Towards Changing Procedures and Attitudes in Sexual Assault Cases

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The primary objective of any law reform should be to ensure that it is implemented at the 'ground level'. To achieve that objective, organisational practices—and therefore individual and institutional attitudes—need to change. To rely solely on the passage of legislation as a means to effect changes of this type is unrealistic. Legislation is too blunt an instrument. By its nature it must be couched in reasonably general terms, leaving it up to the agencies affected to translate general directives into specific rules, procedures and routines. Legislation is also open to interpretation, so that the intention of policy makers and the parliament may be lost in strict adherence to the letter, rather than the spirit, of the law.

In its review of sexual assault laws and procedures over 1991 and 1992, the Victorian Law Reform Commission recognised that a more practical approach was called for to accomplish real reform. The Commission had been requested by the Attorney General to report on two specific issues:

- the definitions of rape and indecent assault, and particularly the element of consent; and

- further measures to improve the experience of victims in the investigation and prosecution of sexual assault cases.

Three main research projects were undertaken:

- quantitative and qualitative analysis of rape prosecution files over a two-year period;
• a review of relevant legislative developments in Victoria and other jurisdictions; and

• the collection of data (by informal interview) from relevant individuals and groups from across the spectrum of experience in the sexual assault field—from victims and sexual assault counsellors, to police and prosecutors.

These projects revealed a number of areas in which measures could be taken to improve the law and investigative and prosecutorial procedures for victims. The Commission's recommendations are made in a series of three reports, and a set of appendices documenting the research.

While not ignoring the role of legislative reform, the Commission chose to concentrate much of its effort on developing detailed proposals for modifying existing practices and winning the agreement of the relevant agencies to institute the necessary changes. The close involvement of members of those agencies in the process meant that workable solutions were found and a cooperative tone set for their implementation.

The package of reforms proposed by the Commission also included amendments to the Crimes Act 1958 (Vic.) and Evidence Act 1958 (Vic.). In brief, the main provisions of the new legislation included the following:

• an extension of the physical circumstances defining the offence of rape;

• a legal definition of 'consent';

• mandatory jury directions in relation to 'consent' and 'late complaint' evidence;

• further restrictions on the admissibility of 'sexual history evidence' so that evidence in relation to a sexual relationship with the accused is not routinely admissible;

• the use of alternative arrangements for giving evidence (closed circuit television; blocking screens) is available to adult victims in some sexual assault cases; and

• the maximum penalty for rape has been increased to twenty-five years.

In general, all the proposed reforms were well received by the agencies that had been involved in the Commission's reference. Media commentators and members of the government embraced the reforms as:

progressive and a genuine attempt to balance the rights of a rape victim with the rights of the accused to a fair trial (Editorial, The Age, 9 October 1991).

The then Premier, Mrs Kirner, described the Commission's report on changes to the substantive law as:

extraordinarily important . . . really trail blazing in terms of turning around attitudes to rape (Editorial, The Age, 9 October 1991).
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While both the legislative and administrative reforms should be acknowledged as progressive, their success in the long term will depend largely upon the degree to which they are able to promote change at an attitudinal level for those who are integral to the criminal justice process. Systematic monitoring of both the legislative and administrative reforms is one method of being able to measure their success, and their potential for implementing change at the 'ground level'. Continued monitoring and evaluation will also go some way towards maintaining a focus on the issues surrounding sexual assault.

The Criminal Justice Statistics Planning Unit (formerly the Victorian Bureau of Crime Statistics and Research) is currently conducting an evaluation of the recent legislative and procedural reforms. The remainder of this paper will focus upon three significant changes to arise out of the 1991 reform activity:

- the Police Code of Practice for Sexual Assault Cases;
- jury directions; and
- the use of alternative arrangements for giving evidence by adult victims.

The paper will explore the developmental process of these reforms, and discuss the strategies being undertaken for their evaluation.

**Police Code of Practice for Sexual Assault Cases**

There has been considerable efforts over recent years to improve police procedures and practices when responding to victims of sexual assault. As part of their research, the Victorian Law Reform Commission consulted with both victims/survivors of sexual assault and victim support workers who spoke positively of their experiences with the police and especially members of the Community Policing Squad (CPS).

Despite these improvements, several problem areas were identified. A common complaint of victims and sexual assault workers heard by the Commission was that victims' needs often take second place to investigative and administrative priorities, particularly where the Criminal Investigations Branch (CIB) is involved. Many victims said they felt they were disbelieved—others that they were believed but were made to feel like 'a piece of evidence'.

The Commission formed a Working Group to examine these and other problems. The Working Group consisted of senior representatives of the CPS and Rape Squad, a forensic physician and two coordinators from the Centres Against Sexual Assault (CASAs). The main objective of the Working Group was to clarify unclear lines of responsibility and confusion about appropriate procedures to follow both in crisis-care and other situations. Obviously the attitude of some members is also part of the problem, and educating and training all members of the police force, in relation to sexual assault issues would be of immense benefit. However, establishing clear procedural guidelines was seen to be the most effective way of improving the situation in the short term and, at the same time, providing a focus for the necessary training.

The CPS Coordinator's Office had previously drafted a comprehensive set of guidelines for all members of the police who come into contact with sexual assault victims. This document was used as the basis for the Working Group's discussions over several
months. A final version was produced and the Police Code of Practice for Sexual Assault Cases was launched in March 1992.

The Police Code contains a comprehensive set of guidelines detailing the procedures to be followed by different sections of the police when dealing with victims of sexual assault. The Code makes clear the respective roles of the police and CASA counsellor/advocates, so that there is a more efficient and coordinated approach from the period of initial report through to the giving of the victim's statement.

The guidelines prioritise the victim's physical and emotional needs. Members are told to allow victims to recount what happened in their own words. They are told never to presume an allegation of rape is false; they are required to have the victim at a medical examination as soon as possible, and in any case no longer than two hours after the report was made to the police.

The Code was distributed in the form of a Force Circular Memo, and has the same authority as Police Standing Orders for police members. Also included in the document are a number of 'feedback' mechanisms so that where significant breaches of the Code's guidelines occur, individual members can be held accountable to the relevant organisation heads—for police this would be either the Officer-in-Charge of the Rape Squad, or the CPS State Coordinator. Similarly, where police have a concern about a particular CASA worker, the Coordinator of the relevant CASA can be approached.

The evaluation of the Police Code of Practice began in May of 1992 in the hope that early research would assist in the process of implementation, and/or identify any problems that need to be addressed. To assist in the evaluation, a Working Group has been set up consisting of CASA representatives, the Victoria Police, the Victim Liaison Officer, a Forensic Physician, and a representative from Court Network. This mirrors the approach taken by the Commission at the development stage.

The evaluation is primarily focused on implementation processes, the extent of compliance with the guidelines, and surveying relevant personnel with regard to their perception of how well the Code is working.

In consultation with Working Group members, various research initiatives have been undertaken to meet the above priorities. There are three main components: a crisis-care survey, police questionnaires, and a victim survey.

Crisis-care survey

All CASAs and Sexual Assault Units/Centres are currently filling out surveys for all crisis-care cases. A crisis-care case is one where the victim either received or was perceived to need a medical examination. The survey collects systematic data on the procedures being followed at the crisis-care stage by all personnel involved, including police members, forensic physicians, and CASA counsellors. The information collected monitors adherence to the Code's guidelines, particularly in relation to times; that is, the time taken between reporting the offence and the time taken to bring the victim/survivor to the medical examination. The survey also provides CASA counsellors with the opportunity to record their comments, both positive and negative, regarding the way in which victims/survivors are treated by the relevant parties involved at the crisis-care stage.
Police questionnaires

The objective here is to obtain the 'police perspective' on the effectiveness of the Code, how well it is working and whether the provisions set out are adequate and appropriate. Members from the CPS, general duties, and the CIB, who have recently attended a rape report, are asked to complete a questionnaire. Much of the information collected relates to the procedure followed by the individual member during the reporting process. The final section of the survey deals with the member's knowledge of the Code, and their experiences and perceptions of working with the Code's guidelines.

Victim survey

Arguably the most important component of the evaluation is the victim survey. This research will be part of a broader study in which the experiences and perceptions of victims of rape going through the criminal justice system will be explored. Victims will be able to discuss, in their own words, the treatment they received after reporting the assault to the police.

Victims later become involved in a prosecution will be reinterviewed after the completion of court proceedings. The first interview will focus specifically on the period following the report of the offence, and the treatment the victim received by the police and other support services at this early stage in the legal process.

Findings to Date

Preliminary 'feedback' on whether the Code is being followed is difficult to assess. There is a real dilemma for CASA workers in reporting significant breaches of the Code where the victim indicates that she/he is not willing to make a formal complaint against a particular police member. For a formal complaint to be made, the Incident Report requires that the victim be identified, and the police member involved is named. However, if the victim has had a negative experience with the police, she/he may not want any further involvement with them. The CASA worker is then constrained by ethical and confidentiality factors from taking follow-up action in regard to a breach of the Code's guidelines. Similarly, if a police member is concerned about the actions of a CASA counsellor, she/he may not wish to have the matter taken along the formal channels of notifying the Coordinator from the particular CASA involved so as not to strain established working relationships.

The establishment of small 'liaison committees' at each CASA may go some way toward alleviating this predicament. The liaison committee would have a CPS and CIB representative present at the meetings. Issues regarding breaches of the Code could be addressed at these meetings without individual police members or victims being identified. The police representatives could then filter the information back to their particular district or station. Fellow police members may be more disposed to receiving feedback from police colleagues than from CASA counsellors.

A second difficulty with the Police Code is that the guidelines seem far more geared to the needs of recent adult victim/survivors than for victims of 'older' assaults and child victims. Much of the Code is directed to 'managing' the victims' medical and emotional needs following the assault; for example, CASAs will only be notified routinely if it is a 'crisis-care case'. However, if a victim attended at a police station and said that she had been raped a year ago, there is nothing in the Code which compels police members to
phone the CASA and inform them that a report has been made. Instead, the Code simply states that police have an obligation to provide the victim with information about CASAs and other support services.

Whether victims are provided with this information is extremely difficult to monitor. Victims may not receive the information, or they may receive the information and choose not to attend a centre. There is an additional problem of some CASAs in the rural regions not having a 24-hour service, so that even victims requiring crisis-care may not have the added support of a CASA worker being present.

These and other problems will be the focus of the Working Group's task of evaluating the Police Code of Practice. In the meantime, it is essential that the police and the CASAs keep the lines of communication open, and continue to work towards the amicable relations that were being established prior to the Code's development. This is critical for improving the experience for victims/survivors, and ensuring the effective coordination of services.

In the meantime, the effectiveness of the Police Code of Practice will depend upon the systematic implementation of the document. This requires that a training program be implemented at all levels of the police force, in both metropolitan and rural stations. It is hoped the evaluation will facilitate such initiatives being undertaken by the Victoria police.

Alternative Arrangements for Giving Evidence

A number of the victims who spoke to the Law Reform Commission, during its consultation process reported that the presence of the accused in the courtroom caused them severe distress and affected their ability to give evidence clearly and accurately. This trauma was exacerbated by the layout of the courtrooms, some of which allowed a direct line of sight from the dock to the witness box. As most people in the field are now aware, the Evidence Act, as amended by the Crimes (Sexual Offences) Act 1991, permits alternative arrangements, including closed-circuit television, to be used in sexual assault or assault cases involving a complainant who has impaired mental functioning or is under the age of eighteen years. Where such arrangements are made, the judge is required to warn the jury not to draw adverse inferences about the accused, or to give the evidence any greater or lesser weight because of these arrangements.

The Commission recommended that the application of these provisions be extended to adult victims who are not intellectually impaired. This recommendation was accepted without significant opposition. The relevant provision of the Evidence Act states that:

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The court may, of its own motion or on the application of a party to a legal proceeding, direct that alternative arrangements be made for the giving of evidence by a witness if—

(b) the proceeding relates (wholly or partly) to a charge for a sexual offence and the court is satisfied that, without alternative arrangements being made, the witness is likely in giving evidence—

(i) to suffer severe emotional trauma; or

(ii) to be so intimidated or stressed as to be severely disadvantaged as a witness.
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The Victorian provisions are just over a year old now having come into operation during February 1992. It is difficult to assess at this stage the extent to which these provisions are being used for adult victims, or for children and intellectually impaired victims. The Sexual Offence Section of the Office of the Director of Public Prosecutions (DPP) is providing the unit with ongoing information about the outcome of applications for the use of alternative arrangements. A more detailed analysis of the relevant cases can then be undertaken.

Clearly though, it was not intended that the alternative arrangements for giving evidence would be used as a matter of course in sexual assault cases. The Commission found that some victims felt that giving evidence in open court was an empowering experience. Rather, it is envisaged that cases in which the use of alternative arrangements would be sought are those in which the prosecution will submit that somewhat unique circumstances exist.

The extent to which the provision will be used for adult victims relies on a number of significant factors. Preliminary feedback, from a small number of cases examined, indicates that so far, in sexual assault cases, child victims and mentally impaired victims, only, have been able to give their evidence using alternative arrangements. There has been at least one application for an adult victim to use alternative arrangements; however, this was unsuccessful. Similarly, applications for the use of alternative arrangements for child victims and intellectually impaired victims are far from routinely granted.

No doubt there will be difficulties encountered in the implementation of this reform, as is the case with most other legal change. Firstly, trial judges may be loathe to abandon the traditional principle of having the accuser face the accused in an open courtroom. This is particularly important when the case is conducted in a higher criminal court, where long established legal conventions may be less easily dislodged. Conversely, individual DPP solicitors may have reservations about the use of alternative arrangements. Davies and Noon (1991) found that some barristers were concerned that the use of closed circuit television, or screens, would lessen the emotional impact the victim's evidence could have on the jury. There is a loss of eye contact with the witness, and the added difficulty of building rapport with the complainant when alternative equipment is used.

Secondly, DPP solicitors may only make applications in those cases where they believe that the application has some chance of success. If there is opposition from the judiciary regarding the use of these arrangements—even for child victims—the DPP may adopt a very conservative approach.

Thirdly, if trial judges were not fully supportive of the new provisions, they could give directions commenting on the inadequacy of the arrangement. DPP solicitors have indicated that, where alternative arrangements have been used, some judges have commented to juries that they (jurors) were at a disadvantage when viewing the victim's evidence. According to the judges, this was because the victim's demeanour could not accurately be assessed, nor is the jury privy to any body language, outside of that which the television monitor could produce.

On an encouraging note, there has been positive feedback from the judiciary in other states and countries regarding the successful use of alternative arrangements for giving evidence. Cashmore's study (1991) on the use of closed circuit television for child witnesses in the Australian Capital Territory found that closed circuit television may reduce the child's stress level and improve the quality of the evidence given. Furthermore, with increasing experience, there was greater acceptance of the procedure by those professionals involved in the process. The English researchers, Davies and Noon (1991), also found that legal
professionals were more in favour of the use of closed circuit television, after they had
observed the influence it had on the quality of the complainant's evidence. Those witnesses
who used the 'video link' were more self-confident, more audible, and less likely to be
inconsistent.

It is likely that with time, these new provisions will become a more acceptable method
for giving evidence, and the legal profession in Victoria will become more favourable to their
use in a relevant case.

Judge's Directions

Considerable debate took place around the Commission's conference table as to the precise
wording of the consent provision that finally appeared as part of the Crimes (Rape) Act
1991 (Vic.). In addition to the consent provision, some of the Commission's consultants
wanted to include a statement of general principles which would form a preamble or
interpretation clause for the sexual offences section of the Crimes Act. Instead it was
decided to incorporate the main principles into directions that judges would be required to
give juries in appropriate cases - that is in cases where consent is the central issue. These
directions have become section 37 of the Crimes (Rape) Act.

Section 37, of the Crimes (Rape) Act states that the person (complainant) must
communicate 'free agreement' or their consent to the particular act. Judges, according to the
Act, must direct juries that not saying or doing anything to indicate consent is 'normally'
enough to show that there was no free agreement on behalf of the victim. Furthermore,
jurors are warned not to assume there has been free agreement just because: there is no
evidence of physical resistance, no protest was made, no injuries were sustained, or there
had been free agreement to sex with the accused or another person on another occasion.

The direction relating to 'late complaint' evidence was introduced by the Crimes
(Sexual Offences) Act 1991 (Vic.). Sexual offence proceedings are unique where this type
of evidence is concerned. Normally, evidence that a witness made a statement to another
person consistent with the testimony they are giving is 'inadmissible'. However, with sexual
offences, the concept of 'recent complaint' evidence has been developed. This means that
evidence of a complaint of sexual assault having been made as soon as possible after the
incident, is admissible—not as evidence that the assault in fact occurred, but as to the
consistency of the complainant's account of the incident. The new jury direction was
designed to counter the commonly-held assumption that a person who has been sexually
assaulted would complain 'immediately' to someone about what had happened. The
direction makes it more difficult for the defence to successfully argue that a delay in
complaining is evidence of the falsity of the complainant's allegation of sexual assault.
Section 61 of the Crimes Act now states:

(b) if evidence is given or a question is asked of a witness or a statement is
made in the course of an address on evidence which tends to suggest that
there was delay in making a complaint about the alleged offence by the
person against whom the offence is alleged to have been committed, the
judge must—

(i) warn the jury that delay in complaining does not necessarily indicate
that the allegation is false; and
(ii) inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in complaining about it.

Both of these directions are mandatory; they are not discretionary. That is, judges are required to give these directions in a relevant case. It is arguable that, in a general sense, the new directions carry an enormous potential for re-educating the community with regard to the rights of all persons to enjoy sexual autonomy and integrity. During rape trials, jurors will be challenged to re-evaluate preconceived images and perceptions they have of the crime, and apply the directions given to them by the judiciary.

However, the impact that these directions will actually have on jurors' decisions cannot readily be assessed. Other factors, such as the evidence of the complainant, the closing addresses, and other comments made by the judge, may well outweigh the effect the new directions have on case outcomes.

Unfortunately, we are not in a position to interview jurors about why particular decisions were made. However, it will be possible to monitor the types of cases that result in convictions. The Law Reform Commission's study of rape prosecutions for 1989 found that cases where there was evidence of physical injuries to the complainant, and evidence of admissions by the accused, the jury was more likely to convict. Therefore, if the conviction rate increases, particularly in relation to cases where there is, for example, an absence of physical injury, it seems reasonable to conclude that juries are reaching their verdicts according to the law as it now stands, mindful of the directions given to them by the judge.

There is a further danger that the new instructions will become lost in the often complex and elongated directions given to juries in criminal trials. In its final report (Law Reform Commission of Victoria 1991c), the Commission suggested that, as far as sexual assault trials were concerned, jurors would be better able to apply the law correctly if they could have a written summary of the relevant principles with them in the jury room. The task of understanding the long oral directions given by judges, especially where many of the terms are foreign, could only be improved by having a list of these principles 'on hand'. However, this recommendation has been met by the judiciary with less than enthusiasm; they have argued that the varying circumstances of cases precludes the possibility of any standard written instructions being formulated.

Nonetheless, before predictions can be made regarding the effect these new directions will have on the attitudes of both the judiciary and jurors, one must consider the actual substance of the relevant sections, and perhaps more importantly, the discretionary power which trial judges have in presiding over criminal matters.

With regard to section 61, the 'late complaint' direction, the following addendum is attached:

(2) Nothing in sub-section (1) prevents a judge from making any comment on evidence given in the proceeding that it is appropriate to make in the interests of justice.

Interestingly, the draft bill for the Crimes (Sexual Offences) Act did not contain this clause. It appears that for the judiciary to accept the new direction in law, assurances needed to be given that a discretionary power still existed. Therefore, a judge has the power to make any comment about the evidence that they feel should be made in the 'interests of justice'; for example, a judge could quite legitimately say to a jury with regard to a 'late'
complaint that: 'There may be good reason why the witness delayed telling someone about
the offence; however, in this case, there is not.'

Now, whether this goes against the 'spirit' of the legislation or not, this comment can,
and may well be made if the judge is not convinced that there is a good explanation for the
victim's decision.

The judiciary has also yet to be tested on their interpretation of section 37 of the
Crimes Act, and the meaning of 'normally' in the text of the section. It is certainly not hard to
imagine a defence barrister putting to a jury that the case in question is 'unusual' in that the
woman was still consenting, or freely agreeing, even though she was doing and saying
nothing. The barrister may argue that the accused had engaged in consenting sex with the
complainant before in circumstances where there has been little verbal or nonverbal
communication. As is the case with all criminal trial proceedings, the onus will then be placed
firmly on the prosecution to prove beyond reasonable doubt that this was not the case.

As part of the Rape Evaluation, we will be examining the extent to which judges have
implemented the legislative changes, particularly in cases where consent, or belief in consent,
was the central focus of the case. We are further proposing to conduct a detailed analysis of
rape prosecutions, which will in part concentrate specifically on the themes and legal issues
raised in rape trials. This will repeat the DPP study conducted by the Law Reform
Commission as part of the 'Rape Reference' last year. We are also interested in exploring
trial outcomes, and whether the influence of the new legislation can explain any change that
may exist.

**Conclusion**

These reforms have the potential to go a considerable distance towards meeting the
overriding objectives of improving the experience for sexual assault victims who go through
the criminal justice system, and, more generally, of legally affirming every person's right to
refuse to engage in sexual activity . The Rape Reform Evaluation Project will make every
effort to ensure that the necessary feedback is obtained and directed to the appropriate
individuals and organisations. Clearly, it is only with their cooperation and commitment that
real reform at the 'ground level' can be achieved.

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