RAPE PROSECUTIONS IN VICTORIA

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IN OCTOBER 1990 THE LAW REFORM COMMISSION OF VICTORIA WAS GIVEN a reference on reform of rape law and procedure by the Victorian Attorney-General (Law Reform Commission 1991). As part of its terms of reference, the Commission was directed to:

- review the Director of Public Prosecution's files on all recent rape prosecutions, being for a period of not less than six months, and in particular report on:
  - the outcome of cases committed for trial (acquittal, convictions, guilty pleas, convictions for other offences, etc.);
  - the frequency and manner in which the issue of consent arose.

This paper summarises the major findings of the Commissioner's research.

Part One: Background

About the data

Two related studies were undertaken specifically for the Commission's reference (see Law Reform Commission 1991, Appendixes 2 & 3). The first was an 'audit' of all rape prosecutions initiated in Victoria in 1988 and 1989, using administrative records maintained by the 'Rape Team' of the Office of the Victorian Director of Public Prosecutions (DPP). This study was designed to identify the main points at which rape prosecutions 'dropped out' of the criminal justice system, and to obtain statistically reliable estimates of conviction and guilty plea rates. Data were collected on 323 accused: 161 of whom were charged in 1988 and 162 who were charged in 1989.

The second, much more detailed study, focused specifically on prosecutions initiated in 1989. A major concern of this study was to identify factors which were related to different prosecution outcomes and, in particular, to determine the frequency with which various legal and evidentiary issues arose in rape trials. Data for this study were obtained from case files held by the DPP. There were 144 accused in
this study—89 per cent of all accused charged with rape offences in 1989. (In eighteen
cases the relevant DPP file could not be located. These were mostly matters which had
been disposed of in the Children's Court, or prior to a committal hearing being held.)

The paper also draws upon the findings of two related research projects conducted in Victoria in 1991:

- a study by the Victorian Community Council Against Violence (CCAV) of
  1473 rapes reported to the Victoria Police in the three financial years 1987 to
  1990 (Victorian Community Council Against Violence 1991);

- a phone-in survey conducted by the Real Rape Law Coalition in April 1991. This
  survey collected data about 267 sexual assaults (predominantly rape or
  attempted rape) from 255 callers (The Real Rape Law Coalition 1991).

Definitions

As used in this paper, the general term 'rape offence' embraces the specific offences of
rape, rape with aggravating circumstances, attempted rape and assault with intent to
rape. Of these various offences the most commonly charged are rape (charged in 42
per cent of cases in 1989) rape with aggravating circumstances (charged in 33 per cent
of cases) and assault with intent to rape (21 per cent of cases).

In the following discussion an accused is classified as 'convicted of rape' if he was
convicted of at least one count of any rape offence. 'Convicted non-rape' applies to any
accused who was acquitted on all rape charges, but convicted of at least one count of
another offence (for example indecent assault, or intentionally causing serious injury).
'Acquitted' means acquitted of all charges. Prosecutions are recorded as 'withdrawn',
'discharged at committal', or 'nolle prosequi entered' only if all charges were dropped.

The prosecution process

Except in rare cases, responsibility for formulating initial charges in criminal cases
lies with the Victoria Police. This is an important, but relatively unstructured, area of
discretion. The Victoria Police Manual states only that a brief should not be
authorised if there 'is insufficient evidence, or a prosecution is not justified' (section
3.8(8)(c)). It does not indicate what evidentiary standard should apply. According to
senior police officers, a 'prima facie' standard is normally used where rape or some
other serious indictable offence is alleged. This test asks: 'is there evidence upon
which a reasonable jury, properly instructed, could be satisfied that all the elements of
the offence have been established beyond reasonable doubt?' However, it is unclear to
what extent this test is applied in practice by individual police officers, or how it is
interpreted in particular instances. There is also no formal mechanism for external or
internal review of police decisions to discontinue an investigation, or to not charge a
suspect. It is open to someone who feels aggrieved by apparent police inaction to
make a written complaint to the Internal Investigations Department of the Victoria
Police, the Deputy Ombudsman or the DPP. However, these avenues of redress are
little known and rarely used.

The Victorian DPP is empowered under the Director of Public Prosecutions Act
1982 (section 10) to issue charging guidelines to the police, but has not yet done so in
relation to any offences. Overall, the DPP has little involvement in police charging
decisions. DPP solicitors will give advice on charges when asked to by the police, but
they usually emphasise to the police that they are not required to follow the advice given.

For most indictable (triable by jury) offences, the DPP does not become actively involved in the prosecution process until after committal proceedings have been completed. However where rape offences are concerned, the DPP assumes responsibility for the prosecution once a person has been charged and a brief of evidence prepared.

Within the DPP, rape prosecutions are primarily handled by a special section known as the 'Rape Team'. Once a brief of evidence is received, this section is responsible for assessing the evidence, making any amendments to charges, and briefing a barrister to appear at a committal hearing. If a defendant is committed to the Melbourne County Court, the Rape Team is then responsible for the preparation of the case for trial or plea. If a defendant is committed to the County Court country sittings, the case is dealt with by the circuit section at the DPP. Any decision to discontinue a prosecution, or accept a plea to a lesser offence, is subject to an extensive internal review process, involving Crown Prosecutors, senior members of the DPP's Office and, in the case of 'nolle prosequi', the director him/herself.

Part Two: Pre-Charge Screening

It is clear that the major filters in the prosecution process are the victim herself and the police. By comparison, as discussed below, only a relatively small proportion of prosecutions 'drop-out' once a decision has been made to charge a suspect.

Victims act as filters in two ways:

- by deciding whether to report the offence to the police in the first place;
- having reported, by then deciding whether they want further action to be taken.

The police act as a filter both directly by making the decision whether charges should be laid and indirectly, by influencing the victim's decision whether to take further action.
**The decision to report**

Only a minority of rapes are ever reported to the police (Temkin 1987). The most reliable Australian data comes from the 1983 *Crime Victims' survey* conducted by the Australian Bureau of Statistics. This study found that of those women aged eighteen years or over who said that they had been sexually assaulted in the previous twelve months, only 26 per cent had reported this to the police. However, this survey did not distinguish rape from other forms of sexual assault. It seems likely that rape victims would be more likely to report than victims of relatively minor indecent assaults, but how much more likely cannot be determined. Another study of interest is the phone-in survey conducted by the Real Rape Coalition in Victoria in April 1991. Of the 139 women aged eighteen years or over who responded to this survey, 39 per cent had reported to the police. Most of these respondents were victims of rape offences. (It is possible that the phone-in methodology may have undercounted non-reporters although by how much is unknown.)

The reasons for non-reporting are complex. They include such factors as the victim's own interpretation of what happened and why, the social context in which the rape occurred, the victim's perceptions of what the law requires to prove rape, and so on. It is significant, however, that in both the ABS survey and the Coalition phone-in, the most common reason given by victims for not reporting was that they considered that the police would not, or could not, do anything about it. Clearly, these perceptions of the police need to be changed if reporting rates are to be increased.

**Screening by the police**

Even if a victim does decide to report a rape to the police, there is only a one in three chance that a prosecution will be initiated. The CCAV study (see above) found that in the three-year period, 1987 to 1990, only 35 per cent of rapes reported to the police resulted in charges being laid. Of course, the police were not always able to locate a suspect, but this does not appear to have been the most important factor, given that only 36 per cent of the reported rapes examined by the CCAV involved strangers.

The CCAV also analysed police crime reports to determine the reasons given by police for not proceeding past the initial report stage. According to this analysis, the most common reason cited by police was that the victim herself did not want to take the matter further. This factor was cited in 60 per cent of cases, whereas 'false reports' or 'insufficient evidence' were cited in 33 per cent of cases. However, it should be noted that this study picked up only cases which 'dropped out' at a very early stage of proceedings. In the majority of cases which did not proceed, the decision not to lay charges was only taken later. Moreover, the 'official' reasons provided by the police must be interpreted with great care. While it is true that some victims genuinely do not want charges to be laid, it is also clear that others are talked out of proceeding by the police. In the Real Rape Coalition phone-in, thirty-five respondents aged eighteen years or over said that they had reported to the police but that their case had not proceeded to court. Of these thirty-five respondents twenty-five (71 per cent) said that the decision not to proceed had been taken by the police, rather than themselves. 'Off the record' remarks of senior police officers confirm this police role. As one officer commented: 'whichever way you want the case to go, you can generally persuade the complainant to go along with you'.

The stated view of the police is that they will only decline to lay charges, or try to dissuade victims from going ahead with court action, if the evidence is weak, or if
they think the victim might not stand up to the strain of a prosecution. However, as noted earlier, the decision as to what is, or is not, 'insufficient evidence' is relatively unstructured and therefore highly discretionary. There is obviously also considerable scope for the beliefs and assumptions of individual officers to influence the advice which they give to victims in particular cases.

**Policy issues**

The Commission's Interim Report (1991) contained a number of recommendations aimed at improving the quality of police charging decisions in sexual assault cases. These included:

- the DPP should use his power under section 10 of the Director of Public Prosecutions Act 1982 to issue detailed guidelines to the police on the laying of charges in sexual assault cases;

- sexual assault victims should have a formally recognised right to have the DPP review any police decision not to lay charges;

- sexual assault victims should be provided, on request, with a written explanation of any decision to discontinue a prosecution or not to lay charges;

- all sexual assault victims should be informed of their right to request written reasons, or to have police charging decisions reviewed.

The *Interim Report* also addressed at some length the more general problem of improving the way in which sexual assault victims are treated by the police and by the criminal justice system generally. (Most of the proposals contained in this report have since been adopted by the Victoria Police and the DPP. As at February 1993, their implementation is being evaluated by the Victorian Bureau of Crime Statistics and Research.)
Part Three: The Prosecution Process

As indicated, the Commission's research was concerned primarily with collecting and analysing data on the outcome of rape prosecutions. The remainder of this paper summarises the main findings of this research.

Rape prosecutions in Victoria, an overview 1988-1989

In brief, the outcomes of the 323 rape prosecutions initiated in Victoria in the calendar years 1988 and 1989 were as follows:

- 137 accused (42 per cent) were convicted in the County Court or Children's Court of at least one rape offence;
- seventy-seven accused (24 per cent) were convicted of some other offence (sexual or non-sexual) in the County Court, Magistrate's Court or Children's Court;
- seventy-seven accused (24 per cent) were not convicted on any charge—this included accused who had been acquitted at a County Court trial or Children's Court hearing; and those who had had all charges withdrawn prior to committal, discharged at committal, or withdrawn following the committal;
- eighteen accused (6 per cent) had their cases returned to the police for re-charging on a non-rape offence';
- ten accused (3 per cent) had absconded; and
- four accused (1 per cent) were still awaiting the completion of proceedings in either the County Court or Children's Court.

Post-charge screening

Once a decision was made to charge a suspect with a rape offence, relatively few prosecutions were screened out prior to plea or trial. Thus in the two years examined, there were only twenty-five cases (8 per cent), in which the DPP dropped all charges. This was done either by withdrawing the charges prior to the completion of the committal (twenty accused), or entering a 'nolle prosequi' subsequent to the committal (five accused). In most cases where rape charges were dropped, there was a prosecution for some other offence. Eighteen were returned to the police for re-charging, eighteen accused pleaded guilty to a lesser offence in the Magistrate's Court, and another nineteen pleading guilty to a non-rape offence in the County Court.

The majority of cases which did not proceed as rape prosecutions were screened out at a relatively early stage, prior to the completion of committal proceedings. Once an accused was committed to stand trial for rape, there was a strong likelihood that he would subsequently be presented for trial on rape charges.

It should be noted that committal hearings were not a significant filter of 'weak' cases. Over the two-year period, only ten accused had all charges against them discharged at the committal hearing, compared to twenty who had all charges withdrawn prior to committal, and five who were granted 'nolle prosequis' by the DPP.
Information on the circumstances under which rape charges were withdrawn, or 'nolle’d', was obtained from the detailed study of 1989 prosecutions. Overall this study showed that prosecutorial discretion was very carefully exercised and that rape prosecutions were generally only discontinued by the DPP if there were good reasons.

**Guilty pleas to lesser offences**

Our research established that 'pleading down' to lesser charges was accepted in only limited circumstances. In 1989, twenty-four accused pleaded guilty to a non-rape offence. The most common plea was to an indecent assault (eleven accused) followed by sexual penetration of a child aged between ten and sixteen (four accused). One accused pleaded guilty to incest and another to sexual penetration of a child under the age ten. The remaining accused pleaded guilty to one or more non-sexual offences, such as intentionally causing injury.

In virtually all cases where a plea to a non-rape offence was accepted, there was an indication in the DPP file that there had been some negotiation over charges between the prosecution and the defence. According to the DPP's guidelines, the complainant should also have been consulted before the plea was accepted (Office of the Director of Public Prosecutions 1988-89).

The willingness of the DPP's office to accept a plea appeared to depend largely on two factors:

**Seriousness of offence** The less serious the initial charge, the greater the willingness of the DPP to accept a plea to a non-rape offence. Only 5 per cent of accused initially charged with rape with aggravating circumstances pleaded guilty to a non-rape offence. By contrast, pleas to a non-rape offence were accepted from 26 per cent of accused initially charged with attempted rape or assault with intent to rape. Relatedly, the DPP was generally unwilling to accept a plea to a non-rape offence if the complainant had suffered physical injuries requiring medical treatment or hospitalisation. The only exception concerned a defendant who pleaded guilty to intentionally causing serious injury after initially being charged with assault with intent to rape with aggravating circumstances.

**Strength of evidence** Pleas to non-rape offences were less likely to be accepted if DPP officers considered that there was a strong case against the accused. For instance, 65 per cent of the accused who pleaded guilty to a non-rape offence, had made no admissions to the police, whereas only 17 per cent of the accused who pleaded guilty to a rape offence had made no admissions. In addition, in a substantial proportion of cases where a plea to a non-rape offence was accepted, there were file entries by DPP personnel indicating significant doubts about the likely quality of the complainant's trial testimony. The reluctance of DPP officers to 'plead down' where there were significant physical injuries may have reflected an assessment that they had a strong case against the accused.
Part Four: Rape Trials

The decision to go to trial

In 1988-89, seventy (33 per cent) of the 210 accused committed to the Victorian County Court on rape charges entered a plea of guilty to one or more of these charges. This was well below the overall County Court guilty plea rate of 79 per cent (Brereton & Willis 1990). The low guilty plea rate for rape is one of the most striking differences between this offence and other serious criminal offences.

The Commission's study of 1989 prosecutions found that by far the best predictor of plea was the initial record of interview. Of the thirty-seven accused in this study who pleaded guilty, 82 per cent had made full admissions to the police. By contrast, only 13 per cent of those who pleaded not guilty had made full admissions.

The fact that admissions were a good predictor of a guilty plea is hardly surprising. An accused who has made a confession to the police has, in most cases, made a subjective acknowledgment of guilt. The other consideration, of course, is that an admission, provided it is legally admissible, is very strong evidence against the accused. In such circumstances, pragmatic considerations dictate that it often makes more sense to enter a plea of guilty and hope for a sentencing 'discount' than to risk being convicted and sentenced at trial.

Explaining why accused choose to make admissions in the first place is less easy. To a large extent, this decision appears to be based on non-quantifiable factors such as the psychological make-up of the accused, his or her own perception of what took place, the skill of interrogating officers, and so on. However, it was apparent that accused were somewhat more likely to make admissions where the complainant was previously unknown to them and/or initial contact with the complainant had been non-voluntary. For instance, in 55 per cent of the cases where the accused made admissions the initial contact was non-voluntary (according to the complainant). This compared to only 23 per cent of the cases in which the accused made no admissions. Likewise, 35 per cent of the accused who made admissions were strangers to the complainant, compared with only 17 per cent of those who made no admissions. Somewhat surprisingly, the willingness of accused to make admissions was not related to the degree of violence involved in the alleged rape.

Clearly, the issue of the low guilty plea rate for rape requires serious attention. Obviously the role of admissions is important, but other issues, such as how accused persons perceive their chances of acquittal, and the extent to which pleas are encouraged or discouraged by the DPP, also require investigation.
Overview of trial outcomes

Summary of outcomes  In the two years 1988-1989, 111 accused were tried by a jury on one or more charges of rape. Another three accused were presented for trial on non-rape charges only, after the DPP had decided to drop all rape charges.

The outcomes for the 111 accused who stood trial on charges of rape are shown in Figure 1.

Nearly half of the accused were convicted of at least one count of a rape offence. Overall, there were 38 acquittals in this two-year period. One of the acquittals was a directed acquittal and one was an acquittal on appeal. The remainder were jury acquittals. It should be noted that there were twenty-three acquittals in 1988, compared to only fifteen in 1989. More data are required to determine if the smaller number of acquittals in 1989 is indicative of a downward trend in acquittals, or simply a random year-to-year fluctuation. However, it is the view of some DPP personnel that there has been a 'real' fall in the acquittal rate in recent years. It should also be noted that twenty accused were acquitted of rape, but found guilty of some other offence.

Figure 1
Trial outcomes, accused charged with rape, Victoria, 1988-1989

Acquittal rates for other offences  The acquittal rate in rape trials is substantially lower than for County Court criminal trials as a whole. In 1989, 45 per cent of all accused whose cases were tried by a County Court jury were acquitted on all charges (Victorian Attorney-General's Department, unpublished). This was well above the acquittal rate of 34 per cent for accused who were tried on rape charges. However, as
noted above, accused charged with rape tend to opt for jury trials much more frequently than those charged with other offences.

Factors affecting trial outcomes

Of the fifty-three accused in the 1989 study who stood trial for rape, fifteen (28 per cent) were acquitted of all charges—in fourteen cases by a jury and in one case on appeal. Convictions on at least one count of a rape offence were obtained against twenty-three accused (43 per cent). The remaining fifteen accused (28 per cent) were acquitted on the rape charges but convicted of some other offence, either of a sexual or non-sexual nature.

Given the small number of cases involved, the inherently variable nature of jury decision-making, high levels of multi-collinearity and the important role which may be played by non-quantifiable factors, it is a futile exercise to attempt to explain all of the variance in rape trial outcomes. However, the data does point towards two particularly important factors: evidence of physical injuries to the complainant and, to a lesser extent, evidence of admissions by the accused.

Figure 2

Evidence of injuries and rape trial outcomes, Victoria, 1989

<table>
<thead>
<tr>
<th>Degree of injury</th>
<th>Acquited (n=11)</th>
<th>Convicted, non-rape offence (n=23)</th>
<th>Convicted, rape offence (n=18)</th>
</tr>
</thead>
<tbody>
<tr>
<td>None (n=11)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Minor (n=23)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Medical treat/hosp. (n=18)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Law Reform Commission of Victoria 1991

Injuries There was only one case in which substantial physical injuries (that is requiring medical treatment or hospitalisation) were inflicted and the accused was
acquitted on all charges (see Figure 2). By contrast, in the eleven cases in which there was no evidence of injuries, there were seven full acquittals.

At the same time, evidence of injuries was not, by itself, always enough to ensure a conviction for rape. Thus, in seven cases where there was evidence of injuries requiring medical treatment or hospitalisation, the accused was acquitted of all rape charges and convicted of a non-rape offence only.

Admissions  As noted above, most accused who made admissions to the police subsequently pleaded guilty to rape. However, there were eleven accused who decided to go to trial despite having made admissions. Presumably they did this in the hope that their confession would be excluded or, if it was admitted, could be explained away. For the most part, such hopes appear to have been misplaced. Of the eleven accused who made partial or full admissions, only one was acquitted on all counts. (The full acquittal arose out of a case in which belief in consent was the dominant issue. In his taped record of interview the accused had told the interviewing detectives: 'And then—um—I took off my shoes and had sexual intercourse with her, without her consent . . . she was in a deep sleep'. In unsworn evidence at the trial, the accused said that he had only answered this way because he was in shock and frightened.) By comparison, thirteen (32 per cent) of the forty-one accused who did not make any admissions were acquitted.

Discussion  Overall, there were only three accused (6 per cent of those who went to trial) who were convicted of rape in the absence of an admission of evidence of injuries to the complainant. One of these cases involved the issue of identity—the defendant's main line of defence being to deny all knowledge of the complainant. (DNA tests conducted on semen from the complainant's medical examination and other evidence obtained from the defendant's car almost conclusively identified the defendant as the assailant.) In the second case, the complainant had been forced into the accused's car while walking to work. The accused argued that there was consent and that the victim was previously known to him, but there was little evidence available to support this claim. In the third case the accused conceded that the victim had struggled and screamed at some stage during the encounter and that he had not asked her if she wanted to have intercourse with him.

Other findings  The study of rape trials was equally important for what it did not show. Specifically, it established that very few prosecutions failed because the accused was successfully able to argue a mistaken 'belief in consent'. The study also showed that the right of accused persons to give unsworn evidence was not a barrier to obtaining convictions.

Belief in consent  There are four main lines of defence which an accused person can raise to an allegation of rape:
he can deny that he was in contact with the complainant when the rape was alleged to have occurred;

- he can admit to contact with the complainant but deny that any sexual encounter took place;

- he can admit that there was a sexual encounter with the complainant, but assert that this was with the consent of the complainant;

- he can argue that even if the complainant did not in fact consent, he honestly believed that there was consent.

Of the fifty-three accused in the study, only three relied on 'belief in consent' as their primary line of defence, with another nine (17 per cent) using a mix of 'consent' and 'belief in consent' defence. By contrast, twenty-seven accused (51 per cent) based their defences primarily on the issue of the complainant's actual consent. Eleven per cent of accused denied any contact with the accused and another 11 per cent admitted that there was contact, but denied that there had been a sexual encounter. In two cases, the line of defence adopted by the accused was unclear.

There is no evidence that those few accused who ran a 'belief in consent' defence fared any better than other accused. Of the twelve accused who relied partly or primarily on this line of defence, six (50 per cent) were convicted of rape and only three (25 per cent) were acquitted of all charges. In four of the six cases where there was no conviction for rape, a 'mixed' defence was run: it is unclear how much weight the jury gave to the 'belief' as opposed to 'consent' issue in these cases.

It is not surprising that few rape trials turn on the issue of the accused's belief in consent. Few juries are likely to believe an accused who claims to have believed that the complainant was consenting, if there is uncontradicted evidence that force or threats had been used, or that the complainant had communicated her lack of consent to the accused. There was only one accused in the DPP study who claimed to have interpreted the complainant's verbal and physical resistance as evidence of consent. Not surprisingly, the jury did not believe this story and the accused was convicted on all counts. In the other two cases in which 'belief in consent' was the primary issue, it was accepted that penetration had been effected without any resistance on the complainant's part. In one case, the complainant was drunk and said that she had mistaken the accused for her husband. In the second case, the complainant said that she was asleep at the time she was first penetrated. In the first of these cases the jury found the accused guilty of indecent assault. In the second, it acquitted on all charges. (See Appendix 3 of the Interim Report, pp. 87-8.)

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1 The criteria for distinguishing between 'belief', 'consent' and 'mixed belief and consent' defences are discussed in Appendix 3 of the Commission's Interim Report (pp. 82-4, 85-8). In brief, 'belief' cases were classified as those in which the defence conceded that there was a real possibility of a mistake on the part of the accused. In 'consent' cases, on the other hand, there was a clear disagreement between the accused and the complainant about what each of them had said or done. Logically, the accused in these cases were also asserting a belief in consent, but the claim was that the belief was well grounded, rather than the result of a possible mistake. 'Mixed' cases were those in which the line of defence shifted during the course of the trial, or evidence was presented which could be seen as relevant to either issue.
Unsworn evidence  Forty-six per cent of the accused in the study gave unsworn evidence at their trials and 44 per cent gave sworn evidence. The remaining 10 per cent exercised their right to remain silent.

As Figure 3 shows, only three (13 per cent) of those accused who gave unsworn evidence were acquitted on all charges, compared to nine (41 per cent) of those who gave sworn evidence.

Figure 3

Unsworn evidence and rape trial outcomes, Victoria, 1989

The fact that accused who gave unsworn evidence were rarely acquitted may indicate one of two things. It may show that juries give substantially less weight to unsworn than to sworn evidence. Alternatively, it may indicate that the option of giving unsworn evidence is most likely to be exercised when the case against the accused is strong and the risks involved in undergoing cross-examination are particularly great. Either way, the oft-stated claim that the accused in a rape trial is unfairly advantaged by the right to give unsworn evidence is not supported by the evidence from this study.
Summary and Policy Implications

Obviously, no one expects that the conviction rate in rape trials, or any other trials for that matter, should be 100 per cent. Some accused who stand trial may well be genuinely innocent. Others may have committed the offence but the evidence does not establish this beyond reasonable doubt. Unless this evidentiary standard associated protections for the accused are abandoned, it is inevitable that some guilty people will walk free. This is the price paid for minimising the risk that people will be wrongfully convicted of serious criminal offences.

Having said this, however, there is understandable concern that juries appear to be very reluctant to convict without evidence of injuries or admissions. Although there were some cases in our study in which it had not been established beyond reasonable doubt that a rape had been committed, there were others where the decision to acquit was surprising, to say the least. No doubt, it is possible to find examples of 'surprising' acquittals throughout the criminal law, but this hardly justifies doing nothing about the problem as it arises in relation to rape.

Unfortunately, this is not a problem which lends itself to easy solutions. The research reported here indicates that doing away with the accused's right to give unsworn evidence, or replacing the mental element of the rape with an objective standard, would not have a significant impact on overall conviction rates—whatever the other arguments for or against these reforms. Other measures, such as getting rid of juries, reversing the onus of proof, or not allowing the complainant's evidence to be properly tested in court, are not acceptable. Such measures would be unfair to those accused charged with rape. Also, once adopted, it would be very hard to confine them to a single area of the criminal law.

There are, however, some worthwhile measures which can be taken. In its report, the Commission proposed that the Victorian Crimes Act define 'lack of consent'. The Crimes (Rape) Act 1991, which was largely drafted by the Commission, gave effect to this recommendation. The Act makes it absolutely clear that to prove lack of consent it is not necessary for there to be evidence that the complainant protested or physically resisted, or that she sustained physical injuries. Judges are now required to direct juries along these lines in appropriate cases.

Another area which needs to be considered is the complex issue of what is legitimate cross-examination. The aim, ideally, should be to ensure that material is only put before juries when it is properly relevant to the issues in the case. This is not so much a matter of legislation as of educating judges and barristers to think more critically about what is and is not pertinent to the issue of consent, or the complainant's credibility as a witness. It also requires a serious analysis of what are, and are not, legitimate cross-examination techniques.

In the long run, perhaps the factor which will have the greatest impact on conviction rates in rape trials will be changes in community attitudes. On this point there may be room for a note of guarded optimism. In Victoria there has recently been an outcry about the comments made by a County Court judge in sentencing a man for raping a prostitute, after the woman had indicated that she did not want to continue having sex with him. It is understandable that many people should have been upset at the judge's suggestion that the accused should get a lesser sentence because the victim was a prostitute. Nonetheless, it also must be kept in mind that the jury had found the accused guilty. Even a few years ago, it would have been unlikely for such a case to have found its way into court, let alone to have resulted in a conviction.
References


Victorian Attorney-General's Department (unpublished data), Management Information Section, Courts Division.