guarded by the restrictions.

What appeared even more striking about this trial (and this was further verified by my observing the discussion first-hand) was the degree of mutual understanding that was shared by the barristers and the trial judge in this case which was based on an established line of reasoning that evidence of alleged prior sexual acts would lead to a higher probability of consent to sex weeks later with a different man altogether. Given the virtual absence of any dialogue, it appeared that this common understanding of consent in the circumstances of this trial was so well grounded in legal discourse that it need not even be spoken.[34]

The difficulty for me was to decipher precisely which traditional theory of consent was being proffered. Was it that the complainant was more likely to have consented to the accused if she had seduced the other two men? Or was it that the accused's second-hand knowledge of the alleged previous sexual encounters may have so clouded his judgement of the complainant that he could reasonably (or more accurately in the legal sense, honestly) have been mistaken about her consenting to him?

Concern over the ease with which this application was endorsed was heightened when the other two men testified about the nature of these sexual encounters with the complainant. One of the men (the accused's nephew and the man who knocked on the door after hearing the complainant's screams) detailed a scenario that involved him spontaneously kissing the complainant and immediately being told by her to 'go home to his wife and kids'. This was disappointing for the defence.

The strength of the accused's social, familial, and cultural connections with these other two men was also continuously referred to throughout the trial. These men were

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[34] Spohn and Horney refer to this as the 'universal norms of relevance' (1992: 137) and Puren as the 'metonymic assumption(s)' (1997: 140) that further enshrine the acceptance of sexual history evidence as highly critical to the legal determination of rape.

depicted as 'the boys', the 'card-playing fellows', 'sporting fellows', 'Don Juans', 'the musketeers', 'the three amigos' and all with considerable levity by the defence. It was precisely the relationship between these three men that, according to the defence, captured the attention of the complainant. The defence alleged that she was obsessed with the performance of 'these Latin lovers' and was keen to gauge whether the accused might be 'as hot as the other boys', even going so far on the night in question as to complement the accused on the size of his 'big banana'.

While the narrative in this trial began to resemble the script of a mainstream pornographic heterosexist movie, a potentially more sinister sub-text was concealed from the jury. On the night of the alleged rape, the three men in question played cards and consumed considerable amounts of alcohol. At some point the accused disappeared. A short time later, the two remaining men were seen looking in the complainant's window. When they were asked by a neighbour what they were doing, they responded that they were looking for the accused. Prior to the jury being empanelled for the trial, these facts were discussed by counsel in the presence of the trial judge. The defence obtained an agreement from the prosecutor to not suggest to the jury that there had been some kind of plot for the accused to have sex with the complainant while his two friends watched from outside.[35]

5.5.1(c) The core defence of sexual reputation

In two trials the core defence explicitly rested on attacking the women-complainants' by constructing long historical narratives which documented their sexual lives. Without any attempt to mask their intentions, the defence barristers in these two trials openly encouraged the jury to acquit the accused on the basis of the complainant's sexual reputation.

[35] The probability of this being a likely scenario increased when it became clear that the person who knocked on the complainant's door in response to her screams was in fact one of the two 'card playing' men who had previously been with the accused and was later observed to be looking in the complainant's window.

In the first of these trials [Trial 12], the defence sought leave to question the complainant about her alleged sexual contact with other men. This could adequately account for the paternity of her pregnancies and more readily explain her motives for making false allegations against her step-father. The implicit assumption was that sexually active (young) women have no limits to the lies they will tell.

Without requiring the defence to articulate how the evidence could be said to meet the threshold test of 'substantial relevance', or without setting the bounds or scope of the questioning that was to be allowed, the trial judge ruled that 'to make an adequate defence they should have liberty to cross-examine the prosecutrix fairly widely'.[36] The trial subsequently became a litany of defence assertions put to the complainant about her sexual proclivities. These flouted any rule of establishing "substantial relevance" and were in direct breach of the legislative shield afforded to complainants in prohibiting the admission of any evidence of their sexual reputation or disposition being admitted.

The complainant was asked about a parade of male friends and acquaintances and whether these relationships had ever been sexual. Several other witnesses were also asked about the nature of their connection with the complainant, even when there appeared to be no correlation between these alleged relationships and the timing of the three pregnancies. These questions seemed far more directed at throwing into question the complainant's character in the minds of the jury. This extended to the court allowing the complainant's sister to suggest the complainant had lied about sleeping with a well known Australian Rules football player![37]

[36] The judge in this matter apparently had little knowledge of the criteria set down within the legislation for determining the admissibility of sexual history evidence. When the prosecutor later objected to aspects of the cross-examination and suggested that the questioning went 'well beyond the ruling' and was 'totally extraneous' to the issues, His Honour finally picked up the *Evidence Act* and asked 'which section is it again?'.

[37] Despite the Court of Criminal Appeal later referring to the 'very substantial attack [made by the defence] on the credibility of the complainant and her evidence', they later endorsed the approach by suggesting that 'matters [ ] had been *quite properly* put against the credibility of the complainant' during cross-examination. See *R v D.P.M.*, Unreported, CCA, Vic, June 1997 at 18.

Even where there appeared to be some forensic purpose in questioning a witness about a brief sexual relationship he had had with the complainant around the time of the third pregnancy, defence counsel attached a series of further questions that were entirely irrelevant to establishing any alternative paternity:

> Were the other girlfriends present in the house when you were having sexual intercourse [with the complainant]?...Where did you have sex?...Was there consumption of alcohol?...

The questioning went further, with the purpose of eliciting evidence of previous sexual assaults experienced by the complainant at the hands of her teenage cousins some years before and, on an earlier occasion, an incident involving her biological father. In spite of prosecution objections and the complainant's own impassioned protestations to the judge, she was forced to recount the details of these assaults before the jury. According to the defence, this questioning, which was said to be 'intrinsic to [his] client's defence', would challenge the complainant's assertion that she was unable to disclose her step-father's abuse to her mother when she had been prepared to tell her about her previous abuse at the hands of other family members.

Once again, in the absence of clear bounds enforced by the court and with little regard paid to prosecution objections, it was hardly surprising when the defence more brazenly referred to the complainant's 'sexual promiscuity'. With flagrant disregard for the provisions, the defence asked:

DB	So is it your evidence now that you are still not sexually promiscuous?
C	Pardon? [incredulous]
DB	Is it your evidence today that you are not sexually active at all?

The immediate objection from the prosecution on this occasion was critical of both the defence tactic and the judge's failure to contain the cross-examination by providing an adequate ruling. He accused the defence of launching a wide ranging attack on the

complainant's credibility and 'reputation' which 'seem[ed] to have no bound at all'. He further defended the complainant's tendency to provide detailed explanations in response to the defence claims as perfectly reasonable in a context where 'indeed the attack is so widespread, such a broad blast, that the witness is only defending her own reputation'. Interestingly, the complainant's experience of cross-examination later appeared of some strategic benefit to the prosecutor. During his closing address, he reminded the jury of the horrific nature of cross-examination endured by the complainant by a defence barrister whose questions were 'designed to blacken her character...to discredit her'.

By contrast, defence counsel's closing address continued the theme of cross-examination by speculating about the 'many possibilities' that could explain why the complainant had falsely accused her step-father of ongoing sexual assaults and asked them to consider that her motive may well be explained by the fact that 'she's been promiscuous, and has been promiscuous for years'.

Similar attempts were made by the defence in another trial to link claims of false accusations with the complainant's alleged sexual promiscuity. In this case [Trial 31], counsel persuaded the court to overrule the provisions regulating evidence of a woman's sexual reputation in favour of allowing the defence to attribute a specific motive to the complainant.[38] According to the defence, the complainant had concocted a story of rape so that she could more easily return to her life of sex work, sexual promiscuity and drug-taking without interference by the accused.

The complainant in this case had been in a relationship with the accused for approximately five years during which he had been violent towards her. The trial related to six counts of rape and other charges involving intentionally causing injury and threats to kill. Medical evidence of the complainant having been bruised and

[38] According to the rules of evidence in Victoria, where a specific motive has been denied by a witness for allegedly making false statements, evidence can be led to rebut the denial. This is contrary to the rules laid down under section 37A where a barrister is bound by the responses given by a witness when the questioning relates to a complainant's credit.

facially beaten was available at the trial. A neighbour also gave evidence that she had 'never seen a woman in a state like that before...she was just a mess...'.

The prosecutor strongly opposed the basis of the defence application and suggested it was 'no more than an attempt to overcome the provisions of section 37A which are there for a good reason'. However, taking on face value the kind of evidence the defence said would come to light in support of these assertions, the judge ruled in favour of the application because a specific motive (to 'resume a life of promiscuity') had been attributed to the complainant for inventing the allegations.

During cross-examination, the complainant was asked to respond to countless assertions about her sexual past, including: her alleged activities as a sex worker; a sexual relationship she was claimed to have had with a police officer, and on other occasions with drug-dealers; and, finally two separate occasions upon which she had engaged in *menage a trois* with the accused and another woman. Other witnesses were also called to testify about their knowledge of these alleged activities.[39]

None of the witnesses gave evidence in support of the defence allegations, apart from a woman who confirmed her participation in sexual activity with the complainant and the accused on one occasion.[40] The complainant herself had already conceded she was a former heroin addict and had financed her habit through periodic sex work during her early twenties and prior to becoming involved with the accused. The defence had effectively been allowed to mount a defence based on assumptions that had no factual basis in evidence, that were untested and unchallenged by the trial judge and were explicitly directed at denigrating the complainant before the jury who were there to deliberate over multiple counts of rape and other offences.

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[39] A prosecution witness, who was a friend of the complainant, was also asked whether she 'hangs around with lesbians' and whether she had once sent nude photos of herself to men in jail in an attempt to discredit the evidence she gave in support of the complainant.

[40] This was described by the complainant as a frightening and humiliating experience facilitated by the accused in which she felt compelled to participate. The other woman gave evidence that the complainant would not speak to her the following day and said she had felt forced to be involved.

Henning cited similar cases where the complainant's motive was used as the crux of defence applications to gain unlimited access to complainants' sexual pasts. She suggests that it is precisely this 'issue of motive in such cases [that] can easily be exploited to enable the complainant's general sexual morality to be investigated beyond any immediate relevance, to implicate her credibility generally' (Henning, 1996: 67).

The prosecutor's visible frustration with this process prompted him to take the unusual course of applying to have the accused's prior convictions admitted[41], including a previous conviction for murder. The prosecutor argued that, given the entire defence had been built around a 'gratuitous character assassination' of the complainant that had 'simply [been] an exercise in character bashing', it was important in the 'interests of justice that the scales ought to be balanced' so the jury could be made aware of the previous character of the accused.

Although the judge ruled against the prosecutor's application, he agreed that the cross-examination 'went far beyond' what may have been necessary in the usual course of events to impugn the complainant's character and acknowledged the 'flimsy' grounds upon which much of the case had been based. Without seemingly any regard for his own failure to curb this, the judge went on to speculate how such a wide-ranging attack was more likely to have gone against the defence rather than have inflicted any real damage on the prosecution case.[42]

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[41] Section 399(5) of the *Evidence act 1958 (Vic.)* states: Where a person charged and called as a witness pursuant to this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless - (b) he has personally or by his advocate asked questions of the witnesses for the prosecution (other than his wife or former wife or her husband or former husband as the case may be) with a view to establishing his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witness for the prosecution (other than his wife or former wife or her husband or former husband as the case may be).

[42] On the contrary, research has historically shown how judicial discretion exercised in favour of allowing evidence of prior sexual history/activities to be assessed by jurors as a *credit* issue is particularly dangerous given that jurors have traditionally judged women harshly for behaving outside the hegemonic stereotype of a rape victim (LaFree et al., 1985; Temkin, 1993).

This cautionary note from the judge however had little effect on the defence whose closing address to the jury continued to foster the kinds of prejudices and gendered belief systems that positioned the complainant as deserving of their strongest censure. After urging the jury to compare the complainant with Mother Teresa, he suggested that 'she's [the complainant] a woman of relatively loose morals', evidenced by her preparedness to engage in 'threesomes' on two occasions. Although he acknowledged the accused's participation in these encounters, the defence barrister claimed it was *her* participation that carried moral implications:

> it reflects more on the woman because there does seem to be a greater acceptance for men engaging in that sort of behaviour - it reflects more on the woman's standards [Trial 31].

He then directly addressed the women on the jury, saying that 'you wouldn't do it [participate in a threesome] as women and you'd be severe in your judgement of women who do'.

Conspicuously absent until the final moments of the defence closing address was any reference to the connection the jury ought to make between the sexual history evidence and the motive attributed to the complainant for lying about the rapes and other assaults. And yet the justification for nullifying the provisions that would normally prohibit such questioning from ever taking place lay in the complainant's alleged attachment to a life of sexual promiscuity.

5.5.1(d) She liked it 'rough'

The nature and extent of the complainant's prior sexual history with the accused was at the heart of the defence in a fourth trial where the accused needed to supply some explanation for the injuries she incurred as a result of her contact with him on the night in question [Trial 9].

The complainant and the accused had been dating for three years during which time a sexual relationship had developed. According to the complainant, however, the sexual

component of the relationship had been confined to activities that excluded penile/vaginal intercourse. After the relationship had ended, the complainant remained in contact with the accused on a strictly platonic basis. On the night in question, some two years after the relationship had been terminated, the complainant alleged that the accused took her to his home, raped her and whipped her with his belt buckle after becoming enraged at learning that the complainant was having intercourse with her current boyfriend.

During the trial, counsel for the defence sought leave to cross-examine the complainant about the previous relationship with the accused, suggesting that not only did their prior sexual relationship include intercourse but that they routinely practiced sado-masochistic techniques. The injuries she incurred, it was argued, were merely the result of some over-zealous "S&M" love-making. Moreover, according to the accused, the relationship had ended only recently, coincidentally on the night of the offences, after the complainant became angry and upset following a discussion they had about marriage.

Once the prosecutor informed the court that he would not contest the application, the judge arbitrarily allowed the questioning to go ahead. Later, when prompted by the prosecutor to order that his reasons for allowing the application be recorded[43], the judge admitted that he had allowed the evidence merely 'because you [the prosecutor] didn't oppose it'. This was a significant statement and revealed how much responsibility and accountability this judge perceived himself as having for determining the merit or otherwise of a section 37A application.

The precise nature and form of questioning that was subsequently undertaken in this and a small number of other trials appeared to correspond with what some academics have interpreted as akin to court sanctioned pornographic vignettes. MacKinnon (1987), Smart (1989) and, more recently, Mawson (1999) have each described

[43] Section 37A sub-section (6) states that the judge must state in writing the reasons for granting leave and cause those reasons to be entered in the records of the court.

processes of cross-examination in which the woman is situated within a pornographic script and is required to detail the minutiae of her sexual activity. Lees (1997: 79) has also talked about this as a contemporary public 'shaming' of rape victims[44] through the process of being forced to describe the physical aspects of prior non-consensual or consensual intercourse.[45]

The heavily sexualised, almost titillating, manner in which some defence counsel question women about occasions of prior sexual activity was clearly evident in this trial where the following exchange between the complainant and the defence counsel occurred. The complainant (in Trial 9) was asked to explain what she said were the limits of her sexual contact with the accused. After stating that 'oral sex was acceptable but intercourse was not', defence counsel asked her to clarify:

C	Ah...well...if he had previously asked me to kiss his penis then I would. [C appeared embarrassed and kept her eyes at her feet]
DB	That's the extent of it is it?
C	Correct.
DB	Just kissing?
C	Correct.
DB	Not suck it?
C	No.
DB	Just kiss it?
C	Correct.

[44] Clark's (1987) research into eighteenth century rape trials found that women at that time would face being condemned and discredited precisely because they would publicly refer to genitalia and the act of penile/vaginal intercourse in open court.

[45] During the second reading speech of the *Crimes (Amendment) Bill 1997 (Vic)*, the then shadow Attorney-General, Rob Hulls, made reference to a conversation he had had with a Queensland magistrate who admitted 'over a few beers' that 'he got a bit of a thrill out of hearing the evidence elicited during committal proceedings for sexual assault matters' (Hulls, Second Reading Speech, Hansard, 29 October, 1997: 90).

DB Not put it in your mouth?

C Oh, put it inside my mouth - yes.

The defence barrister went on to question the complainant about other activities by asking her to read out teenage love-letters she had written to the accused. He then suggested they watched pornographic videos together and on one occasion she had bought hand-cuffs for the accused's birthday.

The accused's evidence consisted almost entirely of long, detailed accounts of the many times, as he alleged, that he and the complainant engaged in S & M sexual activities, including some instances where they had whipped each other. And finally, in his closing address, defence counsel made it clear that their entire case rested on the jury accepting that a sexual relationship, which included intercourse, had in fact existed, in which case the complainant's 'story falls apart' and the accused is left with nothing to answer for.

In another trial [Trial 27][46], alleged prior sexual contact between the complainant and the accused was also the subject of unfettered defence questioning. The content is again resonant of the tones and lewd narratives of popular male-centred pornography:

DB And that you started to kiss and cuddle again. What do you say to that?

C No, I did not do that. Nothing like that at all.

DB And that while your bodies were pressed together, Mr [G's] penis became erect?

C No.

DB Realising that he had an erect penis, you knelt down in front of him and put his penis in your mouth?

C No.

[46] This case is discussed in more detail in the next section.

Later in cross-examination, the defence suggested that the complainant and the principal accused had mutually participated in several sexual encounters together:

DB	And that that sexual activity consisted in the main of you taking Mr [G's] penis in your mouth?
C	No.
DB	But on one occasion, however, Mr [G] went down on you. Do you understand what I mean?
C	Yes. But he didn't.

At this point, the complainant became extremely distressed and the proceedings were adjourned.

5.5.1(e) The defence of "Open Slather"

It was this same trial [Trial 27] that best typified the "open slather" approach of the defence where they rested their entire case on the complainant's sexual past. It contains elements found in the examples previously discussed in that similar kinds of sexual history material were paraded before the jury. However, the nature and extent of sexual history evidence that continually punctuated not only the complainant's evidence and cross-examination, but the evidence of the two accused men, and of the complainant's then boyfriend, merit particular attention.

While a written application to question the complainant about her alleged prior sexual activities with both accused men was eventually made and approved[47], there were

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[47] New legislation introduced by the *Crimes (Amendment) Act 1997* requires the defence to make a written application to obtain the court's leave to cross-examine the complainant in relation to her prior sexual history prior to the trial commencing. After allowing the defence team in this trial to draft such an application in court, the trial judge ruled in favour of allowing the cross-examination, after being satisfied that it 'compl[ied] with the requirements of the section'. Similarly in Trial 34, where the proceedings occurred after the legislative changes were introduced, the defence barrister was required to make a written application on the first day of trial. He was unaware he was required to give notice 14 days prior to the commencement of the trial of an intention to question the complainant in relation to her prior sexual history. Freckleton (1998a: 153-4) is critical of these provisions for the unfair advantage he believes they afford the complainant to 'think through exactly what answers she/he proposes to give, and for those few complainants who are unscrupulous, to organise in advance perjured evidence'.

several other occasions and avenues which allowed evidence of her sexual past and reputation to be illicitly admitted.

The first avenue emerges from what have become standard sources of information in relation to a complainant's sexual past although they have rarely been subjected to scrutiny by the courts: the complainant's statement and the accused's record-of-interview with police.[48] In this particular trial, both accused were asked by police during their initial interviews about their knowledge of the complainant's sexual proclivities. The co-accused immediately volunteered his impression of the sixteen year old complainant as being a 'a bit of a tart...you know, bloke after bloke after bloke...'. He also suggested that the complainant's boyfriend at the time had not been her first sexual relationship. Encouraged by the police interviewer, the accused then claimed that he too had had sex with her and that:

> ...it wasn't her first time. I know what first time is. I've broken in a few virgins in me life... (Trial 27; Police record-of-interview, p.75)

The principal accused was also asked several questions by the interviewing police officers about whether the complainant was 'a sexually active girl?'. He replied, 'yes...she had a little bit of a reputation'.

Whilst the police undoubtedly provoked the discussion through their questioning, there were no attempts by the prosecutor or the judge during the trial to request appropriate editing of these parts of the interview tapes.[49] They were simply played without interruption for the jury to hear.

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[48] Kaspiew's (1995) view of rape victims' statements as providing the critical basis on which the stories of rape will be constructed in court can be extended to the alternative accounts offered by the accused in their police records-of-interview. While the complainant's statement will be censored for any reference she might make to experiences of his previous violence or offending behaviour, the accused's account remains intact in terms of any prejudicial commentary he may provide about the complainant.

[49] The editing out of inadmissible evidence from an accused's record-of-interview is almost routinely undertaken prior to any trial. In fact the tape-recorded interviews in this trial had already been the subject of pre-trial editing to avoid the jury learning that one of the accused men had been an inmate at a Youth Training Centre around the time of the alleged offences.

During the trial, the complainant's sexual relationship with her then boyfriend was also the subject of both prosecution and defence questioning, an area that fell well outside the prevailing ruling. The prosecutor initially breached the ruling by asking the complainant whether the relationship had been sexual. One of the defence barristers subsequently used her evidence on this point to ask her former boyfriend the following questions:

DB Did she [the complainant] ever tell you that you were her first sexual partner, or did she say something different to that to you, or did she never say anything about it at all?
W No, she did say that I was her first.

Even despite the fact that this response corroborated the complainant's evidence, the same defence barrister then provocatively asked:

DB You didn't know any of the previous boyfriends to know whether or not you were being given an accurate account about that?

W No, I didn't.

On the face of it these trials demonstrate how despite any statutory restriction, the legal legacy of connecting a woman's prior sexual history with issues of consent and credibility can still be powerfully represented within contemporary rape trial discourse. They also highlight how little resistance was mounted by judges and prosecutors to counter these assumptions, even despite the greater awareness, and one hopes, a wider acceptance of the reformist arguments against court strategies that depend on placing women's sexual pasts on trial.

More heartening and of particular significance in the current study, however, were the outcomes in three of these five trials where despite the "sexual history defence" jurors convicted the accused men of rape. These findings may even suggest a reduction in the extent to which jurors have traditionally been preoccupied with, if not completely

overwhelmed by, evidence of prior sexual history in the context of rape cases (Kalven & Zeisel, 1966; LaFree et al., 1985).

These cases, however, comprised only some of the kinds of situations in which sexual history evidence continues to figure within rape trial discourse. There were other trials where defence teams appeared to have developed more sophisticated methods for subverting the efficacy of the sexual history provisions. They developed arguments that carefully avoided explicit or simplistic drawing of rudimentary lines between a rape complainant's past sexual conduct and her capacity for telling lies about rape or her willingness to consent to sex with the accused.

5.5.2 Using Legal Gymnastics

There was a small number of trials observed where the arguments for introducing sexual history evidence appeared more sophisticated and more focused on the specific circumstances of the case, and moved beyond the usual arguments that the complainant belonged to a class of either unchaste or morally suspect women. When examined more closely, however, these barristers were successfully deploying methods to persuade judges to admit questioning related to prior sexual history which by various devious means played on traditional stereotyped preconceptions about women and rape.

Defence counsel in one such trial [Trial 16] convinced the presiding judge of the legitimacy of asking the complainant questions about her sexual involvement with her boyfriend who was employed by the accused. The defence argued that the evidence had a real bearing on the likelihood of the accused forming an honest belief in the complainant's consent at the time of penetration.

On the night of the alleged offences, the accused had been introduced to the complainant by her boyfriend (his employee) at a hotel where they were having a few drinks. At the end of the evening, the complainant and her boyfriend had accepted the accused's invitation to sleep at his house to save them driving home. Once there, the

couple shared a single bed in the accused's spare room. The complainant was very drunk by this time and could recall little else that occurred that night. Her evidence was that, in particular, she had no memory of having engaged in any sexual activity with her boyfriend. Her very next memory was waking to find the accused penetrating her. Initially she had thought it may have been her boyfriend but when she turned and saw that it was the accused, she became distressed, screamed and pushed him away.

Although the accused told the police that he thought the complainant had known it was him having intercourse with her, he later conceded that she could not have freely agreed to sex in such circumstances (since she was asleep) and that he really had no reason to think she had. Despite this serious admission, the accused pleaded not guilty at the trial and claimed not to have held the requisite guilty intention to commit the crime. He honestly thought she had consented even if he could subsequently appreciate that she might not have been.

The complainant's behaviour during the early hours of this morning became the focal point of the trial. To substantiate the accused's honest belief in consent, the defence were intent on establishing that the complainant had engaged in sexual activity with her boyfriend during that night. This would render the accused's honest belief more feasible that the complainant may have sub-consciously believed it was her boyfriend penetrating her when she awoke, and so would have been acquiescing to his initiative. This could then help the accused's defence that he believed she was willing to have sex with him.

Faced with the fact that the complainant could not recollect any sexual activity with her boyfriend that night, the defence further sought to question her about a previous instance of intercourse that had occurred with her boyfriend on New Year's Eve, six days before the alleged offence. This could then substantiate the boyfriend's evidence that there had been some sexual activity between them on the night in question.

This was a very complicated and tenuous chain of argument. It was, nevertheless, presented as a reasonable rationale for allowing section 37A to be stood aside. The arguments, when more systematically unpacked, however, amounted to a far more conventionally framed narrative along the following lines:

A woman, having already engaged in sexual activities with her boyfriend at least at some stage in the recent past (either on the night of the assault or a few days earlier), is consequently more likely to have participated in sexual activity with another man on the night in question, even if her "consent" would have had to have been retrospective or inferred given that she had been asleep at the time of penetration. However, this part of the narrative is less disturbing than the next element which concerns the accused's belief in consent. This presumes that any "agreement" a woman has with her boyfriend provides the grounds for another man to believe that she may also consent to sex with him.

The judge in this case seemed to have no difficulty with the line of the questioning and allowed the cross-examination to proceed with the complainant being asked to confirm the act of sexual intercourse she was alleged to have participated in with her boyfriend on New Year's Eve. However, defence counsel were quick to seize on a further opportunity to question the complainant about her general sexual proclivities:

> He [the current boyfriend] was saying at that stage he couldn't go out with you because of his being a mate of your old boyfriend?...But somehow on New Year's Eve you wound up in bed with X [current boyfriend] didn't you...the day after you had broken up with Y [former boyfriend] is that right? [Trial 16]

Clearly, this questioning bore no resemblance to the substance of the original application and yet proceeded without any interference or challenge from the prosecutor or trial judge. Whilst initially the arguments appeared directed at the specifics of the case, grounded in genuine attempts to meet the tests required by 37A, the questioning that followed and the inferences that the jury were later asked to draw

from the evidence revealed the barrister's intention of reactivating the links between sexual proclivities and judgements about women's allegations of rape.

The emergence of a different but equally complex legal discourse being used by barristers to justify sexual history applications was observed in other trials where there was evidence of past sexual assaults or previous complaints being made by the complainant. These women were constructed as inherently suspect, not because their earlier experiences of abuse were in doubt, but as a result of the kind of psychological damage that was likely to impact on adult survivors of childhood sexual assault. In one trial, the complainant was said to have developed a 'victim mentality' as a result of the horrific abuse she experienced at the hands of her two brothers. The defence suggested that this could be used to explain the false allegations she subsequently made against another extended family member [Trial 6].[50]

The argument was ingenious, despite its tautological nature. It rested on the defence firstly constructing the complainant as a "victim". He then simultaneously used this characterisation to discredit her capacity for making further reliable and truthful statements in relation to any subsequent sexual assault that, in this case, she alleged was perpetrated by her cousin.[51]

The complainant in another trial was said by the defence to have 'transposed' her childhood experiences of sexual abuse by a stranger and an uncle onto a situation where she was professionally massaged by a naturopath [Trial 26]. The complainant confirmed during her evidence that she was seeing a psychologist to deal with the

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[50] There was also a brief attempt by the defence to suggest that the sexual abuse allegedly perpetrated by the complainant's brothers could be deemed a relevant consideration by the jury when assessing the likelihood of her consenting to have intercourse with the accused. The accused had claimed that the first occasion of consensual sexual intercourse had occurred in his car when he was assisting her to move house to escape the sexual abuse perpetrated by her brothers. Defence counsel used this to propose that the timing of the complaints against the brothers could somehow be associated with the complainant having consented to sex with the accused in his car on the side of the road.

[51] The fact that the accused was aware of the sexual abuse perpetrated by the complainant's brothers against her was uncontested at the trial. Indeed, according to the complainant, the accused had used his knowledge of the abuse as a kind of precursor to the first occasion upon which he indecently assaulted her.

emotional damage caused by her childhood experiences of sexual assault which included instances of digital rape. The defence subsequently used this information to argue that the complainant had simply substituted the earlier experiences onto the accused where in a therapeutic context she was having a 'cathartic release' that produced the sensory effect of mistakenly feeling digitally penetrated.

A third trial involved multiple rape charges being laid against an accused in a situation where the co-accused had already pleaded guilty and was serving a prison term for his part in the incident. The complainant's status as "rape victim" could therefore not be challenged [Trial 20]. And yet, according to the defence the horror of her having been raped by the co-accused rendered her memory of the accused also raping her and shooting a firearm above her head highly unreliable.

These kinds of arguments provide illustrations of Cuklanz's argument (1996: 39). At the same time as feminist inspired theories are becoming more prominent amongst mainstream cultural understandings of rape, they may also be deployed for other purposes by lawyers who see value in maintaining the previously dominant conceptions of rape victims as inherently untrustworthy (and unstable in terms of the trial examples). Faced with fewer opportunities for directly impugning women's accounts through traditional narratives based on their prior sexual histories[52], defence barristers offered alternative constructions that draw on the more sensitive understandings of rape afforded through reformist agendas to assist in reframing their discourse. Now women are rendered less credible because of sexual experience even when it is non-consensual.

Although Cuklanz (1996) remains hopeful that feminist insights will reduce the power of mainstream representations of rape, she warns of this kind of potential backlash that ultimately works to undermine feminist discourses on rape while appearing to support the philosophical frameworks on which they are based. For example, the kinds of legal arguments that advanced in these trials appeared to be inspired by discourses normally

[52] Although the examples of the current study would suggest the opportunities are ever present.

associated with contemporary victimology theories and/or feminist analyses of the long term emotional and psychological consequences of childhood sexual assault, including the repressed nature of some of the memories of sexual abuse.[53] The approach taken is to adopt empathetic tones and the trauma experienced by the woman complainant is expressly acknowledged. At the same time she is reconstituted as so irreparably damaged that her emotional stability, and therefore her credibility more generally, must be in serious doubt.[54]

Moreover in the confines of the courtroom, where judges must listen and rule on complex legal points in response to the kind of mental gymnastics performed by defence counsel when mounting their cases, some of this reasoning can appear seductively persuasive. Unless the threshold tests of section 37A are rigorously applied, which now requires that even the most intellectually elaborate and challenging arguments are carefully and systematically unpacked, defence counsel will face little resistance. Their continued attempts at constructing even more ingenious arguments for sexual history applications that appear to be far removed from the now discredited grounds for adducing sexual history evidence are proving remarkably successful and the result is that these prejudicial lines of questioning remain a powerful defence tool.

5.5.3 The Breaching of Section 37A

Giving attention to the ways in which Section 37A applications are argued is particularly valuable for exploring the kinds of narratives being advanced by barristers in their attempts to override the restrictions. By no means, however, does this represent the only avenue through which aspects of women's sexual histories are introduced to the court. Whether it is because barristers are deliberately flouting the provisions, or are unaware of either the ambit or scope of the legislation, or assume a

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[53] Important contributions to our knowledge and understanding of these issues can be found in the books by Herman (1981), Gil (1983), Butler (1985) and Maltz & Holman (1987).

[54] In some ways, criticisms of the battered woman syndrome having operated to pathologise women could be used in this context. That women who experience sexual violence are likely to suffer from rape trauma syndrome (Burgess & Holmstrom, 1974) can be reconstituted by barristers as providing a reasonable (even sympathetic) basis for subsequently viewing women as emotionally fragile or hyper-sensitive in so far as men's conduct towards them is concerned.

level of consensus about the admissibility of certain kinds of sexual history evidence, complainants are frequently subjected to questioning related to their sexual pasts without any formal application having been made, and without intervention from the prosecution counsel or from the trial judge.

As many as 30% of complainants, who gave evidence at trials examined for the Victorian Evaluation Study, were asked questions prohibited by the section without the prior approval of the court (Heenan & McKelvie, 1997: 134). In the current study, clear breaches of section 37A were observed in 9 of the 36 instances (25%) in which sexual history evidence appeared.

On three occasions, evidence relating to the complainant's prior sexual activities was admitted after some informal agreement had been struck between the parties outside of the court. In one of these trials [Trial 3], the fact that the complainant had had a termination four days before the alleged incident was the subject of cross-examination for a number of prosecution witnesses, including the complainant herself. When I later queried an absence of any application, the prosecutor's view was that it had simply been unnecessary. The prosecutor said that she too had been keen for the jury to hear that the complainant was still suffering the physical effects of a termination at the time of the offences. This, she assumed, would render the accused's claims of vigorous consensual sex less likely.

In the second trial, no application was ever made to cross-examine the complainant about her previous sexual relationship with the accused [Trial 21]. After the trial was finalised, the OPP solicitor conceded that a pre-court agreement had been reached between the prosecutor and the defence barrister to allow the admission of these questions. In hindsight, the OPP solicitor said she was disturbed by how the questioning had proceeded and by the fact that the lack of any bounds being placed on its scope led to the following kinds of exchanges through cross-examination:

DB	Can you remember when it was that you first had sex with [the accused]?[55]
C	No I can't....
DB	You do recall having sex with him at some stage during the relationship do you?
C	Yes I do.
DB	On many occasions?
C	No, not very many....
DB	You see what I'd suggest to you is that it was quite a healthy sexual relationship and that sex took place on a regular basis. What do you say about that?
C	How do you mean by regular? It wasn't every night. I didn't see him every night.

In a third trial, the same kind of pre-trial arrangement had been made and later formalised by defence counsel just prior to cross-examining the complainant [Trial 7]. It was only then that the prosecutor sought leave retrospectively from the trial judge, conceding that he ought to have done so before proceeding to question the complainant about her prior relationship with the accused. The judge obligingly responded that he was:

> not in the slightest surprised that it did not in the circumstances of this case occur to you to make it, because whatever justifications might exist for the provisions of this particular statute, their application to this case would already, in my opinion, be utterly ridiculous [Trial 7].

Clearly echoing the sentiments of the vast majority of trial court judges who are loath to exclude the fact of any prior sexual contact between a complainant and an accused, this judge almost criticised the prosecutor for drawing the court's attention to his non-compliance with the relevant section of the law.

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[55] This was the very first set of questions faced by the complainant in cross-examination.

The continued significance of a shared understanding that often appeared to guide the necessity or legitimacy of making sexual history applications was demonstrated through this kind of unspoken consensus for a number of trials. Casper and Brereton emphasise the strength of cultural practices and mutual understandings that operate in legal work groups 'whose members - judges, prosecutors, defence attorneys, probation officers - work regularly with one another and develop patterns of behaviour that serve both individual and institutional needs' (1984: 131). In this context breaches may occur in full knowledge of the parties involved because each operates within a shared belief system of legal relevancies, where the admission of sexual history evidence, particularly between a complainant and the accused, is understood as *a fait accompli.*

In other trials there were breaches that unequivocally flouted the provisions, where any connection between the questioning and the disputed issues in the trial was entirely specious. In one trial [Trial 25], the complainant was asked about whether she and her friend had looked through a pornographic magazine in the presence of two men, one of whom was the accused:

DB ...You [the complainant] joked to [another female], you made a joke about anal sex and you said jokingly "You should try it, it's good" and she said "No way, it's a one way valve". Do you recall having said that?

C No.

The accused, who was a senior ranking member of the army, alleged that the complainant, a private, consented to intercourse after they drunkenly fell asleep on the same mattress in a room where others were also sleeping. This same line of questioning in relation to the pornographic magazine became a theme for each of the other three witnesses who had been present in the room.

In another trial, the defence barrister asked the complainant why she had volunteered in her statement to the police that the principal offender had not masturbated before penetrating her. He then brazenly ignored the provisions by asking her:

DB ...was it your belief at that stage, at the age of 16, that that was a normal occurrence? [Trial 27].

The prosecutor immediately and successfully objected and criticised the defence for framing 'a dangerous and mischievous question'. This was in fact the third area of sexual history questioning the complainant had faced in a trial where her sexual past had already been constructed as the key to the defence case [Trial 27].

A small number of judges were also quick to respond to breaches of section 37A. In one country trial observed towards the end of 1996, defence counsel suggested the following to a 15 year old complainant [Trial 22]:

DB Now, I put it to you that...the thing that upset you most of all about this incident was the fact that you were dumped by these boys....Because sex is no big deal to you is it?

The judge immediately interjected:

J Mr X, I can't believe it

DB Well I am only...[interrupted]

J No you are not "only". You are not permitted and you know that.

In the presence of the jury and the complainant, the judge in this case went on to rule that the defence barrister was in clear breach of the provisions and he would not tolerate any further violation.

This kind of public censure was directed by another judge at the defence barrister when he asked the complainant a question aimed at introducing evidence related to her sexual proclivities. The judge remonstrated:

> ...You went perilously close and you raised it without even thinking it might be regarded as previous sexual activity, and it is getting very close to that too [Trial 24].

5.5.4 "A nod is as good as a wink to a blind horse": Innuendo substituting for sexual history evidence

Criminologist Alison Young (1998) has recently explored the kinds of strategies used by defence barristers in rape trials for sexualising or objectifying women's behaviour as a signal to men their readiness for sex. She focussed on defence methods for silencing women's accounts of rape through constructing alternative, though familiar, narratives of consent in which women are figured as mutually participatory or as keen to incite men's attentions. With this in mind, she explored how these processes of trial questioning worked so successfully to revive the dominant stories about rape (Young, 1998: 456-457).

In particular, Young identifies sub-texts of defence questioning that rely on a notion of 'signals' that are supposedly transmitted to men by women through their behaviour, speech and dress (1998: 449). With respect to dress, she draws attention to how often during the trial process the complainant's 'clothing and bodily appearance are regarded as pre-eminent sources of information about the self' (Young, 1998: 448). Without necessarily making explicit the connection between the complainant's dress (the message) and the cultural meanings ascribed to it (willingness to have sex in the past, present and future), Young provides examples of how clothing can be transformed by defence barristers into a story of implied consent so that 'singlets becomes lingerie, swimwear becomes underwear' regardless of the social situations in which they appeared (1998: 450).

Others such as Newby (1980), Adler (1987), Bonney (1987) and Brown et al. (1992) have also highlighted the use of innuendo to bypass the regulations governing sexual history evidence. Newby (1980: 121), for instance, points to the 'subtle' but 'complicated' mechanisms through which women's sexual proclivities and conduct are suggested or assembled before the jury, while the defence remain careful to avoid

questions that could more readily be identified as falling within the protected confines of section 37A. More recently, research documenting young women's experiences of giving evidence in sexual assault cases revealed how a certain 'type of questioning implied sexually inappropriate behaviour' and was particularly difficult for the young women to handle 'because it relied more on insinuations, sniggering, and rhetorical comments made during cross-examination' (Eastwood et al., 1998: 5).

An example in the current study is a defence barrister [in Trial 13] who, when frustrated by his unsuccessful attempts to persuade the trial judge that an incident involving subsequent sexual activity between the complainant and another male should be admitted, opted to use other means through which the suggestions could be made without directly breaching the judge's ruling. The complainant was alleged to have been in her bathroom with another male while the accused and others were in the house. While the judge refused to allow any questioning about what occurred in the bathroom, the defence continued to draw attention to this mysterious bathroom scene by asking other witnesses whether they had witnessed the complainant enter the bathroom with this male and even asking one witness about whether the complainant looked embarrassed when she came out.

Further questions using euphemisms for sex were also asked of other complainants and witnesses in some of the other trials observed. For example, complainants were asked whether they were 'interested in partying' on the night of the alleged rape or whether they had 'been going out with other men' around the time of the offences. During one trial [Trial 22], the young friend of a complainant was asked:

DB	Would you say that [the complainant's] behaviour was what you'd call uninhibited with the boys?
W	I don't know what that means.
DB	...without any reservation, without concerns. She carried on with the boys, not seeming to bother whether she was being watched or anything like that. Agree with that?

W Yes.

5.6 THE ONE THAT GOT AWAY

While the current trial sample appears to have an undue proportion of cases where sexual history evidence was admitted, there were eight trials (23.5%) that emerged as "sexual history free". An obvious point of inquiry was to explore the features of these eight trials that worked against the potential admission of prior sexual history evidence.[56]

Two of these trials deserve mention here. In one trial [Trial 15], there was an attempt by the defence barrister to introduce evidence of the complainant's occupation as a sex-worker to explain why she had suffered pelvic tenderness in the weeks following the sexual assault. Once the prosecutor gave assurances that the issue of pelvic tenderness would not be raised or related to the offence, the defence was prevented from referring to the complainant's occupation. In a second trial, the complainant did not give evidence due to the severity of her intellectual disability [Trial 32]. This reduced any opportunity the defence may have had for introducing evidence of prior sexual history.

In the remaining six trials, however, neither barrister at any stage sought leave to question the complainant about her prior sexual activities and nor did they breach the provisions by introducing evidence without the court's permission.
Even a cursory analysis of these trials reveals certain characteristics that immediately distinguish them from the rest of the cases. As the tables below show, none of the complainants who were spared the experience of being asked sexual history questions were in close relationships or friendships with the accused.

[56] An interesting aside when considering these trials is that jury decision-making appeared unaffected by the absence of sexual history evidence. Four of these eight trials resulted in convictions, while the remaining four produced full acquittals.

Table 5

RELATIONSHIP BETWEEN THE COMPLAINANT AND THE ACCUSED

Relationship to the accused	Frequency
Met that day	3
Slight/second order acquaintance	3
Employee	1
Client (naturopath)	1
TOTAL	8

Most women had also reported the assault relatively quickly.

Table 6

TIME TAKEN TO REPORT TO POLICE

Report time to police	Frequency
Less than 1 hour	3
1 – 12 hours	1
13 – 24 hours	2
Within one month	1
Unclear	1
TOTAL	8

Furthermore, when first interviewed by the police, none of the accused suggested that the activity in question had in fact been consensual. Instead, four of the accused claimed to have had some social contact with the complainant but denied any sexual activity, three exercised their right to silence in answer to the allegations and one claimed to have not ever met the complainant. Even once the charges were brought to trial, only two accused (who had initially refused to comment in their interviews with police) based their defence on consent.

On the surface then, these eight trials could be seen as straightforward examples of where the existing sexual history provisions were adequate and effective. Given six of

the accused claimed that no *sexual* contact had occurred, sexual history evidence could hardly have been positioned as "substantially relevant" to any fact at issue, leaving less room for barristers to construct arguments that would satisfy the threshold tests specified in the legislation.

However, as the earlier findings showed, defence barristers were often extremely adept at mounting successful applications using the second discretionary arm of the legislative provisions, that is, the evidence would have a critical bearing on the complainant's credit as a reliable and honest witness.[57] These eight cases might therefore equally be explained on the basis of an alternative thesis. The accused in these cases may simply have known less about the women who made allegations against them and have consequently less material available to them to construct the kinds of narratives that were frequently presented in the other trials observed. Or perhaps, as Temkin suggests (1993:17), given the willingness on behalf of the courts to allow sexual history evidence, it is 'an inept defence counsel' who cannot find some means or foundation for trying on a 37A application.

5.7 Concluding Comments

By the close of the twentieth century, most people might have expected that the admission of sexual history evidence as a relevant consideration in relation to the issues to be determined in a rape trial would be virtually negligible. With early reformist attention having been focussed on legislatively restricting some of the more distressing and humiliating aspects of cross-examination, one would certainly have expected a significant decline in its use. And yet with monotonous consistency, studies conducted throughout the early 1990s in Australia continued to show the extent to which the use of sexual history evidence remained a core component of contemporary rape trials.[58]

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[57] See previous discussions of Trials 12 and 16.

[58] This is in spite of cultural shifts in social and sexual behaviour and expectations amongst men and women in mainly Western societies. Research has shown a profound increase in the likelihood of women becoming sexually active during their mid teens, and certainly prior to marriage or the establishment of long term relationships (Lindsay et al., 1997: 25-26). Rather than efforts being directed

The current study points to a comparatively worsening situation. Of the 34 trials examined, in 26 (76.5%) there was at least some evidence relating to the woman complainant's past sexual activities. On a majority of occasions (61.1%), the evidence concerned the complainant's history with people *other* than the accused man, including where the evidence was admitted without the judge's approval. Where applications were made to introduce evidence of previous sexual contact between the complainant and the accused, judges invariably allowed at least some questions to be asked, even in situations where the complainant vehemently denied there had ever been prior occasions of consensual sex between them. Few judges would intervene once questioning in relation to sexual history commenced, even where barristers displayed a total disregard for the provisions in questioning complainants without first seeking the court's permission.

There were, however, some significant although rare exceptions involving trial judges who obstructed barristers' attempts to include sexual history evidence. Sometimes this involved judges making a direct reproach in open court. Although proving a sharp contrast to general trial practice, these occasions demonstrated the potential role that judges can play by more rigorously monitoring the use of sexual history evidence in trials over which they preside.

When compared with the findings of other studies (Henning, 1996; Department For Women, 1996), the same problems of illegitimate application and lack of uniformity in determining sexual history applications were apparent in the current study. This was particularly the case for barristers who wanted to question women in relation to previous allegations of sexual assault. Given the alleged sexual activities were said to be non-consensual, questions as to whether the provisions even applied occupied considerable court time.

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at persuading young people not to have sex, they are more realistically focused on encouraging them to practice safer sexual practices.

Henning concludes that, despite greater statutory control being placed around the sexual history provisions, the legislation is having 'little impact upon the conduct of cases' (1996: 77). She attributes this failure broadly to the frequent absence of any genuine attempt to assess applications against the requisite threshold tests. Definitional problems, inconsistent approaches to interpretation and outright breaches of the section are all highlighted within the Henning report and hence the status quo of large numbers of women being subjected to sexual history questioning is maintained.

This is not to suggest that evidence regulated by section 37A should never be admitted in rape trials. There may well be situations where the fact of any prior consensual or non-consensual sexual activity may be critical for the jury to consider, especially where this concerns the complainant and the accused. For example, it may be important from the perspective of the prosecution for the jury to hear of the fact (as opposed to the detail) of a previous sexual relationship. That they may have once lived together or had been in a relationship where issues of trust or power often figured in the context of their interaction may provide some contextual basis for the jury in considering the current allegations.

However, these were almost never the circumstances under which the significance of sexual history evidence was constructed. Its "relevance" continued to be located within the same gendered paradigm where sexually active women are seen as prone to lie or are more likely to consent to sex with any man in the future. Far from these 'twin myths'[59] being dismantled under the weight of the provisions, they continue to be further 'enshrined' by the rulings and rationales proffered by the courts in allowing juries to consider this evidence as relevant to their deliberations (Sheehy, 1991: 454).

What continue to remain hidden, however, as the trials showed, are the kinds of discourses used to thread together the "reasonable doubts" that juries are encouraged to form with respect to evaluating complainants' sexual pasts and proclivities. The five

[59] The term 'twin myths' was used by Justice Beverley McLachlin as part of the majority judgement in upholding the constitutional challenge of *R v Seaboyer; R v Gayme*, which reinstituted wide judicial discretion for admitting sexual history evidence in Canada [(1991) 48 O.A.C. 81 S.C.C. at 98].

trials [Trials 9, 12, 17, 27, 31] where the core component of the defence case rested on locating the complainant's sexual history as a paramount consideration for the jury provided the most disturbing examples of law reform having failed women in this area. Far from the provisions (or most judges' treatment of them) being used to prevent an 'attack upon the sexuality and morality of the complainant', as one judge suggested in the Victorian Evaluation Study (Heenan & McKelvie, 1997:138), the legislation was effectively manipulated if not openly disregarded in a bid to reconstitute women's sexual lives as both reasonable and substantially relevant bases for the accused men to defend rape allegations made against them.

Alternatively, barristers in these and other trials sought to use sexual history evidence as a means to damage the complainant's credibility. This included situations where women had made previous allegations of sexual assault, where they had chosen not to disclose the sexual assault to anyone around them, where they claimed to be sexually naïve, or where they had resumed sexual lives post the offences: these kinds of events were all said to lessen the likelihood of these women being seen as genuine victims of rape.[60]

Similar examples feature in both Henning's (1996) and the Victorian Evaluation Study research (Heenan & McKelvie, 1997) where complainants were often subjected to credibility tests using their past sexual conduct. Perhaps these trials more than any other examples reveal the extent to which some defence barristers will deliberately flout the provisions. Indeed one judge who was interviewed as part of the Victorian study lamented that:

> ...in the good old days you'd go hell for leather and use everything as ammunition, much to the chagrin of the prosecution and the upset of the victim, and I suppose it was irrelevant but it was something that you did and indeed I think

[60] Freckleton, (1998a: 152) concedes how 'in practice considerable freedom has been given for cross-examination which happens to have the collateral effect of putting the prior sexual behaviour of the complainant, provided that its primary purpose is convincingly portrayed as being to contradict an assertion made by the complainant in examination-in-chief or in a previous answer in the course of cross-examination'.

> defence counsel, er, defendants, got away with too much...
> (Heenan & McKelvie, 1997: 136)

Puren is convinced that barristers know all too well the power of sexual history evidence as a tool for unfairly discrediting women in the eyes of the jury, which she suggests occupies a 'defining site for the reiteration of patriarchal culture' (1997: 135). This was empirically supported by the comments made by 57% of barristers interviewed for the Victorian Evaluation Study who believed that a complainant's sexual history was still a relevant consideration for juries and, if introduced, would be likely to influence their view of the complainant:

> ...not consciously, but I really think that if they take a dim view of a woman, [it] doesn't matter what the evidence is, they are gonna [sic] acquit - unless its a bad break-in type rape. If it's an ambiguous one without serious violence, if they think she's a moll or she's rough or she's a bitch, they're very reluctant to convict (Heenan & McKelvie, 1997: 147).

And:

> I still think there is a prejudice against young, sexually active women...there is a distinction made between "good" and "bad" women (Heenan & McKelvie, 1997: 147).

In line with this perception, some defence barristers were prepared to disclose how any shield provided by the provisions can effectively be circumvented. Consider the approach taken by one Victorian defence barrister when faced with a non-interventionist magistrate:

> ...[without the court's permission] I was clearly asking matters of sexual history and the prosecutor didn't object, and His Worship didn't say anything, *so I kept going* (Heenan & McKelvie, 1997: 148, emphasis added).

Similar comments were reiterated by a defence attorney interviewed by Spohn and Horney in their research conducted in the United States:

> if the judge rules the evidence can't be admitted, you can still always blurt something out in court and then say you didn't understand the order (1992: 169).

It is therefore significant that in three out of the five cases where the woman-complainant's sexual history featured as central to the defence case, juries elected to convict the accused.[61]

Leaving aside the more standard methods through which sexual history evidence was often admitted, there was a small number of trials where more sophisticated arguments were constructed to ground the "relevance" of certain kinds of sexual history information. Defence barristers in these trials were careful to avoid making arbitrary connections between occasions of prior sexual activity and believability. These trials all involved cases where the complainant's credit was constructed as suspect. Three of the applications were directed at eliciting evidence of previous instances of *non*-consensual activity experienced by complainants years before the events in question [Trials 6, 20, 26]. A fourth trial involved a complainant who had no memory of allegedly engaging in sexual activity with her boyfriend a few hours prior to waking up to find the accused (her boyfriend's employer) penetrating her [Trial 16].

Without questioning their status as victims of previous events or constructing them as unworthy of the jury's sympathy, defence barristers in these cases inferred from these experiences an emotional fragility in these women that would render them especially unreliable in terms of any future complaints of rape or sexual assault. Here, the narratives developed by defence barristers, in mounting their section 37A applications, cleverly drew on theories associated with early victimology as well as feminist analyses that described the long term impact and consequences of sexual assault. As Cuklanz observes, the language of law reform can also be appropriated by legal practitioners who adapt to perceived cultural shifts in the prevailing views about rape,

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[61] Some prosecutors would suggest these outcomes reflect a shift in jurors' attitudes towards rejecting defence tactics that place the women complainant on trial. Indeed some prosecutors said they might decide against intervening during illegitimate cross-examination of a complainant's prior sexual history

and violence against women more generally, and reconstruct 'discourse[s] separated from the framework of meaning in which they were originally formulated' (1996: 117).

While the arguments were in themselves more complicated and less directed at impugning women's characters through the usual avenues of sexual history evidence, they were nevertheless reminiscent of the mechanisms through which law has historically pathologised women or invalidated their experiences. Their success in mounting these kinds of applications to allow sexual history evidence may say less about any shift in legal practice and more about the:

> ...the symbolic message [that] is, in some degree, an expression of the legal system's high tolerance for violence against women and its low threshold for the measure of her unworthiness (Bumiller, 1990: 127).

These themes are further explored in the next chapter where the focus is in on the legal management of consent. A renewed sense of reformist optimism followed the introduction of a progressive legislative framework governing the definition and meaning of consent which appeared to increase law's capacity to recognise a wider set of social circumstances in which rape was experienced by women. Moreover, in cases where there was no physical or verbal resistance, it placed a greater onus on the accused to explain how a silent or otherwise motionless woman could "freely agree" to sex. The potential for these amendments to disrupt or subvert the dominant discourses surrounding the legal adjudication of consent, including the practices and processes through which barristers constructed their respective cases, or produced their stories of "what really happened", is considered in the light of the trials observed.

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if it could tactically advantage the prosecution case in turning the jury against the defence team (See Heenan & McKelvie, 1997).

CHAPTER 6

Transforming the meaning of consent in rape trials or telling the same old story...

6.1 INTRODUCTION

The profile of rape cases being prosecuted through the courts has undoubtedly shifted over the past ten or more years due to significant changes in patterns of reporting behaviour. Where stranger rape scenarios depicting the dominant image of sexual violence constituted almost 40% of reported rapes in Victoria during 1987 to 1990 (Victorian Community Council Against Violence, 1991: 26), by 1991/92 this figure had halved to 19.4% (Ross and Brereton, 1997: 139). By 1998/99 the Victoria police reported just on 7% of rapes where the offender was previously unknown to the victim (Victoria Police Statistical Review, 1998-1999: 116). As social awareness surrounding rape and sexual assault increased, so too did the numbers of reports involving a far wider, more representative cross-section of situations in which women experienced rape. The men they accused were now far more likely to be their ex-partners, fathers, boyfriends, bosses or dates than the dangerous unknown assailants against whom they had traditionally been warned.

The complexities surrounding the adjudication of cases of this kind in courts governed by adversarial principles of law have been well documented (Clark and Lewis, 1977; Adler, 1987; Temkin, 1987; Smart, 1989; Lees, 1996) and were the central theme of the original research conducted for my Honours thesis in 1990 (Heenan, 1990; Edwards and Heenan, 1994). In conjunction with the procedural mechanisms safeguarding the interests of the accused man, the issue of consent continued to dominate the trial process. Faced with situations that regularly involved at least some previous social contact between the two parties, where there was unlikely to be any marked difference between the versions leading up to the alleged assault nor any physical evidence that would conclusively support one account over the other, courts effectively placed women on trial in assessing the credibility and plausibility of their claims.

Moreover, my earlier research (Heenan, 1990; Edwards & Heenan, 1994) on Melbourne rape trials (prior to the 1991 changes) supported the findings of an American study that highlighted the role which "extra-legal" factors played in positioning women as either risk-taking and therefore deserving victims of rape or as showing a greater likelihood to consent to sex (LaFree et al., 1985; Reskin & Visher, 1986). While the significance of sexual history evidence and strong corroboration warnings was evident amongst the trials I observed, factors such as alcohol consumption, the absence of signs of force and resistance, and the gendered evaluations of acceptable social behaviour for women featured powerfully within the legal constructions of consent adopted by both parties' barristers, in their attempts to shape jurors' assessments and interpretations of the situations in which rape was alleged (Edwards and Heenan, 1994: 225-232).

This chapter is designed to explore the current legal management of consent after the introduction of statutory definitions and directions in Victoria in 1991 which were said to hold considerable promise for better incorporating women's experiences of rape within law. The focus is on how the stories of consent and non-consent in rape trials are now being constructed and substantiated by barristers, judges, jurors and victim-complainants in the light of this new legislative framework. It therefore deals with those trials where consent was the principal issue in dispute.

In most criminal trials the mechanisms through which barristers develop their cases are restricted to the direct evidence given by witnesses, as well as their closing addresses to the jury. While the conduct of cross-examination has often assumed significance within rape trial discourse, the closing addresses are where the legal story telling of consent is left virtually uninterrupted. It is within these stories that the legislative and cultural meanings ascribed to consent are most magnified within rape trials. For this reason, the closing addresses assume particular significance in the descriptive analysis undertaken throughout this chapter.

Table 7 shows more than half of the trials involved a situation where the accused claimed a case of straight consent (and where the complainant was said to be lying about what happened) or where the accused's defence rested on a mixture of consent

and/or an honest belief in consent (and where the accused may have been mistaken, or for some other reason unaware that the woman-complainant was not freely agreeing to sex).

Table 7[1]

TRIAL DEFENCE NOMINATED BY THE ACCUSED[2]

Line of Defence Used	Number of Accused	Percentage[3]
Consent	18[4]	48.6%
Belief in consent	1	2.7%
Combination consent/ belief in consent	3	8.1%
Admit contact, denied any sexual activity	11	29.7%
Denied any contact	2	5.4%
Other	2	5.4%
TOTAL	37	100%

Specifically, in just under half the trials observed (18 or 48.6%), the accused alleged there was consent to the sexual activity in question. Three other accused (8.1%) argued a combined defence of consent or having an honest belief in consent. One other accused (2.7%) admitted that the complainant was unlikely to have freely agreed to have intercourse with him, although he claimed at the time he had thought she had consented.

The stories of consent in these 22 cases are the subject of this chapter. Firstly, attention is given to those cases that have come to predominate in rape prosecutions, that is, where the complainant and accused have some prior knowledge of each other and where there are two competing and uncorroborated accounts of sexual activity.

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[1] See Appendix 3 for a representation of this information according to the individual trials observed.
[2] Of the thirty-four trials observed, three trials involved allegations against two offenders. The total number of accused is therefore thirty-seven.
[3] Percentages are rounded to the nearest decimal place.
[4] The accused in Trial 7 was included here even though the jury were asked to consider their verdict after the prosecution case had closed. While neither counsel had the opportunity to deliver their closing addresses, and the accused had not given evidence, I assumed on the basis of the complainant's cross-examination and on the accused's record-of-interview with police that his principal defence in the trial would have been consent.

To this extent, barristers' approaches to cross-examination and the closing addresses they delivered to juries are explored in order to consider whether reform activity has altered the standard trial mechanisms used to discredit women's rape accounts. In particular, the objective was to investigate whether these trials continued to turn on classic indicators of consent, such as evidence of force and resistance, and the extent to which presumptions regarding the complainant's prior sexual history and moral character also figured in the determination of consent.

There were a small number of trials that offered a direct challenge to the standard conceptualisations of consent. Although less frequent amongst the total number of trials observed during the research period, cases involving women who offered no physical or verbal resistance in circumstances where they were asleep, unconscious or under the influence of alcohol or other drugs, nevertheless exceeded the proportions that have appeared in past research. While there was common law support for these cases to be prosecuted in the past, the chance of conviction was considered negligible especially while trial outcome continued to depend so heavily on the presence of injuries or on the admissions of accused men.

The new legislation offered greater statutory foundation for these more difficult cases to come before the courts where precisely these kinds of circumstances were spelt out within the statute as vitiating any genuine consent. With the assistance of the new mandatory judicial directions, the Office of Public Prosecutions was perhaps more readily convinced that juries might convict in cases where the complainant was asleep or, for some other reason, unable to communicate her lack of consent (Heenan & McKelvie, 1997).

These kinds of cases bear most directly on what have been described as the more progressive features of Victoria's new laws in terms of the extent to which they provide the greatest challenge to the conventional legal and cultural meanings underlying consent (Naffine, 1992; McSherry, 1998). The interesting sociological questions were then: firstly, how were trials being processed and adjudicated in courts by barristers, judges and juries where the case circumstances sat squarely within the black letter law reading of the relevant section regarding consent, but

which were nonetheless defended by the accused men at trial; and secondly, how did defence barristers attempt to fashion convincing arguments for consent in circumstances where sleeping, drugged or drunk women claimed they were raped, and where jurors would likely be directed that non-responsive and non-resisting women were not capable of freely agreeing to sex?

There were nine trials where the case circumstances involved complainants who "said and did nothing" to indicate their free agreement to the sexual activity in question. Seven of these cases involved women who were asleep or otherwise unconscious prior to the accused man's initial approach. Two other trials involved women who were assaulted in the context of consultations with health care professionals. They too described themselves as "saying and doing nothing" during the commission of the alleged offences. How these situations were then reconstituted by barristers attempting to persuade juries of consenting/non-consenting women, while also managing the statutory changes to the legal definition and meaning of consent, are considered in detail for the light they shed on the efficacy for law reform and the potential for attitudinal change within the broader community.

6.2 Stories of Consent Simpliciter

This section draws primarily on the legal stories constructed in the 18 (48.6%) trials where consent was situated squarely as the issue in dispute and where there were pre-existing relationships of some kind between the accused men and the complainants. Seven of the complainant-accused pairs had some short acquaintanceship immediately prior to the incident; five were more closely connected as friends or acquaintances and there had been previous social contact; one pair were cousins; and the remaining five complainants and accused had shared intimate relationships as partners, spouses or de factos.

The overall legal treatment of these cases largely accorded with the findings documented in previous research on rape trials, including the most recently conducted research in Victoria (Heenan & McKelvie, 1997) and New South Wales

(Department For Women, 1996). Little separated the substantive stories given by the complainants and the accused of the events that occurred both prior to and post the alleged rapes. Injuries and other physical evidence were either absent or were assessed as equivocal and therefore did not assist in the process of discriminating between the woman-complainant's and the accused's versions of events.

Where the trials were reduced to a consideration of "oath against oath", the battle for a favourable outcome tended to rest on defence barristers negotiating a familiar and deeply gendered account of consensual sex. The meanings underlying these stories were often positioned within a wider social commentary reflecting the unequal power divisions that mark the cultural positioning of men and women in society. In particular, defence barristers clung to the traditional standards of consent when defending the conduct of their clients in dating situations or where the women-complainants had met the accused shortly before the offences were alleged to have been committed.

In one case, a woman first met the accused while walking along the beach and shared a small amount of (his) marijuana before she agreed to engage in certain sexual acts with him [Trial 1]. The level of activity that took place was quite uninhibited, given they were situated in a relatively public place.[5] Nonetheless, the woman maintained that she had made it clear to the accused throughout the encounter that she was not willing to engage in sexual intercourse. According to the complainant, the accused ultimately ignored their agreement and forcefully engaged in sexual intercourse with her.

The dominant theme throughout this trial was the sexual activity that had taken place between the complainant and the accused just prior to the alleged rape and the social interpretations and meanings attached by the barristers in constructing their respective cases of consent and non-consent. For the defence, the extensive nature of the sexual activity that took place immediately prior to the incident in question made consent to intercourse virtually axiomatic. Using a more traditional model of

male-female sexuality where a woman's sexual pleasure, if it exists at all, is defined within a male determined sequence of actions, the complainant's consent to intercourse was positioned as the logical next step in completing the (hetero)sexual performance.

This was particularly well illustrated in an exchange between the defence barrister (DB) and a (woman) police officer (PO) who had first spoken with the complainant following her report of rape:

> DB Would you agree that what she was doing was to excite the man?
>
> PO No, I agree she...[interrupted by DB]
>
> DB Why? Are you serious? You are saying what she is doing is not to excite a man? This is not a trick question, it is a simple question. A woman is taking off her brassiere; she is masturbating in front of a man and that is not to excite him?...it's simple logic?...
>
> [Trial 1]

In other words, the jury was urged to accept that there was only one 'logical' conclusion which was that sexual intercourse was anticipated and willingly, if not enthusiastically, agreed to by the complainant as the accused had suggested. The notion that the complainant may have participated in the preceding activity for self-gratification or at least mutual sexual pleasure, but not as a prelude to other sexual acts, was outside the conventional thinking being presented.

The jury in this case nevertheless found the accused guilty of rape. This was significant given this trial would almost certainly not even have been prosecuted prior to the legislative changes being introduced in Victoria. The solicitor from the Office of Public Prosecutions candidly admitted they had not expected to 'get up on it'[6] since the case involved the withdrawal of the complainant's consent after an episode of consensual sexual activity. Prior to the trial commencing, the defence had

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[5] The complainant maintained she did not initiate any of the activity but merely 'went along with' what occurred.

[6] This meant there had been some initial doubt about whether the case would even make it to trial.

in fact requested that the prosecution be discontinued for this reason. However the OPP had been influenced by the complainant's evidence at the committal which showed her to be 'a really credible witness'.

The measured and convincing way in which the young woman gave her evidence was probably a deciding factor in the trial (Frohmann, 1991), as perhaps were the progressive arguments fashioned by the prosecutor in his closing address. The prosecutor highlighted the legal status of consent and directly challenged conventional rape law discourse by dramatically reminding the jury that '...no longer does a woman have to exhibit her wounds of resistance as her badges of non-consent'.[7] He suggested it would be 'prejudicial' for the jury to simply believe the complainant's prior behaviour meant that she 'deserved it' or 'asked for it' and argued that 'she was still entitled to draw the line and refuse to have intercourse'.

However, a further influence on the jury may well have been the racial appearance of the offender. He was of Chilean descent[8] with limited proficiency in English. The credibility of a white middle class young woman making rape allegations against a man of non-English speaking background, even despite conceding some prior consensual contact with him, may have carried some sway with the jury. The OPP solicitor also conceded that a further reason for continuing with the prosecution to trial was the likelihood of the jury thinking the accused was 'a real sleaze-bag'.[9]

For the most part, however, prosecutors in these cases were preoccupied with the issues raised during cross-examination and devoted considerable portions of their closing comments to rebutting inferences designed to impugn or discredit the

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[7] The judge later undermined this by emphasising to the jury that there was no evidence of torn clothing or physical violence.

[8] Sexualised cultural stereotypes have often been assigned to men of South American or Latin descent. In another trial, the defence relied on these stereotypes to construct the complainant as keen to experience the sexual skills of 'Latin lovers' [Trial 17].

[9] Racist determinants in jury decision-making have been evidenced in studies where conviction and acquittal rates appear to discriminate on the basis of colour or cultural identity (Wriggins, 1983; Smith, 1990). A study conducted by Feild and Beinen (1980) on jury decision-making in hypothetical rape trials found that African-American women were far less likely to be believed than women of Anglo descent, especially where the accused man was white. LaFree et al. also found that jurors in their study were less likely to convict when the complainant was a Black woman (1985: 401).

complainant's position on consent. The prosecutors rarely disrupted the more standard rape trial discourse that relied on traditional preconceptions about the behaviour and reactions of women who had "really" been raped. For example, only one prosecutor referred to the continuously high levels of under-reporting or to studies documenting the reasons why so many women often decide not to disclose, or at least delay, their report of the assault. Rather, prosecutors emphasised individual case factors such as the personalities and life circumstances of the woman involved or the absence of any real motive for the complainant to make false allegations against the accused. Mostly, it was an argument directed at persuading the jury why the account of this raped woman should be believed.

A small number of prosecutors also appeared ill-prepared for dealing with both the substantive and the circumstantial issues relevant to most sexual offence cases. They were non-interventionist during cross-examination and gave closing addresses that seemed confusing and unconvincing. They also seemed to lack the fervour and dynamism that was often exhibited by defence barristers who were keen to capitalise on their final opportunity to speak directly to jurors in defence of their client's case.[10]

For example, one prosecutor, who usually defends in rape cases, made little to no effort to intervene during a rigorous cross-examination of a distressed complainant, opting to rely on the trial judge to regulate the tone and manner of the defence barrister [Trial 17]. In closing, this same prosecutor continually confused the names of the various witnesses who had given evidence and at one point mistakenly referred to evidence given by the accused when no such evidence was given. This almost resulted in the trial being aborted. Finally, he offered little more than a cursory protest to the judge's stated intention to provide the jury with a strong

[10] A defence barrister, renowned for delivering impassioned and compelling closing addresses that often included stories of his own personal life, admitted to me at the close of the trial that, although he 'didn't like his client', he felt he owed it to him to deliver a well prepared closing address. He also felt that few prosecutors devoted the same kind of attention to their closing addresses which he felt may influence the jury's consideration of the case, or at least 'the way the case is finally put to them'. Each of the three accused men who were represented by this barrister in the trials observed was acquitted of rape charges.

corroboration warning in circumstances where it was debatable that a warning was appropriate at all.[11]

There were some exceptions where barrister's arguments provided a significant contrast to the standard prosecution discourses that included criticising the defence for relying on strategies that fed on social prejudices and stereotypes or for inviting jurors to draw on the double standard of male-female behaviour. One such prosecutor began his closing address by accusing his colleague of running 'the green light defence' where the complainant was constructed as 'fair game' or 'grist for the mill' because she had agreed to be in the company of men whom she had only just met. He further berated the defence for treating cross-examination 'like [a] sport' in spending hours comparing every detail of the complainant's police statement with the evidence she gave in court [Trial 20].

This kind of direct censure of defence techniques was rare amongst the trials I observed, albeit powerfully delivered to juries who might well have become mesmerised by the theatre of cross-examination and less attuned to the actual evidence given. The same prosecutor developed this approach even further in another of the consent-trials I observed. He concluded with a dramatic indictment of the 'defence world' that has long since dominated rape trial discourse and the socio-legal adjudication of consent:

> Let me tell you about the world where the defence would like you to live, what sort of world it would be. They'd like you to live in a world where women cannot have a couple of drinks at home. They'd like you to live in a world where women cannot go out to nightclubs, they'd like you to live in a world where if you're at a nightclub you've got to count every drink you consume...where you can't drink too much at a nightclub ...because if you do all of that in the defence world, it means you consent to intercourse. It means

[11] In this trial there was an immediate report and a witness had given evidence of having heard the complainant scream 'stop it'. The police attended within an hour of the offence and the accused was interviewed immediately. The judge would also have been aware that the accused's bail had been revoked because he regularly drove by the complainant's home and made threatening gestures towards her.

> that you meet somebody for the first time...and you freely have sex with this person...open slather in the defence world, and you're entitled to take what you want...is that the world you want to live in?...I hope we don't live in a defence world [Trial 13].

Neither of these two trials resulted in convictions despite the defence barristers relying on precisely these kinds of sentiments to argue their cases. Continual reference was made by the defence, in most of the cases where consent was the principal issue, to the 'real' rape victim as she has been represented in the law: she is the woman who reports quickly; who has corroborative evidence of his force and her resistance; who is consistent in the minutiae of her account; and who has nothing in her social or sexual past that would call into question her moral choices or general lifestyle. Juries would often be asked to consider:

> Did [C] act as you would expect a rape victim to act and did [A] act as you would expect a rapist to act?...She could've done a lot of things that you would ordinarily expect a rape victim to do. [Trial 2]

Or:

> What would a normal person, male or female, do in that situation? You'd say "help me, help me. I've been raped". [Trial 20]

Additionally, some trial judges would reinforce this presumption by suggesting that it is the 'experience of the law' that 'women who are compelled to sexual conduct complain about it'.[12]

Women's conduct following the rape was the source of much defence comment and censure throughout the trials. One barrister castigated the complainant during cross-examination for showering after the incident:

> DB Now you know and everybody knows when you've been raped, the one thing you do is not have a shower or bath. You knew that didn't you?

[12] One judge deliberately countered this legal proposition by telling the jury that it was the 'experience of the law' that complaints are rarely made immediately following an assault [Trial 13].

C No I didn't; I've never been raped before...[13]
[Trial 23].

By contrast, another defence barrister suggested to the jury that a woman who had 'really been raped' would firstly 'attend to her toilet' or clean herself up before doing anything else [Trial 13].

The women in these cases were also variably constructed as the ones in pursuit, the instigators of the sexual activity, in effect the reason it happened. One complainant was told she had not acted 'responsibly' at any stage of the night which began when she left her children to go out drinking and socialising at a pub with friends [Trial 23]. Another defence barrister suggested that the young woman 'absolutely threw herself at these two young men' which resulted in the two accused alternately having intercourse with her some time later [Trial 22].

A thirteen year old complainant and her friend were similarly accused of being the sexual aggressors by an accused who, at 27 years their senior, was answering to charges of rape and sexual assault. He said:

> ...looking back on it now, I think what was the main driving force was that she wanted it. That she was the instigator. [Trial 10]

While the jury quickly decided on the guilt of the accused in this trial[14], statements of this sort were often thematically woven through defence cases. The result was an account that closely resembled those described by feminists such as MacKinnon (1983) and Pineau (1989). Here, women either were described in ways that matched the masculinist fantasy of a female sexuality unleashed and unlimited in their desire to provide sexual pleasure to men, or were positioned within the customary pattern of male aggression-female acquiescence where women delight in being "taken"

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[13] After the judge intervened to suggest that the legal profession were far more likely to know about such matters than lay people, the defence barrister followed with this particularly offensive and insensitive remark: 'I have never been raped myself, but I won't make light of things it is a serious matter Your Honour...*Much to my disappointment*' [emphasis added].

under the powerful force of male seduction. The closing statements made by one defence barrister epitomised the second version with the woman acceding to sex in the begrudging manner that is culturally expected of her - an image that perhaps struck a chord for the seven women and five men on the jury in this trial:

> And you know and everyone here knows that the real truth of this matter is that she let him have sex with her, and she didn't like it. Perhaps it was a little bit rougher than she liked. Perhaps the love bite was something that she really didn't want to happen. But I suggest to you that it is all part and parcel of things...we're all men and women of the world...It's not as if he bashed her.
>
> [Trial 23]

Another significant feature of these cases was the extent to which they were over-represented amongst trials where a strong corroboration warning was given. Seven of the nine trials where strong corroboration warnings were given (see Chapter 4, page 159) were among the eighteen "consent trials", with juries being warned of the inherent dangers of convicting the accused on the unsupported word of the complainant. In four of these seven trials the result was an acquittal. In seventeen out of the eighteen cases, complainants were also asked questions relating to their past or present sexual lives, which provides further evidence of the argument in the preceding chapter about the enduring link between sexual history and the construction of consent in rape trials.

Even more disturbing was the extent to which consent for some of these women-complainants was of little or no meaning in the context of the sexual relationships they had experienced with their partner – now the accused. One woman had effectively normalised the regular episodes of non-consenting sex she experienced with her de facto husband over the years. She approached the police only after his regular bouts of physical violence towards her escalated to such an extent that she feared for her life. During cross-examination, she was asked why she stayed with the accused after the alleged episodes of rape and violence:

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[14] The forewoman spoke to the police informant at the end of the trial and indicated that most of the jurors had decided the accused was guilty long before they were asked to retire and consider their verdict.

> I didn't want to lose [the accused] alright; I did not know what rape was, classed as rape. I just didn't like the way he was treating me, how he was hitting me and doing what he was doing to me but I didn't class it as rape. [Trial 31]

During an interview with police another accused described how he had normalised non-participatory sex with his girlfriend, who was the complainant in the trial.[15] When asked by police whether the complainant looked like she was 'enjoying [the sex] herself', the accused replied:

> No. Well, you can't tell with her. She...every time we had sex when we were living together, she just looked, she wouldn't, wouldn't smile or anything...she just lay there. [Trial 7[16]]

Interestingly, it was within the four trials where a pre-existing relationship existed and consent was the principal issue in dispute that evidence of force and resistance was most apparent [Trials 4, 9, 21, 31]. Each of the accused men stood trial for both rape and other charges of intentionally causing (serious) injury or recklessly causing injury to the complainant.[17] Similar to the findings of previous studies, where a strong correlation has been found to exist between trial outcome and physical injuries (e.g., LRCVb, 1991: 98 -- 99; LaFree, et.al, 1985: 401), three of the accused men were found guilty of both rape and injury-related offences.

In the remaining trial, while the jury found in favour of the prosecution with respect to the injury charge, they were far from convinced of his guilt with respect to the rape charge [Trial 21]. This seemed a peculiar result: the jury rejected the accused's version of a non-physical argument between them, but remained unconvinced that non-consensual sexual activity occurred in this context. The complainant gave evidence of having recently broken off the brief relationship she had with the

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[15] Both the complainant and the accused in this trial were described as having a mild intellectual disability.
[16] This was the trial that resulted in the directed acquittal. See footnote 4.
[17] One of the accused was initially charged with attempted murder which was later reduced to intentionally causing serious injury due to the perceived difficulty of proving an intention to kill. The accused was found guilty of having beaten his estranged wife over the head to the point of unconsciousness and then raping her [Trial 31].

accused after he had begun to make demands for sex. He then planted a voice-activated tape-recorder in her house after he became suspicious that she was seeing other men. On the night of the incident, the accused arrived at the complainant's house in a rage, accused her of lying to him, forced his way inside and proceeded to physically assault and rape her. He then also indecently assaulted her and threatened to kill her dog should she tell anyone about what happened.[18]

In two other trials, the defence argument was that no sexual contact had occurred at all with the complainant at the time in question[19] and the accused men were acquitted of rape but convicted of assault [Trials 5 & 24]. While consent was not central to the defence in these cases, there were attempts to link pre-existing (sexual) relationships between the accused men and the complainants with possible explanations or rationalisations for the injuries they sustained. The implication was that the jury might view the injuries and the claims of non-consensual sex as part and parcel of domestic relationships that had gone sour. One of the women, who was 45 years of age and from a non-English speaking background, had run naked and crying to her neighbour's place. The accused was alleged to have used a coat hanger, a screwdriver and a file during his attack on her [Trial 5]. The other complainant alleged the accused had violently anally penetrated her with both his fist and a vibrator which caused severe lacerations and bruising. The accused claimed this had all been self-inflicted as a result of a peculiar sexual fetish [Trial 24].

The strength of the medical evidence and the somewhat feeble explanations provided for the injuries by the accused men in these cases lessened any doubt the juries may have had with respect to the men's culpability for causing the injuries. However, this was not enough to persuade them of the complainants' accounts of rape. It

[18] It was later established by the OPP solicitor that the foreman had been opposed to acquitting the accused of the rape charge, which accounted for the majority verdicts being delivered. He also revealed that other members of the jury had felt the complainant was telling the truth, although they were ultimately unpersuaded given the high standard of proof. According to the foreman, the jury had become preoccupied with evidence that seemed entirely incidental to the case, such as whether the accused had a key to the complainant's house, and the degree of lighting in the hallway.

[19] There were 11 trials (29.7%) altogether where the accused admitted to being in the company of the complainant but denied that any sexual contact occurred. These trials were the only two out of the eleven where the accused claimed there had been no sexual contact on the day in question and yet

seems that the jurors could not overcome reasonable doubts regarding the rapes in a context where the complainants' credibilities were disputed and where the accused men vehemently denied any incidence of sexual activity on these occasions.[20]

In one of these cases the verdict is perhaps less surprising given there was evidence of subsequent sexual contact between the complainant and the accused [Trial 24].[21] This was not so for the other two trials [5 & 21] where the complainants' post-rape behaviour closely accorded with the perception of 'real rape' victims (Estrich, 1987): they had been injured; they immediately disclosed an assault to friends/neighbours; and they made reports to police within hours of the alleged rape/assaults occurring. Perhaps, as Adler's (1987) English trial study found, the mere fact that there had been a sexual relationship between the two parties meant that the accused men were given the benefit of the doubt on these occasions, albeit in situations that left the complainants with injuries consistent with significant force having been used.[22]

Prosecutors did nothing to assist the verdicts in these cases. Both barristers urged jurors to favour the physical evidence in support of the allegations of rape while they glossed over the evidence given in court by the complainant. One prosecutor went so far as to say to the jury that 'it doesn't matter if you don't think much of her as a witness' [Trial 5]. Only one prosecutor referred to issues of 'power and dominance' in attempting to provide some meaning or explanation for the accused raping his estranged wife while she lay unconscious from the head injuries his blows had caused her [Trial 4].[23]

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acknowledged having previously been in a long-term (sexual) relationship with the complainant. The other nine accused were either acquaintances or in familial relationships with the complainant.

[20] Although strangely one of the jurors in Trial 24 asked the judge whether 'if the other party was consenting is it reckless behaviour' to cause injury to that person.

[21] This was in the context, however, of the accused admitting that he had been physically violent towards her, and of describing a high level of sexual coercion throughout the relationship. The jury are unlikely to have been able to grapple with the complexities surrounding a woman who has contact with a man she has accused of raping her.

[22] Despite the fact that judges are often at pains to remind juries that a verdict of not guilty does not mean a finding of innocence, when it came to sentencing the accused men for the injury related offences, the judges presumed that the juries' 'not guilty' verdict on the rape charges must have meant that they had decided the events occurred in the context of consensual sexual activity. For example, in Trial 21 the judge stated that the 'verdict [is] very difficult to reconcile with the evidence…it is only understandable if it is accepted that in fact following the commission of the offence of which you were convicted there was an act of consensual sex in the bedroom'.

[23] This trial will be discussed in some detail later in the chapter.

Defence barristers, when forced to deal with complainants who had suffered injuries as a result of the alleged assault, relied on the same stereotypical consent scripts to paint a picture of over-zealous love-making, which accorded with the accused's version of events. In one trial the accused explained whip marks on the complainant as an unfortunate consequence of the sado-masochistic sex they both enjoyed [Trial 9]. Her facial injuries were the result of an argument that ensued later. The defence in another trial attempted to convince the jury that the complainant was a drug addicted, emotionally unstable woman who would episodically inflict injuries upon herself. This explained the black eyes and bruising she had alleged she incurred at the hands of the accused [Trial 31].

This same barrister, in defence of his client's alleged sexual attack upon his de facto wife, urged the jury to apply their common sense to the notion of consent within ongoing sexual relationships. He relied on the conventional model of consent as it related to a particular person and a particular relationship. He urged the jury to consider as ludicrous the suggestion that it was necessary to establish consent on each and every occasion even where, according to the complainant, sex had often occurred in a context of physical violence or threats:

> On matters of sexual conduct, it's not as if people fill out a questionnaire...there's a lot that's assumed in a relationship, in sexual relationships ...there's a lot about consent that's assumed [Trial 31].

Only eight of the eighteen (47.1%) "consent" cases resulted in convictions. Overall, the standard arguments for constructing consent/non-consent proved relatively resilient to the philosophical and other challenges implicit in some of the new 'reform' legislation. The defence stories typically remained ones of seduction with few signs of more egalitarian communicative models of sexuality coming to bear. The legal stories continued to perpetuate the prevailing cultural interpretations of a gendered (hetero)sexual exchange, where aggressive sexual tactics in men and acquiescent or obliging sexual roles for women were juridically favoured.

The battery of stereotypical images usually drawn on to explain the propensity of women to lie about rape was then monotonously paraded before the jury. Women were portrayed as false accusers, once again mostly for money, revenge or to conceal their sexual promiscuity.

Prosecutors seemed loath or unable to convert complainants' claims of non-consent into stories that would reflect the wider considerations of women's sexual lives and acknowledge mutuality and self-determination for both women and men in sexual relationships. Such an approach would require offering an explicit challenge to the more traditional conceptualisations of consent within legal discourse. That convictions rarely followed in cases relying primarily on women's accounts of non-consent was therefore hardly surprising, especially in a context where judges (supported by the law) remained committed to delivering strong corroboration warnings cautioning against accepting the unsupported words of women in these cases.

6.3 Preserving The Presumption of Consent: The Challenges to Vitiating Women's Free Agreement

The trials where women reported being asleep, drunk or unconscious at the time when the sexual activity was alleged to have occurred were more testing of the new legislative framework governing consent. Since a key function of the new statutory definition was to provide a list of circumstances that would vitiate consent, an examination of cases in this sub-category provides an opportunity to test the effectiveness of these changes in shifting the focus of the trial from the complainant to the accused.

Section 36, sub-section (d) of the *Crimes Act 1958 (Vic)*, refers specifically to the 'meaning of consent' in this context, that is a 'person [who] is asleep, unconscious, or so affected by alcohol or another drug' is considered 'incapable of freely agreeing' to sexual activity. In situations where the case circumstances meet these conditions, it would appear to place greater responsibility on the defence to show that either there was consent despite the complainant being asleep, drunk, drugged or

unconscious or, more likely, that she was conscious and capable of freely agreeing at the relevant moment.

Prior to the changes introduced by the *Crimes (Rape) Act* in 1991, cases of this kind rarely featured amongst trials proceeded with by the Office of Public Prosecutions. Subsequently, however, cases appeared more likely to proceed because they were armed with a clearer legislative statement of what legally constituted "free agreement". As one solicitor remarked during the Victorian Evaluation Study:

> It gives you the framework to draw on. It's made it so much easier, simpler and clearer to see what the law sets out as constituting free agreement. Prior to that there was a fair bit of common law, that still exists, but it was all in various cases that you would have to look at and resort to and, being common law, open to so many interpretations really...judges and barristers just thrive on that, days and days of legal argument on what this proposition means, reciting in [sic] these cases. Now we have it in clear print what the law says (Heenan & McKelvie, 1997: 305).

In five of the thirty-four trials examined (14.7%), the case circumstances involved complainants who reported being asleep at the time the sexual activity was initiated. Two further trials (or 5.9%) involved complainants who were unconscious during the incident with little or no memory of the events that were alleged to have occurred. This compared with a total of eight out of ninety trials (8.8%) that were prosecuted in similar circumstances during the period of the Victorian Evaluation Study.[24]

In spite of the new definition, the caveat remained open for the defence to pitch the meaning of consent against the law's preoccupation with *mens rea*. Given the test for establishing an accused's guilty intention remained predominantly subjective, where the defence could argue against culpability on the grounds that the accused claimed to have held an honest belief in the woman's consent, the definition could well be undermined. Thus, even if she was drunk or sleepy so that in hindsight her

[24] These figures were obtained after I re-analysed the trial data from the Victorian Evaluation Study.

capacity to freely agree to sexual activity was questionable, the defence would argue that she behaved in a way that could adequately explain the accused forming an honest belief in her consent.

Four of the seven accused men in these trials relied partially on this defence of honest belief in consent [Trials 14, 16, 19, 22]. In three cases, each mounted a combined approach to their defence which first argued that the complainant genuinely consented to the activity, but had a fall back position of claiming an honest belief in her consent, regardless of whether she consented or not. The accused in the fourth trial [Trial 16] presented a straight belief defence[25] by acknowledging the complainant was unlikely to have freely agreed to sex, although he maintained that at the time he mistakenly believed she had consented.

Interestingly, the four accused represented here constituted the total number of accused to run a defence of honest belief in consent across the entire thirty-four trials examined (see Table 7, p. 243). This supports what had been anticipated (with approval) by members of the legal profession around the time of the Victorian Evaluation Study, namely that cases which most challenged the legal status quo in terms of the meaning of consent were likely to be thwarted by what remained a subjective standard for assessing men's "honest belief" defences. According to one barrister:

> Probably the greater number of trials on [consent] go to the state of belief of the man in any event. I reckon that most juries accept that she wasn't consenting – that's not the stumbling block for most trials...in which case the consent definition doesn't greatly matter and it hasn't really changed things (Heenan & McKelvie, 1997: 304).

In the three remaining trials involving complainants who were said to be incapable of freely agreeing [Trials 4, 25, 29] consent was relied upon as the main defence by

[25] The use of the terms 'straight consent' and 'straight belief' was introduced in the original Public Prosecutions study conducted by the Victorian Law Reform Commission prior to the reforms being introduced (See LRCVb, 1991: 85-86).

two accused while the third alleged that nothing of a sexual nature had occurred at all.

Attention will first be given to those five trials where women claimed to have been asleep at the time of penetration. The two trials where women were said to have been unconscious throughout the duration of the offences will follow. There were two further trials that fall within this sub-category where the alleged rapes took the form of digital penetration by health care professionals during a formal consultation. These trials will be considered in the final section of the chapter.

6.3.1 While she was sleeping...

In five trials, the women-complainants claimed to have been asleep at the moment of penetration in situations where there was no pre-existing sexual or social relationship with the accused, and where there was little to no discussion prior to the activity. These circumstances directly correspond with the legislative provisions that statutorily vitiate 'a person's'[26] capacity to freely agree to sexual activity.

In three cases [Trials 14, 16, 19], the circumstances were remarkably similar: each represented a scenario where the complainant was asleep at the time the sexual activities commenced. Each of the accused men, however, claimed an honest belief in the woman-complainant's consent despite conceding that any response she made was likely to be the result of her either mistaking him for someone else or having been asleep and unconsciously reacted to his initial approach.

A different line of defence was claimed by the accused in two further trials where the women reported being asleep prior to the offences. In the first trial, the accused alleged the complainant was lying and had in fact consciously consented to the activity [Trial 25]. In the other trial, the defence shifted position from denying

[26] I have highlighted the statutory use of the term "person" in recognition of feminists (e.g. Naffine, 1994) who argue that the use of gender-neutral language in this context masks the overwhelmingly gendered nature of sexual offences. Women continue to represent at least 90% of the "person's" victimised and in nearly every case the "persons" alleged to be responsible are men (Victorian Community Council Against Violence, 1991: 16; Gilmore & Pittman, 1993: 24, 27).

anything sexual had occurred, to alleging an honest belief in consent, to finally suggesting that the complainant may have been dreaming [Trial 29].

It is the mechanisms through which understandings of consent are constructed and presented within rape trial discourse that is of key interest here. Specifically, the focus is on the space in which new legal definitions that promote far more positive images of women's sexualities (where mutuality and participation mark the statutory assessment of consent) intersect with dominant rape trial discourses in the context of adversarial principles of law that require juries to accept one meaning of consent over another.

The first of these five cases offers particularly useful insight into the workings of the adversarial system and the theoretical and pragmatic implications that reforms can have for processing cultural meanings and workings of the law and criminal justice with respect to the adjudication of sexual offences.

The life of this case spanned several years. It was first represented amongst those trials examined for the Victorian Evaluation Study.[27] During this first trial in 1995 the accused was convicted of rape and other sexual assaults. He successfully appealed his conviction and a retrial was scheduled. It was this retrial that was observed[28] quite coincidentally during the early part of the current study [Trial 14].

The offences were alleged to have occurred a few weeks after the complainant had been employed by the accused as the receptionist for his massage business. One night, following a social drink after work, the accused offered to drive the complainant and a co-worker home. After he dropped off the co-worker, the accused suggested the complainant accompany him to dinner. A considerable amount of

[27] My co-researcher, Helen McKelvie, and myself had observed some of the first trial during a random observation of rape proceedings towards the latter part of the data collection phase of the Victorian Evaluation Study (1997).

[28] The prosecution had successfully applied for the court to be closed during the complainant's evidence. The complainant also preferred that I be included within this order. A jury question later resulted in the audiotapes of her evidence being played when I was present. I observed first-hand the remaining parts of the trial, including the closing addresses and the judge's direction.

alcohol was consumed during the evening, particularly by the accused, before they again returned to the workplace with a bottle of vodka in hand.

The accused fell asleep after some discussion and a brief attempt to kiss the complainant. The complainant left the premises with the intention of walking home. However, she was concerned for her safety after she surveyed the surrounding streets and so she returned to the workplace and also fell asleep. At some point the complainant heard the accused vomiting on the floor. Soon after the complainant alleged that she awoke to find the accused touching her. He then digitally penetrated her and proceeded to have intercourse with her. She froze immediately after becoming aware of his presence. She neither said nor did anything to participate in the activity apart from moving her head away from his attempts to kiss her.

At the completion of the first trial the jury, who were unconvinced by his claims that the complainant had consented or that he could have honestly believed she had consented in such circumstances, convicted the accused on each charge. He was sentenced to a minimum term of three years and ten months imprisonment.

An appeal was successfully argued against the accused's conviction.[29] A retrial was ordered after the Court of Criminal Appeal unanimously agreed that the trial judge had erred in his directions to the jury about how to assess the *mens rea* requirement.[30] The appeal court was in no doubt that the accused and his representatives had argued a case primarily resting on the issue of consent. The complainant had clearly been positioned as having enthusiastically responded and cooperated in the activities with the accused. However, according to the judges hearing the appeal, there had also been sufficient reference to the issue of the

[29] The ground of appeal that ultimately proved successful arose after the appeal judges had themselves 'invited' counsel to consider whether a misdirection had occurred after the jury were asked to assess the accused's belief in terms of reasonableness (*R. v. Ev Costa*, CCA, unreported, 2 April, 1996 at 17).

[30] The trial judge had repeatedly directed the jury to apply an (objective) standard of *reasonableness* when assessing the accused's belief in consent, as opposed to first establishing whether the accused had in fact held an honest belief in the complainant's consent. The reasonableness of holding such a belief, according to the current status of the law, is merely a guide for determining whether his belief was in fact genuinely held.

accused's belief in consent to warrant the relevant directions from the trial judge.[31] This was reinforced when the defence closed with a subsidiary argument that urged the jury to accept that, whatever the position was with respect to consent, the accused had honestly believed she had consented.

At the retrial I observed for the current study, the prosecutor anticipated the likelihood of the defence again situating the complainant's consent as the principal issue to be determined. During his opening address to the jury, he was therefore at pains to stress the lack of any free agreement to sex from the complainant. He further argued that there was no basis upon which the accused could have formed such a belief, given the complainant had been asleep when he first touched her, that she had become physically immobilised when she awoke and she had in no way participated in the sexual acts that were performed upon her.

As part of the defence case the accused gave sworn evidence that initially appeared to accord with the version advanced during the original trial. Most of his early evidence was literally saturated with statements of his infatuation with the complainant. She was 'a very attractive lady`, `my type of woman...I like young women'. She reminded him of his wife and 'looked so cute and innocent' while she was sleeping. He also conceded that he 'always likes to be surrounded by pretty young women', that he 'just couldn't get enough of her' on the night in question and he considered her his 'pet' in the workplace.

A significant change of pace occurred, however, when it became plain that the crux of the defence case for the second trial was to focus on the accused claiming an honest belief in consent as opposed to a defence of straight consent. Moreover, a new "scientifically-based" scenario that suggested his level of intoxication played

[31] The accused argued during cross-examination that his 'belief was that [the complainant] was responding, she didn't *discourage* me in any way, so it was the natural thing to do, and we had sexual intercourse' [emphasis added]. As an aside, this man was previously incarcerated for offences involving indecent assault, aggravated rape and other sexual offence charges. He was on parole when he committed the offences against the woman-complainant in question.

havoc with his recollection and was likely to have substantially affected his behaviour became an ancillary defence argument.[32]

During his closing address the prosecutor was highly critical of the accused's sudden change of tack. Drawing on the legal definition of consent, the prosecutor repeatedly drew the jury's attention to the fact that consent was about free agreement and this implied that both parties were proactive and communicative in their willingness to engage in sex. At this point, however, the style of the address appeared to shift direction. In attempting to undermine the defence position (a claim of mistaken but honest belief in consent), the prosecutor[33] appeared unable to sustain his case by building on this notion of consent (meaning free agreement) and referred to traditional standards based on force and resistance.

He contrasted the complainant's failure to resist with the screaming, shouting and scratching other women exhibit in situations involving sexual assault. He described her account of having 'frozen' after becoming aware of the accused touching her as 'unusual', although he added rather weakly that this was not 'of necessity' an indication of her consent. He acknowledged the lack of corroborative evidence that could independently confirm the complainant's account of events and levelled a degree of criticism at her overall 'lack of judgement' in agreeing to return to the workplace and consume more alcohol with the accused. At the same time, the jury were told that corroboration was not necessary for them to convict the accused and that the jury ought to be 'careful of the stereotypical image of a rape victim...who goes down fighting, kicking and scratching'. It seemed the prosecutor had difficulty constructing a narrative of non-consent where there were no obvious signs of her unwillingness to participate. In his address, he succeeded in both weakening and at times confusing the kinds of arguments that could have been advanced following the legislative reforms.

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[32] Once again, the defence took their lead from the comments of the appeal court judges, who had remarked on the failure of the trial judge to appropriately direct on the issue of intoxication. According to them, the jury ought to have been alerted to the possibility that the accused's belief may well have been coloured by the amount of alcohol he had consumed for 'it is in just such circumstances that a person may form a genuine, although unreasonable, belief' in consent (*R. v. Ev Costa*, CCA, unreported, 2 April, 1996 at 35).

[33] This prosecutor was usually employed to defend rape allegations.

The five hour address[34] fashioned by the defence barrister echoed many of these same elements: there was no corroboration; the complainant gave every indication that she was willing to remain in the accused's company during the earlier part of the evening; and her subsequent behaviour appeared at odds with a woman who had 'really been raped'. Considerable mileage lay in dispelling the image of the complainant as innocent or shy. She was unwilling to say the word "vagina" in open court and this was contrasted with the tattoos that had been observed on her body.[35] Her initial unwillingness to take on a position as a masseuse within the agency was matched against her preparedness to conduct a one-off non-sexual massage on a client when no other worker was available.

Statements which ridiculed the current legal status of consent were also reiterated throughout the address. According to the defence, 'it would be absolute rubbish to suggest that silence alone [was] all there [was] to it':

> You are not being pushed away or told to stop - surely you're entitled to make some assumptions about her state of mind...she's lying there saying nothing and doing nothing while he's putting his finger in her vagina...she's lying there saying nothing while he...Are you not entitled to conclude that they're prepared to go along with it? [Trial 14].

The 'entitlement' to which this barrister refers fits with the long-standing tradition of male interpretations of women's sexual responsiveness - a lack of physical protest being seen as synonymous with silent consent. Nevertheless, the narrative offered by the defence may have corresponded more closely with the jury's understandings and expectations of the motivations conventionally used to explain the claims of women who say they've been raped. The complainant, according to the defence,

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[34] This was by far the longest closing address heard throughout the duration of the study. The average time for the prosecution was 52 minutes, with a range of 20 minutes for the shortest, and 2 hours 16 minutes for the longest closing address. The corresponding average for the defence was 1 hour and 20 minutes, with a range of 15 minutes to 5 hours and 18 minutes.

[35] In response to a question put by the defence, the doctor gave evidence of having observed two tattoos on the complainant's body. The question of relevance was never raised by the prosecutor or the judge. This can be contrasted with the vigilance of the prosecutor in another trial who anticipated the potential use by the defence of the doctor's report which included reference to the complainant's

was likely to have been financially motivated and in this context her claim for crimes compensation was raised. The jury were also asked to consider a further possibility where the complainant had agreed to go along with the sexual activity with her boss knowing that she may somehow financially benefit from having a relationship with him:

> You can consent to something that you don't particularly like to do...She may not have been enjoying it...but she may have thought...this is not a bad idea...I've got a job, and he's offering to buy me clothes and give me money [Trial 14].

The allegations could therefore be explained as the result of her embarrassment and shame at simply having been "caught out" with the boss.

The implications of the appeal decision placed a considerable obligation on the judge at the retrial to ensure that the jury understood how to assess whether or not the accused held the requisite guilty intention to commit the offences. While the jury were correctly told to consider whether the accused's honest belief could have reasonably been held in all the circumstances, the judge went on to explain that the jury's task was really one of determining whether the belief was in fact genuinely held in the first place. Even if they found that, in all the circumstances, it was not reasonable for the accused to hold such a belief, as long as they found it was genuinely held, they were obliged to acquit the accused.

This case exemplified the arguments related to the subjective versus objective *mens rea* debate that has been conducted by feminists and law reformers alike for several decades that men under a subjective standard will continue to receive the benefit of the doubt in claiming an honest but unreasonable basis for presuming women's consent (Wells, 1982; MacKinnon, 1983; Vandervort, 1987/8; Faulkner, 1991). Moreover, the mental gymnastics required to unpack the law's current position on the guilty mind were not lost on the jury. Within the first two hours of their deliberations they sought a redirection that would provide 'clarification of the guilty

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tattoos. Before the doctor gave evidence, the prosecutor requested that he not report his "finding" to the court independently [Trial 25].

mind'. The directions were repeated. The judge reiterated the accused's right to an acquittal should the jury believe the belief was unreasonably albeit honestly held. After two days of deliberations, the jury returned verdicts of not guilty.[36]

It seemed the accused's flagrant disregard for the wishes or desires of the complainant, when viewed alongside the representation of his personality as particularly masculine in character, persuaded the jury that such a man might well have perceived the complainant's lack of participation and mild expressions of resistance as merely performing the script of sexual coyness common to the dominant cultural constructions of "Woman" to which he so enthusiastically subscribed. Her appearance and behaviour, according to him, was the epitome of feminine appeal where sexual activity, under the circumstances, was literally axiomatic. The jury seemed unable to stand back and question whether he truly believed the complainant was consenting to the intercourse and how any lack of participation on her behalf would be seen by him as purely incidental.[37]

While the jury might well have accepted the complainant's evidence regarding her lack of consent, they were nonetheless reluctant to see the accused as culpable amidst his claims of remaining blissfully unaware that he was committing rape. The outcome here signals how ineffective the new legislation might prove in the face of a statutory model that continues to allow men's interpretations of consent to cancel out the circumstances that would normally be sufficient to negate any suggestion of a woman's free agreement to sex.

In four other trials the accused men were charged with rape in circumstances where the women alleged they were asleep at the time of penetration [Trials 16, 19, 25, 29]. The relationships between the parties in these cases were relatively distant. In the first case, the accused and the complainant had met on the night the offences [Trial

[36] Two women jurors were in tears during the delivery of the verdicts. The solicitor from the Office of Public Prosecutions believed the result would otherwise have been a "hung jury" after which the OPP would more than likely have discontinued the prosecution.

[37] When asked by his own barrister whether the complainant was encouraging his sexual advances, he admitted that she had verbalised to him that he 'shouldn't be doing that'. He went on to explain that, 'she might have moved her head in the foreplay, I don't know, *I wasn't really paying attention*, I was concentrating on kissing her'. [emphasis added]

16] while in the other three [Trials 19, 25, 29], the complainants had had some limited contact with the accused men earlier in the evening and only knew them as acquaintances.[38]

This relative lack of previous social and/or sexual contact between the accused and the complainants proved to be a factor in the prosecutions' favour. Two of the women had initially gone to sleep in the company of other males prior to the accused men entering the bedrooms and getting into bed with them. The third complainant had gone to bed after returning from a local hotel where she had been drinking with her husband. She had left early and gone to bed believing her husband would join her at some time later in the night. The remaining complainant went to sleep on a bed alongside three other people in a room, none of who were sleeping directly beside her. At some point during the night the accused moved from the floor to lie beside the complainant on a single bed mattress.

A feature common to three of the four trials was the amount of alcohol consumed by the individuals. The women each described themselves as having drunk heavily prior to the alleged offences being committed. The accused men also admitted to having been drunk immediately prior to the event. Both the complainant and the accused in the fourth case consumed some alcohol but neither was drunk at the time of the alleged offence(s).

The consent of each of the women-complainants and the status of the accused's awareness of their consent were at the crux of the prosecution and defence cases. The defence for three of the accused men relied at least partially on suggesting that there were sufficient grounds for them holding an honest belief in the complainant's consent, although they conceded in retrospect that any agreement may well have been based on the complainant mistaking their identity. The trial for the remaining accused rested more squarely on a straight consent defence. The complainant was

[38] One of these women was an eighteen year old private in the Australian army. The accused was a Sergeant posted within the same barracks. He therefore occupied a relatively senior position within the army hierarchy.

apparently lying about her version of the events and had willingly and proactively consented to the intercourse that took place.

Conversely, the women's accounts were of confused states of consciousness regarding the accused's actions. They each testified to having woken during various stages of vaginal penetration. Their reactions were immediate and unreserved. Three women screamed at the accused to get away from them.[39] Reports to friends or family were made within twelve hours of the alleged assaults. The fourth complainant quietly left the room in which she and three others, including the accused, had slept after attending a social event at an army barracks. She found another room in which to sleep. When she awoke, she told a colleague about what happened who then confirmed the identity of the man lying in the room as an army sergeant.

During the trials, two of the prosecutors immediately focused the jury's attention on the new statutory model of consent.[40] Specific reference was made to the vitiating circumstances including where a person is asleep at the time of penetration, or is for some other reason incapable of freely agreeing. They suggested the jury's task would be relatively uncomplicated and straightforward in these cases - heavily intoxicated women, sleeping women, and women who are mistaken about the identity of the man with whom they are having sex cannot, according to law, freely agree to sexual activity.

And yet, prosecutors were loath to rely solely on the jury being persuaded to apply the contemporary legal determination of consent to their deliberations. Aware that the narratives of consent proffered by defence barristers could carry considerable weight against them, time was devoted to dealing with the complainants' conduct prior to the incident, particularly in terms of their amount of drinking. Prosecutors mostly appeared as apologists in this context and urged the jury to disregard what

[39] The defence barrister in one of these cases used the complainant's response as a means to discredit her. The hysterical, albeit racist, description she gave of the assault to her friend, that 'that black cunt had been fucking [her]', was repeated to witnesses throughout the trial.

they might construe as risky behaviour on behalf of the women. One jury was invited to apply a rights focused framework to their deliberations. They were to see the law as there to 'protect everybody', including the complainant who 'deserves not to be raped, *however careless she might have been about her own safety*' [emphasis added] [Trial 25].

By contrast, two prosecutors focussed their attentions on denouncing the conduct of the accused men. They rejected any grounds for an accused to claim an honest belief in the complainant's consent in such circumstances especially because these men were little known to the women prior to the offences. Their submissions depended on constructing the complainants as sexually self-determining while also alerting the jury to the kind of cultural meanings and interpretations still inappropriately afforded to men about the presumed sexual availability of women. As one prosecutor stated, 'pardon the crudeness, but you can't just have a woman...'cos [sic] her vagina is nearby' [Trial 19].[41] These prosecutors also reminded the jury that rape was not confined to situations involving force or physical violence.

Defence barristers in these cases appeared to avoid discussing the new legal definition of consent. Indeed they simultaneously minimised any weight the jury might attach to the current statutory definition of consent while they reconstituted the women-complainants as having been capable of making conscious decisions to engage in sex. Even in the context of sleeping complainants, the jury were encouraged to consider the legal aspect of consent as irrelevant given that each accused man had claimed the awareness and participation (although perhaps belated) of the complainant in the sexual activity.

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[40] While specific reference to the definition of consent was not made by the prosecutor in the fourth trial, the jury were asked to consider the capacity 'a vulnerable girl who was obviously intoxicated to some considerable degree' would have to offer any real consent to an accused whom she barely knew.
[41] This prosecutor was also critical of the 'microscopic analysis' undertaken by the defence of the complainant's testimony and described the defence barrister's technique of dividing the complainant's recollection of the event into 'micro seconds' as 'utterly artificial and ridiculous' [Trial 19].

The images created by the defence were of "seedy" situations that were sexually charged[42], where both the accuseds' and the complainants' accounts referred to heavy drinking and a degree of crudity leading up to the incidents, and where the behaviour of all those involved was open to question and condemnation: a tactic that essentially aimed to leave jurors unsure as to the "real situation" so that it would be impossible for them to satisfactorily determine responsibility and guilt.

In one trial, the fact that the complainant's tampon had been removed during the incident was treated by both barristers as significant to the issue of consent [Trial 25]. The complainant testified she was unaware of her tampon having been removed prior to intercourse. For the prosecution the tampon issue was a classic indicator of non-consent, that is, a woman would never agree to the embarrassment of someone else removing a bloodied tampon.

Alternatively, the defence suggested that the accused had removed the complainant's tampon and her failure to mention it to the police further confirmed that she was embarrassed by having consensual sex with the accused while menstruating. During his closing address, the defence linked this issue with what he claimed were the wider character parameters that suggested the complainant was the kind of young woman likely to feel uninhibited by having her tampon removed while in the throes of consensual sex.[43]

Similar to Trial 14, the accused noted an absence of words spoken except for 'a couple of low moans occasionally from both of us'. His record-of-interview with police went on to describe a consensual situation where the complainant assisted him to remove her clothing (before he removed the tampon) - all with nothing said

[42] Two of the complainants were subjected to lengthy cross-examination about sexual activity they had engaged in with other men on the night in question. A third complainant was also illicitly asked whether, in the presence of the accused, she had referred to having previously tried anal sex. Despite this evidence being admitted without the court's permission, the judge later repeated these matters in recounting his summary of the evidence to the jury [Trial 25].

[43] In his closing address, the defence referred to the complainant having attended a beach party night, becoming involved in a jelly wrestling competition wearing a white bikini under a 'see-through top' while she consumed heavy quantities of alcohol.

between them. This appeared, however, at variance with his account of events to the police, as follows:

> Q: Who made the first approach?
>
> A: I think we both moved in at the same time, yeah.
>
> Q: Alright. Continue.
>
> A: From there, she - I then forced, I didn't force her – I then just started pushing the, well, moving my body towards her and she rolled on her back [Trial 25].

Once again the jury showed signs of confusion with respect to the law about whether the accused held the requisite guilty intention. Not only did they seek two redirections regarding this issue, they asked whether they could apply the notion of 'irresponsibility' to their assessment of the accused's culpability. The trial judge was then required to explicate the law's position regarding the accused's honest belief in consent and the jury was told of their obligation to acquit the accused should they find his belief to be honestly, albeit unreasonably, held. The jury in this trial subsequently acquitted the accused.

A different outcome ensued in one of the other five trials [Trial 16]. Here the defence was hampered by the accused's own record-of-interview with police during which he tearfully admitted that the complainant had been asleep at the time he first began touching her. He further conceded that the complainant, after regaining some consciousness from sleep, must have thought her boyfriend was still in bed with her. He even went so far as to plainly admit to police that he now knew the complainant must not have consented to have sex with him. Nonetheless, at the trial, he continued to maintain that at the time the offences were committed he thought she knew it was him.

The accused was in his late twenties, married with a young child.[44] He was also the employer of the complainant's boyfriend. The defence relied on stirring the jury's sympathies for a man whose 'ghastly mistake' had already cost him his job and

seriously damaged his relationship with his family.[45] Character evidence, coupled with the accused's remorse, was painted as evidence of his innocence. According to the defence, he in no way resembled the character and demeanour of a "real" rapist, and for the jury to deny him his freedom would constitute a complete travesty.[46] The accused in this trial was neatly constructed as a victim himself while the harm suffered by the woman-complainant was minimised, if not explained away entirely. The defence barrister in this case was at great pains to assure the jury that he was not accusing the complainant of lying.[47] He was nevertheless 'troubled' by the serious memory gaps that plagued her evidence that meant 'she can't remember any of it'. During cross-examination there were also several attempts to impugn the complainant's character through admitting sexual history evidence. She was subsequently asked to detail her sexual relationship with her boyfriend and was subjected to an unauthorised question designed to imply that the complainant had casual regard for her sexual life more generally. [48]

In the other trial that resulted in a conviction the accused also clung tenaciously to his belief in the complainant's consent, although he was clearly hampered by earlier indications that he would plead guilty to rape [Trial 19]. During the trial, the prosecutor was permitted to question the accused about his earlier intention to plead guilty[49] as evidence of his culpability. The accused, on the other hand, maintained that he was merely considering the legal advice of his lawyer that a plea of guilty would probably result in a non-custodial sentence.[50] At the trial, he continued to deny raping the complainant.

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[44] The accused's wife and child remained in the courtroom during the entire trial.
[45] The focus on the emotional impact of the trial on the accused even extended to the prosecutor who began his closing address by asking the jury to put aside their feelings of compassion for him.
[46] The statements of other witnesses included reference to the accused having 'harass[ed]' another woman at the hotel that same night. She had allegedly refused to accompany him back to his house (his wife and child were away at the beach for the weekend). Later that night, and prior to the offences occurring, the accused was dropped off to find the house of this young woman. He arrived back home having twice been rejected by her to 'go home to his wife and kid'.
[47] At one point, he loudly declared 'Look, if you're waiting for a denunciation of this girl, you can keep waiting...'.
[48] This trial was described in detail in Chapter 5; see p. 220.
[49] This was later the subject of appeal, resulting in the accused being retried and acquitted by another jury.
[50] During the trial, the defence barrister explained the accused's earlier plea of guilty to the rape charge by making an analogy with responding to speeding fines. He suggested that some people, rather than dispute the fine, simply pay it to avoid further action being taken against them.

The women-complainants in these trials were all, at times, visibly distressed in the witness box, particularly during cross-examination when they were confronted with questions and allegations that suggested they had responded, even sub-consciously or sleepily, to the sexual advances initiated by the accused men. Two of the women were faced with alternative scenarios that were particularly upsetting with one complainant becoming almost hysterical after the defence continued to insist that she could not rule out having unwittingly responded to the sexual touch of the accused while she was asleep. The defence further suggested that she could have been the instigator of the activities after the accused gave evidence of her rubbing against him, assisting him to penetrate her and moving with him during intercourse - all in the throes of believing she was having sex with the same male with whom she had gone to bed with earlier that night. This occurred despite the fact that the accused admitted to having crawled through his friend's bedroom window[51], manoeuvred himself between his friend and the complainant while they slept and commenced to have intercourse with her [Trial 19].

The manner in which the complainant's consent was reconstructed through the defence case in this trial was particularly telling of the kinds of narratives still thought to carry significant currency with jurors in rape trials. During the early parts of her cross-examination, the twenty-one year old complainant faced a barrage of irrelevant questions in relation to her character and lifestyle. She was asked how many children she had, where they were on the night in question, how often she left them to go out socialising and who had fathered them.

Her state of sobriety just prior to the incident and her preparedness to go to bed with her former boyfriend were the subject of further defence questioning. This was mainly tailored to suggest to her that she had created her own misfortune. She had renewed her attempts to have sexual intercourse with her drunken bed-partner,

[51] The location was a bungalow located at the back of a property where several males roomed together. The accused had crawled through his housemate's bedroom window on several occasions. On this night it was to avoid the police questioning him in relation to taxi fare evasion.

mistook the accused for her ex-boyfriend while the accused behaved as any man would and good naturedly accepted the offer.[52]

Another complainant became upset after the defence made similar suggestions that she had been physically responsive to the accused's sexual touch because she believed it was her husband [Trial 29]. Although the complainant's credibility was less of an issue in this trial[53], her reliability and accuracy in giving information were rigorously challenged particularly in relation to her memory of events and the amount of alcohol she had consumed. At one point, the complainant became frustrated with this persistent focus on her drinking and challenged the defence on the relevance of this line of cross-examination:

> DB You were very, very drunk...You were a bit more than well on your way weren't you?
>
> C I've already stated that I was well on the way and I had had more than I should have had to drink. What's that got to do with a man being in my bed that shouldn't have been there?...I was in my bed in my own house... [Trial 29].

On the one hand the complainants' accounts in these cases highlight the complexities surrounding the meanings of consent within heterosexual relationships. The perennial question, first posed by radical feminist Catherine MacKinnon (1983) becomes relevant here, namely, how meaningful are conceptualisations of consent when they appear so inextricably linked within a gender regime based on dominance and submission? The women in these trials described becoming conscious of a male engaging in some form of sexual activity with them. That another male, not the accused, but a male with whom they had already shared a level of intimacy, is thought to be the instigator appears entirely unproblematic. One gets the distinct impression it was taken for granted that these women (and presumably women

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[52] However (and contradictorily) the defence also suggested to the complainant on more than one occasion that she must have known the man having sex with her was not her ex-boyfriend given his physical characteristics and state of dress at the time.

[53] She was a middle aged woman who ran a business with her husband in regional Victoria. This narrowed the scope for the defence to discredit her moral character and lifestyle.

generally) have woken before to find their bodies being sexually touched by male partners.[54]

The prosecution in these cases also relied on the familiarity of this scene to jurors. The fact that the complainant had participated in the sexual activity, or had sub-consciously responded to the sexual touching of the accused, could be seen under traditional heterosexist standards as an entirely understandable, if not reasonable, response by women. Women in such situations thereby indicated their retrospective consent to male partners intent on having sexual relations with them, whether they are immediately conscious of their intentions or not. In effect then prosecutors were suggesting that, while it was criminal for the accused men to exploit the use of "vaginas that were nearby", it was acceptable for men who had enjoyed previous consensual access on this basis to continue to do so.

Finally, the defence also relied on the cultural strength of this traditional consent paradigm in planting enough reasonable doubt for the jury to consider an accused may well have stupidly, but honestly, believed the woman was consenting to him, although he acknowledged on reflection that any perceived participation by her was likely intended for the woman's current sexual partner. Combining a series of cross-examination questions provides an example of this kind of narrative construction where the defence re-present the event as an unfortunate misunderstanding suffered by all involved, although clearly facilitated by the complainant's sub-conscious, yet encouraging responses:

> When you were being caressed did you react?...When you were being caressed, and you say you thought it was your husband, what you did is you cuddled into the person...You were giving every indication that you were happy with what was occurring. That's fair isn't it?[55]
>
> [Trial 29].

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[54] The words of barristers interviewed for the Victorian Evaluation Study should be recalled in this context. They were concerned that their rights to initiate sex with their sleeping partners may be capriciously revoked through overly broad interpretations of the existing consent provisions (Heenan & McKelvie, 1997).

[55] Even then, the defence also kept in play an alternative scenario where the jury were left with the clear implication that the complainant may well have known that the man in her bed was not her husband. For example, the complainant was asked how she could have mistaken the accused when he was fully clothed and her husband always slept naked.

The jury took almost seven hours to acquit the accused in this trial. This was in spite of fairly damning evidence later revealed by a video recording of a conversation the accused had with a petrol station attendant soon after the incident. Having been physically assaulted by the complainant's husband, the accused explained his injuries by boasting that 'this is what happens when you get caught on top of another man's wife', and 'I was fooling around with this bloke's wife and he fuckin' [sic] came home when he shouldn't have' [Trial 29].

The jury in this trial might well have been influenced by the directions they received in relation to assessing the accused's guilty mind. An attempt was initially made by the trial judge to situate the *mens rea* requirement within a broader set of considerations in line with the spirit of the legal definition. The jury were directed that it was:

> ...the second limb that [the jury] may have the more difficulty with and that is that he realised she might not consent. Very often sexual acts between adults are not prefaced with a formal demand. The approach of a man to a woman for sex can be one of the most subtle parts of human behaviour and the law takes this into account and places a responsibility on a man who does not formally get consent from a woman to have sex with her to consider whether in the circumstances she might not consent. This places a man in a position of having to be fairly sure before he proceeds [Trial 29].

The defence, however, took exception to this direction on two occasions.[56] The jury therefore heard on three separate occasions that it was for the prosecution to prove that the accused held the requisite guilty intention to commit the crime of rape over and above any view they may have taken with respect to the complainant's actual consent.

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[56] The prosecutor in this case was also concerned that the judge's direction may have had the effect of reversing the onus of proof and left the jury with the impression that it was the accused who had to prove that he did not have the requisite guilty intention. Presumably to avoid the case being appealed,

6.3.2 While she was unconscious...

In two trials the prosecution case involved complainants who had been raped while unconscious: one as the result of a high intake of alcohol [Trial 22] and the other after she suffered severe head injuries [Trial 4].

In this latter case [Trial 4], the accused was charged with raping his estranged wife after bludgeoning her to near death with a blunt instrument. He denied committing any of the offences and suggested that an intruder had entered the house and injured his wife while he was out jogging in the early hours of the morning. The accused claimed to have had consensual sex with his wife prior to leaving the house for his jog.

The woman-complainant was unaware of any sexual activity. Her statement to the police related solely to a physical attack. After becoming aware of her husband's claim that sexual activity occurred on this night, she maintained the estranged nature of their relationship meant there was no sexual intimacy between them. In the moments immediately prior to being struck, she recalled seeing her husband approach her in the darkness with something in his hand and pleaded with him to not hurt her. Forensic tests later revealed that intercourse had occurred with the accused man on this night.

Prior to the trial, there were attempts by the defence to have the rape charge withdrawn from the prosecution given the complainant was unable to give any evidence of a sexual act having occurred. The Office of Public Prosecution's solicitor recommended against withdrawing the rape charge because it was the accused himself who had stated that sex had taken place. At the trial it was therefore open to the prosecution to suggest that the accused had raped the complainant as she lay bleeding and unconscious. This was a highly perturbing trial feature with which the defence was forced to contend.

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the prosecutor agreed with the defence that the judge ought to remind the jury that the onus is on the prosecution to prove that the accused man intended to commit the crime of rape.

During the trial the prosecutor made direct reference to the legislation and the statutory definition governing consent. He argued that the jury's task would be straightforward, given the complainant's state of unconsciousness at the time intercourse took place. Although the seriousness of the physical injuries sustained by the complainant were exploited by the prosecutor, he was clearly mindful of the disturbing scenario he was asking the jury to accept. He therefore appeared to locate the sexual violence within psycho-social (and maybe some feminist) theories about sex. According to the prosecutor sex '...includes deep forces...connected with power...dominance...' that could adequately explain the potential for the accused to have inflicted such a horrific act on his ex-wife. He concluded by adding gratuitously that 'nothing is surprising in the phenomenon of sex...' [Trial 4].

For the defence the issue of the complainant's consent on the night in question was matched against the accused's claims that sex had been an ongoing part of their relationship, even during their three year separation. She was portrayed as the omnipresent estranged wife who continued to provide 'all the usual services that are fortunately provided to men by their wives...[including] washing, ironing, cooking...' and by implication the provision of sexual services.

In spite of the vicious and almost fatal assault upon her, the defence still employed some of the more traditional lines of attack to challenge the complainant's credibility. She lied about the lack of sexual intimacy between them since their separation and lied about not having intercourse with him that night. She was said to be inconsistent in her accounts of the attack and was too easily convinced that her husband was the assailant.

The defence were also careful to re-present the prosecution case as a horror story that required the jury to accept a disturbing and unrealistic image of inhumanity. The image of the accused in the witness box as emotionally contained and passive throughout the proceedings was neatly contrasted with:

> ...[a] monster [who would] have sex with his
> unconscious wife. Bleeding profusely, blood and glass

> everywhere, and do it so carefully and neatly and cleanly that all his semen remained inside her and not one drop on [the] sheet. Or his version the true one - a wife not being truthful...this charge should be thrown out the nearest window [Trial 4].

The jury was therefore faced with an image that was very challenging when set against the context of an estranged man and woman attempting to cohabitate for the sake of their children and where there had been no previous (reported) history of physical violence or animosity. Undoubtedly aware of how threatening this might appear to the jury, the defence urged them to see it as:

> ...absolutely inconceivable that this man or any other man could rape a profusely bleeding unconscious woman. It defies belief [Trial 4].

In the second of these two trials [Trial 22], a fifteen year old complainant was allegedly raped by two males after she became unconscious. Once again, the complainant had no specific memory of the offences. She was discovered semi-clad and sleeping in parkland where she had been abandoned. A forensic examination showed the complainant had suffered significant injuries to her vagina.[57]

Despite both the accused making partial admissions regarding their involvement on this night, they steadfastly denied committing any rape offence.[58] While they may have 'taken advantage' of the situation and engaged in sex with a girl who was both drunk and under the age of consent, they both maintained her active involvement in the alleged activities or at least they claimed to have *thought* she was agreeing to whatever sexual acts were being performed upon her.[59]

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[57] The injuries were likened by a surgeon to those a woman might suffer through childbirth.

[58] When first interviewed by the police, both men denied having had contact with the complainant and her friend. They later admitted to having picked up two teenaged girls, drinking alcohol, kissing the complainant and dropping them off again. Finally, they admitted to having returned to pick up the complainant and driving out to some parkland. While they both suggested it was the complainant who had repeatedly offered to have sex with them, one of the men later admitted to 'tak[ing] advantage of her...you know...she was sort of drunk'.

[59] The principal offender suggested the complainant had consented outright to the sexual activity. The co-accused (charged with attempted rape and rape through aiding and abetting the principal offender) claimed a mixed defence of both consent and having held an honest belief in consent at the time the offences were alleged to have occurred.

Certain features of this case lent themselves to more conventional trial techniques associated with defending rape allegations that at one time may have posed too big an obstacle for convincing a jury of non-consent. The complainant admitted to being accustomed to high intakes of alcohol that had previously resulted in blackouts. Her friend also swore it was the complainant who had flagged the accused men's car down, who had encouraged them to buy alcohol and who had been a willing participant in kissing both accused men earlier in the afternoon.

The two defence barristers representing the interests of the two accused in a single trial were nevertheless separately able to (re-)construct the complainant's behaviour as providing strong indications of consent to sex with the two men. Not only could her behaviour on the day be judged as highly morally questionable and extremely risky for a young teenage girl, she was also located within the familiar defence script of being sexually promiscuous, even insatiable, and resorting to a rape accusation only after the accused men abandoned her following their mutually enjoyable sexual activity. The following defence narrative encapsulates the many statements made about the complainant by the barrister defending the principal offender:

> she had the hots for [the principal offender]. She threw herself at him, absolutely threw herself at him....She was keen to get into the car...she wanted to have a good time...she wanted to have sex with [the offender] as soon as she possibly could...if not at his home, then anywhere else would do...its glaringly obvious that she was consenting...She's an unfortunate little creature...but she was very unfortunate in the way she behaved...if [taking her top off] is not an example of someone raring to go, I don't know what is...[She's] a young girl there whose absolutely chucked herself at him...she's starved for affection...she's chucked herself at him...what else could a young man with testosterone bouncing around his body [have thought about consent] [Trial 22].

The barrister who appeared for the co-accused stressed to the jury that the issue for them to decide was whether the accused *could* have honestly believed the complainant consented in the circumstances. He adopted a variation on his

colleague's original approach by suggesting that they consider the notion of consent against the many complexities surrounding 'human relations' especially situations where 'human passions are involved'. He described the young complainant's behaviour as 'very erratic'. According this narrative, a fifteen year old girl engaged in spontaneously kissing two males who were relative strangers to her, used alcohol as a disinhibitor and took her top off while she was still in the car. She was in every sense of the word "asking for it".

According to the defence, while there may have been some question about whether the sexual activity was consensual, the jury could never satisfactorily decide the guilt of the accused men in a context where the complainant's behaviour at the time was so unpredictable and her subsequent account of it so unreliable. Whatever *her* state of mind, the ambiguity associated with her conduct throughout the afternoon could explain the participation of the accused men in the incident and their states of mind in believing that she had consented.

Conversely, while the injuries to the complainant were an obvious factor in support of the Crown case the prosecutor commenced his closing address by highlighting the current state of Victorian law in respect of consent. Various aspects of the evidence that supported the complainant's incapacity to have given her 'free and conscious permission' to the activities, such as her high level of intoxication and lack of recollection regarding the events, were systematically highlighted before the jury. Moreover, the particularly unsavoury aspects of this night that had been so carefully avoided by the defence were meticulously itemised by the prosecution: the complainant had vomited and, according to the accused men, she had 'pissed herself' in the car; she had bruising on her legs and a severe vaginal tear despite the men claiming she had been 'easy to get into'; and she had been found dazed and reeking of urine and alcohol the following morning.

While these trials resulted in convictions, both juries deliberated for several hours before reaching a verdict. Moreover, jurors in both cases raised concerns during

their deliberations about the difficulties they were having in making a unanimous decision.[60]

6.3.3 While she was a client...

Two further cases bear particular mention here also [Trials 26 & 30]. Each case involved a woman-complainant who had reported being assaulted by a health care professional during an individual consultation. The accused men denied committing the offences. They suggested that the complainants were either mistaken about the nature of the treatment they had received or they were deliberately making false allegations against them.

Like the cases previously discussed, these trials offered a direct challenge to the contemporary legal definition of consent or free agreement. The case features were comparatively unusual. Both women described similar experiences of the assaults after they presented to the accused men with symptoms requiring some physical manipulation of their bodies. That these men could be prosecuted at all was largely the result of subsections (f) and (g) of Section 36 of the *Crimes Rape Act (1991)* being included amongst those circumstances that could vitiate consent where it was given under the mistaken belief that 'the act is for medical or hygienic purposes' or where a person is simply 'mistaken about the sexual nature of the act'. This is sometimes referred to as the 'Mobilio amendment' (Morgan, 1991-92, footnote 1: 403). The changes occurred after a radiographer, Vincenzo Mobilio[61], successfully appealed to the Victorian Court of Criminal Appeal to have his convictions overturned on the basis that his clients[62] had in fact consented to the internal examinations he had performed (Bronitt, 1992).

Judiciously accepting the decisions of previous courts, the Court of Criminal Appeal determined that, while Mobilio's motive or intention in performing the procedure

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[60] As it was, the jury was forced to deliver majority verdicts in the trial involving the two offenders.
[61] *R. v. Mobilio* [1991] 1 V.R. 339
[62] Mobilio was convicted of three counts of rape after facing prosecution for eight separate incidents involving eight different women. The offences involved Mobilio performing unnecessary internal ultrasound examinations on women clients.

may have been for his own sexual gratification, the women nevertheless consented to undergo the examination and that, moreover:

> the consent is real even though the act of intercourse, having been done for the purpose the man actually had, may wear a different moral complexion from that it would have worn if done for the purpose the woman believed he had.[63]

The changes made to Victoria's laws in 1991 made it far less likely that health care professionals would escape successful prosecutions for sexually assaulting women in the context of medical or therapeutic examinations in the future.

In the two trials covered in the current study both women alleged that the accused had digitally penetrated them during routine consultations under the guise of it being a legitimate therapeutic technique.[64] Neither woman gave permission for the "procedure" to be undertaken, but they did not object during or after it had occurred. They reported that they felt immobilised by the events. Although alarmed and shocked by the accused's conduct, each woman rationalised the "treatment" as within the scope of alternative therapy or as an appropriate technique given the status and professionalism of the accused. Both women paid for their appointments and rescheduled another consultation, although neither had any intention of returning.

Remarkably the accused men, who denied having penetrated the complainants, provided detailed accounts of the consultations but they acknowledged that certain manipulations conducted close to the vaginal area might cause feelings or sensations that are localised in other parts of the body. They claimed the women had imagined they were digitally penetrated, were lying about it or had experienced a sensory/bodily reaction to a technique that simply felt like their vagina was being penetrated.[65]

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[63] *R. v. Mobilio* [1991] 1 V.R. 339 at 344.

[64] It was to assist with 'vaginal dryness' in one woman, and to better educate the other regarding how her partner should 'ride her' if she was to avoid pain during sexual intercourse.

[65] One of the women described experiencing an involuntary orgasm during the consultation after the accused had manipulated her pelvic region. The accused denied this occurred and suggested it was a cathartic release of emotion that was misinterpreted by the complainant as orgasmic.

The accused men bore reputations of professionalism and competency within their regional communities and both produced evidence to substantiate the respectability and appropriateness of the particular treatment methods they claimed they adopted during the consultations. Their colleagues further attested to the techniques being commonplace within their respective fields, although internal manipulations or penetrations were regarded as completely improper.

Procedurally, there were also similarities. Both men were committed to stand trial in relation to sexual offences involving multiple victims who had been clients of the accused. Prior to the trials commencing and in line with the relevant common law authorities, the presiding judges separated the charges and ruled that individual trials would be conducted to protect the accused from being convicted on the basis of propensity evidence.[66] Separate juries who heard the allegations of individual women in discrete trials were unaware of the proceedings that would follow to serially determine the guilt or otherwise of each accused man.[67]

While consent was not the principal defence in either case, it was incumbent on the defence to present these women as having consented to techniques adopted by the accused that were entirely unremarkable within the context of their professions. A detailed account of the subsequent behaviour and responses from the women themselves was given to convince the jury that this was far from the behaviour one would expect from women who had just experienced digital rape. They did not object or resist the actions of the accused, paid for the appointment and made another, hesitated to tell anyone about what had happened and delayed making a report to the police.

Faced with women who were reasonably articulate, emotionally self-contained and morally unquestionable (and therefore hard to disbelieve or discredit), the defence attempted to pathologise the women as likely to misinterpret or misapprehend what

[66] The concern is that a jury will be more likely to convict an accused on the basis of believing he had a propensity for committing sexual offences when faced with more than one complainant giving evidence of the same or similar allegations at the one trial.

had happened to them. In one trial the defence endeavoured to suggest that the bowel condition with which she had presented to the accused was stress-related probably induced by the birth of her son. In a statement later made by the accused, he referred to the complainant as suffering from 'stress breakdown problems' [Trial 30].

In the second trial, the defence was allowed to give significant attention to confidential disclosures that had been made by the complainant to her psychologist about childhood sexual assault [Trial 26]. In a sequence of questioning likely to have had a significant impact on the jurors' minds, the defence cross-examined the complainant extensively about the childhood assaults which included allegations of digital penetration. He also questioned the current status of her sexual relationship with her husband. According to the defence, any woman who sought help from a psychologist was emotionally susceptible to transposing previous trauma onto her experience on the massage table under the care of her trusted masseur.

In his closing address, the defence barrister referred to the 'spate of psychological problems' the complainant had been experiencing at that time which had prompted her to confide in both her psychologist and the accused. He ultimately argued that this explained her perception of the nature of the consultation. She was a 'poor woman' who had a 'cathartic release, as distinct from an orgasm', that was later misinterpreted by her as inappropriate sexual contact.[68]

Even though consent was not the primary issue of dispute in the trial, both defence barristers attempted to reconstitute the consultation as sexually charged in that the women were constructed as behaving provocatively or as having 'signal[led]' a level of availability. One woman was said by the defence to have initiated the removal of

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[67] In 1997 this situation was changed to allow multiple charges of sexual assault involving different complainants to be heard together. See ss.(3AA), (3AB) and (3AC) of S.372 of the *Crimes Act 1958 (Vic.)* introduced by the *Crimes (Amendment) Act 1997*.

[68] According to the complainant in this trial, the accused had been fairly brazen when committing the assaults. After he suggested her anxiety could be alleviated through him getting her 'body juices flowing', he later indecently assaulted her by touching her breasts and kissing her as she left the room. Most of the other women-complainants had also made similar allegations of him touching their breasts and digitally raping them under the pretence of it being part of the massage or necessary to 'fix' something inside of them.

her own dress in lieu of the examination and indicated her preparedness to freely discuss her body with the accused. He went on:

> DB I suggest that you also sent out a signal, although perhaps not as clear, that you didn't have a problem with physical examination of various parts of your body?
>
> C I didn't send out any signal that I would want him to examine any part of – that part of my body. No I didn't send out that signal [Trial 30].

It was suggested to the second complainant that she had inappropriately confided in the accused by divulging the nature of her sexual problems with her husband. During the accused's evidence the complainant was said to have agreed to the accused demonstrating the standard technique for breast examination and it was *she* who had finished the session by giving the accused a 'little camaraderie kiss and hug'.

One of the more compelling arguments utilised by the defence barristers in these two trials related to the failure by either woman to object to what occurred. The defence appealed to the women on the jury (a female to male ratio of 4 to 12 and 7 to 5 respectively) and referred to the 'immediate outrage' that one would expect would follow an incident that was so 'tremendously invasive' [Trial 30]. It was considered highly implausible that the women had in fact remained silent, not called out to anyone at the time and then avoided disclosing the event after leaving the premises. This might well have been a persuasive argument for the jury.

However, the responses of the women-complainants themselves to this issue offered a powerful alternative view for the jury to consider:

> I've already said yesterday in the court, you heard me, everyone's heard me, all I said was that I was in a professional situation with a man who was in a big white coat acting like a big professional naturopath. I didn't - God, as if I'm going to think he's going to abuse me [Trial 30].

The complainant in the second case described herself as having dissociated during the consultation. She recalled focussing instead on sounds she could hear outside the consultation room window.

The prosecutors both appeared strongly committed to mounting a successful case.[69] They were well versed in sexual offence law, were generally interventionist during the complainant's cross-examination and, in comparison with other trials observed, were also particularly well prepared for cross-examining the accused. Considerable time and effort had clearly been given to fashioning powerful closing arguments for their final addresses to the jury.[70]

One of the prosecutors was also careful to demystify the mythology surrounding popular notions of rape offenders as having deviant characteristics. She commented on the wide range of men who commit sexual offences:

> Well, some people, you know, can't resist it. Even doctors, you know as well as I do, that doctors get charged with indecently assaulting patients, priests with indecently assaulting boys, um, fathers or brothers fondling their baby brothers or sisters, when they're naked in the bathroom or something, just can't resist touching. And that is the only explanation. No doubt many naturopaths or some naturopaths have been charged. Some people just can't resist [Trial 30].

The outcomes of these trials, however, were somewhat different. One of the accused was found guilty of rape [Trial 30], while the second accused was convicted of indecent assault and acquitted on the rape charge [Trial 26]. The extended use made of the complainant's prior sexual history, coupled with the strong corroboration warning given to the jury in the latter case, may well explain the discrepancy in the verdicts. The complainant in this trial was also better known to the accused as his client and student and both were residents of a small rural community.

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[69] One was a Crown prosecutor (also a woman) who was employed by the Office of Public Prosecutions and was usually briefed to prosecute the more "serious cases" presented before the courts.

A number of other factors probably influenced the results, such as: the personalities of the legal personnel involved, the methods of approach used and the levels of resistance displayed by the complainants during cross-examination. In the trial that resulted in a rape conviction, the complainant consistently challenged the story constructed by the defence. On several occasions she succeeded in either muting the defence attack upon her version of the events or facilitating intervention from the trial judge. For example, in the following exchange over the alleged digital penetration:

DB	I suggest you couldn't see anything [A's fingers in her vagina].
C	I suggest you want to crack me up. I've been through this.
DB	And you say you saw this? You saw three fingers enter your vagina, you're saying? Is that what you're saying?
C	I felt it God damn you.

Then later:

DB	You did not see three fingers enter your vagina?
C	We've been through this with the one finger. It's a stupid question [Trial 30].

At this point, the trial judge intervened and said he was 'inclined to agree with that'! The level of resistance displayed by the complainant in this case, while not entirely unique across the trials observed, was an important moment in rape trial discourse. It not only undermined the narrative being constructed by the defence but it also disrupted the legal processes governing courtroom talk where the space for disturbing the eternal story of consent remains ever so fleeting (Matoesian, 1993).

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[70] This may well reflect the OPP's practice in devoting considerably more resources, including briefing more senior prosecuting counsel, in contexts where multiple offences or serial assaults are alleged.

6.4 CONCLUDING COMMENTS

The findings from this chapter suggest the influence of law reform on altering the legal conception of consent is largely discursive. In the 18 trials where a more straightforward contest over consent governed the direction of the trial, little separated them from the conventional stories that have often been constructed in rape trials to discredit or impugn women's versions of events. The strength of defence and prosecution cases continued to capitalise on the fit between the particular case circumstances and the hegemonic image of real rape victims, offenders and scenarios. The influences of other trial features, including strong corroboration warnings and the extent to which sexual history evidence was almost routinely canvassed before juries, would have significantly contained the scope for any shift in the legal consideration of consent in these cases.

Even in those rare examples when barristers relied on the more positive or communicative model of sexuality, and even where direct references were made to the notion of consent as no longer being dependent on the traditional bases of injuries and degrees of resistance, juries often remained unconvinced of the accused's guilt. This was especially the case where it was argued that a pre-existing (however brief) social or sexual relationship should complicate any straightforward consideration of the issues in dispute.

The one exception was a surprising conviction of an accused man who was found guilty of rape, despite the fact that the complainant admitted to having initially participated in relatively extensive sexual activity with him after they had only just met [Trial 1]. While the verdict may well have been unfairly prejudiced by racial issues, it is equally possible that the jury carefully applied the meaning of consent to the circumstances and were satisfied on the basis of the complainant's evidence and her immediate disclosure to police that the intercourse had in fact occurred without her free agreement.

The nine trials that offered a more direct challenge to the legal meaning of consent because they involved situations where women-complainants 'said and did nothing'

to indicate their free agreement, were particularly revealing of the contested cultural beliefs, values and ideas within contemporary rape trial discourse. On the one hand, both culturally and legally, there is increasing appreciation of the need for a notion of consent that supports a communicative, mutually self-determining framework for the conduct of sexual relations between men and women. On the other hand, the kinds of images that have governed the legal determination of rape for centuries (e.g. where there are shows of force and unequivocal resistance) remain powerful ones within the courts and the community.

An obvious site of conflict is that, while some onus is placed on men to consider free agreement in the light of women being sexually responsive or proactive in contexts involving sexual intimacy, at the same time these considerations seem to become irrelevant where men claim that if the sex was rape, it was unintentional. It seems an improbable coincidence that each of the four men who claimed an honest belief in the complainant's consent across the thirty-four trials observed, appeared in cases where the women complainants said they had been unresponsive, non-participatory or, for some other reason, unable to resist the actions of the accused.

To maintain a subjective standard for measuring an accused's guilty intention to commit the crime of rape means that men's interpretations of these events will prevail over a legislative framework that statutorily places more responsibility on them to ascertain women's free agreement. Interestingly the accused in Trial 14 had been convicted of rape during his original trial after claiming that the woman-complainant had unambiguously consented to the sexual activity. He was subsequently acquitted at the retrial I observed, however, after changing tack and suggesting that he had failed to appreciate, or even consider, the state of mind of the woman-complainant at the time of his initial approach. Unless injuries can further a woman's claim that it was non-consensual in a situation where she fails to resist, juries are clearly reluctant to convict. As Naffine puts it:

> Rape without resistance contains an ambiguity that the law will resolve in the man's favour (1992: 760).

Prosecutors undoubtedly had more success in trials where the extent of women's injuries reduced any anxiety the jury might have felt in considering the issue of consent, or of an accused's claims that he failed to appreciate that she may not have been consenting.

However, as the stories of these nine trials testify, it is not simply a matter of assessing cases against the influences of discriminatory trial practices, such as the admission of sexual history evidence or the trial judge delivering strong corroboration warnings. The more complicated and sociologically challenging issue concerns the kinds of narratives and processes of questioning that particular legal definitions and procedures allow and encourage, and how shifts in responses to legal and social reform result in changes to the discourse of rape trials and the mechanisms used by juries for adjudicating conflicting rape accounts.

The next chapter looks at the efficacy of law reform against these various considerations. I will focus on how both legal and non-legal stories work to fragment the kinds of alternative meanings and interpretations that feminist inspired reformists thought would provide for social change with respect to the legal treatment and understanding of rape offences, particularly those cases that predominantly turn on the issue of consent. This overall critical interpretation and evaluation of the meaning and symbolic import of the findings considered over the last three chapters will draw on the major feminist theories that have contributed to both an understanding of rape and an analysis of rape law reform.

CHAPTER 7

An overview of feminisms: contemplating the effects of rape law reform

7.1 INTRODUCTION

Women's prejudicial and highly sexist treatment at the hands of the legal system has repeatedly been exposed by feminists determined to effect meaningful social change in their broader social and structural condition (Berger, 1977; Scutt, 1979, 1997; Adler, 1987; Smart, 1989; Lees, 1996). Much of the law reform that has taken place both globally and locally can largely be attributed to their protests and activism surrounding the event of rape trials which led to the mobilisation of community, media and state support. While the legislative and/or social frameworks for change may have differed across feminisms, the broad objectives of reformists have remained constant - women should have equal access to justice through law's processes, procedures, discourses and outcomes. In spite of all this, the broad consensus across feminisms is that women's experience of rape trials has remained 'virtually unchanged' (Adler, 1987: 151) where signs of reformist success have often proved 'ephemeral at best' (Henderson, 1991: 415).

How feminists understand or make sense of this situation, despite (some) reformist achievements, lies at the core of this chapter. I am particularly interested in exploring how analyses of the 34 trials included in this study can usefully draw on alternative feminist approaches when considering the conduct of contemporary rape trials. With this in mind, I intend to set the findings from the last three chapters against a typology of liberal, radical, and poststructuralist feminisms – the major schools of feminism. These feminisms adopt different philosophical and theoretical conceptions of how gender is constructed, reproduced and positioned under historically and culturally situated patriarchal conditions. I make the usual disclaimer in this context about the artificiality of drawing distinctions of this kind which over-simplify the many complex

and contradictory levels at which these theories intersect and interact.[1] In discussing the efficacy of rape law reform, feminists have often tended to write from one or other philosophical position (Puren, 1999) rather than situate their critiques across multiple perspectives. My intention here is to expose the tensions between feminisms in analysing and attaching meaning to the successes or otherwise of rape reformist ideals in the context of contemporary rape trial discourses, and explore the potential for greater fluidity, or interaction, across feminisms in contemplating (the value of) future reformist agendas.

Using the three principal areas of analysis within the current study - corroboration warnings, sexual history evidence and legal constructions of consent - this chapter will grapple with how feminisms might understand the mechanisms through which key agents involved in the rape trial respond to, intersect with, and appropriate legal discourses surrounding rape. It will also consider the kinds of cultural perceptions and understandings that bear on the current operation of rape laws and procedures. Overall, this work attempts to further those (mostly feminist inspired) contributions to broaden our understanding of how feminist discourses engage with the apparatus of law in considering the potential for rape law reform to alter the social condition of women.

7.2 Empirically Speaking - Reporting on the 34 Rape Trials

Most empirically-orientated studies seek to evaluate or measure the success of legislative change through quantitative assessments of whether reforms have been satisfactorily implemented. In this first section of the chapter, an overview of the 34 trials will be provided along these lines [See Appendix 2[2]].

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[1] Smart (1995: 70) favours 'transcend[ing]' this practice altogether to avoid the limitations imposed by such 'conceptual straightjackets' which have long since outgrown their use. Atmore argues more particularly against the 'common polarizing of feminist poststructuralist versus radical feminist perspectives' (1994: 20).

[2] Appendix 2 presents the trial information in a table format where each of the three areas under consideration in the previous chapters is distinguished.

7.2.1 Corroboration

In view of the current legal status of corroboration warnings it was somewhat surprising that, in the light of the binding High Court authority introduced by *Longman*, only 16 of the 33 trials[3] succeeded in remaining corroboration warning free. In these cases, the judges not only complied with the statutory position regarding the abolition of corroboration warnings, but made no attempt to exploit the opportunity also provided by the common law (in the name of *Longman*) to legitimate a warning to the jury of the dangers of convicting solely on the evidence of the woman-complainant. In a further 8 trials, juries were exposed to more diluted versions of corroboration warnings where judges commented on the merits of looking for 'supportive' or 'confirmatory' evidence for the allegations.

On the surface these findings appeared to indicate broad compliance by a proportion of the judiciary. Upon closer examination, however, these trials represented the types of cases which conformed to the standard 'real rape' scenario (Estrich, 1987) (ie, women with injuries or who made prompt reports), where corroboration warnings would likely have been considered superfluous given the degree of physical or medical evidence that was readily available.

There were six judges who, in spite of there being a complete absence of corroborative evidence and in that sense a higher likelihood of a defence request for providing such a warning, decided against making any comment about corroboration or the lack of it. Two of these trials were previously described in detail (Chapter 4, pp. 162 - 165) and in these the judges assumed particularly strong stands in favour of upholding the spirit of the legislation that was designed to eliminate the law's entrenched suspicion of women rape complainants.

The most conservative responses to the decision in *Longman* were found in the nine remaining trials, where juries were strongly advised by judges to acquit the accused in the absence of corroborative evidence. Delays in reporting by women-complainants

were a factor in some of these trials, although in other trials judges gave strong warnings where no such delay existed and where other evidence clearly capable of supporting the allegations was available.

Defence barristers on a number of occasions further widened the scope for corroboration to remain an issue within dominant rape trial discourses. Some recounted stories of the ease with which capricious, neurotic, fallacious or vengeful allegations are made by women who claimed to have been raped. Other barristers successfully petitioned trial judges to modify their original position of presuming corroboration warnings were either no longer allowed or, in the specific instance, simply unnecessary.

Some prosecutors further sanctioned the legal reliance on corroborative evidence by inviting juries to focus their deliberations on any injuries that were sustained or on the evidence of other witnesses, rather than placing primary significance on the evidence of the woman-complainant herself. Nonetheless, a small number of prosecutors used the law to promote the changing social and legal understandings of rape and appealed to jurors to recognise rape in situations even where injuries and prompt reports were missing.

7.2.2 Sexual history/proclivities

In only 8 of the 34 trials observed the issue of the complainant's prior sexual history or experience was not included in the proceedings. This represented a striking 76.5% of cases where sexual history evidence was introduced. This figure stands well in excess of the findings reported in other Australian studies (Department for Women, 1996; Heenan & McKelvie, 1997).

Importantly, this difference cannot be explained by any social or demographic differences in the cases examined for the various studies. The Victorian Evaluation Study showed the characteristics of the complainants, the accused and the offences to

[3] The missing trial concluded prior to the barrister's closing addresses and the judge's final direction

be broadly comparable with those of the 34 trials in this study, particularly in terms of the degree to which complainants frequently knew the alleged offender (see Appendix 2). In fact the current study has a higher proportion of cases where the complainant and the accused had only just met (27.03% compared with 16.3%), a circumstance that might ordinarily have limited the scope for cross-examination to focus on sexual history given the absence of any social or sexual relationship between them. And yet 7 out of these 10 complainants were subjected to questions directed at their sexual histories.

Given that complainants (and other witnesses) can be asked sexual history questions with or without the court's permission by both defence and prosecuting barristers, I took care in the current study to document the multiple points at which sexual history evidence was often introduced in a single trial. There were 36 occasions across the 26 trials where evidence of the complainant's sexual history/experience/ proclivities was introduced. This occurred mostly in response to successful applications made by (mainly) defence barristers (69.4%) although some breaches did occur (25%).[4]

'Key[s] to unlocking' (Temkin. 1993: 11) the "rape shield law" contained in section 37A for the current trials included applications that related to:

- previous experiences of sexual assault;
- previous consensual sex between the woman-complainant and the accused;
- claims by the defence that the complainant was known to be sexually promiscuous, masochistic, capricious, or simply "available"; and
- claims by the defence that a sexually active woman was either (paradoxically) less likely to be a victim of sexual assault or more likely to lie about it.

There were occasions where prosecutorial objection or effective judicial control were exercised both in terms of limiting the space through which sexual history evidence

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[Trial 7].

[4] In the other two cases (5.6%), it was unclear whether the evidence was adduced legitimately (court sanctioned) or not.

could be constructed as legally relevant or in terms of refusing to admit the evidence altogether. However, the familiar pattern of sexual history or sexual experience being linked with women's propensity to consent to sex or to lie about sexual assault, was apparent in a substantial proportion of the trials observed. The currency of these 'stock stories' (Delgado, 1989: 2412) was most flagrant amongst those five trials where the complainant's sexual life was treated as critical to assessing the culpability of the accused.

In other trials, the defence persuaded judges of the relevance of a woman's sexual history by providing assurances that the evidence was intended to challenge the complainant's *reliability* and was only incidentally related to her sexual past. These barristers relied not on the conventional chains of reasoning used to ground straightforward links between sexual history and credibility or consent, but offered a more sophisticated justification for sexual history evidence in the context of their client's defence. In some cases, barristers claimed they wanted to introduce the evidence to expose inconsistencies in the woman-complainant's evidence, or lapses in her memory, or to suggest she was emotionally unstable, and only coincidentally would this reveal the woman's prior sexual activities/abuse/experiences.

Illicit questions were asked of complainants on nine occasions. Some prompted quick and effective intervention from prosecutors and trial judges. Others occurred as a result of some informal pre-court agreement being struck between the parties. Otherwise, recourse to the familiar innuendo where women's actions, inaction, and clothing choices were often pitted against traditional feminine stereotypes featured in several of the proceedings.

7.2.3 The legal construction of consent

As with other studies, the issue of consent remained a dominant focus of the trials observed. Typically, the defence sought to capitalise on any pre-existing social or sexual contact between a complainant and an accused to problematise any straightforward assessments regarding (lack of) consent.

Specifically, the principal defence for 18 of the 37 accused (48.6%) was to claim that the complainant had consented. A further 4 (or 10.8%) introduced a mixed defence of consent and/or holding an honest belief in consent. While consent was not central in the trials for the remaining 15 accused, most of whom denied that anything of a sexual nature had occurred at all (40.5%), the complainant's credibility was similarly tested by using the traditional logic that presumed sexually active women have a hidden propensity to lie about sex. This widened the space through which narratives of consent could be deployed in the determination of rape allegations even where the primary line of defence should have rendered consent or non-consent irrelevant.

Despite statutory (re-)definitions and new guidelines framing the legal meaning of consent, there were still straightforward contests over this issue where juries were required to adjudicate between two competing accounts of the acts in question. The discourses in these cases varied little from the conventional arguments characteristic of conventional trial practice. The meanings and interpretations for the women's actions, choices, sexualities and passivities were continually situated in the same gendered and sometimes racialised patriarchal cultural contexts that have previously been so well documented.

Women-complainants were repeatedly measured against the archetypal image of "real-rape" victims where their behaviour before, during and after the assault was invariably found wanting. Doubts were raised, on the one hand, about women who had showered after the incident (on the basis of them not knowing that showering hinders the collection of forensic evidence) and, on the other, about women who had not showered (and who were therefore neglectful of "feminine hygiene"). Equally suspect were women who cried (a sign of regret for their actions) and women who did not cry (a sign that they were not affected). Women who could not verbalise the word "rape" had not really been raped and women who alleged being regularly raped would not know the difference between rape and consensual sex. Even when injuries helped to strengthen a woman's account of rape, they did not guarantee a conviction.

Most prosecutors were unwilling or unsure how to find ways to disrupt traditional narratives of consent based on male-centred notions of force and resistance. Nor did they make use of the feminist analyses and personal testimonial accounts of women that could assist to establish the credibility of women-complainants by explaining reasons for delays in disclosing or reporting, the absence (and rarity) of injuries, and the likelihood of women knowing their offender.

There were a few exceptions to this. In these trials, powerful diatribes were delivered to juries where the defence were roundly criticised for suggesting that men were entitled to expect sex in certain situations, especially where women had been drinking and/or socialising in their presence. Drawing on a kind of rights focused analysis typically associated with liberal feminism, prosecutors countered 'the green light' or the 'she asked for it' defences by suggesting women had the 'right' to drink, to go nightclubbing, to be out at night, to develop relationships - all without being raped.

The five trials (or 14.7%), where women were asleep at the time when the rape was alleged to have occurred, offered an even greater challenge to jurors trying to make sense of the new legislative framework surrounding consent. These cases were of particular interest given the current study's focus on exploring a potential shift towards a greater emphasis being placed on a more communicative model of consent as such, and on how this might translate into changes in the narratives constructed by barristers to establish or contest the accused's culpability.

Traditional conceptualisations of consent proved relatively resilient in these cases, as prosecutors struggled to convert the more familiar and widely understood (female) acquiescent- (male) aggressive model with an alternative view based on positive signs of mutual participation (Pineau, 1989; Naffine, 1994). The potential for prosecutors to use the new legislative framework to introduce alternative discourses that would position consenting women as those who are sexually proactive and communicative about their sexual desires and performance (not dissimilar to how men are characterised) was, on the whole, inadequately realised.

Some defence barristers appeared to adopt the remarkable tack of indirectly advising jurors simply to ignore the implications of the legislation and to draw on their own "common-sense" understandings of the notion of consent. In the words of one defence barrister:

> it would be absolute rubbish to suggest that silence alone is all there is to it [Trial 14].

As the women in these cases were asleep at the crucial time, largely as a result of consuming large amounts of alcohol, the defence easily turned the focus of the trial to traditional measures of moral blameworthiness for women who engage in such "risky" behaviour. Given also the law's subjective standard for assessing an accused's guilty intention, it was hardly surprising that jurors in three of these trials were unable to convict even in situations where these women barely knew the accused before they woke up to find themselves being sexually touched or penetrated.

The issue of consent figured in two other trials where women were alleged to have been unconscious at the time they were raped. That consent was the principal line of defence for the accused in these cases was unexpected, especially given both women sustained injuries that resulted in hospitalisation, a factor that usually held sway with juries contemplating a conviction (LRCVb, 1991: 98-99). Nonetheless, the particular defence barristers seemed unperturbed about featuring the standard stories of consent where the women's credibilities again assumed particular significance. One woman was said to be lying about regularly providing '[sexual] services' to her estranged husband [Trial 4]. According to the accused, he and his ex-wife regularly engaged in sexual intercourse for convenience and this had also been the case on the occasion in question. The other complainant was a young 15 year old girl who was said to be 'raring to go' and 'who chucked herself' at the accused men in a state of self-induced intoxication. Her earlier kissing and flirting with the accused men was constructed as

positive proof that she would later consent to having sex with them, both orally and vaginally [Trial 22].[5]

This study also produced two cases highlighting the operation of the consent provisions in the context of actions by medical or health care practitioners [Trials 26 & 30]. Both trials concerned the practices of naturopaths who had digitally penetrated the women and claimed it was a routine and necessary component of a legitimate therapy. The women had been loath to protest during the examination because of the accused's professional status.

Even though both accused men denied anything sexual had occurred during the consultations, and they were faced with complainants whose lives appeared thoroughly respectable, the defence nevertheless attempted to portray the women as intentionally creating a sexually charged dynamic. One woman was accused of initiating the sexual dynamic by removing her dress for the purposes of the examination. She apparently also sent out other 'signals' to the accused through her readiness to discuss intimate body parts. The other complainant was said to have asked the accused to demonstrate how she should examine her breasts before she spontaneously planted a farewell kiss on his cheek at the end of the consultation.[6]

The defence counsel also applied traditional rape preconceptions by constructing the women-complainants' post-rape behaviour as failing to meet the cultural expectations of what have become the criteria for identifying genuine situations of rape: these women made no protest at the time to the accused men; they agreed to make future

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[5] The barrister for the co-accused, who claimed a mixed consent/belief in consent defence, mounted a less contentious but no less conventional argument. The ambiguity of a drunken young woman, who was seen kissing and lolling with both accused in a nearby park, was said to substantiate the accused's claim that he later formed an honest belief in her consent to engage in sexual activity with both him and his friend in a different location. Her state at this time was explained away. She had vomited and was incapable of walking.

[6] The woman in this last trial was also questioned about her experiences of childhood sexual assault as well as the current status of her sexual relationship with her husband. This was a bid to suggest the allegations may be the unfortunate outcome of an emotionally unstable woman managing some difficult personal issues [Trial 26].

appointments (which neither of them kept); and they failed to report the incidents immediately to police.

The prosecutors in these two trials were unusually interventionist during cross-examination and were particularly well versed in sexual offence law. The narratives presented in their closing addresses offered powerful alternatives for the jury to consider in assessing the markedly different accounts given by the opposing parties. The prosecutors relied heavily on establishing that the women-complainants' responses were perfectly understandable given the professional status of the accused men. They argued that the confusion and distress which the women felt more than adequately explained their conduct following the consultations. One prosecutor was also mindful of the need to widen the contextual scope within which jurors might initially have perceived rape by drawing on the ever-increasing numbers of reports made within church communities and families to dramatically push home the point.

7.3 THEORETICAL INTERPRETATIONS: EXPLORING FEMINIST ANALYSES

The remainder of this chapter is a reconsideration of some of the key findings and themes from the 34 trials in the light of feminist commentaries surrounding rape trial discourses, particularly in the context of reformist objectives. While I acknowledge the many and varied points at which feminist analyses compete or diverge, I also recognise the commonalities and the spaces through which their theoretical and philosophical differences have often benefited from important moments of intellectual sharing. Here, contemporary feminist discourses are informed by a constituency of ideas and analyses that can meaningfully cross-disciplinary and epistemological boundaries. This is where considerable promise for effecting genuine reform to rape laws in the future may lie.

7.3.1 How Liberal Feminists Might Account for the Findings

> What the law owes us is a celebration of our autonomy, and an end at long last to the distrust and suspicion of women victims of

> simple rape that has been the most dominant and continuing theme in the cases and commentary (Estrich, 1987: 102).

Estrich (1987) and other notable feminists committed to social justice agendas believe in the potential for law to effect change that will benefit the social position of all women (Adler, 1987; Lees, 1996). Their concerns, in the context of sexual assault legislation, have traditionally been with changing the overt behaviour of law enforcement and judicial personnel, including police, lawyers and judges, with the objective of removing the prejudices and biases that work against women-complainants and in favour of accused men in such cases.

Local feminists and reformists rightly take considerable credit for the politicising, mobilising and lobbying that undoubtedly contributed to the introduction of the package of reforms in Victoria in 1991 (Brereton, 1994; Egger, 1994). While it was anticipated that most of the provisions would work to improve women-complainants' experience of the rape trial, it was the consent provisions in particular that were expected to have the most significant impact on the cultural understandings of rape both within the courts and in the community generally (Naylor, 1992; Naffine, 1994; McSherry, 1998).

A liberal feminist assessment of the findings from this study would focus on whether the agents of law - police, barristers, solicitors, and judges - appear to have adequately interpreted and applied the new laws and procedures to effect a fairer criminal justice response to victims of sexual assault and, in this light, attempt to assess the need for further reforms to tighten any outstanding or residual problems.[7] The three aspects of legal reform need to be considered separately.

With respect to corroboration warnings, contemporary liberal feminists might reasonably point to the partial success of statutorily abolishing any judicial discretion

[7] Both the Victorian Evaluation Study (Heenan & McKelvie, 1997) and its equivalent in New South Wales (Department For Women, 1996) took this approach in the context of the commitment of governments and community bodies to maintaining the issue of violence against women on the political agenda. In Victoria, a key aspect of the lobbyists' agenda had successfully been to commit

for judges to continue to caution juries about the general unreliability of sexual assault complainants. In this study 16 of the 33[8] trials were "corroboration warning-free". In a further 8 trials judges were careful to avoid using the word "corroboration" and delivered watered down versions.

The characteristics of these cases accorded fairly closely with those that have historically proved less difficult to prosecute (e.g. cases characterised by injuries and prompt reports). There were, however, a small number of judges who also refused to give a corroboration warning even in situations where the jury was faced with an "oath against oath" trial, or where there was no other independent evidence of the rape apart from the woman-complainant's word. Given the binding authority of *Longman*, a liberal feminist analysis might attribute this behaviour by judges to a deeper understanding of how such discriminatory legal practices have historically impacted on women.

No judge in any of the trials gave the jury a Hale-style warning along the lines of reference to an inherent predisposition by 'girls and women...[to] tell an entirely false story which is very easy to fabricate but extremely difficult to refute'.[9] Liberal feminists might therefore celebrate the successful eradication, at least in some instances, of 'the worst of the myths about women as subtle malicious liars' in that sexual assault complainants are generally treated as an unreliable *class* of witness: this is at least 'no longer formally endorsed by the law' (Mack, 1998: 73).

That the winds of social change might well be influencing a certain (although small) section of the judiciary was also evidenced by the actions of a few Victorian judges who drew attention to the potential backlash of *Longman* during the Victorian Evaluation Study (Heenan & McKelvie, 1997). At one of their annual seminars, the Chief Justice of South Australia also advised trial judges against applying a wide

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the government of the day to funding an evaluation project to monitor the impact of the new *Crimes (Rape) Act 1991*.

[8] Trial 7 was excluded from this analysis.

[9] These words often represent the contemporary version of Chief Justice Matthew Hales' words from 1736.

interpretation of *Longman* which would effectively limit the precedential scope under which corroboration warnings might be considered necessary in the future.[10]

Nonetheless, there were still nine trials within the current study where more orthodox approaches to corroboration were adopted by trial judges, even in circumstances far removed from the criteria imposed by *Longman*. Although judges were careful to confine their comments to the perceived unreliability of the particular complainant, the use of powerfully delivered directions alerted juries to the 'dangers of convicting' and, on one occasion, to the potential for a 'miscarriage of justice'. As it was, only three of the juries who heard traditional corroboration warnings[11] were persuaded to convict the accused for rape.[12]

The ease with which some judges ignored the statutory outlawing of corroboration warnings and continued to perpetuate the law's customary distrust of rape complainants is more likely to be judged from a liberal feminist perspective as a failure to produce the right statutory formulations for strictly limiting judicial discretion, rather than as demonstrating any broader role the law might play in institutionalising women's oppression (Chamallas, 1988).

With specific regard to *Longman*, solutions might be thought to lie in legislating to counteract the High Court's authority so that there was some statutory support for judges to refuse to give cautionary warnings (Tannin, 1996).[13] The actions of prosecutors who failed to adequately protest or who (as was the case on one occasion) advocated a *Longman* warning would also need to be addressed. Lees has often

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[10] Pia Van derZandt (Women's Legal Resources Centre, Sydney) and I facilitated this seminar in 1998. A focus of our presentation was on the inordinately high national profile given to the decision in *Longman* and its implications for trial practice. The Chief Justice sent an important message to trial judges who may have been concerned about appeals that their refusal to provide a *Longman* warning will be supported by the Supreme Court (see Chapter 4, footnote 52, p. 180).

[11] In two of these trials, the women-complainants had suffered additional physical injuries [Trials 9 & 31] while the accused in the third trial had made partial admissions regarding his contact with the 13-year-old complainant [Trial 10].

[12] One other accused was convicted of an indecent assault but was acquitted of rape [Trial 26].

[13] Lees (1996: 251) suggests that appeal courts be subjected to independent structures of accountability, with broader representation from community and survivor groups to better educate them on the social realities of sexual assault.

criticised the 'neutral' position adopted by prosecuting counsel (1993; 1996: 254) in distancing themselves or refusing to take on strong advocacy roles in sexual offence hearings. She suggests that special training in the art of prosecuting rape offences, including more detailed briefings with complainants, might better prepare and motivate prosecutors to improve their chances of obtaining convictions in rape trials.

Some of the prosecutors in the trials observed were clearly well versed in sexual offence law and remained sensitive to the position of women-complainant's giving evidence. Others, however, appeared less familiar with the rules of evidence, less attuned to the tactics of defence barristers, and even indifferent to the outcome of the case. Lees' proposal would perhaps encourage a more consistent and perceptive approach to the prosecution of sexual offences, as well as improve their understanding of the particular difficulties faced by women who appear in rape trials.

With respect to the provisions for sexual history evidence, there was little to suggest a reformist approach alone would ever be effective. While obvious appeals could be made to increase prosecutorial and judicial vigilance to curb the more deliberate breaches of the legislation (Department For Women, 1996; Henning, 1996; Lees, 1996), the failure of section 37A to cope with situations which require more complex assessments and interpretations of the motivation and reasoning underlying (mostly) defence applications has meant the provisions have in effect almost totally collapsed.

In a small number of cases, more straightforward problems with interpretation were evident with barristers and judges adopting inconsistent approaches to assessing whether instances of prior sexual assaults, or even prior consensual activity with the accused, were covered by the section. Clearer statutory guidelines, coupled with appropriate training that addresses the meaning, scope and intentions of the provisions may well lessen the frequency of sexual history evidence being admitted simply out of ignorance. Significant interventions or refusals to admit applications from a minority of judges stood in contrast to the practices adopted in other trials where careful attention was paid to the chains of reasoning used to substantiate claims of relevance.

In these latter instances judges were at least mindful of the seriousness with which questions concerning the admissibility of sexual history evidence ought to be adjudicated.

Rare examples in four trials (see Chapter 5, p. 195) might give encouragement to liberal feminist strategists by showing an increasing potential for judges, who have become more "gender aware", to demonstrate in their actions an understanding of how information about women's sexual pasts/proclivities may be used by the defence to discredit their status as complainants.

One judge (later overturned on appeal) refused to grant leave for the defence to admit evidence of a complainant who subsequently 'slept with' another male while the accused was also present in the room [Trial 19]. These circumstances would almost certainly have been sufficient to persuade other judges of its relevance to credibility, especially since on the surface her actions fell far short of how one might ordinarily perceive a rape victim should behave.[14] However the original judge (assisted by the prosecutor) carefully unpacked the apparent merit of the defence application and was alert to the irrelevance of this incident in the light of the particular facts in dispute. If the jury was provided with information about her subsequent sexual activity, it would clearly not have helped to determine whether the accused had held an honest belief in her consent, even though he later conceded that any such consent was likely to be the result of the complainant mistaking his identity.

From a liberal feminist viewpoint, the most progressive aspect of the findings in relation to the consent provisions might be found in the number of cases amongst these trials that at one time would not have been prosecuted.[15] That several of the trials observed appeared to challenge traditional conceptions of rape situations suggested a substantial modification of views within the ranks of police and the Office of Public

[14] Upon retrial, the judge allowed this evidence to be admitted as relevant to the complainant's credibility. The jury then heard that the complainant had been warned of the accused's presence in the room. She allegedly replied that she 'didn't really care' and was later seen sleeping in the room with another male while the accused occupied a separate bed [Trial 19].

Prosecutions. Even where concerns were expressed about the viability of such prosecutions resulting in conviction, decisions were largely made in favour of at least allowing the issues to be determined by a jury.[16]

The trials involving women whose capacity to consent was the principal issue in dispute[17] provided the most direct challenge to assessing whether the reforms designed to shift the meaning of consent towards a standard based on communication rather than supposition had influenced the processing and outcomes of rape trials (Weiner, 1983). That juries convicted in three of these trials where alcohol, drugs and other sexual activities formed the backdrop to the allegations, might suggest that the law reform solution to the problems of consent can be effective.

Liberal feminists might further claim that the preponderance of trials involving complainants and accused who were known to each other in some way prior to the alleged offences reflects a greater preparedness of women to disclose sexual assaults by their friends, acquaintances, partners and their fathers - a consequence largely resulting from (feminist inspired) reformists' pressure to sensitise police and communities to the social realities of rape.[18] In other words, as Allen suggests, these reforms might represent 'an instance of beneficial feminist intervention into law and "state" policy' (1990: 231).

With respect to the third aspect, the experience of cross-examination, there was an apparent reduction in the most flagrantly offensive questions customarily deployed to

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[15] See one solicitor's view on the impact of the legislation on prosecutorial decision-making in Heenan and McKelvie, 1997: 305-306.

[16] See Appendix 2 for cases where a request was made for the prosecution to be discontinued and a *nolle prosequi* entered.

[17] These included the five trials where women were asleep, drunk, or drugged, and one other [Trial 1] where the accused was alleged to have raped the woman complainant after they both impulsively agreed to engage in a variety of other mutually-consensual sexual activities.

[18] Some feminists might also see the increase in women reporting sexual violence by their partners as evidence of women "knowing the difference" between mutually enjoyable sex and rape. This point is often made in repudiating what has been claimed to be MacKinnon's thesis (1983, 1987) that all intercourse is rape.

impugn the character and credibility[19] of complainants who tried to fend off accusations of consent. Few barristers resorted to simply constructing women's behaviour as somehow precipitative in terms of their choice of clothing or make-up, or used simple correlates between "being raped" and being at a pub or a nightclub, or being socially or sexually active.[20] Even on those occasions where defence barristers suggested that the complainant somehow invited the attentions of the accused, some prosecutors who were armed with or inspired by (liberal) feminist discourses admonished the accused for running a 'green light' defence to undermine women's rights to social and sexual self-determination.

The few enlightened practices found amongst such trial studies would hardly satisfy feminists adopting a more radical position. As Smart argues, while some of the reform efforts may, even where partially implemented, 'mitigate some of the worst horrors' of women's rape trial experience (1989: 35), they do little if anything to challenge the repertoire of heterosexist assumptions that remain as fundamental features of rape trial discourses that perpetuate the law's revictimisation of women rape survivors in court.

7.3.2 How Radical Feminists Might Account for the Findings

> I sat on a wooden seat. In a wooden pen. With my feet touching the wooden floor. From my position I could see most of the people in the room. I recognised some of them. I wondered who the others were. The men in grey at the table to the right. The men in grey at the table to the left. The men in uniform. The man with the beard typing. The man elevated above all others was barely discernible from where I was seated. His head bobbed up and down on top of his podium in the sky. He looked old. I knew he was the most important person in the room. I think he did too.
>
> (Julia Grix, 1999: 85).

This powerful narrative provided by Julia Grix of her experience of sitting in the courtroom and being surrounded by the "maleness" of law brilliantly encapsulates

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[19] This is complicated by the frequent admission of sexual history evidence which suggests the style, rather than the content, of cross-examination may be the subject of the most change.
[20] Young (1998: 448) also noted a reduction in the kind of 'heavy-handed cross-examination' used to discredit and intimidate women rape victims in court.

what some radical feminists might see as patriarchy personified. Grounded in decades of testimonies where women have described experiences similar to those of Julia Grix, radical feminist analyses might focus less on how law reform has been translated for the individuals in the 34 trials of the current study, and consider more broadly whether engagement with the criminal justice system has simply reinforced the power of law (Smart, 1989) to further institutionalise male bias through a tenacious set of practices and processes that continue to invalidate women's experiences of rape during the trial (Tarrant, 1990).

Feminists might certainly acknowledge the extent to which reformist efforts have resulted in some improvement to this situation with figures that suggest a greater willingness on behalf of women to disclose, and on the part of the police and the Office of Public Prosecutions to authorise proceeding with, a wider range of circumstances in which rape is alleged to have occurred.[21] The Victorian Evaluation Study reported an increase in prosecutions for intra-familial assaults, particularly father/daughter rapes (Heenan & McKelvie, 1997: 36), as well as a greater number of cases involving current or former partners proceeding to trial (see Appendix 2). The current study provided further support for this latter trend. Five out of the 34 trials involved an accused who was the former or current spouse/de facto of the woman-complainant and 3 trials involved situations where the accused and the complainant were familially related.

However, higher acquittal rates in recent times suggest these cases are far less likely to have a reasonable chance of conviction. The Victorian Evaluation Study reported that, in each of the areas that might represent an important site for measuring the success of rape reformists' agendas, the acquittal rate correspondingly increased (Heenan & McKelvie, 1997). So while these trials more adequately reflected the social reality of rape situations, juries felt less able to convict. This was particularly the case where women were not physically injured or medically examined, or where they had been

[21] While the changes at this end of the criminal justice process have been applauded, feminists are still highly critical of the inordinate filtering that still occurs with respect to reports which results in charges being laid or prosecutions being initiated. Compare the discrepancy in statistics for any one year between the Victorian Police Statistical Review and the Higher Criminal Courts' Case Flow figures for rape and other sexual offences (for example, see Chapter 1, pg 34).

related, married to or intimately involved with the accused at the time of the alleged offences (Heenan & McKelvie, 1997: 233-237). The small number of trials observed for the current study means that statistical comparisons should be treated with caution. Nonetheless, the percentage of acquittals was slightly higher in the current study (45.9%) when compared with the trials examined for the Victorian Evaluation Study (34%) (See Appendix 2, Table 8).

It is precisely in these types of cases that radical feminists believe there is the least capacity to use the apparatus of the law to alter the balance between the rights of men and those of women. These cases fundamentally challenge the narrow legal scope that has been afforded to women who claim to have been raped or sexually assaulted in childhood, in partnerships, in friendships or in circumstances that leave no physical trace of the assault having occurred. Any reforms aimed at increasing the status of women's uncorroborated testimonies are therefore liable to prompt the kind of legal or cultural backlash that effectively undermines the potential for any meaningful change in the treatment of rape cases (Lees, 1993, 1996; Adler, 1987; Tarrant, 1990; Sheehy 1991).

However, according to the theoretical analyses developed by radical feminists, the fundamental problem for women lies not in the individual and often highly sexist arguments used by barristers, judges and juries to resist or pervert the potential for reform-induced social change, but in the underlying structures of the laws themselves and other institutions (Caringella-MacDonald, 1988; Tarrant, 1990; Edwards, 1996) which serve to maintain the prevailing power relations between men and women. Within both historical and contemporary rape law, this takes the form of legal definitions and procedures that privilege men's accounts of sex over women's accounts of rape.

The implications of the High Court decision in *Longman* can be viewed in this light. Despite the legislative changes in Victoria, including the abolition of the corroboration warning occurring two years after the decision in *Longman*, the provisions were

narrowly drafted and subsequently interpreted to dispense with only the more gross incidences of jurors being warned about the generic unreliability of women sexual assault complainants. Nothing prevented the invocation of corroboration warnings when specific to the case circumstances in particular trials. Indeed the 'interests of justice' clause invited judges to presume such circumstances would likely present themselves – *Longman* merely sanctioned the juridical conditions. In those rare cases, where jurors have been minded to convict an accused in spite of being cautioned about the dangers of relying on the uncorroborated evidence of the complainant, the High Court has on occasion been reluctant to allow the verdict to stand because it is fearful of a potential miscarriage of justice (Young, 1995; Mack, 1998).[22]

The most damning evidence of the failure of rape reforms to lessen the trauma for women giving evidence in the courtroom is the remarkable frequency with which the courts continue to sanction questions directed at the complainant's sexual history. In three quarters of the trials observed, there were 36 separate occasions when evidence of sexual history was introduced. This leaves little doubt about the currency of feminists' claims that a double standard for measuring women's reputation and credibility is still alive and well across the courtrooms of Victoria. While information on the accused's prior convictions remains tightly guarded, evidence about the woman-complainant that was considered "substantially relevant" to a determination of the issues included: previous sexual assaults, previous consensual sex with third parties that was known to the accused, and previous sexual contact between the complainant and accused, regardless of the temporal proximity to the events in question.

Amongst the most disturbing examples were the five trials where women's sexual histories were the centre-piece of the defence of the accused. In spite of the recent provisions strictly forbidding the admission of any evidence surrounding the complainant's sexual disposition or reputation, there was recourse to traditional sexist arguments about the links between the woman's sexual proclivities and the accused's

[22] Both Young (1995:107-112) and Mack (1998: 68) detail the case of *M* to make this point. Here, the jury convicted the accused of sexually assaulting his 13-year-old daughter. A majority judgement

perceptions of consent: that either she would be more likely to have freely agreed to the activities in dispute, or that she is just the kind of woman to lie about it. With little more than a cursory inquiry into the evidentiary basis of the defence claims, judges granted leave for women to be asked about their sexual activities with other men. The justification being that it might shed important light on the accused's state of mind, or on any prior sexual contact the woman was alleged to have had with the accused man himself to further reduce the probability of her refusing sex with him on this later occasion.

More innovative applications were made by other defence barristers who were keen to distance themselves from such a simplistic approach. They insisted the admission of sexual history evidence would be purely incidental to the defence point they wished to make. So, for example, it was not that the woman-complainant had had intercourse with her boyfriend's best friend on New Year's Eve that the defence claimed was relevant to their case, it was that this evidence could substantiate the likelihood of her engaging in further sexual activity with him on the night of the offences when the complainant herself, due to her drunken state, could not recall whether anything sexual had happened between them [Trial 16]. Hence, according to the defence, it was not an issue of the complainant's credibility or her propensity to consent, rather it was evidence that could support the defence's claim that her memory of the events that night was unreliable. It was claimed to have nothing to do with sexual history. The court was persuaded by this ingenious reasoning to consider the evidence relevant, despite the fact that the accused (another man altogether) had absolutely no knowledge of these events.[23]

Some feminists would certainly point to instances of this kind as proof that defence lawyers will inevitably find ways to adapt contemporary legal argument to preserve access to women's sexual lives, providing a clear indication of the extent to which those pursuing law reformist agendas are wasting their time (MacKinnon, 1983; Smart,

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of the High Court overturned their decision declaring the verdict "unsafe and unsatisfactory". See *M V The Queen* (1994) 76 A Crim R 213.

1989; Tarrant, 1990). The more legislative gains appear to encroach on men's once unfettered control over traditional rape trial discourses, the greater the skill and ingenuity in resisting these provisions. In the context of sexual history evidence, this has taken the form of moving the debate beyond the confines of individual courtrooms to broader challenges being mounted against the very constitutionality of the provisions themselves (Fudge, 1989).

The famous Canadian case of *R v Seaboyer; R v Gayme*[24] demonstrated the ease with which legislative change could be negated by institutionalised legal structures precedentially enshrined to protect male interests. Elizabeth Sheehy (1991; 1995) and Sheila McIntyre (1994) have both chronicled the events that followed the Supreme Court decision that found the existing sections banning the admissibility of evidence relating to a complainant's reputation and restricting the introduction of evidence of past sexual activity[25] to be unconstitutional.[26] The appeal court ultimately decided that the provisions were in contravention of an accused's right to present a reasonable defence to allegations of which, under a democratic legal system, he must be presumed innocent. Despite politically strategic efforts made by a coalition of Canadian feminist law reformers to resist the challenge to their rape shield laws, the immediate effect of *Seaboyer* was to reinstate a wider discretionary power under which judges could determine the admissibility of sexual history evidence (Sheehy, 1991; Temkin, 1993).

Similarly in New South Wales, defence barristers have had some limited success in overriding their rape shield laws through requesting permanent stays[27] in sexual offence proceedings after they claimed that the provisions unfairly obstructed an accused from mounting a full and fair defence (Department For Women, 1996: 250).

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[23] I am not suggesting his knowledge of the events would have made the evidence relevant, but that at least this may have been more consistent with the approach adopted in other courts.
[24] See *R v Seaboyer; R v Gayme* (1991) 48 Ontario Appeal Court 81 (Supreme Court of Canada).
[25] Sections 276 and 277 were introduced by the Criminal Code of Canada in 1982.
[26] A similar challenge was mounted against the constitutionality of rape shield laws in Wisconsin. Courts there were given greater leverage to override the statute bar imposed by more restrictive models where the admission of sexual history evidence had previously been strictly limited to a few enumerated exceptions (Hanson, 1992). Hanson believes the Constitution justly 'provides the judiciary with a discretionary ace in the hole' (1992: 804) in so far as the rape shield is concerned.
[27] A permanent stay is where the proceedings are adjourned indefinitely.

Whilst the High Court later ruled against the granting of permanent stays, the Chief Justice ensured further scrutiny of the provisions by questioning the fairness of their operation[28] (Chief Justice Brennan, cited in Department For Women, 1996: 251). This in fact appears to have been the turning point for the Model Criminal Code Officers Committee (MCCOC) (1999) when developing recommendations for their final report aimed at nationalising a Model Criminal Code for Australia. Despite being inundated by submissions favouring more restrictive legislative models[29] regarding the admissibility of sexual history evidence, the Committee concluded that:

> In the light of the undoubted difficulties encountered with the New South Wales model in recent times, and the fact that the rest of Australia and indeed the common law world[30] have rejected the mandatory model, the Committee remains attracted to a strictly circumscribed discretionary model (MCCOC, 1999: 243).

The model to which they refer mirrors the structure of the Victorian provisions despite the Committee, as Rush and Young (1997) point out, being fully aware of how ineffectual section 37A has proved when left in the hands of individual judges. That a decision was made in favour of Victoria's status quo for fear of the rights of accused men being unfairly diminished, and in the face of consistent evidence which highlights the extent to which women's sexual lives are still being paraded before the courts, represents for most feminists 'an authentic expression of a deep-seated lack of commitment to reform of the law' in this area (Temkin, 1984: 964).

That law continues to reinforce gendered belief systems through its reliance on sexual history evidence in rape trials is often obscured in the context of individual trials where the sexual history of a particular woman is constructed as "substantially relevant" to the defence of a particular accused man. This is clearly evident for trials where there is alleged to have been previous sexual contact between the complainant and the accused

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[28] Like Canada, the New South Wales provisions are tighter than those of Victoria with a list of particulars limiting the discretionary power of judges to determine the "relevancy" of sexual history evidence.

[29] See footnote 243 of the MCCOC report that lists a vast array of proponents of more restrictive regimes (1999: 243).

[30] I read this as referring to judges across the Western legal world.

(Henning, 1996; Heenan & McKelvie, 1997). Without exception, and with little to no discussion about how the evidence in these cases was deemed to be "substantially relevant", judges in trials from the current study granted leave for the defence to question the woman-complainant whenever an accused alleged there had been prior sexual contact.[31] Hence, despite juries being warned against assessing the issue of free agreement by reference to the existence of any prior sexual activity, this is precisely the chain of reasoning the courts continue, and defence lawyers urge them, to accept. For radical feminists, this failure of the law to recognise as morally culpable men who rape women with whom (they say) they have been sexually intimate in the past, demonstrates the level at which these institutions continue to reproduce social and sexual expectations that fundamentally reflect the male perspective.

This situation is unlikely to improve if the recent High Court decision of *Bull v The Queen*[32] is symptomatic of the law's continued resistance to these types of statutory reforms. This decision provides a powerful reason for arguing, as do most radical feminists, that law often serves as an extension of male power where the interests and perspectives of men are institutionalised to (re-)set the (objective) standards of law (MacKinnon, 1983).

In brief, three men including *Bull* were charged with raping a 21 year-old woman after she arrived at their house in the early hours of the morning. Her ordeal allegedly lasted several hours during which time she was handcuffed and subjected to both anal and vaginal rapes which included the use of objects. According to the offenders, the sexual activities were unequivocally consensual (although Bull argued an honest belief in consent) after the young woman willingly engaged in smoking marijuana, drinking vodka and watching pornographic videos with them. The jury convicted each man on

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[31] This occurred on nine occasions where the accused claimed there had been instances of prior consensual sex. The woman-complainant denied the activity occurred in relation to three of these accused men. In two cases it was unclear whether any application had been made, and in one other case there was a clear breach of the provisions, with questions being asked without the court's permission first being sought.

[32] *R v Bull* (2000) 171 ALR 613

at least two counts of rape, one count of indecent assault and on a further charge of attempted rape.[33]

While they failed to win their appeal in Western Australia, the High Court agreed to hear the case on the grounds that the trial judge (a woman) had erred in refusing to admit evidence of a telephone conversation between the complainant and the offender, Bull, prior to the offences occurring.[34] The telephone conversation allegedly made reference to the complainant's sexual fantasies, one of which was her desire to have sex with several men, while other comments were directed at whether the complainant had recently been sexually active.[35] The complainant, on the other hand, said Bull had invited her to the house to speak about his recent trip overseas and did not mention the presence of the other men at the house.

The High Court quashed the convictions and ordered a retrial for the three accused after they unanimously agreed that the evidence of the telephone conversation should have been admitted. While each judge acknowledged that the evidence 'incidentally' compromised the complainant's sexual disposition, an area absolutely prohibited by statutory authority[36], the fair trial of the accused, according to the five High Court judges, demanded that the telephone conversation be admitted as relevant to the issue of consent or (Bull's) belief in consent .[37]

Different chains of reasoning were used by the High Court to arrive at this decision, although they were equally damaging in terms of preserving the statutory strength of

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[33] Verdicts of acquittal were entered in relation to other counts of rape and indecent assault.
[34] The trial judge also excluded evidence of an occasion of alleged sexual contact between the complainant and the accused given how remote it was in time to the date of the alleged offences, thwarting any inference the defence might have attempted to draw in relation to consent (See *R v King, Bull and Marotta*, Unreported, CCA, Western Australia, January 19, 1998 at 25.)
[35] The accused claimed to have asked the complainant whether she had 'any cobwebs?', referring to how regularly she had sex. This was followed by his suggestion that he and his friends could 'blow [her]cobwebs away'.
[36] Section 36B and Section 36BA of the *Evidence Act 1906* (WA).
[37] This was also the view of Justice Ipp who was the sole dissenting voice in the judgement handed down by the Supreme Court of Western Australia, Unreported, January 18, 1998.

sexual history provisions across national jurisdictions in the future.[38] While repeated (although some might say token) reference is made to the importance of maintaining the spirit, if not the substance of these provisions, none of the five judges seriously takes account of the feminist position in overturning the convictions. Instead, as Blackshield and Dominello point out, the majority judgement reflects a thorough and unashamed 'preoccupation with weaving crochet patches of legalism on the fingers of the statute' (May 20, 2000: 4[39]) to resurrect the legacy of the common law with respect to women's sexual dispositions/reputations and histories having a legitimate bearing on the determination of guilt in rape trials. The acceptance of the telephone conversation in any retrial of Bull and his co-offenders will mean that jury will be invited to draw inferences about the relationship between the alleged statements made by the complainant hours before arriving at the accused's house and the likelihood of her consenting to sexual activity with the three men.[40] Despite the assurances of the High Court Justices that the jury should be carefully warned against using this evidence to suggest the complainant is "the kind of" woman to engage in the sexual acts under question, the Justices are more than aware that juries are influenced by the admission of sexual history evidence in precisely this manner (LaFree et al.,1985).[41]

No regard is given to how the Justices' decision, made under the authority of legal rationalism, fundamentally ignores the wider historical and socio-cultural context in which law has systemically discriminated against women rape victims.[42] Nor do they

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[38] For a useful critique of the varying approaches adopted by the High Court Justices, see the article produced by Professor Tony Blackshield and Francesca Dominello, *The Age Newspaper*, "News Extra", May 20, 2000, p. 4

[39] Sheehy also notes (1991: 460) how appeal judges' conventional approach to legal method allows them to 'abstract legal issues from their social, political and historical context'.

[40] According to Justices McHugh, Gummow and Hayne, the relevance of the telephone conversation lies not in the truth or otherwise of any of the statements made, but in the facts that they were made 'and the complainant responded in the way she did is relevant to the complainant's reason for going to the house...Her state of mind - her reason for going to the house - was relevant to whether she consented to the sexual activities that took place after she arrived...' (*R v Bull* (2000) 171 ALR 613 at 640) The judges here distinguish between the evidence as it relates to the accused's and the complainant's state of mind and the evidence being seen as revealing the complainant's sexual disposition or as the "kind of" woman to engage in vigorous sexual acts with three different men.

[41] See *R v Bull* (2000) 171 ALR 613 at 622, 623, 624.

[42] Ironically, Justice Kirby makes reference to the decision of Justice Claire L'Heureux-Dube's judgement in *R v Seaboyer* [1991] 2 SCR 577 at 651-655, the dissenting voice in the Canadian constitutional challenge to the sexual history restrictions, and suggests that his judgement does not interfere with the integrity of the provisions rightfully designed to 'prevent reasoning from

consider how their judgements are likely to impact on the minds of juries deliberating in rape trials in the future. How quickly or comprehensively this judgement affects individual state and territory jurisdictions depends on how individual trial judges choose to exercise their discretion in future cases. If the example of *Longman* provides any indication, however, the impact of the decision will be felt widely across rape trials, as defence barristers develop arguments that suggest the circumstances of *Bull* can cut across the circumstances of a broad range of situations in which rape is alleged.

Greater potential for social change may have appeared imminent in the light of Victoria's consent provisions which incorporated a more communicative notion of agreement in the legal framework. Feminists, critical of the traditional model of equating consent with women who do not fight back, might initially have been reassured by the appearance of trials in the current study which involved women who were asleep, highly intoxicated or unconscious at the time that the events took place. These cases covered precisely those circumstances that reformists wanted to have recognised when they put forward as "normal" a model of sexuality that embodied mutually responsive and participatory sexual performance.

MacKinnon (1992) has certainly paid credit to the reforms inspired by feminists, who were committed to politicising the realities of rape, for having substantively narrowed the legal gap between traditionally gendered understandings of normalised heterosexual sex and sexual violence. (These are the reforms which removed the immunity for rape within marriage and extended rape to cover coercive sex within date and acquaintance relationships.) What she has fervently argued, according to Olsen however, is how meaningless the standard of consent will prove to be as long as the law systematically denies women 'the ability and opportunity to say "no"' (1989: 1157).

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stereotypes and unjust or irrelevant humiliation of complainants' (*R v Bull* (2000) 171 ALR 613 at 643 (see footnote 85 of the decision).

That acquittals were ultimately the result in four of the five cases[43] where women claimed to have been asleep, provides a powerful illustration of what MacKinnon and other feminists (Pineau, 1989; Puren, 1999) claim is the singular disinterest of those framing and applying the law to shift from a model of sexuality that eroticises gendered power relations of dominance and acquiescence. Four of these women reported waking up to find the accused penetrating them and the other woman woke to being digitally assaulted prior to the accused raping her. Three of the accused conceded that the woman-complainant had been asleep immediately prior to penetration. In only one case, where the accused himself made tearful admissions regarding his own recklessness in presuming consent, was there a conviction. In spite of these circumstances, and with little more than passing acquaintanceships marking the relationships of the parties prior to the events, the juries did not apparently consider that the possibility of consent or the accused's honest but mistaken disregard for it could, without reasonable doubt, be discounted.

Defence barristers often successfully positioned the case circumstances as far removed from the kinds of situations that jurors would commonly identify with rape. Most importantly, given that the current provisions specifically nominated sleep as vitiating an individual's capacity to consent, it was essential that the women were established as fully awake, particularly at the moment of penetration. Whether it was rape or an episode of regrettable consensual sex was to be determined, according to the defence, by balancing the accused's account against the fact that these complainants were mostly young women[44] who had been drinking heavily, and who were socially (and in some cases sexually) interacting with other men shortly before the events. Further, the jury could hardly be sure that in a state of lowered sexual inhibitions, and even though in retrospect it might be admitted the woman had not said much if anything at all, there was in fact free agreement to sex, which is necessary for the accused to escape conviction.

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[43] Trial 19 is included in this number since a retrial resulted in a subsequent acquittal.
[44] The inference often drawn for juries was that they were either silly and naive or that they were party girls out for a "good time".

Underpinning these more routine grounds for launching credibility attacks that were designed to position complainants as morally blameworthy, however, was the unmistakeable[45] paradigm of normal sexual relations. This would ultimately often sway the judgement in favour of the accused's moral innocence.

In the closing addresses of some defence barristers, the meaning of consent in the current law was blatantly ridiculed for attempting to replace the culturally prevalent notion that women who appear silent or inert may nonetheless be signalling a readiness for sex. One barrister in particular appeared to address his concerns about any departure from these widely held beliefs to the men on the jury on the grounds that this would affect the sexual rights and entitlements of all men. He drew on traditional heterosexist images surrounding romance and seduction (Puren, 1998) and used the actual words of the legislation to claim it would be absurd to criminalise conduct which falls well within the sexual bounds to which most men (and women) subscribe:

> You are not being pushed away or told to stop –surely *you're entitled to make some assumptions about her state of mind*,...she's lying there saying nothing and doing nothing while he's putting his finger in her vagina...she's lying there saying nothing while he...Are you not entitled to conclude that they're prepared to go along with it? [Trial 14; emphasis added].

The trial outcome and legal management of Trial 14 in particular provides radical feminists with an unambiguous example of the law continuing to privilege the male perspective despite a statutory framework that should have resulted in a situation where free agreement should have been presumed absent. Having been found guilty by one jury, the Victorian Court of Criminal Appeal had ordered a retrial for the accused after finding that the trial judge had misdirected the jury. The judge had instructed them to assess the "reasonableness" of the accused's honest but mistaken belief in the woman-complainant's consent when only a subjective test can be applied. This gave rise to the retrial I observed as part of the current study.

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[45] Pardon the pun!

This case epitomised the concerns of many feminists who at the time of the reforms in 1991 strongly advocated for amendments to include changes to the *mens rea* requirement in order to ensure that men who proffered an honest but unreasonable belief in consent would still be held morally and legally culpable.[46] Following the LRCV's recommendation (1991c: 18), however, parliament maintained the status quo and refused to criminalise conduct that resulted in sexual violence through an unreasonably albeit honestly held belief in consent. Trial 14 might be seen by those applying a more radical 'feminist lens'[47] as a direct result of an institutionalised failure to seriously consider sexual assault from women's point of view. As MacKinnon suggests, it exposes the law's reliance on a 'line between intercourse and rape [that] is so passive...a dead body could satisfy it' (1991:1300).

While features of this case may have caused the jury to have some initial misgivings, it seems strangely ironic that the accused was given the benefit of the doubt precisely because he revealed such flagrant disregard for the wishes of the woman-victim, as well as the sexual subjectivity of women more generally. Here was a man who admitted his infatuation for a 21 year old woman who worked for him, who after sharing some dinner and alcohol claimed he was 'falling for her', and who later, in her presence, vomited and fell asleep. By his account, she was moving her head from side to side (she said moving her head away from his mouth); she let out a couple of sighs during the sex (she claimed she said 'you shouldn't be doing this'); she was not 'discouraging' him (she said she was physically immobilised with fear) and she raised her hips up to meet him in the throes of sex (she said she lay very still, that he was very heavy).

Even more perplexing in view of the eventual acquittal in this trial was the manner in which the defence discursively constructed the accused's version of events. The

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[46] Radical feminist commentators were not alone in anticipating the ineffectiveness of consent provisions that left the *mens rea* requirement "in-subjectivist-tact". Some prosecutors and solicitors also anticipated the incompatibility between consent provisions advocating women's ("people's") sexual autonomy, while maintaining the legal defence of honest, even if unreasonable, belief in consent (Heenan & McKelvie, 1997: 323).

[47] Acorn (1994: 1) used this phrase in referring to how feminists might view the implications of changes to the *mens rea* requirement contained in the Canadian Criminal Code.

accused's own evidence moved from suggesting the complainant was unambiguously consenting, to conceding that at some level he 'wasn't really paying attention' to how she was reacting to his advances, to finally suggesting that he was 'that far gone, who knows what happened'[48]. Regardless of the ultimate argument settled on by the accused, the court's obligation was to ensure the jury were aware of the law's requirements with respect to how they should deal with competing accounts of events such as these.

Contrast this case with the only one where a conviction for rape was sustained after a jury found the accused guilty of having penetrated the complainant while she was asleep [Trial 16]. The point at which this case departed significantly from the four which resulted in acquittals can readily be found in the extensive and damning admissions made by the accused to police during his record of interview. During the interview, he ultimately agreed with police that there was simply no basis upon which he could have formed a belief regarding this young woman's willingness to have intercourse with him. It is fair to conclude that, among these cases, the only point at which the law adequately intervened to enforce women's legalised right to sexual autonomy was where the man was willing (or forced) to acknowledge his contravention of it.[49]

These findings should alleviate the concerns of some legal professionals that a more communicative model of consent would upset the "taken for granted" sexual understanding that exists between most men and women in established relationships. These lawyers opposed any definition of consent that placed some onus on men to inquire about the sexual willingness or otherwise of their prospective partner on each occasion (Heenan & McKelvie, 1997: 317; see also Pineau, 1989).

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[48] It is less likely the accused would have successfully argued these defences had he been tried in Canada. Self-induced intoxication cannot be used to ground a defence of mistaken belief in consent, nor would the jury have likely considered him to have taken *'reasonable steps, in the circumstances known to the accused at the time'* to establish that the complainant was consenting (see Section 273.2 of the Canadian Criminal Code. See also Sheehy, 1996)

Harris (1996) attributes the failure of courts to give broad effect to a more communicative model of consent to this fundamental gap between the legal definition and the social conception of rape (and consensual sex). For Harris, as long as the values and standards required to effect a more communicative model remain beyond the interpretative reach of most jurors, 'the ghost of the aggressive-acquiescent model [of consent] lingers' (1996: 52). Changes to the law relating to consent will therefore be pointless while legal practitioners and jurors are comfortable only with the traditional social norms with respect to understanding sexual relations between men and women.

For MacKinnon, it is this 'unconscionable bargain'[50] struck between law and the state that secures and maintains the social and sexual conditions of women's oppression. It is here, according to MacKinnon, where the gendered power relations embedded in the operation of the law are exposed. As she puts it, '[f]rom whose standpoint, and in whose interest, is a law that allows one person's conditioned unconsciousness to contraindicate another's experienced violation?' (MacKinnon, 1983: 654). Although one might welcome the small number of cases amongst contemporary prosecutions where men's power in their relationships with women as partners, father, employees, etc., is the subject of challenge, there are a far greater number where the women's claims are rejected. Radical feminists (such as MacKinnon (1983, 1987), Smart (1989) and Tarrant (1990)) point to the ease with which these results seemed to be achieved and question whether to persist with further attempts at using the state to reform rape law in order to advance the position of women.

A reduction in the budgets and resources of both the police and the Office of Public Prosecutions, a result of economic rationalism dominating the political agenda in Victoria throughout the 1990s under the Kennett government, has had a direct impact on the likelihood of more complicated cases being investigated, charged or prosecuted in the immediate future. Allegations of rape that rely entirely on the sworn testimonies

[49] In sentencing the accused, the judge severely admonished his behaviour in perpetrating sexual assault against a woman who was sleeping and unaware of his presence. However, these comments did not seem to accord with the 12 month minimum term of imprisonment he ultimately received.

of women rape victims are now even less likely to be authorised for prosecution.[51] It seems that 'legalising justice'[52] for victims who have historically been the most easily exploited and the least likely to be believed depends on how "male" the state is at any one time (MacKinnon, 1983).

It is this resilience of legal structures and practices resting on more fundamental social institutions in the face of progressive reforms regarding the treatment of consent, that gives the ammunition to radical feminists who have serious doubts about the law's intention or capacity in Western societies to ever consolidate changes that will alter the balance of power in relation to sexual violence against women (Taylor, 1987; Tarrant, 1990). For MacKinnon (1992), reshuffling the phrases in consent provisions is unlikely to bridge the "difference" between law's treatment of women and its treatment of men in rape trials. Unless or until rape is transformed into 'a crime of sexual inequality' (MacKinnon, 1992:192), no amount of law reform will result in the kind of structural revolution required to overturn the prevailing notion of sex as a power relationship with the male as the dominant party and give at least equal weight to the meaning of sexuality from women's point of view.

7.3.3 How PostStructuralist Feminists Might Account for the Findings

> But if context and content were all that dictated the generation of narrative, then we could be sure that once certain procedures were agreed upon, once certain topics were accepted as permissible and other topics outlawed, then rape trials could proceed in ways that inflicted no further suffering upon the victim. However, I would argue that such suffering is produced as much through the processes of law's storytelling itself, through the implication of the victim into the defence narrative, as through the substantive detail of defence questioning. It is not enough for the victim to be vilified according to received ideas about dress or

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[50] A term used in the title of Vicki Waye's article, 'Rape and the Unconscionable Bargain' (1992).
[51] This has particularly been the case for adult survivors of intra-familial childhood sexual assault and women raped in the context of existing sexual relationships.
[52] This term comes from the subtitle of the "Sexual Assault and the Law" conference held in Melbourne in 1995 designed by the irrepressible Kate Gilmore, founder of the first Centre Against Sexual Assault (CASA) in Victoria.

> drink, she must also be made to rub up against the fantasy that informed the defence account, made to perform as a character in the narrative. (Young, 1998: 456)[53]

Not unlike the position of most radical feminists, feminist poststructuralists are far from convinced that reforms designed to de-genderise the legal frameworks and procedures through which law has enshrined its mistrust of women will ever meaningfully alter the experience and processes of rape trials (Smart, 1995; Puren, 1999). Many feminist poststructuralists also have little confidence that some episodes of compliance by legal practitioners or judges signify that systematic change is underway. Any modification to trial practice under patriarchal cultural conditions, according to poststructuralist theorists, is likely to obscure the processes through which traditional and highly gendered discourses continue to dominate representations of rape in court (Smart, 1989, 1995; Puren, 1998, 1999; Young, 1998). Moreover, as Puren suggests, to limit analyses of law reform to the sexism that is internal to the histories, practices and processes of the law neglects opportunities to further 'our understanding of the complex relation which obtains between the coordinates of "rape", "law reform" and "Australian culture"' (1999: 144).

Feminists have been understandably cautious about engaging with poststructuralist and postmodernist ideas, particularly in the context of rape (Fraser & Nicholson, 1990; Henderson, 1991; Smart, 1995). As this entails abandoning the more conventional epistemological commitment to "know" or to reveal the "truth" about women's experience of institutionalised oppression, poststructuralist theories have been rejected by some feminists for their potential to depoliticise and decentralise the issue of gender (Hartsock, 1987; Hawkesworth, 1989; Di Stefano, 1990; Harding, 1990). Poststructuralism has certainly been given credit for exposing the essentialism of some feminist grand theorising which leads to the denial of women's differences (Harris, 1990; Butler, 1992). To go further, however, and to theorise not in terms of the

[53] Puren (1999) also quotes this paragraph in full. She claims Young's words capture 'the heart of the problem of rape law reform' (1999: 145).

structural significance of power and gender under patriarchal social conditions but rather the particularised, local, historically and culturally specific conditions of women's lived experiences is, according to some, fracturing feminism beyond all recognition (e.g. Hawkesworth, 1989). Representing women's accounts of rape as one partial and perspectived discourse amongst many has been seen as fundamentally antithetical to ongoing feminist political endeavours.

More recently, however, some feminists have revised their views about the theoretical value of extending poststructuralist ideas to our thinking on rape (Gavey, 1990; Marcus, 1992) and the law (Plaza, 1980; Smart, 1989, 1995; Bell, 1991, 1993). Smart's compilation of her own works (1995), accompanied by a reflective commentary, offers a personal (and political) charting of shifting feminist theoretical positions regarding the discursive relationships between gender, sexuality and law. While her earlier works considered the production of gendered power relations to be a 'relatively straightforward' invocation of law's power through a male state (Smart, 1995: 3), she now prefers to regard law as 'a site on which to dispute meanings of gender' (1995: 219). Keen to avoid the dangers of substituting law's truth with a feminist one (1995: 84 and 1989: 68-69), Smart favours deconstructing law 'as gendered in its vision and practices' while also 'operat[ing] as a technology of gender' (1995: 191) where the complexities and contradictions of law's discourses can represent important sites of struggle rather than be reduced to a 'simple exercise of male power' (1995: 141). Clearly influenced by some of the more challenging ideas to have emerged with poststructuralism (such as Butler, 1992), Smart suggests that we reconceptualise law as part of a wider, far more complicated process through which gendered subjects are constructed and reproduced, so that:

> Law is no longer analysed as that which acts *upon* pre-given gendered subjects, rather law is part of the process of the continual reproduction of problematic gender differentiation (1995: 218).

The emphasis for feminists who use a poststructuralist approach in their writings on rape tends to focus on deconstructing how power relations are configured within

particular situational contexts. Of specific relevance to the current study has been the poststructuralist concern with rape law reform and how meanings are negotiated and contested through discourse, narrative, and text which are generated within the trial process itself. Kristen Bumiller (1990) and others have argued that the nature of court performance brings into play an array of complex meanings that appear not only through the practices and processes of legal method but also in the language and discourses through which are constituted the key roles of victim and accused. Similarly, while Weedon acknowledges the extent to which the most powerful discourses are almost always institutionally based, she highlights the space through which the 'dominant discourses' shaping legal practice and processes are also 'sites of contest' that remain 'under constant challenge' (1987: 109; Carmody, 1995).

Recent research which examines how textuality is particularly revealing of the processes through which law reform can be thwarted, is clearly illustrative of poststructuralist influences on our analyses of rape in law. As previously outlined, the works of Matoesian (1993) and Young (1998) provide fascinating contributions to making sense of the event of rape trials by focusing more closely on the "talk" of rape trials. They do this not only in terms of the legal and non-legal discourses that textually reframe women's experiences of rape, but by focusing on specific sequences of trial questioning and the grammatical construction of narrative that works to discursively (re)produce a gendered power relation both inside and outside the courtroom. With respect to cross-examination in particular, Young and Matoesian have each referred to the pattern of talk and question sequences that dominates the exchange between defence counsel and the woman-complainant, in which her responses are ultimately 'excised' (Young, 1998: 443) or 'transform[ed]' (Matoesian, 1983: 177), leaving a decisive narrative through which she will be seen to have implicated herself.[54]

Even a cursory consideration of the 34 trials included in the current study suggests there is considerable value in giving greater feminist emphasis to the poststructuralist

[54] Grix graphically recounts her experience of feeling powerless to define the pace or content of cross-examination: 'The defence lawyer spoke very quickly...Time was of the essence. He did not wait for

critique and approach to rape law reform. Casting an eye across Appendix 3, a Table that summarises the position with respect to the results of the three key areas, signals a more complicated relationship exists between any compliance with individual reforms and measures of their success overall. It cannot be assumed, for example, that just because a single feature of the reforms was appropriately observed during a proceeding, that there was adherence to the other two. Moreover, compliance with one or other of the provisions did not of itself symbolise any heightened sensitivity to the difficulties faced more generally by women in court.

For example, one judge, who keenly observed the restrictions imposed by the sexual history provisions and who appeared to understand the reasons underlying their existence, also made particularly insensitive comments about the complainant's need for breaks during her evidence [Trial 19]. In the absence of the jury, he asked the prosecutor whether the complainant was on 'some form of drugs or medication' because she appeared to be 'away with the fairies'. After the prosecutor assured the judge that the complainant's demeanour was more likely to be an indication of the 'strain she [was] under', the judge advised the defence barrister not to belabour his cross-examination, saying 'she is obviously not the brightest in the class' and is so easily 'mesmerised' by the questioning process. This same judge was also unfamiliar with the mandatory consent directions introduced in 1991 and only reluctantly agreed to direct the jury accordingly after the prosecutor insisted.

Another judge, who was extremely interventionist during cross-examination and allowed considerable space for the complainant to resist the defence story of consent, went on to deliver a fairly strong corroboration warning to the jury and imposed a comparatively lenient sentence on the accused following his conviction [Trial 9].[55] One of the few trials to avoid the admission of sexual history and a corroboration warning [Trial 23] was where the woman-complainant underwent a particularly

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me to catch up to him. I wanted to catch up to him...His words lunged at me. His absolute precision. I was immobilised by perpetual sound. I was immobilised by my own limitations' (1999: 89).

[55] The offender was sentenced to an effective minimum term of two years imprisonment. Moreover, a psychiatric report on the offender had been ordered by the trial judge who was somewhat confused by the result which indicated 'a degree of normality' with respect to the offender's mental health.

aggressive cross-examination. Her claim of non-consent became a story of a woman crying rape after agreeing to sex that might have turned a little 'rougher than she would have liked'.

Feminist poststructuralists would also direct serious theoretical attention to the intersection of race, class, culture and sexuality alongside gender in contemplating whether reformist discourses bear any relation to the discursive experiences of women who appear in rape trials. From the trials discussed in previous chapters (Trials 2, 5, 15, 34) it appeared that dominant legal and feminist rape reformist discourses had done little to challenge the meanings and assumptions underpinning law's mono-cultural and racialised response to sexual violence. The trial experience for these women could no more be separated from their culturally and historically lived experiences as indigenous women or as immigrant women as it could from the colonial, ethnocentric, heterosexist, male standard of law that was applied to them.[56]

Hence, while considering women's experience within the context of law's structures and processes remains an important exercise for feminists engaged in reformist agendas, it may also obscure the complexities underlying rape trials as sites where social definitions and 'culturally embedded and context-sensitive interpretations' discursively compete and conflict (Matoesian, 1993: 192). Poststructuralists would therefore direct attention to the situated and subjective contexts of these trials and recommend a closer examination of the 'uneven development of law' (Smart, 1995: 154) and the precise mechanisms used in the playing out of the legal provisions and practices. This, they argue, would reveal the multiple dimensions through which

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[56] This was particularly well illustrated in Trial 34. Both the accused man and the woman-complainant were Aboriginal. Throughout the trial the dual influences of racial ignorance and ethnocentrism were repeatedly made visible, not only through the approaches of the barristers and the processes of the court, but through the perceptions and attitudes of the jurors. The woman-complainant was rendered virtually silent after the defence barrister claimed her statement to police departed significantly from her evidence in court. She also remained silent in response to repeated questioning about the details of the rape, after which the jury were prompted to ask if there was 'anything that [they] should be allowing for; she seems to be having a lot of difficulty expressing herself?'. During an adjournment, the defence barrister also felt it necessary to approach me and pass on his impressions regarding his client: 'Yeah this is a funny case this one...with the aborigines...they don't care...they just wander off'.

meanings are negotiated, reinterpreted and contested, drawing on both dominant and alternative discourses around stories of rape.

The following section analyses the trials in the current study in the light of feminist poststructuralist considerations of rape law reform and trial discourse. The focus is on two main areas. The first section concerns the more direct generation of narrative mainly through the structure of closing addresses. Here the uninterrupted legal and non-legal stories produced throughout the trial are alternatively fashioned to ultimately suggest the presence/absence of consent, the honesty or otherwise of an accused's belief, the relevance/irrelevance of prior sexual histories and the suspicion/trust the jury should consider with respect to the woman-complainant's corroborated/uncorroborated testimony.[57]

The second issue is whether wider social definitions and understandings of rape have gained presence in the courts through alternative (mostly feminist oriented) discourses around rape that challenge those that were previously dominant. This involves looking at the role of complainants and their attempts to resist the imposition of law's power over the narrow legal space through which they may speak their accounts of rape in the courtroom.

7.3.3(a) The legal/non-legal stories of contemporary rape trial discourse

> [T]he rape trial...constructs a category of Woman as if it was a unit. The individual woman who has been raped is subsumed into this single category of Woman which is known to be capricious and mendacious. This construction of Woman is confirmed by a common sense which is fed by routine phallocentric orthodoxy [women who say "no" must mean "yes"]....The jury will recognise this Woman, they have been warned about her..., it will be hard for them to be absolutely certain that the individual woman before the court is not this archetypal Woman. If she is black, or poor, or a prostitute it will just be easier to fit her into this category.
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> (Smart, 1989: 41-42)

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[57] Matoesian considers cross-examination the structural precursor to fashioning a closing address that 'repeats, formulates, and summarizes the talk conducted in cross[-examination]; selectively combines

In the struggle to purge the law's content and practice of its overtly prejudicial treatment of rape victims, feminists sought to redefine new categories of "Woman" that the law would be forced to recognise. Unlike the woman spoken of by Smart, the rape victim as presented throughout the 1970s and 1980s was disempowered and without agency. She was acted upon not only by the conduct of the offender but also by the laws and procedures that systematically meted out a secondary assault against her in the witness box (Berger, 1977).

Feminist poststructuralist criticisms of both radical and liberal feminist reformist ideals have tended to centre on the extent to which universalising "feminist truths" about rape have failed to widen the cultural legal framework against which most rape complaints are generally assessed (Bumiller, 1987; Smart, 1990; Harris, 1990; Marcus, 1992). Even though tightening the sexual history provisions and discarding corroboration warnings may have improved the trial experience for some rape victims, an effective challenge has yet to be mounted against the dominant discourses that continue to narrowly define women's accounts of rape within the traditional consent/non-consent dichotomy, so that most women's experiences of rape remain unrecognisable (Bumiller, 1987). Put more simply, if rape reformists continue to maintain, as law does, that there are unambiguous determinants of rape situations, the space will remain far too narrow for women to be able to detail the complexities and ambiguities of their experiences of sexual violence, especially when these experiences occur in the context of pre-existing social, sexual or familial relationships (Kelly, 1988; Gavey, 1990; Bumiller, 1990; Wood & Rennie, 1994; Mawson, 1999).

Nina Puren has talked about this process in the context of the law's appropriation and institutionalisation of powerful non-legal discourses, which discursively refigure the woman-complainant as culpable while simultaneously providing accused men with a variety of choices of culturally approved 'alibis for rape' (1998: 3). The instant a woman claims an experience of rape, 'a plane of discourses' (Puren, 1997: 138) provides a seamless textual and cultural array against which her story will be assessed

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key strands of testimony into coherent blame-relevant arguments; transforms blame references and other allusions, innuendos, etc. into full-blown accusations and rationalisations' (1993: 177).

and reproduced, the most powerful of which derive from and reinforce hegemonic understandings of rape (Kaspiew, 1995).

While feminists have previously recognised the dependence of rape scripts on wider cultural images that conflate rape and seduction (MacKinnon, 1983; Pineau, 1989; Pringle, 1993; Naffine, 1994;), Puren looks closely at how the adjudication of consent in rape trials, even despite definitional changes, is continuously and inextricably linked to more powerful discourses and images depicting romance. For Puren, the 'greatest obstacle faced by those feminists and law reformers who are working to make the various modalities of sexual violence statable is the discourse of romance' (1998: 98). She argues that, wherever the case circumstances diverge from a "real rape" scenario, the ambiguities are likely to be resolved in favour of story-telling pre- and post- rape behaviour according to well-worn culturally recognisable romance scripts where the textuality of rape indistinguishably fuses with tales of love, sexual attraction and passion. As Gavey puts it (1990: 194):

> When rape is described within a certain narrative structure in the context of variables which are not usually thought of as being associated with rape (eg an event in an ongoing and developing sexual relationship, that is, between lovers; the presence of love and sexual desire), the chances are that it won't be "read" or understood as rape.[58]

There were few trials amongst those observed for the current study where these insights did not assist in providing an understanding of the processes through which women's stories were reconstituted as unfortunate events of "sex gone wrong", or where any perceived ambivalence on behalf of the complainant could justifiably be (mis)interpreted as acquiescing to men's practiced methods of sexual persuasion.

[58] This is not to suggest that women themselves do not struggle with interpreting situations of non-consensual sex as rape when the perpetrator is someone with whom they have shared a friendship or relationship. As a telephone crisis counsellor, I have been struck by the number of women who preface a call to the sexual assault service with "I'm not sure whether this is really rape..." and then go on to detail a situation where they have woken to find their partner, flat-mate or friend penetrating them.

The events of Trial 14 are again particularly revealing on this point at a number of levels. Dominating the trial narrative was the story of budding romance, where alcohol had incited the sexual activity initiated by the accused on this night. The frame was set through capitalising on events that could easily be reconciled according to popular conceptions of dating situations: a man and woman had enjoyed dinner together earlier in the evening; they consumed a quantity of alcohol; a feeble attempt was made by the man to kiss the woman who coyly avoided ('dodged' according to the complainant) the touch of his lips. He woke later to find her looking so 'cute and innocent'; that he kissed her. She opened her eyes and may have said, 'you shouldn't be doing that' and he said go back to sleep. They had sex.

The power of culturally prevalent non-legal discourses to minimise the effects of new statutory frameworks governing consent was undoubtedly epitomised by the processing and outcome of this trial. While the circumstances were unmistakeably aligned with key features of the legislation, (that is, sex was initiated in the context of a sleeping woman and the accused, on his own account, paid little regard to her having remained virtually immobile during the activity), more powerful stories could be drawn upon to absolve the accused of any guilty intention. Indeed the defence cursorily dismissed the meaning of the new legislation because he was confident of the jury's disregard for a model that would prove fundamentally at odds with their own "common sense" understandings (and experiences) of the situations in which consent, for men, is often taken for granted:

> You are not being pushed away or told to stop - surely you're entitled to make some assumptions about her state of mind…the unspoken word is obviously there from the body language…[the complainant] wasn't saying "yes please" but….she was going along with everything that's happening [Trial 14].

The jury's role is represented as one of preserving the sexual prerogative of all men to presume women's symbolic consent within a non-communicative frame of sexual

passivity and reactive sexual desire.[59] This was made explicit when the defence barrister pronounced that, in direct contrast to the contemporary legal framing of consent, it would nevertheless be 'absolute rubbish to suggest that silence alone is all there is to it'.[60]

Women who described themselves as silent or (fearfully) compliant in their accounts of rape were frequently ridiculed or dismissed by the defence who was keen to refigure them as mutually participatory sexual actors.[61] Why they did not immediately and instinctively scream, kick, run out or tell someone is constructed as unfathomable within a textuality of rape that has historically been conceptualised according to highly gendered frameworks of force and resistance (Pringle, 1993). Puren has also referred to law's refusal to account for how 'the effects of power work with different kinds of bodies' (1998: 54). She is referring to how the meaning of women's failure to react as men might when faced with a potential rape situation is not considered in the light of a gendered power differential, but as a further sign of their preparedness to engage in the

[59] Heath & Naffine (1994) draw on the work of Luce Irigaray (1985) in this context to consider how under patriarchal social conditions the image of female sexuality is often seen to reflect that of male sexual desire. Women's sexual subjectivities become a mirror to how men understand, interpret and respond to their own sexual needs rather than represent a 'separate, distinct and different human (sexual) subject' (Heath & Naffine, 1994: 34). In situations where the issue of consent is contested, women's (sexual) conduct is likely to be judged against a masculine paradigm. Put more simply, if she is seen as sexually desirous to men, her inaction or ambivalence will be taken to represent her own (even if sub-conscious) sexual desire.

[60] Discourses variously relying on these kinds of Victorian constructs of women's sexualities were particularly evident in cases where the trial focussed on juries' interpretation of whether the accused could have honestly believed the woman was freely agreeing to sex (Smart, 1989). Such was the case in Trials 14, 16, 19. However, women who were (initially) sleeping were not solely recast in images of the passive "female" body who readily although silently submitted to the sexual performance of the male accused. On the contrary, some of the women were simultaneously positioned as agents of active sexual desire who in sleep unconsciously became the subject of their own biological urges and unwittingly responded to the accused. She was thought to participate, initiate and encourage the accused to form his honest even reasonable belief that she in fact subconsciously and freely agreed to have sex with him (particularly in Trial 19 & 25). Where they intersect is the point at which these stories symbolically represent the 'cultural distrust' that is historically 'connected to female sexuality' (Puren, 1998: 23) and, where 'in law, it is the nature of women's bodies to invite trouble' (Smart, 1995: 225).

[61] Within the scene of the trial itself, the incapacity or reluctance on behalf of some women in the current study to articulate the discourse of rape was also strategically used by defence counsel to suggest a literal interpretation ought be applied by the jury in considering the veracity of the complainant's evidence. Put simply, if women cannot say they were raped, then *ipso facto* they were not raped. The defence barrister in Trial 14 commenced his closing address, for example, with 'a little quotation' that he suggested was the key to the jury's consideration of the offences - when the complainant was asked whether she had ever said to anyone that she had been raped, she responded with, 'No, I have never said that word and I never will'.

act. According to this logic, that they "could have" taken action before, during or after the rape is seen as clear evidence that there was no crime because no right-minded (read rational) woman would 'prefer to be raped' [Trial 28].

With the law summarily dismissed, the remainder of the defence case in Trial 14 depended on positioning the complainant in the role of protagonist. Faced with a young woman whose quiet and reserved demeanour in the courtroom mirrored what the prosecution had intended to portray with respect to her behaviour on the night in question, she remained the subject of a multitude of discourses intended to cloud any straightforward assessments that might have been made regarding her character and personality. In the longest closing address observed throughout the entire study period, it was this image of the complainant as 'innocent' that set the trial scene through which the complainant's version was cumulatively demolished.[62] That she was willing to work in a massage parlour (in reception), that she sported a discreet tattoo, that she was prepared to eat, drink and fall asleep in the company of the accused, that she concerned herself with her pay in the days following the rape, were discursively used to develop an alternative story to rape.

According to Puren (1988), the accused often remains literally absent from this scene; the prevailing discourses repeatedly situating him as being performed upon by the complainant (1988: 133). In Trial 14, the woman-complainant was alternatively represented as the powerful figure through her characterisation as 'sexually attractive'[63], along with the indisputable fact of her (sexual) availability, having been with the accused drinking, socialising and provoking the inevitable.[64]

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[62] The jury were variously asked throughout the address whether the complainant 'is [] quite as demure as the Crown wants you to think she was'; 'how realistic is the innocent Miss [C]?'; 'is that innocent?' [Trial 14].

[63] Both the prosecution and the defence frequently referred to the complainant's physical appearance and the extent to which the accused found her to be 'sexually attractive'.

[64] Even the accused admitting he 'couldn't get enough of her', and that he had effectively 'lost' himself in her presence, could safely be reinterpreted within a cultural legal frame that conceives of women's sexualities as 'sirens leading men to rash actions against their better selves...' (Griffin, 1979: 54).

This is where Young's (1998) reading of rape trials perceptively captures the discursive power of law's processes to implicate the woman-complainant within her own narrative frame. Through the question-answer sequence of cross-examination, which works to limit and reconstitute the meaning of women's actions as they relate how much they had to drink, how little or how well they knew the accused, how they conducted themselves, how agreeable they were to remain in the accused man's company, and how "unlike a rape victim" was their behaviour following the alleged assault, they implicitly concede their own moral choices and value judgements to be, at the very least, morally questionable. Young refers to the strategies of insinuation and implication (1998: 456 - 457) to demonstrate how defence counsel confine the dialogic bounds through which women may disrupt the 'narrative building block' that exonerates the accused man of rape to such responses as "no", "it didn't happen like that" or "no, that's not true" which sound 'flatten[ed]' and 'numbly repetitive' (1998: 458).

Against this backdrop, the scene of the rape itself became almost incidental for the defence in Trial 14. While the strength of the prosecution case appeared to lie in highlighting the inconsistent versions that the accused had given with respect to the details of the alleged rapes, the extent to which the defence placed any genuine store in the accounts of the events themselves was almost negligible. This became exceedingly obvious after the jury later requested to have those parts of the complainant's evidence that dealt with the actual offences replayed for them. Intermittent sequences of trial questioning were finally distinguished from within the cross-examination to reveal the degree to which the defence systematically relied upon stories *outside* the rape scene itself, but that fitted well *within* culturally prescribed non-legal discourses surrounding sexuality and consent: the portrayal of a young woman whose pre- and post- rape behaviour incontrovertibly symbolised a situation of consensual office sex where she was 'in all the circumstances found out'.[65]

[65] The defence cleverly situated the allegations within a more familiar cultural setting, where the massage parlour and employer-employee relationship was substituted for an office Christmas party when, after too many drinks, 'colleagues' find themselves in the photocopy room having sex. Later 'the girl...feels it's quite impossible to see that person that she's behaved [with] in that way...' [Trial 14]

Bumiller has also considered other sites through which contemporary 'messages about sexual violence' (1990: 126) are negotiated and contested. She has been particularly concerned with the processes through which symbolic accounts of sexual violence within mainstream representations of popular culture often result in the same kinds of gendered belief systems and stereotyped images of rape victims being discursively reactivated. There is a complex interplay, according to Bumiller, between the cultural significance attached to the representations of victims and offenders in the context of individual cases, where much of the "story" provides interpretations and evaluations of their actions and motivations leading up to and following the alleged rape, and the wider cultural and legal understandings used to determine where the moral and social responsibility for rape should lie.

Drawing on newspaper accounts and lawyers' interpretations of the now infamous rape that occurred at *Big Dan's Tavern* in Massachusetts, Bumiller (1990) shows how a single trial event reveals multiple and competing discourses that variously construct popular conceptions surrounding rape and rape victims. The symbolic significance of the trial lies in the multiplicitous meanings that underpin the judgements and determinations about the moral worthiness and legitimacy of women and whether they deserve to be given the status of victim. Where law reform has done little to alter the conceptual traditions of defining rape, the legal language and strategies used for undermining women's experiences of rape will consequently depend less on any perceived new framework provided for under legislation and more on the cultural interpretations and meanings produced through the kind of familiar story-telling that has historically delegitimised rape victims:

> The themes developed here, however, do not turn on the factual premises of the case. The symbolic import of the trial depends less on the witnesses' adherence to or betrayal of the truth, and more on the way the stories told resonate with images of victims and thus form the context for interpretation (Bumiller, 1990: 127).

The stories in this study were often situated within the kinds of universal (and reasonable) expectations held by men, and understood by women, when negotiating

social and sexual relationships with each other 'all over the world' [Trial 21]. One woman's account of rape was recast as an instance of "bad sex" where the accused's insensitive and unchivalrous conduct following the sexual activity was said to explain the complainant's licentious allegations. She was left like 'a shag on a rock', abandoned by the accused after she had 'let him have sex with her' and, in the wake of 'her humiliation, falsely accused him of rape' [Trial 23].

Reference to men's boorish behaviour with women with whom they have been "sexually intimate" was also the frame in which allegations of rape in another trial were reconstructed by the defence. The defence sought to establish the complainant (even though 15 years old) as 'a seasoned drinker' who was 'used to blacking out' [Trial 22]. Her credibility was further implicated by contrasting the conduct of her friend who was positioned as 'by far the most sensible of the two', indeed 'a well behaved girl', whose version of events was reconstituted as consistent with that of the two accused men.[66] The space was then open for a multitude of discourses exonerating the accused men to be paraded before the jury.

The Western cultural maxim of "boys will be boys" also figured strongly. The accused were presented with a young woman who was allegedly 'chucking herself' at them, the accused men had understandably thought 'all [their] Christmases had come at once' [Trial 22]. However the act for which the accused deserved the 'highest censure' was abandoning her following the sexual activity. It was the act of a 'young cad' to leave 'that silly little girl behind' in the middle of deserted parkland. It was 'a rotten, low thing to do...ungallant, despicable...but', the jury were reminded, the accused were 'not on trial for [their] lack of gallantry'. Against this backdrop, the more familiar story of "a (young) woman scorned" unfolded, and the allegations could more easily be recast as:

[66] Bumiller (1990) has also spoken of the defence counsel positioning other women as moral arbiter within rape trial discourse where the character and moral choices of the complainant leading up to the events are contrasted unfavourably with other women who preserve a far more socially acceptable standard of behaviour for their sex.

> [A] young girl [who] was outraged at being dumped...I suggest she turned consensual sex into rape...[Trial 22].

As suggested by Puren, the narratives are frequently ones of 'sexual complicity and romance, rather than sexual coercion and rape' (1998: 20). The story of rape told by one complainant became an instance of 'people...hav[ing] one for old time sake', where she was portrayed as having 'cut a bloke off at the knees' after rejecting his marriage proposal [Trial 21]. The extent to which the complainant had described the accused as sexually demanding in the latter part of their relationship was further normalised within the familiar cultural parameters of the male prerogative: 'Look, if you're a bloke... you wanna [sic] get your licence, you wanna [sic] drink a beer, and then you wanna [sic] have sex...'.

Another variant was the story of a young woman learning about her sexuality and whose false allegations of rape were explained by having experienced 'one of those summers', where teenagers 'discover themselves' and 'discover their own sense of freedom', when 'you start to reject your parents' [Trial 13]. In a 'desperate attempt to stem the tide...to restore her credibility' with another young man to whom she was attracted, she fabricated a rape that implicated the very person with whom she was rumoured to have had sex in the school toilets.[67]

Accused men's actions and their own accounts provided further ammunition for juries to interpret the events within a discourse of unintentional, perhaps even misplaced, romantic interest or sexual attraction. The accused in Trial 14 sent flowers to the complainant in the days following the alleged rape and apologised for all the 'trauma' he had caused her. The young men in Trials 16 and 19 immediately apologised to the women they had penetrated while they lay sleeping, after they realised the women had not known it was them. In the case of *Bull*, the three offenders walked the woman they had gang-raped to the car and said 'We should do it again some time'.[68]

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[67] Interestingly, the defence barrister in this trial made reference to the 'classic script of a genuine rape' where the behaviour of a woman who had "really" been raped appeared in stark contrast with that of the complainant.

[68] See *R v King, Bull, Marotta,* Unreported, CCA, Western Australia, January 19, 1998.

Nonetheless, their culpability for rape was navigated within the cultural and legal space provided to men which recognises that women's (particularly sexual) behaviour might well be cause for misinterpretation or unintended consequence.[69] Young considers how rape trials continue to attribute to women's clothing and bodies the power to symbolically propel messages to men about women's availability for sex. The effect is to create a 'discursive suspicion that these accused men are guilty of incompetent message-decoding, rather than rape' (1998: 448). Scully (1984, 1990) also noted in her interviews with convicted rapists how wide the interpretative cultural scope remained for men who continued to deny their culpability:

> Since patriarchal societies produce men whose frame of reference excludes women's perspectives, men are able to ignore sexual violence, especially since their culture provides them with such a convenient array of justifications (Scully, 1990: 116).[70]

Even where it emerged that men had initially lied about their contact with the complainant or had made admissions regarding the events in question, in court their behaviour was justified according to a complex range of discourses that prioritised male concerns and interests in maintaining their relationships, their families, their jobs and their friendships. That the accused men in Trials 2, 22, and 34 lied about their sexual contact with the complainants because they feared a breakdown in their relationships with wives or girlfriends, or in the case of Trial 25 in a bid to avoid disciplinary action within the army hierarchy, worked to restore men's credit rather than implicate them as having already been willing to misrepresent what occurred.[71]

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[69] The psychologist assessed the accused's actions in Trial 14 as 'simply a drunken, sexually enthusiastic domination of the unfortunate victim...not motivated by a hatred of women or a quest for power over women'. This was despite his knowledge of the accused's prior convictions for rape and indecent assault.

[70] Interestingly, in Scully's study of convicted rapists 56% of those who denied their crimes claimed the women they raped were at the time affected by alcohol or other drug use. Scully observed how offenders then correlated alcohol intake with describing their victims as being sexually aroused or prone to hysteria, '...clearly...aware that their victims would be discredited and their own behaviour excused or justified by the self-interested portrayal of alcohol and drugs in their crimes (1990: 125).

[71] The defence in Trial 16, despite admissions by the accused, appealed to the jury's sympathies to 'let him resume his life' with his young wife and new baby who were sitting in the courtroom throughout the trial.

Moreover, in assessing men's culpability for rape, a number of competing discourses may be invoked, and several stories culturally activated, to diminish the guilt of the accused while emphasising the moral responsibility of the complainant. Appeals were made to the jurors in Trial 29 to consider a range of possibilities which could adequately explain the conduct of the accused. He had either drunkenly mistaken the complainant for his girlfriend, drunkenly thought the complainant was consenting or indeed nothing sexual had occurred at all – it was the drunken woman who had dreamt the whole thing![72]

7.3.3(b) Competing with traditional trial discourses – the impact of feminisms

Based on the work of Matoesian (1993), Young (1998) and Puren (1998), the impact of feminist inspired discourses on the event of rape trials appears virtually negligible considering the savaging women complainants continue to endure through the construction of narratives that discursively figure them as responsible, blameworthy, teasing and seductive. While Matoesian and Young both acknowledge the narrow spaces through which on occasion women may successfully counter the structures of trial questioning, they are rarely more than momentary pauses to law's authority for resetting the narrative frame through which women's resistance too will be made answerable to the 'asymmetry of [law's] power' (Young, 1998: 460).

The work of Lisa Cuklanz (1996), however, suggests some feminist poststructuralist attention ought be directed at more subtle sites of social change within rape trial discourse, where hegemonic social meanings and interpretations of rape are shown to compete with those inspired by feminist law reform agendas. Cuklanz reveals how representations of rape cases within the mass media suggest there is a 'struggle over meanings about rape' (1996: 6) and that feminist discourses are often discursively co-opted, redefined and/or accommodated within the public discussion surrounding rape

[72] The accused in this case had been caught boasting about his sexual indiscretion (the alleged assault) with 'another man's wife' and yet the jury were told not to use it as evidence of his guilt unless they were satisfied it reflected the truth of what happened. Perhaps the greater ratio of men on this jury (10:2) meant the accused's "admission" merely attested to cultural scripts that readily identify and celebrate male sexual bravado.

trials.[73] Focusing on the coverage of three non-celebrity rape cases, Cuklanz describes how mainstream news-media coverage of each of the trials appeared to adjudicate 'between a traditional view of rape and a revision based on female experience and voice' (1996: 7). She concluded that while the original goals of feminist reformist agendas have yet to be achieved, new categories and understandings of rape were increasingly part of the public imagination.[74]

The approach encouraged by Cuklanz can usefully be applied to the kinds of legal stories crafted by barristers and judges in some of the cases reported in the current study, particularly in the closing comments they delivered to juries. The uninterrupted story-telling characteristic of barristers' closing addresses certainly revealed the potential for contemporary rape trials to contain a discursive struggle between dominant discourses that have traditionally positioned women as morally suspect and/or blameworthy, and feminist and rape reformist discourses that seek to adapt law and its practices so as to more adequately represent women's experiences of rape within patriarchal cultures. Against a backdrop of trial questioning that often in one way or another allowed the introduction of sexual history evidence and corroboration warnings, the more standard or 'stock stories' that variously reconstitute women as consenting/non-consenting, as credible or non-credible, continue to feature (Scheppele,

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[73] Media attention also 'served women's interests well' by using feminist inspired discourses to educate the community about sexual assault in the wake of a comprehensive legal package of reforms being introduced in Canada (McIntyre, 1994: 308). Focusing on the content of the legal changes, rather than the fear campaign prompted mainly by defence barristers, the media played an educative role in terms of promoting a greater understanding of the social realities of rape, the issue of consent in established relationships, and the culpability of men claiming a mistaken belief in consent (McIntyre, 1994). See also Atmore (1994) who is particularly concerned with how the stories of sexual violence in the mass media provide an important site through which struggles over meaning can be interpreted alongside socio-political interests and motivations.

[74] Law reform in and of itself may be evidence of the partial appropriation of feminist ideals. With feminists exposing the dehumanising experience of rape trials, communities were themselves advocating the merits of rape shield laws, changes to statutory definitions and improvements to trial procedures. As has previously been discussed, most contemporary law reform has relied on the courts to apply a far more complex understanding of sexuality and gender relations. This is where radical feminism's greatest contribution to poststructuralist considerations of rape law is often seen to lie, i.e., in effectively blurring the conceptual line between rape and consensual sex. MacKinnon's (1983) contentious statement equating sexual violence with the violence wrought by normative models of (coercive) heterosexuality posed 'a powerful oppositional discourse' so that the meaning of rape for women could be seen to exist within marriage, within relationships and within dating situations (Gavey, 1990: 206). Moreover, these sentiments are now enshrined in the mandatory

1992: 128). However, faced with the advent of progressive statutory reforms and the likelihood of a heightened community awareness surrounding rape, the narratives produced by barristers and judges also appeared increasingly to be conscious of the ways in which feminist inspired ideas about rape and rape victims may have translated into the cultural perceptions and social understandings of jurors who deliberate in rape cases.

Some of the closing addresses directly exposed this struggle between barristers who sought to regenerate discourses that conformed with more hegemonic understandings of rape and those who re-conceptualised trial issues in the context of alternative discourses and a legislated framework that encouraged more sympathetic and less male-oriented assessments of rape victims.

The more obvious examples were where prosecutors argued against common defence strategies that invariably depicted women as having consented due to their conduct preceding or post the alleged rape. The previous chapters have documented the monotonous regularity with which defence barristers continued to pit women's credibility against the question that underlies most cross-examination - 'what kind of woman was she?' Especially in situations where women had consumed alcohol, socialised with friends or had been in the company of the accused men, they were symbolically[75] figured as "signalling" an availability or readiness for sex. While the response from some prosecutors was a more customised approach of attempting to minimise any behaviour that appears at odds with 'real rape victim' status, other prosecutors appealed to liberal "rights-focused" discourses that insisted that the behaviour of women-complainants was in accord with contemporary social standards, and women were "free" to go out and socialise, drink alcohol, be (responsibly) sexually active and remain blameless should they become the unfortunate victims of sexual assault. It was in this context that one prosecutor criticised his colleague for running 'a

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directions that judges provide to juries as the conceptual (and legislative) frame within which they are expected to deliberate.

[75] Young's work considers how the victim's clothing and the consumption of alcohol within rape trials are treated as representative of women's bodily surfaces being 'replete with messages [that are] transmitted to men, to law, to juries' (1998: 446).

green light defence' where '...in the world that the accused lives in...she becomes fair game...grist for the mill...' [Trial 20]. Another prosecutor suggested that the defence was attempting 'to attract' the jury with a defence that 'portray[ed] [the complainant] as a woman of loose morals' [Trial 31].

Although numerically few across the 34 trials observed, some prosecutors also attempted to educate juries about the social realities of sexual assault that included making references to the continued high levels of under-reporting, and asking them to consider the dehumanising process through which the complainant had been placed during cross-examination by being forced to describe the minutiae of the offence before the eyes and ears of the court and the accused. These prosecutors referred to the complainant as being unfairly subjected to a 'character assassination' by the defence where the jury could be forgiven for thinking that the woman was 'herself on trial'.

There were also occasions where prosecutors' practices appeared to be influenced by an increased understanding of the long-term consequences of being a victim of sexual assault. Two prosecutors defended the demeanour of women-complainants who had experienced considerable difficulty in getting through their evidence. Another prosecutor was particularly concerned about a woman-complainant who, while giving her evidence, appeared to be psychologically re-living the childhood rape she had experienced. He immediately requested an adjournment and was subsequently observed outside the court providing emotional support to the woman while the solicitor (usually the quasi court support person) informed witnesses that the trial would be delayed [Trial 10]. An Aboriginal woman victim sent flowers to the prosecutor (a woman) in her trial in appreciation of all she had done in pursuing the prosecution of an offender, after the defence had made repeated requests for the trial to be discontinued [Trial 15]. The prosecutor's support for this woman extended to defending her in an out-of-court discussion with a judge's associate where inappropriate comments were made about the victim's heroin addiction and the likelihood of her having 'had a hit' prior to giving evidence.

While it was not possible to clearly establish any direct or acknowledged link between contemporary interpretations of rape apparent within prosecutorial practices and the use of alternative discourses more commonly attributable to feminist analyses of rape, there were signs of women's perspectives having influenced the conduct of these rape trials as suggested by Cuklanz (1996). Consider a particularly perceptive analysis of the complainant's experience by one prosecutor, who addressed the issue of a delayed report by suggesting:

> there is no such thing as a typical rape victim…people experience things differently…everyone reacts differently…some people might have raced out of the house and phoned the police. Some might go through the agony of indecision...is it worth it...to come to court and be put on trial herself? [Trial 33]

Women were also active in resisting the many subtexts underlying defence attempts to exonerate the accused through standard usage of the mythical rape response. In some instances, this may have occurred unintentionally as complainants spontaneously reacted to the rigours of cross-examination, particularly when faced with the final defence accusation of having lied, embellished, and/or consented. Other women disrupted the narrative sequence by providing responses that fell outside the anticipated framework, where 'that's not right' or 'no it didn't happen like that' were replaced with overt challenges by complainants to the content and foundation of defence assertions.

Two of these women strongly rejected attempts to reframe their stories to fit with defence reconstructions of "what really happened" by directly confronting the absence of any logic behind the question, or by demanding evidentiary proof to support the fictitious claims being made by the accused. Both of these cases resulted in convictions [Trials 9 & 30] and the role of the trial judge in allowing significant leeway through which these women were able to exert a degree of independence may have encouraged jurors to interpret the evidence and demeanour of the women-complainants in a particularly positive light.

Whilst it is unlikely that these acts of resistance were inspired by a conscious appreciation of feminist discourses on rape, it is possible that a widening public perception regarding the typically unsympathetic experience of rape complainants in court had better equipped these women for what they anticipated would be a direct attack on their moral integrity.[76] Amanda Konradi (1996a, 1996b) has explored the mechanisms through which women have themselves endeavoured to challenge the law's attempts to reconstruct their stories to accord with more conventional rape scripts. Her interviews with 32 rape survivors in America revealed how women might strategically prepare for the experience of giving evidence in court (Konradi, 1996a). The women gave consideration to how they would dress, the degree to which they felt comfortable in expressing emotion and, of particular interest, how they might subvert the cross-examination so as to more fully articulate their story of what happened (Konradi, 1996a). Her research undoubtedly reminds us of 'how skilfully and creatively women speakers circumvent and subvert the processes of social control...(Devault, 1990: 112)

Some of the women interviewed by Konradi (1996, 1996b) were also aware through media reports and the more popular representations of rape in movies, literature and television that they would be telling their stories 'into some powerful cultural headwinds' against which jurors would be asked to assess their accounts (Scheppele, 1992:142). Nonetheless, some of these women clearly perceived themselves as having an especially active role in influencing the impressions and perceptions jurors might form in relation to how closely they accorded with preconceived notions of women who were really raped:

> ...I was very clear that I wanted there to be no question on the part of the court about my character, that I was going to play every game that I thought that they expected me to play, and I'm very good at that...I did very consciously create a persona, it was not about who I was or who he was or what could have happened, it

[76] Consider also the complainant in Trial 9 who, when confronted with a question revealing the sexual status of her current relationship with her boyfriend, asked 'do I have to answer...I don't know if that's relevant...'.

> was about my objective that this fucker was going to jail, that's what was on my mind (Konradi, 1996a: 412).

Ironically, it was in the closing addresses of defence barristers and in the comments provided by judges that both direct and implied reference was most commonly made to the contemporary impact of feminist reformist principles and their potential to disrupt the conventional story of rape.

The attention given by some defence barristers and judges to the possibility of jurors being affected by feminist inspired discourses provided some indication that feminist ideals had had some impact within the broader populace. This, Rathus (1995) suggests, is where the symbolic value of rape reforms, especially those that fundamentally challenge the status quo of gender relations, operate as powerful alternative discourses through which meanings about rape can be more publicly debated. For example, if law students are now learning about what legislatively constitutes rape, where a (partially) communicative standard of consent operates to define a more progressive mutually participatory model of sexuality, there remains some future prospect of change not only in the practice of law but in the conduct of their social and sexual lives.[77]

On the majority of occasions, defence barristers were nonetheless intent on co-opting and distorting feminist discourses in ways that reworked the "messages" about sexual assault to best suit the interests of the accused. In three cases, defence barristers appeared to rely on familiar feminist analyses of the long term emotional and psychological harm of sexual assault, but constructed stories that were strategically designed to cast doubt upon the veracity of the women-complainants. In each of these trials, the defence had successfully applied to question the complainant about previous experiences of sexual assault. In one trial the defence used the torment of the complainant's earlier repeated sexual assaults by her two brothers as grounds to construct a story of consensual sex with the accused, where

[77] It was heartening to learn that the Victorian Evaluation Study (Heenan & McKelvie, 1998) was used in 1998 as a basic text to a legal "Common Assessment Task" or CAT during the VCE year. This means that a considerable number of secondary school students were reading about the legislative status of rape law and the associated problems with implementation.

the 'victim mentality' that she had 'developed' as a result of the abuse had somehow been transferred onto the mutually participatory sexual acts she was claimed to have engaged in with her older cousin [Trial 6].

In another trial the defence placed considerable emphasis on the complainant's approach to a psychologist for counselling in relation to childhood sexual assault in order to persuade the jury that 'this lady did have a spate of psychological problems at that time', which included a 'deep depression' about her childhood and her current relationship with her husband [Trial 26]. The events of her childhood sexual assault, and in particular her experience of digital penetration, it was claimed, had been transposed within the context of a cathartic release she had during her naturopathic treatment by the accused.[78]

Similarly in the third trial the complainant was said to have extrapolated the traumatic events of a previous sexual assault by multiple offenders onto the present situation with the accused. The accused's attempts to protect the complainant against further horrors being inflicted by his friend (the real rapist) became a scene in the complainant's mind where the accused had also taken part in raping her [Trial 20].

These trials may confirm the fears of some post-structuralists (Marcus, 1992) and other feminists (e.g. Wolf, 1993) that law's processes would soon convert radical feminist analyses of rape, that are said to rely on conceptualisations of women as powerless and forever victimised, into narratives that will discursively betray them. For example, one American defence barrister described to Timothy Beneke how his brand of feminism might usefully be applied to defend a client accused of rape:[79]

> I would argue that this is a sexist society in which men are brought up to treat women as objects of desire that they can dominate and treat as any other commodity, and that a woman who acts coy or flirts is

[78] The prosecutor attempted to reconstitute the victim's credibility by suggesting that the complainant had quite 'sensibly go[ne] to a psychologist...' to address the impact of the childhood sexual assault and that the 'undercurrent' of suspicion fostered by the defence that she may have transferred one set of events with another was entirely spurious.

[79] Beneke (1995) described 'Ken' as married to a feminist.

> engaging herself in socially conditioned behaviour. I'd talk about my client, who's not a well-educated person, who probably had certain notions about what the evening was going to be all about. He's a victimizer/victim of society...he's caught in this sexist configuration where he forced this woman to have sex either because he thought she owed it to him or he couldn't resist, because this sexual stereotype that she fell into was so overpowering for him that he couldn't control himself (1995: 198).

Defence barristers in the current study would speak in sympathetic tones during cross-examination about previous assaults and use language that often positioned the women as 'confused' or 'emotionally unstable'. They referred not only to the emotionally debilitating impact that previous rapes may have had on their capacity to accurately recall traumatic events or to invent new ones, but also argued that this meant the women would remain culturally and legally "rapeable". For, if a woman who is sexually assaulted can never fully emotionally recover, any subsequent allegations must fairly be viewed, according to the defence, with a fair degree of scepticism. This scenario is only slightly removed from the more pervasive previous characterisation of rape complainants as generically, although for different reasons, inherently untrustworthy.[80]

One defence barrister criticised a woman-complainant for assuming a particularly proactive role in assisting the prosecution by remaining in court after her evidence was given. Her actions were reinterpreted within popular (and some feminist) discourses that understand rape victims as eternally traumatised and perhaps forever life-changed.[81] She was, according to the defence, 'no shrinking violet' nor was she 'breaking down full of tears' in recounting her evidence. Indeed:

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[80] Delorey (1989) warned of this kind of potential backlash effect in considering the defence use of rape trauma syndrome in rape proceedings. She anticipated the defence using the evidence to 'open the door to new questioning of the woman's background – medical, psychological, and sexual' (Delorey, 1989: 548).

[81] Consider one of the women interviewed by Konradi who was determined to 'consciously create a persona', '...it was not about who I was or who he was or what could have happened...' (1996a: 412). Bumiller also noted how popular discourses surrounding rape victimisation constrained the story told by the victim in the *Big Dan's Tavern* such that 'her strategy was not to reveal the "whole" story, but to construct a narrative that she felt would best establish her innocence' (1990: 133).

> [t]his young lady, if what she says happened, happened, has had a horrible degrading experience, and reliving it in court would be painful. And you'd think that she couldn't wait to be excused from the witness box...but she's been back...and as involved as possible....[and that's] consistent with her not having been raped and consistent with her having made a false allegation [Trial 9].

Other barristers also seemed alert to the potential for jurors to have been influenced by non-legal, mostly feminist, discourses which pleaded for more sensitive trial practices in order to curb the horrors of cross-examination often depicted in trials reported by the media.[82] Some barristers appeared at pains to variously suggest to the jury that they had not intended or should be forgiven for, subjecting the complainant to a distressing cross-examination. One defence barrister, in his opening comments to the jury declared one of the most 'unsavoury aspects of this job is having to cross-examine an alleged victim of a rape' and conceded that if the complainant had been raped, then 'she has had to go through it all again' [Trial 15]. Other barristers insisted they were 'doing [their] job' [Trial 16] and certainly were not receiving 'any perverted pleasure from' discrediting the complainant through a detailed and extended cross-examination [Trial 20][83].

The absurdity of these comments in the light of the methods and styles often used to demolish the character, moral worthiness and integrity of women-complainants was particularly evident during the course of one trial where questions by the defence were repeatedly prefaced with 'I'm not doing this to hurt you or distress you' [Trial 10]. He then went on to explore the details of a childhood rape that occurred over twenty years ago. The anguish of having to recount the scene of disclosing to her mother when she was slapped and called a liar, the incredulity of being told she

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[82] Barristers interviewed for Largen's research spoke of traditional defence techniques being 'counter-productive' or damaging to their client's interests (1988: 282).

[83] One defence barrister was keen to hear whether I had perceived his cross-examination of the woman-complainant and his closing comments to the jury as 'ideologically sound'. Despite his persistent and sometimes illicit attempts throughout the trial to introduce evidence of the complainant's past and subsequent sexual history in the context of a defence story that continued to refigure the complainant's account of rape as an example of a teenage sexual awakening, he remained baffled by media reports describing reprehensible defence tactics in rape trials the likes of which he claimed never to have seen [Trial 13].

behaved provocatively towards the accused and the unfairness of having to explain why she had failed to follow up her police report of ten years ago where no action had been taken, revealed the extent to which any sensitivity exhibited towards the complainant was more likely the result of contemporary trial tactics.[84]

Others were careful not to isolate those jurors who might be supportive of women's rights or who might be sympathetic to rape complainants. One defence barrister appealed to the traditional principles of criminal law in cautioning the jury to remain objective in their assessments of the evidence and to place their emotions and political beliefs to one side. Perhaps directed at the six women on the jury, the defence warned of 'people' who get 'carried away' with the issue of 'women's rights' and how unfair it would be to an accused if his trial was used as an opportunity for people to say 'it's time we stood up for women' [Trial 31]. In a similar vein, a defence barrister in another trial made direct reference to 'the strident views of militant feminists' that unfairly demonise men accused of rape while assuming that 'all women are angels' [Trial 9].[85] Interestingly, a prosecutor also made reference to how the law on consent was an example of 'good law' as opposed to an exercise in trying 'to appease feminist groups or something', as if the new meanings had miraculously emerged from within the law itself [Trial 25]. A common theme underlying these comments was the danger that was perceived to flow from applying feminist understandings of rape to the intellectual task of deciding the guilt or otherwise of an accused man being tried for rape. In this context, feminism was constructed as antithetical to a jury members' capacity to remain fair, reasonable and dispassionate in their assessments of rape allegations.[86]

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[84] These kinds of defence tactics were also reported in the study by Eastwood et al., (1998). The young women-complainants they interviewed said they felt tricked into trusting the defence barrister who at first appeared as 'smiling, friendly and caring, only later to turn viciously against the girls and accused them of "wanting it" and of lying' (Eastwood et al., 1998: 4).

[85] Bumiller may have found this last comment particularly ironic given law's historical preoccupation with gendered narratives that position women as 'fallen angels', unchaste and undeserving of law's protection (1990: 125).

[86] Interestingly there were several trials where (mostly women) jurors were excused from jury service by the court after indicating they would be unable to decide the case without prejudice or bias. One can only speculate that previous experiences of sexual assault may have prompted these women to consider themselves particularly unsuited or unable to consider the issues before them at the trial.

Some judges also appeared especially concerned about the potential currency of victim-oriented discourses and their capacity to impact on the deliberations of sympathetic (or enlightened) jurors. The remarks of one judge were clearly intended to revive the dominant image within traditional legal discourse of women complainants who are prone to making false allegations of rape. Indeed, he went so far as to suggest a potential victimisation *of men* if this disturbing community 'trend' to presume women's allegations of rape are immediately credible were to continue:

> [To assume that] whenever a person, particularly a girl, says that she's been raped then she must be telling the truth....[is] grossly unfair to the accused person....if it has not been committed then there can't be a victim of that offence.... And it is unfortunately not something unheard of in these courts for a person to wrongfully accuse another and to effect thereby an injustice [Trial 27].

These examples may further substantiate Faludi's thesis (1991) of a discursive *backlash* against feminism, where any significant improvement in the social position of women will be met with a barrage of discourses concerned with preserving and reinstating male interests, especially within institutions that have remained male-dominated in terms of setting the precedents, practices and structures of the profession.

7.4 Feminisms Working Together

Law reform in the area of sexual assault has been a primary target for social change for feminists of all persuasions since the late 1960s and different strategies have been employed. While the focus of this chapter has been on a range of feminist theoretical approaches to understanding rape law reform and the conduct of rape trials, I would like to conclude by briefly considering how these analyses might usefully combine at the level of feminist practice. The following discussion of the struggle for reform to Canada's rape laws during the early 1990s provides an example. It suggests that one of the points at which the various feminisms and related politics are likely to intersect

may be at those moments when improvement in the social conditions for women appear most threatened (Smart, 1989).

McIntyre, in her fascinating article "Redefining Reformism: The Consultations That Shaped Bill C-49" (1994), describes how the consolidation of Canadian women's groups secured a powerful political stronghold for negotiating the passage and content of legislative change to Canada's sexual assault laws in 1992. Concerned not to 'replicat[e] the historic failures of mainstream feminism', the coalition's political strategising is held up by McIntyre as an example of women:

> breath[ing] inclusive, substantively egalitarian politics into legal (re)form, [which] ensures that equality-seeking communities [can] learn from our successes and defeats or hold Parliament accountable for what it knowingly refused to incorporate in the bill (1994: 294).

In the wake of significant public outcry following successful constitutional challenges in 1991 being mounted against the statutory provisions restricting the admission of sexual history evidence in sexual assault trials[87] (Sheehy, 1991; Majury, 1994), the Minister for Justice consulted with women's groups on how best to legislatively offset the implications of the Supreme Court decision in *Seaboyer*. Soon after a coalition was formed, combining the expertise, experiences and grass roots knowledge of a cross-section of women to formulate a comprehensive package of legislative reforms.

Although couched in language customarily associated with liberal feminist discourses, with a focus on the constitutional rights[88], egalitarianism and equality of freedom and protection for women under Canadian law, McIntyre chronicles the coalition's approach as a far more sophisticated feminist campaign designed to produce a legislative model:

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[87] See *R. v Seaboyer* (1991), 83, D.L.R. (4th) 193 (S.C.C.)

[88] The coalition argued that maintaining the existing structure of laws, even after removing the deleterious effects of *Seaboyer*, would do nothing to increase the reporting rates of women who have routinely been 'multiply oppressed' by law's agents and processes (McIntyre, 1994: 309). The laws were said to be 'constitutionally unacceptable' in that they were known to be of limited value to a small number of women (McIntyre, 1994: 300).

> ...whose measure of achievement is not the reform's particular substantive legal yield or its potential as a building block for changing other laws, but the degree to which it translates principles of accountability to, inclusion of, and genuine power sharing among the broad women's community into feminist legal practice (1994: 294).

Central to the coalition's objectives (and unlike other feminist legal campaigns such as the Victorian Real Rape Law Coalition[89]) was, therefore, acknowledging the exclusiveness of traditional liberal and radical feminisms that had further *supp*ressed and *opp*ressed the words, cultures, and gestures of women whose identities and experiences were inextricably related to issues of race, class, sexuality, disability, etc. (Kline, 1989; Monture-OKanee, 1992).[90]

Although keen to tighten evidentiary laws relevant to sexual assault hearings, the coalition was also wise to how legislative band-aiding or 'procedural tidying' (McIntyre, 1994: 300) had often worked to further enshrine the deeply gendered belief systems that had systematically denied justice to most women who reported sexual assault. The heart of the coalition's objectives therefore lay in overturning the substantive legal elements relevant to the adjudication of consent, namely, include a list of circumstances that would situationally negate consent, as well as altering the *mens rea* requirement to establish reasonable grounds for any mistaken belief in consent. Crucial to this objective was, however, the process of consultation that was committed to including the voices of aboriginal women, women of colour, lesbian women, poor women, and women with disabilities.

A range of feminist discourses was therefore galvanised into action by the coalition in order to convert a Ministerial campaign of shortsighted, issue-focussed reforms into a

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[89] Unlike the Canadian equivalent, the Real Rape Law Coalition and the Law Reform Commission failed to successfully include a diversity of women's voices during the Victorian Rape Law Reform Reference in 1991. Most of the coalition members who worked as representatives on the LRCV Working Groups were feminists from within mainstream women's services and universities, who were white and predominantly middle-class.

[90] As McIntyre relates, '[f]or many grassroots and minority women, the global question whether women should attempt to combat sexual violence through legislators and/or courts, was cross-cut with and tested by a less abstract and more urgent question: whether to work with white women lawyers' (1994: 295).

Bill that would meaningfully alter the fundamental legal definition of consent. The statutory changes, some of which have long been called for by radical feminists[91], and the proposed preamble to the legislation using inclusive, culturally responsive language that would meet the requirements of poststructuralist critiques (Smart, 1995), were purposefully negotiated within a constitutional, rights-focused, reform agenda.[92] More importantly, according to McIntyre, the coalition devised a preamble which specified the gendered experience of sexual violence as well as recognised particular classes of women who have been structurally disadvantaged in terms of being able to both access and receive a criminal justice response. The list made reference to sex workers, lesbian women, Black women, aboriginal women, older women, women of colour, immigrant and refugee women, Jewish women, poor women, women with disabilities, women without full citizenship and children (McIntyre, 1994, Appendix C: 315-316)

While the 'perennial question' (McIntyre, 1994: 295) of whether or not to employ the law as an agent of social change[93] philosophically plagued the coalition during various stages of the consultations with Justice officials, fundamental reforms to the legal treatment of consent, including a considerable narrowing of the defence of mistaken belief in consent, appeared to be a direct result of the political pressure and strategic planning chartered by coalition women.[94]

While the coalition was unsuccessful in having the Preamble included as part of the final legislative proposal, McIntyre passionately argues that what was achieved by the Coalition had less to do with the proclamation of new legislative amendments and everything to do with establishing the kinds of processes through which 'sectors of the

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[91] McIntyre acknowledges the influence of radical feminists Andrea Dworkin and Catherine MacKinnon (1988) in this context, as well as Lucinda Vandervort (1987/88).

[92] The media described the Bill as the 'No means No Law' drawing on liberal feminist discourse (see McIntyre, 1994: 302) while the opponents of the Bill ironically saw it as the work of 'radical feminists' (McIntyre, 1994, footnote 3: 317).

[93] This question has most often been asked by radical (MacKinnon, 1987; Sheehy, 1991) and some poststructuralist (Smart, 1989) feminists.

[94] The changes introduced in June 1992 by Bill C-49 are considered by McIntyre in detail (1994: 306-308). Most disappointing for the Coalition was the Parliament's refusal to include the preamble that had symbolised the inclusiveness of the Coalition's approach (McIntyre, 1994; see also Acorn, 1994: 15-16).

women's community who have never before so influenced power politics' (1994: 310) could function as key participants in debates on the implications of law reform for women in all their diversity.

As Brereton suggests, the issues that concern law reformers will never be solved by simply changing the words in statute books, the "solutions' (such as they are) can only be found by allowing consultative mechanisms to operate, and by engaging in negotiation, compromise and persuasion' (1994: 85). Far from feminists being co-opted by the process, according to McIntyre, most reformers are more than aware of how limited the space is through which meaningful gains for women can be ever be expected to flow from law's practices and processes. Co-optation, she colourfully suggests, is far more 'the process by which tokens feel useful, even daring, rather than used and tamed, in the process' (1994: 310).

The final commentary of this thesis consolidates some of the more empirical findings from the study and concludes with some practical directions in terms of contemplating future priorities within law reform agendas. While the previous discussion has outlined how tenuous these changes are likely to prove in the face of non-legal discourses that discursively reproduce conventional stories about women, men and rape, there were also moments amongst the trials observed that symbolised law's capacity to occupy a critical site upon which these very conceptions will be contested.

CONCLUSION

1. "Real Rape Law" Reform[1]: A Study Of A New Legislative Framework For Victoria

This study was based on first-hand observation of 34 rape trials held between 1996 and 1998 in Victoria and provides an in-depth analysis of the impact of legislative and procedural change on rape trial practice and discourse. It demonstrates that the effects of rape law reform are both complex and uneven, and depend on a range of competing sociological, legal and cultural considerations.

The study focussed on the most recent and substantial package of reforms that were introduced in Victoria by the *Crimes (Rape) Act* in 1991 which included fundamental changes to key features of rape legislation. In part, these represented an extension of earlier reform ideas to further restrict the use of sexual history evidence and reduce the judicial scope for cautioning juries against the reliability of rape complaints. Changes to the definition and meaning of consent, however, were more profound and aimed to address many of the philosophical concerns raised by feminists advocating for "real reform" to the traditional framework for responding to women's allegations of rape (Real Rape Law Coalition, 1991; Naffine, 1994; Mason, 1995).

In particular, Section 36 of the *Crimes (Rape) Act 1991* defined consent to mean 'free agreement' and included a non-exhaustive list of circumstances where consent could be vitiated. Such circumstances included: where a person submits through force or its threat; where s/he is unlawfully detained or unconscious; where s/he is mistaken about the sexual nature of the act or the identity of the person; where s/he is incapable of understanding the sexual nature of the act; or where s/he is mistaken that the act is for medical or hygienic purposes. Mandatory directions for judges to give juries were also introduced that implied a different legislative standard for assessing consent. In particular, juries would be told that saying and doing nothing to indicate free agreement in the context of sexual activity is 'normally enough to show that the act took place without that person's free agreement'.[2]

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[1] The Real Rape Law Coalition in Victoria used this term during their campaign in 1990.
[2] Section 37 (a) of the *Crimes (Rape) Act 1991*.

This new definition was said to promote standard of consent within rape law, based on a model of communication as opposed to one in which submission was often taken to mean consent (Heath & Naffine, 1994; Bargen & Fishwick, 1995; McSherry, 1998). The extent to which juries would therefore use the traditional indicators of force and resistance as the key determinants of non-consensual sexual activity was arguably reduced under this more progressive legislative framework (Mason, 1995).

An important impetus for this research was my earlier involvement with the Victorian Evaluation Study, a government funded research project that was specifically designed to assess the operation and impact of the 1991 reforms on rape prosecutions that were initiated after the legislation came into force. The Victorian Evaluation Study was primarily based on a quantitative assessment of how the legislation was being applied in practice through examining the disposition of all rape cases, including those where charges did not proceed, where the accused pleaded guilty, and those cases that went to trial (Heenan & McKelvie, 1997). As part of the study, interviews were conducted with barristers, solicitors, magistrates and judges about their impressions of the new legislation, how they felt it was being interpreted and applied in the courtroom, and what it meant for the future conduct of rape cases. The researchers also spoke with victim/survivors about their experience of the criminal justice system since the reforms came into effect.

The findings from the Victorian Evaluation Study suggested the changes had little bearing on the conventional use of standard trial tactics in rape cases (Heenan & McKelvie, 1997). Sexual history evidence featured prominently in a substantial proportion of cases and women still described the experience of giving evidence as deeply traumatic. In the words of one woman, it was 'the most degrading thing [she'd] ever had to do in [her] life, except go through the experience of the rape' itself (Heenan & McKelvie, 1997: 205).

The current study offered an important opportunity to further explore the post-reform situation in Victoria. It followed on from earlier empirical studies that methodically documented the impact of procedural and evidentiary changes to the laws of rape by examining those features of the legislation that have profoundly discriminated

against women making rape complaints (Clark & Lewis, 1977; Marsh et al., 1982; Bonney, 1987; Spohn & Horney, 1992; Lees, 1996; Department for Women, 1996). Its primary focus, however, was to explore sociologically the relationship between rape law reform, trial practice and contemporary rape trial discourses in the actual proceedings of rape cases. A critical issue was how the reforms, and particularly the new definition of consent, had been adapted by the courts in the context of the arguments being presented by the prosecution and defence counsel, and in the final rulings and directions of presiding judges.

The study also aimed secondarily to investigate whether and how feminist-inspired understandings of rape, which were increasingly reflected in the substance of the provisions, may also have a presence within rape trial discourse, as the participants (barristers, judges, women-complainants themselves and maybe the accused men) draw on both traditional and alternative constructions of rape situations.

In this aspect, the study was assisted by a small number of contemporary writers who have directed their theoretical attention to the complexities of law in the context of rape trial discourse (Scheppele, 1989, 1992; Kaspiew, 1995; Cuklanz, 1996; Young, 1998). Particularly useful was research on how the practice of law operates as an important site through which to consider the notions of gender, power and sexuality as socially (re)produced (Naffine, 1992, 1994; Smart, 1989, 1995; Puren, 1998). The current study considered these analyses in the context of the narratives constructed throughout rape trial proceedings, especially those that appeared to underlie the points of legal argument or the reasoning behind a judge's ruling. An important focus here were the stories generated through barristers' closing addresses to juries, an element of rape trials that had previously been neglected in so far as any empirical research on the trial process was concerned. Exploring the legal story-telling implicit in the closing addresses provided an opportunity to observe how the current laws defining rape, particularly in the context of consent, were being negotiated, co-opted or reconstituted through barristers' stories of the events as portrayed differently by the principal parties in dispute. Further, the closing addresses offered a space in which wider interpretations about rape, women's sexuality, and the meaning of the reforms could be discursively contested.

Three key features of the 1991 Victorian reforms were distinguished for analysis: the abolition of corroboration warnings, the prohibition on the admission of sexual history evidence and the new statutory framework governing the legal treatment of consent. These areas were chosen for their historical significance in harbouring the law's deep suspicion, if not outright contempt, for women rape victims, particularly when rape allegations were made by women in the absence of injuries or prompt complaints, or where no other witnesses could be called to confirm what had occurred. How legislative changes to these areas were integrated into the existing structures and practices governing rape trials provided some interesting insights into the operation of contemporary rape law reform.

I was also interested in how various feminist approaches might make sense of the findings from the 34 rape trials I observed. The theoretical implications of the research findings were therefore considered by using liberal, radical, and poststructuralist feminist approaches to provide explanations for the current legal response to rape.

My first-hand observation of the trials was critical in this study. Firstly, as a feminist researching the area, I felt an obligation to experience the trials first-hand – to get closer to the people and the processes I was studying.[3] On a few occasions my presence at the trials involved talking with women-complainants after they became aware of the fact that I was conducting research in the area. These were important moments within the research setting where women asked about certain aspects of the trial or spoke about what had happened to them in court. On other occasions, (usually defence) barristers inquired about the research and sometimes took the opportunity to discuss the issue of rape law reform or their impressions of the proceedings.

Secondly, my observation of the trials provided the best means of accessing reliable information with respect to the content of legal argument, judges' rulings on

[3] I do not wish to imply here that I have in some way "experienced" the trial in the same way as the women-complainants who gave evidence. Rather, my experience of researching rape trials was greatly intensified by my presence in court. Many times I found myself needing to debrief with colleagues or friends at the end of the court day. Fortunately, my field notes allowed me a more immediate forum for expressing the many spontaneous emotions and responses I felt about what I was seeing and hearing in the courtroom.

particular legal issues and the closing addresses. As previously outlined (see Chapter 3), access to this information had become limited and transcripts with more than the evidence of the principal witnesses in the case were rarely available.

The study was unique for its focus on this aspect of trial proceedings. Empirical research on rape trials had not previously explored the structure or content of barrister's closing addresses to juries as representative of an important story-telling device through which cultural meanings or assumptions about the law and about men, women and rape were often the centrepiece. These stories included explanations on how jurors should interpret or attach the legal framework governing rape to the circumstances in the case. Commentaries that focussed in particular on the new definition and meaning of consent (and on the accompanying directions) illustrated how the reforms were being negotiated and contested in an adversarial context, at the point at which jurors might be particularly receptive to a story that neatly integrated the evidence into a plausible, culturally familiar, story.

A further strength of this study was the inclusion of regional Victorian trials. While I was only able to observe a small number of these trials, the experiential differences for women-complainants in metropolitan versus regional proceedings should have been palpable to most onlookers. In the regional trials, there was an absence of court support services and an apparent lack of any pre-hearing contact between the prosecution team and women-complainants. One woman, for example, was unsure whom she should speak to about her role in the proceedings because she was not introduced to the prosecutor or the OPP solicitor upon her arrival at court [Trial 27]. During adjournments in the trial she waited alone outside the court on a bench just metres away from the accused men.

In another regional trial, no attempt had been made to secure court support for an Aboriginal woman-complainant who was giving evidence against a member of her local community [Trial 34]. No thought had been given to how the court might respond to cultural differences in communication, or in alternative conceptions of age, familial relationships, or the passing of time. The woman-complainant in this case appeared overwhelmed and alienated in a courtroom (made up almost entirely of men) that was distinctly unresponsive to issues that might culturally impact on her

ability to give evidence. That she was unable to maintain eye-contact with the barristers, that she could not verbalise "who put what where" when describing the rape, and that she often sat silent in response to questions was simply irreconcilable with a courtroom of people who preferred to think of her as simply 'shy and reserved' [Trial 34].[4] Andrews has noted the degree of:

> ...ignorance and non-awareness of Aboriginal culture and communication styles that affect the tendering of evidence, and cross-examination that can have dire consequences for the outcome of the case (1995: 9).

While the small number of regional trials observed reduced the extent to which reliable quantitative comparisons could be drawn with trials held in Melbourne, a re-examination of the Victorian Evaluation Study's trials suggested some important areas for future research. In particular, close attention could be paid to the higher proportion of cases in regional areas involving sexual assaults perpetrated by family members, especially given the influence this factor alone is likely to have on jury decision-making (See Appendix 2).[5]

2. Rape Law On Trial: The Impact of Reforms on Victorian Courts

The overall picture gained was that the implementation of the reforms designed to change procedures and practices with respect to corroboration, sexual history evidence and consent in rape trials was uneven, fragmented and often dependent on the skills and experiences of the individual legal professionals, judges and juries involved.

The findings with respect to corroboration warnings offer the clearest example of how the law's method and processes can easily subvert, if not entirely negate, the

[4] The OPP solicitor and the prosecutor described the woman-complainant in this way when I asked whether they had thought to involve local Aboriginal women's services in providing support to the woman-complainant and in educating the court about what it might mean for her to give evidence.

[5] A re-examination of the trials from the Victorian Evaluation Study showed that trial outcome was influenced by where the proceedings were held. Juries who sat in trials held in Melbourne during 1992-1994 were 17% more likely to find the accused guilty of rape than juries in regional settings (see Appendix 2). In the current study, however, juries in the four regional areas convicted the accused of rape in 5 out of the 10 trials observed as compared with a total of 10 out of the 24 trials that were held in the city (see Appendix 2, p. 401).

intent of legislation designed to repeal one of the most deeply enshrined legal dictums governing the treatment of rape.

The High Court decision in *Longman*[6] signalled the end of the legislative potential for section 61' to eradicate the use of corroboration warnings in rape trials. Throughout the study period, requests for a "Longman warning" became standard practice within the rape trials observed, even where corroborative evidence was clearly available. Prosecutors rarely objected to a *Longman* warning being given. Indeed the warning became so well entrenched during the study period between 1996 and 1998 that one prosecutor feared the possibility of a retrial and initiated a request for the warning himself [Trial 12]. Moreover, where corroborative evidence was available, prosecutors tended to highlight the tangible signs of force or resistance over and above the complainant's account.

A marked contrast was one prosecutor who, having been warned by the trial judge that a *Longman* direction would be given, carefully listed all of the evidence that was consistent with the complainant's account (even if not technically corroborative) *after* urging the jury to convict the accused principally because the complainant was telling the truth about having been raped [Trial 10]. There were also examples of judges who maintained a commitment to the statutory principles underlying the abolition of the corroboration requirement. Warnings were either not given (n=16, 48.5%) or watered down (n=8, 24.2%) for juries in over two thirds of the cases I observed. Two of these judges even refused to provide corroboration warnings despite the fact that the case circumstances closely reflected those of Longman's case. For the majority of the remaining 22 trials where a traditional warning was not given, however, the absence of a *Longman* warning may have had more to do with the fact that there was at least some additional evidence available to support the prosecution. This will have reduced the basis upon which defence barristers could substantiate the need for a strong corroboration warning to be given.

On occasion, some judges also appeared to try very hard to respond to the criticisms made by reformists by applying or interpreting those provisions that had historically

[6] (1989) 168 CLR 79.

obstructed the fair adjudication of rape trials in a more sensitive manner. Their comments sometimes even reflected the realities of sexual violence for women that have been generated by feminist analyses, implying that some judges are possibly becoming more "gender aware". For example, some judges seemed particularly attuned to the fears and pressures experienced by women who were raped by family members or where the accused occupied a position of power over the women-complainant. Juries were encouraged to treat any delay in women-complainant's initial disclosure of rape or a lack of physical evidence as reasonable and to be expected in the context of a familial or more complicated social setting.

Similarly, there were some instances where applications for sexual history evidence were carefully dismantled and ruled against by judges. Breaches of the sexual history provisions sometimes also received strong intervention (and in one case public censure) by judges who appeared well versed in the standard techniques and arguments used by defence barristers for legitimating or bypassing section 37A.[8] A small number of experienced prosecutors were also particularly alert to more devious methods used to override the provisions and strenuously objected to the more obvious attempts by defence barristers to use sexual history evidence as a means to 'blacken' the complainant's character [e.g. Trial 12].[9]

In direct contrast, there were trials where the reforms appeared to have had minimal impact on the approaches and tactics used by barristers and on the conduct and trial practices of presiding judges. With respect to corroboration warnings, nine juries (27.3%) were advised in particularly strong terms about the 'dangers of convicting' an accused based on the unsupported evidence of a woman rape complainant. The judge who delivered the strongest warning of all went on to further educate the jury about the unfairness surrounding what he understood represented a new victim-centred culture that indiscriminately encouraged the belief that all rape victims were telling the truth [Trial 27].

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[7] *Crimes Act 1958 (Vic.)*.
[8] *Evidence Act 1958 (Vic.)*.
[9] Prosecutors' attempts in this regard were not always successful [See discussion of Trials 12 & 31in Chapter 5].

Sexual history evidence was also introduced in slightly more than three quarters of the trials observed (76.5%). Judges were persuaded to exercise their discretion to allow its admission on 25 of the 36 occasions (69.4%) where a formal application was made. Statistically the odds therefore remained heavily weighted in favour of a complainant's sexual past or experience being considered relevant to the legal determination of rape accounts.

Interestingly, the large majority of occasions where sexual history evidence was admitted related to some aspect of the complainant's sexual activities with men (usually men, although in one case there was the implication that the complainant mixed with "lesbians") *other* than the accused (61.1%), a discretionary door that feminists may have presumed had effectively been closed given the history of the provisions.[10] And yet various chains of reasoning were still successfully deployed to somehow link the alleged rape with sexual activities that had nothing whatsoever to do with the accused. In some instances this evidence related to previous sexual assaults experienced by the women-complainants. In others, however, there was little attempt made by the defence to mask the direct inferences about a woman's sexually active status (including men with whom she had chosen to be sexually intimate) to a more generic "sexual availability". This was particularly highlighted in the five trials where sexual history was constructed as the centrepiece of the defence case.

The findings on consent demonstrated that little had changed with respect to its legal treatment for the majority of cases. In dealing with the more straightforward contests over what occurred, barristers tended to revert to the more conventional portrayals of rape versus consensual sex as depicted in the evidence of injuries, force and resistance, or partial admissions being made by the accused. Sexual history evidence was also introduced in a disproportionately high number of these cases (17 out of the 18 trials where a defence of "straight consent" was featured) suggesting the resilience of the standard arguments for constructing consent/non-consent had triumphed over any philosophical shift intended by the reforms.

In many ways, Faludi's (1991) warning of a 'backlash' against feminist successes could be used to explain some of the trends that emerged during the study period. For example, as more adult women victim/survivors appear to edge towards legal redress for assaults that occurred to them as children, mechanisms within the law in the form of corroboration warnings have been reactivated to tighten the conditions under which convictions will be considered safe and just. As the opportunities to introduce sexual history evidence have been legislatively narrowed, barristers are developing more sophisticated or subtle ways of ensuring women's credibility can legitimately be checked against events in their sexual pasts (even with men other than the accused).[11] Moreover, just when women's consent can statutorily be vitiated in the absence of evidence of mutual participation or any positive signs of "free agreement", defence barristers will argue for example that their client's social conditioning has him sadly lacking the social skills to recognise a woman's reluctance or unwillingness to have sex with him.[12]

An important dimension to this thesis has concerned the theoretical arguments that suggest these problems lie not with the individual attitudes held by judges, barristers or juries, and their degree of sympathy with women's interests or the women's movement more broadly (as might typify liberal feminist analyses), but rather are likely to reflect the complex and diverse range of cultural beliefs and social experiences found across society, that are reproduced in the courtrooms of rape trials.

Radical feminists would interpret the frequency with which sexual history evidence is admitted in the trials I observed as a perfect example of how the underlying

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[10] The restrictions shielding the complainant from sexual history questions related to activities with men *other* than the accused were the first to be introduced in Victoria in 1976.

[11] Sheehy (1995) suggests the use of women's records, including their counselling files, can also be seen in this light. Subpoenaing women's files became 'the latest defence strategy' at a time when greater legislative restrictions meant defence barristers would have a harder time convincing courts of the "relevance" of women's sexual histories (Sheehy, 1995: 20).

[12] Media reporting has also participated in a kind of backlash against feminism with claims that feminist rhetoric is partially to blame for women's continued sexual victimisation. Young women who take full advantage of their equal rights to public space, including social venues such as pubs, clubs and hotels etc are said to be behaving in particularly risky and provocative ways. A Melbourne sexual assault service has highlighted this 'finger point[ing]' at feminism in their recent publication on young women and sexual violence within licensed premises (CASA House, 2000: 18). They refer to newspaper articles where 'girl power' feminism is said to have inspired young women to be

structures of law work to contain any disruption to the established patterns of sexual relations that are institutionally, procedurally and culturally controlled by men. The cases I observed increasingly reflected a wider range of situations where women were identifying, reporting and (the OPP) prosecuting rapes in contexts where previously they may have remained silent, or found it difficult to distinguish the event as rape (especially if they had been socialising, dating or married to the accused). However, the complexity and ambiguity associated with adjudicating these cases, particularly where there had been previous social/sexual contact (no matter how brief or how innocuous), nearly always served to diminish the culpability of the accused.

For feminist poststructuralists, making sense of the trial process using a radical feminist perspective oversimplifies complexities and obscures the importance of seeing the trials themselves as sites where social definitions and meanings about rape, sexuality and women are often negotiated and contested. This is where, for poststructuralists, discourse and narrative generated through the trial process itself occupy a critical setting for the reconstitution of traditional power relations.

Drawing on the approaches used by Puren (1998) and others before her (Pineau, 1989; Pringle, 1993) was particularly valuable in illuminating how the current legal definition and meaning of consent struggled to compete against the currency of discourses that conflate rape with images of seduction, sexual desire and romance.

While the new model may have promoted an alternative image of mutuality or participation within heterosexual sexual relations, the stories told by defence barristers suggested that such a portrayal was still at odds with 'common sense' [Trial 14]. Women who, for example, 'went along with everything' or who 'may not have been enjoying it...but [may have consented] for some material reason' [Trial 14], or even where the sex was a 'little rougher than [the woman] would have liked' [Trial 23] were refigured by defence barristers as freely agreeing to sex. Hence, in spite of the philosophical challenge within the legislation to precisely these kinds of stereotypical and gendered portrayals, the present recourse to the traditional

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sexually aggressive or assertive in ways that will place them in unsafe situations where they can more

narratives depicting women as the passive "acquiescors" (eg, 'she was a person who was *accepting*', Trial 14) of sexual techniques based on male sexual aggression, or pursuit and seduction, remained intractable. As Puren laments:

> The tragedy of the limited success of crucial reforms to rape legislation is that the law is not the only story that is deployed in the courtroom. There are other, infinitely sedimented and powerful stories which have more efficacy than the text of the legislation (1998: 240).

On the whole, much of what I observed confirmed these impressions, that the changes to fundamental elements of rape legislation are likely to be subverted, misapprehended, 'conservatis[ed]' (Thornton, 1991: 461) or neutralised as a result of trial practices, processes and discourses that continue to resist the emergence of alternative viewpoints.

In those cases where the prosecution directly suggested that the women's capacity to consent was vitiated under the new provisions (eg, when they were asleep), defence barristers called on a host of discourses that could exonerate the accused for having (honestly) mistaken or misunderstood the woman's position regarding consent. This took on a particularly disturbing tone when the sequencing of trial questioning meant women were forced to implicate themselves as having been sexually responsive to, or inviting of, the accused's sexual attentions - even though they were asleep or had mistaken the accused's identity (Young, 1998). Here, the effect of the current subjectivist status of the *mens rea* requirement was revealed as particularly deleterious to any reconceptualisation of consent that attempted to give at least equal weight to women's point of view. While a defence of "honest belief" is not common in rape prosecutions (LRCVb, 1991: 87; Heenan & McKelvie, 1997: 191), it nonetheless proved difficult to circumvent in the face of provisions that, in the context of rape situations, continue to give way to a male sexual prerogative. The closing addresses offered by defence barristers in these cases included careful reminders to juries about how to apply the third element of rape law, ie, where there remains a statutory obligation to acquit an accused even if his honest belief in the complainant's consent is considered to be *un*reasonably held.

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easily become the targets of physical or sexual assault (CASA House, 2000: 18).

Prosecutors found it particularly difficult to argue an unambiguous story of rape in those situations where evidence of force and resistance was lacking. Juries were effectively asked to excuse the conduct of women who had not exercised good judgement, or who took risks, or who should not have been drinking or actively socialising, or who should not have been in the company of men whom they had only just met. In this sense, women-complainants in the study were often depicted as contributing to, even if not responsible for, the subsequent rape(s) committed against them. This argument carried little currency with jurors who acquitted four of the seven men who were charged with rape in the context of dating situations or where the accused and the complainant had just met prior to the alleged incident.

A few prosecutors attempted to confront these kinds of common preconceptions by urging jurors to uphold women's equal right to dress, drink and socialise with whomever they like and be free from unwanted sexual approaches or conduct. These are instances of what Cuklanz (1996) suggests are more subtle sites of social change, where public representations of rape may increasingly show the influence of feminist interpretations of women's perspectives. While Cuklanz acknowledges that these more progressive signs fall short of a 'coherent feminist analysis' of the problem (2000: 155), these moments, nonetheless, are evidence of the potential for alternative discourses to have a presence and replace, or at least compete with, more hegemonic understandings. That a small number of prosecutors had begun to incorporate an analysis of rape within their closing addresses that sought to contextualise the social realities for women reporting and giving evidence in rape trials is significant in this light.

It is curious that the strongest indications from the current study that feminist understandings are having an influence came from defence barristers. The examples provided by the three barristers who successfully based their applications to admit prior instances of sexual abuse experienced by the woman-complainant as a relevant consideration of her emotional stability were a particular cause for concern [Trials 6, 20 & 26] since they reveal a tendency to distort or subvert the purposes of including insights into the painful experiences of victim/survivors of sexual assault.[13]

[13] See Chapter 7, pp. 350 - 352.

Defence barristers appeared concerned about the potential for jurors (particularly women jurors) to become overly sympathetic towards rape complainants, or perhaps be more likely to endorse the notion of "women's rights", and reminded jurors of their oath to decide the issues dispassionately and on an intellectual basis. That defence barristers felt obliged to combat the potential effects of, or at least challenge the discourse surrounding feminist-inspired understandings of rape is, I would suggest, a new phenomenon and in some respects an encouraging development. They are clearly no longer prepared to assume that jurors are predominantly influenced by a rape supportive culture (Rathus, 1995).

It would have been useful in this context to have interviewed barristers who appeared in the trials and focus on their impressions of what most influenced the outcome and, in particular, about the impact of the closing addresses and the judge's directions on jury decisions. Other questions might include: what kinds of philosophical approaches they identified in their arguments and whether or how reformist discourses (feminist or otherwise) might have influenced the way in which they conducted their cases?

A critical question and largely unresearched area is how what goes on in the courtroom impacts on jury decision-making. At present, this important element of the rape trial process can only be inferred through a consideration of trial outcome in the context of the cases as a whole. With respect to corroboration warnings, only three out of nine juries were prepared to convict after receiving strong cautions from the trial judge about the dangers of convicting on the uncorroborated evidence of the particular complainant. In terms of sexual history evidence, juries seemed less liable in some respects to draw the conventional and highly sexist links that have been made in the past between women's sexual history and any perceived predisposition this gave to women for making false allegations or to misrepresent consensual acts of sex as rape. In three out of the five trials where women's sexual history was constructed by the defence as central to the accused's case, juries delivered guilty verdicts. And yet overall, out of the 17 (of a possible 18) who proffered a "straight consent" defence in cases where sexual history evidence was admitted, only 8 (47.1%) were convicted of rape.

In particular, juries were still reluctant to convict men of rape in situations where the free agreement of the woman, who claimed to have been asleep at the outset of the incident, was the principal point of dispute. These situations provided an important insight into how juries might interpret and apply a test of consent that rests on a model of mutual sexuality which incorporates unambiguous signs of positive assent within the sexual relationship. Only two out of the five accused were convicted[14] of rape in these circumstances and both these cases had other features in common. Neither man had been in the company of the women-complainants prior to the rapes and both men were unable to say why they had assumed the women would freely agree to have intercourse with them. While they both claimed to have nonetheless held an honest belief in the complainant's consent, the juries remained unconvinced (one would assume) of how any honest belief could have been genuinely formed when penetration occurred at the time the women claimed they had been asleep.

In the other three cases, where the accused men were found not guilty of rape, the juries were faced with scenarios that were open to a range of more complicated interpretations and judgements that ultimately favoured the accused. Here, the focus moved away from the actual event of the alleged rape, and therefore its statutory meaning and definition, and on to a story centred around romance and sexual desire. In two cases [Trials 14 & 25], the women had been socialising and drinking with the accused men. They had both fallen asleep knowing that the accused men were also present in the room. The accused men had also claimed that, prior to going to sleep, some preliminary attraction was forming so that the accused in one case [Trial 25] was sleeping on a mattress close by the complainant and the other accused [Trial 14] had made a foiled attempt to kiss the complainant. In the third trial, the defence story was that the accused and the complainant were so drunk that it was impossible to establish what happened, and so a range of explanations were constructed as plausible, including that, if any sexual activity had in fact occurred, the accused may have mistakenly believed the complainant was his girlfriend [Trial 29].

Nonetheless, it seems the communicative model of consent was more likely to work in situations where the accused and the complainant had only just met. A more

[14] One of these men was subsequently acquitted after his appeal resulted in a retrial [Trial 19].

established social contact tended to complicate how juries might interpret the motivations and expectations underlying the competing stories that were being told of rape versus free agreement to sex. Defence barristers put special emphasis on the conduct prior to the rape and argued that women's (heavy) drinking and socialising immediately reduced the level of culpability attributable to the men. Regardless of the woman's account of the rape experience, there was enough reasonable doubt created in the minds of jurors about any intention a man might have with respect to committing rape.[15]

The processing of these cases in many ways highlights the greatest limitation to the current study. The reality remains that 'jury verdicts – in either acquitting the defendant or in finding him guilty and thereby certifying an act of rape – contribute to the ongoing process of defining what society considers to be rape' (LaFree et al., 1985: 393). Therefore we are really no closer to understanding how juries arrive at their decisions, how they interpret and apply key concepts such as consent and honest belief in consent into their fact-finding role or indeed whether these figured at all within the processes of their deliberations.[16]

As I have previously suggested (Edwards and Heenan, 1994), jurors are being asked to function as key agents in a process of social change in situations where the meaning of their own life experiences, perspectives and interests as men and women in sexual or familial contexts must inevitably exert an influence (Smart, 1989). As Kelly (1988) and Gavey (1990) have suggested, the meaning of consent or voluntariness in sexual relationships under patriarchal cultural conditions is unlikely to ever be realistic for women because most will have experienced situations that have seriously undermined their sense of power, control, or capacity to define meaningful and mutually pleasurable sexual interactions from their point of view.[17]

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[15] Lees' (1996) rape trial research also revealed how alcohol is used to diminish mens' culpability for the seriousness of sexual acts that are performed upon women who are heavily intoxicated. At the same time, the Victorian Secondary School study, conducted by Lindsay et al., reported that over a third of young women surveyed in Year 10 and over a quarter of young women in Year 12 disclosed having had unwanted sex in circumstances where they were too drunk or 'high' at the time (1997: 79).

[16] The County Court frustrated my attempts to conduct an empirically reliable study of jurors that could better our understanding of jury decision-making in this area (See Chapter 3).

[17] Consider the recent Melbourne survey conducted with young women about their experiences and perceptions of violence in the context of attending licensed premises (CASA House, 2000). The principal concern for 70% of survey participants was being physically touched against their will at a

These same cultural conditions suggest that men are also likely to perceive their role in sexual encounters as taking-for-granted certain unspoken "signs" of consent and/or where it is perfectly reasonable to coerce or "encourage" acquiescence and quell any overt sign of sexual rejection. As suggested by one male defence barrister in a trial involving allegations of long-term sexual and physical violence: 'On matters of sexual conduct, it's not as if people fill out a questionnaire... there's a lot that's assumed in a relationship, in sexual relationships...there's a lot about consent that's assumed' [Trial 31].

In the confines of the courtroom, and under the pressure of deciding whether the prosecution have proved the charges of rape beyond reasonable doubt, juries are likely to struggle with the ambiguities that predominantly feature in the defence representations of non-stranger rape scenarios, and to find that such cases fall outside the familiar cultural lens through which they feel confident of separating rape from most women's (and men's) normative experience of sex. These are at present intractable difficulties and they have clearly not been resolved by legislating a communication standard of consent.

Some of the anecdotal information obtained from jurors implied that other non-legal or evidentiary factors occupied the minds of some jury members. In one trial, the jury were reluctant to convict the accused unless they could be sure of other evidentiary factors that seemed to be extraneous to the issues in dispute [Trial 21].[18] In another trial, the forewoman disclosed to the police informant that most of the jury had determined the guilt of the accused after hearing the woman-complainant's

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nightclub (CASA House, 2000: 27). For one woman, sexual harassment or assault at these venues had become par for the course: 'Leering, unwanted touching, groping...it occurs so often that you just get used to it...you just deal with it' (CASA House, 2000: 28).

[18] The foreman suggested to the police informant that some members of the jury had been concerned about how the accused had been able to access the complainant's house to plant a voice-activated tape recorder or whether she had given him a key to the house. This was despite the accused admitting that he had planted the tape-recorder because he suspected she had been lying to him [Trial 21].

evidence and that they had paid little attention to the judge's direction[19] (although they felt the closing addresses were well presented) [Trial 10].[20]

Some inconsistency appeared in the outcomes of other trials where juries were prepared to convict the accused of injury-related offences, but remained in doubt about the veracity of the rape allegations [Trials 5, 21 & 24]. While injuries have always increased the likelihood of women being believed, the juries in these cases seemed unable to rule out the possibility of the women freely agreeing to sex in the context of physical force that either immediately preceded or occurred soon after the sexual contact.

These findings confirm some of the insights gained from an earlier Indianapolis study on actual jurors in rape trials (LaFree, Reskin & Visher, 1985; Reskin & Visher, 1986). The researchers found that in cases where there was little other evidence to support the allegations, jurors were generally swayed by extralegal factors, or 'by their own values and reactions' to the impressions they had formed about the women-complainants and the offenders, or about the circumstances of the case (Reskin & Visher, 1986: 436). Puren (1999) might also argue the influence of non-legal discourses in these cases where, in the absence of physical evidence, juries returned to the stories that accorded with the dominant ideology surrounding social and sexual relationships between men and women. Like the plots of mainstream tele-drama, jurors appeared to speculate about disgruntled ex-lovers, about young women that "partied" (while their children were at home), about the motives individuals might have for lying or embellishing, and about the image of rape versus regretful episodes of sex, romance or desire.

However, the wider range of rapes that have appeared during the 1990s may have meant that some jurors are beginning to appreciate the greater complexities

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[19] A study conducted by Kramer & Koenig indicated that judge's instructions were 'often lost on jurors' (1990: 429). The authors found low levels of comprehension amongst jurors with respect to applying the term "beyond reasonable doubt" as well misunderstanding the use they could make of circumstantial evidence (Kramer & Koenig, 1990: 415 & 418).

[20] Interestingly, the jury in this trial also decided to conduct a "re-enactment" of the rape scene after one member of the jury (a woman) was undecided about whether penetration had actually occurred. According to the forewoman, the remaining jurors assured her that men's sexual arousal is difficult to quell after being stimulated.

associated with rape situations, especially in the context of date rape or where there is little more than a casual prior acquaintanceship between the woman-complainant and the accused. The outcomes in trials where women freely conceded there had been some sexual intimacy with the offender immediately prior to the alleged rape [Trials 1 & 33] illustrate this. Here, despite the credibilities of the women involved being heavily challenged, and despite equally plausible or at least culturally acceptable accounts being offered by the accused, jurors were unwilling to endorse the defence interpretation of events. The jury in Trial 1 convicted the accused of rape against a backdrop of marijuana use and extensive sexual contact between the woman-complainant and the accused within hours of them having just met. The jury in Trial 33 was unable to agree to acquit an accused (hung jury) despite the complainant's version of events being contradicted by a medical practitioner and her best friend, and despite the fact that the incident occurred after she had agreed to go with the accused to a bedroom and engage in some kissing and touching.[21]

There were also convictions for rape in cases where there was a familial relationship between the complainant and the offender [Trials 6 & 12].[22] The conviction in Trial 6 was particularly unexpected given that there was no corroboration and a two year delay in reporting the incident to police. It is perhaps significant that the judge in this case refused to deliver a *Longman* warning (and this was not appealed).

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[21] It is important to consider the increasing numbers of women who are disclosing rape after having had their drinks spiked (Russo, 2000; CASA House, 2000). The use of Rohypnol in rendering women unconscious in order to rape is becoming more widely publicised (see for examples: 'A Question of Consent', *"Sunday Magazine", The Sunday Age Newspaper*, 1998: 19; 'Slip, Sip, Shock: The New Date Rape Drug', *Cosmopolitan Magazine*, August 2000: 100 – 103). Women raped in these circumstances often have little more than a vague memory of the event. There are no witnesses, no injuries and often no knowledge of the identity of the offender. Even where the victim/survivor can identify her offender, few reports are made, few charges are laid and few prosecutions proceed (CASA House, 2000). It is possible that, as courts become more sympathetic to allegations of rape by young sexually active women (eg, in situations of date rape), young men may see their opportunities to have sex, regardless of the woman's position on consent, increasingly diminished. It is also possible that spiking drinks in social situations provides these men with an alternative, and arguably more reliable, means of having sex with women while remaining virtually free from criminal prosecution.

[22] These cases would previously have been prosecuted under alternative offence categories, such as incest or charges of sexual penetration of a child under 16 years, where consent does not feature as an element of the definition of the offence.

3. Thinking Ahead – Some Practical Directions

In many ways these findings clearly demonstrate the discursive process of change that Naffine perceptively anticipated would occur as a result of Victoria's legal reforms on rape:

> ...what we are seeing is...a constant struggle over meaning in which there is a widening of definition of the unacceptable and then the assimilation (or partial collapse) of those new definitions into the old – and then the assertion of further new meanings...This in turn will generate further feminist challenge and resistance and the struggle over meaning will continue – and thus meanings will be changed (1994: 103).

Changes to the definition and meaning of consent and other evidentiary rules, coupled with the gradual although discursive introduction of discourses that challenge conventional approaches, such as those inspired through feminism, is illustrative of this process.

In a more pragmatic sense, however, some of this change may be assisted by the implementation of further reform. In particular, reformists' attentions could refocus on the issue of the *mens rea* requirement. It was clear that in at least two of the trials where the accused's belief in consent was an issue [Trials 14, 25], jurors struggled to come to terms with how this element should be applied to the case.[23] Judges were then obliged to repeat their directions that an accused cannot be convicted of rape if he is found to have held an honest, even if unreasonable, belief in the woman's consent. In other situations, men successfully denied their culpability in precisely those situations where evidence of women "saying and doing nothing" to indicate their free agreement to sex should have been enough to sustain a conviction [Trials 14, 19[24] & 29].

Gans (1997) is confident that empirical studies seriously underestimate the extent to which the accused's honest belief in consent is likely to figure in rape cases. Callinan's (1984) experience of sitting on a jury more than a decade earlier confirms

[23] See Chapter 6, pp. 273 & 278.

this potential. She suggested that the jury's reluctance to convict stemmed from jurors becoming preoccupied with the issue of the accused's guilty mind despite neither the defence nor prosecution focussing on the issue (Callinan, 1984).

For MacKinnon (1987), Vandervort (1987/8) and Pineau (1989), it is the *mens rea* issue that most epitomises the wrong in rape law for women and that most reflects the nature of heterosexual relations in our society. According to these writers, rape and its regulation in law continues to reflect the power relationships that mark our sexual identities and experiences where 'faith has been kept with a simple, reductive and orthodox view of sexual relations between the sexes' (Naffine, 1992: 10). This dominant view reflects a model of coercive sexuality that venerates men's sexual prowess, ingenuity and assertiveness while portraying women as the ever-consenting, often passive or receptive, objects of male sexual desire.

To introduce an alternative story of sexual relations in rape law that promotes more overt communication between men and women will inevitably prove futile in the face of retaining a subjective test for assessing the accused man's guilty mind. The 'erasure of women's subjectivity' (Naffine, 1992: 33) occurs exactly at the point at which their "saying and doing nothing" to indicate free agreement becomes a secondary, and therefore, irrelevant consideration to a man's claims that his (the dominant form of) sexuality provided the cultural (and legal) basis upon which he reasonably misapprehended, mistook or ignored her silence. Victoria's provisions on consent, to this extent, failed to establish a model of sexuality that genuinely provided women with full statutory support for their sexual self-determination.

A more radical position was taken by the Canadian legislature in 1992 when the *mens rea* requirement was modified.[25] An accused can now argue an honest but mistaken belief in consent only when he took "reasonable steps to ascertain whether the complainant was consenting". This amendment, according to Bronitt, genuinely 'reinforces the positive consent standard' (1994: 249) that shifts the prevailing

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[24] The accused was convicted at the trial I observed but subsequently acquitted after a retrial where evidence excluded from the first trial in relation to the woman-complainant's prior sexual history was admitted.

[25] See section 273.2 of the Canadian *Criminal Code*.

definition of sexuality away from the traditional form.[26] It would certainly make it more difficult for men to argue (as they did in some of the trials I observed) that adequate steps had been taken to establish the free agreement of a woman who was asleep, drunk, or unresponsive to their approach.

According to Rush and Young, one conclusion to draw from the failure so far to meaningfully alter the legal consideration of consent is that the reformist agendas have been set within too limited confines, rather than that it is futile ever to seek to reform sexual offence law 'from within law' itself (1997: 101). They suggest that reformists have often remained so preoccupied with redesigning definitions of consent, or with displacing it with new categories of violent assault, that other definitional models for sexual offences have been left unexplored.

This 'failure of legal imagination' prompted Rush and Young to traverse existing legal concepts and structures 'from within law' in considering the possibility of an alternative definition of rape (1997: 100 – 101). Their starting point takes seriously the importance of effectively communicating the 'ethical standards of law' not only to the public, but more importantly to 'the legal profession' whose moral standards and obligations through the practice of law have frequently been marked as questionable, particularly in the context of sexual offences (Rush & Young, 1997:102).

In brief, their proposal is to imagine the law of rape as a 'result crime' where the *consequences* of the crime form the basis of the offence, rather than the *circumstances* under which it occurs (Rush & Young, 1997: 108). In traditional rape law, the act of sexual penetration, in the absence of consent, is what makes the circumstances of the act criminal (along with the associated guilty intention or *mens rea*). The new frame would locate the consequences of the accused's conduct, that is the trauma experienced by the victim, as central to the legal determination of guilt (Rush & Young, 1997: 108-109).

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[26] Bronitt (1994) notes that while some other states in Australia have minimised the role of *mens rea* in rape cases, the defence of "honest belief in consent" is still available.

The unlawful consequence would be found in a person who voluntarily engages in sexual penetration that intentionally or recklessly *causes* serious injury[27] to another person (Rush & Young, 1997: 106). The prosecution would still be required to prove the accused held a guilty intention to cause serious injury to the woman-complainant, but consent could not be raised as a defence. Nor is consent a definitional element of the crime. The only point at which consent could legitimately arise during a trial is where the defence claim it is '*evidentially* relevant to the physical element of [the] definition' (Rush & Young, 1997: 110; their emphasis).

This conceptual reframing of the fault element (causing serious injury) and the positioning of rape as "a crime of consequence" would, according to Rush and Young, significantly reduce the evidentiary potential of the trial focusing on the complainant's credit or character:

> ...having limited the operational ambit of consent claims to the actus reus, the rules regulating the use of evidence in sex trials (together with the judicial directions to jury [sic.] as to the law and as to the facts) will have greater purchase in controlling the unacceptable stereotypes or prejudices that may be held by the legal profession or by members of the jury (Rush & Young, 1997: 111).

While the defence could still argue that no serious injury was caused to the complainant through engaging in sexual penetration because she was consenting, the onus for deflecting an inquiry based on causation falls more immediately on the accused, and in particular, on *his* conduct and on *his* state of mind.[28]

Posing considerably more difficulty for the authors' claims to have displaced consent as a definitional element of the crime of rape, and lessened its evidential value, is where an accused argues that he failed to hold the requisite intention to commit the crime of rape. In other words, an accused could argue, as was the case for some of the trials observed,

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[27] The authors acknowledge that the law would be required to 'set a standard which clearly sends a message that the injuries caused to victims of sexual crimes are of a different *quality* to the harms caused in assaults' (Rush & Young, 1997: 107). Here the emotional and psychological "consequence" of the crime is distinguished.

[28] The authors refer here to the law's conceptualisation of causation being focused on the accused's actions, not on the beliefs or perceptions of the victim/survivor (1997: 111).

that he did not intend to cause, nor was he reckless in causing, serious injury to the complainant for he honestly but mistakenly believed she had consented.

While such a defence might immediately stand as an admission of guilt regarding the consequence of having *caused serious injury*, it seems highly unlikely that the complainant's behaviour and credibility would not then become central in the accused's bid to suggest there were culturally acceptable grounds upon which his honest belief and his conduct were based. Hence, while the extent to which women would suffer the traditional challenges to their conduct and integrity when giving evidence would be substantially reduced, there seems little doubt that similar discourses would emerge in assessing the degree of culpability that accused men would be held to account for during sentencing.

Moreover, the authors remain silent on how the *consequences* of the unlawful behaviour of causing serious injury would be assessed. Clearly, Rush and Young start from the knowledge of the deleterious impact of sexual assault on women's emotional, social, familial, and financial lives. The authors are also aware of the limited options available to complainants to have the effects of the assaults legally considered or even explained during criminal proceedings. So how would the law of rape be administered? Would charges be laid, and prosecutions be initiated, on every occasion that a woman reports having been raped on the basis that rape itself causes injury? What would constitute a serious injury, and how would a victim/survivor demonstrate suffering serious injury? How would the law deal with victim/survivors whose memories of sexual assault had been repressed or where the injuries were exacerbated through having been silenced by fears related to disclosure?

While there is clearly potential in both the Canadian and the Rush & Young model for shifting or further challenging the legal treatment of rape, and even the social conception of sexual relationships more generally, the findings from this study are powerful reminders of how easily feminist reformist interventions are subverted in the context of rape laws and procedures. Scutt's words, although two decades on, perceptively captures this inexorable dilemma:

> One of the problems faced by feminists trying to use the system to bolster our view of reality is the ever-present danger of the system co-opting ideas, turning them about, and coughing them out under a spurious banner (1980b: 11).

Like Smart (1995), I remain angry at how deeply entrenched and culturally malleable the discursive construction of the "Woman" of the rape trial remains. While the reforms have contested the more straightforward processes through which women have been dehumanised and discounted, they have mostly failed to compete or disrupt the prevailing cultural meanings, practices and discourses, both legal and non-legal that mark the bounds through which traditional stories of rape continue to hold ground.

As Heath and Naffine (1994) caution, however, we cannot simply abandon women to the men who rape and to a state that remains indifferent to the violence perpetrated against us. We must find ways to force law in all its dimensions to be responsive to women. We need a range of creative alternatives that, in different ways, undermine, modify, redirect, reshape, if not thoroughly eclipse, the cultural understanding, expectation, and acceptance of rape, and the frameworks of meaning that continue to favour the male perspective. There is not likely to be just one solution to this. It remains our task to conceive of these alternatives, to resist law's limitations, and to imagine into existence a vision of justice that values the words of women in all our dimensions. There is solace in knowing that the struggle to imagine this world is one that many feminists, regardless of their theoretical stripes, continue to believe is still possible.

APPENDIX 1

Reporting and Prosecuting Rape Offences Under the Victorian Criminal Justice System

The following section provides a brief sketch of the steps involved in both reporting and prosecuting offences of rape and other sexual assaults. How these more formal processes and procedures are often applied in practice is also the subject of some brief commentary.

1. Reporting Sexual Assault to Police

The Police Response to Reporting Recent Sexual Assault

The procedures that guide the police response to reports of sexual assault are contained in the Victoria Police Code of Practice For Sexual Assault Cases (1999). According to the Code of Practice (1999), in cases of recent sexual assault the first police members to respond are uniformed members. The Sexual Offence and Child Abuse Unit (SOCAU)[1] are then notified to take the victim to a hospital where a counsellor is called to provide crisis care support and advocacy.

The Code lists the priorities for police members in responding to reports of sexual assault as focussing on the medical and emotional needs of the victim. Police members are told that:

- every police member should be sensitive and supportive to the victim;
- the victim must be taken to a Centre Against Sexual Assault (CASA) or Hospital Crisis Care Unit within two hours of the report being made for counselling support and medical attention; and
- the victim should be given as much control over the process as possible so that they can make informed decisions about how they would like to proceed.

The Code of Practice should be applied regardless of when the assault occurs. Although immediate medical care may not be required for women reporting past

sexual assault, police members are still obliged to refer victim/survivors to the closest CASA as soon as possible for counselling support and information regarding their legal rights.

In cases of recent sexual assault, the Code states that a SOCUA member of the same sex as the victim should be responsible for taking the statement. S/he is also encouraged to allow the victim/survivor to detail the assault in her own words while reassuring her that 'it is the offender who has committed the crime' (Code of Practice, 1999, guideline 59, pg. 13). Police members are asked to keep victims informed about the progress of the investigation and to notify them of any charges laid. A decision not to lay charges must be related to the victim verbally and if requested in writing. If the victim/survivor is not satisfied with the outcome of the investigation, they may request the Director of the Office of Public Prosecutions to review the decision.[2]

According to an evaluation of the Code of Practice (of which I was co-author), police compliance with the guidelines varied (Heenan & Ross, 1994). Overall, the evaluation showed a significant improvement in police practices for dealing with reports of sexual assault. When the Code was followed victim/survivors received a professional and co-ordinated response in addressing their emotional and medical needs and a number of women-victims spoke positively about their treatment by police, particularly CPS (now SOCAU) members. Non-compliance with the guidelines however included: significant delays in bringing the victim to the crisis-care unit (Heenan & Ross, 1994: 47-48); a failure to notify CASAs to organise the attendance of on-call counsellors; and, poor treatment by some police members who were perceived by victims to be unsympathetic and disbelieving of them (Heenan & Ross, 1994: 71, 77-78).

The evaluation further revealed how police knowledge and perceptions of the Code also dictated the way in which it was applied in practice (Heenan and Ross, 1994: 53-54). A number of police objected to the emphasis on victim welfare over and

[1] SOCAU members formerly worked within Community Policing Squads (CPS) of Victoria Police.

above investigative requirements. Other police were simply uninformed about what was contained in the Code – they had yet to receive any training with respect to its core requirements.

Since the time of the evaluation, Victoria Police have reprinted the Code and it has been widely distributed across the Force. Training for new SOCAU members with respect to the Code's guidelines occurs annually. While the attitudes and conduct of some police members may still impact negatively on victims of sexual assault, the Centres Against Sexual Assault indicate broad compliance with the Code across police ranks. This is especially the case for SOCAU members who appear to have developed a much greater understanding and sensitivity towards victim/survivors of both recent and past sexual assault.[3]

Preparing the Brief of Evidence

If an offender is identified and charged as a result of the investigation, the detective in charge of the investigation (the "informant") will prepare a brief of evidence. The brief includes all of the statements that were taken from witnesses, doctors and forensic experts, and the interview with the accused. It may also contain photographs that are considered relevant for the prosecution such as: the area where the assault occurred; physical injuries that may have been sustained by the victim; and any photos taken of the accused.

The likelihood of the investigation resulting in a brief of evidence will depend on several factors, some related to the particular circumstances of the case, others related to the attitudes and personalities of those investigating the offence. The informant must submit the brief to a senior police member for authorisation before it can be sent to the Office of Public Prosecutions (OPP). The authorising member is primarily concerned with whether the case is likely to result in a conviction. The

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[2] The Office of Public Prosecutions does not have the authority to overturn a police decision; if upon review of the case they believe it has a reasonable chance of conviction, they can only "recommend" that charges be laid.

[3] Personal communication with Yvonne Pilatowitz, Program and Research Co-ordinator, CASA House, Melbourne 2001. This also accords with my own experience of working as a counsellor on the After Hours Sexual Assault Telephone Crisis Line. The After Hours Crisis Line service is affiliated with the Victorian Centres Against Sexual Assault. In addition to providing crisis telephone

outcome of this process will depend on the informant's impressions of the complainant, the type of evidence available to support or corroborate the complainant's version of events, and the plausibility of the alleged offender's account of events.

If a person is charged, he is likely to receive bail. Very few accused are remanded in custody pending the commencement of any court proceedings[4], although there may be specified bail conditions that prevent the accused having any contact with witnesses for the prosecution.

2. The Prosecution[5]

After a brief is authorised, it is sent to the Office of Public Prosecutions (OPP) where a solicitor is assigned the responsibility for preparing the case. If the case is to proceed to a committal hearing or a trial, the solicitor will brief a barrister to appear at the proceedings. The solicitor then works alongside the barrister in prosecuting the case before the courts.

The accused will generally be required to obtain legal representation. A solicitor will be retained to advocate on his behalf throughout the proceedings. This solicitor will also brief a barrister to represent his interests in court. Should the accused not have the resources to obtain a solicitor, he may apply for Legal Aid, and a solicitor will be appointed to the case. If the accused does not receive legal aid, he will be required to defend himself. Although this rarely occurs, it is possible that a victim might face being cross-examined by her alleged offender.

Prior to any court proceedings, contact between the solicitor or the barrister acting on behalf of the accused and the OPP is common. It may be to clarify the accused's

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counselling, the service is responsible for co-ordinating state-wide crisis care for victims of recent sexual assault.

[4] According to section 4 of the *Bail Act 1977*, any person charged with an offence shall be granted bail pending the outcome of court proceedings unless particular circumstances exist, for example in the case of a person charged with murder or drug trafficking offences. Bail may also be refused if the court is satisfied that the person is likely to abscond, to commit a further offence whilst on bail, or might interfere with witnesses in the case.

[5] The information presented throughout the remainder of this Appendix has been adapted from "Who's On Trial?", a Legal Education and Training Kit published by CASA House (1998). I was one of three authors of the Kit .

position with respect to his willingness to plead to certain alleged offences or it may be that the defence is applying to have the prosecution discontinued (a *nolle prosequi*).

Ultimately, the OPP are responsible for making decisions that impact on the nature of the prosecution. For example, they may choose to accept a plea offer made by the defence; they could decide to reduce the number of charges on the presentment; or they may decide to enter a *nolle prosequi*. The OPP's policy is nevertheless to consult with victim/survivors before any final decision is made. In practice, however, prosecutorial considerations take precedence over the victim's personal wishes regarding the outcome of the case.

The solicitor and prosecutor do not function as the victim's legal representatives. They officially represent the interests of the Crown or the State. The victim's status is therefore the same as that of any other witness in the case. In practice, the victim remains a key witness for the prosecution and is usually the first person to give evidence in court.

Procedurally, over the past five years, the Victorian Office of Public Prosecutions has made significant attempts to improve its response to victim/survivors of sexual assault. Increasingly more aware of the particular stresses and trauma victim/survivors are likely to face in giving their evidence, the OPP have adopted the policy of arranging pre-hearing meetings between the OPP solicitor, the prosecutor and the victim a week before any court proceedings are scheduled to go ahead (Heenan & McKelvie, 1997).[6] These meetings are designed in part to assist women to feel more at ease with the process and provide them with at least some information about what is likely to occur in court. It is also an opportunity for the solicitor and prosecutor to clarify any aspects of the victim/survivor's statement that appears unclear or ambiguous.[7]

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[6] In regional and more isolated areas, pre-hearing meetings are more haphazard given most of the OPP solicitors and prosecutors are Melbourne-based. In these circumstances, it is not uncommon for the victim to meet the OPP solicitor and the prosecutor on the day of the proceedings.

[7] In recent years, victim/survivors have also spoken more positively about their contact with the OPP and prosecutors. Compare the findings from the Real Rape Law Coalition Phone-In (1991: 41) and the Law Reform Commission's research (LRCVb, 1991: 126-127) with Heenan & McKelvie, 1997: 262-267).

3. The Committal Hearing

The first stage of the court process in prosecuting a rape offence involves a preliminary hearing at the Magistrate's Court. The aim of the hearing is for the magistrate to determine whether there is sufficient evidence for a jury to consider the allegations in a higher court.

The brief of evidence is given to the magistrate and used as the basis for the hearing. This is known as a hand up brief procedure and means that the victim and other relevant witnesses may not be required to give evidence in person. More often than not, however, the defence request that certain witnesses be available to give evidence during the proceedings.

Adult women-complainants are almost always called to give oral evidence at a committal hearing. Although legislation allows for victims of sexual offences to give evidence via alternative means (such as closed circuit television, or screens blocking the view of the accused in the courtroom) she is unlikely to be allowed the use of these arrangements unless she is under 18 years or has an intellectual disability (Heenan and McKelvie, 1997: 56-59). She is more likely have a support person present in court while she gives her evidence (Heenan & McKelvie, 1997: 60).

The hearing is closed to the public so that only the magistrate and relevant court and legal personnel are likely to be present in the court while the woman-complainant gives her evidence. There is no jury at this hearing.

Committal hearings can result in one of three outcomes. Firstly, the accused can be committed to stand trial in front of a judge and jury at the County Court. This is by far the most common outcome of a committal hearing involving rape offences. Secondly, the magistrate may decide that there is insufficient evidence to sustain a conviction and the charges are dismissed.[8] Thirdly, the accused may indicate a

[8] Only a very small proportion of committal hearings result in the matter being discharged by the magistrate. Recent research indicates that only around 2% of accused prosecuted for rape will be discharged at the committal stage (Heenan and McKelvie, 1997: 48).

preparedness to plead guilty to the offences, and will be committed for sentencing at the County Court.[9]

The prosecution of sexual offences are given priority within the criminal justice system by providing that a committal hearing must take place within three months of the accused being charged.[10] However, the OPP solicitor and/or the defence often successfully apply for an extension to the three month time limit due to the lack of availability of witnesses, or where the case is not yet ready to proceed.

4. Entering a *"Nolle Prosequi"* or Discontinuing the Prosecution

Where the OPP consider that the case is unlikely to result in a conviction, even after an accused has been committed to stand trial by a magistrate, they are entitled to discontinue the prosecution by entering a *nolle prosequi*. A *nolle prosequi* is often considered after the defence make a specific request for the case to be dropped, although in some cases the OPP may independently decide to discontinue the prosecution. Applications for a *nolle prosequi* must be referred to senior prosecutors for a final decision although the views of the OPP solicitor, the informant and the victim will generally be sought.

The Victorian Evaluation Study reported a total of 29 *nolle prosequi* applications were considered by the OPP during the 18 month period of research (Heenan & McKelvie, 1997: 164). Just over half of these applications were successful (51.7%), representing around 5% of all accused charged with a rape offence (Heenan and McKelvie, 1997: 164). In five of the seven cases where a *nolle prosequi* was initiated by the prosecution, the victim/survivor had requested that the matter not proceed (Heenan & McKelvie, 1997: 167-8).

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[9] The Victorian Evaluation Study found that 21% of accused men charged with rape over the 18 month period of the research pleaded guilty to one or more rape offences (Heenan and McKelvie, 1997: 48). This was consistent with findings from the earlier Law Reform Commission study that showed 22.5% of accused charged with a rape offence during 1988 and 1989 pleaded guilty (LRCVb, 1991: 39).

[10] Schedule 5, clause 15(8)(a) *Magistrates' Court Act 1989 (Vic.)*.

If a *nolle prosequi* is entered in the face of the victim's willingness to proceed to trial, she can formally write to the Director of Public Prosecutions requesting a review of the decision.

5. Plea bargaining

In some cases, negotiations may take place between the defence and prosecution to reduce the number of charges or the nature of the offences. This may occur in order to secure a guilty plea from the accused or it may be done in order to simplify the issues that the jury will have to consider at trial.

Although there is no official policy on plea bargaining within the OPP, it is not uncommon for some agreement to be reached in relation to the final set of charges upon which the accused will face trial. If such negotiations are taking place, the OPP claim to take the victim's views into consideration. However, the final decision ultimately rests with the OPP.

6. Trial Proceedings

Where an accused has been committed to stand trial, the case will proceed to the County Court before a judge and jury. A jury of 12 members will then determine whether the prosecution have proved their case against the accused beyond reasonable doubt.

The following outline provides an overview of the main features of the trial process:

Legal Argument

Prior to the proceedings commencing, counsel may require formal rulings from the judge with respect to the admissibility of certain features of the evidence. Legal argument often takes place in this context where the prosecution and defence barristers make submissions to the judge about why certain evidence ought to be admitted or struck out. For example, a defence barrister may apply to have the accused's record-of-interview (ROI) with police excluded from evidence on the basis that the interview was not conducted fairly or appropriately, or that the police verbally or physically coerced the accused into making certain admissions. The

prosecutor might oppose the application and argue that no such harassment occurred. The judge would then determine the admissibility of the ROI and provide a formal ruling.[11]

Where the defence plan to question the woman-complainant in relation to her prior sexual history, the law requires a formal application to be made under section 37A of the *Evidence Act 1958* to determine the admissibility of the evidence. Prior to 1997[12], this application would have been made on the day the proceedings were scheduled to commence and prior to the jury being empanelled. The judge would then decide whether to exercise his/her discretion for allowing the admission of sexual history evidence under the exceptions of the section and make a ruling accordingly. By contrast, the prosecutor may make an application for the victim to use one of the alternative arrangements for giving her evidence. If the defence barrister opposed the application, a legal debate would ensue about whether the arrangements ought to be used.

There may be occasions when a *voir dire* is held to assist the judge to determine the relevance or admissibility of certain evidence. A voir dire is like a "mini trial" that is held in the absence of the jury. Witnesses may be called on the *voir dire* to assist the judge in determining the admissibility of certain evidence.

Although most of the legal argument occurs at this preliminary stage of the trial, there may be other issues which emerge during the trial that require the judge to make specific rulings. These discussions are always held in the absence of the jury.

Jury Selection

When the trial is ready to commence, a jury pool of approximately 30 people will be assembled in the courtroom. The process of empanelling the jury then takes place. This involves jurors' names being randomly selected from the pool and then proceeding to the jury box without first being challenged. The only information that

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[11] The level of pre-trial argument may have been reduced by the increased use of direction hearings. These hearings take place before the trial gets underway and is designed to lessen the time spent on legal argument once the trial is underway.

[12] New legislation introduced by Section 9 of the *Crimes (Amendment) Act 1997* (Vic.) requires the defence to make a written application 14 days prior to the trial commencing.

is available to the court with respect to prospective jurors is their name, occupation, and physical appearance.[13]

The defence and the prosecution each have the right to six peremptory challenges.[14] This means they are not required to provide any reason for choosing to exclude certain jurors over others. As each prospective juror makes his or her way to the jury box, the defence advises the accused of the jurors he ought to challenge. The defence may challenge a prospective juror because of their gender, their racial appearance, their occupation or perhaps because they look unsympathetic to the accused. By contrast, the prosecution rarely challenge a prospective juror unless he/she is recorded as having a criminal conviction.

After twelve jurors are seated it the jury box, they are required to swear an oath to return a verdict in accordance with the evidence they hear and observe throughout the trial.

The Crown Case

Opening Address

The case for the prosecution is presented first. The prosecutor gives an opening address to the jury which provides an overview of the evidence that will be presented in support of the charges. Some prosecutors also advise the jury of the law relating to sexual offences, including the definition of consent. Jurors are also often told of the high standard of proof required by the criminal law before an accused can be found guilty of an offence and are reminded that the onus of proof always rests with the prosecution.

The prosecution witnesses will then be called consecutively. The first witness in the trial is almost always the woman-complainant.

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[13] The prosecution are also made aware of those jurors who have previously been convicted of a criminal offence.

The Evidence of the Victim

The prosecutor will ask the complainant to recount her version of what occurred during her evidence-in-chief. This involves guiding her through the details of the event as contained in her statement as well as any additional information that was provided at the committal hearing. The complainant must recount the rape in significant detail including the mechanics of any penetration (e.g. 'he pushed the full length of his penis inside my mouth'; 'he put two fingers in my vagina up to his second knuckle'). The prosecutor has a relatively minor role in adducing the evidence-in-chief other than to ensure the complainant exhausts her memory of the events.

She will then be cross-examined by the defence barrister. Generally, the purpose of the cross-examination is to challenge or "test" the victim's account of events. In most cases, the defence will suggest that the victim is lying or mistaken about what really happened. Her actions and behaviour around the time of the offence will be subjected to close scrutiny in an effort to discredit or distort her version of events.

The prosecutor will then re-examine the victim. This further questioning is restricted to clarifying or revising particular points raised during cross-examination.

After the victim's evidence has been concluded she is excused from further attendance at the trial although she may decide to observe the remainder of the proceedings.

Alternative Arrangements For Giving Evidence

The prosecutor may apply for the victim to give her evidence using alternative arrangements.[15] This includes: the use of closed circuit television; screens that block the line of vision between the witness box and the accused; support people standing or sitting beside the victim while she gives her evidence; requiring barristers to be seated or to appear without wigs and robes; or ordering the exclusion of members of the public from the proceedings.

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[14] In trials where there is more than one accused, each is entitled to six peremptory challenges. For example, where there are two accused the defence are entitled to arbitrarily challenge 12 jurors.
[15] Section 37C of the *Evidence Act 1958 (Vic.)*.

The legislation states that alternative arrangements can be used by in sexual offence proceedings and by victims of offences involving other serious personal violence. In practice, prosecutors rarely apply for adult women to use the alternative arrangements for giving their evidence. This is especially so in terms of the use of closed circuit television which they perceive will lessen the emotional impression the complainant is likely to leave on the jury if she is present in court to give her evidence (Heenan and McKelvie, 1997).

Where any of the alternative arrangements are used at trial, the judge is required to warn the jury that they cannot draw any adverse inference towards the accused, or give the victim's evidence any greater or lesser weight because the arrangements were used.

Other Witnesses

After the victim has finished giving her evidence, other witnesses may be required to testify on behalf of the prosecution. For example, a forensic medical officer or doctor may be called to give their findings obtained from any medical examination that was conducted. The witness to whom the victim first disclosed the assault may also be called to give evidence.

The final witness for the prosecution case is usually the informant. The evidence of the police ROI with the accused is admitted at this point and the audio-tapes of the interview are played to the court.

The Defence Case

After the prosecution have closed their case, the judge will call upon the defence barrister (usually in the absence of the jury) whether they intend to call any evidence. There are two options open to an accused person at this stage of the trial. Under the current system of law, the accused can nominate to stand mute and not give evidence, in which case the court is prevented from making any comment to the jury about the accused's decision not to testify. Alternatively, he can decide to give sworn evidence and be cross-examined like other witnesses.

The defence may also call other witnesses in support of the defence case[16] although more often than not, it is simply the accused that gives evidence.

Closing Addresses

At the close of the defence case, each barrister provides a closing address to the jury that takes the form of an uninterrupted narrative of events selectively relying on evidence that tends to support their respective cases. The jury are directed to consider the closing addresses as arguments or comments that they may take into account when reviewing the evidence, rather than as evidence in and of themselves.

The prosecutor addresses the jury first. This will often include a brief outline of the relevant legislation as well as to remind the jury that the onus is on the Crown to prove the case beyond reasonable doubt. Similarly, the defence often begin their address by reminding the jury of the basic principles underlying the adjudication of criminal justice. The "presumption of innocence" is often reiterated as the panacea of a democratic legal system where a high standard of proof operates to protect the community from frivolous or unsubstantiated allegations.

The remainder of the closing addresses are generally devoted to constructing a legal story about the evidence where the jury are encouraged to apply a prosecution or defence spin to their interpretations and evaluations of the witness's evidence.

Judge's Direction

At the conclusion of the closing addresses, the judge will direct the jury regarding the relevant law they must apply to the counts or charges alleged against the accused. The judge will direct the jury of the elements of each offence that must be proved by the prosecution beyond reasonable doubt.

A summary of the evidence is then provided. The detail provided in the summary may depend on the length of the trial, the complexity of the issues in the case and the usual practices adopted by individual judges. The jury will then be asked to retire and consider their verdict.

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[16] This may include witnesses who provide evidence of the "good character" of the accused.

Exceptions

Each barrister has the opportunity to take exception or object to particular aspects of the judge's charge. This may result in the judge redirecting the jury on certain aspects of the law or the evidence. This is a relatively common occurrence. Juries are regularly brought back into court soon after they have commenced their deliberations and told that there are matters which the judge neglected to mention in her/his charge or that there is an amendment that needs to be made to a particular direction.

Verdict

The jury are initially told that their verdict in relation to each count must be unanimous. If, however, their deliberations extend over some considerable time (longer than approximately six hours), the judge has a discretion to accept a majority verdict of eleven to one on each count.

When a verdict has been reached the jury foreperson is required to announce whether the jury found the accused guilty or not guilty of each count.[17]

Plea in Mitigation

Where the accused is convicted or pleads guilty to an offence, the defence will offer a plea in mitigation on his behalf. The plea involves the defence barrister providing a synopsis of the offender's background, including where he was born, the nature of his childhood, his personal relationships, his education and employment history and any prior convictions that have been recorded against him. In some cases, the offender may have been referred to a psychiatrist or psychologist for assessment. These reports are given to the judge and form part of the information that must be considered in sentencing.

Character witnesses can only be called by the defence.

[17] According to the Victorian Evaluation Study, the trial conviction rate for rape had decreased. Heenan & McKelvie reported an 8.3% drop in trial convictions (1997: 47) when compared with the original DPP Study (LRCVb, 1991: 94). The rate of acquittal had correspondingly increased in the trials examined in the more recent study by Heenan & McKelvie, from 11.7% in the original study (LRCV, 1991b: 40) to 19.6% (1997: 47).

Sentencing

The maximum penalty for rape is 25 years imprisonment.[18] When deciding on an appropriate sentence for an offender, judges must have regard to a range of sentencing principles. These include: a just punishment, specific deterrence, general deterrence, protecting the community from the offender, and establishing the court's condemnation and intolerance for the offender's behaviour in committing the offences.[19]

In determining an appropriate sentence, judges are also obliged to consider what the established sentencing range for rape offences has been.[20] For example, the accepted range for rape offences may be between four and six years imprisonment. Sentences given outside of this range may be the subject of appeal.

The judge may also have regard to a victim impact statement.[21] A victim impact statement allows the victim/survivor to describe the impact of the offence within certain limited parameters including the effects of physical injuries, financial loss, emotional trauma and property damage or loss. Although these statements are generally handed to the judge in written form at the sentencing stage, the defence are entitled to request that the victim attend court and is cross-examined on the content of the statement.[22]

7. Appeal Process

Where an accused is found guilty, he may lodge an application with the Court of Criminal Appeal against his conviction and/or sentence. The grounds for an appeal against conviction may be related to an aspect of the judge's charge or concern any

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[18] According to the Higher Criminal Court Sentencing Statistics reports published between 1990 and 1995, the average imprisonment penalty for rape was 54.9 months or approximately 4½ years. However, these figures are based on the maximum rather than the minimum terms that most offenders actually serve. On the basis of the cases examined for the Victorian Evaluation Study, the authors concluded that realistically 'most rape offenders receive about a fifth of the maximum penalty, and serve a minimum of around two to three years in prison' (Heenan & McKelvie, 1997: 248).
[19] These principles are contained in Part 2, Section 5 of the *Sentencing Act 1991*.
[20] Judges must also consider whether the convictions result in the offender being classified as a 'serious sexual offender'. The *Sentencing (Amendment) Act 1997* allows for cumulative sentencing where an offender has previously been convicted and sentenced of at least two sexual offences.
[21] The *Sentencing (Victim Impact Statement) Act 1994* was introduced in Victoria in 1994.
[22] An overview of some of the concerns related to the introduction of victim impact statements in Victoria appears in McCarthy (1994).

of the formal rulings made with respect to the admission of evidence throughout the trial.

It is not uncommon for a notice of appeal against conviction and /or sentence to be lodged following a conviction for rape.[23]

While the Office of Public Prosecutions cannot appeal against an acquittal, they may lodge an application of appeal against a sentence they believe to be "manifestly inadequate".

The applications for appeal are dealt with by three Supreme Court Justices.

[23] Among the 34 trials observed, appeals were lodged in a total of nine cases (26.5%), five of which proved successful. Two resulted in the accused being retried (Trials 19 & 22), two resulted in the offenders' sentences being reduced (Trials 4 & 26), while the conviction against the accused in the last trial was quashed (Trial 30).

APPENDIX 2

1. Demographics and Other Information About the Trials Observed

The first part of this section deals with the 34 trials observed for the current research including information in relation to the accused, the women-complainants and the offences. The second compares these trials with the findings of earlier studies. In particular, the data-base developed for the Victorian Evaluation Study is used to compare whether the smaller number of trials observed for the current study was broadly representative of the kinds of trials processed during the early 1990s.

1.1 The trials observed

A total of 34 trials were examined and partially observed during the study period, with the evidence of the complainant being wholly observed in 17 trials. Joint trials were held in three cases where co-offenders were involved resulting in a total of 37 accused and 34 complainants.

Thirty-six of the accused had initially been charged with at least one rape offence following a police investigation and one other accused was charged with assault with intent to rape and recklessly causing injury.[1] Each of these 37 accused were subsequently committed to stand trial in the County Court of Victoria for rape offences.[2]

Five of the 37 accused were to be the subject of more than one trial. In two cases (Trials 18 & 32) these subsequent trials related to charges of a non-sexual nature and were independent of the circumstances related to the trial observed. The remaining three accused (Trials 26, 28 & 30) were to be tried for rape and/or sexual assaults

[1] This trial was included in the current study given the principal charge related to a rape offence.
[2] See Appendix 1 that describes the process for prosecuting criminal offences from charging through to the trial stage.

allegedly perpetrated against other women. At the commencement of each of these matters, the judge had ruled that separate trials would be held.[3]

1.2 Background demographics of women-complainants and the accused

All of the complainants who gave evidence at trials in the current study were women and each of the accused being tried for rape were men reflecting the monotonously gendered reality of this crime.

Just under half of the accused (48.6%) were aged between 30 and 50 years, while a further 43.2% were aged in their late teens or twenties at the time of being charged with rape offences.

Forty-one per cent of complainants were aged between 16 and 25 years. The eldest woman represented in the study sample was 51 years of age. There were three complainants aged 15 or below and one aged nine at the time the assaults first began. The alleged perpetrator in this last case was the young woman's step-father.

Just under a third (30%) of women-complainants aged 18 or above were in paid employment at the time of the offence and approximately half of the accused were also in paid employment.

Fifty-four per cent of the accused men appeared to be Anglo-Australian.[4] The cultural background of the remainder of accused men included those who identified as: Serbian, Croatian, African, Austrian, Spanish, Chinese, Greek and Maori. One of the accused men in the current study was an Aboriginal Australian.

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[3] In January 1998, the *Crimes (Amendment) Act 1997* removed the presumption in law that prosecutions involving accused who were alleged to have committed sexual offences against more than one victim would always be separated (see section 372 *Crimes Act 1958*). It is likely that had the three trials in the current study been conducted post this legislative change, the charges may well have been heard together.

[4] Arbitrarily ascribing cultural background to individuals is obviously problematic. This information should therefore be treated with caution given that case file material and police records cannot substitute for how people may interpret their own cultural identity.

Women from non-Anglo origins were significantly, but unsurprisingly, under-represented in the trial sample (Young & Wallace, 1994). Only two women were from non-English speaking backgrounds, and were assisted by interpreters during the trial. These women were Vietnamese and Romanian. Two other young women appeared to culturally identify with their parent's country of origin which were Poland and Croatia.

Two of the 34 cases in the trial study included women who identified as Aboriginal. This compares with only one case identified through the 242 case files examined for the Victorian Evaluation Study and the offender pleaded guilty (Heenan & McKelvie, 1997: 29).[5] In contrast, Aboriginal complainants were over-represented amongst the cases in New South Wales study when compared with the overall population figures with 11% of women in their research being identified as indigenous Australians (Department For Women, 1996: 97).

1.3 Age of offences

Most of the accused represented in the study were on trial for relatively recent offences that occurred during the early to mid 1990s. The "oldest" offences were alleged to have occurred in 1976 when the complainant was 13 years old. One other trial involved ongoing sexual assaults that were alleged to have been perpetrated from the time the complainant was nine years old through to when she turned 20. A third trial involved a set of co-offenders who were being tried for offences that occurred in 1987 when the complainant was 16 years old.

1.4 Location of offences

Most offences occurred in the home: 20.6% in the woman's, 20.6% in the accused's, 8.8% in the home of both the woman and the accused and 11.8% in another private home.[6]

[5] This woman was one of sixteen women raped by a Melbourne serial rapist during the early 1990's.
[6] Including one trial where the woman was alleged to have been raped in a caravan owned by the perpetrator and his wife.

Other more private settings included four incidents that were alleged to have occurred in the accused's professional rooms or workplace and two other incidents that took place in hotel rooms.

Offences alleged to have been perpetrated in more public areas included remote parkland, bush/beachland, a residential parking area, school toilets and an industrial vacant block (total 14.7%).

1.5 Relationship between the accused and the woman-complainant

The type of relationship most commonly represented amongst the trials observed was where the woman complainant knew the accused in some way (94.1%). However, unlike the most recent Victorian research in the area, for over a third of cases (35.3%) the level of knowledge or acquaintanceship appeared relatively slight, with women either having only just met the accused that day/night (n=7) or having become acquainted with him just prior to the alleged offences being committed (n=5).[7]

The relationship with the accused and two other women was also relatively distant, although it appeared as if they may have been in the accused's company on several occasions. In one of these cases, the accused was the husband of a close friend whom the complainant often visited and stayed with overnight. The other accused was known to the woman as being a reliable source for supplying prescription drugs.

In five trials (14.7%), the accused was either the former or current spouse or de facto of the woman-complainant. Although on its own this figure appears relatively small, it may in fact mean that trials involving inter-spousal rapes are slightly over-represented in the current study when compared with nine such trials represented among those examined for the Victorian Evaluation Study (9.8%). It may also be a further indication of an increased preparedness on behalf of women to report and the OPP to prosecute rapes by former or current partners.[8]

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[7] Only 16.3% of the complainants in the Victoria Evaluation Study trial sample had met the accused on the day or night of the offences.

[8] Since the spousal immunity for rape was lifted in Victoria in 1985, few prosecutions had been initiated. The LRCV reported just three prosecutions in their study of 1989 cases (1991b: 65).

There were three trials (8.8%) involving rapes offences that were alleged to have been committed by family members. In one case the accused was the step-father of the complainant and was alleged to have perpetrated multiple offences against her throughout her childhood and teenaged years. Another case involved a cousin of the complainant who often stayed weekends at her family home. The third trial related to alleged offences that were committed by the complainant's uncle. There was also a fourth matter where the trial involved an accused who was the de facto partner of the complainant's mother. However they had never lived as a family in the same home nor did the complainant ever identify or describe her relationship with the accused as being in any way familial.

In four of the 34 trials, the accused were in positions of authority or power over the complainant (11.8%). In two cases, the women were clients of the accused, in another case an employee, and in the fourth case the accused held a senior position in the defence forces.

Only two of the accused (5.4%) amongst the trial sample were completely unknown to the complainants prior to the offences. However, these incidents were not akin to the spontaneous and immediate attacks often associated with stranger-rapes. Both of these incidents involved some prior conversation or some limited time spent with the accused that was initially perceived by the woman as non-threatening.

1.6 Disclosure time following the assaults

Just over 70% of women disclosed the incident(s) within 24 hours while two other women told somebody what had happened within the week following the assault. Only two of the cases represented amongst the trials observed (5.9%) involved disclosures of more than one year where the women involved ultimately chose to confide in a close friend.

Heenan & McKelvie reported a significant increase, however, with 26 of some 280complainants having been the former or current spouse/de fact of the accused (1997: 36).

These findings roughly correspond with the timing of reports to police. A number of the incidents (52.9%) were reported within 24 hours of the assault or within the following week (total of 61.7%).

Delays of six months or more were noted in seven of the trials, three of which did not come to police attention for more than 5 years after the offences were alleged to have occurred.

1.7 Physical injuries

Over two thirds of the women complainants were medically examined either by a Forensic Medical Officer (58.9%) or by a private medical practitioner (11.8%) following the assault.

Few of the women received physical injuries as a result of the assault with four complainants requiring medical treatment while a further three were hospitalised. Two of the women who were hospitalised had significant lacerations to their vagina.[9]

The small number of cases involving additional physical injuries is consistent with other recent rape trial research indicating a greater preparedness on behalf of prosecuting officers to proceed with trials that would traditionally have been considered "weaker" cases (see Reskin & Visher, 1986). The fact that judges are required to direct juries that an absence of physical injuries does not equate with consent may have also contributed to the apparent shift in prosecutorial practices in this regard (Heenan & McKelvie, 1997: 305).

1.8 Line of defence provided to police

Over two thirds of accused (67.6%) denied committing the offences when interviewed by the police. Eight other accused (21.6%) refused to answer any questions by indicating that they had "no comment" to make about the substance of the allegations.

[9] One of these women required surgery. Her injury was described as being consistent with recent childbirth in appearance.

Consistent with the other recent rape trial studies, one of the most common defences put forward by an accused during the police interview is one of consent: either that the complainant consented, that he believed she had consented, or that at least some consensual sexual activity had taken place (37.8% in total).

Equally relied upon amongst the accused in the current study was a denial that anything sexual had occurred with the complainant (27%). Although this defence appears at a proportionally higher rate here than it does in other studies, it is consistent with a greater likelihood in more recent years of accused availing themselves of this defence at trial. The Victorian Evaluation Study suggested that this may be a reflection of an increase in the number of reports being made against family members and other relatives where a defence of consent would be untenable where the victim is his niece, step/daughter, grand-daughter, or cousin (Heenan & McKelvie, 1997: 46).

Four of the accused (10.8%) pleaded not guilty at trial after having made at least some admissions during their record of interview with police. Ironically, the admissions often involved the accused men conceding that they had behaved in a manner consistent, at least in part, with what had been alleged by the woman-complainant. Two of these accused were co-offenders charged with the rape of a young girl in her early teens. Initially, they both denied having had contact with her but then changed their stories to suggest that they had spent a short time with the young woman and her friend before dropping them off near their home. They subsequently made partial admissions of having been with the complainant, that she had become drunk and that some sexual activity had occurred. They nonetheless maintained to the police (and during the trial) that she had consented to sexual activity with both of them, despite admitting that she had been drunk, had vomited in their car, and that they had abandoned her in some vacant parkland.

Partial admissions were made by a third accused when he denied penetrating the complainant, but claimed to have exposed his penis upon her request. He also said that he *might* have rubbed his penis up against her. Ultimately, however, he had suggested that it was the complainant, a 13 year old girl, and her friend who had been sexually provocative and suggestive. Despite these damaging admissions, the

accused maintained his innocence regarding the rape allegations and proceeded to trial.

The final accused made full admissions to the police that he had penetrated the complainant without her consent. At the trial, he pleaded not guilty claiming that at the time of the incident, he had honestly believed that she was consenting to intercourse with him. The complainant had been asleep at the time of penetration and after becoming aware of the accused screamed and pushed him away.

1.9 Trial Outcomes

Fifteen of the 37 accused (40.5%) were found guilty of at least one rape offence while 17 were acquitted of all charges (45.9%). These figures are slightly higher on both counts than the Evaluation trial sample. Just over 34% of the 96 accused were acquitted of all offences as compared with 38.5% of guilty verdicts being entered in relation to the remaining cases.

Three other accused in the current study were acquitted of rape but found guilty of a non-sexual assault (8.1%). In another trial, the accused was found not guilty of rape but guilty of an indecent assault (2.7%). In the final trial, the jury were unable to reach a decision and a *nolle prosequi* was subsequently entered by the OPP.

1.10 *Nolle Prosequi*: Prosecutions that were Discontinued

In 11 of the 34 cases, the defence requested the OPP to consider withdrawing the prosecution. Each of these applications were refused by the Director of the OPP.[10]

There was, however, a *nolle prosequi* entered in relation to three of the trials observed. In two cases, the jury had initially been unable to agree on a verdict resulting in the ordering of retrials. By coincidence, both women had been reluctant to proceed at the outset after experiencing a fairly gruelling cross-examination at the committal hearing. They had also spoken to the OPP solicitors about concerns,

[10] Once a request for a *nolle prosequi* is made, a senior prosecutor as well as the solicitor to the Director of the OPP reviews the case. The final decision regarding the future of the case rests with the Director of the OPP.

including their sense that the jury would be unlikely to convict as well as the damaging impact the whole process was having on their lives.

One of these women subsequently faced cross-examination twice after the first trial was aborted during the third day of evidence. Following a retrial the jury acquitted the accused of one count of digital rape, and failed to reach a verdict in relation to the charge of attempted rape. The OPP were keen to prosecute the accused in relation to this outstanding charge, however the complainant indicated that she just wanted 'to get on with her life, and put the whole case behind her'.[11]

The second trial involved a young woman who had been extremely unwilling to go through the trial process to the extent that the OPP solicitor had been unsure whether she would testify. The case file contained several notes from the complainant requesting that the case be withdrawn. She indicated that she was experiencing severe depression and had become suicidal. Nevertheless, the OPP were reluctant to discontinue the case. After the trial resulted in a hung jury[12], the complainant became adamant that she would not give evidence at a retrial. The OPP finally agreed to support the complainant's request to withdraw the case and the prosecution was discontinued.

A third *nolle prosequi* was entered in a case where the accused had been charged with two sets of offences involving the same complainant.[13] After he was acquitted by the jury of the rape offences, both the complainant and the OPP were reluctant to proceed with the remaining charges and a *nolle prosequi* was subsequently entered.[14]

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[11] This was communicated to me by the OPP solicitor involved in the case.

[12] After 13 hours of deliberation, the jury said they could not decide on a verdict and were discharged. There was some confusion following this case. Some of the jurors believed that a verdict had been reached in relation to one count. The jury were returned to court and the Forewoman announced that she had been confused and that they had reached a verdict in relation to one count. The judge was however unable to accept a verdict given that the jury had already officially been discharged.

[13] This accused had been tried and convicted of another sexual offence in relation to a 10 year old girl. He was sentenced to 12 months imprisonment.

[14] The initial charges related to indecent assaults that were alleged to have occurred in the mid 1980s followed by a second set of offences were said to have occurred ten years later (the subject of the rape trial). Following a defence application to separate the charges, two separate trials were ordered relating to the two sets of offences.

2. Comparability with the Victorian Evaluation Study: Revisiting the Trial Sample

The terms of reference for the Victorian Evaluation Study were broadly concerned with the processing of rape prosecutions through the criminal justice system. These included cases where the accused pleaded guilty, where the prosecution was discontinued, or where the accused pleaded not guilty and went to trial before a judge and jury. The reporting on case demographics that appears in the Heenan & McKelvie report (1997) relates to all 242 cases where a rape prosecution was initiated.

This section therefore relies on a separate data-base that was specially developed for the current study using the original data obtained for the Victorian Evaluation Study. The original data-base was used to distinguish the demographic information for the complainants and the accused who appeared in cases that went to trial only. This allowed for some useful comparisons to be drawn between the larger rape trial sample used as part of the Victorian Evaluation Study and the 74 trials observed for the current study, particularly in terms of assessing whether the current cases were similar to those prosecuted during the early 1990s.

The new data-base (hereafter referred to as the Victorian Evaluation Study trials) relies on a total of 90 trials involving 96 accused and 92 complainants. It should be noted that these figures are slightly at odds with those reported in the published report (Heenan and McKelvie, 1997: 192). This is largely due to the greater importance being given in the current study to the qualitative information contained in the original coding booklets. Booklets that only contained quantitative information due to the unavailability of trial transcripts, or for some other reason did not include information relevant to important trial features such as the complainant's cross-examination, were excluded from the current analysis.[15]

[15] Two trials where the accused was ultimately tried for sexual penetration charges as opposed to rape offences were also excluded from the current study.

2.1 Gender of Women-Complainants and the Accused

The gender distribution for accused and complainants represented amongst the Victorian Evaluation trials was slightly different to the current study. Six of the complainants were male (6.5%) and one of the accused (1%) was a woman who was tried for aiding and abetting her de facto husband to rape and sexually assault her two daughters.

2.2 Age of Women-Complainants and the Accused

The ages of accused represented amongst the Victorian Evaluation Study trial sample were very similar to the current study with 45.3% being aged between 30 and 50 years, while just over a third (36.8%) were aged in their late teens or twenties at the time of offences were alleged to have been committed.

Over half of the women complainants were aged between 16 and 25 years (52.2%), although there were slightly more complainants who fell under the lower age categories with 17.8% being 15 years or younger.

2.3 Cultural Background

Given the larger study sample there was a greater range of both complainants (12.8%) and accused (25.3%) whose country of origin was other than that of Australia.

2.4 Aboriginality

Four of the accused tried during the time of the Victorian Evaluation Study were identified as indigenous Australian as compared with just one accused in the current study.

2.5 Employment

Significantly more complainants aged 18 years and over were in paid employment at the time of the offence (46.4%) as compared with the current study (30%), although the employment status for men accused of rape remained constant with around half being in paid employment at the time of both studies.

2.6 Age of the offences

Most of the trials occurred proximate to when the offences took place, the majority of allegations relating to incidents committed during the late 1980s or early 1990s. There were a small number of trials where the offences were said to have occurred some years prior to the trial being held, the oldest relating to offences that were alleged to have occurred in 1977.

2.7 Disclosure time following the assaults

Similar to the current study, most complainants represented in the Victorian Evaluation trial sample reported to police within a relatively short time with two thirds (66.3%) of reports being made within two days of the assault.

Conversely, there 11 complainants (12%) who did not report until at least a year after the rape occurred[16], with two of these women not reporting for more than five years. We noted amongst the Victorian Evaluation Study's findings the extent to which these figures represented an increased willingness on behalf of the Office of Public Prosecutions to proceed with cases where there had been a lengthy delay in reporting (Heenan & McKelvie, 1997: 42).

2.8 Location of offences

Most of the offences took place in the home of either the accused (22.8%), the complainant (20.6%), their joint home (12%) or some other private home (9.8%). Only around 16% of offences were alleged to have occurred in public settings such as in bush or parkland, or in a street or vacant land area.

Five complainants alleged they had been raped at their workplace (5.4%).

2.9 Relationship between the accused and the woman-complainant

Very few accused (7.6%) were completely unknown to the complainant prior to the assault, with most being either acquaintances or friends (41.3%).

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[16] Four of these complainants gave evidence at a single trial in relation to the same accused man. The rapes occurred without their knowledge after having been drugged and photographed by the accused man. The police charged the accused after making the various women aware of the photographs depicting the accused man having sex with them while they were unconscious.

Almost 20% of accused were the current or former partners or boyfriends of the complainant, three of whom had been living with the alleged offender at the time of the offences. Just over 16% of complainants were related to the alleged perpetrator in some way, six of whom involved father or step-father familial ties.

3. Victorian Evaluation Study Trials: City versus Country Cases

Media interest in the findings from the Victorian Evaluation Study led to the public reporting of higher acquittal rates in some regional areas as compared with trials held in Melbourne.[17] The evaluation team were supplied with figures generated from trials held in Wangaratta, Geelong and Bendigo which showed significantly higher acquittal rates for rape trials over a 10 year period when compared with the overall state figure.

While 10 of the 34 trials observed in the current study took place in regional Victoria[18], the larger sample provided by the Victorian Evaluation Study offers a more reliable indication of whether there is any marked differences in the kinds of rape prosecutions tried in city versus country courts.

3.1 Country/Circuit Trials

There were 28 trials included in the Victorian Evaluation Study trial sample that were heard in country regions representing 28 complainants and 30 accused. There were two trials involving two accused who were tried jointly for alleged offences committed against a single complainant, and a de facto couple who were the subject of two trials arising from allegations made by two complainants.[19]

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[17] A public forum was held in Wangaratta following the release of the figures which was attended by representatives from community groups, legal professionals and interested members from the local area.

[18] A brief examination of the trials observed for the current study revealed that accused who were tried in the city were slightly *more likely* to be acquitted (n=12 or 48%) than those who appeared in regional trials (n=5 or 41.7%). There were also no marked differences in the demographics of complainants and accused that appeared in country versus city cases.

[19] Although the offences occurred in a familial context, the judge ordered separate trials be held in terms of dealing with the charges relating to each complainant.

Alternatively, there were 62 trials held in the Melbourne County Court during the evaluation study involving 64 complainants and 66 accused. Joint trials were held on two occasions involving two accused, with one other trial involving an incident where four accused were the subject of rape charges against a single complainant. One other trial involved allegations from four complainants in relation to separate offences perpetrated by the same accused over a three year period.

3.2 Demographic Differences For Women-Complainants and the Accused

There appeared to be few demographic differences when comparing complainants and accused involved in circuit and city trials. The demographics relevant to complainants giving evidence in the country broadly matched those living in the city in terms of gender and age. Complainants in the country were more likely to be married or in a de facto relationships but less likely to be in paid employment as compared with those in city cases.

The timing of reports to police were also fairly analogous, although complainants in the country were slightly more likely to delay their initial disclosures. The degree of injuries sustained by complainants was also similar across the two sets of trials.

Undoubtedly, the most significant difference between the city and rural cases concerned the relationships between the complainants and accused. Nine out of the 28 complainants (32.2%) in the country were the child/step-child or relative of the accused, as compared with only 6 out of the 64 complainants (9.4%) in city cases. This finding is of particular note given that one of the factors said to impact on trial outcome is whether the relationship between complainant and accused is familial (Heenan & McKelvie, 1997: 236)

3.3 Trial Outcome

In line with the higher proportion of acquittals reported in the Evaluation Study, the likelihood of an accused being convicted of rape in the country is lower than for trials heard in the city.

Table 8
Trial Outcome For Melbourne versus Regional County Courts[20]

Trial Outcome	Melbourne County Court		Regional County Courts	
	N	%	N	%
Convicted of a rape offence	29	43.9	8	26.7
Convicted of other sexual offence (non-rape)	8	12.1	2	6.7
Convicted non-sexual offence only	3	4.5	2	6.7
Acquitted of all offences	19	28.8	14	46.7
Other	7	10.6	4	13.3
TOTAL	66	100	30	100[21]

Accused who were tried in the country were almost 18% more likely to be acquitted by juries than those tried at the Melbourne County Court. While there has been broad speculation about the conservatism or "small town" mentality of jurors in country areas, this seems overly simplistic. It is likely that a range of factors are operating at any one time to produce the marked differences in trial outcome, including whether the accused is well known within the community, whether the charges relate to intra-familial offences as well as the degree of information that is available to communities in relation to understanding sexual assault. In metropolitan areas, sexual assault now forms a regular part of the issues addressed at secondary schools and colleges, is often included in workplace training and is commonly discussed in the media. The extent to which communities in rural areas have the same exposure to these same kinds of discourses would be a useful direction for further study.

[20] The figures reported here are based on the number of accused prosecuted in both city and country trials.
[21] Percentages have been rounded to the nearest decimal point.

Appendix 3 – Key Features of the Trials Observed

City Trials – Melbourne
Regional/Country Trials – Victoria

× No application for appeal Lodged

Trial No.	Status of Corroboration Warning	Status of Sexual History Evidence Admitted	Principal Line of Defence	Relationship	Trial Outcome	Status of Appeal
1	Diluted version – Jury directed to look for evidence that supports the complainant.	Successful applications by both barristers to admit evidence of prior sexual history with the accused.	Consent	Met on day	Convicted	×
2	Strong corroboration warning – 'dangerous to convict'.	Successful defence application related to an allegation of previous sexual assault by her former husband.	Consent	Short prior acquaintance-ship	Acquitted	×
3	Diluted version – Jury directed to scrutinise the complainant's evidence with great care but can act upon it if satisfied of its truth.	Breaches by both barristers: • Re. a recent termination by former boyfriend (PB) • Re. previous allegations of sexual assault (DB)	Consent	Met on night	Acquitted	×
4	★ No corroboration warning or cautionary statements made.	Unsure of whether application made. Evidence admitted re. status of sexual relationship between the accused and the complainant.	Consent	Estranged spouse	Convicted	Successful - sentence reduced.

Trial No.	Status of Corroboration Warning	Status of Sexual History Evidence Admitted	Principal Line of Defence	Relationship	Trial Outcome	Status of Appeal
5	Diluted version – Jury directed to look for evidence that supported the complainant.	Unsure whether application made. Extensive questioning about the frequency of sexual relations between the complainant & the accused prior to the offences.	Admitted contact, denied rape. Offered no alternative scenario.	Estranged spouse	Convicted Non-Sexual Offence only	Not successful against conviction or/sentence.
6	★ No corroboration warning despite a defence request being made by the defence for a corroboration warning to be given.	Two successful defence applications: • Evidence admitted of prior sexual assaults by other family members • Allegations of previous instances of consensual sexual contact between the complainant & the accused were detailed. Subsequent defence application to question about other allegations of sexual assault against another male was disallowed.	Consent	Cousin	Convicted	×
7	N/A Jury invited to return verdict following the close of the prosecution case.	Successful application by defence barrister to admit evidence of the prior sexual relationship between the complainant & the accused. Prosecutor also elicited this evidence without application.	Consent	Former de facto	Acquitted	×

Trial No.	Status of Corroboration Warning	Status of Sexual History Evidence Admitted	Principal Line of Defence	Relationship	Trial Outcome	Status of Appeal
8	Diluted version – Jury directed that there was no independent evidence to support her case, 'her word against his'.	★ No applications made/ No sexual history evidence admitted.	Admitted contact, denied any sexual activity	Met on night	Convicted	×
9	Strong corroboration warning – Jury told not to convict on the uncorroborated evidence of the complainant unless satisfied beyond reasonable doubt of its truth.	Successful applications made by both barristers to admit evidence of prior sexual activity with the accused, as well as sexual status of relationship with current partner.	Consent	Ex-boyfriend	Convicted	×
10	Strong corroboration warning – Jury told of the dangers of convicting, but can convict if, after scrutinising her evidence with great care, they are satisfied of its truth.	Defence given 'some limited leave' to ask the complainant about her sexual experience at the age of 13 when the offences were alleged to have occurred.	Consent (but no 'sexual penetration')	Met on day	Convicted	Not successful against conviction/sentence
11	No corroboration warning given. Judge spontaneously announced that a Longman warning would be 'unnecessary'.	★ No applications made/ No sexual history evidence admitted.	Admitted contact, denied any sexual activity	Second order acquaintance (husband of friend)	Acquitted	×
12	Diluted version – Jury directed to carefully scrutinise the complainant's evidence but entitled to act upon it if satisfied of its truth and accuracy.	Successful applications by both barristers. Defence questioned the complainant extensively about her sexual past with other men and previous allegations of sexual assault by other family members. Also prosecution allowed to illicit evidence of the ongoing nature of the sexual abuse experienced by the complainant.	Denied sexual activity	Step-father	Convicted	Not successful against conviction

Trial No.	Status of Corroboration Warning	Status of Sexual History Evidence Admitted	Principal Line of Defence	Relationship	Trial Outcome	Status of Appeal
13	Strong corroboration warning – dangerous to convict but can convict if satisfied of truth of complainant's evidence.	Successful applications by one of the defence barristers to cross-examine complainant re an alleged sexual relationship with the accused. Subsequent defence applications involving alleged sexual activity with another male was disallowed.	Two offenders: A Consent B Denied contact	A Friend B Second order acquaintance	Both Acquitted	✕
14	Diluted version - Jury directed to carefully scrutinise the complainant's evidence but entitled to act upon it if satisfied of its truth and accuracy. Also added that corroborative evidence would be unlikely given the case circumstances.	★ No applications made/ No sexual history evidence admitted.	Mixed consent/belief in consent	Employer	Acquitted	✕
15	★ No corroboration warning or cautionary statements made.	Defence application to admit evidence of the complainant's occupation as a sex worker to provide another explanation for pelvic tenderness was disallowed.	Admitted contact, denied any sexual activity	Acquaintance	Convicted	Appeal applic. abandoned
16	★ No corroboration warning or cautionary statements made.	Successful defence applications to cross-examine complainant about her sexual activities with current boyfriend on night of the incident and on the occasion upon which they had first had intercourse.	Belief in consent	Met on night	Convicted	✕

Trial No.	Status of Corroboration Warning	Status of Sexual History Evidence Admitted	Principal Line of Defence	Relationship	Trial Outcome	Status of Appeal
17	Strong corroboration warning – Jury told of the dangers of convicting, but can convict if, after scrutinising her evidence with great care, they are satisfied of its truth. Persuaded to repeat the warning after the defence took exception to its content.	Successful defence applications to cross-examine the complainant about alleged sexual activities with other neighbours.	Consent to some Sexual contact, but denied penetration	Acquaintance (Neighbour)	Acquitted	×
18	★ No corroboration warning or cautionary statements made.	Without application, defence asked the complainant whether she had made an allegation of rape before. (Not coded as a breach)	Admitted contact, denied any sexual activity	Mother's de facto	Convicted	Not Successful against conviction
19	Diluted version – Jury directed to look at the complainant's evidence very carefully before they can safely convict.	Successful applications by both barristers to admit evidence of the complainant having engaged in sexual activity with her former boyfriend (not the accused) hours before the incident occurred. Defence application to question on subsequent sexual activities with another male while the accused was asleep in the same room was disallowed.	Mixed consent/ belief in consent	Second order acquaintance	Convicted	Successful against conviction – Acquitted on retrial
20	A strong corroboration warning was given after being persuaded by the defence to give judicial emphasis to the direction that was originally to be a more diluted version.	Successful defence application to introduce evidence of previous complaint of rape involving multiple offenders. Complainant had previously denied making such a report.	Consent	Met that day	Acquitted	×

Trial No.	Status of Corroboration Warning	Status of Sexual History Evidence Admitted	Principal Line of Defence	Relationship	Trial Outcome	Status of Appeal
21	★ No corroboration warning or cautionary statements made.	Breach by defence barrister in questioning the complainant extensively on past sexual activity with the accused.	Consent	Former partner	Convicted non-sexual assault only	✕
22	★ No corroboration warning or cautionary statements made.	Breach by one defence barrister in attempting to suggest to the complainant that she was sexually promiscuous. Trial judge immediately intervened & sanctioned.	Two offenders: A Consent B Mixed consent/belief in consent	A Met on day B Met on day	Both convicted	Successful against conviction – both convicted on retrial
23	★ No corroboration warning or cautionary statements made.	★ No applications made/ No sexual history evidence admitted.	Consent	Met that night	Acquitted	✕
24	★ No corroboration warning or cautionary statements made. Judge spontaneously announcing that no Longman warning would be given (same judge as for Trial 11)	Successful defence applications to introduce evidence of: • The previous sexual relationship with the accused • A previous allegation of indecent assault by neighbour. A further application to illicit evidence of sexual activities with other men and alleged sex work was refused. A breach later occurred by defence asking complainant about other sexual proclivities.	Denied any sexual contact occurred on this day	De facto	Convict non-sexual assault only	✕

Trial No.	Status of Corroboration Warning	Status of Sexual History Evidence Admitted	Principal Line of Defence	Relationship	Trial Outcome	Status of Appeal
25	★ No corroboration warning or cautionary statements made.	Breach by defence barrister that concerned the complainant's sexual proclivities – other witnesses also asked about this.	Consent	Work colleague in senior position	Acquitted	✕
26	Strong corroboration warning given after initially deciding that no such warning was required. Defence persuaded the trial judge a warning was required.	Defence successfully applied to question the complainant about experiences of childhood sexual assault and alleged sexual difficulties she was allegedly having with her husband.	Admitted contact, denied any sexual activity	Client/Student of the accused	Convicted indecent assault	Successful – sentence reduced
27	Strong(est) corroboration warning given – Jury told it was dangerous to convict on the uncorroborated evidence of the complainant.	• Both defence barristers successfully applied to cross-examine the complainant about alleged sexual contact she'd had with both accused men in the past. • Both defence barristers & the prosecutor breached the section by asking about her sexual relationship with her then boyfriend without permission. • Other evidence admitted through comments made by the accused men to police re. the complainant's sexual reputation.	Two offenders: A Consent B Admitted contact, denied sexual activity	A Acquaintance B Friend	Both Acquitted	✕

Trial No.	Status of Corroboration Warning	Status of Sexual History Evidence Admitted	Principal Line of Defence	Relationship	Trial Outcome	Status of Appeal
28	★ No corroboration warning or cautionary statements made despite defence request. The defence had given the jury a corroboration warning in his closing address.	Breach by defence barrister asking complainant about whether she had ever sought advice from the accused regarding a potential pregnancy.	Admitted limited sexual contact (said this was initiated by the complainant)	Uncle (by marriage)	Acquitted	✕
29	Refused to give a Longman warning. Gave diluted version directing the jury to scrutinise the complainant's evidence very carefully.	★ No applications made/ No sexual history evidence admitted.	Admitted contact, denied sexual activity; or belief in consent	Met on night	Acquitted	✕
30	★ No corroboration warning or cautionary statements made.	★ No applications made/ No sexual history evidence admitted.	Admitted contact, denied sexual activity	Client of the accused	Convicted	Successful against convictionNo retrial
31	Strong corroboration warning – Jury told of the dangers of convicting, but can convict if, after scrutinising her evidence with great care, they are satisfied of its truth.	Successful defence applications to cross-examine the complainant: • About her sexual relationship with the accused • Re. the complainant's alleged general promiscuity. This was allowed after the defence suggested it was the specific motive nominated by the accused to explain the false allegations against him, overriding the provisions of S.37A.	Consent to some, denied some of the activities occurred at all	De facto	Convicted	✕

Trial No.	Status of Corroboration Warning	Status of Sexual History Evidence Admitted	Principal Line of Defence	Relationship	Trial Outcome	Status of Appeal
32	★ No corroboration warning or cautionary statements made despite defence request.	★ No applications made/ No sexual history evidence admitted.	Admitted contact, denied sexual activity	Acquaintance	Convicted	✕
33	★ No corroboration warning or cautionary statements made.	Successful defence application to cross-examine the complainant about whether she was sexually active. Inconsistent statements had been made to the doctor at a hospital on this issue.	Admitted contact, denied any sexual activity	Short-term friendship	Hung Jury Prosecution later discontin-ued	N/A
34	★ No corroboration warning or cautionary statements made. Jury told that complainants in sexual offence proceedings are *not* an unreliable class of witness.	Both barristers successfully applied to explore evidence of alleged prior sexual contact between the complainant and the accused.	Consent	Acquaintance	Acquitted	✕

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